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Cover Page Footnote

J.D. Candidate, May 2018, Loyola Law School, Los Angeles; B.A., English, University of Oregon, 2011. I wish to thank Professor Priscilla Ocen for her guidance and invaluable feedback throughout the entire writing process, as well as the editors of the Loyola of Los Angeles Law Review for their hard work and thoughtful suggestions. Most importantly, I want to thank my family, particularly my mother, Patricia, and friends for their unwavering encouragement and support.

NCAA: NO CONSEQUENCES AGAINST ATHLETES

*Catalina Kelly**

I. INTRODUCTION

Academic institutions across the United States are being bombarded with complaints regarding sexual assault. Despite their duty to adjudicate such claims, institutions of higher learning are failing to protect students from sexual assault in violation of federal law.¹ Title IX is a federal civil rights law that prohibits sex discrimination in any educational program or activity that receives federal funding.² The protection this law provides encompasses sexual harassment as well as sexual violence.³ While university adjudication does not act as a substitute for the criminal justice system, it does act as “a separate antidiscrimination right protecting students’ access to educational opportunities at their schools, unburdened by historical and persistent gender-based disparities.”⁴ However, Title IX has yet to live up to its potential.⁵

While laws like Title IX are in place for colleges and universities to ensure the safety of their students, an overwhelming number of institutions are under federal investigation for not addressing

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1. See Abbie Nehring, *Campus Sexual Assault: What Are Colleges Doing Wrong?*, PRO PUBLICA (July 29, 2014), <https://www.propublica.org/article/campus-sexual-assault-what-are-colleges-doing-wrong>.

2. *Title IX*, END RAPE ON CAMPUS, <http://endrapeoncampus.org/title-ix>.

3. *Id.*

4. Alexandra Brodsky & Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO MAG. (Dec. 3, 2014), http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294_Page2.html#.WAFdJzbfDFI.

5. *See id.*

allegations of sexual violence in the legally required manner.⁶ Since 2011, the government has conducted 392 investigations of colleges for possibly mishandling reports of sexual violence.⁷ As of now, only sixty-two cases have been resolved and 330 remain open.⁸ To make this problem more concerning, one type of person tends to have greater immunity to repercussions regarding acts of sexual violence than others. That person is the student-athlete.

There is great difficulty in ascertaining exactly how many institutional investigations involve abuse by student-athletes because “neither campus police nor judicial affairs offices indicate whether an alleged perpetrator is a student-athlete.”⁹ However, one study, which obtained data collected from campus police departments and judicial affairs offices, shows over thirty different institutions with 107 cases of sexual assault.¹⁰ “[I]n this sample, male football and basketball players comprised 30 percent of the student-athlete population, yet were responsible for 67 percent of the reported sexual assaults.”¹¹ With a large number of educational institutions failing to act, filing a federal lawsuit is generally the next option to be sought by students.¹²

In 2012, 45 percent of colleges reported zero sexual assaults.¹³ From 2009 to 2014, at least 15 colleges and universities have alleged incidents of sexual assault involving a football player, yet these colleges and universities did not take any action until the allegations garnered national media attention.¹⁴ Universities are protecting a brand and not looking out for the best interests of the students.¹⁵ More than 16 percent of college women are sexually assaulted while in college.¹⁶ Given these statistics, college athletes are a likely

6. See *Title IX Tracking Sexual Assault Investigations*, THE CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/>.

7. *Id.*

8. *Id.*

9. Crosset, Benedict & McDonald, *Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices*, SAGE SOC. SCI. COLLECTIONS 126, 129 (1995), <http://journals.sagepub.com/doi/pdf/10.1177/019372395019002002>.

10. *Id.*

11. *Id.* at 133.

12. *How to Pursue a Title IX Lawsuit*, KNOW YOUR IX, <http://knowyourix.org/title-ix/how-to-pursue-a-title-ix-lawsuit/>.

13. THE HUNTING GROUND (Anchor Bay Entertainment 2015).

14. Vivian Nunez, *The Intersection of Campus Sexual Assault And Sports*, GENERATION PROGRESS (Aug. 28, 2014), <http://genprogress.org/voices/2014/08/28/30519/the-intersection-of-campus-sexual-assault-and-sports/>.

15. THE HUNTING GROUND, *supra* note 13.

16. *Id.*

contributor to this problem.¹⁷ The prevalence of sexually violent incidents perpetrated by college athletes should serve as a wake-up call to educational institutions, and player-associated organizations like the National Collegiate Athletic Association (“NCAA”) to implement policies setting forth consequences for acts of sexual violence.

This Note will explore the failure of federally funded institutions to adequately investigate Title IX complaints, as well as the need for another administrative body to adjudicate claims of sexual violence perpetrated by student-athletes due to the more lenient discretion that colleges apply to athlete misconduct. When it comes to student-athletes, the NCAA is closely associated with athletic departments and educational institutions, and has the power and ability to regulate sexual assault and interpersonal violence. This Note argues that the NCAA has a duty to regulate student-athletes’ behavior, and is thus insufficiently protecting women on college campuses from acts of sexual violence perpetrated by the organization’s athletes.

Section II of this Note provides statistics that give insight into the number of sexual assault allegations committed by athletes, explains how universities currently handle sexual assault matters involving both student athletes and non-student athletes, and discusses competing interests that universities are faced with. Section III outlines the general framework of the NCAA as an organization and its current policies, or lack thereof, on sexual violence. Finally, section IV proposes how the NCAA can regulate this devastating issue, and justifies each proposal.

II. BACKGROUND

In December 2012, a female Florida State University (“FSU”) student alleged that a prominent college athlete sexually assaulted her.¹⁸ In January 2013, the woman identified FSU star quarterback, Jameis Winston, as her assailant.¹⁹ Athletics officials interviewed two other athletes who claimed to be present during the encounter and stated that the encounter was consensual.²⁰ Athletics officials claim

17. *Id.*

18. Letitia Stein, *Florida State University Defends Handling of Quarterback Rape Investigation*, HUFFINGTON POST (Dec. 10, 2014), http://www.huffingtonpost.com/2014/10/10/fsu-quarterback-investigation-rape_n_5966938.html.

