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PREVENTING RECURRENCES OF THE COVER-UPS AT PENN STATE & BAYLOR (AND NOW MICHIGAN STATE): WHERE DOES IT END?

ANDREW SOLOMON*

In recent years, several high-profile sexual assault and abuse scandals have rocked the collegiate athletic world and forced university officials to reexamine their legal and moral responsibilities after learning about potential criminal activity on campus. In several scandals, ranging from Pennsylvania State University (Penn State) to Baylor University to more recently Michigan State University, high-level officials from prestigious universities knew about allegations of potential sexual assaults and did not take the allegations as seriously as needed. Other prestigious organizations, including the Catholic Church, have encountered similar problems, but this Article focuses on universities generally, and their athletic departments specifically.¹

The most high profile case occurred at Penn State where former assistant football coach, Gerald (Jerry) Sandusky, was ultimately convicted of forty-five counts of sexual abuse for his serial sexual molestation of children.²

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1. Although this Article focuses on college athletics, there are parallels between the scandals at universities and the cover-up by the Catholic Church. Penn State head football coach, Joe Paterno, and Baylor head football coach, Art Briles, like some Church leaders, seemingly looked the other way because they were protecting their universities and reputations rather than the innocent victims. Other coaches, like others in the Church, looked the other way and put their careers in front of innocent victims because they knew it was what the hierarchy wanted. In totality, both Penn State and Baylor's administrations, similar to the Vatican, put their schools and football teams before innocent victims. In both cases, innocent victims were abused and let down by trustworthy leaders. Even today, some Penn State and Baylor loyalists continue to make excuses and remain blinded by their loyalty and faith in the institutions.

2. CNN Wire Staff, *Jury Finds Jerry Sandusky Guilty on Dozens of Child Sex Abuse Charges*, CNN (June 23, 2012), <http://www.cnn.com/2012/06/22/justice/pennsylvania-sandusky-trial/> (noting that after

Sandusky's crimes were heinous in nature, but perhaps even more shocking was the revelation that several high-level Penn State University and athletic department officials, including legendary head football coach, Joe Paterno, either witnessed or learned about the potential abuse and took inadequate steps to properly investigate, report, or stop the abuse. An independent investigation into the Penn State situation, conducted by former Federal Bureau of Investigation (FBI) Director Louis Freeh's law firm,³ ultimately found that:

[f]our of the most powerful people at The Pennsylvania State University—President Graham B. Spanier, Senior Vice President-Finance and Business Gary C. Schultz, Athletic Director Timothy M. Curley and Head Football Coach Joseph V. Paterno—failed to protect against a child sexual predator harming children for over a decade. These men concealed Sandusky's activities from the Board of Trustees, the University community and authorities. They exhibited a striking lack of empathy for Sandusky's victims⁴

More recently, evidence suggests that the cover-up may not have lasted ten years, but up to forty years.⁵ The scandal ultimately led to the firing of Penn State's president, vice president, athletic director, and head football coach, Joe

deliberating for twenty-one hours, jurors convicted Sandusky on forty-five counts related to his sexual abuse of ten boys over a fifteen-year period).

3. FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (GEO. L. LIBR. 2012), *available at* <http://cdm266901.cdmhost.com/cdm/ref/collection/p266901coll4/id/3983>. According to the introduction,

Freeh Sporkin & Sullivan, LLP, ("FSS"), was engaged by the Special Investigations Task Force ("Task Force") on behalf of The Pennsylvania State University's Board of Trustees ("Board" or "Trustees") as Special Investigative Counsel on November 21, 2011. As Special Investigative Counsel, FSS was asked to perform an independent, full and complete investigation of:

- (1) The alleged failure of Pennsylvania State University personnel to respond to, and report to the appropriate authorities, the sexual abuse of children by former University football coach Gerald A. Sandusky ("Sandusky");
- (2) The circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth.

In addition, the Special Investigative Counsel was asked to provide recommendations regarding University governance, oversight, and administrative policies and procedures that will better enable the University to prevent and more effectively respond to incidents of sexual abuse of minors in the future.

Id. at 8.

4. *Id.* at 14.

5. *See infra* Part I (detailing recent evidence showing that Paterno and others possibly knew about Sandusky's problems in the 1970s).

Paterno. It also led to the filing of numerous civil lawsuits against Penn State, and criminal convictions of top university leaders.

Even though the Penn State scandal sent shockwaves across the nation and caused universities to reconsider the reporting of possible criminal activity and sexual assaults, Baylor University officials and football coaches recently failed to adequately investigate and report numerous sexual assaults committed by football players.⁶ An independent investigation into the Baylor situation, conducted by the Pepper Hamilton law firm,⁷ concluded that “[t]he choices made by the football staff and athletics leadership . . . posed a risk to campus safety and the integrity of the University.”⁸ More specifically, high-level Baylor officials failed to “identify and respond to a pattern of sexual violence . . . [and] to take action in response to reports of a sexual assault by multiple football players”⁹ After the release of the Pepper Hamilton report, Baylor Board of Regents Chair, Richard Willis, stated, “[w]e were horrified by the extent of these acts of sexual violence on our campus This investigation revealed the University’s mishandling of reports in what should have been a supportive, responsive and caring environment for students.”¹⁰ The scandal ultimately led to the firing of Baylor University’s Chancellor, Kenneth Starr, head football coach, Art Briles, and several other Baylor officials. It also led to numerous lawsuits against Baylor University.

Although the Penn State and Baylor scandals are the two most egregious examples of significant problems within universities and their athletic departments (at least until the recent scandal at Michigan State University), several other universities have encountered similar problems.¹¹ For example, in

6. *Timeline: Baylor Sexual Assault Controversy*, WACO TRIB.-HERALD, Jan. 1, 2017, https://www.wacotrib.com/news/higher_education/timeline-baylor-sexual-assault-controversy/article_abf21ab8-2267-51bf-84d8-6268f4222af0.html.

7. BAYLOR UNIV., BAYLOR UNIV. BD. OF REGENTS FINDINGS OF FACT 1 (2016), *available at* <http://www.baylor.edu/rtsv/doc.php/266596.pdf>. <http://www.baylor.edu/rtsv/doc.php/266596.pdf>. The Pepper Hamilton law firm did not release a final report, but Baylor University’s Board of Regents issued findings of fact. *Id.*

8. *Id.* at 10.

9. *Id.* at 2.

10. Edwin Rios & Madison Pauly, *Read the Damning Report on How Baylor Failed to Address Sexual Assault by Its Football Players*, MOTHER JONES (May 26, 2016), <http://www.motherjones.com/politics/2016/05/baylor-football-sexual-assaults-damning-report-ken-starr>.

11. *See generally* Paul Bowers, *The Citadel’s Failure to Act Has Tarnished Its Reputation*, CHARLESTON CITY PAPER, Nov. 23, 2011), <http://www.charlestoncitypaper.com/charleston/the-citadels-failure-to-act-has-tarnished-its-reputation/Content?oid=3648975>. Other educational institutions have also been the subject of sexual abuse scandals. *Id.* The Citadel, a military college in Charleston, South Carolina, came under fire for failing to report the sexual abuse of several children by a former summer camp counselor who was an alumnus of the college. *Id.* In 2007, the school investigated allegations, but ultimately dropped the investigation and did not report it to police. *Id.* *See generally* Eric Prisbell, *Syracuse Report Offers Criticism of Bernie Fine*

June 2016, the University of Tennessee paid \$2.48 million to settle a Title IX lawsuit brought by eight female students who alleged that the university had a policy of indifference toward sexual assaults committed by its athletes, and thereby created a hostile sexual environment for female students.¹² More specifically, the students claimed that the University of Tennessee had created a culture that enabled sexual assaults by student-athletes, especially football players, and the university was biased against victims who stepped forward.¹³ Each of these scandals have exposed a significant problem within universities and athletic departments, and sparked a debate about how to prevent future recurrences.

This article examines the recent failures by athletic department and university officials to properly investigate and report allegations of criminal conduct. In addressing this problem, the article focuses on the Penn State and Baylor scandals, some of the relevant state and federal law, and the National Collegiate Athletic Association's (NCAA) role. The article's first section details the specifics of the "failure to investigate and report" scandals at Penn State and Baylor. The second section examines some of the applicable state and federal laws, which obligate the reporting of campus criminal activity, most notably sexual assault and abuse. The third section examines the NCAA's role in regulating and punishing universities that engage in illegal and immoral conduct showing a lack of institutional control. Finally, the fourth section takes a brief look into the recent Michigan State scandal and recommends steps for improving laws and other measures that will prevent future recurrences, provide better protection for students, and help to avoid university liability.

I. THE PENN STATE AND BAYLOR SCANDALS

Although the scandals at Penn State and Baylor are not the only examples of organizations or universities failing to properly investigate and report, and possibly covering-up criminal activity and sexual abuse, this Article focuses on

Investigation, USA TODAY, July 5, 2012, <http://usatoday30.usatoday.com/sports/college/mensbasketball/bigeast/story/2012-07-05/syracuse-findings-bernie-fine-investigation/56041250/1>. In another incident, several men accused Syracuse University Assistant Basketball Coach Bernie Fine of sexual abuse that occurred when they were ball boys for the school's basketball team. *Id.* Although Syracuse University investigated these allegations in 2005, neither the university nor the police found enough evidence to discipline or charge Coach Fine. *Id.* However, in 2012, after the release of an audiotape in which Fine's wife seemingly acknowledged her husband's role in the abuse, Coach Fine was immediately fired. *Id.*

12. Nate Rau & Anita Wadhvani, *Tennessee Settles Sexual Assault Suit for \$2.48 Million*, TENNESSEAN, July 6, 2016, <http://www.tennessean.com/story/news/crime/2016/07/05/tennessee-settles-sexual-assault-suit-248-million/86708442/>.

13. Anita Wadhvani & Nate Rau, *Sweeping Sex Assault Suit Filed Against University of Tennessee*, TENNESSEAN, Feb. 24, 2016, <http://www.tennessean.com/story/news/2016/02/09/sweeping-sexual-assault-suit-filed-against-ut/79966450/>.

these two high-profile scandals to illustrate the depth of potential problems on collegiate campuses.

A. The Penn State Scandal

“This is a tragedy. It is one of the great sorrows of my life.
With the benefit of hindsight, I wish I had done more.”¹⁴ –
Coach Joe Paterno

In November 2011, a Pennsylvania grand jury report detailed how former Penn State assistant football coach, Jerry Sandusky, had sexually assaulted eight young boys in the Penn State locker rooms and elsewhere over a period of approximately fifteen years (from 1994 to 2009).¹⁵ Sandusky was ultimately convicted on forty-five counts of sexual abuse, including rape and sodomy, of ten teenage boys who Sandusky had groomed and sexually abused in and around the locker room of the school’s hallowed football stadium.¹⁶ Perhaps even more shocking than the serial sexual abuse by the former football coach was the cover-up or inadequate investigation and reporting by athletic and university officials who seemingly deemed the sanctity of Penn State and its football program to be more important than preventing the recurrence of future sexual abuse or justice for the victims.

According to the grand jury report, Penn State staff members witnessed inappropriate conduct between Sandusky and a number of young boys on several occasions and these staff members notified their university supervisors, but did not notify the police or child protective services agencies.¹⁷ In the most

14. Mark Memmott, *Penn State Coach Paterno to Retire, Says ‘I Wish I Had Done More’*, NPR: THE TWO-WAY (Nov. 9, 2011, 10:43 AM), <http://www.npr.org/sections/thetwo-way/2011/11/09/142171189/son-says-penn-state-coach-paterno-will-retire-at-end-of-season>.

15. See GRAND JURY REPORT ON ALLEGED PENN STATE SEX ABUSE (2011), <http://www.documentcloud.org/documents/264894-sandusky-grand-jury-presentment.html>. On November 4, 2011, the grand jury report detailed explicit testimony that former Penn State Defensive Coordinator Jerry Sandusky sexually abused eight young boys over a period of at least fifteen years. *Id.* On December 7, 2011, the number of victims increased from eight to ten. *Id.*

16. See Joe Drape, *Penn State’s Sandusky Convicted of Sexually Abusing Boys*, N.Y. TIMES, June 22, 2012, <http://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html>. On June 22, 2012, after a two-week trial, a jury convicted Sandusky, sixty-eight, of sexually assaulting ten boys, all from disadvantaged homes, whom Sandusky had befriended often using his access to Penn State’s vaunted football program. *Id.* During the trial, eight men offered graphic testimony about repeated rapes and sexual assaults by Sandusky — on the Penn State campus, in hotel rooms, and in the basement of Sandusky’s home. *Id.*

17. See GRAND JURY REPORT ON ALLEGED PENN STATE SEX ABUSE, *supra* note 15, at 10. The Grand Jury Report showed that two Penn State officials — Athletic Director, Tim Curley, and Vice President, Gary Schultz — purportedly failed to notify law enforcement after learning about some of these sexual assault incidents, and they were subsequently charged with perjury and failing to report suspected child abuse. *Id.*

egregious example detailed in the grand jury report, graduate assistant football coach, Mike McQueary, after returning to the Penn State locker room at night in 2002, heard sounds in a shower and saw a ten-year-old boy “with his hands up against the wall, being subjected to anal intercourse by a naked Sandusky.”¹⁸ Although assistant coach McQueary did not intervene, on the next morning, he visited head football coach, Joe Paterno, and reported that Sandusky was “fondling or doing something of a sexual nature to a young boy.”¹⁹ On the next day, instead of notifying the police, Coach Paterno reported the incident to Penn State Athletic Director (“AD”), Tim Curley.²⁰ Approximately ten days later, AD Curley and the Senior Vice President (“VP”), Gary Schultz, met with graduate assistant coach, McQueary, and promised to “look into” the incident.²¹ Two weeks later, AD Curley told McQueary that Sandusky’s keys to the locker room had been taken away and the incident had been reported to the Second Mile charity, an organization for disadvantaged youth run by Sandusky.²² The

Penn State President, Graham Spanier, was also subsequently charged with “failure to report” and “child endangerment.” *Id.*

18. *Id.* at 6–7.

As the graduate assistant entered the locker room doors, he was surprised to find the lights and showers on. He then heard rhythmic, slapping sounds. He believed the sounds to be those of sexual activity. As the graduate assistant put the sneakers in his locker, he looked into the shower. He saw a naked boy, Victim 2, whose age he estimated to be ten years old, with his hands up against the wall, being subjected to anal intercourse by a naked Sandusky. The graduate assistant was shocked but noticed that both Victim 2 and Sandusky saw him. The graduate assistant left immediately, distraught.

19. *Id.* at 7.

Paterno called Tim Curley (“Curley”), Penn State Athletic Director and Paterno’s immediate superior, to his home the very next day, a Sunday, and reported to him that the graduate assistant had seen Jerry Sandusky in the Lasch Building showers fondling or doing something of a sexual nature to a young boy.

20. *Id.*

Joseph V. Paterno testified to receiving the graduate assistant’s report at his home on a Saturday morning. Paterno testified that the graduate assistant was very upset. Paterno called Tim Curley (“Curley”), Penn State Athletic Director and Paterno’s immediate superior, to his home the very next day, a Sunday, and reported to him that the graduate assistant had seen Jerry Sandusky in the Lasch Building showers fondling or doing something of a sexual nature to a young boy.

21. *Id.*

Approximately one and a half weeks later, the graduate assistant was called to a meeting with Penn State Athletic Director Curley and Senior Vice President for Finance and Business Gary Schultz (“Schultz”). The graduate assistant reported to Curley and Schultz that he had witnessed what he believed to be Sandusky having anal sex with a boy in the Lasch Building showers. Curley and Schultz assured the graduate assistant that they would look into it and determine what further action they would take. Paterno was not present for this meeting.

22. GRAND JURY REPORT ON ALLEGED PENN STATE SEX ABUSE, *supra* note 15, at 7–8.

incident observed and reported by graduate assistant coach McQueary was never reported to the police or child protection services. AD Curley told the grand jury that he reported the incident to Penn State President, Graham Spanier, but not the authorities because the allegation was “not sexual of any kind” but only “horsing around.”²³ Senior VP Schultz also told the grand jury that graduate assistant coach, McQueary, reported “inappropriate sexual conduct,” but it was “not that serious” nor criminal.²⁴

Shortly after the release of the grand jury report, AD Tim Curley and Senior VP Gary Schultz were both deemed blameworthy and were immediately charged with failing to report sexual abuse to police as required by Pennsylvania law.²⁵ Less than one week after the release of the Sandusky grand jury findings, Penn State President, Graham Spanier, was fired because he failed to take precautionary steps after being made aware of the Sandusky incidents; he was

The graduate assistant heard back from Curley a couple of weeks later. He was told that Sandusky’s keys to the locker room were taken away and that the incident had been reported to The Second Mile. The graduate assistant was never questioned by University Police and no other entity conducted an investigation until he testified in Grand Jury in December, 2010. The Grand Jury finds the graduate assistant’s testimony to be extremely credible.

23. *Id.* at 8.

Curley specifically denied that the graduate assistant reported anal sex or anything of a sexual nature whatsoever and termed the conduct as merely “horsing around.” When asked whether the graduate assistant had reported “sexual conduct” “of any kind” by Sandusky, Curley answered, “No” twice. When asked if the graduate assistant had reported “anal sex between Jerry Sandusky and this child,” Curley testified, “Absolutely not.”

24. *Id.* at 8–9.

