Closing The Campus Gates — Keeping Criminals Away From The University — The Story of Student-Athlete Violence And Avoiding Institutional Liability For The Good Of All

I. INTRODUCTION

The names, Randy Moss,[1] Christian Peter,[2] Kenny Brunner,[3] Richie Parker,[4] Sean Key,[5] and Lawrence Phillips[6] ring familiar in the

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1. Moss is a wide receiver for the Minnesota Vikings who spent 30 days in jail for kicking a white man in a racially motivated fight while in high school; had scholarship offers revoked from Notre Dame and Florida State for marijuana use; and was charged with domestic battery stemming from a fight with his girlfriend. *See* Jarrett Bell, *Moss' Fieldwork Inspires Oohs*, USA TODAY, August 4, 1998, at 8C.

2. Peter is a former All-American lineman for the University of Nebraska who pled guilty to sexual assault and played the entire 1995 college football season while on probation, after he was accused of grabbing Miss Nebraska by the crotch. *See* Jim Hodges, *Tom Osborne: A Legacy In Lincoln*, DENVER POST, Dec. 11, 1997, at D1. At Nebraska Peter developed a reputation as a dangerous drunk who abused women while under the influence of alcohol. *See* Jim Donaldson, *Will New England Take The Road Less Traveled?*, PROVIDENCE J.-BULL., July 28, 1998, at D1. During his sophomore season, Peter's coach at Nebraska told him to get help to control his drinking problem. *See* Deepti Hajela, *Giants Rookie Working to Straighten Out Personal Problems: Peter's Woes Began As Sophomore At Nebraska*, MILWAUKEE J. & SENTINEL, May 31, 1997, at 7. During the 1996 NFL draft the New England Patriots drafted Peter in the fifth round. *See* Donaldson, *supra*, at D1. Three days after the draft, amidst public outcry, the Patriots renounced the rights to Peter. *See id.* Peter now plays for the New York Giants. *See* Hajela, *supra*, at 7.

3. Brunner, a former guard at Georgetown University who transferred to Fresno State University during his freshman season, was at an on-campus party where he assaulted another Fresno State student with a samurai sword. *See* Tom Knott, *A Sword, A Pistol, 25 to Life*, WASH. TIMES, May 29, 1998, at B1. The Los Angeles County prosecutors charged him with attempted murder, from an unrelated incident, after allegedly robbing a junior college basketball coach at gunpoint. *See* Barker Davis, *Ex-Hoya Brunner Is Charged With Attempted Murder*, WASH. TIMES, May 28, 1998, at B1.

4. Parker was a standout high school basketball player who had signed a letter of intent to attend Seton Hall University. *See* A.K. Ruffin, *Parker Hopes Furor Fades As Rebirth Begins At LIU*, STAR LEDGER, Nov. 5, 1996, at 57. During Parker's senior year, he and another classmate forced a fourteen year-old female schoolmate to perform oral sex on him in a stairwell at Manhattan Center High School. *See id.*; *see also* Tom Pedulla, *Picking Up The Pieces: High School Star Looks Ahead to Pursuing His Dream Again*, USA TODAY, July 12, 1996, at 3C. Parker pled guilty to reduced charges of first-degree sodomy and was sentenced to five years probation. *See* Pedulla, *supra*, at 3C. Seton Hall subsequently revoked its scholarship offer. *See* Ruffin, *supra*, at 57. As a result of the upheaval surrounding Parker's conviction, the University of Utah, the University of Southern California, and George Washington University stopped recruiting him. *See id.* Parker eventually matriculated at Long Island University where he was a member of the school's basketball team. *See* Jerry Zgoda, *Long Island Might Give Gophers A Better Test*, MINN.-ST. PAUL STAR TRIB., Dec. 28, 1996, at 1C.

5. Key, a safety for Florida State University, was arrested for aggravated battery after kicking a person in the face during a fraternity party. *See* Steve Wieberg, *More Schools Laying Down the Law*, USA TODAY, Sept. 18, 1998, at 17C. Key pled no contest to the aggravated battery charges and served 30 days in jail. *See id.* The University kicked Key out of school in 1997. *See id.* Key has since been readmitted to the university and has been allowed back on the football team. *See id.*

6. The former University of Nebraska running-back pled no contest to charges that he

ears of sports enthusiasts and non-sports enthusiasts alike. On one hand, the names read like a who's who of prominent athletes today. On the other, the names read like a who's who of those who have committed acts of violence. The common thread that binds these individuals is not that they are all athletes, but that each one has a violent streak. In past years, the stories of athletes' violent behavior have become as prevalent as the tales of their athletic prowess. In fact, some student-athletes are virtually unknown until they engage in violent behavior. As a result, the criminal allegations often overshadow the students' athletic endeavors. In such an educational landscape, a student-athlete's exploits on the athletic field, gymnasium, on a final exam, or behavior at an off-campus watering hole can become the focus of a nationally televised ESPN SportsCenter piece.[7] Such magnification of student-athlete behavior

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assaulted his former girlfriend. *See* Paul Newberry, *NFL Bad Boys Try To Shake Reputations*, HOUS. CHRON., Aug. 30, 1998, at 15. Phillips was accused of dragging his girlfriend down a flight of stairs by her hair. *See* Mike Vaccaro, *Any Last Thoughts? Osborne's Career Ends At Bowl That Defines Him*, KAN. CITY STAR, Jan. 2, 1998 at D1. While playing with the St. Louis Rams, Phillips was arrested on three separate occasions. *See id.* While with the Miami Dolphins, he was arrested for hitting a woman who refused to dance with him at a bar. *See* Newberry, *supra*, at 15. While at Nebraska, Phillips was playing for the national championship along side two other standout players who had difficulty with the law. *See* Steve Wieberg, *Nebraska: 'A Very Defining Case'*, USA TODAY, Sept. 18, 1998, at 19C. One was Christian Peter, whose problems are described *supra* note 2. The other was Reilly Washington who was awaiting trial for attempted second degree murder before the bowl game. *See id.* Both Phillips, Peter, and Washington played in the Fiesta Bowl for Nebraska against the University of Florida. *See* Jim Hodges, *Tom Osborne: A Legacy In Lincoln*, DENVER POST, Dec. 11, 1997, at D1. Nebraska won the national championship by beating Florida 62-14. *See* Vaccaro, *supra*, at D1. According to Cedric Dempsey, President of the National Collegiate Athletic Association, "There's as much remembrance of Nebraska for those incidents as there was for playing for the national championship." *See* Steve Wieberg, *Nebraska: 'A Very Defining Case,'* USA TODAY, Sept. 18, 1998, at 19C.

7. *See* Austin Murphy, *Kataclysm Andy (The Big Kat) Katzenmoyer, Ohio State's Explosive Linebacker, Has One Small Season-Threatening: The Classroom*, SPORTS ILLUSTRATED, Aug. 31, 1998, at 72. Andy Katzenmoyer, the All-American linebacker for Ohio State University, has been the focus of a great deal of media attention due to his academic and legal difficulties. *See id.* During the last year, Katzenmoyer, after spending the night in a Columbus, Ohio tavern, was arrested for drunk driving and under-age drinking. *See* Vic Ziegal, *After Scare, Ohio St. Takes Pass*, N.Y. DAILY NEWS, Sept. 20, 1998, at 96. Katzenmoyer's academic and legal woes are as much a reflection upon the student himself as that of Ohio State. *See id.* During the past summer, Katzenmoyer had to successfully complete three courses in order to remain academically eligible to participate in the 1998 college football season. *See id.* Those courses included: Golf 1, Music 140, and AIDS: What Every College Student Should Know. *See* Rick Reilly, *Class Struggle At Ohio State*, SPORTS ILLUSTRATED, Aug. 31, 1998, at 156. The ridiculous nature of Katzenmoyer's summer school curriculum has been the focus of some stinging criticism aimed at the administrators of Ohio State. *See id.*; *see also* Tom Knott, *Ohio State's Lesson Plan: Condoms, Clubs, and CDS*, WASH. POST, Aug. 31, 1998, at B1.

is more evident when a student-athlete engages in violent behavior.

Colleges and universities[8] have been unable to keep criminals off their interscholastic athletic teams. While there are over 3,500 colleges and universities educating over 14 million people through out the United States, these colleges are not immune to the problems that also plague society.[9] Crime, especially violent crime between students, often rears its ugly head on campus. The prevalence of student-on-student violence on campus has resulted in increased litigation against both universities and students.[10] Universities have begun to be named as defendants in civil actions stemming from student-athlete violence against other students.[11]

I suggest that colleges should be held liable for the violent acts of their student-athletes against other students. The creation of institutional liability for the violent acts of student-athletes against other students would encourage colleges to take a more active approach in examining the types of student-athletes they admit. Imposition of liability on colleges for the acts of the student-athlete should spur them to supervise and monitor the behavior of their athletes, thereby reducing the acts of violence by the student-athletes.

Part II of this Comment addresses the multiple factors which contribute to student-athlete violence. Part III of this Comment observes that, whether fairly or unfairly, student-athletes are targets in sexual-assault and violence cases and are seen as representatives of colleges and universities. I suggest that because of the revenue raising role that college athletics serves that a principal-agent relationship exists between student-athletes and universities. Part IV addresses the federal statutory civil rights law pertaining to colleges and universities and the role that it has played in establishing liability for universities due to the violent acts of their student athletes. Part V addresses case law pertaining to institutional liability of universities for student-athlete violence. Part VI argues that colleges concerned

8. For the remainder of this Comment I will use the terms university and college interchangeably.

9. *See* Terry Nicole Steinberg, *Rape on College Campuses: Reform Through Title IX*, 18 J.C. & U.L. REV. 39, 51-52 (1991).

10. *See generally* Brzonkala v. Virginia Polytechnic Institute, 132 F.3d 949 (4th Cir. 1997), *vacated and reh'g en banc granted* (Feb. 5, 1998) (alleged rape of female student by football players); Thorpe v. Virginia State University, 6 F. Supp.2d 507 (E.D. Va. 1998) (alleged rape of female student by student-athletes); Tanja H. v. Regents of the University of California 278 Cal. App. 3d 434 (Cal. Ct. App. 1991) (alleged rape of female student by student-athletes).

11. *See id.*

about their own liability should take affirmative steps to prevent student-athletes from engaging in violent behavior.

