

**Institutional Liability for the Sexual Crimes of Student-Athletes:
A Review of Case Law and Policy Recommendations**

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I. INTRODUCTION

Sport in American culture—both professional and intercollegiate—has become a massive economic and entertainment venture.¹ With the massification of sport through upstart leagues² and an abounding numbers of network and cable sport providers,³ Americans increasingly are

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¹ *E.g.*, the 2006 team payroll for the New York Yankees is nearly \$199 million. See New York Yankees 2006 Salaries, <http://sports.espn.go.com/mlb/teams/salaries?team=nyy>. (last visited April 29, 2006). In 2003, the NFL's annual television contracts equaled \$2.25 billion. See PAUL C WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 431 (West Publishing 3d ed. 2004).

² For example, the National Basketball Association expanded in 1997 to include a women's league. See WNBA Membership Chronology 1997-2003, <http://members.aol.com/bradleyrd/wnba9799.html>. (last visited April 29, 2006). The National Indoor Football League began in 2000 with 8 teams. See A Brief History of the NIFL, <http://nifffootball.com/history.htm>. (last visited May 1, 2006).

³ *E.g.*, ESPN, ESPN2, ESPN Classic, ESPN 360, FoxSports and their affiliated FSN regional stations.

becoming enthralled spectators and consumers.⁴ With that trend has come an increased elevation of professional and intercollegiate athletes to that of semi-celebrities⁵ and role models.⁶

This designation perhaps is wrongly so, as news of athletes' mishaps are a featured part of the daily news.⁷ Athletes' misconduct can become a serious problem particularly for colleges and universities that sponsor intercollegiate sport teams.⁸ Not only does it besmirch the image of the institution and its teams, but in certain instances can cause the institution, athletic association, and members of the administration and athletic staff to be the targets of litigation.⁹ This paper seeks to explore whether or not the growing number of criminal acts committed by intercollegiate athletes is cause for concern for increased institutional liability. Does recruiting or retaining such athletes expose the institution to lawsuit, particularly if the institution was aware of the student's criminal past? Or should the educative purpose of college offer a redeeming "second chance" to these promising young men and women? Section two offers a brief history of American intercollegiate athletics, exploring its modest beginnings and evolution into a multi-billion dollar enterprise. Section three includes a legal-historical analysis of institutional tort liability and Title IX

⁴Nearly 91 people watched the 2006 Super Bowl. See Super Bowl Earns Super Ratings, <http://www.cbsnews.com/stories/2006/02/06/superbowl/main1288104.shtml>. (last visited April 29, 2006).

⁵ Matt Leinert became a semi-celebrity in Hollywood following his Heisman Trophy win, appearing on the cover of sports and fashion magazines alike, as well as fraternizing with entertainment stars like Nick Lachey.

⁶ In the 1990s, because of the popularity of ubiquitous Nike commercials, "I Want to Be Like Mike" was a common phrase referring to the hero-like image portrayed in the media of Michael Jordan. Conversely, another NBA star, Charles Barkley, known for his brazen comments with the media, proudly proclaimed that he was *not* a role model.

⁷ In April 2006 alone, top sport scandals included the alleged rape charges against three Duke lacrosse players, see Susannah Meadows & Evan Thomas, *What Happened at Duke*, NEWSWEEK, May 1, 2006, at 40; reports that an agent paid a mortgage for Heisman Trophy winner Reggie Bush's family, see Lawyer Shares February Letter with Newspaper, <http://sports.espn.go.com/ncf/news/story?id=2426429> (last visited April 29, 2006); and an indictment against Olympic sprinter Tim Montgomery for money laundering, see Sprinter Montgomery Charged with Fraud Scheme, <http://sports.espn.go.com/oly/news/story?id=2425460>. (last visited April 29, 2006).

⁸ See generally J. DOUGLAS TOMA, FOOTBALL U.: SPECTATOR SPORTS IN THE LIFE OF THE AMERICAN UNIVERSITY (The University of Michigan Press 2003) (claiming that intercollegiate athletics can serve as an invaluable tool in formulating name recognition, brand, alumni pride, legislative support, and community connectedness).

⁹ *E.g.*, *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 2006 U.S. App. LEXIS 5895 (11th Cir. 2006).

harassment, so as to set the context for the myriad of theories under which colleges and universities can be held liable for students' actions. Next, section four focuses specifically on the extant case law involving student-athlete sexual crimes in which the institution also was charged with having some responsibility for those actions. Lastly, section five highlights a few current student-athlete scandals and posits whether or not intercollegiate athletics poses the next big challenge in institutional risk management—and whether those risks should be taken for the sake of “the game.”

II. HISTORY OF THE GAME

The first intercollegiate game was a highly touted crew race between Harvard and Yale in August 1852.¹⁰ Soon, college sports whetted the appetite of Americans thirsty to learn more about the “collegiate way.”¹¹ But the amateur nature intended to exist in intercollegiate sports never truly was present. By 19th century standards, early intercollegiate contests were professional: cash prizes, competition with professional athletes and teams, admission charges, “free rides” for athletes at training table, highly-paid professional coaches, and tutors provided by the athletic association.¹² The American notion of freedom of equality, the ability to rise socially from hard work, free market values, and the valuing of a meritocracy made the 19th century notion of “amateurism” unappealing to hard-working Americans.¹³

The first Harvard-Yale crew meet was very commercial, as teams' expenses were paid for by entrepreneurial railroad officials who wanted to attract spectators to vacation in New York. Soon, crowds grew from 1,000 to 20,000—replete with gambling and debauchery.¹⁴ From 1870 to the turn of the century, Thanksgiving Day football games, normally deciding the national champion, served as the marker of the winter social season for the New York elite, with an

¹⁰ See RONALD A. SMITH, *SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS* 4 (Oxford University Press 1988).

¹¹ See JOHN R. THELIN, *A HISTORY OF AMERICAN HIGHER EDUCATION* 178, (The Johns Hopkins University Press 2004) (noting that sport and newspapers at this time had a symbiotic relationship and football games were front-page news stories).

¹² See Smith, *supra* note 10, at 168.

¹³ *Id.* at 172.

¹⁴ *Id.* at 27.

estimated 30,000 in attendance.¹⁵ By the 1930s, rivalry football games, such as The University of Southern California versus Notre Dame or Michigan versus Ohio State, were drawing crowds as large as 120,000.¹⁶

What started out as an extracurricular activity run by students,¹⁷ intercollegiate sports soon became a business—with large revenues from gate sales¹⁸ and the hiring of professional coaches.¹⁹ The Carnegie Foundation for the Advancement of Teaching in 1929 issued a report decrying intercollegiate athletics and encouraging college presidents and trustees to regain control of college athletics from entrepreneurial coaches, alumni, and business sponsors.²⁰ However, by the 1960s, cover-ups and corruption once again seemed to dominate “big time” college sports, like football and basketball, and the enforcement of rules eventually was transferred from the conferences—which seemed to be unable to control the mayhem—to the NCAA.²¹

Though there were obvious drawbacks to collegiate athletics, sports also could bring prestige—if not just simple name recognition—to an otherwise obscure institution. More and more colleges fielded teams not only in an effort to compete but also, as Professor J. Douglas Toma claimed, to counter-balance the impersonal campus culture born from rising student enrollments by creating an atmosphere of excitement and school pride.²² Athletics also, in some ways,

¹⁵ *Id.* at 78-82.