19. *Id.*

20. *Id.*

that they did not file a report to the university office charged with investigating reports of sexual violence under federal law because the athletics officials were informed that police were no longer investigating the matter.²¹ The university's office did not hear about the incident until November 2013, following media inquiries to police.²² It was not until April 2014 that the U.S. Department of Education's Office of Civil Rights launched an investigation into FSU's handling of the case once the victim filed her Title IX lawsuit.²³ The lawsuit alleged that university officials concealed and obstructed the sexual assault investigation so that Winston could play football for more than two years after the victim's initial sexual assault allegations.²⁴ The victim's complaint asserts that officials at FSU knew that Winston raped her.²⁵ She further claims that its response to such knowledge was unreasonable, and that had the university not been deliberately indifferent, she would not have been subjected to further discrimination.²⁶ In 2014, Winston led FSU to win the National Championship; he also won the Heisman trophy and was selected first in the 2015 NFL draft by the Tampa Bay Buccaneers.²⁷ In December 2015, the university cleared Winston of all sexual assault allegations in a student conduct hearing, and FSU settled the lawsuit in January 2016 by paying the victim \$950,000.²⁸

Another sexual assault incident regarding a college athlete occurred on February 14, 2016, when Delaney Robinson, a student at the University of North Carolina ("UNC"), alleged that UNC football player Allen Artis raped her.²⁹ According to Robinson, she reported the incident, allowed a rape kit to be taken, gave a statement, and cooperated with both law enforcement and the school's Title IX

21. *Id.*

22. *Id.*

23. *Id.*

24. Tony Gutierrez, *FSU Pays \$950,000 to Woman who Accused Jameis Winston Of Sexual Assault*, NPR (Jan. 25, 2016), <http://www.npr.org/sections/thetwo-way/2016/01/25/464332250/fsu-pays-950-000-to-woman-who-accused-jameis-winston-of-sexual-assault>.

25. *Kinsman v. Fla. State Univ. Bd. of Trs.*, No. 4:15cv235-MW/CAS, 2015 U.S. Dist. LEXIS 180599, at *4 (N.D. Fla. Aug. 12, 2015).

26. *Id.*

27. Gutierrez, *supra* note 24.

28. *Id.*

29. A.J. Perez, *North Carolina's Allen Artis, Accused of Sexual Assault, Turns Himself in*, USA TODAY (Sept. 14, 2016), <http://www.usatoday.com/story/sports/ncaa/acc/2016/09/14/north-carolina-allen-artis-accused-of-sexual-assault-turns-himself/90351338/>.

office.³⁰ Six months after reporting the incident, it appeared as if the university did nothing to further the investigation.³¹ Currently, North Carolina District Attorney Jim Woodall assures that these allegations are still being investigated.³² Despite that assurance, no charges have been filed.³³

Robinson faulted the UNC Department of Public Safety and the school's Title IX office for mishandling the investigation.³⁴ Investigators told Artis, "Don't sweat it, just keep on living your life and playing football."³⁵ Due to the inaction by the police, prosecutors and the university, on September 13, 2016, Robinson took matters into her own hands and sought criminal charges as an individual.³⁶ "A magistrate issued an arrest warrant for two misdemeanors: sexual battery and assault."³⁷ It was not until charges were filed that Artis was suspended by the university's football team, and only because it was required by the athletics department's policy for an athlete accused of a misdemeanor.³⁸

Another occurrence that took place in 2014 included star Baylor University running back Devin Chafin, whose girlfriend accused him of violently assaulting her.³⁹ In one incident, Chafin's girlfriend alleged that Chafin had slammed her arm into a car door.⁴⁰ In another incident, she alleged that he had picked her up and slammed her on the ground.⁴¹ The victim reported both incidents to the Baylor football team, including head coach Art Briles, and Chafin's position coach, passing game coordinator and running back coach Jeff Lebby, who is Briles's son-in-law.⁴² No one investigated these allegations, and the

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Jordan Sargent, *The Scandal at Baylor Makes it Clear Penn State Did Nothing to Change College Football*, GAWKER (May 27, 2016), <http://gawker.com/the-scandal-at-baylor-makes-it-clear-that-penn-state-di-1778988677>.

40. *Id.*

41. *Id.*

42. *Woman Says Art Briles Was Aware of Assault Allegations Against Baylor RB*, SPORTS ILLUSTRATED (June 7, 2016), <http://www.si.com/college-football/2016/06/07/baylor-devin-chafin-assault-allegation-art-briles-aware>.

victim never pressed charges.⁴³ From her experience, she had “seen other girls go through it, and nothing ever happened to the football players.”⁴⁴ Chafin was not disciplined by anyone at the school, but the school suspended him from the football team in March 2016 for a marijuana charge in Oklahoma.⁴⁵

Similarly, in July 2015, FSU’s De’Andre Johnson was arrested on domestic violence charges for punching a woman in the face at a Tallahassee nightclub.⁴⁶ Although the head football coach was aware of the charges, FSU did not dismiss Johnson from the team until a video of the ordeal went viral on social media in early July, 2015.⁴⁷

The persistence of sexual violence involving college students is problematic.⁴⁸ In one study that involved an equal ratio of 379 male, undergraduate, intercollegiate athletes and non-athletes, researchers found that 54.3 percent of the intercollegiate athletes engaged in sexually coercive behaviors, compared to 37.9 percent of non-athletes.⁴⁹ Horrifiably, “[a] three-year study shows that while male student-athletes comprise 3.3 percent of the population, they represent 19 percent of sexual assault perpetrators and 35 percent of domestic violence perpetrators.”⁵⁰

A. Current Statistics Regarding Acts of Sexual Violence Perpetrated by Student-Athletes

Athletes are often viewed as leaders. When given the right platform, athletes can be powerful, influential voices in the fight to end violence against women.⁵¹ However, they can also be the exact opposite. The National Coalition Against Violent Athletes released

43. *Id.*

44. Sargent, *supra* note 39.

45. *Id.*

46. Cody Junot, *Domestic Violence And the NCAA*, C. AD (July 9, 2015), <http://collegead.com/domestic-violence-ncaa/>.

47. *Id.*

48. *See* Nehring, *supra* note 1.