II. ATHLETE BEHAVIOR/LIFESTYLE CONTRIBUTING TO VIOLENCE

In order to analyze the appropriate remedy due to the high prevalence of student-athlete violence, it is necessary first to address the causes of student-athlete violence. According to a 1986 Federal Bureau of Investigation report, claims of sexual assault were 38% higher among college basketball and football players than the average male college student.[12] There are, of course, a multiplicity of factors which contribute to student-athlete violence on campus. I will discuss the use of alcohol, drugs and steroids by athletes as well as the student-athlete's feeling of invulnerability as contributing to student-athlete violence. I limit my discussion to these topics because, colleges often exacerbate the drug and alcohol problem on campus through its policies and treat student-athletes in a fashion that allows for the perpetuation of the feeling of invulnerability. To avoid institutional liability colleges, who have control over these factors and their effects, can take affirmative steps to quell their influence on student-athlete behavior on campus.

Between September 1997 and September 1998, more than 175 athletes were arrested for criminal activity at the 112 NCAA Division 1-A schools.[13] The most prevalent reported crimes by student-athletes were violent in nature, primarily assault and sexual-assault.[14] At the top 25 nationally-ranked college football schools, 70 football players were charged with criminal activity in the past year.[15] Colleges are frustrated by the prevalence of student-athlete violence and the havoc these students wreak on campus. Some have taken steps to address these problems. After a year of embarrassment at Fresno State University, as a result of numerous incidents of violence and illegality by student-athletes, the school responded in attempt to limit the effects of student-athlete violence.[16] Fresno State implemented an athletic code of conduct for the twenty varsity

12. *See* BERNARD LEFKOWITZ, OUR GUYS, 3 (1997). According to a sexual assault study at the National Institute of Health athletes involvement accounted for 33% of the reported cases. *See id.* at 279.

13. *See* Wieberg, *supra* note 5, at 17C.

14. *See id.*

15. *See id.* For the purposes of this Comment, the 25 nationally ranked college football teams are those listed by the 1998 CNN/USA Today pre-season poll. *See id.*

16. *See id.*

sports.[17] The university administration has taken a "no tolerance" policy toward criminal behavior by athletes.[18]

A. Steroids

Even though steroids are banned substances by the National Collegiate Athletic Association, athletes' use of anabolic steroids among college athletes is unquestioned. Such use undoubtedly contributes to student-athlete violence.[19] Relied upon to facilitate the growth of muscle, anabolic steroids increase the testosterone level in the user which, in turn, makes the steroid user more aggressive and violent.[20] Steroids, like other narcotics, are illegal and selling steroids carries a term of imprisonment up to five years and a $250,000 fine.[21] The violent behavior induced by steroid abuse does not end when the student-athlete walks off the field or out of the gymnasium but rears its ugly head in the dormitory, fraternity party and other non-athletic campus settings.[22] March Hochhauser, a psychologist for the National Steroid Research Center writes, "Steroids don't magically go away. They remain in the athlete's body and so do their effects. Those who believe violent behavior can be limited to a three hour block of time on a Sunday afternoon are simply deluding themselves."[23]

While the use of steroids is often overlooked as a reason for student-athlete violence, this phenomenon is attributable to the fact that the incidences of student-athlete crime, like all types of crime,

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17. *See id.*

18. *See* Wieberg, *supra* note 5, at 17C.

19. March Hochhauser, *Steroids and Athletes: The Chemistry of Violence*, ADDICTION LETTER, May 1, 1996, at 5.

20. This phenomenon is commonly referred to as "roid rage." *See* Glenn Dickey, *Pressure to Win Has Robbed Sports of Joy*, S.F. CHRON., February 19, 1996, at B2. Dickey notes, "Only the naive would doubt that the increase in violence against women by male athletes is connected to the increase of steroid use." *Id.* According to Dr. Eli Chesen, a psychologist, steroid use by athletes contributes to manic behavior and violent mood swings. *See* Kevin O'Keeffe, *Sports Figures' Jokes Detrimental to Cause*, SAN ANTONIO EXPRESS NEWS, Oct. 17, 1995 (page unavailable online), 1995 WL 9506202; *see also* Valerie Lynn Dorsey, *Anabolic Madness*, USA TODAY, June 7, 1998, at 1C.

21. *See id.*

22. *See* Hochhauser, *supra* note 19, at 5; *see also* Martin J. Bidwill & David L. Katz, *Injecting New Life Into An Old Defense: Anabolic Steroid-Induced Psychosis As A Paradigm of Involuntary Intoxication*, 7 U. MIAMI ENT. & SPORTS L. REV. 1, 21-23 (1989) (describing the effects of steroids to include "auditory hallucinations, paranoid delusions, delusions of reference, and delusions of grandeur").

23. *See* Hochhauser, *supra* note 18, at 5.

often go unreported to the local authorities.[24] The under-reporting occurs for two reasons: (1) the victim is unwilling to press charges and subject himself/herself to humiliation and criticism; and (2) the university discourages the student from bringing formal charges due to the negative publicity which would ensue from such a report.[25]

Despite the inconsistent reporting of crimes, this Comment suggests that the potential for university liability increases when coaches and athletic trainers encourage and permit student-athletes to take steroids.[26] Coaching staffs often encourage and allow student-athletes to take steroids to improve their performance on the field.[27] If coaching and athletic training staffs encourage the use of steroids and then these athletes subsequently commit acts of violence the university should be held liable for those violent acts.[28]

Certain commentators argue that trying to scare athletes by telling them the harmful effects of drug and steroid abuse is largely ineffective.[29] Rather than turning a blind-eye to athletes' use of steroids, coaches should warn student-athletes that they risk being kicked off the team and losing their scholarship due to their drug

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24. Congress, however, has taken a more active interest into the goings on throughout colleges today. *See* MaryAnn Spoto, *New Bias Crime Laws Put Onus On Colleges*, STAR LEDGER, Oct. 17, 1998, at 6. Under the Campus Security Act of 1991, Congress has previously insisted on reports of religion or race-based hate crimes involving rape, sexual assault, or murder. *See id.* Sexual assault and sexual harassment are not the only acts of discrimination that occur on college campuses. According to the Maryland Prejudice Institute, approximately one-fourth of all minority students on predominantly white colleges have been the victims of hate crimes. *See id.* In addition to rape, murder, and sexual assault, Congress now requires colleges to report "physical assaults, burglaries, arson, graffiti, motor vehicle thefts or drug offenses." *Id.* Under the Higher Education Reauthorization Act, however, Congress has threatened to not renew federal grant money to colleges that fail to report incidents of hate crimes. *See id.*

25. *See id.* (describing increased congressional interest in reporting of campus-crime); *Cf.* Clarence Page, *Dole Can't Back Up Claim On Violence Sports Link Bigger Than Welfare Link*, DAYTON DAILY NEWS, June 20, 1996, at 19A (not discounting that there is a serious problem with violence in sports but claims that media often over-reports instances of athlete violence).

26. *See* Julie Cart, *The Cleansing of South Carolina: Football Team Gets New Coach, New Image*, L.A. TIMES, Sept. 12, 1989, at 1.

27. *See id.* Three University of South Carolina football coaches were convicted and sentenced to one-year in prison for encouraging student-athletes to take steroids. *See id.* The coaching staff distributed the steroids directly to the students. *See id.*

28. *See* Charles Feeney Knapp, Note, *Drug Testing and the Student Athlete: Meeting the Constitutional Challenge*, 76 IOWA L. R. 107, 113 (1990). Accordingly, many institutions have taken actions to limit the use of steroids by student-athletes. *See id.* One such procedure is drug testing of student athletes to limit the use of drugs. *See id.* In 1986, the NCAA instituted wide-spread random drug testing of student-athletes. *See id.* at 116.

29. *See* Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L.J. 93, 101 (1990).

and steroid use. While certain commentators wish to place the onus on professional teams to declare college students who have engaged in violent crimes ineligible for the professional drafts,[30] this suggestion, for purposes of preventing student-athlete violence, misses the mark. First, most student athletes will not be drafted for professional sports. Second, because professional sports teams do not receive federal funds, Titles VI and IX of the Civil Rights Act do not apply to them. Because the Civil Rights laws (namely Titles VI and IX) apply to colleges, they are the ones who must promote and secure a safe educational environment.

B. Drugs/Alcohol

A second cause of student-athlete violence is the prevalence of drug and alcohol abuse by student-athletes. Researchers have found that alcohol abuse contributes to student-athlete violence against women.[31] For a good survey of the constitutional implications of drug testing of athletes, *see* Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L.J. 93 (1990).[32] According to a Michigan State University study, 36% of student-athletes used marijuana, 17% used cocaine, 8% amphetamines, and 4% used anabolic steroids.[33]Furthermore, according to a recent study in the *Journal of American College Health*, student-athletes tend to binge drink more often than non-athlete students.[34] The report states that athletes consume an average of 7.34 drinks per week, compared to 4.12 drinks for their non-athlete counterparts.[35] To limit the effects of alcohol and narcotics abuse, colleges should adopt a preventative educational approach to drug use by student athletes. These schools should inform their athletes of the dangers inherent in drug use and the damage that drugs cause to the student-athlete's physical health

30. *See* Jeff Benedict, *Felons Don't Belong In The N.F.L.*, N.Y. TIMES, Nov. 4, 1998, at A27. Benedict conducted a recent study in which he concluded, "one out of five players in the National Football League has been charged with a serious crime, including homicide, rape, kidnaping, robbery, assault, domestic violence, or drug related offenses." *Id.*

31. *See* Bill Brubaker, *Violence in Football Extends Off Field*, WASH. POST, Nov. 13, 1994, at A1. Much has been made of the constitutional implications of random drug testing of student athletes. This is not the focus of this Comment.

32. Rather, this Comment deals with drug prevention rather than drug detection.

33. *See* Hill v. National Collegiate Athletic Ass'n, 865 P.2d 633, 638 (Cal. 1994) (analyzing the NCAA drug testing policy and holding the policy did not violate the Privacy Initiative of the California Constitution).

34. *See* Steve Wieberg, *Studies Raise Eyebrows*, USA TODAY, Sept. 18, 1998, at 18C.

35. *See id.*

and academic career. If a college coach suspects drug use by the student athlete, confrontation is imperative. If the student admits drug use the coach or appropriate school official should immediately suspend the student from participating in athletics and assist the student in getting the student-athlete into a detoxification program. After successful completion of the detoxification program, the student-athlete should be given the option of returning to the team.

Christian Peter[36] who played football at Nebraska, and Andy Katzenmoyer[37] who plays football for Ohio State, are prime examples of the problem of alcoholism that permeates college athletics. As the Peter and Katzenmoyer examples indicate, when a college is aware of the student-athlete's alcohol or drug problem and takes no action to help the student-athlete, dire consequences can result. A college has a duty to both the university population as a whole and to the student-athlete to help the individual with the drinking or drug problem.[38] Furthermore, if the college knows of the problems and overlooks these problems an allows the athlete to compete, the college is opening itself to potential liability as a result of any act of violence by the athlete.