Schultz testified that he was called to a meeting with Joe Paterno and Tim Curley, in which Paterno reported “disturbing” and “inappropriate” conduct in the shower by Sandusky upon a young boy, as reported to him by a student or graduate student. Schultz was present in a subsequent meeting with Curley when the graduate assistant reported the incident in the shower involving Sandusky and a boy. Schultz was very unsure about what he remembered the graduate assistant telling him and Curley about the shower incident. He testified that he had the impression that Sandusky might have inappropriately grabbed the young boy’s genitals while wrestling and agreed that such was inappropriate sexual conduct between a man and a boy. While equivocating on the definition of “sexual” in the context of Sandusky wrestling with and grabbing the genitals of the boy, Schultz conceded that the report the graduate assistant made was of inappropriate sexual conduct by Sandusky. However, Schultz testified that the allegations were “not that serious” and that he and Curley “had no indication that a crime had occurred.” Schultz agreed that sodomy between Sandusky and a child would clearly be inappropriate sexual conduct. He denied having such conduct reported to him either by Paterno or the graduate assistant.

25. Kate Giammarise, *Penn State’s Spanier, Curley and Schultz to Stand Trial on All Charges in Sandusky Case*, PITTSBURGH POST-GAZETTE, July 30, 2013, <http://www.post-gazette.com/news/state/2013/07/30/Penn-State-s-Spanier-Curley-and-Schultz-to-stand-trial-on-all-charges-in-Sandusky-case/stories/201307300204>. In addition to being charged with failing to report the possible abuse of a child, AD Curley and VP Schultz were charged with making false statements to the grand jury. *Id.*

later also charged with failing to report after initially not being charged criminally.²⁶ At the same time, longtime head football coach, Joe Paterno, who was also made aware of the sexual incident and reported it to his supervisors but did not take any other action to fully investigate or ultimately stop the abuse, was fired by Penn State; he was not charged criminally and died less than three months later.²⁷ Pennsylvania State Police Commissioner, Frank Noonan, who admitted that Paterno likely met his legal requirement under Pennsylvania law by reporting the abuse to his superiors, chastised Paterno for not calling and notifying the police.²⁸ Because of the nature of the allegations, the Police Commissioner thought, “[w]hether you’re a football coach or a university president or the guy sweeping the building, . . . I think you have a moral responsibility to call us.”²⁹

Although the failure to report the 2002 shower incident detailed in the grand jury report is troubling, these same Penn State officials apparently knew about Sandusky’s sexual abuse for a longer period of time. According to an eight-month independent investigation into the sex abuse scandal, commissioned by Penn State and conducted by former FBI Director Louis Freeh, “several staff members and football coaches regularly observed Sandusky showering with young boys” in the Penn State football building as early as 1998.³⁰ In 1998, police investigated a mother’s report that Sandusky showered with her eleven-year-old son on the Penn State campus.³¹ The University police notified VP Schultz of the investigation, who subsequently notified President Spanier and AD Curley.³² VP Schultz’s handwritten notes on

26. Bill Chappell, *The Penn State Child Abuse Scandal: A Guide And Timeline*, NPR (June 21, 2012), <http://www.npr.org/2011/11/08/142111804/penn-state-abuse-scandal-a-guide-and-timeline>.

27. *Id.*

28. John L. Micek & Peter Hall, *Penn State, Paterno: Pennsylvania’s Police Commissioner Says Penn State and Joe Paterno Didn’t Do Enough to Stop the Alleged Sexual Abuse of Children By a Former Assistant Football Coach*, MORNING CALL, Nov. 8, 2011, <http://www.mcall.com/news/local/mc-penn-state-sandusky-charges-20111108-story.html>.

29. *Id.*

30. FREEH SPORKIN & SULLIVAN, LLP, *supra* note 3, at 39-40. “Before May 1998, several staff members and football coaches regularly observed Sandusky showering with young boys in the Lasch Building (now the East Area Locker Building or “Old Lasch”). None of the individuals interviewed notified their superiors of this behavior.” *Id.* at 39. “Former Coach Richard Anderson testified at Sandusky’s trial in June 2012 that he often saw Sandusky in the showers with children in the football facilities but he did not believe the practice to be improper.” *Id.* at 40.

31. *Id.* at 20. “Victim 6’s mother reports to the University Police Department that Sandusky showered with her 11-year old son in the Lasch Building on Penn State campus. The police promptly begin an investigation.” *Id.*

32. *Id.* “Schultz is immediately informed of the investigation and notifies Spanier and Curley. Schultz’s confidential May 4, 1998 notes about Sandusky state: ‘Behavior—at best inappropriate @ worst sexual

the incident describe Sandusky's behavior as "at best inappropriate," "at worst sexual improprieties," and "at [a] minimum poor judgment."³³ VP Schultz's notes also wondered whether this was "opening Pandora's box" and whether "other children" were involved.³⁴ The investigation also showed that AD Curley "touched base with" Coach Paterno about the 1998 incident who was "anxious to know where it stands."³⁵ During the investigation, Sandusky admitted, "hugging" the boy in the shower and having "done this with other children in the past."³⁶ Although a detective advised Sandusky "not to shower with any child,"³⁷ Penn State's Police Chief ultimately found a "lack of clear evidence of a crime" and the District Attorney declined to bring charges.³⁸ Despite their knowledge of the criminal investigation, President Spanier, VP Schultz, AD Curley, and coach Paterno never spoke to Sandusky about his conduct or took measures to adequately protect children on Penn State's campus.³⁹

The Freeh Report ultimately concluded that Paterno and Penn State's leadership had displayed a "callous and shocking disregard for child victims" and "failed to protect against a child sexual predator harming children for over

improprieties' and 'At min—Poor Judgment.' Schultz also notes: 'Is this opening of pandora's box?' and 'Other children?'" *Id.*

33. *Id.*

34. *Id.*

35. FREEH SPORKIN & SULLIVAN, LLP, *supra* note 3, at 20. "[AD] Curley notific[ed] [VP] Schultz and [President] Spanier that he has 'touched base with' Paterno about the incident. Days later, Curley emails Schultz: 'Anything new in this department? Coach is anxious to know where it stands.'" *Id.*

36. *Id.*

University Police detective and Department of Public Welfare caseworker interview[ed] Sandusky [who] . . . admit[ted] . . . hugging Victim 6 in the shower but says there was nothing 'sexual about it Harmon emails [VP] Schultz: officers 'met discreetly' with Sandusky and 'his account of the matter was essentially the same as the child's.' Sandusky said, 'he had done this with other children in the past. Sandusky was advised that there was no criminal behavior established and that the matter was closed as an investigation.'

37. *Id.* at 39. ("The detective advised Sandusky not to shower with any child and Sandusky said he 'wouldn't.'").

38. *Id.* at 20. "University Police Department Chief Harmon emails Schultz: 'We're going to hold off on making any crime log entry. At this point in time I can justify that decision because of the lack of clear evidence of a crime.' [D]istrict Attorney declines to bring charges against Sandusky." *Id.* "The District Attorney at the time of the 1998 incident has been missing for several years and has been declared dead." *Id.* at 46.

39. *Id.* at 39.

Spanier, Schultz, Paterno and Curley did not even speak to Sandusky about his conduct on May 3, 1998 in the Lasch Building. Despite their knowledge of the criminal investigation of Sandusky, Spanier, Schultz, Paterno and Curley took no action to limit Sandusky's access to Penn State facilities or took any measures to protect children on their campuses.

Id. In 1999, less than one year after this incident and after twenty years as Paterno's defensive coordinator, Sandusky retired. *Id.* at 40.

a decade.”⁴⁰ More specifically, it concluded that for over fourteen years, from 1998 to 2011, “the most powerful leaders at [Penn State] University — Spanier, Schultz, Paterno and Curley — repeatedly concealed critical facts relating to Sandusky’s child abuse from the authorities, the . . . Board of Trustees, Penn State community, and the public at large.”⁴¹ The Report found a “total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky’s child victims.”⁴² According to the Report, even with knowledge about the 1998 investigation, President Graham Spanier approved a decision by AD Curley to not report Sandusky in 2002 after the incident witnessed by graduate assistant coach McQueary. The Report shows that emails allegedly exchanged between President Spanier, AD Curley and VP Schultz suggest that a conversation between AD Curley and coach Paterno may have altered a plan to report Sandusky to the Department of Welfare.⁴³ By failing to report these allegations, these Penn State officials placed the reputation of Penn State ahead of the harm that Sandusky did to young boys for the next ten years, from 2002 to 2012. After the release of the Freeh Report, Penn State’s Board of Trustees took “full responsibility” for not stopping Jerry Sandusky from sexually abusing children, and stated:

“We are accountable for what’s happened here. . . . People who were in a position to protect children and to confront a predator . . . did not put the welfare of children first Our hearts remain heavy and deeply ashamed.”⁴⁴

After the release of the Freeh Report, the Penn State scandal evolved further after evidence emerged that the Sandusky incidents did not start in 1998, but possibly as early as 1971 when Sandusky allegedly sexually abused a

40. FREEH SPORKIN & SULLIVAN, LLP, *supra* note 3, at 14.

41. *Id.* at 16.

42. *Id.* at 14.

43. *Id.* at 24.

Curley emails Schultz and Spanier and says he [Curley] has changed his mind about the plan “after giving it more thought and talking it over with Joe [Paterno] yesterday.” Curley now proposes to tell Sandusky “we feel there is a problem” and offer him “professional help.” “If he is cooperative we would work with him to handle informing” the Second Mile; if Sandusky does not cooperate, “we don’t have a choice and will inform” DPW and the Second Mile. “Additionally, I will let him know that his guests are not permitted to use our facilities.” Spanier emails Curley and Schultz: “This approach is acceptable to me.” He adds: “The only downside for us is if the message isn’t ‘heard’ and acted upon, and we then become vulnerable for not having reported it. But that can be assessed down the road. The approach you outline is humane and a reasonable way to proceed.” Schultz concurs with the plan in an email to Curley and Spanier: “this is a more humane and upfront way to handle this.” Schultz adds, “we can play it by ear” about informing DPW of the assault.

44. Adam Clark, *Penn State Trustees Respond to Freeh Report*, MORNING CALL, July 12, 2012, http://articles.mcall.com/2012-07-12/news/mc-penn-state-freeh-report-trustees-20120712_1_penn-state-trustees-trustee-kenneth-frazier-spanier.

fifteen-year-old boy. Furthermore, newly released testimony seemingly showed that coach Paterno might have known about Sandusky's abuses as early as 1976 (not 1998).⁴⁵ These revelations became known after Penn State sued its insurer over the \$92.8 million that was paid to settle thirty-two claims of abuse by Sandusky; Penn State sued over who should pay these settlements.⁴⁶

One issue in the insurance lawsuit was whether the insurer should pay settlement claims even though Penn State failed to notify the insurer about Sandusky's behavior in a timely manner. In denying Penn State's request for summary judgment, the court noted, "[t]his case arises out of a series of heinous crimes perpetrated against a multitude of children over a forty-year period."⁴⁷ Notably, the forty-year period noted by the court was considerably longer than the fourteen-year period (1998 to 2012) noted in both Sandusky's grand jury indictment and the Freeh Report. In addition to addressing evidence that the incidents started in 1971 (not 1998), and that Penn State officials likely knew about allegations as early as 1976, the court cited other previously unheard allegations that Penn State coaches also knew about other molestations by Sandusky and failed to act in 1987 and 1988, and "[t]hese events [we]re described in a number of the victims' depositions."⁴⁸ Although the precise details from these incidents are unknown because the details are in sealed depositions, the court cited the depositions and suggested knowledge by Paterno dating back to 1976.⁴⁹ The court noted that former President Graham Spanier, and VP Schultz apparently chose "to sweep the problem under the rug," and that

45. Pa. State Univ. v. Pa. Manufacturers' Ass'n. Ins. Co., No. 03195, 2016 Phila. Ct. Com. Pl. LEXIS 158, at *4 (Pa. D. & C. May 4, 2016) (order granting motion for summary judgment). The opinion from the insurance lawsuit, relying on sworn deposition from numerous witnesses, held that Paterno knew about Sandusky's behavior much earlier and specifically stated that:

Sandusky was employed by PSU as an Assistant Football Coach and Assistant Professor of Physical Education from 1969 until his retirement in 1999. PMA claims Sandusky committed several acts of molestation early in his career at PSU: in 1976, a child allegedly reported to PSU's Head Football Coach Joseph Paterno, that he (the child) was sexually molested by Sandusky; in 1987, a PSU Assistant Coach is alleged to have witnessed inappropriate contact between Sandusky and a child at a PSU facility; in 1988, another PSU Assistant Coach reportedly witnessed sexual contact between Sandusky and a child; and also in 1988, a child's report of his molestation by Sandusky was allegedly referred to PSU's Athletic Director.

Id. See Patrick Redford, *Court Opinion Reveals Joe Paterno Reportedly Knew of Jerry Sandusky Molesting Children as Early as 1976*, DEADSPIN (May 5, 2016), <https://deadspin.com/court-opinion-reveals-joe-paterno-reportedly-knew-of-je-1775014993>.

46. Pa. State Univ., 2016 Phila. Ct. Com. Pl. LEXIS 158, at *1–*2.

47. *Id.* at *1.

48. *Id.* at *1–*2.

49. Charles Thompson, *'I Don't Want to Hear Any of That Stuff,' Paterno told Sandusky accuser in 1976: Deposition*, PENN LIVE, July 12, 2016, http://www.pennlive.com/news/2016/07/john_doe_150_tells_of_alleged.html.

Penn State's failure to report a sexual predator on staff to its insurer—if proven at trial—could constitute “intentional omission of a material fact” and therefore render the insurance policy void.⁵⁰

B. The Baylor Scandal

“Those are some bad dudes. Why was she around those guys?”⁵¹ – Coach Art Briles

Despite the lessons that should have been learned from the Penn State scandal, allegations have surfaced that Baylor University officials and football coaches similarly failed to investigate and report numerous sexual assaults committed by football players dating back to 2009. Since 2014, two Baylor football players, Tevin Elliot and Sam Ukwuachu, have been convicted of felony sexual assaults, and several other players face similar charges and allegations.⁵² Like at Penn State, the sexual assault cases against Tevin Elliot and Sam Ukwuachu are disturbing, but the level of knowledge possessed by Baylor officials and their inaction to these sexual assaults is possibly even more troubling.⁵³

50. *Pa. State Univ.*, 2016 Phila. Ct. Com. Pl. LEXIS 158, at *11–*12.

51. Paula Lavigne & Mark Schlabach, *Art Briles, Baylor Assistants Kept Players' Misbehavior Under Wraps, Legal Documents Reveal*, ABC NEWS, Feb 2, 2017, <http://abcnews.go.com/Sports/art-briles-baylor-assistants-players-misbehavior-wraps-legal/story?id=45235213>.

52. Bruce Tomaso, *A Quick, Complete Guide to the Baylor Football Sex-Assault Scandal*, DALL. MORNING NEWS, June 1, 2016, <https://www.dallasnews.com/news/crime/2016/04/14/how-a-sexual-assault-scandal-engulfed-baylors-football-program>. In addition to the rape convictions of Elliot and Ukwuachu, Baylor football player, Shawn Oakman, has recently been charged with sexual assault and this rape occurred more than three years after Oakman was accused of assaulting another ex-girlfriend in 2013; several other Baylor football players have also allegedly committed uncharged acts of sexual assault, domestic violence, and other violence. *Id.* More recently, former Baylor football players, Shamycheal “Myke” Chatman and Tre’Von Armstead, have been indicted and arrested on three counts of sexual assault, a second-degree felony that is punishable by up to twenty years in prison, stemming from an alleged 2013 sexual assault when they were members of the Baylor football team. *Timeline: Baylor Sexual Assault Controversy*, *supra* note 6.

53. Paula Lavigne & Mark Schlabach, *Waco Police Records Reveal Additional Violence Allegations Against Baylor Football Players*, ESPN (May 19, 2016), http://www.espn.com/espn/otl/story/_/id/15562625/waco-police-records-reveal-additional-violence-allegations-baylor-football-players.

According to the police documents, at least some Baylor officials, including coaches, knew about many of the incidents, and most players did not miss playing time for disciplinary reasons. None of the incidents has been widely reported in the media . . . [There are also] several examples in which school officials either failed to investigate, or failed to adequately investigate, allegations of sexual violence. In many cases, officials did not provide support to those who reported assaults, in apparent violation of Title IX federal law.

The problems at Baylor started to emerge in April 2012 after Baylor linebacker, Tevin Elliott, was arrested for raping a fellow Baylor student at a party; head football coach, Art Briles, said that Elliott was suspended because he had “violated a team policy” and declined further comment.⁵⁴ Elliott was ultimately convicted of rape, sentenced to the maximum of twenty years in prison, and fined \$10,000.00.⁵⁵ During the trial, four other women testified that they were also raped by Elliott, starting in 2009.⁵⁶ Charges were not filed in these other cases because the “Waco Police Department detectives failed to follow through with victim interviews.”⁵⁷

After Elliott’s rape conviction, disturbing details began to emerge about several Baylor officials who had failed to act even after many Baylor students had made rape allegations against Elliott.⁵⁸ According to one of the rape victim’s mothers, Baylor “was not helpful in guiding her daughter during this academically stressful time.”⁵⁹ Other rape victims claimed that Baylor officials “knew about previous sexual assault allegations against Elliott and failed to take proper action to protect other students.”⁶⁰ Other information showed that Baylor officials hesitated to act even though six females reported being sexually

54. Associated Press, *Baylor’s Tevin Elliott Suspended for Violating Team Rule*, ESPN (Apr. 30, 2012), http://www.espn.com/college-football/story/_/id/7864666/baylor-tevin-elliott-suspended-violating-team-rule.

55. Tommy Witherspoon, *Ex-BU Football Player Gets 20 Years in Sexual Assaults*, WACO TRIB.-HERALD, Jan. 24, 2014, http://www.wacotrib.com/news/courts_and_trials/ex-bu-football-player-gets-years-in-sexual-assaults/article_0e8c23fa-44cc-59da-a134-de9fe39a7d5e.html.

56. Tomaso, *supra* note 52.

57. Paula Ann Solis, *Elliott Guilty: Ex-Football Player to Serve 20 Years for Assault*, BAYLOR LARIAT, Jan. 24, 2014, <http://baylorlariat.com/2014/01/24/elliott-guilty-ex-football-player-to-serve-20-years-for-assault/>.