49. Tricia Tonga, *New Study Explores Sexual Assault by Male College Athletes*, ATTN: (June 9, 2016), <http://www.attn.com/stories/8926/sexual-assault-by-male-college-athletes-study>.

50. Jeff Benedict & Todd Crosset, *The Stats Tell the Story*, NCAVA, <http://www.ncava.org/statistics>.

51. *See Athletes*, NCAVA, <http://www.ncava.org/athletes>; *see also* Alanna Vagianos, *Young Male Athletes Push Back on ‘Locker Room Banter’ in One Viral Photo*, HUFFINGTON POST (Oct. 17, 2016), http://www.huffingtonpost.com/entry/male-athletes-push-back-on-locker-room-banter-in-one-viral-photo_us_5804edcae4b06e047595ec6b (depicting young men wearing t-shirts in the locker-room that say “wild feminist” to remind the world that sexual assault is most definitely not the stuff of locker room banter, as Donald Trump claims).

statistics⁵² revealing that student-athletes commit one in three sexual assaults on college campuses.⁵³ A 2014 survey reported that more than 20 percent of college athletic departments oversaw investigations of sexual assault allegations made against their athletes.⁵⁴ And while less than 4 percent of college students are athletes, student-athletes are involved in nearly 20 percent of sexual assaults reported on college campuses; the emphasis is on the word “reported.”⁵⁵ As far as crimes that have been reported, a new incident of a crime involving an athlete emerges in the United States once every two days.⁵⁶ One survey investigated how often colleges prosecuted general crimes involving athletes, including all men’s football and basketball players on rosters from 2009 to 2014.⁵⁷ This data came from campus and city police departments covering ten major programs.⁵⁸ The University of Florida had the most athletes named as suspects, 80 in more than 100 crimes at Florida, yet those athletes never faced charges, had charges against them dropped, or were not prosecuted 56 percent of the time.⁵⁹

B. How Universities Are Currently Handling Allegations of Sexual Violence

Sexual assault on college campuses is an invidious problem that both universities and students are challenged with handling. Title IX, enacted in 1972, is a federal civil rights law that prohibits discrimination on the basis of sex in educational institutions that receive federal funding.⁶⁰ “As a matter of law under Title IX, colleges and universities across the United States are required to investigate and adjudicate allegations of sexual misconduct.”⁶¹ Reporting incidents of sexual violence to colleges and universities is not a

52. Benedict & Crosset, *supra* note 50.

53. *Id.*

54. Dennis Van Milligen, *Blurred Lines*, ATHLETIC BUS., Apr. 2015, at 58, available at <http://www.athleticbusiness.com/rules-regulations/college-athletic-departments-role-in-investigating-sexual-assaults.html>.

55. *Id.*

56. Benedict & Crosset, *supra* note 50.

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

58. *Id.*

59. *Id.*

60. 20 U.S.C. § 1681 (2012).

61. Sara Ganim & Nelli Black, *An Imperfect Process: How Campuses Deal with Sexual Assault*, CNN (Dec. 21, 2015), <http://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals/>.

replacement for reporting the matter to the police; instead, it is another option for victims based on civil rights rather than criminal law.⁶² Procedures for how to handle such allegations vary from school to school, but the majority of institutions hold disciplinary hearings that generally consist of teachers and students acting as prosecutor, judge, and jury.⁶³ The theory behind these disciplinary hearings is that they provide both parties an equal opportunity to be heard, present witnesses and evidence, and allow students to take advantage of appeal rights.⁶⁴ As fair as this may seem in theory, these equitable procedures are sparingly put into practice. According to a survey of over 236 schools across the country, more than 40 percent reported that they have not conducted a single sexual assault investigation in the past five years.⁶⁵ In addition, it was discovered that over 20 percent of institutions investigated fewer than the number of incidents reported, with some reporting as many as seven times more incidents of sexual violence than they have investigated.⁶⁶

The U.S. Department of Education's Office for Civil Rights ("OCR"), which handles claims for Title IX violations by institutions, allows investigations to drag on for years, even after the parties have graduated.⁶⁷ To file a Title IX claim against an institution through the OCR, the victim must write to the Department of Education and explain what happened to them and why it violates Title IX.⁶⁸ Students can file federal lawsuits against institutions that fail to comply with Title IX requirements, which has become a growing practice.⁶⁹

Although the OCR does not have the authority to adjudicate cases between two students, it does have the authority to investigate the complainant's allegations against the institution and enforce disciplinary action against the institution if a Title IX violation has

62. *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <http://knowyourix.org/why-schools-handle-sexual-violence-reports>.

63. Ganim & Black, *supra* note 61.

64. *Common Concerns When Filing a Title IX Complaint*, KNOW YOUR IX, <http://knowyourix.org/title-ix/common-concerns-when-filing-a-title-ix-complaint/>.

65. Tyler Kingkade, *National Survey Finds Many Colleges Still Failing Investigating Sexual Assault*, HUFFINGTON POST (July 10, 2014), http://www.huffingtonpost.com/2014/07/09/survey-college-sexual-assault_n_5569258.html.

66. *Id.*

67. Katie Thomas, *Long Fights for Sports Equity, Even With a Law*, N.Y. TIMES (July 28, 2011), http://www.nytimes.com/2011/07/29/sports/review-shows-title-ix-is-not-significantly-enforced.html?_r=0.