¹⁶ See Thelin, *supra* note 11, at 208.

¹⁷ Faculty later gained control of athletics when such scandals surfaced like the enormous amount of money raised from attendance and a slush fund appropriated to serve the lavish lifestyles of team captains. See Smith, *supra* note 10, at 119-133.

¹⁸ In 1928, the Yale University athletic association reported more than \$1.1 million in gross revenue and a profit of nearly \$350,000. See FREDERICK RUDOLPH, *THE AMERICAN COLLEGE & UNIVERSITY: A HISTORY* 389 (The University of Georgia Press 1990).

¹⁹ See Thelin, *supra* note 11, at 178.

²⁰ *Id.* at 209-10. Alumni involvement can be credited for the quick upstart of college football. See Rudolph, *supra* note 18, at 382.

²¹ See WALTER BYERS, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES* 123 (The University of Michigan Press 1995).

²² Universities already had such activities as the campus newspaper and fraternities to make the bureaucratic shuffle of college life seem more personal and humanized. After the Ivies began to play each other in sport (specifically football), other teams quickly were formed. See Toma, *supra* note 8, at 37.

diminished the educational caste system.²³ “By 1900 the relationship between football and public relations had been firmly established and almost universally acknowledged as one of the sport’s major justifications.”²⁴ Even today, according to Toma, athletics is a powerful public relations tool that can assist in fundraising, establishing identity and brand name recognition, and humanizing an otherwise distant ivy-clad world to an outside constituency (including legislators and potential tuition-paying parents).²⁵

The place intercollegiate athletics occupies in the sport market grows unabated. Average revenue from Division I schools’ athletic budgets grew from approximately \$675,000 in 1960 to \$3.4 million in 1981, with football²⁶ and basketball comprising 56 and 13 percent, respectively.²⁷ In 2004, the University of Georgia athletic association’s budget was \$45 million.²⁸ The Collegiate Licensing Company of Atlanta estimates the market for collegiate merchandise to be \$2.5 billion.²⁹ By 2013, CBS will pay the NCAA \$764 million for the broadcast rights to the men’s basketball “March Madness” tournament.³⁰

As the market for intercollegiate athletics grows, so do the opportunities for young men and women to get a college education via an athletic scholarship. However, as access has increased, so have the incidents of college athlete crimes. In an effort to stay competitive at all costs, universities have lowered admission standards and coaches have recruited talented high

²³ When the Aggies of Massachusetts A&M triumphed over an Ivy League competitor in crew, it brought instant notoriety to the school. See Smith, *supra* note 10, at 43.

²⁴ See Rudolph, *supra* note 18, at 385.

²⁵ See Toma, *supra* note 8, at 1, 18.

²⁶ Surprisingly, football’s contribution to overall revenue fell from 72 percent in 1960 to 56 percent in 1981. See ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 158 (Princeton University Press 1999). This may be because of the increasing number of sports added, particularly after the passage of Title IX, and the increasing popularity of other spectator sports, such as baseball.

²⁷ *Id.*

²⁸ See Dooley’s Second in Command Will Administer \$45 Million Athletic Budget, <http://www.uga.edu/gm/304/FrontSpo.html>. (last visited April 29, 2006).

²⁹ See GEORGE H. SAGE, POWER AND IDEOLOGY IN AMERICAN SPORT 242 (Human Kinetics 2d ed. 1990).

³⁰ See Weiler & Roberts, *supra* note 1, at 822.

school athletes who already have criminal pasts.³¹ Does recruiting or retaining athletes who commit serious crimes heighten institutional liability? To attempt to address that question, the next section explores the evolution of jurisprudential thought regarding the student-institution relationship—in regard to both monitoring student behavior and protecting students from harm.

III. LEGAL-HISTORICAL ANALYSIS OF INSTITUTIONAL LIABILITY

A. TORT-RELATED CASES INVOLVING STUDENT INJURY

Outside of intercollegiate sport, the majority of institutional liability cases are determined by tort theory. Though the application of tort theory is amorphous (as tort law varies from state to state), certain tests, or prongs, must be met to bring forth a tort claim. For a tort claim to be successful, a plaintiff must prove four elements: (1) duty, (2) breach of that duty, (3) injury, and (4) that the defendant's negligence and breach of duty was the proximate cause of injury.³² A duty of care may stem from either a “special relationship” between the plaintiff and defendant or from knowledge that injury to the plaintiff was foreseeable.³³ Generally, the student-institution relationship is not recognized as a special relationship—only those situations where a party is in custodial care is such a strict measure imposed.³⁴

Institutional tort liability has shifted, particularly since the 1960s, from the laissez-faire attitude held by courts that the actions of adult students were uncontrollable to today's standard in which institutions are expected to exercise reasonable means by which to monitor students, regulate behavior, and prevent foreseeable harm. During the era of *in loco parentis*, in the early 1900s, because courts recognized the heightened duty of care established by the institution-

³¹ In 1993, All-American high school football and basketball player Allen Iverson (now of NBA fame) was convicted of three counts of maiming by mob for his involvement in a racially-charged fight in a bowling alley that involved more than 50 people. See Thomas N. Sweeney, Note, *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*, 9 SETONHALL J. SPORT L. 228, 236 (1999).

³² Another issue is “cause-in-fact,” which determines whether “negligence was a substantial factor in causing harm. See, e.g., *McMahon v. St. Croix Falls Sch. Dist.*, 596 N.W.2d 875, 879 (Wis. Ct. App. 1999).

³³ See, e.g., *Id.*

³⁴ Courts generally construe the relationship between prisons and mental hospitals as a custodial one. See, e.g., *Hickey v. Zezulka and Michigan State Univ.*, 443 N.W.2d 180 (Mich. Ct. App. 1988) (a case involving the suicide of a student held in a university-run jail).

student fiduciary relationship, universities had the latitude to decide what was in the “best interest” of students.³⁵ Prior to 1960 institutions rarely were held liable for student injury, regardless of the cause.³⁶

The term *in loco parentis* generally is credited to Sir William Blackstone, describing the schoolmaster-pupil relationship in which a father delegates authority to the tutor.³⁷ The doctrine of *in loco parentis* was first recognized in American higher education law in *Gott v. Berea College*.³⁸ Robert Bickel and Peter Lake cited three sources of institutional authority employed during the era of *Gott*: (1) under *in loco parentis* institutions could “discipline, control, and regulate,”³⁹ (2) institutional power was parental (or *parens patriae*), and (3) the institution—via the state or private trustees—had contractual authority over students who were considered not “contracting parties” but instead governed by the contract.⁴⁰

Some consider the seminal case *Dixon v. Alabama State Board of Education*⁴¹ as the “death knell” of *in loco parentis* in higher education⁴², whereby the court recognized students’ substantive due process rights, holding that education was no longer considered exclusive to the

³⁵ See Douglas R. Pearson, *Negligent Liability in United States Colleges and Universities: A Legal-Historical Analysis*, at 34 (1998) (unpublished Ph.D. dissertation, The Florida State University) (on file with Strozier Library, The Florida State University).