58. Tomaso, *supra* note 52.

59. Solis, *supra* note 57.

60. Complaint & Demand for Jury Trial at 11, *Hernandez v. Baylor University Board of Regents*, No. 6:16-CV-00069 (W.D. Tex. Mar. 30, 2016), *available at* <https://www.scribd.com/doc/306537753/Hernandez-v-Baylor-Complaint>; *see* Sue Ambrose & David Tarrant, *Rape Survivor’s Lawsuit Details Claims That Baylor, Art Briles Ignored Warning Signs*, DALL. MORNING NEWS, Mar. 31, 2016, <https://www.dallasnews.com/news/news/2016/03/30/former-baylor-student-files-lawsuit-says-university-failed-to-protect-her-from-sexual-assault>; *see also* Tommy Witherspoon, *Former Baylor Student’s Lawsuit Against School Alleges Negligence After Assaults*, WACO TRIB.-HERALD, Mar. 31, 2016, http://www.wacotrib.com/news/higher_education/former-baylor-student-s-lawsuit-against-school-alleges-negligence-after/article_a992bbfd-e0a5-5440-9c4d-278a60352d17.html.

assaulted by Elliott,⁶¹ and that head football coach, Art Briles, was aware of the reports⁶² and “looking into” the matter.⁶³

In addition to the troubling facts surrounding Baylor’s handling of Tevin Elliott’s sexual assaults, Baylor’s actions in the transfer and subsequent rape claim against football player, Sam Ukwuachu, raised questions. In 2012, before transferring to Baylor, Ukwuachu was a freshman All-American football player at Boise State University.⁶⁴ In May 2013, despite his stellar on-field performance, Boise State dismissed Ukwuachu for repeated violation of team rules.⁶⁵ Ukwuachu was kicked off Boise State’s team after an incident of violence involving a female student; he allegedly attacked his girlfriend while drinking and using drugs.⁶⁶ Less than one month later, Ukwuachu transferred to Baylor saying that a “minor problem occurred [at Boise State] and the coaches decided I needed to get a fresh start with somebody else.”⁶⁷ Although it is unclear exactly what Baylor head football coach Art Briles knew about Ukwuachu’s problems at Boise State, at a minimum, he knew that Ukwuachu’s disciplinary history was serious enough for the team to dismiss the freshman All-American.⁶⁸ Furthermore, according to then Boise State head football coach, Chris Petersen, “[a]fter Sam Ukwuachu was dismissed from the Boise

61. Second Amended Complaint & Demand for Jury Trial at 5, *Hernandez v. Baylor University Board of Regents*, No. 6:16-CV-00069 (W.D. Tex. Oct. 12, 2016).

At this meeting, McCraw informed Roe that there was nothing McCraw could do in response to Roe’s complaint that she had been raped by Elliott. McCraw also told Roe and her mother that Roe was the sixth female student to come in to McCraw’s office to report that they had been sexually assaulted by Elliott. Roe and her mother asked if Briles knew of these reports, to which McCraw responded that Briles was aware of the reports. McCraw told Roe and her mother that there was nothing the school could do for Roe unless there was a court determination that Elliott had indeed raped Roe. Otherwise, McCraw said, it would come down to a “he said-she said” situation, and the school could not act on it.

Id.; see Witherspoon, *supra* note 60.

62. Witherspoon, *supra* note 60.

63. *Id.*

64. *Ukwuachu Named Freshman All-America*, BOISE ST. BRONCOS, <http://broncosports.cstv.com/sports/m-footbl/spec-rel/010713aaa.html> (last visited July 30, 2018).

65. Jessica Luther & Dan Solomon, *Silence at Baylor*, TEX. MONTHLY, Aug. 20, 2015, <http://www.texasmnthly.com/article/silence-at-baylor/>.

66. *Id.* In May 2013, Boise State’s assistant athletic director, Marc Paul, advised Ukwuachu’s then-girlfriend to stay away from Ukwuachu, after he put his fist through a window while drunk. *Id.* “Paul also . . . plan[ned] . . . to get police protection for the couple’s other housemate, who received threatening text messages from Ukwuachu.” *Id.* Another document from Boise State shows that “Ukwuachu would get verbally abusive over ‘small irritants’ like a spilled drink” and described Ukwuachu’s relationship with his girlfriend as “*NOT healthy*.” *Id.*

67. Jill Martin, *Sam Ukwuachu Guilty: What Did Baylor Know Before?*, CNN (Aug. 22, 2015), <http://www.cnn.com/2015/08/21/us/baylor-football-player-guilty-sexual-assault/>.

68. Luther & Solomon, *supra* note 65.

State football program and expressed an interest in transferring to Baylor, I initiated a call with Coach Art Briles. In that conversation, I thoroughly apprised Coach Briles of the circumstances surrounding Sam’s disciplinary record and dismissal,” which included violent, abusive, and threatening behavior against several students at Boise State University.⁶⁹

In October 2013, less than four months after Baylor accepted Ukwuachu, who had previously presented a threat to students on another college campus, he was charged with viciously raping a Baylor soccer student-athlete Jane Doe.⁷⁰ After the alleged rape, Baylor conducted an investigation that was subsequently described as “shockingly brief,” involving only cursory interviews and a failure to look at the victim’s rape kit examination.⁷¹ Baylor was again seemingly more interested in protecting its football player and team than its female student body, and took no disciplinary action against Ukwuachu.⁷² Several months later, when prosecutors finally learned about the case from the Waco police department, Ukwuachu was quickly indicted (and subsequently convicted for felony sexual assault); the court even deemed Baylor’s initial investigation to be so “insufficient” that it restricted the defense from even referencing it during Ukwuachu’s trial.⁷³

Even after Ukwuachu’s indictment on felony sexual assault charges, Baylor officials downplayed the significance of the alleged rape; Baylor’s defensive coordinator, Phil Bennett, said that the defensive end had “some issues” and

69. Martin, *supra* note 67.

70. Luther & Solomon, *supra* note 65. At the rape trial, Doe testified that Ukwuachu grabbed her after she resisted his initial advances:

“He was using all of his strength to pull up my dress and do stuff to me He had me on my stomach on the bed, and he was on top of me.” Doe testified that [Ukwuachu] pulled her dress up, pulled her underwear to the side, . . . forced her legs open . . . , [and] then forced himself inside of her. Doe was a virgin at the time [and] . . . testified, “I was screaming stop and no.” [Afterwards, Ukwuachu] told her “This isn’t rape,” [and] asked . . . if she was going to call the police”

Id. Doe told two friends who picked her up that Ukwuachu had raped her. *Id.* On the next day, “Doe went to the hospital and . . . a sexual assault nurse examination [revealed] vaginal injuries including redness, bleeding, and friction injuries.” *Id.* Other trial testimony showed that, earlier in the week and before the rape, Ukwuachu and Doe had exchanged text messages:

Doe [was] unambiguous that she [was] not interested in a physical or romantic relationship. [Ukwuachu] [texted] “we have unfinished business,” in reference to a previous encounter, . . . characterized [by Doe] as Ukwuachu trying to put “moves” on her. She replied “I don’t think we need finish any business” and “let’s just chill.”

71. *Id.*

72. *Id.*

73. *Id.*

“w[ould] not practice for awhile.”⁷⁴ Prior to the next season and before Ukwuachu’s trial, coach Bennett told members of the media that he expected Ukwuachu to play during the season. Thus, for fourteen months, from June 2014 until August 2015, Baylor never elaborated on Ukwuachu’s “issues.” Finally, in August of 2015, after news about Ukwuachu’s sexual assault charges finally broke—more than twenty months after the rape—Baylor’s community learned that Ukwuachu’s “issues” were two felony rape charges⁷⁵ and Baylor head coach Art Briles said, “I like the way we’ve handled it as a university, an athletic department, and a football program.”⁷⁶ Less than one month later, after Ukwuachu’s conviction for sexual assault, Baylor’s President, Ken Starr, denounced this “unspeakable tragedy” and insisted that Baylor will work “tirelessly” to provide a safe environment for its students and that perpetrators of sexual violence will “find no shelter on our campus.”⁷⁷ In the same statement, President Starr called for “a comprehensive internal inquiry into the circumstances associated with this case and the conduct of the various offices involved.”⁷⁸ Less than one week later, Baylor hired outside counsel to conduct a “thorough and independent external investigation into the university’s handling of cases of alleged sexual violence.”⁷⁹ Baylor hired Pepper Hamilton

74. *Id.* (noting that although Ukwuachu did not practice with the team, he was allowed to condition with the team).

75. Tommy Witherspoon, *Baylor Football Player to Stand Trial for Sexual Assault*, WACO TRIB.-HERALD, Aug. 5, 2015, http://www.wacotrib.com/sports/baylor/football/bu-defensive-end-set-for-trial-on-sexual-assault-charge/article_6d9ff60d-38a9-5930-a68c-b214ad0e4b7d.html.

76. John Werner, *Baylor notebook: Oakman Talks About His Python; Ukwuachu Noticeably Absent; Roster Changes*, WACO TRIB.-HERALD: BEARS EXTRA, Aug. 7, 2015, http://www.wacotrib.com/sports/baylor/football/baylor-notebook-oakman-talks-about-his-python-ukwuachu-noticeably-absent/article_53e9cf66-2b85-5740-a9dd-bcab117bd482.html.

77. Ken Starr, *Our Stand Against Sexual Violence*, BAYLOR UNIV. (Aug. 21, 2015), <http://www.baylor.edu/president/news.php?action=story&story=159265>. Baylor President Ken Starr’s statement read in part:

Yesterday, a former student-athlete was convicted for the sexual assault of another former student-athlete. Our hearts are broken for the victim who has been terribly harmed by this unspeakable tragedy In addition to the work already being undertaken by our Title IX Office, we are doing everything in our power to ensure that acts of sexual violence are not committed and that those who perpetrate them will find no shelter on our campus.

78. *Id.*

79. *Baylor President Ken Starr Statement on Internal Inquiry, Next Steps*, BAYLOR UNIV. (Aug. 28, 2015), <http://www.baylor.edu/mediacommunications/news.php?action=story&story=159497>. Baylor President Ken Starr’s full statement:

We must guarantee there is no room at Baylor University for those who would perpetrate sexual violence on our campus. I want to thank Jeremy Counsellor, Professor of Law and Faculty Athletics Representative, for his judgment and guidance. After reviewing the results of his internal inquiry, I am recommending that our Board of Regents retain the services of outside counsel to investigate thoroughly these matters and recommend continued improvements. The Board plans to announce its selection of outside counsel early next week.

Law Firm to engage “in an open exploration of the issues with no limitation by the University” and was “provided with unfettered access to personnel and data.”⁸⁰ According to the Board of Regents, “Pepper’s review was detailed, thorough and rigorous.”⁸¹

Similar to the independent Freeh Report commissioned by Penn State, Baylor’s Board of Regents wanted to conduct “an independent and external review of Baylor’s institutional response,” a response which seemed eerily similar to Penn State because Baylor officials, including President Kenneth Starr, AD Ian McCaw, and football coach Art Briles, had seemingly ignored repeated warnings about sexual assaults on campus. For over a decade, reports had surfaced that these Baylor officials had openly ignored sexual assault claims made against eight football players and even retaliated against the women who made such claims.

After this “rigorous” investigation which included a “high-level audit of all reports of sexual harassment or violence for three academic years,” the Pepper Hamilton report concluded that Baylor had completely mishandled multiple rape allegations against football players.⁸² The Report detailed a stunning willingness to seemingly do anything to win football games and ultimately concluded “football was above the rules.”⁸³ Similar to the findings in Penn State’s Freeh Report, Baylor seemingly cared more about protecting its football program than preventing further sexual assaults or the well-being of the sexual assault victims, many of whom were female students at Baylor. The report ultimately found that the athletic department leadership left women on campus

In addition, I am creating a unique position, housed in the Division of Athletics, that has the authority and oversight of all student-athlete behavior. This officer-level position will report directly to the President and ensure our student-athletes maintain the high level of personal ethics and integrity that Baylor Nation demands. I will work directly with the Board of Regents to formulate the specific responsibilities of this position.

Baylor University is committed to maintaining the highest degree of campus safety to protect the welfare of all our students. This is central to Baylor’s mission as a Christian university and at the heart of our commitment to our students, faculty and staff. We must have zero tolerance for sexual violence on our athletic teams and our campus.

80. BAYLOR UNIV., *supra* note 7 (in August 2015, Baylor University engaged Pepper Hamilton LLP (Pepper) “to conduct an independent and external review of Baylor University’s institutional response to Title IX and related compliance issues through the lens of specific [sexual assault] cases.”).

81. *Id.* at 2 (noting that “Pepper conducted document-based interviews to ensure accuracy, integrity and efficiency, and Pepper’s findings and recommendations are based on the law, related authority, facts and reasonable inferences from the facts.”).

82. *Id.* at 1.

83. *Id.* at 10-11 (finding that “[i]n some cases, football coaches and staff had inappropriate involvement in disciplinary and criminal matters or engaged in improper conduct that reinforced an overall perception that football was above the rules, and that there was no culture of accountability for misconduct.”).

at risk by discouraging victims from reporting assaults and keeping accusations against Baylor football players quiet.

Baylor University's Board of Regents issued its "Findings of Fact" which identified systemic problems within the school and its athletic program, including the following: A high-level audit of all known reports of sexual harassment and assaults, from 2012–2015, showed that the "overwhelming majority of cases did not move forward to an adjudicative hearing, with only an extremely limited number of cases resulting in a finding of responsibility or significant sanction."⁸⁴ This occurred because University personnel:

discouraged, rather than encouraged, participation in the University's Title IX processes . . . because of an erroneous determination that Baylor did not have jurisdiction in off campus matters or because [of improper determinations] that there was not a preponderance of the evidence based on an inadequate or uninformed investigation.⁸⁵

These actions "contributed to or accommodated a hostile environment" and the University even retaliated "against a complainant for reporting sexual assault."⁸⁶ Baylor had fundamentally failed "to implement Title IX of the Education Amendments of 1972 (Title IX) and the Violence Against Women

84. *Id.* at 6.

85. BAYLOR UNIV., *supra* note 7, at 7. Baylor's investigation of Sam Ukwuachu's sexual assault allegation was a sham that somehow failed to find a "preponderance of evidence" [the standard required under Title IX to expel a player] even though a criminal court later found him guilty of sexual assault under the much higher "beyond a reasonable doubt" standard of evidence. *Id.*

86. *Id.* at 7-10.

The investigations reviewed were wholly inadequate to fairly and reliably evaluate whether sexual violence had occurred . . . Administrators engaged in conduct that could be perceived as victim-blaming, focusing on the complainant's choices and actions, rather than robustly investigating the allegations, including the actions of the respondent. In many instances, student conduct investigators conducted cursory investigations and failed to identify and interview readily apparent witnesses or gather relevant evidence. Student conduct investigators also applied the preponderance of the evidence standard of proof in an inconsistent manner, and in many instances, required a far greater level of proof than preponderance . . . In some instances, administrative responses and campus processes caused significant harm to complainants . . . [and] accommodated or created a hostile environment, rather than taking action to eliminate a hostile environment . . . Baylor failed to conduct adequate training and education for its students and employees . . . [and thereby] created an atmosphere that did not foster reporting and participation in the Title IX process. [As a result,] Baylor's students lacked awareness of the range of conduct prohibited under Title IX and of University policies, resources or reporting options . . . [and] may have led to significant underreporting by students and missed opportunities by administrators to respond appropriately to reports. [Also,] [o]nce aware of a potential pattern of sexual violence, the University failed to take prompt and effective action to protect campus safety and protect future victims from harm.

Reauthorization Act of 2013 (VAWA).”⁸⁷ It ultimately concluded that Baylor allowed a culture that failed to hold the football team accountable, discouraged victims from filing complaints, and, on numerous occasions, neglected to remove victims from potentially dangerous situations with assailants.⁸⁸

In addition to these broader University failings, the Board of Regents admitted specific failings within both the football program and Athletic department leadership. According to the Board of Regents, the choices made by football staff and athletics leadership “posed a risk to campus safety and the integrity of the University.”⁸⁹ These leaders failed “to take appropriate action to respond to reports of sexual assault and dating violence reportedly committed by football players.”⁹⁰ The football coaches and staff “took affirmative steps to maintain internal control over discipline of players and to actively divert cases from the student conduct or criminal processes.”⁹¹ In some instances, “athletics and football personnel affirmatively chose not to report sexual violence and dating violence to an appropriate administrator outside of athletics,” and thereby protected players from university and law enforcement investigation and punishment.⁹² In several cases, “football coaches or staff met directly with a

87. *Id.* at 1. Noting with respect to Title IX and VAWA requirements:

Baylor failed to provide training and education to students; failed to identify and train responsible employees under Title IX; failed to provide clear information about reporting options and resources on campus; failed to have a centralized process for ensuring that all reports reached the Title IX Coordinator; failed to impose appropriate interim measures in many cases; failed to appropriately evaluate and balance institutional safety and Title IX obligations against a complainant’s request for anonymity or that no action/investigation be pursued against; failed to conduct prompt, equitable, adequate, and reliable investigations; failed to give complainants access to full range of procedural options under the policy; and failed to take sufficient action to identify, eliminate, prevent and address a potential hostile environment in individual cases.

Id. at 4-5.

88. *Id.* at 9.

In some instances, administrative responses and campus processes caused significant harm to complainants. Actions by an University administrator within [the Baylor University police department] and an administrator within an academic program contributed to, and in some instances, accommodated or created a hostile environment, rather than taking action to eliminate a hostile environment.

89. *Id.* at 10 (“Leadership in football and the athletics department did not set the tone, establish a policy or practice for reporting and documenting significant misconduct.”). *Id.* at 12.

