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Aaron Hernandez

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STEP ONE: SOLVING THE NCAA SEXUAL ASSAULT PROBLEM

AARON HERNANDEZ*

INTRODUCTION

The National Collegiate Athletic Association (“NCAA” or “Association”) is no stranger to controversy.¹ Since the NCAA is a member association, the controversies the Association has faced over time are largely dictated by the demands and interests of its member institutions. In 2010, the college football world set its eyes on Auburn, AL as eventual Heisman winner Cam Newton was embroiled in a recruiting scandal that drew unprecedented media attention and the ire of several member institutions for being allegedly “shopped around” during the recruiting process.² A short three years later, Heisman winner Johnny Manziel was the center of a major recruiting scandal at Texas A&M for allegedly accepting money in exchange for autographing sports memorabilia.³

* Director of the Allan Bud Selig Sports Law and Business Program at the Sandra Day O’Connor College of Law. I would like to thank my research assistant Zak Kuchler, a third-year law student at Arizona State University College of Law, who helped research my initial ideas regarding this topic and identified key legal issues. I also would like to thank Logan Deeny, a third-year law student at Marquette University Law School, for his substantial efforts with editing my article. There is no way this article would have been completed in time without Logan helping me through the citation and source editing. Logan was a lifesaver in this process. Finally, thank you to all the brave sexual assault victims I worked with during my time as an NCAA investigator. My hope is that this article will serve as a small catalyst to help enact change so other women do not suffer their fate.

1. *See generally* JEFF BENEDICT & ARMEN KETEVIAN, *THE SYSTEM: THE GLORY AND SCANDAL OF BIG-TIME COLLEGE FOOTBALL* (2013); Angela J. Hattery, *They Play Like Girls: Gender and Race (In)Equity in NCAA Sports*, 2 WAKE FOREST J. L. & POL’Y 247, 258 (2012); MICHAEL ORIARD, *BOWLED OVER: BIG-TIME COLLEGE FOOTBALL FROM THE SIXTIES TO THE BCS ERA* (2009); John F. McGuire, *The NCAA-Institution Under Constitutional Siege*, 2 J.C. & U.L. 175 (1974); Josephine R. Potuto, *NCAA as State Actor Controversy: Much Ado About Nothing*, 23 MARQ. SPORTS L. REV. 1, 5-6 (2012); Marc Tracy, *After Scandals, Plain Old Failure Drives Out a Coach*, N.Y. TIMES, Nov. 13, 2018 (§ B), at 8. *See also* Alan Rubenstein, *The 25 Biggest Scandals in NCAA History*, BLEACHER REP. (Sept. 20, 2010), <https://bleacherreport.com/articles/468221-the-25-biggest-scandals-in-ncaa-history>.

2. Pete Thamel, *For Auburn, Grimaces May Still Replace Smiles*, N.Y. TIMES, Jan. 12, 2011 (§ B), at 11.

3. Steve Eder, *Manziel Must Sit Out Half of Opener for 'Inadvertent Violation'*, N.Y. TIMES, Aug.

Member schools were outraged and both episodes were put under the mainstream media microscope.⁴ Around this time, the NCAA was widely known for aggressive enforcement tactics that led to some of the most punitive infractions cases in the history of the association.⁵ Many people believe the aggressive enforcement was directly correlated to member schools being so upset from the alleged cheating occurring in the recruiting space.⁶

Lately, it is not just member schools who have found a way to drive the infractions and rulemaking agenda of the Association. Governments, including the federal government, have also played a role in the NCAA infractions and rulemaking agenda. In 2017, the FBI raided the offices of several NCAA basketball coaches connected to shoe companies (namely, adidas) providing benefits to recruits in exchange for their commitments to certain schools.⁷ The scandal drew so much criticism that the Association mobilized a commission spearheaded by the former US Secretary of State to draft reforms adopted at breakneck speed which were aimed at cleaning up recruiting in men's college basketball.⁸ A short couple of years later, the FBI was once again knocking at the door of member schools who were part of a college admissions scandal that included several college administrators taking bribes from parents to admit their students into member schools.⁹ Both sets of NCAA infractions cases are still ongoing at many of the respective schools, and some impactful punishments

29, 2013 (§ B), at 18.

4. *Id.*; see also Thamel, *supra* note 2.

5. See generally NCAA, UNIVERSITY OF SOUTHERN CALIFORNIA PUBLIC INFRACTIONS REPORT (June 10, 2010), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102369>; NCAA, THE OHIO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT (Dec. 20, 2011), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102374>; NCAA, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL PUBLIC INFRACTIONS REPORT (Mar. 12, 2012), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102358>.

6. The Cam Newton scandal, which occurred during the first year of NCAA President Mark Emmert's tenure as the head of the organization, particularly aggravated the new executive. He spoke to constituents of the need to close loopholes and to strengthen NCAA rules enforcement. This frustration led to aggressive NCAA enforcement tactics that eventually backfired on the organization. See *Newton Case Frustrated NCAA Prez*, BUFFALO NEWS (Feb. 14, 2011), https://buffalonews.com/news/local/education/newton-case-frustrated-ncaa-prez/article_d6a9e8c3-af6a-55cf-8ad7-7b0c16b5bea0.html; see also Jim Litke, *Column: NCAA Knows 'Lack of Institutional Control'*, ASSOC. PRESS SPORTS (Feb. 20, 2013), <https://apnews.com/article/0eaa3f3de6284895beecce56361f3c03c>; Assoc. Press, *Mark Emmert: Transparency is Vital*, ESPN (Feb. 12, 2011), <https://www.espn.com/college-sports/news/story?id=6117101>.

7. *United States v. Gatto*, 986 F.3d 104, 111 (2d Cir. 2021).

8. Commission on College Basketball, *Report and Recommendations to Address the Issues Facing Collegiate Basketball*, NCAA 1-3 (Apr. 2018), https://ncaaorg.s3.amazonaws.com/compliance/cbreform/2018CCB_ReportFinal.pdf.