68. THE HUNTING GROUND, *supra* note 13.

69. Ganim & Black, *supra* note 61.

occurred.⁷⁰ Considering how much federal funding educational institutions receive, the threat of losing such funds is a big enough incentive for institutions to comply with OCR's investigation. However, such a threat does not mean that any institutions have been reprimanded for failing to comply.⁷¹ OCR has never used its power to terminate the federal funds received by an educational institution.⁷² "Like any statutory right, Title IX is only as effective as the remedy it provides for a school's noncompliance."⁷³

In April 2011, OCR issued a "Dear Colleague" letter to all educational institutions receiving federal funding, addressing sexual assault and domestic violence in both educational programs and institutional activities.⁷⁴ The first of its kind, OCR's letter indicated the steps that educators must now take to investigate and resolve claims regarding sexual violence.⁷⁵ Student-on-student sexual harassment and sexual violence are both covered in the letter.⁷⁶ Moreover, the letter explains that schools are required to take immediate action to eliminate the harassment as soon as they learn of it; additionally, schools must publish a notice of nondiscrimination and adopt and publish grievance procedures.⁷⁷

The obligation that these institutions have to respond is not limited to acts of sexual assault and interpersonal violence that occur on campus; the obligation may pertain to acts that occur off campus involving students of the institution.⁷⁸ Employees of institutions who will likely receive complaints regarding sexual assault are to receive training to learn how to respond to such complaints.⁷⁹ OCR recommends that such training extend to "any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school

70. THE HUNTING GROUND, *supra* note 13.

71. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 55 (2013).

72. *Id.*

73. *Id.* at 52.

74. *Id.* at 50.

75. *Id.*

76. "Dear Colleague" Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Off. for C.R. 1, 2 (April 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

77. *Id.* at 4.

78. *Id.*

79. *Id.*

administrators, school counselors, general counsels, health personnel, and resident advisors.”⁸⁰

But what happens if a college athlete perpetrates the sexual assault? Per one devastating statistic, more than 20 percent of college institutions allow athletic departments to oversee cases of sexual violence that involve student-athletes, rather than requiring the department to hand-off the case to a neutral party.⁸¹ This unchecked allocation of oversight keeps many victims silent.⁸² Athletic departments have competing interests that cause them to protect athletes and ultimately, a lucrative brand that they help promote and do not want to tarnish with the bad publicity that accompanies such heinous acts.⁸³

As is particularly true for Division I institutions with extremely large budgets, leniency towards academic success and strong recruiting efforts are reserved for athletes.⁸⁴ Because sports bring in large revenue for schools and because athletes shape their schools’ reputation, both coaches and school officials arguably have an incentive to be more protective of athletes than other students.⁸⁵ Accused athletes are sometimes chided, but are rarely disciplined during investigatory proceedings.⁸⁶ Instead, coaches protect athletes while victims are discounted.⁸⁷ In 2014, the University of Oregon allowed two members of its men’s basketball team accused of gang rape to compete in the NCAA basketball tournament.⁸⁸ Only after the tournament ended were the individuals expelled.⁸⁹ In 2009, the University of Michigan allowed a football player accused of rape to play for two full seasons until Michigan expelled him one month after his final game.⁹⁰ In 2010, the University of Missouri allowed a star

80. *Id.*

81. Kate Fagan, *Athletic Departments Handling Sexual Assault Cases: Never a Good Idea*, ESPN WOMEN (Aug. 21, 2014), http://www.espn.com/espnw/news-commentary/article/11386174/why-athletic-departments-clueless-handling-sexual-assaults.?ex_cid=espnapi_public.

82. *Id.*

83. *Id.*

84. *Athletes and Sexual Assault*, PACT5, <http://pact5.org/resources/prevention-and-readiness/athletes-and-sexual-assault/>.

85. *Id.*

86. *Id.*

87. *Id.*

88. THE HUNTING GROUND, *supra* note 13.

89. *Id.*

90. *Id.*

football player accused of sexual assault to play for two more seasons, until he was convicted of sexually assaulting yet another student.⁹¹

Often, universities do nothing in response to complaints of sexual assault that implicate student-athletes, because universities have a financial incentive to protect perpetrators.⁹² If an institution were to act upon each allegation made and take disciplinary action against perpetrators, such action would need to be reported.⁹³ Universities often avoid these proceedings because such reports would deter students from wanting to attend the institution and would deter donors from donating large sums of money because of concerns about the school's reputation.⁹⁴

C. Competing Interests Pose a Significant Problem

Due to the conflict of interest inherent in a school's investigation of sexual assault allegations against student-athletes, many victims are deterred from proceeding through disciplinary hearings.⁹⁵ The culture within most athletic departments is created and believed in by members of the community and fans across the country.⁹⁶ Among many, the most important quality that a team can harbor is loyalty.⁹⁷ On the other hand, the most damaging is *blind* loyalty.⁹⁸ While an institution is often put in a tough spot when arbitrating matters of sexual violence between two students, the interest and influence of the school's athletics department can cause even greater challenges when one party is a student-athlete.⁹⁹ ESPN reporter, Kate Fagan, stated, "Whether intentional or just a byproduct of university culture, protecting the school image can occasionally take precedence over proper protocol under Title IX."¹⁰⁰ Former student-athlete Katie Hnida stated,

91. *Id.*

92. *Athletes and Sexual Assault*, PACT5, <http://pact5.org/resources/prevention-and-readiness/athletes-and-sexual-assault/>.

93. THE HUNTING GROUND, *supra* note 13.

94. *Id.*

95. Fagan, *supra* note 81.

96. *Id.*

97. *Id.*

98. *Id.*

99. Christopher Coble, *Are Colleges the Best Investigators of Campus Sexual Assault?*, FINDLAW (Feb. 11, 2016, 12:02 PM), http://blogs.findlaw.com/tarnished_twenty/2016/02/are-colleges-the-best-investigators-of-campus-sexual-assault.html.