C. Feeling of Invulnerability

In addition to the use of drugs and alcohol contributing to student-athlete violence, the intense coddling and special treatment that athletes receive promotes a psychological feeling of invulnerability in athletes. This state of mind allows student-athletes, as compared to other students, to feel that they are beyond reproach. For example, on March 3, 1989 thirteen males escorted a seventeen-year-old retarded girl into a basement of a home in Glen Ridge, New Jersey where the youths raped the girl with a broomstick and a small baseball bat.[39] All five males who were arrested for the assault were popular high school athletes.[40] This incident illustrates that in American society athletes are placed on a pedestal from the

36. For a discussion of Peter's alcohol and legal problems, *see supra*, note 2.

37. For a discussion of Katzenmoyer's alcohol and legal problems, *see supra*, note 9.

38. In *Bally v. Northeastern Univ.*, the Supreme Judicial Court of Massachusetts held that a university's drug testing policy did not violate the Massachusetts Civil Rights Act. 532 N.E.2d 49, 54 (Mass. 1989); *Cf.* Hill v. National Collegiate Athletic Assn., 865 P.2d 633, 669 (Cal. 1994)(holding that NCAA drug testing did not violate the California constitutional right to privacy).

39. *See* LEFKOWITZ, *supra* note 12, at 3.

40. *See id.*

earliest moments of development. From the days of Pop Warner football and little league baseball, the exceptional athlete receives special treatment from parents, coaches, teachers and peers. Because of this special treatment, some argue, athletes are not taught to consider the moral implications of their actions.[41] Chris O'Sullivan, a psychologist studying 24 instances of gang rape on college campuses during the 1980s, determined that athletes from the most recognizable sports including, football and basketball, were among the most likely to be the perpetrators of the gang rapes.[42] O'Sullivan claimed that the college community and society as a whole places athletes on this pedestal; and it is this elite status that student-athletes enjoy which insulates them from suspicion and "discourag[es] them from moral reflection."[43] This feeling of moral infallibility poses a major concern to universities that recruit and admit these students who feel free to run rampant and wreak havoc on the campus. Feminist thinkers argue that the male power structure promotes and allows for the perpetuation and glorification of college athletics and athletes in general.[44] This Comment treats student-athlete violence by men and women equally and does not distinguish between the male against female violence or female against male for civil rights purposes. Even if there is no cause of action under the Civil Rights Act because of the absence of discrimination based on gender, race or nationality based violence, common law tort liability could attach.[45]

III. ATHLETES ACTORS OF COLLEGE AND UNIVERSITY

After having examined the multiple factors which contribute to an increase of student-athlete violence, this Comment next addresses the status of modern day student-athletes and how this status factors into potential litigation for universities.

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41. LEFKOWITZ, *supra* note 12, at 278.

42. *See id.*

43. *See id.*

44. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED, 121 (1987). MacKinnon observes:

> [A]thletics to men is a form of combat. It is a sphere in which one asserts oneself against an object, a person, or a standard. It is a form of coming against and subduing someone who is on the other side, vanquishing enemies. . . .Physicality for men has meant male dominance; it has meant force, coercion, . . .

Id.

45. *See infra*, section IV(B), and accompanying text.

A. Student-Athletes as Targets?

A contributing factor for the high number of reported incidents of violence by athletes is the high profile nature which causes victims to report the crimes by athletes more readily.[46] In February 1993, Allen Iverson, an All-American high school football and basketball player was involved in a fight in a Hampton, Virginia bowling alley.[47] An altercation ensued between fifty bowlers along racial lines.[48] The authorities charged, among the fifty bowlers (half of whom were black) that were involved in the incident, four black teens, including Iverson.[49] After a bench trial, Iverson was convicted of three counts of maiming by mob.[50] The prosecuting attorney in the case made it a point to highlight Iverson's athletic notoriety in bringing the case.[51] During her closing argument the prosecuting attorney, invoking the shoe and athletic apparel company Nike's popular advertising slogan, urged the court to "Just Do It," and convict the star-athlete Iverson.[52] The prosecutor also urged the court to make an example of Iverson and that his status as a star-athlete should not be grounds for avoiding punishment.[53] Iverson, with no prior criminal record, was convicted of maiming by mob and was sentenced to five years in state prison.[54] Star athletes or athletes in general, whether deserved or not, have bull's-eyes on their backs.

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46. *See* Chris Cobbs, *Fair or Foul? Sports Heros Tagged as More Abusive*, ARIZ. REPUBLIC, Mar. 10, 1996, at A1.

47. *See Iverson v. Virginia*, 1995 WL 363706, *1 (Va. Ct. App. 1995).

48. *See* Rick Reilly, *Counter Point*, SPORTS ILLUSTRATED, Mar. 9, 1998, at 86.

49. *See id.* at 87.

50. *See Iverson*, 1995 WL 363706, at *1.

51. *See* John Smallwood, *Hoyas' Iverson Has 'Em In Awe - Trouble With Law Behind Him, Freshman Guard Lifts Georgetown*, CHI. TRIB., Dec. 4, 1994, at 11.

52. *See* David Nakamura, *A Star, Rising or Falling; Conviction Clouds Athlete's Future*, WASH. POST, Sept. 6, 1993, at A1.

53. *See id.*

54. *See* Reilly, at p. 87. Even though Iverson was 17 at the time of the crime, he was tried as an adult. *See id.* Iverson did not serve five years because then-Governor of Virginia L. Douglas Wilder pardoned him after four months. *See* Smallwood, *supra* note 55, at 11. After serving his jail sentence, Iverson graduated from high school and enrolled at Georgetown University. *See id.* Between Iverson's freshman and sophomore years, the Virginia Court of Appeals reversed his conviction. *See Iverson*, 1995 WL 363706, at *3. The court held that as a matter of law, Iverson could not be guilty of maiming by mob when the state provided no evidence that he was a member of the mob. *See id.* The court added that the evidence produced could have been enough to convict Iverson of individual assault but there was not enough evidence to prove beyond a reasonable doubt that Iverson was a member of the mob. *See id.*

B. An Unhappy Marriage or A Marriage of Convenience

While the media may overly publicize the instances of student-athlete violence and victims may be more inclined to file charges against well-known assailants, colleges have entered into a Faustian bargain with student-athletes. College administrators, well aware of the high prevalence of crime by their own student-athletes and cognizant of the amount of revenue that successful interscholastic sports teams generate, often overlook the violent tendencies of the student-athletes. According to a 1994 University of Massachusetts at Amherst study, male student-athletes comprised 3.3% of the student population among ten large universities but of all the incidents of sexual assault on campus they were the alleged perpetrators in 19% of the cases.[55] Distancing themselves from the student-athlete after a tragic incident of violence is not an attractive alternative for colleges. Instead, colleges must take a pro-active approach to eliminate (or at least minimize) violence by student-athletes. Because of the growing media attention and the strong association between college athletes and universities, litigation will explode against universities and their student athletes from allegations of student-athlete on student violence. In order to avoid liability, colleges must also take affirmative steps to educate its students of the many dangers inherent from student-athlete violence. If an anti-violence policy is implemented by university athletic departments, a win-win-win situation would result.[56] First, student-athletes could avoid the rigors of the criminal and civil justice systems and enjoy an enriching academic and athletic career in college. Second, students can enjoy college life free from the threat of violence by student-athletes. Third, universities can provide a violence-free academic setting for the benefit of all students and also prevent a blockbuster civil verdict against themselves.

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55. *See* Brubaker, *supra* note 31, at A1. According to the University of Massachusetts study, basketball and football players were the alleged perpetrators in two-thirds of those cases. *See id.*; *see also* Page, *supra* note 25, at 19A.

56. *See* Steinberg, *supra* note 9, at 69. Title IX extends to violations by universities for its flawed procedures in dealing with student-athlete violence. *See* Brzonkala v. Virginia Polytechnic Institute, 132 F.3d 949, 960 (4th Cir. 1997). Terry Nicole Steinberg argues that colleges by failing to prevent college rape should also be held liable under Title IX. *See* Steinberg, *supra,* at 58-59. Colleges would be free, of course, to apply these anti-violence education policies campus-wide. This Comment, however, restricts its analysis to limiting student-athlete violence. Therefore, its focus remains on how college administrators, athletic departments and coaching staffs can limit student athlete violence on campus.

C. A New Type of Agency Relationship

To counter the problem of student-athlete violence, this comment suggests a new type of agency principle. Student-athletes are agents of the university, more so than any other undergraduate student. The Restatement (2d) Agency defines the principal-agent relationship as:

> [T]he fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and is subject to his control, and consent by the other to so act.[57]

In college athletics, student-athletes (agents) enable universities (principals) to raise enormous amounts of revenue from the athletic teams. In exchange for a scholarship, the student athlete allows the university (coach mainly) to dictate when the student-athlete will sleep, eat, study, practice, travel, compete and attend class. Since a college has such total control over the student-athlete, an agency relationship exists which should allow for victims of student-athlete violence to recover from the university, under the federal Civil Rights Act, or in common law tort actions. Student-athletes occupy a distinct position in a college setting. College coaches command far greater salaries than professors do, while revenue raising sports like football and basketball generate millions in university profits.[58] For example, the average Division I basketball school earned $2.2 million in profit.[59] The NCAA signed a $1.7 billion contract with CBS for the rights to televise the Men's Division I basketball tournament.[60] Accordingly, when a university admits a student-athlete who it knows has a violent and/or criminal past and allows that student to roam freely about campus, in order to win athletic contests, it subjects itself to possible civil liability for the student-athletes violent acts. Nevertheless, colleges can take appropriate steps to limit their own liability which, in turn, benefits all of the parties involved.

Even if the university is unaware of the behavior of the student-athlete liability should attach to the university because the university

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57. RESTATEMENT (SECOND) AGENCY, § 1 (1958).

58. *See* Steve Brisendine, *Most Division I, II Athletic Programs Lose Money, NCAA Study Says Revenue Isn't Meeting Expenses*, MILWAUKEE J & SENTINEL, Oct 18, 1998, at 2.