90. BAYLOR UNIV., *supra* note 7, at 10.

91. *Id.* at 11 (“Football staff conducted their own untrained internal inquiries, outside of policy, which improperly discredited complainants and denied them the right to a fair, impartial and informed investigation . . .”).

92. *Id.* at 10. Baylor’s informal system of discipline involved multiple coaches and administrators, relied heavily upon their individual judgment without any clear standards for discipline, and resulted in conduct being ignored or players being dismissed from the team based on an informal and entirely subjective process. *Id.*

[sexual assault] complainant and/or a parent of a complainant and did not report the misconduct,” and even worked to discredit the sexual assault accusers.⁹³ Instead of properly reporting such incidents, “football coaches and staff had inappropriate involvement in disciplinary and criminal matters or engaged in improper conduct that reinforced an overall perception that football was above the rules, and that there was no culture of accountability for misconduct.”⁹⁴ As a result, the football and athletic department leadership failed to address “cultural concerns within the football program, or protect campus safety once aware of a potential pattern of sexual violence by multiple football players.”⁹⁵ Further, Baylor football coaches and staff did not attempt to understand why sexual assault complaints against players were so prevalent, the root causes of their behavior, or the steps needed to prevent the recurrence. Finally, Baylor coaches and staff allowed football players to act with impunity and simply dismissed alleged offenders or helped them transfer to another school instead of reporting them.⁹⁶ Then, Baylor coaches and staff did not properly investigate

93. *Id.*

[F]ootball coaches or staff met directly with a complainant and/or a parent of a complainant and did not report the misconduct Football staff conducted their own untrained internal inquiries, outside of policy, which improperly discredited complainants and denied them the right to a fair, impartial and informed investigation, interim measures or processes promised under University policy.

94. *Id.* at 11 (“The football program’s separate system of internal discipline reinforces the perception that rules applicable to other students are not applicable to football players, improperly insulates football players from appropriate disciplinary consequences, and puts students, the program, and the institution at risk of future misconduct.”). *Id.* at 12.

95. BAYLOR UNIV., *supra* note 7, at 10.

Football staff conducted their own untrained internal inquiries, outside of policy, which improperly discredited complainants and denied them the right to a fair, impartial and informed investigation, interim measures or processes promised under University policy. In some cases, internal steps gave the illusion of responsiveness to complainants but failed to provide a meaningful institutional response under Title IX. Further, because reports were not shared outside of athletics, the University missed critical opportunities to impose appropriate disciplinary action that would have removed offenders from campus and possibly precluded future acts of sexual violence against Baylor students. In some instances, the football program dismissed players for unspecified team violations and assisted them in transferring to other schools. As a result, some football coaches and staff abdicated responsibilities under Title IX and Clery; to student welfare; to the health and safety of complainants; and to Baylor’s institutional values The University and Athletics Department failed to take effective action in response to allegations involving misconduct by football staff [even after] other departments repeatedly raised concerns [about] the Athletics Department’s response.

96. *Id.* at 11 (“[Baylor football coaches] reinforced an overall perception that football was above the rules, and that there was no culture of accountability for misconduct In some instances, the football program dismissed players for unspecified team violations and assisted them in transferring to other schools.”).

football players who were transferring to Baylor, including researching their disciplinary and criminal records.⁹⁷

In addition to the information released by Baylor's Board of Regents based on the Pepper Hamilton report, the following additional information has been uncovered about the action and inaction at Baylor:

ESPN reported that multiple victims reported that Briles, Starr, and other Baylor officials, including coaches, knew about numerous reports of sexual violence by football players, did nothing about it, and even worked with the police to hide investigations from the press and the public.⁹⁸

For two years, Baylor failed to investigate sexual assault claims even though it was required to by Title IX and failed to hire a Title IX coordinator until 2014, three years after it was required by the Department of Education.⁹⁹

Finally, evidence showed that the apparent cover-ups extended from the football office to the university to the Waco police department, in a concerted effort to protect the football program at the expense of victims, whom the university systematically failed to provide with resources and support. One woman, who reportedly notified the football team chaplain, head coach Art Briles, and University President Starr about being assaulted by a Baylor football player, said Baylor's actions had a chilling effect on the reporting of sexual assaults: "I'd seen other girls go through it, and nothing ever happened to the football players. It's mind-boggling to see it continue to happen. I can't

97. *Id.* at 13.

Baylor did not consistently conduct due diligence with respect to potential transfers. In at least one identified instance, the process reflected a failure to conduct appropriate due diligence and assessment of risk regarding past criminal or student conduct and an affirmative decision not to seek additional information about an athlete's prior criminal or student conduct records.

Id. In one incident, Baylor accepted a transfer football player, Sam Ukwuachu, without requesting any records from Boise State that showed that he was released by Boise State due to his violent temperament. Just months after he arrived onto the campus in Waco, Texas, Ukwuachu raped a female Baylor student. *See generally* Luther & Solomon, *supra* note 65.

98. Lavigne & Schlabach, *supra* note 53 ("According to the police documents, at least some Baylor officials, including coaches, knew about many of the incidents, and most players did not miss playing time for disciplinary reasons.")

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

Baylor University did not investigate a sexual assault report made against two football players for more than two years, despite the school's obligation under federal law to immediately address allegations of sexual violence involving students Moreover, it took Baylor more than three years to comply with a federal directive to hire a full-time Title IX coordinator.

understand why. I think as long as they're catching footballs and scoring touchdowns, the school won't do anything."¹⁰⁰

These reports showed that Baylor officials feigned ignorance and even blamed the victims despite knowing that its football players were terrorizing women. The Baylor Board of Regents specifically recognized that:

[t]he comprehensive investigation by Pepper Hamilton and the subsequent Findings of Fact fully and openly outlined systemic failures across the University regarding Title IX policies, procedures and University personnel. . . . We recognize this is a tumultuous time for Baylor, most importantly for our current and former students and victims of sexual assault. We were horrified by what we learned from the investigation and again express our public acknowledgment and deepest apologies.¹⁰¹

The chairperson of Baylor's Board of Regents added,

[w]e were horrified by the extent of these acts of sexual violence on our campus. This investigation revealed the University's mishandling of reports in what should have been a supportive, responsive and caring environment for students The depth to which these acts occurred shocked and outraged us. Our students and their families deserve more, and we have committed our full attention to improving our processes, establishing accountability and ensuring appropriate actions are taken to support former, current and future students.¹⁰²

Although the complete fallout from Baylor is still evolving, the scandal has led to the firings or resignations of Baylor's head football coach Art Briles, President & Chancellor Ken Starr, AD Ian McCaw, and other Baylor officials.

The leadership failure at Baylor was eerily similar to Penn State because, after allegations of sexual assaults, the leadership at both schools failed to act legally and ethically. The problems at Baylor, unfortunately, serve as a reminder that, even after Penn State, institutional leaders (i.e. coaches, athletic directors, and administrators) may still fail to respond properly to allegations of sexual misconduct, especially when it involves a highly successful football

100. Lavigne & Schlabach, *supra* at 53.

101. Reagan Roy, *REPORT: Former Baylor Student Files Formal Title IX Complaint with U.S. Department of Education*, EAST TEX. MATTERS, June 1, 2016, <http://www.easttexasmatters.com/news/local-news/report-former-baylor-student-files-formal-title-ix-complaint-with-us-department-of-education>.

102. *Id.*; Baylor University Media Communications, *Baylor University Board of Regents Announces Leadership Changes and Extensive Corrective Actions Following Findings of External Investigation* (May 26, 2016), <http://www.baylor.edu/mediacommunications/news.php?action=story&story=170207>.

coach and program. Even though the Penn State story was beyond shocking, the Baylor saga makes it abundantly clear that Penn State's situation did not cause fundamental legal or institutional changes to occur within big-time college athletics and shows that a dark and troubling culture continues to exist even within highly prestigious universities: a culture built on intense loyalty to protect the interests of the athletic program, almost at any cost. At both Penn State and Baylor, prestigious universities—led by both prominent university presidents and high-profile head football coaches—systematically protected its football program at the expense of victims of sexual violence.

Perhaps even more troubling, even after the institutional failures at Baylor and Penn State, universities are still seemingly beholden to the “winning at all costs” culture.¹⁰³ In June 2016, less than one week after Baylor coach Art Briles lost his job for giving out too many second chances and ignoring known risks, Mississippi State University showed that the lessons from Penn State and Baylor were not being learned. Rather than revoking the scholarship of a top football recruit who was charged with assault after a video showed him beating a woman repeatedly and gloating as he walked away, Mississippi State allowed the recruit to enroll and gave him a one-game suspension.¹⁰⁴ Mississippi State AD Scott Stricklin said these “type of actions and poor decisions are not acceptable,” but then added, “[f]ive seconds of a really poor choice shouldn't preclude an individual from going to school.”¹⁰⁵ This overly forgiving reaction, unfortunately, seems eerily similar to the response at Baylor. Even after the Peppers report, former University President Ken Starr said: “I can't disagree with the policy judgment to give second chances to young men with a very tough past. . . . Yes, in retrospect it would have been a lot safer to say to these young men, no, we're not going to give a second chance.”¹⁰⁶ Mississippi State's response seems to ignore or callously disregard potential dangers to the entire university student population for the good of the football program. These

103. Pete Van Mullem, *The Baylor Scandal: A Self-Check for Educators*, PHYSICAL & HEALTH EDUC. AM. (July 16, 2016), <http://www.pheamerica.org/2016/the-baylor-scandal-a-self-check-for-educators/>. In recent years, there have also been lower profile examples of educational leaders remaining loyal to their athletic programs at Florida State University, the University of Montana, and the University of Oregon. *Id.*

104. Andrea Adelson, *Mississippi State Bulldogs Learn Nothing from Baylor Bears in Jeffery Simmons Decision*, ESPN (June 2, 2016), http://www.espn.com/college-football/story/_/id/15914709/mississippi-state-bulldogs-learn-baylor-bears-jeffery-simmons-decision. Jeffrey Simmons, an ESPN 300 football recruit, has assault charges pending stemming from an incident where he was shown on video beating a woman repeatedly. *Id.*

105. *Id.*

106. *Id.*; See Mark Schlabach, Brett McMurphy, Paula Lavigne, Jake Trotter, & the Associated Press, *Kenneth Starr to Resign as Chancellor of Baylor But Will Continue to Teach*, ESPN (June 1, 2016), http://www.espn.com/college-sports/story/_/id/15875833/kenneth-starr-resign-chancellor-baylor-continue-teach.

scandals unfortunately show that no university, no matter how prestigious, is immune from scandal, and a culture of abuse and cover-up can likely occur at any major university, this warning has recently been proven again at Michigan State University. One of the big issues raised by these scandals is the relationship between the universities, the NCAA, and the legal system. The legal system can put sexual abusers in jail and impose civil liability on universities, but only the NCAA has the ability to impose eligibility sanctions against these universities.

II. STATE & FEDERAL LAWS – REPORTING REQUIREMENTS

One of the most troubling developments in the Penn State and Baylor scandals was the failure by university and athletic department officials to act promptly and swiftly upon learning about possible criminal conduct. This section examines some of the state and federal laws that require investigation and reporting of criminal activity. The state law section focuses on mandatory reporter laws and the failure to report charges brought against Penn State officials; the federal law section focuses on the Title IX lawsuits brought against Baylor officials for inaction.

A. State Laws – Reporting Criminal Conduct

In the aftermath of the Penn State scandal, both “failure to report” and “child endangerment” charges were filed against three high-level Penn State officials: former President Spanier, former AD Tim Curley, and former VP Gary Schultz.¹⁰⁷ Although the Penn State officials moved to have the charges dropped, prosecutors justified the charges under precedent set during the 2012 conviction of a high-ranking Catholic Church official in Philadelphia.¹⁰⁸ In that case, Monsignor William Lynn was found guilty of “child endangerment” after he reassigned priests to new jobs where they could continue to prey on children, even after those priests had credible sexual abuse allegations lodged against them.¹⁰⁹ Monsignor Lynn’s conviction was a landmark sexual abuse case

107. The court documents for these cases can be found at: http://www.dauphincounty.org/government/courts/curley_schultz_spanier_case_information/index.php.

108. Jon Hurdle & Eric Eckholm, *Msgr. William Lynn of Philadelphia is Convicted of Allowing Abuse*, N.Y. TIMES, June 22, 2012, http://www.nytimes.com/2012/06/23/us/philadelphias-msgr-william-j-lynn-is-convicted-of-allowing-abuse.html?_r=0.

109. *Id.* (during the child endangerment trial, prosecutors produced evidence showing that the administrator of Philadelphia’s Archdiocese had reassigned priests known to have sexually abused children to new parishes without the new pastor’s or community’s knowledge).

because he was the first high-ranking church official in the United States to be convicted based on the actions of his subordinates.¹¹⁰

Similar to the *Lynn* case, where a high-ranking church official failed to take appropriate action despite credible evidence of sexual abuse, Pennsylvania's Chief Deputy Attorney General (AG) Laura Ditka believed that emails from Penn State President Spanier, VP Schultz, and AD Curley proved a collaborated plan to not report Sandusky to police or child welfare officials despite information from graduate assistant coach McQueary, and this inaction foiled a direct opportunity to catch a predator.¹¹¹ After this inaction and failure to report, Sandusky went on to sexually abuse several more boys and his access to Penn State teams and athletic events allegedly helped lure to the boys to these facilities.¹¹² According to AG Ditka, when the administrators decided to handle graduate assistant coach McQueary's report in-house, "they assumed the duty to ensure the matter was handled thoroughly and correctly and cannot now shrug off the responsibility that they chose to assume."¹¹³ Even though Sandusky was no longer an employee at Penn State, AG Ditka believed that the Penn State administrators collectively "still had the duty to ensure that the allegations of sexual improprieties . . . were fully investigated and that sexual predators were excluded from the facilities for which they were responsible."¹¹⁴

Not surprisingly, in an effort to be exonerated from criminal liability, President Spanier, AD Curley, and VP Schultz initially vigorously denied these "child endangerment" and "failure to report" charges.¹¹⁵ All three Penn State officials denied knowing about the scope of Sandusky's alleged abuses and claimed that the record would prove that they made a thoughtful attempt to deal seriously with a potentially horrific situation that lacked clarity.¹¹⁶ Shortly before trial, however, AD Curley and VP Schultz accepted a plea bargain deal in which both pled guilty to one count of endangering children and agreed to testify in the case against former Penn State President Graham Spanier.¹¹⁷ AD

110. *Id.* (guilty verdict "was hailed by victim advocates who have argued for years that senior church officials should be held accountable for concealing evidence and transferring predatory priests to unwary parishes.").

111. Charles Thompson, *Attorney General Ties Jerry Sandusky Cover-Up Prosecution to Catholic Church Sex-Abuse Case*, PENN LIVE, Aug. 25, 2016, http://www.pennlive.com/news/2016/08/attorney_generals_office_hinge.html.

112. See GRAND JURY REPORT ON ALLEGED PENN STATE SEX ABUSE, *supra* note 15, at 11.

113. Thompson, *supra* note 111.

114. *Id.*

115. *Id.*

116. *Id.*

117. Colin Dwyer, *2 Former Penn State Administrators Plead Guilty to Roles in Abuse Scandal*, NPR: THE TWO-WAY (Mar. 13, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/13/519996345/2-former-penn-state-administrators-plead-guilty-to-roles-in-abuse-scandal>.

Curley was ultimately sentenced to seven to twenty-three months (with three months in jail and the remainder served under house arrest) and VP Schultz was sentenced to six to twenty-three months (with two months in jail and the remainder served under house arrest).¹¹⁸

Both AD Curley and VP Schultz testified against ex-Penn State President Spanier who was ultimately convicted on child endangerment charges, but acquitted on conspiracy charges.¹¹⁹ During the case, the Prosecutors argued that Spanier acted criminally when he did not demand that Sandusky be immediately reported to child protection services, after learning about graduate assistant coach McQueary's report about the shower incident.¹²⁰ The key evidence was emails exchanged between the three Penn State officials where they seemingly agreed to not report Sandusky to law enforcement or child protection services, and only barred Sandusky from bringing children to Penn State facilities.¹²¹ In an email to AD Curley and VP Schultz, President Spanier specifically wrote that "[t]he only downside to us is if the message isn't 'heard' and acted upon [by Sandusky], and we then become vulnerable for not having reported it;" Spanier called the plan "humane and a reasonable way to proceed," but the jury ultimately convicted Spanier based on his own words.¹²² One juror noted, "It didn't feel like they were conspiring to endanger children, . . . [t]hey were conspiring to protect Penn State."¹²³ President Spanier was sentenced to four to twelve months, with the first two months in jail and the remainder served under house arrest.¹²⁴

118. Will Hobson, *Former Penn State President Graham Spanier Sentenced to Jail for Child Endangerment in Jerry Sandusky Abuse Case*, WASH. POST, June 2, 2017, https://www.washingtonpost.com/news/sports/wp/2017/06/02/former-penn-state-president-graham-spanier-sentenced-to-jail-for-child-endangerment-in-jerry-sandusky-abuse-case/?utm_term=.d9081bf01da7.

119. Jess Bidgood & Richard Pérez-Peña, *Former Penn State President Found Guilty in Sandusky Abuse Case*, N.Y. TIMES, Mar. 24, 2017, https://www.nytimes.com/2017/03/24/us/graham-spanier-jerry-sandusky-penn-state.html?_r=0.

120. Jason Slotkin, *Ex-Penn State President Guilty of Child Endangerment in Abuse Scandal*, NPR: THE TWO-WAY (Mar. 24, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/24/521427407/ex-penn-state-president-guilty-of-child-endangerment-in-abuse-scandal>.

121. Hobson, *supra* note 118.

122. Slotkin, *supra* note 120. See Associated Press, *Ex-Penn State President Guilty of 1 Count of Child Endangerment*, USA TODAY, Mar. 24, 2017, <https://www.usatoday.com/story/sports/ncaaf/2017/03/24/ex-penn-state-president-guilty-1-count-child-endangerment/99596538/>.