100. Fagan, *supra* note 81.

They talk about having a zero-tolerance policy, about doing the right thing first—“We’re here to create good men and shape their characters.” While I always want to believe that’s true, so often it comes down to wanting to protect your own image, which comes back to money. And then also to winning, which in turn also comes back to money.¹⁰¹

Athletics departments have competing interests.¹⁰² They are often influenced by the school’s money and brand.¹⁰³

In short, schools are ill-equipped when it comes to investigating sexual assaults in general, but it is even worse when the accused party is a student-athlete.¹⁰⁴ While colleges and universities will always bear the responsibility of preventing sexual assault on campus and doing what it takes to create a safe environment for all, they cannot meet this burden on their own.¹⁰⁵ Title IX expresses what educational institutions should do in handling these matters, but frequent mishandling by colleges and universities strongly suggests that another organization more closely associated with college athletes should play a role in cases involving college athletes accused of perpetrating acts of sexual violence.¹⁰⁶

III. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

College sports is a multibillion-dollar industry.¹⁰⁷ This wealth implies that colleges and the NCAA are indirectly profiting from their lack of involvement in, and often suppression of claims of sexual assault involving student-athletes.¹⁰⁸ Given an industry this profitable, it is likely not incompetence that results in the failure to hold individuals and athletes accountable, but fear of the negative monetary influence such accountability may cause.

101. *Id.*

102. *Id.*

103. *Id.*

104. Coble, *supra* note 99.

105. *See id.*

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

107. Beejoli Shah, *NCAA Remains Quiet as Athlete Sexual Assault Cases Continue*, ROLLING STONE (Sept. 16, 2016), <http://www.rollingstone.com/sports/ncaa-remains-quiet-on-sexual-assault-cases-w440108>.

108. *Id.*

A. *The NCAA as an Organization*

The National Collegiate Athletic Association is a non-profit organization that represents college athletes.¹⁰⁹ The NCAA is the “oldest, wealthiest, and most powerful of the national associations, governing the largest, richest, and most popular sports programs in higher education.”¹¹⁰ This unincorporated association is the largest voluntary association of intercollegiate athletics in the United States.¹¹¹ It represents more than 1,000 colleges and universities and was created to foster and regulate intercollegiate athletic competition.¹¹² All of its member institutions and collegiate athletes are required to follow NCAA rules to be eligible to participate in NCAA-sponsored events.¹¹³

B. *Revenue Generated by the NCAA*

During the 2011–2012 season, the NCAA generated \$871.6 million in revenue, and while those are the most recent confirmed statistics available, the NCAA is projected to rake in \$797 million for the 2012–2013 season.¹¹⁴ In sum, the NCAA is a fully commercialized, multibillion dollar industry that arguably exploits student athletes.¹¹⁵ College athletes are the primary reason these numbers are so high, considering more than 80 percent of revenue comes from television and marketing, which showcase the athletes in action.¹¹⁶ Also, 11 percent of revenue comes from championship games alone, which cannot happen without the players.¹¹⁷

Let us take into consideration how much revenue is generated by some of the most popular collegiate football programs. During the 2014 season, the University of Texas generated \$92 million in profit, the University of Tennessee made a profit of \$70 million, and

109. *What Is The NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa>.

110. Mary Grace Miller, *The NCAA and the Student-Athlete: Reform Is On the Horizon*, 46 U. RICH. L. REV. 1141, 1141 (May 2012).

111. *Cal. State Univ., Hayward v. Nat'l Collegiate Athletic Ass'n*, 121 Cal. Rptr. 85, 87 (Ct. App. 1975).

112. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 637 (Cal. 1994).

113. *Id.*

114. *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue>.

115. Greg Johnson, *The NCAA Makes Billions and Student Athletes Get None of It*, NATION (Apr. 9, 2014), <https://www.thenation.com/article/ncaa-makes-billions-and-student-athletes-get-none-it/>.

116. *Revenue*, *supra* note 114.

117. *Id.*

Louisiana State University profited \$58 million.¹¹⁸ These exorbitant profits are generated by football alone, but all sports programs' profits combined are extremely lucrative to colleges and universities across the country. Thus, the cost to the NCAA of investigating a player-perpetrated sexual assault is substantially less than the revenue that a college sports team can generate in a single season.¹¹⁹

C. Core Values Behind the NCAA

As an organization, the NCAA prides itself on having a core set of values that governs the way it conducts its business.¹²⁰ Among the core values that the NCAA is committed to fostering in its association are:

The collegiate model of athletics in which students participate as an avocation, balancing their academic, social and athletics experiences. The highest levels of integrity and sportsmanship. The pursuit of excellence in both academics and athletics. The supporting role that intercollegiate athletics plays in the higher education mission and in enhancing the sense of community and strengthening the identity of member institutions. An inclusive culture that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds. Respect for institutional autonomy and philosophical differences. Presidential leadership of intercollegiate athletics at the campus, conference and national levels.¹²¹

The NCAA aims to hold college athletes to a high standard of moral character, and it does this not only by requiring athletes to meet a certain academic standard, but also by implementing rules “on ethical conduct that regulate student-athletes’ off-field behavior.”¹²² The NCAA’s goal is for these regulations to promote student-athlete welfare by protecting athletes’ health, setting up a safe environment,

118. Clay Travis, *The 20 Most Profitable College Football Teams*, OUTKICK THE COVERAGE (Dec. 22, 2015), <http://www.outkickthecoverage.com/the-20-most-profitable-college-football-teams-122215>.

119. Shah, *supra* note 107.

120. See *NCAA Core Values*, NCAA, <http://www.ncaa.org/about/ncaa-core-values>.

121. *Id.*

122. Trisha Ananiades, *Penalty on the Field: Creating a NCAA Sexual Assault Policy*, 19 VILL. SPORTS & ENT. L.J. 463, 471 (2012).

and creating academic standards with which each athlete should be able to comply.¹²³ Above all, NCAA President Mark Emmert has stressed that “the most important thing to the NCAA membership has always been that students aren’t treated in any privileged or disproportionate fashion.”¹²⁴

D. Current NCAA Policies Regarding Sexual Assault and Interpersonal Violence

Currently, the NCAA does not have any rules or penalties regarding student-athlete acts of sexual assault or domestic violence.¹²⁵ The NCAA has explicit rules that players must abide by including, but not limited to: substance abuse, in-game fighting, gambling, a player profiting from their own name, and even monitoring at which point during the year a recruit can receive a phone call from a prospective coach.¹²⁶ However, when it comes to matters as serious as sexual assault and interpersonal violence, the NCAA rule book is silent.¹²⁷

In September 2014, the NCAA joined President Obama and Vice President Biden’s campaign, “It’s On Us,” as an initiative to raise awareness and educate institutions about sexual assault and interpersonal violence by providing critiques and tips to improve enforcement, transparency, and accountability.¹²⁸ The NCAA participated by creating and distributing a fifty-six page handbook that encouraged universities to address the rapidly growing concerns of sexual violence.¹²⁹ However, a report shows that 82 percent of Division I schools provide sexual violence prevention training for college athletes, but only 37 percent of 236 other schools polled provide this type of training.¹³⁰ As a whole, while this manual and other types of training may exist, clearly they are not uniformly utilized by the NCAA’s member institutions.