³⁶ See Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of ‘In Loco Parentis’ and the Restatement (Second) of Torts*, 20 J.C. &U.L. 261, 272 (1994).

³⁷ *Id.* at 263. No case British case law seems to pre-date Blackstone’s use of the term. See Pearson, *supra* note 35, at 14.

³⁸ 161 S.W. 204 (Ky. 1913) (holding that the College could forbid students to visit certain off-campus locations because the College is responsible, in place of the parent, for not only the academic but the mental and physical-well being of students). *State v. Pendergrass*, 19 N.C. 348 (1837) (a case involving corporal punishment where the court held that the power of the school master was analogous to the parent) was the first case in K-12 education law whereby courts recognized the principle of *in loco parentis*, cited in Bickel & Lake, *supra* note 36, at 264.

³⁹ See Bickel & Lake, *supra* note 36, at 264.

⁴⁰ *Id.* See also, e.g., *Stetson Univ. v. Hunt*, 102 So. 637, 640 (Fla. 1924), cited in Bickel & Lake, *supra* note 36, at 266 (applying contract theory, the University was allowed to suspend a student for offensive behavior).

⁴¹ 294 F.2d 150 (5th Cir. 1961).

⁴² See, e.g., Kerry Brian Melear, *The Evolution of the Contract Theory of Institution-Student Relations in Higher Learning: A Legal-Historical Analysis* (2001) (unpublished Ph.D. dissertation, The Florida State University) (on file with Strozier Library, The Florida State University); Pearson, *supra* note 35.

privileged class⁴³ but was now a legitimate property interest entitled to 14th Amendment protection.⁴⁴ Bickel and Lake explained that jurisprudential reasoning prior to *Dixon* was “a prime example of what many believed *in loco parentis* meant . . . [i]mmunity had become impunity.”⁴⁵ *In loco parentis* did not protect students but instead was a judicial form of insularity from liability.⁴⁶

The ruling in *Dixon* also shifted the contractual nature of higher education from institution-parent to institution-student.⁴⁷ The parent was no longer delegating authority.⁴⁸ Though *Dixon* ushered in a new era, from *in loco parentis* to student as consumer under contract-theory, the first glimpse of an inferred institution-student contract came in 1901—but to the detriment of student rights.⁴⁹ In that case, the court held that, because of the private eleemosynary nature of the University, administrators should be free from governmental interference to discipline students as deemed necessary. Students agreed to a contract of sort by enrolling and, thus, had to obey all restrictions.⁵⁰

Conversely, by today’s jurisprudential reasoning, student judiciary codes can be considered implied-in-fact contracts—a promise defined not by law but by the promises inferred from the statement or conduct of the parties (i.e. the student and institution).⁵¹ However, students

⁴³ See *Dixon*, 294 F.2d at 156. Access to higher education by this era had increased with the passage of the GI Bill and the land-grant acts. See, e.g., Thelin, *supra* note 11, at 135-6, 262-68.

⁴⁴ See *Dixon*, 294 F.2d at 156 (*Dixon* also enforced the notion that public universities were state actors, contrasting *Trs. Of Dartmouth College v. Woodward*, 17 U.S. 518 (1819) (the seminal case to implement the public/private university distinction), cited in ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 45 (Carolina Academic Press 1999).

⁴⁵ See Bickel & Lake, *supra* note 44, at 38.

⁴⁶ *Id.* at 17.

⁴⁷ *Id.* at 156.

⁴⁸ See *Dixon*, 294 F.2d at 156, cited in Bickel & Lake, *supra* note 44, at 39 n.9.

⁴⁹ See *Koblitz v. Western Reserve Univ.*, 21 Ohio C.C. 144 (Ohio Misc. 1901).

⁵⁰ *Id.* at 147 (the law school dismissed a student because he was arrested twice during the previous year).

⁵¹ See Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU EDUC. & L.J. 1, 6 (2003) (construing the institution-student relationship as a contractual one in that an offer is made by the institution and the student accepts that offer upon matriculation; consideration is the tuition paid by the student in return for an education). See also Melear, *supra* note 42, at ix.

and families over time have continued to sue when they feel that the institution-student agreement has been compromised—and court opinions have vacillated.⁵²

Case law exists involving a multitude of situations and theories under which institutions have been sued for liability: landlord-tenant and third-party assaults, on-campus third-party assaults, off-campus attacks, hazing, alcohol-related incidents, and extracurricular activities.⁵³ Bickel and Lake classified the courts' general view of institutional liability into three eras: the era of *in loco parentis*, the “bystander” era (or the duty/no duty era), and the contemporary era of duty.⁵⁴ The seminal case of the “bystander” era, an era in which courts sent the message that universities should not get involved in the lives of students or else run the risk of assuming a duty of care,⁵⁵ was *Bradshaw v. Rawlings*.⁵⁶ In *Bradshaw*, a student sued Delaware Valley College when he became a quadriplegic as a result of an automobile accident which occurred after a school-sponsored picnic. Utilizing a two-prong interpretation of *in loco parentis*, the court rejected the notion that the University had a right to regulate and discipline student behavior—hence implying that the other prong, duty to protect, also did not apply.⁵⁷ Holding that the University was not liable for the student's injury and recognizing that *in loco parentis* was no longer applicable because students were considered adults⁵⁸, the court said:

Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrators has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. By constitutional amendment, written

⁵²Bickel and Lake argue that lawsuits against universities should be considered under tort law and not contract law. See Bickel & Lake, *supra* note 44, at 47.

⁵³ See generally Douglas R. Pearson & Joseph C. Beckham, *Negligent Liability Issues Involving Colleges and Students: Balancing the Risks and Benefits of Expanded Programs and Heightened Supervision*, 42 NASPA J. 460 (2005) (using this classification scheme in their legal-historical analysis of institution-student liability).

⁵⁴ See generally Bickel & Lake, *supra* note 44.

⁵⁵ *Id.* at 12.

⁵⁶ 612 F.2d 135 (3d Cir. 1979).

⁵⁷ *Id.* at 139-140, *cited in* Bickel & Lake, *supra* note 36, at 274.