9. See Joshua Lens, *Operation Varsity Blues and the NCAA's Special Admission Exception*, 31 J. LEGAL ASPECTS SPORT 147, 150-51 (2021).

have already been handed down by the Association.¹⁰

Federal and state governments have also put a heavy priority on NCAA rulemaking, especially the NCAA's concept of amateurism. In 2021, multiple state governments have passed legislation to make the NCAA rules regarding an athlete's ability to profit off of their own name, image, and likeness ("NIL") illegal—so athletes would be able to profit off of their own NIL.¹¹ It has become a bipartisan political issue that politicians have been eager to jump on because of sour public attitude towards the NCAA in this area.¹² The United States Senate has convened committees to study the issue and put it on the congressional agenda,¹³ where a federal law would be the end goal to bring uniformity to the NIL issue—making it federal law for athletes to be able to profit off of their NIL in some way.¹⁴ Additionally, the Supreme Court of the United States recently ruled in a landmark case that the NCAA was subject to a full rule of reason analysis and amateurism was not a valid defense when evaluating the restriction of academically-related benefits being provided to student-athletes.¹⁵ The operation of the NCAA is so interesting to the state and federal governments that the internal issues of the Association have reached the highest court of the land.

Pardon the lengthy introduction, but this context is important. Most of the aforementioned controversies have: (1) revolved around tangible benefits being

10. See, e.g., NCAA, TEXAS CHRISTIAN UNIVERSITY PUBLIC INFRACTIONS DECISION 18-26 (June 29, 2021), https://ncaaorg.s3.amazonaws.com/infractions/decisions/Jun2021D1INF_TCUPUBLIC_InfractionsDecision.pdf; see also NCAA, OKLAHOMA STATE UNIVERSITY PUBLIC INFRACTIONS DECISION 16-22 (June 5, 2020), https://ncaaorg.s3.amazonaws.com/infractions/decisions/Jun2020D1INF_OklahomaStatePublicDecision.pdf; NCAA, UNIVERSITY OF SOUTHERN CALIFORNIA PUBLIC INFRACTIONS DECISION 11-21 (Apr. 15, 2021), https://ncaaorg.s3.amazonaws.com/infractions/decisions/Apr2021D1INF_UniversityofSouthernCaliforniaPublicDecision.pdf.

11. See, e.g., FLA. STAT. §1006.74 (2021); CAL. ED. CODE §67456 (effective: Jan. 1, 2023); see Marie Kadlec, Comment, *Game Changing Legislation: NCAA Forced to Revise Name, Image, and Likeness Compensation Rules*, 45 NOVA L. REV. 227, 229 (2021); see also Gregg E. Clifton, *NCAA Division I Council Approves Interim Name, Image and Likeness Policy Which Places Additional Burdens on Conferences and Schools*, JACKSON LEWIS (June 28, 2021), <https://www.collegeandprosportslaw.com/uncategorized/ncaa-division-i-council-approves-interim-name-image-and-likeness-policy-which-places-additional-burdens-on-conferences-and-schools/>. See generally Christopher J. Gerace, *Reestablishing Education as the Cornerstone in the NCAA's Name, Image, and Likeness Debate*, 10 MISS. SPORTS L. REV. 83 (2021).

12. Rich Ensor, Commissioner of the MAAC, even said in an interview that the Association is the only body that has been able to unite both wings of Congress and multiple branches of the US government. See Ken Kraetzer, *Richard Ensor, MAAC Commissioner on SCOTUS Ruling, Name, Image, Likeness on #SALRadio*, YOUTUBE (June 23, 2021), <https://www.youtube.com/watch?v=AdHp2v9cdAw>.

13. See, e.g., *NCAA Athlete NIL Rights: Hearing Before the U.S. Senate Comm. on Com., Sci., and Transp.*, 117th Cong. (2021).

14. Kadlec, *supra* note 11, at 259-264.

15. *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2162-63 (2021).

provided to student-athletes, and (2) resulted in an impactful reform or punitive action from the Association (or government). To boil down all of the controversies, the worst thing that happened in any of these cases was an exchange of money. Nobody was physically harmed—money just changed hands and the NCAA concept of amateurism was at risk.

By contrast, for the last several years, NCAA member institutions have found themselves in the crosshairs of the recurring sexual assaults on campus committed by student-athletes. According to one very prominent Title IX plaintiff attorney, John Clune, at least 95% of Division I athletics programs have had a sexual assault case during his time as an attorney doing this work.¹⁶ A survey of anecdotal evidence and quantitative measures indicates that this is not an isolated issue and it has plagued college athletics for some time now.¹⁷ This means that over the same time period of the controversies tied to athletes receiving some type of tangible benefit (i.e. exchange of money), there have been droves of (mostly) women on those same college campuses who have been raped, sometimes serially, by college athletes.

Surely, one would think this shocking issue would draw the ire of NCAA member institutions in at least the same way that the aforementioned controversies did in college athletics—but that is not the case. Title IX sexual assault, which specifically deals with sexual assault in higher education, is not an NCAA violation. In fact, no form of sexual assault is an NCAA violation. Accepting a bribe from a booster or shoe company to attend a specific school could result in permanent ineligibility for a college athlete¹⁸—but committing sexual assault might not.¹⁹ It is an absurd thought: rape, by itself, is not an NCAA violation.

Why sexual assault is not an already a legislated NCAA violation is a subject that an entirely separate article could address. What this article seeks to address is why sexual assault *should* be an NCAA violation. Part I identifies why sexual assault is a problem on NCAA campuses within student-athlete populations. Part II explains how the federal government and state governments have failed to address this issue and why the NCAA should not wait for those bodies to address the issue. Part III explains how the current NCAA policy on

16. E-mail from John C. Clune, Partner, Hutchinson Black and Cook, LLC, to Zakery Kuchler, J.D. Candidate, Sandra Day O'Connor College of Law, Arizona State Univ. (July 23, 2021, 09:57 MST) (on file with author) [hereinafter Clune Email].

17. See Jayma M. Meyer, *It's on the NCAA: A Playbook for Eliminating Sexual Assault*, 67 SYRACUSE L. REV. 357, 378-94 (2017).