123. Mark Scolforo, *Juror: Ex PSU President's Own Words Showed He Knew of Sandusky Allegations*, INQUIRER, Jan. 11, 2017, <http://www.philly.com/philly/news/pennsylvania/penn-state-sandusky-spanier-jury.html>.

124. Hobson, *supra* note 118.

B. State Law – Reporting Requirements

Although anyone can report suspected child abuse, all states have statutes identifying which persons are required to report suspected child maltreatment to either child protective services, a law enforcement agency, or a state’s toll-free child abuse reporting hotline.¹²⁵ These so-called “mandatory reporters” are people who are required by law to report suspected child abuse and are held legally responsible for not reporting suspected child abuse, and generally include people who come into contact with children as a part of their employment or profession, or even as volunteers in programs designed to serve children.¹²⁶ These mandatory reporting laws¹²⁷ ordinarily address: (1) the persons who are required to report suspected abuse (i.e., *who* is a mandatory reporter?), (2) the definitions for the types of abuse that must be reported (i.e., *what* constituted child abuse, physical abuse, sexual abuse, emotional abuse, and neglect that needed to be reported), (3) the standards for knowing *when* to report abuse (i.e., knowledge and reasonable suspicion) and the specifics of the reporting requirements (i.e., *how*, *when*, and *to whom* a report must be filed?), and (4) the consequences for failing to report.¹²⁸

As a result of the scandal at Penn State and even before the aforementioned cases against the three Penn State officials concluded, legislators in Pennsylvania (and other states) scrambled to re-examine and strengthen their state laws on child endangerment and the mandated reporting of criminal activity. According to the grand jury report in the Penn State scandal, one of the applicable provisions stated that when a staff member reports abuse, “the person in charge of the school or institution has the responsibility and legal obligation to report or cause such a report to be made by telephone and in writing within 48 hours to the Department of Public Welfare.”¹²⁹ Thus, even though the wording of Pennsylvania’s mandatory reporting law appeared to be clear and unambiguous, state lawmakers still set up a special commission to review and revise the law after the Penn State scandal.¹³⁰

125. CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2015), <https://www.childwelfare.gov/pubPDFs/manda.pdf>.

126. *Id.* at 2.

127. *Id.* (detailing the state statutes for reporting child abuse and neglect and noting that forty-eight states have mandatory reporting laws but these laws varied from state to state).

128. *Id.*

129. See GRAND JURY REPORT ON ALLEGED PENN STATE SEX ABUSE, *supra* note 15, at 12.

130. *Changes to Pennsylvania’s Child Protective Services Law*, SENATOR GENE YAW, <http://www.senatorgeneyaw.com/changes-to-pennsylvanias-child-protective-services-law/> (last visited July 30, 2018) (noting that, during the 2013–2014 Legislative Session, “23 pieces of legislation were enacted changing and improving how Pennsylvania responds to child abuse.”).

As a direct result of the special commission, the Pennsylvania Legislature, during the 2013–14 session, ultimately enacted twenty-three pieces of legislation aimed at making sweeping improvements to Pennsylvania’s Child Protective Services Law.¹³¹ Many of these laws were directed at mandated reporting and were designed to improve the required response to child abuse, including making critical improvements to the list of individuals who were required to report child abuse, providing for multidisciplinary investigative teams to coordinate child abuse investigations between county agencies and law enforcement, and increasing the penalty for a mandated reporter’s failure to report child abuse while also providing whistleblower protection to anyone who made a good faith report of suspected child abuse.¹³²

C. *Who is a Mandatory Reporter?*

Perhaps the biggest horror in the Penn State scandal is the fact that so many people were aware of the likely abuse and could have helped bring the abuse to the attention of authorities, but they did not do so and were seemingly not legally required to do so. As a result, many legislators began rethinking mandatory reporter laws with respect to *who* should have a duty to report to the police or state agencies. In most states, including Pennsylvania, the law did not require everyone who suspected child abuse to report it to authorities.¹³³ Instead, most state laws only required members of certain professions who have frequent contact with children to be mandated by law to report child abuse. Thus, reporting laws generally only required teachers, doctors, social workers, peace officers, and emergency responders, and sometimes daycare workers and voluntary athletic coaches, to report child abuse.¹³⁴ Pennsylvania’s new legislation extended the list of mandatory reporters to include athletic coaches, licensing boards, camp counselors, and employers.¹³⁵ It specifically delineated sixteen categories of mandatory reporters, including all school employees, all staff at childcare and medical facilities, and also volunteers who work regularly with youth activities (i.e., sports, church groups, boy scouts, or dance

131. Lucy Johnston-Walsh & Megan M. Riesmeyer, *A Practitioner’s Guide To New Developments in Pennsylvania’s Child Protection Law*, 86 PA. B.A. Q. 59 (2015) (discussing the changes to Pennsylvania’s Child Protection Law).

132. *Changes to Pennsylvania’s Child Protective Services Law*, *supra* note 130 (outlining the changes made effective in 2014 as a result of the Penn State saga).

133. See 23 PA. CONS. STAT. § 6311 (2014); see also MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, *supra* note 125, at 2 (detailing the state statutes for reporting child abuse and neglect and noting that most states only require some people in certain professions to report child abuse and neglect).

134. See MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, *supra* note 125, at 2.

135. § 6311(a) (delineating the persons required to report child abuse).

companies).¹³⁶ In addition to the new class of mandatory reporters, the revised law clarified some of the old category of reporters. For example, “school employees” now included staff at all public, private, and community colleges, in addition to K-12 schools.¹³⁷ Some jurisdictions even began requiring every adult who had “regular contact” with a child to report any form of suspected abuse.¹³⁸ Some states extended the law to require reports by **any** person who suspected child abuse or neglect.¹³⁹ The legislation reflected public outrage that several individuals at Penn State, who could have made a difference and prevented the continuing abuse, failed to directly report Jerry Sandusky to authorities. More specifically, many people believed that several Penn State officials, including coaches Joe Paterno and Mike McQueary, should have been required to directly report the abuse to the authorities, rather than merely passing the information onto supervisors and allowing only an internal investigation to occur.

D. What is Filing a Report? To Whom?

In addition to expanding the rules regarding *who* was required to file a report, the revised Pennsylvania law provided clearer rules for filing a report and to whom the report needed to be filed. Prior to the changes, Pennsylvania’s

136. *Id.*; *Who Are Mandated Reporters?*, PA. FAM. SUPPORT ALLIANCE, <http://www.pa-fsa.org/Mandated-Reporters/Understanding-Mandated-Reporting/Who-are-Mandated-Reporters> (last visited July 30, 2018) (“Mandated reporters generally are people who come into contact with children as a part of their employment, practice of their profession and, sometimes, as volunteers in child-serving programs”).

137. *Who Are Mandated Reporters?*, *supra* note 136.

Effective December 31, 2014, these people are considered mandated reporters under Pennsylvania Law: School employee (someone who is employed by the school or who provides a program, activity or service sponsored by a school). This includes youth camp/program, a recreational camp or program; sports or athletic program, outreach program, enrichment program and a troop, club or similar organization

138. MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, *supra* note 125, at 2.

139. *Id.* (noting that eighteen states now require reports by any person who suspects child abuse or neglect). Some states, like Texas, now require anyone with knowledge of suspected child abuse or neglect to report it to the appropriate authorities. *Id.* This mandatory reporting applies to all individuals and is not limited by profession (e.g., teachers, health care workers, etc.) and even extends to individuals whose personal communications might be otherwise privileged, such as attorneys and clergy members. TEX. FAM. CODE § 261.101 (2018). Section 261.101 mandates that anyone who suspects child abuse or neglect must immediately report it to (1) any local or state law enforcement agency, or (2) the Department of Family and Protective Services. § 261.103. Thus, the report must be made to an agency charged with expertise in child abuse and merely reporting the incident to a supervisor or manager is insufficient. In addition, Texas law broadly defines “abuse” and “neglect” so that every action in which a child’s physical or mental health or welfare has been or may be adversely affected is potentially covered. § 261.001(1), (4). Furthermore, a person acting in good faith who reports or assists in the investigation of a report of child abuse or neglect is immune from civil or criminal liability, section 261.106(a), but failure to report suspected child abuse or neglect is a Class A Misdemeanor, punishable by imprisonment of up to one year and/or a fine of up to \$4,000.00. *See* § 261.109.

law, like the law in many states, allowed educators who were aware of possible abuse to report it only to their workplace supervisors.¹⁴⁰ Under the Pennsylvania law in effect at the time of the Sandusky incident, coach Joe Paterno (and even graduate assistant coach Mike McQueary) both reported the possible child rape to their superiors and therefore probably complied with their legal statutory duty.¹⁴¹ The old law then arguably required coach Paterno's bosses to report the alleged abuse to law enforcement officials, and only those supervisors (AD Tim Curley and University VP Gary Schultz) faced charges for failing to notify police about the suspected abuse by Sandusky.¹⁴² To rectify the loophole of the problem merely being "passed up the chain of command," Pennsylvania's revised law now requires all reports to be made to the state's ChildLine hotline, rather than leaving it to the supervisors to report.¹⁴³ The hotline specialists then route the report to the appropriate child welfare or police agency for

140. Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37 (2014). See Nirvi Shah, *Penn State Scandal Shines Light on Child-Abuse Reporting Laws*, EDUC. WEEK, Nov. 16, 2011, <https://www.edweek.org/ew/articles/2011/11/16/13abuse.h31.html>; *Panel Recommends Changes to Pa. Hot Line for Reporting Child Abuse*, WHYY, <https://whyy.org/articles/panel-recommends-changes-to-pa-hotline-for-reporting-child-abuse/> (last visited July 30, 2018).

141. Brown III & Gallagher, *supra* note 140.

142. *Id.*

143. § 6313 (delineating the basis for filing a report); *What Are a Mandated Reporters Responsibilities?*, PA. FAM. SUPPORT ALLIANCE, <http://www.pa-fsa.org/Mandated-Reporters/Understanding-Mandated-Reporting/What-are-a-Mandated-Reporters-Responsibilities> (last visited July 30, 2018).

Mandated reporters are required to make a report of suspected abuse when they have reasonable cause to suspect that a child is a victim of child abuse under any of the following circumstances:

They have contact with the child as part of work or through a regularly scheduled program activity or service OR

They are responsible for the child or work for an agency that is directly responsible for the child OR

Someone makes a specific disclosure to the mandated reporter and the child is identifiable. This includes children that the mandated reporter may not know through their work or volunteer position OR

A person 14 years old or older makes a disclosure that he/she has committee child abuse. This includes children that the mandated reporter may not know through their work or volunteer position.

The child does NOT have to come before the mandated reporter in order for the mandated reporter to make a report of suspected child abuse.

Mandated reporters must not try to determine whether abuse has happened. They are not investigators and should not ask questions about what happened, who did it, and so forth beyond reaching the threshold of reasonable cause to suspect that the child has been abused.

investigation.¹⁴⁴ Thus, the duty to file a report is now only fulfilled when the extended list of mandatory reporters go outside their institutions and file a report with an agency possessing special expertise in deciphering the validity of such reports.¹⁴⁵

Under this portion of Pennsylvania's revised law, when former Penn State graduate assistant football coach Mike McQueary observed the shower-room incident, he would have been required to report the conduct directly to an outside authority with expertise, instead of reporting it to university officials, who were subsequently implicated in failing to further the investigation. Likewise, coach Joe Paterno, upon learning about the incident, would have been required to file a report with an agency with special expertise for these incidents. Thus, Pennsylvania's revised mandatory reporter law now requires a direct report to the hotline specialist, rather than just passing of information on to immediate supervisors. These safeguards might have led to Sandusky's arrest ten or more years earlier.

E. When Must a Report Be Filed?

Another issue in mandatory reporting laws involves when a report must be filed. In other words, how much evidence of abuse was needed to trigger the legal duty to report? In many instances, individuals have claimed their failure to report resulted from a lack of concrete evidence of abuse and uncertainty about when a report was required to be filed. In the Penn State scenario, graduate assistant coach McQueary seemed confused about whether he needed to report. The revised Pennsylvania law triggers a duty to file a report whenever a mandatory reporter has "reasonable cause" to suspect child abuse because the reporter either directly observed suspected abuse or received a credible second-hand report with an identifiable victim.¹⁴⁶ The report must be made immediately and include the victim's identity, the nature and extent of the suspected abuse, the name and relationship of the suspect (to the victim), and

144. § 6313.

145. *Id.*; *Reporting Child Abuse*, PA. FAM. SUPPORT ALLIANCE, <http://www.pa-fsa.org/Mandated-Reporters/Understanding-Mandated-Reporting/Making-a-Report> (last visited July 30, 2018).

To fulfill his legal mandate, when a mandated reporter has reasonable cause to suspect that a child is being abused, he must immediately make the report. This can now be done in two ways:

(1) Call ChildLine at 1-800-932-0313 . . . ChildLine is available 24 hours/ 7 days a week. As a mandated reporter, you must provide your name and contact information when making the call. After making the call, mandated reporters must follow up with an electronic report or a written report completed on the CY-47 form within 48 hours of making the oral report. (2) Submit the report electronically.

146. *What Are a Mandated Reporters Responsibilities?*, *supra* note 143.

the source of the information if from a second-hand source.¹⁴⁷ By clarifying when a report must be filed and the precise information required in the report, the mandatory reporter now has better information on what must be done and higher quality reports are likely to be filed. Importantly, the mandatory reporter does not have to determine whether abuse occurred.

The revisions to the Pennsylvania law were designed to avoid cases from “falling through the cracks.” These revisions tried to ensure that people report their suspicions and avoid thinking that more evidence is needed before filing a report. At Penn State, both McQueary and Paterno would have been required to file a report to child protective experts. Thus, the revised law tries to ensure that professional experts assess these situations, and determine whether a child needs help and whether criminal behavior has occurred.

F. Penalties for Failure to Report

The revised Pennsylvania law also increased the penalty for failure to report, but also ensured that reporters received protection for reports, made in good faith, that turned out to be erroneous.¹⁴⁸ The revised Pennsylvania law also increased the penalties for the willful failure to report for mandated reporters who had reasonable suspicion of abuse and decided not to report it. The first offense is a second-degree misdemeanor and becomes a third-degree felony for multiple offenses, but the penalties also increase to a third-degree felony if the mandated reporter fails to report child abuse that is a first-degree felony of which the mandated reporter has direct knowledge.¹⁴⁹ Finally, the revised law also expanded immunity from liability and protection from

147. § 6313(b).

148. § 6319(a) (delineating the penalties for failure to report).

149. *Id.*; *Penalties for Willful Failure to Report Child Abuse*, PA. FAM. SUPPORT ALLIANCE, <http://www.pa-fsa.org/Mandated-Reporters/Understanding-Mandated-Reporting/Penalties-for-Failing-to-Report> (last visited July 30, 2018).

Willful failure to report (having a reasonable suspicion of abuse and deciding not to report it) may be punished. The penalties for failure to report have been increased under the new CPSL amendments. The first offense of willful failure to report is a second degree misdemeanor. Penalties are increased to a third degree felony if the mandated reporter willfully fails to report child abuse that is a felony of the first degree or higher and the mandated reporter has direct knowledge of the nature of the abuse. For multiple offenses, a felony of the third degree is committed, increasing if the abuse of the child is a felony of the first degree or higher. If willful failure to report continues, while the mandated reporter knows or has reasonable cause to believe the child is being actively abused, the offense is considered a first degree misdemeanor except when the abuse to the child constitutes a felony of the first degree or higher. In this instance the penalty is a felony of the third degree.

employment discrimination because of making a report.¹⁵⁰ More specifically, any mandated reporter who acted in good faith in making a report is shielded from both civil and criminal liability, and good faith is assumed.¹⁵¹

G. Federal Law – Reporting Requirements – Title IX

Although Pennsylvania’s revised state law might have helped to ensure the reporting of the conduct at Penn State and possibly prevented years of abuse, most state reporting laws only apply to conduct involving minors, which makes them largely inapplicable to the situation at Baylor and other college campuses. For that reason, Title IX¹⁵² has become the preferred legal recourse for trying to impose accountability on universities for failures with respect to campus sexual violence.¹⁵³ Title IX was originally passed in 1972 as

150. §§ 6318, 6320 (delineating immunity from liability and protection from employment discrimination); *Protection for Mandated Reporters*, PA. FAM. SUPPORT ALLIANCE, <http://www.pafsa.org/Mandated-Reporters/Understanding-Mandated-Reporting/Protection-for-Mandated-Reporters> (last visited July 30, 2018) (“The amendments to the CPSL have expanded immunity from liability for reporting general protective services cases and testifying in proceedings as a result of the general protective services report. Also, mandated reporters may not be the victims of employment discrimination because they have made a report.”).

151. *Protection for Mandated Reporters*, *supra* note 150.

All persons are protected from civil and criminal liability if acting in good faith when reporting, cooperating and consulting in investigations, testifying in proceedings as a result of the report, taking photographs, arranging for medical tests and x-rays, taking a child into protective custody (as allowed under the CPSL) and admitting a child to a private or public hospital. The good faith of a mandated reporter is assumed.

152. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2018).