⁵⁸ By that time, laws regarding military service, voting, and minimum drinking age had changed the role of young adults in society.

and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrators have been transferred to students.⁵⁹

Further, in *Baldwin v. Zoradi*, a California court also found that attempts to control drinking on college campuses were futile.⁶⁰ The court rejected the student's negligence claim, stating that no duty existed to protect her from off-campus incidents:

The transfer of prerogatives and rights from college administrators to the students is salubrious when seen in the context of a proper goal of postsecondary education—the maturation of the students. Only by giving them responsibilities can students grow into responsible adulthood. Although the alleged lack of supervision had a disastrous result to this plaintiff, the overall policy of stimulating student growth is in the public interest.⁶¹

Continuing the line of “bystander” cases, in *Rabel v. Illinois Wesleyan University* (a case involving third-party on-campus injuries) a court held that the collegiate environment does not create a “custodial” relationship but rather an “educational” one.⁶² In this case, an intoxicated fraternity pledge abducted a female friend from the lobby of her dormitory and injured her when, while carrying her over his shoulder, dropped her on the pavement.⁶³ Citing the decisions reached in *Baldwin* and *Bradshaw*,⁶⁴ the court did not find that University regulations against fraternity hazing and underage alcohol consumption put the University in a custodial role over

⁵⁹ 612 F.2d at 138. Courts post-*Bradshaw* debated whether the “no duty” principle applied when the institution had knowledge of student conduct to the extent that foreseeable risk existed regarding a class (e.g. Greeks) or individual student. See Bickel & Lake, *supra* note 36, at 279. Bickel and Lake also argue that *Bradshaw* instead could have been interpreted as a negative breach of duty creating a foreseeable risk to students (hypothesizing what a court would have held had the University provided cars for the students to drive after supplying liquor) *Id.* at 287.

⁶⁰ 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981) (an underage student sued after she and other students became intoxicated in a campus residence hall, supposedly to the knowledge of staff, and were involved in a serious automobile accident in which the plaintiff became a quadriplegic).

⁶¹ *Id.* at 818. See also *Beach v. Univ. of Utah*, 726 P.2d 413, 414 (Utah 1986) (case in which a student became a quadriplegic after falling from a cliff during a class trip. The court ruled that there was no special relationship and no duty to protect her from actions resulting from her voluntary intoxication).

⁶² 514 N.E.2d 552, 561-62 (Ill. App. Ct. 1987) (holding that it was unrealistic to protect and prevent students from the harm caused by fraternity drinking and pranks), *cited in* Bickel & Lake, *supra* note 44, at 63.

⁶³ 514 N.E.2d at 561-62.

⁶⁴ *Id.* at 560.

students.⁶⁵ The court also found that the University did not owe a duty vis à vis the tenant-landowner theory to protect the student from injuries caused by a third party.⁶⁶

However, as the conclusion of the “bystander” era neared, and as charitable and governmental immunity defenses were no longer acceptable under *in loco parentis*,⁶⁷ duty became the test of institutional liability.⁶⁸ In the hazing case of *Furek v. The University of Delaware*,⁶⁹ a case which is labeled as the end of the “bystander” era and by which ushered in an era of duty, the court set forth a test not of strict liability but of reasonable care.⁷⁰ *Furek* questioned the reasoning in *Bradshaw* and *Beach* that, because college students were adults, the University should not intervene in inappropriate cases of alcohol-use.⁷¹ The *Furek* court sent “an unmistakable message that a university cannot make rules and policies against hazing (etc.) and then do nothing to enforce them beyond verbal threats and admonition or fail to give campus police the authority and guidelines to enforce them through intervention.”⁷²

Courts also have held universities liable for a duty of care assumed through the campus housing contract vis à vis landlord-tenant relationship.⁷³ In *Mullins v. Pine Manor College*⁷⁴, a court rejected an institution’s *in loco parentis* immunity claims and held that the institution was negligent in failing to provide security when a resident was abducted by an intruder. Further, in *Nero v. Kansas State University*,⁷⁵ a court found the University liable for a student’s assault

⁶⁵ *Id.*

⁶⁶ *Id.* at 561-62.

⁶⁷ Institutions can be held liable, because of state sovereign immunity, only up to the point in which state law allows. See, e.g., Pearson, *supra* note 35, at 30.

⁶⁸ See Bickel & Lake, *supra* note 44, at 10.

⁶⁹ 594 A.2d 506 (Del. 1991) (holding the University ninety-three percent responsible following an incident in which a fraternity pledge suffered serious burns when a lye-based cleaner was poured on his neck and back during a hazing ritual).

⁷⁰ See Bickel & Lake, *supra* note 44, at 130.

⁷¹ *Id.* at 285.

⁷² *Id.* at 130. *Furek* later was distinguished by *Lloyd v. Alpha Phi Alpha Fraternity*, 1999 U.S. Dist. LEXIS 906, at *8 (D.N.Y. 1999) (holding that the Cornell University could not be liable for injuries sustained during a hazing incident because no duty existed, as there was no history of such activity to which the University could have been aware and responsible to control).

⁷³ See Pearson & Beckham, *supra* note 53, at 461-62.

⁷⁴ 449 N.E.2d 331 (Mass. 1983).

⁷⁵ 861 P.2d 768 (Kan. 1993).

because administrators failed for to notify her of the foreseeable danger created when an accused rapist was assigned to her coed residence hall.⁷⁶

However, Baker argues that, unless expressly created through the housing contract, the student-institution residential situation does not create a special relationship.⁷⁷ This is because a university housing situation is not completely analogous to the *in loco parentis* situation created in the K-12 setting, as students are recognized as adults and have more personal freedom, thus releasing the institution from a heightened duty of care. Also, it is not analogous to a custodial situation, created in prisons or mental facilities.⁷⁸ However, some speculate that parents soon may claim a fiduciary duty to assist students through the transitional period of college adjustment.⁷⁹

B. STUDENT-ON-STUDENT SEXUAL HARASSMENT AND TITLE IX LITIGATION

Because the majority of cases related to institutional liability and student-athlete crimes involve sexual harassment, assault, or rape, it is fitting to briefly explore the current case law that defines the circumstances under which institutions can be held liable for peer-on-peer harassment. The issues surrounding Title IX are complex, and it is beyond the scope of this

⁷⁶ This case will be discussed later, as it is analogous to *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 2006 U.S. App. LEXIS 5895 (11th Cir. 2006) (a case involving institutional liability for the criminal acts committed by a student-athlete with a known history of sexual assault).

⁷⁷ See Thomas R. Baker, *Notifying Parents Following a College Student Suicide Attempt: A Review of Case Law and FERPA, and Recommendations for Practice*. 42 NASPA J. 513, 520 (2005).

⁷⁸ See, e.g., *Hickey v. Zezulka*, 443 N.W.2d 180 (Mich. Ct. App. 1989) (where the university was held liable for the care of a student who committed suicide while being detained in a campus jail).

⁷⁹ See Peter Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 STETSON L. REV. 125, 146 (2002), citing *Stanton v. U. of Me. Sys.*, 773 A.2d 1045, 1045 (Me. 2001) (a case holding that no implied contract existed but that a school could be held liable for breach of duty and failure to act on the foreseeable danger that an underage student, staying in campus housing during a summer camp, could be sexually assaulted and had not been properly warned to take precautions).

paper to further explore the gamut of cases involving teacher-on-student harassment⁸⁰, faculty-faculty harassment⁸¹, or athlete-coach harassment.⁸²

Title IX of the Education Amendments of 1972 states that, “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”⁸³ Title IX regulations prohibit schools and universities—not just publics but all those institutions and educational programs receiving federal funding—from discriminating on the basis of gender.⁸⁴ To avoid liability, schools must act prudently when made aware of possible harassment.