59. *See id.* In addition, the average Division I football school's profit was $5 million. *See id.*

60. *See* Thad Williamson, *Bad As They Wanna Be (College Athletics Corrupted By Money)*, THE NATION, Aug. 10, 1998, at 38.

admitted the student for the purpose of playing a sport to help raise revenue for the school.[61] For that reason, the university should be held liable for the violent acts of student-athlete regardless if those acts occurred on or off campus.[62] As long as the one victimized is also a university student, a duty exists for the university to provide a violence-free educational setting. When a student-athlete, as an agent of the university, engages in violent behavior against another student, the university is failing in its duty to provide such a violence-free educational setting.

IV. STATUTORY LAW

After establishing the problem and effects of student-athlete violence on campus, this section takes a closer look at the civil rights laws that apply to violence on campus. Title IX of the Educational Amendments of 1972 protects students from discrimination on the basis of gender at federally funded schools.[63] Title VI, on the other hand, prohibits racial and religious discrimination by federal fund recipients.[64] Title IX provides in pertinent part:

> 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 educational program or activity receiving federal financial assistance.... give a cause of action for students against schools that receive federal funds.[65]

Title IX is patterned after Title VI which prohibits discrimination on the basis of race, color, or national origin.[66] The statutory language of Title IX is strikingly similar to that of Title VI. Section 601 of Title VI of the Civil Rights Act of 1964 provides in pertinent part:

> No person in the United States shall, on the ground of race, color, or

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61. *See* RESTATEMENT (SECOND) AGENCY, § 216 (1958). RESTATEMENT (SECOND) AGENCY, § 216 provides:

> A master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion.

Id.

62. *See id.*

63. 20 U.S.C. § 1681(a) (West 1994).

64. *See* 42 U.S.C. § 2000d (West 1994).

65. *Id.*

66. *See* Cannon v. University of Chicago, 441 U.S. 677, 684-85 (1979).

> national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving federal financial assistance.[67]

Title IX merely substitutes the words "on the basis of sex" for "race, color or national origin."[68] Otherwise, the statutes are identical in identifying the benefitted class.[69] While Title IX applies only in the education context, in addition to schools, Title VI applies to other recipients of federal funds including hospitals, highway departments, and local housing authorities.[70]

A. Legislative History

To determine whether the Civil Rights Act should provide a remedy for student-athlete violence, the analysis must then turn to the legislative intent of the Civil Rights Act. During the congressional debate regarding Title IX, the senators did not mention student-on-student violence.[71] The congressmen, however, noted that they did not intend for federal funds to be used in ways that were clearly discriminatory. According to Representative Green, "Neither the President, nor the conscience of the nation can permit money which comes from all of the people to be used in a way which discriminates against some of the people."[72] The Spending Clause[73] of the United States Constitution allows Congress to place limitations on recipients of federal funds. The legislative history of Title IX suggests that Congress sought to limit federal fund recipients from engaging in gender discrimination.[74] Federal funding does not convert private non-state colleges and universities into state actors under a constitutional analysis.[75] To date, the Supreme Court, however, has not answered the question whether Congress enacted Title IX pursuant to the Spending Clause to prohibit student-on-

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67. 42 U.S.C. § 2000d (West 1994).

68. *See Cannon*, 441 U.S. at 694-95.

69. *See id.* at 695-96.

70. *See id.* at 695 n.17.

71. *See* Paul C. Sweeney, *Abuse, Misuse, and Abrogation of the Use of Legislative History: Title IX and Peer Sexual Harassment*, 66 U.M.K.C. L. REV. 41, 49-50 (1997).

72. 117 CONG. REC. 39257 (1971) (statement of Rep. Green).

73. The United States Constitution provides, "[t]he Congress shall have [the] Power To. . .provide for. . . the general Welfare of the United States." U.S. CONST. art. I, §8, cl. 1.

74. *See* Davis v. Monroe County Bd. of. Ed., 120 F.3d 1390, 1397 (11th Cir. 1997) (en banc), cert. granted —— S.Ct. ——, 1998 WL 6632 (U.S. Sept. 29, 1998).

75. *See Davis*, 120 F.3d at 1398 n.12.

student violence.[76] Senator Humphrey explained that:

> [Title VI] encourages Federal departments and agencies to be resourceful in finding ways of ending discrimination voluntarily without forcing a termination of funds needed for education, public health, social welfare, disaster relief, and other urgent programs. Cutoff of funds needed for such purposes should be the last step, not the first, in an effective program to end racial discrimination... Moreover, the purpose of Title VI is not to cut off funds, but to end racial discrimination... In general, cutoff of funds would not be consistent with the objectives of the Federal assistance statute if there are available other effective means of ending discrimination.[77]

During the congressional debate surrounding Title IX, Representative Mink stated that:

> Any college or university which has [a]...policy which discriminates against women applicants ... is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.[78]

Additionally, when Congress debated Title VI Senator Humphrey remarked, "[D]iscrimination is contrary to national policy and the moral sense of the Nation. Thus Title VI is simply designed to ensure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation."[79] While Title IX does not describe gender discrimination in terms of student-athlete on student violence, courts have interpreted student-on-student sexual harassment as a form of gender discrimination under Title IX.[80] Also, the term rape is not mentioned in the amendments as a form of discrimination, however, some argue that rape is the most

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76. *See Franklin*, 503 U.S. at 75 n.8; *Cf.* Davis v. Monroe County Bd. of. Ed., 120 F.3d 1390, 1397 (11th Cir. 1997)(en banc), cert. granted —— S.Ct. ——, 1998 WL 6632 (U.S. Sept. 29, 1998)(stating that the legislative history of Title IX does not indicate that Congress acted under the Spending Clause with respect to student-on-student sexual harassment).

77. 110 CONG. REC. 6546 (1964). For purposes of this Comment, I treat violence based on gender under Title IX and violence based on race, religion or nationality under Title VI equally.

78. 117 CONG. REC. 39252 (1971)(statement of Rep. Mink).

79. 110 CONG. REC. 6544 (1964).

80. *See* Brzonkala v. Virginia Polytechnic Institute, 132 F.3d 949 (4th Cir. 1997); *cf.* Davis v. Monroe County Bd. of Ed., 120 F.3d 1390 (11th Cir. 1997)(en banc), cert. granted —— S.Ct. ——, 1998 WL 6632 (U.S. Sept. 29, 1998).

serious form of discrimination on campus.[81] Terry Nicole Steinberg argues that to severely quell the instances of rape on campus, Congress should amend the amendment's legislative language to include rape.[82]

B. Congressional Oversight

Because federal spending is at issue at colleges that receive federal funds, the following subsection addresses congressional response to on campus instances of hate and violence. The Department of Education rarely enforces Title IX to withhold funds from colleges.[83] Congress, however, has taken a more active interest into the goings on throughout colleges today.[84] Under the Campus Security Act of 1991, Congress has previously insisted on reports of religion or race-based hate crimes involving rape, sexual assault, or murder.[85] In addition to rape, murder, and sexual assault, Congress now requires colleges to report "physical assaults, burglaries, arson, graffiti, motor vehicle thefts or drug offenses."[86] Under the Higher Education Reauthorization Act of 1998,[87] however, Congress has threatened to not renew federal grant money to colleges that fail to report incidents of hate crimes.[88] While the Higher Education Reauthorization Act does not create institutional liability or establish a standard of care for universities,[89] universities now have a duty to categorize and report instances of prejudice "based on actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability."[90]

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81. *See* Steinberg, *supra* note 9, at 52.

82. *See id.* at 52.

83. *See* Edward S. Cheng, Note, *Boys Being Boys and Girls Being Girls—Student-to-Student Sexual Harassment From the Courtroom to the Classroom*, 7 U.C.L.A. WOMEN'S L.J. 263, 293 (1997).

84. *See* MaryAnn Spoto, *supra* note 24, at 6. Sexual assault and sexual harassment are not the only acts of discrimination that occur on college campuses. According to the Maryland Prejudice Institute, approximately one-fourth of all minority students on predominantly white colleges have been the victims of hate crimes. *See id.* In the wake of the highly publicized murder of Matthew Shepard, the gay University of Wyoming student, President Clinton has suggested that Congress take a more active role with college affairs and pass the Hate Crimes Prevention Act that would include homosexuals within the definition of hate crimes. *See* Richard Lacayo, *The New Gay Struggle*, TIME, Oct. 26, 1998, at 34.

85. *See id.*

86. *Id.*

87. *See* 20 U.S.C. § 1092 (West 1998).

88. *See* Spoto, *supra* note 24, at 6.

89. *See* 20 U.S.C. § 1092(f)(7)(C).

90. HR 6, 105th Cong. (1998), enacted amending 20 U.S.C. § 1092 (West 1998).

V. CASE LAW

In addition to statutory law, the recent development of case law suggests that colleges can be held liable for instances of violence by students which occur on campus. Part A looks at recent court interpretation of civil rights law. Part B then explores the development of tort law relating to on campus violence against students.

A. *Civil Rights Law*

The ultimate Title IX enforcement mechanism for colleges to obey the non-discrimination provisions of the Civil Rights Act is the fear of the loss of federal funds.[91] This measure is rarely implemented by Congress, however, recent acts of violence on college campuses has forced Congress to rethink its previous stance.[92] In *Cannon v. University of Chicago*,[93] the United States Supreme Court held that under Title IX a plaintiff may pursue a private right of action[94] to sue a university that receives federal funds and is engaged in discrimination on the basis of gender.[95] The Court determined that the goal of Title IX was twofold: (1) to prevent the use of federal funds to support university practices that were discriminatory; and (2) to protect private citizens from such discrimination.[96]

Since *Cannon*, there has been an explosion of lawsuits brought against universities by students alleging discrimination under Title IX.[97] Among those suits, many students have alleged discrimination

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91. *See* Cheng, *supra* note 83, at 293.

92. *See* Spoto, *supra* note 24, at 6.

93. 441 U.S. 677 (1979).

94. Justice Powell defined the term "private right of action" in the Title IX setting as "the right of a private party to seek judicial relief from injuries caused by another's violation of a legal requirement. In the context of legislation enacted by Congress, the legal requirement is a statutory duty." *Cannon*, 441 U.S. at 731 (Powell, J., dissenting).

95. *See id.* at 688-89. In *Cannon*, a female medical school applicant filed an action under Title IX against two medical schools that denied her admission alleging that the medical schools discriminated against her because of her gender. *See id.* at 680.

96. *See id.* at 704.