153. In addition to Title IX, educational institutions have a legal obligation to report suspected abuse under two other federal statutes: (1) The Jeanne Clery Disclosure of Campus Security Policy and Campus Crimes Statistics Act of 1991 (Clery Act), 20 U.S.C. § 1092(f) (1991) and (2) the Campus Sexual Violence Elimination Act of 2013 (SaVE Act), which is embedded within the 2013 reauthorization of 1994’s Violence Against Women Act. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 89 (2013). The Clery Act was originally called the Crime Awareness and Campus Security Act and was promulgated in 1990. Jeremy D. Heacox, *S-A: Clery Act Responsibilities for Reporting Allegations of Peer-on-Peer Sexual Assaults Committed by Student-Athletes*, 10 WILLAMETTE SPORTS L.J. 48, 51 (2012). It requires colleges to report crimes that occur on campus and was named after Jeanne Clery, a student at Lehigh University who was raped and murdered in her dorm room in 1985. *Id.* Her parents discovered that students had not been told about dozens of violent crimes that had taken place on campus in the three years before her murder, and lobbied Congress for enhanced reporting requirements. *Id.* “The primary purpose of the Clery Act was to increase transparency around campus crime so that prospective students and their parents could make more knowledgeable decisions about which schools to attend.” Nancy Chi Cantalupo, ‘Decriminalizing’ Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 481, 511 (2012) (citing H.R. REP. NO. H11499-01, at 1 (1990) (Conf. Rep.) (statement of Rep. Gooding)). In 2013, Congress passed the SaVE Act which built on and clarified Title IX obligations of colleges and universities to protect abuse victims. Jill C. Engle, *Mandatory Reporting of Campus Sexual Assault and Domestic Violence: Moving to a Victim-Centric Protocol that Comports with Federal Law*, 24 TEMP. POL. & C.R. L. REV. 401, 404 (2015). The SaVE Act called for increased transparency regarding the frequency of campus violence. *Id.* More

an amendment to the Civil Rights Act of 1964 and hailed as a landmark federal civil right because it opened educational doors to women and prohibited discrimination based on sex.¹⁵⁴ Until recently, it was probably best known for ensuring equal opportunities and funding for women in high school and college athletics, which had been lacking until required by Title IX regulations. More recently, because of the 2011 “Dear Colleague Letter” issued by the Department of Education, Title IX has become a tool for fighting unchecked sexual violence at educational institutions and it now prohibits gender discrimination and sexual harassment by any educational institution that receives federal funds.¹⁵⁵

The “Dear Colleague Letter” issued by the Office for Civil Rights of the Department of Education to educational institutions recognized that sexual harassment, which included sexual violence, was “a form of sex discrimination prohibited by Title IX.”¹⁵⁶ After proclaiming that sexual violence, which included sexual assault, sexual battery, sexual harassment, and sexual coercion, constituted discrimination under Title IX, the “Dear Colleague Letter” noted that such sexual violence was both pervasive and under-reported.¹⁵⁷ In an effort to combat the discrimination stemming from sexual violence on campuses and

specifically, the SaVE Act requires institutions to collect statistics from a broad range of campus officials including resident advisors, deans, athletic coaches, campus police or security, and local law enforcement. *Id.*

154. 20 U.S.C. § 1681(a). Title IX reads: “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.” *Id.* Thus, by its terms, the law prohibited educational programs that receive federal funding, which is the vast majority of schools (from elementary schools to colleges), from discriminating based on sex.

155. Russlynn Ali, Acting Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFF. FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (recognizing that “Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance.”).

156. *Id.* The letter defined sexual violence as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol,” including “sexual assault, sexual battery, and sexual coercion,” and required colleges and universities “to take immediate and effective steps to end sexual harassment and sexual violence.” *Id.*

157. For example, recent data shows nearly 4,000 reported incidents of sexual battery other than rape and 800 reported rapes and attempted rapes occurring in *our nation’s public high schools*. SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2010, BUREAU OF JUSTICE STATISTICS 104 (Nov. 2010), <https://nces.ed.gov/pubs2011/2011002.pdf>. Indeed, by the time girls graduate from high school, more than one in ten will have been physically forced to have sexual intercourse in or out of school. DANICE K. EATON ET AL., YOUTH RISK BEHAVIOR SURVEILLANCE 2009, MORBIDITY & MORTALITY WEEKLY REPORT (2010) available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/ss5905a1.htm#tab12>. When young women get to college, nearly 20% of them will be victims of attempted or actual sexual assault, as will about 6% of undergraduate men. CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY, NAT’L INST. OF JUSTICE, 5-3, 5-5 (Dec. 2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>; see Russlynn Ali, Acting Assistant Secretary for Civil Rights, *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts*, OFF. FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf>.

comply with Title IX, the “Dear Colleague” Letter required schools to take the following actions:

- Once a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate action to investigate or otherwise determine what occurred.
- If sexual violence has occurred, a school must take prompt and effective steps to end the sexual violence, prevent its recurrence, and address its effects, whether or not the sexual violence is the subject of a criminal investigation.
- A school must take steps to protect the complainant as necessary, including interim steps taken prior to the final outcome of the investigation.
- A school must provide a grievance procedure for students to file complaints of sex discrimination, including complaints of sexual violence. These procedures must include an equal opportunity for both parties to present witnesses and other evidence and the same appeal rights.
- A school’s grievance procedures must use the preponderance of the evidence standard to resolve complaints of sex discrimination.
- A school must notify both parties of the outcome of the complaint.¹⁵⁸

These new Title IX requirements dramatically altered the compliance obligations on educational institutions and subsequently resulted in the filing of numerous Title IX lawsuits against universities for noncompliance. Additionally, in *Davis v. Monroe Cty. Bd. of Educ.*,¹⁵⁹ the United States Supreme Court had already held that educational institutions could be liable for damages if the institution is deliberately indifferent to known, severe, pervasive, and objectively offensive sexual harassment that deprives the victim of access to educational opportunities.¹⁶⁰ Not surprisingly, seven Title IX suits have been filed against Baylor and the scope of the allegations in these lawsuits is chilling. Baylor’s Board of Regents has admitted that seventeen women have accused nineteen Baylor football players of sexual assault—including four gang rape

158. Russlynn Ali, *supra* note 157.

159. 526 U.S. 629, 648–50 (1999).

160. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648-50 (1999).

allegations—since 2011.¹⁶¹ The allegations in the lawsuits claim that the number of players involved and the number of rapes is even higher.

The first Title IX action brought against Baylor alleged that university officials had been “deliberately indifferent to complaints by student victims of rape” by athletes on the Baylor campus.¹⁶² The rape victim’s mother alleged that Baylor “was not helpful in guiding her daughter during this academically stressful time,” and that the victim even lost her scholarship following the assault.¹⁶³ Other rape victims filed Title IX lawsuits alleging that Baylor “knew about previous sexual assault allegations against [football player] Elliott and failed to take proper action to protect other students.”¹⁶⁴ These women also claim that Baylor failed to timely hire a Title IX coordinator to oversee and handle such complaints.¹⁶⁵ According to the attorney who filed the Title IX action, “[r]ather than following the law intended to protect victims like our client, Baylor failed to investigate these allegations, allowed Elliott to remain a threat to other female students and did nothing to offer any counseling or academic support, which ultimately forced her to drop out of Baylor.”¹⁶⁶

One of the scarier allegations alleges that Baylor’s chief judicial officer, Bethany McCraw, told one of the sexual assault victims (“Jane Roe”) that she was the sixth female to report being sexually assaulted by football player Elliott.¹⁶⁷ Baylor’s chief judicial officer then told Roe “there was nothing the school could do for Roe unless there was a court determination that Elliott had indeed raped Roe” because otherwise “it would come down to a

161. Brad Reagan, *Baylor Regents Found Alleged Sexual Assaults by Football Players ‘Horrrifying’*, WALL ST. J., Oct. 28, 2016, <https://www.wsj.com/articles/baylor-details-horrifying-alleged-sexual-assaults-by-football-players-1477681988>.

162. Tommy Witherspoon, *Former Baylor Student to File Lawsuit Over School’s Handling of Elliott Sexual Assault*, WACO TRIB.-HERALD, Mar. 30, 2016, http://www.wacotrib.com/former-baylor-student-to-file-lawsuit-over-school-s-handling/article_ff8d1ba1-394b-52b3-909e-cdad7a40a43e.html.

163. Solis, *supra* note 57.

164. Complaint & Demand for Jury Trial, *supra* note 60; Ambrose & Tarrant, *supra* note 60; Witherspoon, *supra* note 60.

165. Complaint & Demand for Jury Trial, *supra* note 60.

166. Witherspoon, *supra* note 60.

167. Second Amended Complaint & Demand for Jury Trial, *supra* note 61.

At this meeting, McCraw informed Roe that there was nothing McCraw could do in response to Roe’s complaint that she had been raped by Elliott. McCraw also told Roe and her mother that Roe was the sixth female student to come in to McCraw’s office to report that they had been sexually assaulted by Elliott. Roe and her mother asked if Briles knew of these reports, to which McCraw responded that Briles was aware of the reports. McCraw told Roe and her mother that there was nothing the school could do for Roe unless there was a court determination that Elliott had indeed raped Roe. Otherwise, McCraw said, it would come down to a “he said-she said” situation, and the school could not act on it.

Id.; Witherspoon, *supra* note 60.

‘he-said-she-said’ situation, and the school could not act on it.”¹⁶⁸ McCraw also told Roe that head football coach Art Briles was aware of the reports.¹⁶⁹ The lawsuit also alleges that the rape victim’s mother and father both contacted coach Briles’ office multiple times and received a call that Briles was “looking into” the matter.¹⁷⁰ Finally, according to the complaint, the rape victim notified and received little, if any, help from Baylor’s Academic Services Department, Counseling Center, or psychology department at Baylor’s Student Health Center.¹⁷¹

Even more recently, another Title IX lawsuit against Baylor alleges even more widespread problems including at least fifty-two acts of rape by thirty-one Baylor football players from 2011-2014.¹⁷² The complaint alleges that football players participated in five gang rapes, two of which involved ten or more players at the same time.¹⁷³ The suit also alleges that players videotaped and shared the recordings with their teammates and that coaches created a “culture of sexual violence” by encouraging female students in the Baylor Bruins hostess program to have sex with recruits and players.¹⁷⁴ It also alleges that Baylor enticed a student athletic trainer, who had accused a football player of rape, to sign a non-disclosure agreement in exchange for Baylor paying for her education.¹⁷⁵ These latest allegations surpass Baylor’s own admission that 19 football players had committed acts of sexual or domestic violence from 2011-16.¹⁷⁶

In the most recent and seventh Title IX suit filed in May of 2017, even more disturbing details emerged. The complaint alleges that football team had a system of drugging and gang raping freshman females, and photographing and

168. Witherspoon, *supra* note 60.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Elizabeth Doe vs. Baylor University*, WASH. POST, <http://apps.washingtonpost.com/g/documents/sports/elizabeth-doe-vs-baylor-university/2309/> (last visited July 30, 2018); Sarah Mervosh, *New Baylor Lawsuit Alleges 52 Rapes by Football Players in 4 years, ‘Show Em a Good Time’ Culture*, DALL. MORNING NEWS, Jan. 27, 2017, <https://www.dallasnews.com/news/baylor/2017/01/27/new-baylor-lawsuit-describes-show-em-good-time-culture-cites-52-rapes-football-players-4-years>; Will Hobson, *Lawsuit Alleges Baylor Football Rape Scandal More Widespread Than Reported*, WASH. POST, Jan. 27, 2017, https://www.washingtonpost.com/sports/colleges/lawsuit-alleges-baylor-football-rape-scandal-more-wide-spread-than-reported/2017/01/27/38e93d3e-e4e0-11e6-a5475fb9411d332c_story.html?tid=a_inl&utm_term=.d9e56d5befc2.

173. *Elizabeth Doe vs. Baylor University*, *supra* note 172.

174. *Id.*

175. *Id.*

176. Reagan, *supra* note 161.

videotaping the sexual assaults and rapes.¹⁷⁷ The suit also alleges that the players then harassed the sexual assault victims through text messages, and that the university never accommodated or properly counseled the victims who reported sexual assaults.¹⁷⁸

In addition to the seven Title IX lawsuits brought against Baylor, the last two Title IX compliance officers at Baylor have filed complaints with the Department of Education. The first Title IX officer claimed that she was intimidated from fully investigating sexual assault cases, involving football players. More recently, the Title IX officer claimed that Baylor violated Title IX provisions even after the school supposedly implemented changes recommended by the Baylor Board of Regents. As a result, the U.S. Department of Education launched a Title IX investigation into how Baylor has dealt with sexual violence on its campus.¹⁷⁹

Unfortunately, Baylor University is not the only institution under investigation for potential Title IX violations because of their deliberate indifference to sexual assault complaints. Over three-hundred institutions are currently facing federal Title IX inquiries concerning their handling of sex assault allegations.¹⁸⁰ In 2016, the University of Tennessee settled a Title IX lawsuit for \$2.48 million.¹⁸¹ The lawsuit stemmed from sexual and physical assaults by student athletes reported by eight female students between 2013 and 2015, and accused the University of permitting a culture of sexual assault to thrive on its campus of 27,845 students.¹⁸² The Title IX complaint also alleged that the university's administrative hearing process was one-sided and "denie[d] victims the rights to a hearing and to the same equal procedural, hearing, and

177. Phillip Ericksen, *Baylor Hit with 7th Title IX Lawsuit, Plaintiff Alleges Gang Rape by Football Players*, WACO TRIB.-HERALD, May 17, 2017, http://www.wacotrib.com/news/courts_and_trials/baylor-hit-with-th-title-ix-lawsuit-plaintiff-alleges-gang/article_1b391c59-1722-5532-9c3b-058b07850249.html.

According to the suit, the football team had a system of hazing freshman recruits by having them bring freshman females to parties to be drugged and gang-raped, "or in the words of the football players, 'trains' would be run on the girls." Considered a bonding experience by the players, according to the suit, the rapes also were photographed and videotaped, and the plaintiff confirmed that at least one 21-second videotape of two Baylor students being gang-raped by football players had circulated.

178. *Id.*

179. Tom Steele, *Baylor Faces Title IX Investigation Over Its Handling of Sexual Assault On Campus*, DALL. MORNING NEWS, Oct. 19, 2016, <https://www.dallasnews.com/news/higher-education/2016/10/19/baylor-faces-title-ix-investigation-handling-sexual-assault-campus>.

180. Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges Than Most People Know*, HUFFINGTON POST, June 16, 2016, https://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d.

181. Steve Almasy & Khushbu Shah, *University of Tennessee Settles Title IX Lawsuit*, CNN (July 5, 2016), <http://www.cnn.com/2016/07/05/us/tennessee-title-ix-lawsuit/>.

182. *Id.*

process rights as given to perpetrators of rape and sexual assault,” and accused the university of providing lawyers for students accused of misconduct and interfering with investigations.¹⁸³ The case was settled only after the plaintiffs were satisfied that the university made significant progress in sexual assault prevention education and the way in which the school responded to assault claims, which included the hiring of six more people in Title IX compliance positions.¹⁸⁴ According to the attorney for the plaintiffs, “[m]y clients and I are also convinced that the university’s leadership is truly committed to continue its exemplary efforts to create a model as it relates to sexual misconduct.”¹⁸⁵ Although the settlement agreement did not admit guilt, negligence, or that laws were broken, University of Tennessee Chancellor Jimmy G. Cheek said, “[l]ike many institutions we are not perfect, but our goal is to continue to be the best we can be at creating awareness, educating and preventing discrimination and abuse in any form, and to continue to be equally prepared when it does happen and to deal with it promptly, sensitively, fairly and effectively,” and that “[w]e’ve come a long way in recent years, and we are working every day to be even better.”¹⁸⁶

III. THE NCAA’S ROLE

In addition to the possibility that state and federal law can help address and possibly curb the problems seen at Penn State, Baylor and other universities, the NCAA, as the governing body for college athletics, can probably best address these issues. Prior to the Penn State scandal, NCAA President Mark Emmert had indicated a willingness to punish rule-breakers severely, indicating that the infractions committee should make the harshest penalties an option including using the “death penalty” as a deterrent.¹⁸⁷ According to Emmert, in unique circumstances and rare cases, “TV bans and death penalties [may be] warranted . . . [and shouldn’t be] off the table.”¹⁸⁸ Despite Emmert’s comments, the NCAA has probably been hesitant to impose the death penalty, especially because of the consequences that resulted from the imposition of the death penalty at Southern Methodist University (“SMU”). In the 20 years after the resumption of football at SMU after the death penalty, the

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Associated Press, *NCAA President Mark Emmert Says Death Penalty an Option to Punish Rule-Breakers*, ESPN (Aug 19, 2011), http://espn.go.com/college-football/story/_/id/6877907/ncaa-president-mark-emmert-says-death-penalty-option-punish-rule-breakers.

188. *Id.*

school posted only one winning record and did not reach another bowl game for decades (until 2009).¹⁸⁹ It is also widely believed that the death penalty played a role in the breakup and then dissolution of the Southwest Conference. Former SMU football coach Phil Bennett once described the NCAA “death penalty” as like an “atomic bomb” because “[t]he NCAA did it one time and created devastation beyond belief—and it’s never going to be done again.”¹⁹⁰

A. *The NCAA & PSU*

On November 17, 2011, less than two weeks after the indictment and arrest of Jerry Sandusky, the NCAA notified Penn State that it would face an NCAA investigation.¹⁹¹ According to NCAA President Mark Emmert’s letter to Penn State, the NCAA was going to “examine Penn State’s exercise of institutional control over its intercollegiate athletics program” because the Sandusky grand jury indictment alleged that serial sexual abuse occurred in the university’s athletic facilities and Penn State officials may have failed to take proper action despite their knowledge of this behavior.¹⁹² The NCAA specifically noted that “individuals who were in a position to monitor and act upon learning of potential abuses” appear to have acted in a way that was “starkly contrary to the values of higher education, as well as the NCAA.”¹⁹³ The NCAA set forth several constitutional and bylaw provisions that may have been violated:

- a failure to meet the NCAA’s standards for institutional control and responsibility, and ethical conduct, and specifically Penn State’s responsibility to oversee that “the actions of its staff members and for the actions of any individual or organization engaged in activities promoting the athletics interests of the university” (para. 2) (Articles 2.1, 6.01.1, and 6.4),
- a failure to promote “civility in society” and “adhere to such fundamental values as respect, fairness, civility, honesty, and responsibility” that should be manifested “in the broad

189. *Id.*

190. Tim Layden, *The Loneliest Losers*, SPORTS ILLUSTRATED: VAULT, Nov. 18, 2002, <https://www.si.com/vault/2002/11/18/8116719/the-loneliest-losers-fifteen-years-ago-smus-powerhouse-football-program-was-obliterated-by-a-pay-for-play-scandal-and-the-ncaas-first-quotdeath-penaltyquot-since-then-20-other-college-programs--including-alabama-football-this-y> (explaining that since the NCAA enforced its “death penalty” sanction against Southern Methodist University, “20 other college programs . . . have qualified for the ultimate sanction, but all have been spared” and that was written more than ten years ago).