18. See, e.g., NCAA, SOUTHERN MISSISSIPPI UNIVERSITY INFRACTIONS REPORT (Feb. 25, 1987), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=101734>; NCAA, UNIVERSITY OF ALABAMA TUSCALOOSA PUBLIC INFRACTIONS REPORT 1 (Feb. 1, 2002), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102231>.

19. See *infra* notes 47-53 and accompanying text.

sexual assault falls short of solving the problem and proposes a simple framework to take the first step towards solving the issue. Part IV explains the legal underpinnings of the NCAA and why the Association would be able to enact enforceable legislation making sexual assault an NCAA violation. Part V introduces an NCAA rule, making sexual assault a violation for currently enrolled student-athletes that would result in permanent ineligibility from athletics competition. Part VI explores some of the legal concerns with enacting the legislation and why the proposed NCAA legislation would be able to withstand such challenges because of its narrow focus. The conclusion addresses the policy concerns of the status quo and why the NCAA needs to prioritize this legislation and the sexual assault problem on its college campuses.

I. TITLE IX SEXUAL ASSAULT IS A PROBLEM

Title IX sexual assault (“sexual assault”) has been a problem on NCAA campuses for some time now, and there is ample evidence to suggest it is a bigger problem in student-athlete populations. Quantitative evidence is not totally bulletproof because of the problems of underreporting and sometimes suboptimal reporting mechanisms at different campuses due to less resources devoted to the issue.²⁰ However, the paragraph below contains data from some of the studies that have attempted to isolate the student-athlete population and show how there is a higher propensity for sexual assault to be committed by someone (typically male) from that population.

In 1995, Male student athletes made up 19% of the perpetrators reported for sexual assault, even though they comprised of only 3.3% of the total male college population.²¹ A more recent study in 2019 conducted by USA Today found that in the previous five years, universities disciplined NCAA athletes for sexual misconduct at more than three times the rate of the general student population.²² Of the thirty-five Division I public universities who complied with the study, 531 students were disciplined for sexual offenses since January

20. Dean G. Kilpatrick et al., *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study*, NAT’L CRIME VICTIMS RSCH. & TREATMENT CTR. 3 (Feb. 1, 2007), <https://www.ojp.gov/pdffiles1/nij/grants/219181.pdf> (stating that only 12% of women college student survivors report the sexual assault to police); *see also* Statistics, KNOW YOUR IX, <https://www.knowyourix.org/issues/statistics/> (last visited Dec. 1, 2021) (explaining various reasons for non-reporting such as not wanting others to know, lack of proof, fear of retaliation, not knowing how to report, and fear of poor treatment by the criminal justice system).

21. Meyer, *supra* note 17, at 379.

22. Kenny Jacoby, *College Athletes More Likely to be Disciplined for Sexual Assault*, USA TODAY (Dec. 16, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/12/12/ncaa-athletes-more-likely-disciplined-sex-assault/4379153002/> (obtaining data from final results of disciplinary proceedings in which the accused student was found responsible for a sexual or violent offense).

2014.²³ One of every twelve names (forty-seven in total) on that list were an NCAA athlete, with nearly two-thirds of the athletes playing football.²⁴ More shocking from that list was the fact that out of those forty-seven athletes in the report, at least eleven transferred and continued their playing careers at other NCAA schools.²⁵

What seems to be more compelling to interested stakeholders though is the anecdotal evidence that has percolated over the last decade from NCAA institutions.²⁶ For the purpose of this article, we will focus on high-profile Division-I NCAA schools, as they seem to garner more attention in this area. First, there is the national perspective of a prominent Title IX plaintiff attorney to consider. John Clune is a partner at Hutchinson, Black, and Cook in Boulder, CO.²⁷ His expertise in this area is exemplary as he has become a renowned Title IX plaintiff attorney and advocate for victims of sexual assault.²⁸ According to Clune's estimation, 95% of Division I NCAA athletics programs have dealt with a Title IX sexual assault lawsuit that originated in their student-athlete population since he started practicing in this area—and 65% of Division I Power Five schools have dealt with a Title IX sexual assault lawsuit where he was involved as the plaintiff attorney (does not include other lawsuits, investigations, criminal charges, etc.).²⁹

At the institutional level, there are a number of high-profile sexual assault cases in the last fifteen years that have plagued the NCAA. Division I college football is a good illustrator of the issue.³⁰ In 2010, Lizzy Seeberg, a student at Saint Mary's College in Notre Dame, IN claimed that she was raped by a Notre Dame Football player.³¹ The case proved difficult to investigate because the Notre Dame Police Department did not begin inquiring into the matter until well

23. *Id.* (leaving 191 Division I public schools, or 85% of the total, who did not comply with the records request).

24. *Id.*

25. *Id.*

26. *See, e.g.*, THE HUNTING GROUND (Chain Camera Pictures 2015).

27. *John C. Clune*, HUTCHINSON BLACK AND COOK, LLC, <https://www.hbcboulder.com/john-clune> (last visited Dec. 1, 2021).

28. *Id.*

29. Clune Email, *supra* note 16.

30. *See* Hillary Hunter, Comment, *Strike Three: Calling Out College Officials for Sexual Assault on Campus*, 50 TEX. TECH L. REV. 277, 278-79 (2018).

31. Melinda Henneberger, *Reported Sexual Assault at Notre Dame Campus Leaves More Questions than Answers*, NAT'L CATH. REP. (Mar. 26, 2012), <https://www.ncronline.org/news/accountability/reported-sexual-assault-notre-dame-campus-leaves-more-questions-answers>; *see also* Katherine E. Leung, Comment, *Intercampus Sexual Assault Accountability: Protecting Students Off Campus*, 2 UNIV. PA. J. L. & PUB. AFF. 235, 243 (June 2017).

after Seeberg had committed suicide.³² Text message exchanges with Lizzy from acquaintances had revealed a relative lack of support for her and warning her not to “mess” with Notre Dame Football.³³ The player who was accused of raping Seeberg was later identified as Prince Shembo, a key member of the defensive unit that helped the football team reach the national championship game against Alabama in 2013.³⁴ Shembo never missed a game and Notre Dame largely painted Lizzy as an unstable and lying young woman trying to ruin Shembo’s career—after she was already dead.³⁵