97. *See, e.g.*, Morse v. Regents of University of Colorado, 154 F.3d 1124, 1126 (10th Cir. 1998) (bringing claim of hostile education environment alleging discrimination in university branch of Reserve Officers Training Corps ("ROTC")); Liberman v. Univ. of Chicago, 660 F. F.2d 1185, 1186 (7th Cir. 1981) (alleging gender discrimination after denial of admissions to medical school); Beasley v. Alabama State Univ., 3 F.Supp.2d 1325, 1328 (M.D. Ala. 1998); Miles v. New York University, 979 F.Supp. 248, 249 (S.D. N.Y. 1997) (denying defendant's motion for summary judgment in Title IX action brought by transsexual student alleging sexual harassment); Pavey v. University of Alaska, 490 F.Supp. 1011, 1013 (D. Alaska

on the part of the university for its handling of student-athlete violence against other students.[98] Because the federal government provides funding to nearly every college and university in the United States those federal funds should not be used in any way to support the educational endeavors of universities that engage in discrimination.[99]

In *Davis v. Monroe County Bd. of Ed.*,[100] a parent brought an action on behalf of her daughter under Title IX against a county school board to remedy student-on-student sexual harassment.[101] Davis claimed that the board of education failed to prevent a student from sexually harassing her daughter.[102] Despite the efforts by Davis and her daughter to alert the teacher and administrators of the sexual harassment, the school officials never removed or disciplined the harassing student for his conduct.[103] The United States District Court for the Middle District of Georgia granted defendant's motion to dismiss.[104] A divided three-judge panel of the United States Court of Appeals for the Eleventh Circuit reversed and reinstated the Title IX claim.[105] The Eleventh Circuit granted the defendant's motion for rehearing en banc.[106] Sitting en banc, the Eleventh Circuit held that student-on-student sexual harassment does not provide a Title IX hostile education environment cause of action against a federal fund recipient.[107] The holding in *Davis* indicates that a recipient of federal funds may not be held liable for failing to prevent students from

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1980) (student alleging discrimination against females in athletic programs).

98. *See supra*, note 10, and accompanying text.

99. *See Cannon*, 441 U.S. at 708-09; *see also* Bernice Resnick Sandler, *Sexual Harassment and the First Amendment*, 3 TEMP. POL. & CIV. RTS. L. REV. 49, 52 (1994). Only Grove City College in Pennsylvania and Hillsdale College in Michigan refuse federal funds. *See id.* at 52 n.10.

100. 120 F.3d 1390 (11th Cir. 1997)(en banc), cert. granted —— S.Ct. ——, 1998 WL 6632, (U.S. Sept. 29, 1998).

101. *See id.* at 1392.

102. *See id.* Davis alleged that a male grammar school student repeatedly fondled her fifth-grade daughter's breast and genitals and directed sexually explicit remarks at her. *See id.* at 1393.

103. *See id.* at 1394.

104. *See* Aurelia D. v. Monroe County Bd. of Ed., 862 F.Supp 363, 367 (M.D. Ga. 1994).

105. *See* Davis v. Monroe County Bd. of Ed., 74 F.3d 1186, 1195 (11th Cir. 1996); *opinion vac'd* 120 F.3d 1390 (11th Cir. 1997)(en banc).

106. *See* Davis v. Monroe County Bd. of Ed., 120 F.3d 1390 (11th Cir. 1997)(en banc).

107. *See id.* at 1406; *see also* Emmalena K. Quesada, Note, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard For School Liability under Title IX*, 83 CORNELL L. REV. 1014, 1054-55 (1998)(arguing that the Eleventh Circuit in *Davis* "distorts common sense and the plain meaning of the statute").

engaging in sexual harassment of other students.[108]

In *Oona, R.S. v. McCaffrey*,[109] on the other hand, the Ninth Circuit held that officials at a school which receives federal funds have a duty to take reasonable steps to prevent student-on-student sexual harassment.[110] The *Oona* Court, applying the Supreme Court rationale from *Franklin v. Gwinnett County Pub. Schools*,[111] found that a school, like an employer in the Title VII context, could be held liable under Title IX for sexual harassment.[112] The Ninth Circuit extended the application of Title IX and held that student-on-student sexual harassment which creates a hostile educational environment violates Title IX.[113]

The holding in *Brzonkala v. Virginia Polytechnic Institute*, furthermore, suggests that a federal fund recipient may violate Title IX through its handling of student-athlete violence and if the procedural mechanisms in the disciplinary proceedings fail or are unduly discriminatory.[114] The Fourth Circuit applied the Title VII constructs to determine liability under Title IX.[115] The Fourth Circuit stated:

> [I]n a Title IX hostile environment action a plaintiff is not seeking to hold the school responsible for the acts of third parties (in this case fellow students). Rather, the plaintiff is seeking to hold the school responsible for its own actions, i.e. that the school 'knew or should have known of the illegal conduct and failed to prompt an adequate remedial action.'[116]

In *Brzonkala*, two members of the Virginia Polytechnic Institute ("Virginia Tech") football team each took turns raping a female who was a freshman at the university.[117] Brzonkala did not file criminal charges against the football players.[118] After Brzonkala filed a

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108. *See Davis*, 120 F.3d at 1406 (holding that student-on-student sexual harassment is not actionable under Title IX).

109. 122 F.3d 1207 (9th Cir. 1997).

110. *See id.* at 1209-10.

111. 503 U.S. 60 (1992).

112. *See Oona*, 122 F.3d at 1210.

113. *See id.*

114. *See Brzonkala*, 132 F.3d at 959-966.

115. *See id.* at 957.

116. *Id.* at 958 (quoting Andrade v. Mayfair Management, Inc., 88 F.3d 258, 261 (4th Cir. 1996)).

117. *See id.* at 953.

118. *See id.* at 954. Brzonkala did not file charges with the local police because she thought that criminal action would have failed because she did not preserve any of the physical evidence from the attack. *See id.*

complaint with the university, the university did not notify the police.[119] Brzonkala brought suit against both the football players individually under the Violence Against Women Act ("VAWA") and against Virginia Tech under Title IX.[120] Brzonkala complained that the university was aware of the criminal behavior of the football players yet did not take any affirmative steps to punish Brzonkala's attackers and even allowed the sexually discriminatory environment to continue unabated.[121] At first Virginia Tech suspended Morrison for one school year for sexual assault but found insufficient evidence on which to charge Crawford.[122] Yet, Morrison appealed and the university, after two hearings, set aside his one year suspension.[123] Brzonkala alleged that Morrison's reinstatement "[was] the result of the involvement of Head Coach Frank Beamer, as a part of a coordinated plan to allow Morrison to play football in 1995."[124] The Fourth Circuit held that Brzonkala sufficiently stated a Title IX claim.[125] The court remarked:

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119. *See id.* Virginia Tech policy dictates that rape is the only felony that is not automatically reported to the local police. *See id.*

120. *See id.* at 953. The student-athletes forced Brzonkala to have intercourse with them repeatedly. *See id.* During the attack, Morrison raped Brzonkala without using a condom. *See id.* Morrison then switched places with Crawford, who also raped Brzonkala without a condom. *See id.* After Crawford finished, Morrison then raped Brzonkala again. *See id.* During the violent attack Crawford shouted at Brzonkala that "she better not have any f#@!&%g diseases." *See id.* Morrison later bragged to other students at the campus dining facility that he "like[d] to get girls drunk and f#@k the s#@t out of them." *See id.*

Brzonkala had difficulty following her attack and attempted suicide. *See id.* One month after the assault occurred, Brzonkala filed a complaint against Crawford and Morrison under the recently promulgated Virginia Tech Sexual Assault Policy. *See id.* After filing her complaint, Brzonkala was informed that another Virginia Tech athlete was overheard "advising Crawford that he should have 'killed the bitch.'" *See id.* at 954.

121. *See id.* at 953.

122. *See id.* at 954-55.

123. *See id.* at 955.

124. *See id.* at 956.

125. *See id.* at 974. The court concluded:

> During the first hearing [Morrison] essentially admitted that he raped [Brzonkala] after she twice told him no. The first hearing resulted in a finding that Morrison had committed sexual assault, and his suspension for one school year. This result was upheld by an appeals officer, under Virginia Tech's published rules that decision was final and not subject to change.
>
> Nevertheless, Virginia Tech voided the first hearing and reopened the case against her admitted rapist, assertedly in violation of its own rules and on the basis of a specious legal argument. The second hearing was procedurally biased against Brzonkala in numerous ways, and Morrison was only charged with the lesser offense of using abusive language.

Id. at 960.

> Indeed, the university Provost's rationale for overturning Morrison's immediate suspension for one school year—that this punishment was "excessive when compared to other cases"—itself evidences an environment hostile to complaints of sexual harassment and a refusal to effectively remedy this hostile environment.[126]

If a coach, faculty member or administrator is aware of the student-athlete's violent past or incidents of violence and does nothing to prevent occurrences of violence in the future, colleges are opening themselves to potential Title IX or Title VI liability.[127] Even a single act of violence by a student-athlete could be enough for the victim to state a claim under Title IX.[128] If a university fails to provide aid or assistance to alleged rape victims and protects the accused it would be in violation of federal regulations for subjecting students to separate rules and behavior.[129]

Recently, the United States Supreme Court in *Burlington Industries, Inc. v. Ellerth,*[130] and *Faragher v. City of Boca Raton,*[131] held that under Title VII an employer may avoid vicarious liability for sexual harassment by an employee if the employer took reasonable steps to prevent or correct the harassing behavior.[132] In the Title IX setting, applying the *Faragher* and *Burlington Northern* holdings, a federal fund recipient may be liable for a hostile educational environment unless the college can provide an affirmative defense that the university "exercised reasonable care to prevent and correct promptly any [violent or harassing] behavior, . . . [and] that the plaintiff [student] unreasonably failed to take advantage of any preventative or corrective opportunities provided by the [university] or to avoid the harm otherwise."[133] The second prong of the affirmative defenses that the plaintiff has to take advantage of the preventative or corrective opportunities within the universities may prove unworkable in the student-athlete violence setting. If the violence has already occurred by the student-athlete, the victim, from the moment of the violent act, experiences a hostile educational environment. In *Brzonkala,* the victim sought help from the Virginia

126. *Id.* at 959.
127. *See Brzonkala,* 132 F.3d at 958.
128. *See Brzonkala,* 132 F.3d at 959; *see also* King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990).
129. *See* Steinberg, *supra* note 56, at 60.
130. 118 S.Ct 2257 (1998).
131. 118 S.Ct. 2275 (1998).
132. *See Burlington Indus.,* 118 S.Ct at 2270; *Faragher,* 118 S.Ct. at 2293.
133. *See id.*

Tech administration.[134] As a result, the "preventative or corrective opportunities" not only did not prevent the alleged rape of the student but also exacerbated the hostile environment for the victims.[135] Hostile environments, such as the one at Virginia Tech, can negatively affect the quality of a student's education.[136] Until the Supreme Court addresses Title IX liability from student-on-student harassment, "courts are likely to apply either a Title VII 'knew or should have known' or an intentional discrimination standard."[137] In the student-athlete violence context, such an educational situation greatly affects the education that universities provide. Davis and Parker argue:

> [T]he idea that '[a] non-discriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives' supports judicial recognition of peer harassment claims involving student-athlete violence yet does nothing to protect the female victim, it fails in its responsibility to foster an academic environment free of hostility and fear. Such failure on the part of the university is inconsistent with its duty to provide equal education.[138]

Title IX jurisprudence provides a powerful vehicle for women to sue universities that fail to protect women against student-athlete violence.[139] The subject of the student-athlete's psychological propensity for sexual aggression is slowly developing in the realm of academia.[140] Those questions I believe are best left to the world's psychologists and psychiatrists. For the purposes of this Comment, I will only provide cursory discussion on such area of academia.