123. *Id.* at 466.

124. Junot, *supra* note 46.

125. *Id.*

126. Ananiades, *supra* note 122.

127. Shannon Ryan, *Why doesn’t the NCAA Take a Tougher Position on Domestic Violence?*, CHI. TRIB. (Jan. 5, 2016), <http://www.chicagotribune.com/sports/columnists/ct-ncaa-joe-mixon-domestic-violence-spt-0105-20160104-column.html>.

128. Wendy Adele Humphrey, “Let’s Talk About Sex”: *Legislating and Educating on the Affirmative Consent Standard*, 50 UNIV. S.F. L. REV. 35, 50–51 (2016).

129. Junot, *supra* note 46.

130. Holden, *supra* note 106.

On its website, the NCAA promotes a few different materials and resources regarding sexual assault to show its dedication to contributing to campus efforts to prevent and intervene in cases of sexual assault, hazing, harassment, and abuse.¹³¹ One such resource is a Sexual Violence Prevention Tool Kit created by the NCAA Sport Science Institute in partnership with the NCAA Office of Inclusion.¹³² This publication, which stresses that athletic departments must work in partnership with campus colleagues to address the issue of sexual violence, provides athletic departments with collaborative strategies to support safer campus environments for everyone.¹³³ Ensuring that campus environments are safe and healthy for all is the responsibility of every individual and department that is part of the institution, including athletics departments.¹³⁴ In response to this resource, NCAA President Mark Emmert stated, “The college sports community—including the college and university presidents and chancellors on the NCAA Board of Governors—recognize member schools and conferences have a collective responsibility to maintain campuses as safe places to learn, live, work and play.”¹³⁵ Restated in the Tool Kit, in 2014 the NCAA Executive Committee released a sexual violence prevention and compliance resolution.¹³⁶ One portion of the resolution states that institutions’ athletic departments must “[c]ooperate with, but not manage, direct, control or interfere with, college or university investigations into allegations of sexual violence, ensuring that investigations involving student-athletes and athletics department staff are managed in the same manner as all other students and staff on campus.”¹³⁷ As previously addressed, more than 20 percent of institutions are violating this requirement by allowing athletics departments to oversee cases that involve student-athletes.¹³⁸

The NCAA clearly realizes the severity of this issue if it engages in other avenues of involvement; but based on the lack of positive

131. *Sexual Assault*, NCAA, <http://www.ncaa.org/sport-science-institute/topics/sexual-assault>.

132. *Id.*

133. *Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture*, NCAA, http://www.ncaa.org/sites/default/files/SSI_Sexual-Violence-Prevention-Tool-Kit_20161117.pdf.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Fagan, *supra* note 81.

results, such avenues are not the type of action that institutions and their student bodies so desperately need from the NCAA.

IV. PROPOSALS AND JUSTIFICATIONS

Given its mission to hold its members to such a high standard of moral character, the NCAA should practice what it preaches and intervene in matters regarding sexual violence among athletes. The NCAA is not currently legally pressured to engage in the arbitration of these matters, but its failure to act and to administer consequences is arguably facilitating student-athletes' sexual crimes.¹³⁹ If the NCAA is committed to fostering college athletics as a program shaping model students and citizens, it should fight to take matters into its own hands and do something to try to decrease the number of violent incidents involving its "money-makers."

The NCAA consistently holds that antitrust law prevents it from implementing rules regulating violations of sexual assault and domestic violence.¹⁴⁰ While this appears to be a solid legal roadblock, the NCAA demonstrated that it is willing to cross this legal threshold if there is enough public pressure to do so.¹⁴¹

The incident involving rampant child sexual abuse at the hands of football coach Jerry Sandusky at Penn State is the only time the NCAA has sanctioned an athletic program for sexual assault.¹⁴² So why not keep getting involved with acts of sexual assault perpetrated by athletes and coaches if such involvement is within the NCAA's power? In response to the Sandusky matter, NCAA President Mark Emmert imposed "five years of probation, a four-year post-season ban, a loss of 40 athletic scholarships, and a vacating of all 112 wins and titles from 1998 to 2012."¹⁴³ When the NCAA came down with the sanctions against Penn State, Mark Emmert ironically stated, "Our goal is not to be just punitive, but to make sure the university establishes an athletic culture and daily mindset in which football will

139. *Id.*

140. Cari Grieb, *NCAA's Response to Sexual Assault Controversies Hasn't Been Strong Enough*, SPORTING NEWS (Aug. 26, 2016), <http://www.sportingnews.com/ncaa-football/news/ncaa-response-to-sexual-assault-football-controversies-baylor-commentary/1ncf2g5kc72yk1ad5c36pk6k6t>.

141. Jake New, *New Push to Ban Violent Athletes*, INSIDE HIGHER ED (June 21, 2016), <https://www.insidehighered.com/news/2016/06/21/petition-demands-ncaa-ban-athletes-violent-pasts>.

142. Shah, *supra* note 107.

143. *Id.*

never again be placed ahead of education, nurturing and protecting young people.”¹⁴⁴ The NCAA’s penalization of Penn State is the exception to the NCAA’s general unwillingness to impose strict consequences for athlete-perpetrated sexual violence. The NCAA should turn this exceptional case into its standard protocol by penalizing athletic programs for a player’s acts of sexual violence.