In 2012, Jordan Johnson, a star quarterback for the University of Montana (“UM”), was subsequently expelled after an appeal of the University’s disciplinary process found that Johnson raped a woman off-campus.³⁶ Instead of upholding the star quarterback’s expulsion for sexual assault, the Montana Commissioner of Higher Education reinstated Johnson after the Dean of Students disagreed with an independent investigator’s findings that Johnson had committed sexual misconduct.³⁷ The star quarterback was back on the football field for the 2013 and 2014 seasons after his criminal case proceedings.³⁸ In the criminal trial, Johnson was acquitted of sexual intercourse without consent³⁹ and eventually received a \$245,000 settlement from UM in which Johnson claimed UM mishandled its investigation into his rape allegations, claiming the institution predetermined his guilt during the investigation.⁴⁰

In 2019, Quintez Cephus, a talented wide receiver at the University of Wisconsin-Madison, was found responsible for committing a sexual assault against a woman on campus.⁴¹ He was expelled from the institution and was

32. Leung, *supra* note 31, at 243-44.

33. *Id.* at 243.

34. Todd Lighty & Rich Campbell, *Ex-Notre Dame Player’s Remarks Reopen Wound*, CHI. TRIB. (Feb. 26, 2014), <https://www.chicagotribune.com/news/ct-xpm-2014-02-26-ct-seeberg-interview-met-20140226-story.html>; see also Dan Gartland, *Notre Dame Forced to Vacate Wins from National Runner-Up Season*, SPORTS ILLUSTRATED (Feb. 13, 2018), <https://www.si.com/college/2018/02/13/notre-dame-fighting-irish-wins-vacated-ncaa-violations>.

35. See Leung, *supra* note 31, at 244.

36. JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN*, 225 (2015).

37. Samantha Iannucci, Comment, “*Due*” the Process: The Sufficiency of Due Process Protections Afforded by University Procedures in Handling Sexual Assault Allegations, 95 OR. L. REV. 609, 611 (2017).

38. KRAKAUER, *supra* note 36, at 187.

39. *Id.* at 299.

40. Associated Press, *Montana to Pay Ex-Quarterback \$254K Over Rape Investigation*, ESPN (Feb. 16, 2016, 9:58 PM), http://www.espn.com/espn/wire/_section/ncf/id/14789176.

41. Michael McCann, *After Re-Admitting Quintez Cephus, Wisconsin Could Face a Tough Legal Battle*, SPORTS ILLUSTRATED (Sep. 7, 2019), <https://www.si.com/college/2019/09/07/quintez-cephus-wisconsin-john-clune-possible-lawsuit>.

charged by prosecutors with two counts of sexual assault.⁴² At the conclusion of the trial, a jury found him not guilty of criminal sexual assault and he was spared jail time.⁴³ A large contingent of Wisconsin fans began pressuring the University to overturn their Title IX decision earlier in the year because of his newfound innocence in the criminal process.⁴⁴ The pressure worked, Cephus was reinstated, he returned to the football team, and he was an integral part of the football program's Big Ten Title and Rose Bowl appearance.⁴⁵ Cephus did not miss a game and was drafted the following year by the Detroit Lions.⁴⁶

In 2020, a report was released by the law firm Husch Blackwell on the problematic culture at Louisiana State University ("LSU") and how numerous football players committed sexual assault from 2015-2019 with little repercussions due to a faulty Title IX apparatus at the university.⁴⁷ Clear oversights in the Title IX investigations just happened to coincide with the fact that star players like Jacob Phillips and Derrius Guice (who was accused of rape twice, and never even went through the Title IX process) were involved.⁴⁸ Since LSU possibly gave football players preferential treatment in the Title IX process, LSU could be subject to an NCAA investigation⁴⁹ – the results of which will likely be informed by another high-profile sexual assault case in college football: the Baylor Football rape case.

In 2016, Baylor University ("Baylor") found itself embroiled in one of the most widespread and shocking sexual assault scandals in the history of college sports. Pepper Hamilton, a law firm retained by the university to conduct an internal audit of its Title IX processes after a flurry of sexual assault cases, published the results of their inquiry and found Baylor Football and its

42. *Id.*

43. *Id.*

44. Kelly Meyerhofer & Ed Treleven, *Woman Sues UW-Madison Over Handling of Quintez Cephus Sexual Assault Case*, WIS. ST. J. (Sep. 16, 2020), https://madison.com/wsj/news/local/education/university/woman-sues-uw-madison-over-handling-of-quintez-cephus-sexual-assault-case/article_b14cdea6-fcf3-5639-a997-621995e23de7.html.

45. Associated Press, *Lions Wide Receiver Quintez Cephus Sues Wisconsin Over 2018 Expulsion*, SPORTS ILLUSTRATED (Feb. 24, 2021), <https://www.si.com/nfl/2021/02/25/quintez-cephus-lions-sues-wisconsin-expulsion-2018>.

46. *Id.*

47. See Husch Blackwell, *Louisiana State University Title IX Review*, LA. ST. UNIV. 47–136 (Mar. 3, 2021), https://www.lsu.edu/titleix-review/docs/4828-6651-7216_1_lsu_report-final.pdf.

48. Kenny Jacoby & Nancy Armour, *Two Women Say Ex-Washington RB Derrius Guice Raped Them at LSU When He Was a Freshman*, USA TODAY (Jan. 28, 2021, 10:20 AM), <https://www.usatoday.com/story/sports/ncaaf/sec/2020/08/19/ex-washington-nfl-player-derrius-guice-accused-rape-while-lsu/3391053001/>.