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134. *See Brzonkala*, 132 F.3d at 953.

135. *See id.*

136. *See* Patricia H. v. Berkley Unified Sch. Dist., 830 F. Supp. 1288, 1293 (N.D. Cal. 1993).

137. *See* Timothy Davis & Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining The Limits of Institutional Responsibility*, 55 WASH. & LEE L. REV. 55, 116 (1998).

138. *See* Davis & Parker, *supra* note 137, at 116-117.

139. *See* Davis & Parker, *supra* note 137, at 75.

140. *See* Davis & Parker, *supra* note 137, at 60. Certain commentators find that "athletes appear to be disproportionately involved in incidents on college campuses." *Id.* at 61 (quoting Todd W. Crosset et al., *Male Student-Athletes Reported For Sexual Assault: A Survey of Campus, Police Departments and Judicial Affairs Offices*, J. SPORT & SOCIAL ISSUES, May 1995, at 126, 135). Davis and Parker concede, however, that there is not overwhelming evidence to support the finding that athletes were more prone to violence than other non-athletes. *See* Davis and Parker, *supra*, at 62-63. Yet, according to a 1986 survey, college basketball and football players were 38% more likely to engage in sexual assault then their non-athlete school mates. *See* Chris Cobbs, *Fair or Foul? Sports Heroes Tagged as More Abusive*, ARIZ. REPUBLIC, Mar. 10, 1996, at A1.

1. "Boys Will Be Boys" Standard Under Title IX

While much of the case law supports the finding that instances of student-athlete violence can lead to civil rights claims against federal fund recipients, not every act of violence by student athletes entitles the victim to a civil rights action. The following section explores the limits of civil rights claims stemming from student-athlete violence. In *Seamons v. Snow*,[141] a male high school football player brought a Title IX action against his high school after a violent incident involving Seamons' five teammates in the school locker room.[142] Seamons alleged that, in the front of the entire football team, his five teammates grabbed him, restrained his movement by taping him to a fixture in the locker room, taped his genitals, and brought Seamons' former girlfriend to view him in the compromising and embarrassing position.[143] Seamons then reported the attack to school officials, instead of disciplining the perpetrators, the football coach made Seamons apologize to the team for betraying them by reporting the incident.[144] The school officials believed that Seamons should have "taken it like a man" and the coach downplayed the assault by saying that "boys will be boys."[145] Seamons sued the school based on its handling of the assault and argued that he was subject to a hostile educational environment created by the school's handling of the incident.[146] The United States Court of Appeals for the Tenth Circuit, in affirming the district court's grant of summary judgment in favor of the school, stated that under Title IX a plaintiff must establish that he was subject to discrimination by a federal fund recipient was on the basis of gender.[147] The *Seamons* holding suggests that not every act of violence by student-athletes constitutes a Title IX violation.

141. 84 F.3d 1226 (10th Cir. 1996).

142. *See id.* at 1230.

143. *See id.*

144. *See id.* The only action the school took in response to Seamons' complaint was to cancel the teams state football playoff game. *See id.*

145. *See id.*

146. *See id.* The school did nothing to quell the threats of classmates, and the principal even suggested that Seamons leave the school (something which Seamons eventually did). *See id.*

147. *See Seamons*, 84 F.3d at 1232.

2. Violence Against Women Act ("VAWA")

Congress enacted the Violence Against Women Act ("VAWA")[148] in September 1994 to address "the escalating problem of violence against women."[149] The purpose in enacting VAWA was that "All persons within the United States shall have the right to be free from crimes of violence motivated by gender."[150] Under Title III of VAWA a victim of gender motivated violence has a private right of action.[151] Plaintiffs do not have to also file criminal charges to bring a VAWA claim.[152] The VAWA applies to those crimes that would "constitute a felony."[153] The crimes of violence that would provide a VAWA claim, namely assault, aggravated sexual assault, arson, robbery, and terroristic threats are generally state law crimes. These crimes could be deemed either felonies or misdemeanors under state law. Under the federal system, however, a felony was a crime that was punishable

148. 42 U.S.C. § 13981 (West 1998).

149. *See Brzonkala*, 132 F.3d at 963-964 (quoting S. Rep. No. 103-138, at 37 (1993)).

150. 42 U.S.C. § 13981(b).

151. 42 U.S.C. § 13981 provides in pertinent part:

(c) Cause of Action

A person (including a person who acts under the color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

42 U.S.C. § 13981(d)(West 1998).

152. 42 U.S.C. § 13981(e)(2).

153. 42 U.S.C. § 13981(d)(2)(B). VAWA further provides:

For the purposes of this section—

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to animus based on the victims gender; and

(2) the term "crime of violence" means —

(A) an act or a series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981 (West 1998).

by more than one year imprisonment.[154] While a state law for assault may carry the maximum punishment of two years, the statute may deem the crime a misdemeanor.[155] The two year imprisonment, under the federal definition of a felony, may satisfy VAWA's felony requirement. To date, the courts have not addressed the state crimes nomenclature issue in VAWA litigation. In *Brzonkala v. Virginia Polytechnic Institute & State University*,[156] the United States Court of Appeals for the Fourth Circuit addressed the constitutionality of VAWA.[157] The court held that Congress did not exceed its Commerce Clause powers in enacting VAWA.[158]

a. "Person" Under VAWA

Recently, prosecutors have brought manslaughter charges against a fraternity institution itself following the death of a college student from excessive drinking.[159] Similarly, such charges could be brought against a university for assault or sexual assault if the student was given steroids by a university official. This Comment suggests that if a university can be held liable under the criminal law for charges that exceed one-year in jail then a civil plaintiff could make a VAWA charge against the university itself, in the civil complaint.[160] A college may be held liable for a VAWA violation because the statute is unclear.[161] The issue of whether a university is a person under VAWA is unsettled and has not been addressed by any court.[162] VAWA,

154. 18 U.S.C. § 3359 (West 1998).

155. *See Doe v. Hartz*, 970 F. Supp. 1375, 1399 (N.D. Iowa 1997) (citing 18 U.S.C. § 3359 (West 1998), *rev'd Doe v. Hartz*, 134 F.3d 1339, 1342 (8th Cir. 1998) (holding that defendant's conduct was not a predicate felony under VAWA); *See also* U.S. v. Haggerty, 85 F.3d, 403, 406 (8th Cir. 1996) (stating that a predicate offense under state law may be called a misdemeanor but if the maximum penalty exceeds the one-year federal requirement the predicate state law offense constitutes a felony for VAWA purposes).

156. 132 F.3d 949 (4th Cir. 1997), *vacated and reh'g en banc granted*, (Feb. 5 1998).

157. *See id.* at 974.

158. *See id.*

159. *See* John Ellement, *DA Reportedly Pressing Case in MIT Death*, BOSTON GLOBE, Sept. 17, 1998 at B1.

160. *See e.g.* Ellement, *supra* note 159, at B1.

161. *See* Anisimov v. Lake, 982 F. Supp. 531, 541 (N.D. Ill. 1997) (denying motion to dismiss VAWA claim against employer as individual and corporate entity and holding that VAWA does not violate Commerce Clause); Doe v. Hartz, 970 F. Supp. 1375, 1399 (N.D. Iowa 1997) (allowing VAWA claim against priest and diocese to proceed), *rev'd* Doe v. Hartz, 134 F.3d 1339, 1344 (8th Cir. 1998) (dismissing VAWA claim); *but see* Braden v. Piggly Wiggly, 4 F. Supp.2d 1357, 1362 (M.D. Ala. 1998) (stating "to date, no court has addressed whether an employer may be held liable under the VAWA for the acts committed by its employees").

162. *See supra* note 161, and accompanying text.

however, is ambiguous in regards to whether an institution can be held liable under the statute.[163] The statute refers to a person, but not a natural person.[164]

If a student-athlete's behavior is actionable under VAWA a Title IX action will be sure to follow. A VAWA claim against a student-athlete after a violent action could be filed along with a Title IX action against the university. Because of the association of athletes and the schools for which they compete, VAWA claims against the students are inevitably linked with Title IX actions against the universities.

b. 11th Amendment Immunity

The following subsection pertains to a common defense of state universities in civil rights actions, namely claims of immunity under the Eleventh Amendment.[165] In *Thorpe v. Virginia State University*,[166] a female student sued her university under Title IX for its handling of the student's rape allegations.[167] Plaintiff alleged that she was raped by student-athletes at Virginia State.[168] As a result of the university's handling of the incident, the plaintiff sued the students who committed the rape under the Violence Against Women Act and brought a hostile-environment sexual harassment[169] claim against the university because it had notice that other Virginia State athletes had assaulted other female students.[170]

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163. *See* 42 U.S.C. § 13981(c).

164. *See id.*

165. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

166. 6 F. Supp. 2d 507 (E.D. Va. 1998).

167. *See id.* at 508. In *Thorpe*, the Plaintiff, a student of Virginia State University, alleged that in late 1995 she visited a male dormitory to watch a movie. *See id.* Plaintiff alleged that while she was in the male dormitory she was gang raped by two students, Marcus Steele and Rodney Granger. *See id.* at 509. While the rapes were occurring, plaintiff further alleged, other VSU students watched. *See id.* After the alleged incident, plaintiff reported the rape to her resident assistant, who in turn informed campus police. *See id.* Plaintiff subsequently pressed charges of felony sexual assault against the perpetrators. *See id.* Granger and Steele admitted that they had intercourse with Thorpe, but both claimed that it was consensual. *See id.*

168. *See id.* at 509, n.1.