In *Franklin v. Gwinnett County Public Schools*, the U.S. Supreme Court declared that a private right to action existed under Title IX.⁸⁵ The student brought suit against her former high school teacher and coach who, at the time she was enrolled, engaged her in sexually suggestive conversations and on several occasions called her from class and engaged her in “coercive intercourse.” She further claimed that school officials took no action when they found out about the harassment subjected on her and other female classmates.⁸⁶ Minus any express directives through Congressional acts, the Court construed Title IX and its provisions to abrogate states’ Eleventh Amendment immunity and allow for damages to be recovered for violations of Title IX. The earlier courts’ decisions were reversed and the issue was remanded.⁸⁷

⁸⁰ *E.g.*, *Crandell v. New York College of Osteopathic Medicine*, 87 F. Supp.2d 304 (D.N.Y. 2000) (holding, in line with *Gebser* that institutions only may be held liable for Title IX violations if they had actual knowledge of the harassment).

⁸¹ *E.g.*, *Jew v. Univ. of Iowa*, 749 F. Supp. 946 (D. Iowa 1990) (holding that workplace rumors could constitute sexual harassment).

⁸² *E.g.*, *Klemencic v. Ohio State University*, 263 F.3d 504 (6th Cir. 2001) (the court failed to recognize any “quid pro quo” retaliation on the part of the coach when a student rejected her requests for a date).

⁸³ 20 U.S.C. § 1681(a).

⁸⁴ *See, e.g.*, *Morse v. Regents of the Univ. of Colo.*, 154 F.3d 1124 (10th Cir. 1998).

⁸⁵ 503 U.S. 60 (1992).

⁸⁶ *Id.* at 64.

⁸⁷ *Id.* at 72-76.

In *Gebser v. Lago Vista Independent School District*⁸⁸, the U.S. Supreme Court further clarified *Franklin* and ruled that a student could not recover damages from a school district for harassment incurred by a teacher unless someone of authority had actual knowledge of the incidents and acted with deliberate indifference.⁸⁹ Gebser, a ninth-grade student, and her English teacher were involved in a sexual relationship throughout the school year. Parents of other classmates had commented to the principal that this teacher made inappropriate comments in class. Though the principal counseled the teacher to not make such remarks, he took no further action nor reported the teacher's misconduct to the district superintendent. When police discovered Gebser and the teacher having intercourse, the teacher was arrested and later terminated by the school district.⁹⁰ Gebser's mother filed a suit under Title IX and state negligence laws.⁹¹

In its analysis, the Court likened Title IX and Title VII of the Civil Rights Act of 1964⁹², two spending clauses, to contracts: without actual notice of the relationship between Gebser and her teacher, the school district could not be held liable for the actions of its employees. Upholding the lower courts' rulings, the Court found that the school acted prudently, upon learning of the affair, when it terminated the teacher's employment.⁹³

The Tenth Circuit court ruled in *Morse v. Regents of the University of Colorado* that, per the precedent to a private right of action established in *Franklin*⁹⁴ and *Gebser*⁹⁵, the University's ROTC program was an agency of the institution and all such programs receiving federal funding were subject to Title IX regulations. Title IX liability applies not only to institutions themselves but

⁸⁸ 524 U.S. 274 (1998).

⁸⁹ *Id.* at 277.

⁹⁰ *Id.* at 278-79.

⁹¹ *Id.* at 279.

⁹² 42 U.S.C. § 1981 (2000) (a statute that pertains to sexual harassment in the workplace).

⁹³ 524 U.S. at 290-92. In its decision, however, the Court did not address the issue of damages recoverable under state tort laws or under 42 U.S.C. § 1983, which allows for damages when civil rights are breached.

⁹⁴ 503 U.S. 60 (1992).

⁹⁵ 524 U.S. 274 (1998).

also to federally funded programs supervised by the institution.⁹⁶ In *Morse*, two students filed suit against the University, claiming that, while participating in the ROTC program, the instructor and two University officials failed to act when they reported that they had been sexually harassed by a higher-ranking cadet.⁹⁷ Reversing the lower court's dismissal of the case, the court found that the students could seek damages if they had been subjected to quid pro quo or hostile environment harassment and if, upon notice of such harassment, no action was taken by school authorities.⁹⁸

The landmark case controlling student-on-student harassment liability was *Davis v. Monroe County Board of Education*.⁹⁹ In *Davis*, a fifth-grade student was harassed repeatedly by a classmate yet the teacher and school administrators failed to act.¹⁰⁰ Her mother filed a Title IX suit, claiming that the harassment "created an intimidating, hostile, offensive, and abusive school environment."¹⁰¹ The district court dismissed the case based on the Federal Rules of Civil Procedure because the school did not directly harass the student¹⁰², ruling that the student could not seek damages because no such precedent had been established for a private cause of action for student-on-student harassment.¹⁰³ Though the Eleventh Circuit initially reversed the district court's decision, upon rehearing the case *en banc*, the appellate court upheld the lower court's ruling because no regulations existed regarding peer harassment—hence, not providing the school with adequate notice regarding how to handle such issues.¹⁰⁴ Finally, the U.S. Supreme Court determined that an institution could be held liable under Title IX if the agency acted with "deliberate indifference to known acts of harassment in its programs or activities" and if it is "so

⁹⁶ 154 F.3d 1124, 1127-28 (10th Cir. 1998).

⁹⁷ *Id.* at 1124.

⁹⁸ *Id.* at 1127-28. (Title IX interpretations borrowed from Title VII the standards of quid pro quo and hostile environment harassment. A detailed analysis of Title VII employment law is beyond the scope of this paper.)

⁹⁹ 526 U.S. 629 (1999).

¹⁰⁰ *Id.* at 633-35.

¹⁰¹ *Id.* at 636.

¹⁰² *Id.* at 633, 636.

¹⁰³ *Id.* at 633.

¹⁰⁴ 91 F.3d 1418 (1996) (the appellate court based its decision on the fact that Title IX is a spending clause and notice must be given regarding its provisions before funding can be rescinded).

severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.”¹⁰⁵

However, citing some of its previous decisions such as *Gebser*¹⁰⁶, the court was careful to stress the high standard created by deliberate indifference—so as to not make institutions liable for the third-party actions of its employees¹⁰⁷ and, instead, to allow administrative discretion, so long as schools respond to reports of harassment with reasonableness.¹⁰⁸ In doing so, it also delineated between K-12 and higher education: “[a] university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy.”¹⁰⁹

IV. STUDENT-ATHLETES AND SEXUAL ASSAULT: DETERMINANTS OF INSTITUTIONAL LIABILITY

Much like the caveat previously mentioned from the *Davis* case, courts throughout the 1990s were reluctant under both tort theory and Title IX litigation to hold universities liable to control the actions of its student-athletes. For example, in *Tanja H. v. The Regents of the University of California*, a female student sued after being raped by four members of the football team in her residence hall following a party.¹¹⁰ The court held that the University was not the insurer of student safety, analogizing the student-institution residential situation to that of an innkeeper.¹¹¹ Reverting to its previous “bystander” era ruling in *Baldwin v. Zoradi*,¹¹² the California court found that it would be against public policy and impractical to require universities to closely monitor, and subsequently be held liable for, the behavior of adult students.¹¹³ In this case, the female student had become intoxicated at her own volition, contrary to campus housing policy.¹¹⁴

¹⁰⁵ 526 U.S. at 633.