A. Lack of Involvement in Investigatory Process and Uniform Rules Regarding Sexual Violence

The NCAA can initiate several steps to create a level playing field. First, the NCAA should prohibit its member institutions’ athletic departments from getting involved in any stage of an investigation against one of its athletes, unless it is in compliance with an order by OCR. Also, policies regarding sexual assault and interpersonal violence should be uniform, and each member institution should adopt them.

For example, each athletic department has its own rules governing drug testing, but the NCAA has its own set of policies that are to be followed by each athlete. Similarly, the NCAA should create a set of policies regarding sexual violence that every athlete must follow regardless of the school’s policies. Such policies would create uniformity, and would put athletes on notice of what to expect as far as punishment if they violate these rules, just like they know what to expect when they violate other rules administered by the NCAA.

Another approach that the NCAA should take to help regulate this problem is to enforce repercussions against institutions that do not comply with a federal directive to hire a full-time Title IX coordinator. For example, Baylor University is currently under federal investigation for failing to investigate sexual assault reports made against football players. Such failure was further evidenced when it was discovered that Baylor took more than three years to hire a full-time Title IX coordinator, which it finally did in late 2014.¹⁴⁵ How is it that colleges and athletic departments can adequately handle

144. Colleen Kane, *NCAA Punishes Penn State*, CHI. TRIB. (July 23, 2012), http://articles.chicagotribune.com/2012-07-23/sports/ct-spt-0724-penn-state—20120724_1_david-joyner-penn-state-ncaa-president.

145. Paula Lavigne, *Baylor Didn’t Investigate Sex Assault Claim Against Players for Two Years*, ESPN (Apr. 14, 2016), http://www.espn.com/espn/otl/story/_/id/15191102/baylor-investigate-sex-assault-claim-football-players-more-two-years-lines.

allegations of sexual violence if they do not abide by federal law to implement the ability to do so?

The President of the NCAA has continuously stressed that the most important value of the NCAA has always been that students are not treated in any privileged or disproportionate manner.¹⁴⁶ In accordance with this principle, the NCAA should practice what it preaches. “When athletics departments oversee investigatory proceedings regarding allegations of sexual assault involving one of their athletes, they can introduce a double-standard that privileges student athletes and harms victims.”¹⁴⁷ Creating a rule that prohibits athletic departments from any type of involvement during the investigation process is the simplest remedy that the NCAA can provide. This rule does not force the NCAA to determine “guilt or innocence in what is ultimately a criminal matter.”¹⁴⁸ “Instead, the NCAA would only be determining whether the athletic department had any involvement in the investigation and if so, to what degree.”¹⁴⁹

The NCAA has extremely strict rules regarding a variety of topics, and such rules take precedence over any contradictory rules that individual member institutions create. For example, the NCAA has its own rules regarding drug testing that athletes must follow, but it recommends that schools adopt their own drug policies.¹⁵⁰ In other words, the NCAA encourages schools to implement their own drug policies, but it can sanction schools for not following the NCAA’s policies.¹⁵¹ As NCAA rules take precedence, it should promulgate a rule prohibiting biased athletic department control over investigatory proceedings.

B. Taking Away Scholarships and Suspending Bowl Game and

146. Junot, *supra* note 46.

147. Nora Caplan-Bricker, *Thousands Petition NCAA to Take a Hard Line Against Rape and Sexual Assault*, SLATE (June 14, 2016), http://www.slate.com/blogs/xx_factor/2016/06/14/change_org_petition_for_ncaa_to_take_hard_line_against_sexual_assault.html.

148. John Infante, *What the NCAA Can Do About Sexual Assaults*, SPORTING NEWS (July 11, 2014), <http://www.sportingnews.com/ncaa-football/news/what-the-ncaa-can-do-about-sexual-assaults/1thfinqfpq011oob1dpa81znu>.

149. *Id.*

150. Eddie Pells, *Technical Foul: Final Four Teams Operate Under 4 Distinct Sets of Anti-Doping Rules, Penalties*, U.S. NEWS (Apr. 2, 2015, 2:30 AM), <http://www.usnews.com/news/sports/articles/2015/04/02/final-four-teams-have-4-different-sets-of-drug-testing-rules>.

151. *Id.*

NCAA Tournament Eligibility

The NCAA often imposes fines upon institutions when they violate NCAA rules and policies, but that does absolutely nothing. Having explained the skyrocketing sums of money that these players earn for institutions, these fines are pocket change to most institutions and do very little to incentivize change in behavior. In contrast, what often hurts a team is decreasing the number of scholarships available for incoming athletes and suspending eligibility to participate in bowl games and other tournaments. Scholarships enable coaches to recruit players who could not otherwise afford to attend the institution or who might have otherwise chosen a different college. These promising players make it possible for teams to participate in bowl games and tournaments. In turn, these games generate a significant amount of money for the institution and the coaches. Also, if a school is prohibited from participating in bowl games and other tournaments for any amount of time, it will greatly deter top recruits from wanting to play for the team because the ability to play in major tournaments is a means of showcasing their talent for professional scouts.

Broadcasting college bowl games and NCAA tournaments results in millions of viewers each game. This viewership generates revenue for organizations like the NCAA, which owns the rights to many of these games, generates publicity for the players participating, generates revenue and publicity for the institution, and produces a large check for victorious coaches. If a team is ineligible to participate in these games, it is a lose-lose situation for everyone involved. As the saying goes, “there is no ‘I’ in ‘team.’” The NCAA should penalize an entire team for severe actions such as sexual assault committed by one player. This will encourage athletic departments to further educate their athletes on the topic, force coaches to keep out of the investigation process unless invited by OCR, and rally teammates to help guide one another. In 2013, due to recruiting violations by University of Oregon’s former football coach, Chip Kelly, the NCAA penalized the football program by reducing the number of scholarships available for three years as well as reducing the number of official paid recruit visits.¹⁵² As evidenced, the NCAA has placed penalties on an

152. *Oregon Program Put on Probation, Loses Scholarships for NCAA Violations Under Philadelphia Eagles Coach Chip Kelly*, ASSOCIATED PRESS (June 26, 2013), http://www.lehighvalleylive.com/sports/index.ssf/2013/06/oregon_football_program_put_o.html

entire team multiple times for the actions of one individual, generally a coach.¹⁵³ There is no excuse for the NCAA to not penalize an entire team based upon the actions of one player.