169. For the purposes of this Comment, harassment constitutes a form of violence whether motivated by race, gender or otherwise.

170. *See Thorpe*, 6 F. Supp. 2d at 509, n.1. Subsequently, Thorpe dismissed the hostile-

The day after the alleged incident, plaintiff met with three university officials: the vice-president of student affairs, and two university psychologists.[171] Thorpe complained that Virginia State did not provide her with either the VSU Student Handbook or the VSU Code of Student Conduct, nor did the university articulate to Thorpe its Sexual Harassment Complaint Procedure as mandated by Title IX regulations.[172] Thorpe claimed that VSU's failures to inform her of the appropriate procedures necessary to bring a rape claim against the VSU athletes violated Title IX.[173] In turn, she claimed these alleged failures allowed the rapists to "remain at large on the VSU campus and that [Thorpe's] personal safety would be in jeopardy if she returned to school."[174] The *Thorpe* court concluded that the Eleventh Amendment immunity did not extend to the States in Title IX actions because Congress expressly intended to "abrogate the States' Eleventh Amendment immunity."[175]

B. Tort Law

After exploring the growing and ever important subject of civil

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environment sexual harassment claim. *See id.*; *see also Brzonkala*, 132 F.3d at 959 (citing Karen Mellencamp Davis, Note, *Reading, Writing, & Sexual Harassment: Finding a Constitutional Remedy When Schools Fail To Address Peer Abuse*, 69 L.J. 1123, 1124 (1994)("[r]ape and molestation provide drastic examples of the types of sex harassment students inflict on their peers...")).

171. *See Thorpe*, 6 F. Supp. 2d at 509, n.1.

172. *See id.* 34 CFR §106.31 provides in pertinent part:

> Except as provided elsewhere...no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training or any other education program or activity operated by a recipient which receives or benefits from Federal financial assistance....
>
> [A] recipient shall not, on the basis of sex, (1) treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit or service; (2) Provide different aid, benefits or services... (3) Deny any person aid, benefits or services... (4) Subject any person to separate or different rules of behavior or other treatment... (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage or opportunity.

34 CFR §106.31 (1997).

173. *See Thorpe*, 6 F. Supp. 2d at 509.

174. *Id.* (quoting Second Am. Compl. ¶ 24). During the meeting with university officials, The vice-president of student affairs told Thorpe that the events were a tragedy and that the school would punish the guilty parties. *See id.* Thorpe was excused from her fall semester final examinations and returned home to New York. *See id.* Thorpe never returned to Virginia State. *See id.*

175. *Id.* at 510, 517.

rights law it is important to shift focus and address the role of tort law and violence on campus. Even if the victim of student-athlete violence is not entitled to bring a Civil Rights action, the potential for common law tort liability remains. In *Mullins v. Pine Manor College*,[176] the Supreme Judicial Court of Massachusetts held a college liable for failing to take precautionary steps to prevent sexual assault and rape of a female student.[177] The *Mullins* Court held the university liable on two tort theories: (1) students have a reasonable expectation that the university will provide reasonable care to protect its students; (2) the university in implementing a security system and employing security guards through out the university assumes the duty to prevent physical harm of its students.[178] The court rejected Pine Manor's argument that the attack was not foreseeable.[179] The court upheld the jury finding and noted that had crimes been unforeseeable the university would not have implemented campus-wide security.[180]

On the other hand, in *Brown v. North Carolina Wesleyan College*,[181] the Court of Appeals of North Carolina held that a university cannot be held liable for violence against women when the actions are not foreseeable. In *Brown*, a university student was abducted after a university basketball game by an individual not affiliated with the university.[182] This third party subsequently raped and murdered the university student.[183] In a suit to recover for the student's death, her estate sued the university to recover for allowing kidnaping by individuals who the university should have known were capable of heinous crimes and claiming that it was foreseeable that third persons could perpetrate violent acts against students on campus.[184] In declining to define liability in this case, the *Brown* Court held that a university could be held liable for criminal assault of third parties if

176. 449 N.E.2d 331 (1983).

177. *See id.* at 342.

178. *See id.* 336.

179. *See id.* at 337. The court held, "[T]he precautions which Pine Manor and other colleges take to protect their students against criminal acts of third parties would make little sense unless criminal acts were foreseeable." *Id.* Here, the perpetrator broke into Mullins' dormitory, dragged her from her bed and raped her in a cafeteria. *See id.* at 334.

180. *See Mullins*, 449 N.E.2d at 334.

181. 309 S.E.2d 701 (1983).

182. *See id.* at 701. The perpetrator was merely on campus because of the university basketball game. *See id.*

183. *See id.*

184. *See id.*

it was foreseeable.[185]

Another case in which a court declined to impose institutional liability was *Tanja H. v. Regents of the University of California.*[186] In *Tanja,* a female student was raped by four members of the University of California at Berkeley football team.[187] The court held the university was not liable for the rape of the female student after a party in a dormitory where under age alcohol consumption occurred.[188] The court held, "Relevant authority indicates universities are generally not liable for the sometimes disastrous consequences which result from combining young students, alcohol, and dangerous violent impulses."[189] This approach to university liability was not widely recognized, at least when Title IX was at issue. In sum, this Comment suggests that if the college was reckless in admitting or overseeing the student-athlete, then the college should be held liable for the tortious actions of the student-athlete.[190]

VI. DAMAGES AND SAFEGUARDS

After examining the legal developments which can allow claims against a university as a result of the violent acts of student-athletes, the next section addresses possible institutional liability and damages as well as the steps universities can take to avoid such liability.

A. *Institutional Liability*

In light of the astronomical amounts of money that universities

185. *See* Brown, 309 S.E.2d at 703. The court recognized that there had been only minimal occurrences on campus between the late 1950s and the early 1980s (the time before the crime against Collins). *See id.* Subsequently the court held that the attack on Collins was not foreseeable because there was "no repeated course of conduct." *Id.* at 584, 309 S.E.2d 703. Accordingly, the court held that the university had no duty to prevent the attack on Collins by an outsider. *See id.*

186. 278 Cal.App.3d 434 (Cal. Ct. App. 1991).

187. *See id.* at 436.

188. *See id.* at 437.

189. *Id.* The court recognized the development of college campuses from "semi-monastic" communities (where the administration played a significant role in shaping the students' lives) to "microcosms of society" with all of society's trappings, including sexual assault against women. *See id.* at 438.

190. *See* RESTATEMENT (SECOND) AGENCY § 217(c)(1958). RESTATEMENT (SECOND) AGENCY § 217(c) provides:

> Punitive damages can be properly awarded against a master or other principal because of an act by an agent if, but only if. . . .
>
> (b) the agent was unfit and the principal was reckless in employing him.

Id.

can raise through sports, student-athletes should be treated like employees, subjecting the university to the doctrine of respondeat superior. In the employment context, courts often calculate damages in sexual harassment cases as a percentage of the employer's earnings for a particular year.[191] Under Titles VI and IX of the Civil Rights Act a similar calculus should apply for student-athlete violence. Because I believe that student-athletes occupy a far stronger relationship with the college than the average undergraduate student (even the non-athletic scholarship student). Because of the huge amounts of money that college sports raise for colleges, victims of student-athlete violence should be entitled to a percentage of the profits generated by the athletic department or specific team. If a university knows that student-athlete violence can result in a verdict based upon a percentage of profits of a particular team, that university would focus on curing or limiting the several factors which contribute to student-athlete violence.

Congress enacted Title IX's statutory scheme around the model created by Title VII, which applies to private employers.[192] Unlike Title VII of the 1964 Civil Rights Act which places a statutory cap on damages at $300,000, Title IX of the 1972 Amendments has no such cap on damages.[193] In addressing the analysis of Title IX in discrimination cases courts often utilize Title VII constructs for Title IX cases.[194] Some commentators argue that Title IX should have a

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191. *See* Harriet Chiang, *Judge Halves $7.1 Million Award In Harassment Case, But Bay Woman Will Still Get Record Sum*, S.F. CHRON, Nov. 29, 1994, at A15. In 1994, a jury awarded a legal secretary $6.9 million in punitive damages against the law firm of Baker & McKenzie after a partner in the law firm groped her breast and poured M&M candies down her blouse pocket. *See id.* Several jurors, citing the reasoning behind the monumental verdict, stated that they awarded damages in the amount equal to 10% of the firm's total net worth. *See* Dennis J. Opatrny, *Whopping Judgment Shakes Up The Workplace, Employers Who Fail To Act On Harassment Held Liable*, PITTSBURGH POST-GAZETTE, Sept. 11, 1994, at C7. One juror stated that the Baker & McKenzie, the world's largest firm, should pay a portion of net worth in punitive damages a punishment for failing to prevent the harassment by a partner. *See id.* A Superior Court judge in San Francisco remitted the damage amount against the law firm to half the jury award, which was equal to 5% of the firm's net worth. *See* Chiang, *supra*, at A15.

192. Title VII does not apply to educational institutions. *See* 42 U.S.C. § 2000e-1(1994).

193. *Cf.* 20 U.S.C. § 1981a(b)(3)(stating nothing on the amount of damages that a plaintiff can recover against a recipient of federal funds) and 42 U.S.C. § 2000e5 (establishing a sliding scale for damages based on the size of the employer).

194. *See Brzonkala*, 132 F.3d at 959 (citing Oona, R.S. v. McCaffrey, 122 F.3d 1207, 1210 (9th Cir. 1997); Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248-51 (2d Cir. 1995); Collier v. William Penn School Dist., 956 F.Supp. 1209, 1213-14 (E.D. Pa. 1997); Pinkney v. Robinson, 913 F. Supp. 25, 32 (D.D.C. 1996); Bosley v. Kearney R-1 School Dist., 904 F. Supp. 1006, 1021-22 (W.D. Mo. 1995); Kadiki v. Virginia Commonwealth Univ., 892 F.

statutory cap like the ones in Title VII to encourage uniformity in jurisprudence and courts already use Title VII constructs in Title IX cases.[195] While it is true that it may be beneficial for courts to address the discrimination claims under Title IX with Title VII constructs, this Comment contends that the statutory cap provision is noticeable absent in Title IX because federal funds are involved in Title IX and not Title VII. To have a cap in Title IX just because a cap exists in Title VII, underestimates the Congressional intent of Title IX. Senator Humphrey suggested, it shocks the conscience of the nation for federal funds to be used in discriminatory practices by schools, capping damage amounts would allow colleges to keep federal funds and foster a discriminatory environment.[196] The Title IX context differs from the Title VII context because the federal government does not directly support private employers in the form of grants, while the federal government does provide direct support to colleges and universities. Therefore, statutory caps on damages are noticeably absent in the Title IX context because of this direct financial support. While a college or university is free to decline federal grant monies,[197] the school accepts, along with the grant money itself, the conditions attached by Congress to the offer.[198]

B. Preventative Measures

While it seems that colleges may be subject to large verdicts because of the violent acts of student-athletes, there are several steps that colleges can take to prevent such a result. Colleges should warn the entire student body about the dangers of on campus violence. Colleges must also specifically target student-athletes because of their at-risk status (whether it be because the students are targets or are more prone to illegal behavior is a question for the psychologists and sociologists). It is foreseeable for colleges that athletes could involve themselves in illegal behavior. Therefore, to limit institiutional liability, colleges must take preventative steps to limit the number of incidents by student-athletes.