191. Letter from Mark A. Emmert, President, NCAA, to Rodney Erickson, President, Pa. St. Univ. (Nov. 17, 2011) (on file with Pennsylvania State University), available at <http://www.psu.edu/ur/2011/NCAA.pdf>.

192. *Id.*

193. *Id.*

spectrum of activities affecting the athletics program” (para. 2) (Article 2.4),

- engaging in unethical conduct through deceit and dishonesty, and “behavior that endangers young people” (para. 3) (NCAA Bylaw 10.1 & 11.1.1),
- a failure by the head coach “to promote an atmosphere for compliance within the program” and “monitor the compliance of all assistant coaches and other administrators involved with the program who report directly or indirectly to the head coach” (para. 3) (NCAA Bylaw 11.1.2.1), and
- failures by individuals associated with the athletics program to meet the “ethical expectations of the NCAA membership” by engaging in “improper conduct or questionable acts” and failing to set an example of high “moral values” (para. 4) (NCAA Bylaw 19.01.2).¹⁹⁴

The NCAA ultimately agreed to Penn State’s request that the NCAA defer further action until Penn State completed its own extensive investigation and shared its findings with the NCAA.¹⁹⁵

Less than one year later, in July 2012, shortly after Penn State publicly released the Freeh Report and several months after Sandusky’s conviction, NCAA President Emmert informed Penn State that the NCAA’s Board of Directors (which historically had no role in rules enforcement) wanted to “unilaterally impose”¹⁹⁶ the “death penalty” on PSU’s football program, which would have completely shut down the football program for multiple years.¹⁹⁷ Interestingly, before threatening Penn State with the death penalty, the NCAA did not launch its own investigation or go through the disciplinary procedures via the “Committee on Infractions” as stipulated in its bylaws.¹⁹⁸ Instead, the NCAA informed Penn State that the findings of the Freeh Report proved an extraordinary institutional failure that justified direct action by the Board of Directors and the possible imposition of the death penalty. Perhaps even more interestingly, even the NCAA’s “Committee on Infractions, which is empowered to identify . . . rules violations and determine . . . disciplinary

194. *Id.*

195. Don Van Natta Jr., *Inside the Secret Negotiations That Brought Penn State Football to the Brink of Extinction*, ESPN (Aug. 4, 2012), http://www.espn.com/espn/otl/story/_id/8228641/inside-secret-negotiations-brought-penn-state-football-brink-extinction.

196. Matthew Mitten, *The Penn State “Consent Decree”*: *The NCAA’s Coercive Means Don’t Justify Its Laud-able Ends, but is There a Legal Remedy?*, 41 PEPP. L. REV. 321, 326 (2014).

197. Van Natta Jr., *supra* note 195.

198. Mitten, *supra* note 196.

sanctions,”¹⁹⁹ seemingly did not have the “explicit authority to impose [the] [death penalty] . . . because [Penn State’s] athletic programs had [not] been . . . guilty of a major NCAA rules violation within the preceding five-year period,”²⁰⁰ which is a prerequisite to the death penalty.²⁰¹

Less than one week after the NCAA informally threatened Penn State with the death penalty, Penn State accepted a Binding Consent Decree, a plea agreement between the university and the NCAA.²⁰² To avoid the death penalty, Penn State agreed to the following penalties²⁰³:

- [a] \$60 million fine (the program’s gross annual income) . . . to be paid over a five-year period . . . into an endowment for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse,
- [a] four-year postseason ban,
- a limit of 15 initial grants-in-aid for four years,
- [f]ive years of probation,
- vacat[ing] all wins [112] of the Penn State football team from 1998-2011 (which meant that Coach Paterno would no longer be college football’s winningest coach), and
- [agreeing] to adopt all [117] recommendations . . . in Chapter 10 of the Freeh Report.²⁰⁴

199. *Id.*

200. *Id.* NCAA Bylaws “permit[] the ‘death penalty,’ which prohibits an institution from participating in an intercollegiate sport for a designated period of time, to be imposed only on “repeat violators” (i.e., institutions found guilty of a “major violation” within the past five years).” *Id.* at 326 n.37; see *Enforcement Process: Penalties*, NCAA, <http://www.ncaa.org/enforcement/enforcement-process-penalties> (last visited July 30, 2018). “A ‘major violation’ is defined as a violation other than one “that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit.” *Id.* at 327 n.37.

Th[e] [death] [penalty] has been imposed only five times, generally in extreme cases in which an institution has committed intentional, severe, and repeated major violations demonstrating clear disregard for NCAA rules: University of Kentucky (no men’s basketball during 1952–1953 season); University of Southwestern Louisiana (no men’s basketball during 1973–1974 and 1974–1975 seasons); Southern Methodist University (no football during 1987–1988 season); Morehouse College (no men’s soccer during 2003–2004, 2004–2005, and 2005–2006 seasons); and MacMurray College (no men’s tennis during 2005–2006 and 2006–2007 seasons).

201. *Enforcement Process: Penalties*, *supra* note 200.

202. Mitten, *supra* note 196, at 327.

203. *Id.*

204. RODNEY A. ERICKSON & MARK A. EMMERT, BINDING CONSENT DECREE IMPOSED BY THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND ACCEPTED BY THE PENNSYLVANIA STATE

According to the Consent Decree, Penn State acknowledged that the findings of the Freeh Report established that Penn State violated the NCAA principles, bylaws, and rules referenced in the NCAA's original letter from NCAA President Emmert on November 17, 2011, agreed that a "traditional investigative and administrative proceedings would be duplicative and unnecessary,"²⁰⁵ and waived its rights "to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rules, and any judicial process."²⁰⁶ Thus, the NCAA used its "de facto 'best interests' power to punish a member university for individual criminal activity and institutional misconduct"²⁰⁷ that might not have been "actionable by the NCAA"²⁰⁸ and Penn State seemingly agreed to these penalties to avoid the "death penalty."²⁰⁹

On the day of the agreement,

Dr. Edward J. Ray, the chair of the NCAA Executive Committee and president of Oregon State University, stated that the "historically unprecedented actions by the NCAA today are warranted by the conspiracy of silence that was maintained at the highest levels of the university in reckless and callous disregard for the children."²¹⁰

He explained further that "[t]he [NCAA] Executive Committee ha[d] the authority to act on behalf of the entire Association in extraordinary circumstances" and had "chosen to exercise that authority."²¹¹ As the basis of authority, the NCAA subsequently cited "Bylaw 4.1.2(e), which states that the Executive Committee is authorized to '[a]ct on behalf of the Association by adopting and implementing policies to resolve core issues and other Association-wide matters."²¹² Although Ray stated this was not an unprecedented exercise of this authority, the Executive Committee had never used this power to impose disciplinary sanctions for NCAA rules violations.²¹³ NCAA President Emmert added,

UNIVERSITY, NCAA, 5–6 (2012), <https://www.ncaa.org/sites/default/files/Binding%20Consent%20Decree.pdf>.

205. *Id.* at 1.

206. *Id.* at 2.

207. Mitten, *supra* note 196, at 322.

208. *Id.*

209. RODNEY A. ERICKSON & MARK A. EMMERT, *supra* note 204, at 4.

210. Mitten, *supra* note 196, at 328-29.

211. *Id.* at 329.

212. *Id.* at 329 n.46; see *NCAA Authority to Act*, NCAA (July 23, 2012), <http://www.ncaa.org/about/resources/media-center/news/ncaa-authority-act>.

213. Mitten, *supra* note 196, at 329 n.46.

This was and is action by the Executive Committee exercising their [sic] authority, working with me to correct what was seen as a horrifically egregious situation in intercollegiate athletics [O]ne should not conclude that this was an abridged enforcement process. It was completely different than an enforcement process.²¹⁴

Shortly after Penn State entered into the consent decree, Pennsylvania State Senator Jake Corman, who represented the county that is home to Penn State and was the chair of the Senate Appropriations Committee, became annoyed that Penn State's \$60 million NCAA fine was going to a national, rather than a Pennsylvania, child abuse foundation.²¹⁵ According to Senator Corman, "if there's any money that's going to be spent by the university, it's going to be spent in Pennsylvania."²¹⁶ With Senator Corman's urging, the Pennsylvania Legislature passed the "Higher Education Monetary Penalty Endowment Act" (Endowment Act) which mandated that any penalties paid by state-funded institutions of higher education would remain in-state.²¹⁷ Shortly after the passage of the Endowment Act, a lawsuit was initiated to force Penn State's \$60 million NCAA sanction to be paid within the state of Pennsylvania.²¹⁸

The lawsuit was originally filed to force the NCAA's penalty sanction to be spent on child sexual abuse prevention organizations in Pennsylvania rather than national organizations, but it "gradually became a referendum on the NCAA's authority to impose sanctions in the first place."²¹⁹ During pre-trial discovery, Penn State discovered several internal NCAA emails that questioned the NCAA's authority to discipline Penn State without going through its normal disciplinary procedures via the Committee on Infractions as stipulated in its

214. Mitten, *supra* note 196, at 329.

215. Jack Holmes, *How Penn State Beat The Sandusky Rap*, DAILY BEAST (Jan. 31, 2015), <https://www.thedailybeast.com/how-penn-state-beat-the-sandusky-rap>.

216. *Id.*

217. *Id.*

218. Meghan Garrity, *Corman/McCord v. NCAA Postponed*, Daily Collegian, Dec. 18, 2014, https://www.collegian.psu.edu/news/crime_courts/article_fc3d3b4e-8715-11e4-b153-3b70484a505e.html. The NCAA had countersued, alleging that the law was unconstitutional. Rachel Axon, *Plaintiffs Gain Leverage Over NCAA in Penn State Lawsuit*, USA TODAY, Jan. 13, 2015, <https://www.usatoday.com/story/sports/college/2015/01/13/penn-state-ncaa-joe-paterno-lawsuit-consent-decree/21723591/>.

219. Jake New, *NCAA Restores Penn State's Wins Under Paterno*, INSIDE HIGHER ED (Jan. 19, 2015), <https://www.insidehighered.com/quicktakes/2015/01/19/ncaa-restores-penn-states-wins-under-paterno>; see *NCAA Reaches Proposed Settlement in Corman Lawsuit*, NCAA (Jan. 16, 2015), <http://www.ncaa.org/about/resources/media-center/news/ncaa-reaches-proposed-settlement-corman-lawsuit> (noting that "[t]he lawsuit originally asked the judge to restrict the distribution of the \$60 million fine to child sexual abuse prevention organizations in Pennsylvania rather than national organizations . . . [but] expanded . . . to include the NCAA's authority to act in this matter . . .").

bylaws.²²⁰ In one email, Kevin Lennon, NCAA Vice President of Academic and Membership Affairs, seemingly admitted that the NCAA did not have a well-developed rationale for why the NCAA's Executive Committee had the jurisdiction to act alone, rather than via the Committee on Infractions.²²¹ Another email seemed to indicate that NCAA executives were unsure whether the NCAA's Executive Committee could unilaterally sanction Penn State without following its bylaws, but believed that Penn State would agree to the terms because of the university's black-eye from the scandal.²²² Thus, top-level NCAA executives seemingly recognized that its bylaws might only allow the Committee on Infractions to punish Penn State, but chose to pursue an alternative course of action.²²³

Furthermore, deposition testimony revealed that NCAA President Mark Emmert threatened Penn State with the death penalty even though such penalty was unlikely.²²⁴ Emmert told Penn State's President that "he had read the Freeh Report from beginning to end twice over the weekend, and many of the presidents [on the executive committee] had as well," and that

everyone viewed this as the worst scandal ever in sports He said the presidents want blood. He said they would like to shut your program down for multiple years; never seen them so angry and upset He thought the only way to head this off would be to craft a package of what he said would be very, very severe sanctions; that he might -- he emphasized "might" -- be willing to get the [NCAA's] boards to look favorably upon, but that time was of the essence and that confidentiality was of the essence.²²⁵

220. Sen. Jake Corman's Response to NCAA's Supplemental "Statement" Regarding Documents Still in Dispute, *Corman v. NCAA*, No. 1 MD 2013 (Pa. Commw. Ct. 2014), <http://www.pacourts.us/assets/files/setting-4002/file-3999.pdf?cb=23623d>.

221. See Jake New, *NCAA Had Doubts on Its Authority in Penn State Case*, *INSIDE HIGHER ED* (Nov. 6, 2014), <https://www.insidehighered.com/quicktakes/2014/11/06/ncaa-had-doubts-its-authority-penn-state-case>.

222. Sen. Jake Corman Response to NCAA's Supplemental "Statement" Regarding Documents Still in Dispute, *supra* note 220, Exhibit B. Julie Roe Lach, the NCAA's Vice President of Enforcement, wrote in an email that:

I characterized our approach to PSU as a bluff when talking to Mark [Emmert] yesterday afternoon after the call. He basically agreed b/c I think he understands that if we make this an enforcement issue, we may win the immediate battle but lose the war when the [Committee on Infractions] has to rule. I think he is okay with that risk.

223. *Id.*

224. Deposition of Rodney Erickson, *Corman v. NCAA*, No. 1 MD 2013 (Pa. Commw. Ct. 2014), <http://www.pacourts.us/assets/files/setting-4002/file-4141.pdf?cb=2b6ef2>.

225. *Id.* at 39–41.

Essentially, the NCAA President was threatening Penn State with the death penalty, stating that the NCAA's executive board would handle the case, and not letting it go through the usual disciplinary channels via the Committee on Infractions. According to Penn State's President, the university was not given the choice to go through the Committee on Infractions and the normal disciplinary procedures that would have allowed Penn State to defend itself before a verdict.²²⁶ Penn State was essentially told to either accept the NCAA's proposed agreement or risk losing its football program.²²⁷ Edward Ray, who was the chairperson of the NCAA Executive Committee at the time of the Consent Decree, later admitted that death penalty was never going to happen. Ray said, "talk of the death penalty for Penn State never gathered strong support . . . [and] the committee discussed such a severe penalty twice—coming to no consensus the first time and voting against it overwhelmingly four days later."²²⁸ Ray could "not remember the vote outcome, 'but if you told me it was 19 to 2, I would believe you.'"²²⁹

In 2014, during the course of the litigation and possibly fearing a loss in court, the NCAA reduced Penn State's postseason and scholarship penalties after the university made progress implementing changes outlined by an independent athletics integrity monitor.²³⁰ In January 2015, before trial, the NCAA agreed to settle the lawsuit and remove most of the remaining sanctions that had been placed on PSU.²³¹ The settlement left in place Penn State's \$60 million fine payable "to activities and programs for the prevention of child sexual abuse and the treatment of victims of child sexual abuse," but restored 112 football wins that had been stripped from Penn State thereby reinstating Joe

226. *Id.* at 43–45.

227. See ESPN News Services, *Penn State Nittany Lions Hit with \$60 Million Fine, 4-Year Bowl Ban, Wins Dating to 1998*, ESPN (July 24, 2012), http://www.espn.com/college-football/story/_/id/8191027/penn-state-nittany-lions-hit-60-million-fine-4-year-bowl-ban-wins-dating-1998. Penn State's President Rodney Erickson told the Centre Daily Times that "[w]e had our backs to the wall on this" and Erickson told ESPN that "[t]he alternative was far worse. The death [penalty] was a possibility I thought it was better to go down this path than face a multi-year penalty." *Id.*

228. Rachel Axon & Erik Brady, *Did Penn State Really Face the Death Penalty?*, USA TODAY, Jan. 15, 2015, <https://www.usatoday.com/story/sports/college/2015/01/15/penn-state-ncaa-mark-emmert-death-penalty-consent-decree-rodney-erickson/21826697/>.

229. *Id.*

230. *NCAA Reaches Proposed Settlement in Corman Lawsuit*, *supra* note 219 (noting that "[t]he NCAA Executive Committee restored postseason access and the full complement of scholarships in 2014, based on the recommendation from Athletics Integrity Monitor Sen. George Mitchell in response to the university's progress."). See Adam Rittenberg, *NCAA President Mark Emmert Praises Success of Penn State Nittany Lions*, ESPN (Dec. 7, 2016), http://www.espn.com/college-football/story/_/id/18227258/ncaa-president-mark-emmert-praises-success-penn-state-nittany-lions.

231. *NCAA Reaches Proposed Settlement in Corman Lawsuit*, *supra* note 219.

Paterno as the winningest coach in major college football history.²³² In settling the litigation, the NCAA did not officially back down on its authority to act and “Penn State acknowledge[d] the NCAA’s legitimate and good faith interest and concern regarding the Jerry Sandusky matter.”²³³ According to one member of the NCAA Board of Governors, the settlement “with Penn State reaffirms our authority to act [And that] the NCAA has a legitimate role when a member’s actions threaten the integrity of college sports.”²³⁴ Furthermore, “[c]ontinuing this litigation would [have] further delay[ed] the distribution of funds to child sexual abuse survivors for years, undermining the very intent of the fine.”²³⁵ Thus, although the NCAA originally threatened Penn State with the death penalty and got agreement to severe sanctions, the NCAA ultimately significantly rescinded or lessened these penalties.

Briefly, the NCAA backed down in the Penn State case because it was seemingly uncertain that it had the power, based on its rules and bylaws, to punish Penn State. It also seemingly had ignored proper protocol by involving the Board of Directors, rather than the Committee on Infractions. Interestingly, the NCAA has been reluctant to formally address the Baylor situation, even though Baylor officials seemingly admitted institutional failure to properly respond to sexual assaults committed by numerous football players.