C. Regulating Transfer Eligibility

“Other than being fully aware that sexual violence is codified into college athletics, and deciding that the costs don’t outweigh the millions of dollars of benefits”—nothing explains why the NCAA allows students “convicted of sexual violence to transfer to other NCAA schools and continue playing sports” almost immediately.¹⁵⁴ “The issue of players parlaying their skills into second chances is exemplified by” a number of incidents where an athlete is dismissed from a team for acts of sexual violence, transfers to play for another team, and commits the same act again.¹⁵⁵ For example, University of Georgia football player Jonathan Taylor was dismissed from the team in the summer of 2014 for physically assaulting his girlfriend during a domestic dispute.¹⁵⁶ He was then signed by the University of Alabama.¹⁵⁷ Not long after joining Alabama’s football program, Taylor was dismissed after he “was arrested and charged with domestic violence third degree assault[,] and domestic violence third degree criminal mischief by the Tuscaloosa Police Department.”¹⁵⁸ Without stricter penalties, perpetrators are not learning from their mistakes and can consequently get away with sexual assault and still reap the benefits that come with being a college athlete. If an athlete is found guilty of committing an act of sexual assault or domestic violence, that athlete should be stripped of his or her scholarship and should not be able to play for any other NCAA team.

A penalty as harsh as this might actually make a difference and change the culture of college sports.¹⁵⁹ Many college athletes continue to play sports with the hope that their career will turn professional

153. *Id.*; Steve Yanda, *Penn State Football Punished by NCAA over Sandusky Scandal*, WASH. POST (July 23, 2012), https://www.washingtonpost.com/sports/penn-state-football-punished-by-ncaa-over-sandusky-scandal/2012/07/23/gJQAGNeM4W_story.html?utm_term=.98d7bda23a82.

154. See Shah, *supra* note 107.

155. Caplan-Bricker, *supra* note 147.

156. Michael Carvell, *Ex-UGA Player at Alabama Arrested on Domestic Violence Charges*, AJC.COM (Mar. 29, 2015), <http://recruiting.blog.ajc.com/2015/03/29/dismissed-uga-player-arrested-at-alabama-on-domestic-violence-charges/>.

157. *Id.*

158. *Id.*

159. Caplan-Bricker, *supra* note 147.

upon graduation or even sooner. If a player were to be dismissed from a team and not allowed to play for any other college, it would greatly affect the player's recognition by professional scouts and ultimately hinder his ability to make a name for himself based on athletic talent rather than unlawful conduct.

On the other hand, student athletes would likely argue that they must be given on-campus hearings in order to avoid pre-determined outcomes,¹⁶⁰ asserting that the due process clause of the Fourteenth Amendment encompasses a property right to continued athletic eligibility.¹⁶¹ It is true that a student athlete whose scholarship eligibility is in jeopardy is entitled to the protection of formal adjudicatory proceedings, including notice and an opportunity to be heard, but the same bias is likely to pose a problem here as well. If NCAA member institutions are left to adjudicate these matters, they will likely be handled in the same manner that claims of sexual assault are, favoring the student athlete. In sum, this proposal may be faced with some challenges, but the NCAA has created exceptions before as previously mentioned.

V. CONCLUSION

On their own, many colleges and universities across the country are failing to adequately protect victims of sexual assault on college campuses.¹⁶² Title IX obligates universities to act and put forth an effort to remedy the effects of the acts for the victim and the community, but such universities are insufficiently fulfilling this obligation.¹⁶³ This has become a devastating reality, and with more students publicly speaking about their experiences, the incompetence and negligence by administrative actors is being recognized nationally.¹⁶⁴ If some part of the process does not change, the incidence of sexual assault and interpersonal violence on college

160. Brian L. Porto, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151, 1174 (1987).

161. *Id.* at 1151.

162. Jen Roesch, *Protecting the University, Failing Rape Survivors*, SOCIALIST WORKER (Oct. 2, 2014), <https://socialistworker.org/2014/10/02/protecting-university-failing>.

163. Tom Farrey and Nicole Noren, *Mizzou Did Not Pursue Alleged Assault*, ESPN (Feb. 12, 2015), http://www.espn.com/espn/otl/story/_id/10323102/university-missouri-officials-did-not-pursue-rape-case-lines-investigation-finds.

164. *Id.*

campuses will continue to increase, and the safe campus environment that these institutions aim to create will cease to exist.

Due to a lack of policies protecting against sexual assault and interpersonal violence perpetrated by athletes under the NCAA's bylaws, disciplinary decisions are left to member institutions, which is an insufficient means of equally protecting both parties because educational institutions are self-interested parties.¹⁶⁵ The NCAA should have disciplinary authority over these matters because it is equipped to implement consistent punishment for student-athletes, as it is a national body that is more disinterested than individual member institutions.¹⁶⁶ The NCAA has shown its involvement once before in a matter regarding sexual assault, so it clearly has the power to take such initiative when it is faced with enough public pressure.¹⁶⁷ There are a number of things that the NCAA can do to help regulate these matters, including creating a policy that prohibits athletic departments from being involved in any stage of the investigation process, creating a uniform set of policies that all member institutions must abide by as their own, reducing player scholarships and tournament eligibility, and regulating transfer procedures. Something must be done to curtail acts of sexual assault perpetrated by college athletes, and the NCAA is the organization best situated to step in. The NCAA has a concern for its reputation and, in turn, a profitable interest in holding its athletes to a higher standard. Now is the time to put its cherished student-athlete model to the test.

165. Ananiades, *supra* note 122, at 466.

166. *Id.* at 466–67.

167. New, *supra* note 141.