¹⁰⁶ 524 U.S. 274 (1998).

¹⁰⁷ 526 U.S. at 641.

¹⁰⁸ *Id.* at 647-49.

¹⁰⁹ *Id.* at 649.

¹¹⁰ 278 Cal. Rptr. 918 (Cal. Ct. App. 1991).

¹¹¹ *Id.* at 919, 921.

¹¹² 176 Cal. Rptr. 809 (Cal Ct. App. 1981).

¹¹³ 278 Cal Rptr. at 920.

¹¹⁴ *Id.* at 919.

The same year of the *Tanja H.* case, Katherine Redmond, a freshman at the University of Nebraska, was twice raped in her residence hall by a member of the football team, Christian Peter, who had prior arrests for sexual assault, threatening a university employee, disturbing the peace, trespassing, and urinating in public.¹¹⁵ In her lawsuit, Redmond charged the University with violating Title IX by being deliberately indifferent in failing to provide her with a hostile-free educational environment. She settled with the University for \$50,000; her terms with Peter remain undisclosed.¹¹⁶

Another case, reminiscent of the “bystander” era, failed to hold a university liable for an athlete’s sexual assault of another student. Brittany Benefield, a 15-year-old freshman at the University of Alabama Birmingham (UAB) who had begun to experiment with alcohol and drugs, repeatedly was sexually assaulted by twenty-six members of the UAB football team. Claiming that University officials had promised to keep them abreast of any problems and that members of the administration were aware of Brittany’s dangerous activities,¹¹⁷ her parents sued the University under Title IX of the Education Amendments of 1972 for deliberate indifference¹¹⁸ to the harassment which was so “severe, pervasive, and objectively offensive” that it denied her of educational opportunities.¹¹⁹ The court found that, though Benefield was not of majority age, the University did not stand *in loco parentis* and did not owe her a duty of care to protect her against the sexual abuse.¹²⁰ Reverting to the ruling set forth in *Bradshaw v. Rawlings*¹²¹, the court held that the University was not an insurer of student safety.¹²² Additionally, the court rejected the Title IX claims of deliberate indifference, namely because Benefield twice denied that she was sexually

¹¹⁵ *Complaint of Katherine Redmond 19, Redmond v. Univ. of Neb.*, 1995 WL 928211 (D. Neb. Dec. 5, 1995), cited in Timothy Davis & Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH & LEE L. REV. 55, 56-7 (1998).

¹¹⁶ See Davis & Parker, *supra* note 115, at 58.

¹¹⁷ *Benefield v. Bd. of Trs. of the Univ. of Ala. at Birmingham*, 214 F. Supp.2d 1212, 1213 (D. Ala. 2002).

¹¹⁸ That standard for determining Title IX liability was set forth in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (U.S. 1999).

¹¹⁹ 214 F. Supp.2d at 1212.

¹²⁰ *Id.* at 1220.

¹²¹ 612 F.2d 135 (3d Cir. 1979).

¹²² 214 F. Supp.2d at 1223-25.

assaulted.¹²³ That \$40 million suit currently is on appeal in the Eleventh District Court of Appeals.¹²⁴

In a similar case pending ruling, Allison Jennings sued Oklahoma State University after allegedly being raped by four football players. Her Title IX claim was predicated on the fact that the university has a policy whereby the normal investigative procedure for sexual assault claims did not require the University to investigate or report student-athlete misconduct.¹²⁵

However, jurisprudential thought may be shifting regarding Title IX suits brought against universities in which plaintiffs allege preferential treatment towards athletes in dealing with peer sexual harassment. In 2002, Tiffany Williams, a student at the University of Georgia (UGA) received a phone call from then-basketball player Tony Cole, inviting her to his residence hall. The two engaged in consensual sex. However, unbeknownst to Williams, Cole and a football player, Brandon Williams, had arranged for Williams to hide in the closet while Cole and Tiffany Williams had sex. When Cole went to the restroom, Brandon Williams emerged from the closet and raped Tiffany. While this occurred, Cole called Steven Thomas, his teammate, and Charles Grant, another football player. Thomas came to Cole's room and also sexually assaulted and raped Williams. Following the incident, Williams filed a complaint with the UGA police department and permanently withdrew from the University.¹²⁶ A year after the incident, a campus judicial hearing resulted in no sanction being imposed on the three student-athletes involved.¹²⁷

In March 2006, in *Williams v. Board of Regents of the University System of Georgia et al.*, the Eleventh Circuit reversed the lower court's decision and allowed Williams to proceed with her

¹²³ *Id.* at 1223.

¹²⁴ See Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 619 (2003).

¹²⁵ *Id.* at 619. However, in 2005, a Title IX suit filed by a student who alleged gang rape by University of Colorado football players was dismissed because of a lack of proof regarding actual knowledge and deliberate indifference on the part of the university. See *Judge Throws out 2 Lawsuits that Sparked Scandal at U. of Colorado at Boulder*, CHRON. OF HIGHER EDUC., April 1, 2005, at <http://www.chronicle.com> (last visited April 28, 2005).

¹²⁶ 2006 U.S. App. LEXIS 5895, *2-4 (11th Cir. 2006).

¹²⁷ *Id.* at *5. In regard to criminal charges, a jury acquitted Brandon Williams and charges were dismissed against Cole and Thomas.

Title IX claims against the University and its athletic association, as well as to amend her complaint to include factual evidence in her individual claims against the University president and former athletic director.¹²⁸ In her suit, Williams accused the University president and then-athletic director of knowingly recruiting Cole even though he had a record of violent crimes against women: he was dismissed from Wabash Valley College for disciplinary issues and dismissed from the Community College of Rhode Island after he was accused twice of sexually assaulting two female employees of that college's athletic department.¹²⁹ In its decision, the court found sufficient evidence of deliberate indifference because (1) the University recruited Cole despite his criminal past, (2) the University was aware of the assault on Williams, and (3) the University was lax in its prompt adjudication of the students and failed to discuss sexual harassment policies with its students.¹³⁰

Though unrelated to institutional liability, the case of *United States v. Morrison*¹³¹ is important, as it eliminated the opportunity for victims of violent crimes to seek redress personally from the perpetrator. In that case, Christy Brzonkala, a female student at Virginia Tech University, brought suit against a former Virginia Tech football player under Section 13981 of the Violence Against Women (VAW) Act of 1994¹³², which was a federal provision allowing victims of gender-motivated violence to seek civil remedy from the assailant.¹³³ After being raped by Antonio Morrison and James Crawford, two Virginia Tech football players, Brzonkala suffered severe emotional stress and withdrew from the University. She filed a complaint under the University's Sexual Assault Policy; upon reviewing the complaint, the University found insufficient evidence against Crawford yet suspended Morrison for two semesters. Morrison appealed his sanction, and the issue was retried under the University's Abusive Conduct Policy. The earlier sanction was

¹²⁸ *Id.* at *1.