49. See generally Brett Martel, *LSU Reeling from Ongoing Reviews of Sexual Misconduct Cases*, ASSOC. PRESS (Apr. 16, 2021), <https://apnews.com/article/college-football-sexual-misconduct-law-suits-football-sexual-assault-6e881fb19daa7a22c0c09ea14c652388>.

administration perpetuating a culture discouraging reporting of sexual assaults and exercising largely no control over the athletes who committed the assaults.⁵⁰ The saga at Baylor is too long and shocking to explain in detail.⁵¹ For this article, the important takeaway is that the NCAA has been investigating Baylor since 2015 and has alleged that Baylor was providing “extra benefits” to the football student-athletes mentioned in the Pepper Hamilton report.⁵² The football student-athletes were allegedly given preferential treatment in the Title IX process at Baylor, receiving special accommodations not available to the rest of the student population.⁵³ The theory of the NCAA Baylor case can be simplified to the following: rape was not the NCAA problem, it was that student-athletes were given preferential treatment in the disciplinary process.

The Baylor case was heard by the Division I Committee on Infractions in 2020 and their decision has still not been released at the time of writing this article.⁵⁴ The results of that inquiry will largely determine steps the NCAA takes in response to LSU,⁵⁵ as the NCAA enforcement staff likely wants to know whether the NCAA Division I Committee on Infractions agrees that preferential

50. Baylor Univ. Board of Regents, *Findings of Fact*, BAYLOR UNIV. 10 (May 26, 2016), <https://www.baylor.edu/thefacts/doc.php/266596.pdf>.

51. See, e.g., PAULA LAVIGNE & MARK SCHLABACH, VIOLATED: EXPOSING RAPE AT BAYLOR UNIVERSITY AMID COLLEGE FOOTBALL'S SEXUAL ASSAULT CRISIS (Center Street, 2017).

52. Mark Schlabach & Paula Lavigne, *Baylor Bears Officials Scheduled to Appear Before NCAA Committee on Infractions over Sexual Assault Scandal*, ESPN (Dec. 14, 2020), https://www.espn.com/college-football/story/_/id/30518346/baylor-bears-officials-scheduled-appear-ncaa-committee-infractions-sexual-assault-scandal.

53. Baylor Univ. Board of Regents, *supra* note 50.

54. Darby Brown, *Baylor Makes Its Case to NCAA Infractions Committee*, KWTX (Dec. 15, 2020, 7:52 PM), <https://www.kwtx.com/2020/12/16/baylor-makes-its-case-to-ncaa-infractions-committee/>.

55. The NCAA Division I Committee on Infractions (“COI”) released the results of the Baylor case on August 11, 2021. NCAA, BAYLOR UNIVERSITY PUBLIC INFRACTIONS DECISION (Aug. 11, 2021), https://ncaaorg.s3.amazonaws.com/infractions/decisions/Aug2021INF_BaylorDecisionPublic.pdf.

The timing of their release was inconveniently right after the submission of this law review article. However, way more upsetting was that the COI panel found that Baylor did not provide extra benefits to its student-athletes in the Title IX disciplinary process. The COI panel reasoning: essentially the whole school was plagued by the poor Title IX process. It is a frustrating line of reasoning the COI has accepted before in another core Association issue. See NCAA, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL PUBLIC INFRACTIONS DECISION (Oct. 13, 2017), <https://www.ncaa.org/about/resources/media-center/news/infractions-panel-could-not-conclude-academic-violations-north-carolina-case>. This result in Baylor—which could be the subject of an entirely separate law review article—likely means that the NCAA Enforcement staff will not pursue an extra benefits case against LSU. The ineptitude of the COI when dealing with important issues like sexual assault and academic fraud make it all the more important for the NCAA to legislate very specific violations in these areas. Otherwise, the most important issues plaguing college athletics are left to a tribunal that will issue draconian penalties for not shutting off a landline phone jack in a hotel room. See NCAA, UNIVERSITY OF MASSACHUSETTS, AMHERST PUBLIC INFRACTIONS DECISION (Oct. 16, 2020), https://s3.amazonaws.com/ncaaorg/infractions/decisions/Oct2020D1INF_MassachusettsDecisionPublic.pdf, but will say its hands are tied when women are being raped on its campuses.

treatment in the Title IX process suffices as an NCAA violation.

These are just a few of the examples of what has become a recurring and dangerous problem for the NCAA. These anecdotal examples largely focus on Division I college football, but there are numerous cases involving other sports⁵⁶, divisions⁵⁷, and even personnel⁵⁸ where the individual institution athletics program has been able to avoid NCAA punitive action that would impact the program competitiveness. Institutions deal with the backlash, they settle cases or sweep them aside, the news cycle washes them away, and then John Clune is back at the same institution years later dealing with the same issues.⁵⁹ It is a vicious cycle and a big ethical problem for the NCAA—an organization that has historically prioritized corrective action related to money and amateurism,⁶⁰ but not its own student-athletes raping women on campus.⁶¹ The status quo, which relies on the individual NCAA member institutions doing right by these sexual assault victims and taking the issue seriously, is clearly not working.

II. THE NCAA CANNOT COUNT ON THE GOVERNMENT TO SOLVE THIS PROBLEM

As referenced in the introduction, the government (federal and state) has taken it upon itself recently to manage particular affairs of the NCAA when it thinks the Association is failing in that area.⁶² However, the government—and we will focus on the federal government—falls woefully short of proving effective in this particular area of governance. The starting point to seeing why

56. See Complaint at 2-3, *Van Overdam v. Texas A&M Univ.*, No. 4:18-cv-02011, 2021 WL 4441987 (S.D. Tex. 2018); see also Travis L. Brown, *Sexual Assault Survivor, Advocate Speak Out on Texas A&M Allegation*, EAGLE (June 12, 2018), https://theeagle.com/news/a_m/sexual-assault-survivor-advocate-speak-out-on-texas-a-m/article_357f2610-6ea3-11e8-b6f5-374c0b21dc6e.html.

57. See MAJORITY STAFF OF S. SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, 113TH CONG., SEXUAL VIOLENCE ON CAMPUS SURVEY REPORT: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS (July 9, 2014), <https://www.hsgac.senate.gov/imo/media/doc/2014-07-09%20Sexual%20Violence%20on%20Campus%20Survey%20Report%20with%20Appendix.pdf>.

58. Andrew Solomon, *Preventing Recurrences of the Cover-Ups at Penn State & Baylor (and Now Michigan State): Where Does it End?*, 28 MARQ. SPORTS L. REV. 379-81 (2018).