IV. SOLUTIONS & RECOMMENDATIONS

In the clearest example that the Penn State and Baylor scandals have not caused any significant or meaningful change in the investigatory or reporting practices within athletic departments, Michigan State University (and USA Gymnastics) recently became embroiled in a scandal that had unfortunate similarities to both Penn State and Baylor. The Michigan State scandal involved the sexual abuse of both under-aged and college-aged female athletes, and a deliberate indifference by Michigan State officials to the university’s female students. In January 2018, Dr. Larry Nassar, who was the team physician for Michigan State University and USA Gymnastics, was sentenced to 40-175 years in prison after pleading guilty to sexually assaulting as many as 265 women, many of whom were under-age girls, many of whom were Michigan State University female student-athletes, and several of whom were prominent female Olympic gymnasts.²³⁶ Dr. Nassar committed these sexual assaults by inserting

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Tracy Connor, *Larry Nassar Accuser Count is Up to 265, Judge Says*, NBC NEWS, Jan. 31, 2018, <https://www.nbcnews.com/news/us-news/larry-nassar-accuser-count-265-judge-says-n843316>.

his fingers into the vaginas and anuses of his female victims while claiming that he was performing legitimate medical procedures and providing treatment for injuries.²³⁷

Dr. Nassar's abuse occurred over a period of approximately twenty years, and continued to occur despite complaints that were either silenced or ignored for seventeen years. "In the Nassar case, campus police and Michigan State's Title IX office did not formally begin investigating him [Nassar] until 2014—17 years after the first complaint was made to a Michigan State coach."²³⁸ Even when an investigation occurred in 2014, one of the experts evaluating Nassar's conduct was his close friend and protégé, and the investigation inexplicably exonerated Nassar while also placing guidelines on his treatment of future patients, guidelines that he never followed.²³⁹ Subsequent to the 2014 investigation and before Nassar's indictment in 2016, Nassar sexually assaulted at least a dozen additional women and young girls.²⁴⁰

More recently, reports show that Michigan State's indifference went beyond its inaction against Dr. Nassar and was widespread throughout its athletic department. An outside investigation found "a pattern of widespread denial, inaction and information suppression of such allegations by officials ranging from campus police to the Spartan athletic department."²⁴¹ The investigation detailed abuses in Michigan State's football and basketball program, including instances of alleged sexual assaults and violence against women that were never reported to the proper authorities and instead "were routinely investigated and handled by AD [Mark] Hollis' department, and sometimes even coaches."²⁴² The investigation found "a number of cases involving football and basketball players that had never reached the light of day, that had never been reported."²⁴³

237. Emily Lawler, *What Was Portrayed as Medical Treatment, Alleged Victims Claim is Sexual Assault*, MLIVE, Mar. 1, 2017, http://www.mlive.com/news/index.ssf/2017/02/what_was_portrayed_as_medical.html; Roni Caryn Rabin, *Pelvic Massage Can Be Legitimate, But Not in Larry Nassar's Hands*, N.Y. TIMES, Jan. 31, 2018, <https://www.nytimes.com/2018/01/31/well/live/pelvic-massage-can-be-legitimate-but-not-in-larry-nassars-hands.html>.

238. Paula Lavigne & Nicole Noren, *Pattern of Denial, Inaction, Information Suppression at Michigan State Goes Beyond Larry Nassar Case*, ESPN (Feb. 1, 2018), http://www.espn.com/espn/story/_/id/22214566/pattern-denial-inaction-information-suppression-michigan-state-goes-larry-nassar-case-espn ("As far back as 1997, athletes began telling multiple MSU officials, including the university's longtime gymnastics coach, that Nassar was assaulting them under the guise of medical treatment.").

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. Richard Deitsch, *ESPN's Paula Lavigne Talks MSU Sexual Abuse Scandal*, SPORTS ILLUSTRATED, Feb. 4, 2018, <https://www.si.com/tech-media/2018/02/04/espn-paula-lavigne-outside-lines-michigan-state-sexual-assault-scandal>.

According to Lauren Allswede, who spent seven years at Michigan State as a sexual assault counselor,

Whatever protocol or policy was in place, whatever front-line staff might normally be involved in response or investigation, it all got kind of swept away and it was handled more by administration [and] athletic department officials It was all happening behind closed doors . . . None of it was transparent or included people who would normally be involved in certain decisions.²⁴⁴

Ultimately, the investigation “uncovered numerous cases where the university apparently knew of but did little about accusations of sexual assaults committed by its athletes.”²⁴⁵

Similar to what happened at Penn State and Baylor, the scandal ultimately resulted in the resignations of Michigan State University President Lou Anna Simon, AD Mark Hollis, and gymnastics coach Kathie Klages (who was made aware of sexual abuse allegations against Nassar as early as 1997).²⁴⁶ Furthermore, more than 150 women are now suing Nassar, Michigan State University, USA Gymnastics, and other entities, and Michigan State’s potential liability may top \$1 billion.²⁴⁷ Finally, the NCAA recently sent a letter of inquiry to Michigan State requesting the self-reporting of any possible NCAA violations related to Dr. Nassar’s assaults against girls and young women, including student-athletes at Michigan State.²⁴⁸ The NCAA specifically cited Article 2.2 of its constitution which “establishes the principle of protecting student-athlete well-being, including health and safety, and Bylaw 20.9.1.6 specifically identifies well-being as an imperative for Division 1 members.”²⁴⁹ It further noted, “Larry Nassar’s heinous crimes of record against more than 150 victims raise serious concerns about institutional practices, student-athlete safety and the institution’s actions to protect individuals from his behavior.”²⁵⁰

244. Grace Bird, *Michigan State, NCAA Under Fire Over Sex Assault Cases*, INSIDE HIGHER ED (Jan. 29, 2018), <https://www.insidehighered.com/news/2018/01/29/michigan-state-ncaa-under-fire-over-sex-assault-cases>.

245. *Id.*

246. Lavigne & Noren, *supra* note 238.

247. Nolan Finley, *Finley: Cost to MSU of Gymnast Abuse Scandal Could Top \$1B*, DETROIT NEWS, Dec. 2, 2017, <http://www.detroitnews.com/story/opinion/columnists/nolan-finley/2017/12/02/cost-msu-gymnast-scandal/108247652/>.

248. Letter from Oliver F. Luck, Exec. Vice President, NCAA, to Mark Hollis, Athletics Dir., Michigan State University (Jan. 23, 2018) (on file with Michigan State University), *available at* <https://www.documentcloud.org/documents/4358981-NCAA-Letter-to-Michigan-State.html>.

249. *Id.*

250. *Id.*

Not surprisingly, the Michigan State scandal has drawn comparisons to both Penn State and Baylor because, once again, athletic department and even university officials failed to respond and even ignored warning signs about crimes being committed on campus. Once again, these officials seemed more committed to protecting the reputation of the prestigious athletic program and university than ensuring the safety and well-being of students and others on campus. Although there are no easy answers to these recurring problems, several possible measures must be considered, including changes to state and federal laws, changes to the NCAA's bylaws and enforcement policies, and changes to university and athletic department policies.

In response to the Penn State scandal, many state legislatures made several changes to its mandatory reporter laws—laws that are designed to protect the most vulnerable victims and ensure the reporting of possible child abuse. As detailed earlier, Pennsylvania's legislature enacted many changes and a reexamination of Michigan law has already begun because of the Michigan State scandal. These changes are designed to strengthen the state's mandatory reporter laws by ensuring that suspected problems are promptly reported and investigated. Most people agree that the best way to ensure reporting is to expand the list of people who are required to report (i.e., mandatory reporters). Mandatory reporters had typically only been people who have frequent contact with children (e.g., social workers, teachers, principals, other school personnel, doctors, nurses, other health-care workers, counselors, therapists, and other mental health professionals, childcare providers, and law enforcement officers).²⁵¹ The logic is that certain professionals (i.e., individuals who encounter children and may recognize or suspect abuse) should have a duty to report these allegations to law enforcement. In several states, including under Pennsylvania's revised law, mandatory reporters now include faculty, administrators, athletics staff, and other employees and volunteers at institutions of higher learning, including public and private colleges and universities and vocational and technical schools.²⁵² After Penn State, a few states (not including Michigan or Pennsylvania) required *anyone* with direct knowledge of abuse to be required to report (i.e. *everyone* was made a mandatory reporter).²⁵³ At the very least, states should re-examine and carefully scrutinize *who* should be a mandatory reporter.

In addition to re-evaluating who should be a mandatory reporter, states should re-examine the scope of the reporter's duty. Under many mandatory reporter laws, mandatory reporters only have the legal obligation to report the

251. MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, *supra* note 125, at 2.

252. § 6311.

253. MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, *supra* note 125, at 30-31, 46-47.

suspected abuse to a superior at work (or to a designated person at the workplace) and do not have a duty to directly report the problematic conduct to the police or other state agency. This has led to problems in many cases, including at Penn State, where reports were made to supervisors but the information never reached child protection agencies. As a result, legislators should consider changing mandatory reporting laws so that mandatory reporters are required to report suspected child abuse directly to either the police or a child protection agency. Pennsylvania's revised law requires such direct reporting to child protective services.²⁵⁴ Direct reporting to the police or child protection agencies prevents the "passing the story down the line" effect that seemingly occurred in the Penn State situation when employees passed reports "up the chain of command" and from one party to another party, but never to law enforcement or child protection agencies. Finally, the mandatory reporting laws need to lower the standard for required reporting, and include tougher penalties for failure to report and immunity for "good faith" reporting that turns out to be untrue. By making these changes, some of the problems at Penn State and Michigan State could have been uncovered sooner and further problems avoided.

Another possible solution to these problems would be to enact a federal law that would provide a uniform national standard for reporting suspected sexual abuse. A uniform national standard would eliminate the inconsistencies currently found in the patchwork of differing state laws. After the Penn State scandal, Pennsylvania Senator Casey Jr. unsuccessfully introduced federal legislation that would have require all adults—not just mandated reporters—to report suspected child abuse and neglect to child protection agencies or law enforcement. Despite this earlier failure, in light of the Michigan State and USA Gymnastics scandal, Congress recently passed considering a bill, entitled the "Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act," which applies to amateur sports groups, such as USA Gymnastics, and other sports organizations that participate in interstate and international travel.²⁵⁵ The Act aims to fix a patchwork of state reporting rules by requiring adults who interact with amateur athletes to report suspected child and sexual abuse within 24 hours to local law enforcement.²⁵⁶ The Act could be extended beyond amateur athletics.

In addition to changes to state and federal law, the NCAA has the ability to more effectively prevent similar problems on college campuses by

254. § 6313.

255. *Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017 (S. 534)*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s534> (last visited July 30, 2018).

256. *Id.*

strengthening its enforcement policies and bylaws pertaining to unethical conduct and institutional control.²⁵⁷ By strengthening its enforcement and bylaws, member schools would have notice that the NCAA had the authority to investigate and impose harsh discipline in such cases, including the imposition of the death penalty. By explicitly changing its bylaws to make clear that the NCAA had the authority to investigate and discipline for institutional failures such as those that occurred at Penn State and Baylor and Michigan State, the NCAA would alleviate questions and concerns that lingered after Penn State about whether the NCAA had the authority to impose such penalties.

Finally, either the NCAA or universities must consider completely relieving coaches and athletic department personnel from their roles in the investigation and disciplining of any player for any off-the-field incident. For too long, coaches and athletic department staff have been directly involved in both the investigation and disciplinary decisions regarding their players. The Baylor, Penn State, and now Michigan State scandals are direct proof that coaches (and athletic department personnel) should not be a part of the disciplinary process in any manner. Over and over, these scandals have proven that coaches (and athletic department personnel) are prone to protecting the school's or team's "brand" and giving the benefit of the doubt to those involved with building that brand. Because of the nature of major collegiate athletics, coaches (and athletic department staff) simply have too much to win or lose when their players are involved in off-the-field incidents. By excluding coaches from the disciplinary process, the student-athletes will know that no favoritism will occur, that uniform standards for student conduct will apply, and that their coach will not be an ally fighting for reduced punishment for their off-the-field indiscretions. Schools need policies mandating that any off-the-field incident, whether relatively minor or possibly criminal, needs to be immediately turned over to an independent university panel specifically tasked with handling such matters and imposing discipline.

Schools also need to establish a culture of open communication that encourages reporting of any misconduct and a zero-tolerance policy against retaliation or backlash for people making such reports. The situation at Baylor, where women who filed sexual assault complaints were retaliated against in several ways, can never be permitted or repeated. One idea, implemented into law in Minnesota, requires colleges to have websites that allow students to

257. NCAA, 2017–18 NCAA DIVISION I MANUAL art. 10, 10.1, at 45 (Aug. 1, 2017). NCAA Bylaw 10.1 deals with unethical conduct and could be expanded to explicitly cover ethical lapses that occurred at Penn State, Baylor, and Michigan State. *Id.* Furthermore, NCAA Bylaw 20.9.1.5 deals with the commitment to institutional control and compliance, and could be explicitly expanded to cover the institutional failures at Penn State, Baylor, and Michigan State. NCAA, 2017–18 NCAA DIVISION I MANUAL art. 20, 20.9.1.5, at 360 (Aug. 1, 2017).

report incidents of sexual assault online and anonymously, which will hopefully reduce the fear that comes with reporting an assault.²⁵⁸

The athletic departments must also fully comply with university and Title IX policies that require any domestic violence incident to be reported immediately to the Title IX office, a university office dedicated to objectively examining claims of harassment and discrimination based on gender. In essence, universities must eliminate the “old way of handling things” and the mindset of “sitting down and working things out” and excusing bad behavior as a “good kid doing a dumb thing.” Universities must be fully committed to ending the culture of indifference and inaction. Some states, like Illinois, have even passed laws mandating that colleges create a detailed policy for responding to reports of sexual assault and requiring the submission of data, on an annual basis, to the State’s Attorney General’s Office.²⁵⁹

Another possibility is to mandate institutional oversight not only for off-the-field incidents, but also for the recruiting for prospective student-athletes with prior disciplinary or criminal histories or even all recruits. This institutional oversight could occur at the university, conference, or NCAA level. When it comes to recruiting, coaches are inherently biased; they both want and need the best athletes to win. As a result, if a player is very talented, coaches will routinely downplay (or even disregard) a player’s history of sexual assault allegations or other problems. To fix this problem, institutional oversight is needed so that coaches do not have the final decision on potentially problematic prospective student-athletes, including transfers, who have significant disciplinary or criminal histories. The individual schools or conferences or the NCAA need to implement policies that result in a full and independent investigation, including detailed background checks, for any problematic prospective student-athlete.²⁶⁰ Under such a policy, before any prospective student-athlete with a prior record of serious disciplinary or criminal conduct is allowed onto campus, an independent panel, without any linkage to the school’s athletic department, would need to investigate, review

258. MINN. STAT. ANN. § 135A.15 (Subd. 5) (2017).

Online reporting system. (a) A postsecondary institution must provide an online reporting system to receive complaints of sexual harassment and sexual violence from students and employees. The system must permit anonymous reports, provided that the institution is not obligated to investigate an anonymous report unless a formal report is submitted through the process established in the institution’s sexual harassment and sexual violence policy.

259. Preventing Sexual Violence in Higher Education Act, 110 ILL. COMP. STAT. ANN. 155 (2017).

260. See Cody Stavenhagen, *Criminal Background Checks Remain a Rarity Despite Issues in College Sports*, TULSA WORLD (Jan. 28, 2017), http://www.tulsaworld.com/sportsextra/collegefootball/criminal-background-checks-remain-a-rarity-despite-issues-in-college/article_09416217-f22c-560e-8bea-484ba787ca84.html (noting that only a few schools nationwide run detailed background checks on every prospective athlete).

the prior problems, and approve the student's admission onto campus. Not surprisingly, after the Baylor scandal where a transfer student-athlete with significant prior abuse problems was admitted onto campus and subsequently committed a campus rape, the Big 12 conference enacted a "Serious Misconduct Policy" for prospective student-athletes.²⁶¹ According to the policy, "[p]rospective student-athletes, including transfers, who have committed serious misconduct shall not be eligible for athletically related financial aid, practice or competition."²⁶² Although "[t]he Big 12 le[ft] the exact definition of serious misconduct up to the individual schools, but [it] mandate[d] that it must include 'sexual assault, domestic violence and other similar crimes involving moral turpitude.'"²⁶³

In 2016, the University of Oklahoma instituted one of the strictest policies for vetting its prospective student-athletes. Under that policy, the compliance office, an entity that directly reports to the university's general counsel office and not the athletic department, conducts a detailed background and social media check on all prospective student-athletes.²⁶⁴ If deemed necessary, the compliance office uses investigators and private detectives to track down follow-up information. The compliance office then creates a robust profile on each prospective student-athlete. Any potential problems are flagged for review by the university's general counsel and president, who ultimately decide whether the prospective student-athlete is admitted into the university. These steps can ensure that the university properly vets each prospective student-athlete and that the investigatory and decision-making process is free from the bias inherent within the athletic department. All schools, conferences, and even the NCAA should consider implementing a similar policy. By taking all of the steps recommended in this section, which include improving both the laws and the institutional oversight and regulation provided by the NCAA, the conferences, and the universities themselves, universities can hopefully prevent future recurrences of the horrors and cover-ups at Penn State, Baylor, and Michigan State, provide better protection for students, and help to avoid liability.

261. Brooke Pryor, *Oklahoma Works to Fine-Tune Background Check System*, OKLAHOMAN, Jan. 31, 2017, <http://newsok.com/article/5536058>.

262. *Id.*

263. *Id.*

264. Before signing letters of intent with the university, the athletes are required to submit a background check "authorization form" which details the recruit's personal information including date of birth, social security number, and driver's license number. *Id.*