Supp. 746, 749-50 (E.D. Va. 1995); Ward v. Johns Hopkins Univ., 861 F. Supp. 367, 374 (D. Md. 1994)).

195. *See* Kaija Clark, Note, *School Liability and Compensation for Title IX Sexual Harassment Violation By Teachers and Peers*, 66 G.W. L. REV. 353, 355 (1998).

196. *See* 110 CONG. REC. 6544 (1964) (Statement of Sen. Humphrey).

197. *See* New York v. U.S., 505 U.S. 144, 168 (1992).

198. *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) (federal highway grant money).

This Comment suggests that universities are in a damned-if-you do, damned-if-you don't position when dealing with disciplinary proceedings stemming from student-athlete violence. Assuming the allegations against the student-athlete are true, if the university, along with the victim's consent, chooses to handle the disciplinary proceedings in-house and the end result favors and is lenient to the athlete, a Title IX action brought by a female victim alleging discriminatory treatment in the disciplinary proceedings could result.[199] Yet, the members of the disciplinary board may feel compelled to impose a harsh punishment on the violent student-athlete to avoid a Title IX claim by the victim. If so, "the disciplinary measures required to avoid liability under Title IX could subject the [college] to the threat of suit by the disciplined [athlete]."[200] To that end, the Supreme Court has held that a financial incentive, i.e. to avoid civil liability, can render a disciplinary procedure impermissibly biased.[201] Because of this dual-edged sword that in-house disciplinary procedures provide, colleges should hesitate, or even decline, to handle such explosive disciplinary procedures and leave them to local law enforcement officials. If the victim of student-athlete violence does not wish to file formal charges with the police, as is often the case with rape victims,[202] and insists on filing a complaint only with the university, to ensure fairness, universities should treat student-athlete violence like any other code infraction by any other student. To leave the disciplinary proceeding in the hands of the athletic department or coach smacks of unfairness and bias.[203] Therefore, to ensure the victim does not feel discriminated against by the university, disciplinary procedures that are employed for all university code infractions provide the surest form of fairness.

C. Avoiding Liability

There is a recent trend at several universities through out the country in which college administrators and athletic departments have implemented codes of behavior for athletes.[204] For some

199. *See e.g., Brzonkala*, 132 F.3d at 961.

200. *Davis*, 120 F.3d at 1404.

201. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

202. The *Brzonkala* Court recognized that universities need to be sensitive to the needs of rape victims. *See Brzonkala*, 935 F. Supp. 772, 777 (W.D. Va. 1996).

203. *See Brzonkala*, 132 F.3d at 956, 960 (noting that the university disciplinary procedures and standards changed when the head football coach became involved).

204. *See* Wieberg, *supra* note 5, at 17C. Among the 25 top-ranked football schools (ranked

schools written policies for student-athletes may not be needed as long as the university enforces the pre-existing code of conduct for the campus uniformly. Obviously those pre-existing codes were ineffective in deterring athletes' crime on campus. One other option for colleges to explore to minimize incidents of violence on campus by student-athletes is to implement screening procedures during the recruiting process to limit criminally prone individuals from gaining access to campus.

1. Looking at Prior Criminal Histories

Colleges can look into a student-athlete's past to determine if the person has a criminal past. The state universities in Idaho have a policy in place which forbids the recruitment of athletes who have been convicted of a felony.[205] Coaches need not utilize formal research to determine the students criminal history, but merely take an active approach in determining the character of the student-athlete that he/she is recruiting. Coaches can ensure the quality of the student that they are recruiting by interviewing the parents, teachers, coaches, classmates, teammates and friends of the recruit. Such procedures, though arduous, are a necessary step and a sound decision considering the university in many circumstances is investing upwards to $125,000 in scholarship athletes. While certain coaches and college administrators believe in giving athletes a second chance and are willing to overlook some of the individual's prior indiscretions, others are becoming less forgiving. According to Northwestern Athletic Director Rick Taylor, "You'd like to think you can give kids a second chance, but we're into giving kids third and fourth chances... They think because they're athletes that they can

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in 1998 pre-season USA Today/ESPN poll) only eight schools have implemented codes of conduct for athletes. *See* Ladka Bauerova, et al., *Special Report: Colleges Confront Athletes' Crimes,* USA TODAY, Sept. 18, 1998, at 20C. Those schools that have written policies include: Arizona State University, Florida State University, Michigan State University, University of North Carolina, Ohio State University, Syracuse University, and the University of Washington. *See id.* On the other hand, the seventeen remaining schools have no written code of conduct for athletes. *See id.* Those schools include: the University of Arizona, Auburn University, Colorado State University, University of Florida, Kansas State University, Louisiana State University, University of Michigan, University of Nebraska, University of Notre Dame, Pennsylvania State University, Southern Mississippi University, University of Tennessee, Texas A&M University, University of California at Los Angeles, University of Virginia, West Virginia University, and the University of Wisconsin. *See id.*

205. *See* Steve Wieberg, *Background Checks Becoming Part of Recruiting Process,* USA TODAY, Sept. 18 1998, at 19C.

get away with anything, and we've got to stop that mentality."[206]

2. Dealing With Student-Athletes Evenly

Colleges ought not leave the disciplining of student-athletes to coaches or athletic departments. Such disciplinary proceedings with members of the athletic department involved are fundamentally unfair to the victim of student-athlete violence and biased in favor of the student-athlete. At some schools the judicial process for student athletes is the same as for the non-athlete student. At Northwestern and Notre Dame, no one from the athletic department has any say in the punishment of a student-athlete stemming from an on-campus incident.[207] All decisions pertaining to student-athlete criminal violations are handled by the vice president of student affairs.[208] Such uniformity provides comfort for both the student-athlete and non-athlete student because the non-athlete knows that athletes are not above the general adjudication process as the rest of campus while the student-athlete knows that he/she must conform his/her behavior to the norms of campus, not their own or coach's understanding of appropriate behavior.

3. Sticking to the NCAA Academic Guidelines

This Comment recommends that colleges apply strict academic guidelines to limit the incidents of student-athlete violence. Currently, football and basketball players at Division I schools have a

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206. *Id.* (statement of Northwestern Athletic Director, Rick Taylor).

207. *See* Steve Wieberg, *More Schools Laying Down the Law,* USA TODAY, Sept. 18, 1998, at 18C.

208. *See id.* The University of Notre Dame Guide to Student Life provides:

> The University's behavioral policies and procedures are under the jurisdiction of the Office of Student Affairs. All alleged violations are at the disposition of that office through the Office of Residence Life. Unless otherwise noted, these policies and procedures apply to all students, undergraduate, graduate or professional, whether the behavior occurs on or off campus.
>
> 1. The following acts may result in disciplinary suspension or permanent dismissal:
>
> a. Any act of physical violence or any act which causes serious injury to another.
>
> 2. Sexual misconduct, including but not limited to, sexual intercourse without consent, unwelcome touching or other offensive sexual behavior is a serious violation. . .
>
> 3. Possession or use of any controlled substance, including, but not limited to, marijuana, cocaine, heroin, amphetamines and depressants, is a serious violation. . .

Du Lac, A GUIDE TO STUDENT LIFE: UNIVERSITY OF NOTRE DAME, 1998-1999 at 59-60.

50% graduation rate.[209] This Comment, on the other hand, does not imply that students with higher SAT scores or grade point averages are less prone to violence.[210] Rather, if the athletes know that they are at the college to study as well as to play a sport and that academics are not merely an afterthought, the athletes may be less tempted to risk behaving violently, because they would understand that they are not entitled to special treatment.

There is a level of comfort knowing that university policy will be administered equally. Student-athletes would not feel tempted to test the limits of the university code. Knowing that they are held to the same standards and procedures as every other student comforts the athletes because they know exactly where they stand. Student-athletes might then not be tempted to break rule or test the limits of the administration. Furthermore, non-athletes are better served knowing that athletes do not get special treatment. As a result, the overall campus environment is improved by the equality among all the students.

VII. CONCLUSION

Colleges and universities must not turn a blind eye to the problem of student athlete violence on campus. With the growing numbers of acts of violence by athletes from the high school ranks to the professional ones and because of the increase in civil rights law suits, colleges can ill afford to let their campuses be a breeding ground for violent actors. Considering the public relations nightmare, the tragic injury that the victim endures, and the grave liability that can result because of student-athlete violence, these schools must take preventative steps which limit the incidents of student-athlete violence. To achieve this end, colleges should apply a no-nonsense policy toward alcohol, drugs, and steroid use by student-athletes, adhere to reasonable academic standards at the admissions process and during the student-athletes years at the university, employ background checks to look for incidents of violent behavior during the recruiting and application process; utilize the

209. *See* Thad Williamson, *Bad As They Wanna Be (College Athletes Corrupted By Money)*, THE NATION, Aug. 10, 1998 at 38.

210. In 1995, Harvard University rescinded its offer of admission to Gina Grant after the school learned that she had murdered her mother when she was 14. *See* Joyce Valdez, *Ex-offenders Create Campus Dilemma, Colleges Fret Over Students With Criminal Records*, ARIZ. REPUBLIC, Nov. 5, 1995, at A1.

same campus disciplinary proceedings for athletes as for non-athletes, set punishments for incidents of violence that are commensurate with the crime or code violation.

College athletics and interscholastic competition is a vital and necessary part of a healthy and functioning educational environment. College administrators, coaches, alumni and athletes, however, have to recognize and let their actions reflect that student-athletes remain students first, athletes second. When a university loses sight of that goal, treats athletes as hired-guns, and permits and tolerates student-athlete violence, the goals of the students are not being served. Furthermore, when a university or athletic department places on-field or on-the-court success above all else and condones, and in some cases promotes, violent behavior by student athletes, the university is not fulfilling its true mission as an educator.

Thomas N. Sweeney