59. See generally *id.*

60. See *id.*

61. Paula Lavigne, *NCAA Sued by 7 Women for Failure to Protect in Alleged Sexual Assaults*, ESPN (Apr. 29, 2020), https://www.espn.com/college-sports/story/_/id/29114869/ncaa-sued-7-women-failure-protect-alleged-sexual-assaults.

62. See Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019); see also Press Release, House Comm. on Oversight and Reform, Maloney, Speier, and Sherrill Call on NCAA to Take Action to Address Gender Inequities Following Release of New Report (Aug. 3, 2021), <https://oversight.house.gov/news/press-releases/maloney-speier-and-sherrill-call-on-ncaa-to-take-action-to-address-gender>.

the federal government fails to solve the sexual assault crisis on NCAA campuses is understanding Title IX. In her 2017 Syracuse Law Review article, Jayma Meyer explains Title IX and points to one of the biggest issues with solving the campus sexual assault problem:

Title IX is a twenty-seven word legislation that says nothing about sexual violence. Enacted as part of the Education Amendments of 1972, it provides that “[n]o 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.” Educational institutions must comply with Title IX if they receive federal funding from the Department of Education. The sanction for failing to comply with Title IX is a loss of funding. However, in the over forty years that Title IX has been enforced, *no school has ever lost federal funding as a result of a failure to abide by Title IX and its regulations.*⁶³

Enacted as a supplement to the 1964 Civil Rights Act, the original intent of Title IX was to promote gender equality. Over time, the application of Title IX evolved to include sexual harassment as a form of illegal sex discrimination.⁶⁴ Victims of sexual assault and harassment at educational institutions receiving federal funding have standing to sue the institution based on Title IX violations.⁶⁵ Individual victims suing and settling cases with educational institutions is the most tangible form of damages any violating institution has faced in the history of the legislation.⁶⁶

So, as a starting point, the federal legislation that guides the government mechanism responsible for solving the sexual assault issues on college campuses has never used its most punitive action: loss of federal funding.⁶⁷ Not once. While the threat of losing federal funding will always loom as a deterrent for not complying with Title IX,⁶⁸ the federal government has never sanctioned

63. Meyer, *supra* note 17, at 364.

64. *See generally* Alexander v. Yale Univ., 631 F.2d 178, 180 (2nd. Cir. 1980).

65. *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1673 (1999); *see also* Jennings v. Univ. of N.C., 482 F.3d 686, 699 (4th Cir. 2007).

66. *See generally* Maggie Jo Poertner Buchanan, *Title IX Turns 40: A Brief History and Look Forward*, 14 TEX. REV. ENT. & SPORTS L. 91 (2012).

67. Meyer, *supra* note 17, at 364.

68. *See, e.g., UW System Statements on Complying with New Federal Title IX Regulations*, UNIV.

a single college for failing to comply with the legislation.⁶⁹ This lack of enforcement is a problematic approach by the federal government.⁷⁰

The federal government is well aware of the problem. The Office of Civil Rights (“OCR”) and Department of Education (“DOE”) have released data on sexual assault investigations for over ten years⁷¹ and the numbers are alarming. In 2011, the Obama Administration attempted to strengthen Title IX enforcement through what has become known as the Dear Colleague Letter (“DCL”) from the OCR.⁷² The 2011 DCL aimed at putting more onus on educational institutions to prevent sexual assault on college campuses by holding perpetrators responsible for their sexual assaults and protecting victims.⁷³ Even with this attempt to strengthen Title IX, it is worth mentioning that most of the anecdotal and statistical evidence of sexual assaults mentioned in the previous section occurred during this time, when a strengthened, victim-friendly approach to Title IX was adopted by the federal government. After the Trump Administration assumed control of the DOE, Secretary of Education Betsy DeVos revised the policy by providing more protection for accused parties, increasing the burden of proof, ending mandatory reporting for college coaches, and subjecting sexual assault complainants to cross-examination during the Title IX hearing.⁷⁴ The policy shift was roundly criticized by advocates for sexual assault victims and it was largely seen as a significant weakening of Title IX.⁷⁵ Many people believe that the Biden Administration DOE will revert to Obama-era policies and swing the Title IX pendulum back

OF WIS. SYS. (Aug. 5, 2020), <https://www.wisconsin.edu/news/archive/uw-system-statements-on-complying-with-new-federal-title-ix-regulations/> (stating the consequences of failing to comply with Title IX regulations included the potential loss of nearly \$1 billion in annual federal funding).

69. Meyer, *supra* note 17, at 364.

70. Elaine Chamberlain & et. al., *Athletics & Title IX of the 1971 Education Amendments*, 19 GEO. J. GENDER & L. 231, 255 (2018).

71. *Title IX Tracking Sexual Assault Investigations*, CHRON. OF HIGHER EDUC. <http://projects.chronicle.com/titleix/> (last visited Dec. 1, 2021).

72. Russlynn Ali, *Dear Colleague Letter*, U.S. DEP’T OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

73. Lisa Karen Atkins, *The Basics of Complying with the “Dear Colleague” Letter Issued by the U.S. Department of Education on April 4, 2011*, OGLETREE DEAKINS (Jul. 25, 2013), <https://ogletree.com/insights/the-basics-of-complying-with-the-dear-colleague-letter-issued-by-the-u-s-department-of-education-on-april-4-2011/>.

74. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. §106 (2020), available at <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

75. Sage Carson & Sarah Nesbitt, *Balancing the Scales: Student Survivors’ Interests and the Mathews Analysis*, 43 HARV. J.L. & GENDER 319, 344 (2020).

to a victim-friendly approach.⁷⁶

However, the political climate surrounding Title IX is largely a moot point for the purposes of this article. The main takeaway is that no matter who is in charge of the DOE, the governmental agency has not once withheld federal funding from a university not complying with Title IX. The legislation, at best, is a deterrent—and sometimes, the political environment weakens its effectiveness at preventing sexual assault on college campuses.⁷⁷

Individual state governments have also failed to seriously address sexual assault on college campuses. There are a number of states that have decided to enact legislation related to sexual assault on college campuses, but the legislation is usually narrowly written and is largely political fanfare.⁷⁸ More importantly, the legislation at the state level almost never directly addresses college athletics and sexual assault; the lone exception being Idaho.⁷⁹ However, the Idaho law only addresses schools being required to have a written policy governing student-athlete discipline related to sexual assault and the law only polices felonious activity by student-athletes.⁸⁰ Being found responsible for Title IX sexual assault does not necessarily mean a student-athlete would be guilty of a felony, due to two different burdens of proof—therefore, the law does not even directly police the majority of student-athletes committing sexual assault.