¹²⁹ *Id.* at *5-6. The facts of this case are similar to *Nero v. Kansas State Univ.*, 861 P.2d 768 (Kan. 1993), discussed earlier, in which the University knew of the student's prior charges for sexual assault.

¹³⁰ *Id.* at *18-19. In fact, by the time the University convened judicial proceedings, two of the accused were no longer students at UGA.

¹³¹ 529 U.S. 598 (2000).

¹³² 42 U.S.C. § 13981 (2000).

¹³³ 529 U.S. at 598.

upheld but the charge was lowered from sexual assault to “using abusive language.”¹³⁴ Upon a second appeal, the University’s provost completely set aside Morrison’s sanction.¹³⁵

In its ruling, the U.S. Supreme Court declared the VAW Act unconstitutional, citing that Congress overstepped its authority in promulgating the act, per Article I, § 8 of the Constitution, which dealt with the regulation of interstate commerce. Citing a long line of precedents in which the Court only upheld intrastate activity of an economic nature, the Court struck down the Act because gender-motivated violence did not qualify as an economic activity.¹³⁶ The Court further rejected Brzonkala’s assertion that a civil remedy existed under § 5 of the Fourteenth Amendment, stating that the Civil Rights Act of 1875, which dealt with private conduct, was beyond the scope of § 5, which dealt with public accommodations.¹³⁷

V. CONCLUSIONS AND POLICY RECOMMENDATIONS

Somewhere within the United States, an athletic director is faced with the criminal behavior of a student-athlete once every two days.¹³⁸ For decades, newspapers and Internet sites have been wrought with stories of players’ misconduct.¹³⁹ During the 1980s, the University of Colorado police department used the football media program as a mug book for victims, as so many violent acts had been committed by those athletes.¹⁴⁰ In 1996, a female student at New Mexico State was raped by a member of the University’s football team. Sadly, two months earlier

¹³⁴ 529 U.S. at 602-3. Following the rape, the football player in question was reported to have made derogatory remarks to Brzonkala personally and about her in the residence hall cafeteria.

¹³⁵ 529 U.S. at 604.

¹³⁶ 529 U.S. at 607-619. The dissent chided the majority for its literal interpretation of the Commerce Clause, stating that present-day social issues deserved a fresh reading. Justice Breyer sarcastically asked if the Act would have been permissible had it been titled “An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or By Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce.” *Id.* at 659.

¹³⁷ 529 U.S. at 619-622.

¹³⁸ See Richard M. Southall, *Good Start, The Bad, and Much Better: Three NCAA Intercollegiate Athletic Department Policy Responses to Criminal Behavior by College Athletes*, 11 J. LEGAL ASPECTS OF SPORT 269, 270, citing S. Wieberg, *Colleges Confront Athletes’ Crimes: More Schools Laying Down the Law*, USA TODAY, Sept. 18, 1998, at 17C-18C.

¹³⁹ See e.g., David Ray Papke, *Athletes in Trouble with the Law: Journalistic Accounts for the Resentful Fan*, 12 MARQ. SPORTS L. REV. 449 (2001) (chronicling the journalistic frenzy existing as early as the 1800s regarding athletes missteps).

¹⁴⁰ See Gil B. Fried, *Illegal Moves Off-the-Field: University Liability for Illegal Acts of Student-Athletes*, 7 SETON HALL J. SPORT L. 69, 71 (1997).

campus police were notified of a similar incident involving this athlete. After the second charge, that student athlete remained on the team, pending the outcome of the civil trials.¹⁴¹ That same year, five members of the Grambling State University football team were charged with raping a teenager who wandered into their dormitory during Homecoming festivities.¹⁴² More recently, in April 2006, a quarterback for the University of Southern California (USC) was arrested for sexual assault—the third assault charge within a year among the USC football team.¹⁴³

Though student-athlete crimes are not confined to sexual assault—and include alcohol and drug abuse, gambling, and non-sexually related violence¹⁴⁴—those crimes are most pervasive among that group. A recent study at 30 universities found that, though athletes comprised 3.3 percent of the male population, they committed 19 percent of rapes and similar assaults on those campuses.¹⁴⁵ A 1986 federal report found that college basketball and football players were 38 percent more likely to commit sexual assault than the average college male.¹⁴⁶

Some sociologists and researchers would say that certain structures inherent and promoted within athletics foster an environment conducive to assault.¹⁴⁷ A 2005 survey of more than 200 student-athletes from 23 teams found that an emphasis on aggression was one element that supported a rape-supportive culture within intercollegiate athletics, as well as a sense of entitlement (coming from male athletes' semi-celebrity status on campus) and excessive use of alcohol among teammates.¹⁴⁸ Another factor may be anabolic steroid abuse, which spikes levels of testosterone.¹⁴⁹

Not only to thwart litigation, but also to respond to such atrocious behavior, universities must become more proactive in not only punishing student-athletes that commit violent crimes but

¹⁴¹ See Zimbalist, *supra* note 26, at 48.

¹⁴² *Id.* at 49.

¹⁴³ See Daisy Nguyen, *USC QB Arrested for Alleged Sex Assault*, retrieved online April 2006 from Associated Press.

¹⁴⁴ See Zimbalist, *supra* note 26, at 48-50.

¹⁴⁵ See Fried, *supra* note 140, at 71.

¹⁴⁶ See Sweeney, *supra* note 31, at 230.

¹⁴⁷ See *generally* Sage, *supra* note 30.

¹⁴⁸ See Sarah McMahon, *Student-Athletes, Rape-Supportive Culture, and Social Change*, NASPA NET RESULTS, Oct. 12, 2005, at 1-2.

¹⁴⁹ See Sweeney, *supra* note 31, at 231.

also in educating and preventing such acts. In Idaho, recruited athletes must sign a disclosure statement regarding any prior arrests, and any student-athlete convicted of a felony is removed from the team. Surprisingly—and sadly, considering the pervasiveness of the problem—the NCAA has no guidelines suggesting appropriate university action if an athlete has committed or previously has committed a serious crime.¹⁵⁰ If individual states were to promulgate such policies, the NCAA would have little authority in enforcing these policies among public institutions located within states that have not passed such regulations.¹⁵¹ Moreover one must consider the freedoms that exist among private institutions to set their own guidelines regarding student behavior. Without action from the NCAA and unilateral adoption among its member schools, the issue becomes a competitive one: which schools are willing to risk losing a star recruit by adopting such “restrictive” codes?