While the NCAA is regularly criticized for ineffectively running the affairs of its private association and politicians swoop in to save the day and gain favor with constituents, it is curious to note that there has been no serious legislation introduced at the federal or state level which would make it illegal for a university to allow a student-athlete responsible for a Title IX sexual assault to participate in the athletics program.⁸¹ These government officials, like Senator Cory Booker from New Jersey, are the same ones who have decided that

76. See Department of Education's Office for Civil Rights Launches Comprehensive Review of Title IX Regulations to Fulfill President Biden's Executive Order Guaranteeing an Educational Environment Free from Sex Discrimination, U.S. DEP'T OF EDUC. (Apr. 6, 2021), <https://www.ed.gov/news/press-releases/departments-educations-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens-executive-order-guaranteeing-educational-environment-free-sex-discrimination>; see also Collin Binkley, *Biden Admin Extends Title IX Protections to Transgender Students*, PBS NEWS HOUR (June 16, 2021), <https://www.pbs.org/newshour/education/biden-admin-extends-title-ix-protections-to-transgender-students>.

77. Carson & Nesbitt, *supra* note 75, at 344.

78. Meyer, *supra* note 17, at 370-71.

79. IDAHO STATE BD. OF EDUC., GOVERNING POLICIES AND PROCEDURE, § 3 (T)(1)– (3) (Dec. 2018), <https://boardofed.idaho.gov/board-policies-rules/board-policies/higher-education-affairs-section-iii/iii-t-student-athletes/>.

80. *Id.*

81. See generally Meyer, *supra* note 17, at 371-75.

student-athletes' ability to profit off of their NIL is the more pressing priority.⁸² Based on the history of Title IX, the NCAA should not hold its breath for the government to take serious steps towards solving this issue.⁸³

III. THE NCAA POLICY ON SEXUAL ASSAULT FALLS SHORT

Throughout the 2010s, the NCAA was forced to address the numerous cases of sexual assault plaguing its athletics programs and has since taken measures to begin directly combatting the problem.⁸⁴ However, all of the NCAA actions have been couched in membership pledges, guidance, resources for combatting sexual assault on campus, and general policy.⁸⁵ There has never been an NCAA rule legislated within its operating bylaws addressing sexual assault.

For context, the NCAA Division I Manual ("Manual") is a comprehensive listing of Association rules that each member of the Association must follow as a condition of membership.⁸⁶ The first part of the Manual is comprised of broad principles that are the Association Constitution ("Constitution")—these are not operating bylaws.⁸⁷ The bulk of the Manual, starting with Bylaw 10 and ending with Bylaw 21, are the operating bylaws.⁸⁸ The Association has historically only enforced operating bylaws.⁸⁹ Therefore, NCAA operating bylaws are the only rules in the Manual which carry any sort of punitive repercussions when violated

82. Sen. Cory Booker, *Senator Cory Booker's Remarks on College Athletes' Rights at Commerce Committee Hearing*, YOUTUBE (June 9, 2021), <https://www.youtube.com/watch?v=dPnOBGqIXQU>.

83. See MAJORITY STAFF OF S. SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 57, at 4 (stating that institutions are failing to comply with Title IX and best practices for handling sexual assault on campus).

84. See *supra* Part I.

85. See generally Barbara Osborne & Clare Duffy, *Title IX, Sexual Harassment, and Policies at NCAA Division IA Athletic Departments*, 15 J. LEGAL ASPECTS SPORT 59 (2005); see also Meyer, *supra* note 17, at 403-06; Anita M. Moorman & Barbara Osborne, *Are Institutions of Higher Education Failing to Protect Students: An Analysis of Title IX's Sexual Violence Protections and College Athletics*, 26, MARQ. SPORTS L. REV. 545 (2016); Lopiano D. et al., *The Drake Group Position Statement: Need for National Collegiate Athletic Governance Organization Rules Related to Athlete Sexual Misconduct and Other Physical Violence*, DRAKE GROUP (Nov. 2020), <https://www.thedrakegroup.org/2016/09/11/institutional-integrity-issues-related-to-college-athlete-sexual-assault-and-other-forms-of-serious-violence/>.

86. NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21 DIVISION I MANUAL (Aug. 1, 2020).

87. *Id.* at 1-43 (Art. 1.1-6.4).

88. *Id.* at 44-435 (Art. 10-21).

89. There is no legislated reason for not enforcing the constitutional bylaws. Throughout my time as an investigator at the NCAA, we had multiple situations where someone had acted contrary to the overall mission of the Association, but they did not violate a specific operating bylaw. I was a more aggressive investigator and advocated for charging violations of the constitutional provisions, but it was our practice as an Enforcement staff to only charge violations of operating bylaws. A review of NCAA Public Infractions Reports will reveal this practice from the Enforcement staff.

because Constitution articles in the Manual have largely not been enforced.⁹⁰

The unwillingness of the Association to enforce Constitution articles means the Baylor rape case described above was charged as an “extra benefits” case under Bylaw 16 because the football players were allegedly given special treatment in the Title IX disciplinary process.⁹¹ The case was *not* charged under the broad principles governing the Association in the Constitution—again, rape was not the problem, it was the fact that the student-athletes may have violated Bylaw 16.⁹²

Therefore, any sort of written governance that does not exist within the bounds of the Manual operating bylaws does not have an enforcement mechanism tied to it. The writing—like the Constitution—declares Association values, but will not likely ever be a reason the NCAA imposes penalties upon a member institution for non-compliance with that writing. The NCAA Policy on Campus Sexual Violence (“NCAA Policy”) is one of those pieces of unenforceable writing.⁹³