Christopher Parent argued that universities also should examine policies and investigative procedures so as not to be found guilty of “deliberate indifference.” Parent even speculated that liability regarding Title IX harassment by scholarship athletes may one day be equated to “negligent hiring.”¹⁵² Professor Gil Fried further questioned whether liability exists under negligent hiring or negligent retention of athletes with criminal pasts.¹⁵³ However, only in cases of workers’ compensation have student-athletes been considered as employees of the university.¹⁵⁴ Hence, the athletic scholarship does not create a relationship by which the institution can be held liable as an employer—particularly under the argument of negligent hiring.¹⁵⁵

¹⁵⁰ See Fried, *supra* note 140, at 92.

¹⁵¹ See *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

¹⁵² See Parent, *supra* note 124, at 646-648.

¹⁵³ See Fried, *supra* note 140, at 83.

¹⁵⁴ *E.g.*, *Univ. of Denver v. Nemeth*, 227 P.2d 423 (Colo. 1953) (holding that a student-athlete was entitled to workers’ compensation because he also was hired part-time by the University as a maintenance worker), *cited in* Fried, *supra* note 140, at 81.

¹⁵⁵ See Fried, *supra* note 140, at 81. Title VII per the ruling in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) permits vicarious liability if an employer does not take reasonable steps to prevent harassment.

Regardless whether institutions can be held liable for negligent hiring and recruiting or through tort liability, recent Title IX case law suggests that courts are serious in addressing not only the pervasiveness of sexual abuse committed by student-athletes but the apparent disregard some coaches and administrators have for the campus judiciary process.¹⁵⁶ When universities show preference to student-athletes when investigating wrongdoing, it intimates that these institutions value athletes more than the student population at-large.¹⁵⁷ One well-publicized example of a campus' blasé attitude toward athletes' crimes was at the University of Nebraska. Despite a string of off-field incidents involving Nebraska football players in the mid-1990s, then-athletic director Bill Byrne proclaimed, "You don't win football games with choirboys."¹⁵⁸ The University's student-athlete handbook took an equally slanted approach toward the guilt of student-athletes regarding crimes against women: "Be careful, especially if you have been drinking, that you do not misread signals. Trouble often has occurred when a woman has remained alone with several men after a drinking party. While some may feel that this shows poor judgment on the woman's part, it certainly does not justify rape."¹⁵⁹

The most recent sexual assault case within intercollegiate athletics involved the Duke University lacrosse team—a scandal that ripped across racial and social class lines.¹⁶⁰ In April 2006, an African American female stripper alleged that three members of lacrosse team raped

¹⁵⁶ In her case, Brzonkala (*United States v. Morrison*, 529 U.S. 598 (2000)) claimed that Frank Beamer, the Virginia Tech football coach, had an indirect role in having the student's sanction vacated, *cited in* Fried, *supra* note 140, at 100.

¹⁵⁷ See Parent, *supra* note 124, at 643.

¹⁵⁸ *Id.* at 640. One player, Lawrence Philips, had several assault charges levied against him, including dragging his then-girlfriend down a flight of stairs. Tom Osborne, head football coach at the time and now Congressman, said of Philips, "It's not as though [he] is an angry young man all the time and a threat to society. But there are occasions ever four to five months where he becomes a little explosive." *Id.* at 647.

¹⁵⁹ See Southall, *supra* note 138, at 276, *citing* Nebraska Athletic Department Student Athlete Handbook, <http://huskerwebcast.com/athdept/handbook/conduct.html> at 2.

¹⁶⁰ See Meadows & Thomas, *supra* note 7 (citing that the accuser is an African-American female while the accused all come from privileged backgrounds).

her when she performed at an off-campus team party.¹⁶¹ Though DNA results conducted on all but one team member,¹⁶² two students were indicted on rape and kidnapping charges.¹⁶³

The Duke case is a difficult one—what should have been the appropriate response? Prior to the indictments, one player was suspended from Duke and the lacrosse season was cancelled. Several players, including recruits, not implicated in the incident were at risk of losing their athletic scholarship for next year.¹⁶⁴ Did swift action send a message that the University seriously punishes and does not condone such action? Or, had this case involved a fellow Duke student, should the University have risked Title IX litigation and awaited the outcome of the civil investigation? What due process rights were entitled to these young men?¹⁶⁵ Would Duke have acted differently had this case involved the hugely successful and revenue-producing men's basketball team? In 2002, another university was faced with a similar dilemma: Four Notre Dame football players were accused of raping a female student at an off-campus. Without waiting for criminal charges, the University expelled the players following an internal investigation.¹⁶⁶

In addition to assessing the risk of liability caused by athlete's crimes, universities also must debate whether involvement in intercollegiate athletics offers some redeeming second chance to deserving, talented students.¹⁶⁷ Do athletes truly appreciate the opportunities afforded them through athletic scholarships or is college sport simply a proving ground for the professional ranks? Though athletic scholarships are available for those who, otherwise, would be unable to

¹⁶¹ See Sara Lipka, *At Duke, Turmoil over Rape Allegations Brings Underlying Tensions to the Surface*, CHRON. OF HIGHER EDUC., April 14, 2006, at www.chronicle.com.

¹⁶² The victim alleged that the rapists were White; the Duke lacrosse team only has one African American member. See *id.*

¹⁶³ See Meadows & Thomas, *supra* note 7.

¹⁶⁴ See Brad Wolverton, *Duke Scandal Ripples Through College Sports, as Experts Predict Range of Repercussions*, CHRON. OF HIGHER EDUC., April 14, 2006, at www.chronicle.com.

¹⁶⁵ See, e.g., *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987) (holding that there was no Constitutional right to play intercollegiate athletics and, hence, no due process rights were owed when a student-athlete was denied participation).

¹⁶⁶ See Parent, *supra* note 124, at 641.

¹⁶⁷ Student development theory would support such an argument. See generally NANCY J. EVANS, DEANNA S. FORNEY, & FLORENCE GUIDO-DIBRITO, *STUDENT DEVELOPMENT IN COLLEGE: THEORY, RESEARCH, AND PRACTICE* (Jossey-Bass 1998).

attend college, “the potential for sport to directly provide social mobility for significant numbers of Americans is largely imaginary.”¹⁶⁸

Or is intercollegiate athletics purely a business, concerned only with the “bottom line” of recruiting and retaining the most competitive talent? Universities profit from these “unpaid professionals”—some of whom move on to lucrative careers in professional sports while others leave often without a degree and no solid education nor psychosocial development enjoyed by non-athletes.¹⁶⁹ Regardless, the issue of student-athlete crimes, namely sexual assault, undoubtedly is pandemic—smearing campus reputations, exposing institutions to heightened liability, and manifesting a culture that degrades and devalues women. Even if a team loses a “star” athlete, the repercussions of forgiving these players’ crimes are too numerous to ignore.

¹⁶⁸ See Sage, *supra* note 30, at 51.

¹⁶⁹ See Toma, *supra* note 8, at 248-49.