The NCAA Policy, which was recently revised in 2021, is a policy that requires each university chancellor/president, director of athletics, and Title IX coordinator to attest to a number of items, including: that the athletics department is aligned with the institutional sexual violence prevention policy, department members are regularly educated, and (most recently) that the institution has taken reasonable steps to vet transfer student-athletes who may have transferred from their previous institution due to sexual violence or a pending Title IX case.⁹⁴ There are two important takeaways from the NCAA

90. There is one case in recent history where the NCAA tried to enact punitive action on a member institution through a constitutional article: The Penn State Football child molestation case. The legality of this process was challenged by Penn State (and questioned by internal NCAA leadership). The NCAA reversed the bulk of the penalties in response to the legal challenges. See *Corman v. Nat’l Collegiate Athletic Ass’n*, 74 A.3d 1149 (Pa. Commw. Ct. 2013). While the NCAA was trying to respond to the horrendous actions committed by Penn State Football, the NCAA did not follow its own infractions process. Legal commentators saw this as a problematic decision by the Association because it seemed to flaunt one of the principal tenets governing the deference afforded to private associations: following their own rules. 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>. See generally Matthew J. Mitten, *The Penn State Consent Decree: The NCAA’s Coercive Means Don’t Justify Its Laudable Ends, but is There a Legal Remedy?*, 41 PEPP. L. REV. 321 (2014) (detailing why the NCAA using a constitutional article as a justification for NCAA penalties was legally problematic). See also Jere Longman, *A Boost from the State Capitol Helped Penn State Escape N.C.A.A. Penalties*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/05/sports/ncaafootball/how-one-legislator-helped-penn-state-escape-ncaas-harsh-penalties.html>.

91. Baylor Univ. Board of Regents, *supra* note 50.

92. *Id.*

93. NCAA Board of Governors, *Policy on Campus Sexual Violence*, NCAA (Revised Apr. 27, 2021), https://ncaaorg.s3.amazonaws.com/ssi/violence/NCAA_CampusSexualViolencePolicy.pdf.

94. *Id.* at 2-3.

Policy: (1) the process for implementing sexual assault prevention is largely left to the individual schools, as the school just needs to have a plan in place for addressing the issues; and (2) non-compliance with the policy by student-athletes may result in penalties as determined by the individual school.⁹⁵

The Association has left the sexual assault issue completely in the hands of its individual member schools—which is problematic. First, the NCAA Policy goes into great detail covering numerous areas of sexual assault prevention but provides no real guide for implementation or accounts for resource disparities among its member schools. This lack of direction leads to a lack of uniformity within the Association on how to combat the problem through meaningful punitive actions. This also leaves the fox completely in charge of guarding the henhouse. As mentioned above, there are countless examples of individual schools who have conflicting interests: the safety of students on campus versus their star football player being able to compete against a conference rival that season.⁹⁶

Sometimes the competing interests are a little less nefarious, but still problematic. For example, when the member school does not have a governing body to blame (like the NCAA) for sitting their star player, the school administration directly faces criticism from interested stakeholders rather than being able to scapegoat that governing body. This situation often occurs when a student-athlete is found responsible for Title IX sexual assault, which requires a less stringent burden of proof, but then is cleared of criminal charges, which requires a higher burden of proof. The star athlete is being actively removed from the field of play by the school even though he has been found innocent by a criminal court. Even though this view is clearly logically unsound because of the differing evidentiary standards in two different processes, this is the view many stakeholders will still adopt and it can lead to the school reinstating the student-athlete.⁹⁷ This is problematic because sexual assaults are more difficult cases to prove in criminal courts (where the respondent's freedom is at stake)

95. *Id.* at 2.

96. See *supra* notes 31-35. Melinda Henneberger, *Reported Sexual Assault at Notre Dame Campus Leaves More Questions than Answers*, Nat'l Cath. Rep. (Mar. 26, 2012), <https://www.ncronline.org/news/accountability/reported-sexual-assault-notre-dame-campus-leaves-more-questions-answers>; see also Katherine E. Leung, Comment, *Intercampus Sexual Assault Accountability: Protecting Students Off Campus*, 2 Univ. Pa. J. L. & Pub. Aff. 235, 243 (June 2017); Todd Lighty & Rich Campbell, *Ex-Notre Dame Player's Remarks Reopen Wound*, CHI. TRIB. (Feb. 26, 2014), <https://www.chicagotribune.com/news/ct-xpm-2014-02-26-ct-seeberg-interview-met-20140226-story.html>; see also Dan Gartland, *Notre Dame Forced to Vacate Wins from National Runner-Up Season*, SPORTS ILLUSTRATED (Feb. 13, 2018), <https://www.si.com/college/2018/02/13/notre-dame-fighting-irish-wins-vacated-ncaa-violations>.

97. See McCann, *supra* note 41.

than in a Title IX hearing (where the respondent has his schooling at stake).⁹⁸ By reversing a Title IX decision based on a criminal court trial, schools can make it very difficult to hold sexual assault perpetrators accountable for their actions.

In sum, the NCAA Policy leaves the sexual assault issue in the hands of its member schools and that strategy alone has proven ineffective. While schools have been able to adopt mechanisms on how to combat the issue, leaving the implementation and enforcement of the NCAA Policy completely up to schools leaves too many opportunities for the individual schools to shirk responsibility and allow sexual assault perpetrators to participate in college athletics.⁹⁹ The NCAA must address the problem by enacting an enforceable operating bylaw that would carry punitive consequences for committing sexual assault.

One of the problems with the NCAA Policy is how many sub-issues it tries to solve at once related to sexual violence. The NCAA should narrow its focus. The NCAA can take a simple first step towards solving this problem with a clear and concise operating bylaw that solves a recurring threshold issue in campus sexual violence: enrolled student-athletes who have committed sexual assault while participating in college athletics.

98. Being found responsible for committing Title IX sexual assault but being found innocent of criminal sexual assault is not an extraordinary circumstance, because of the different burdens of proof in each process. In a criminal proceeding, a defendant's freedom is in the balance—necessitating that the evidence proves “beyond a reasonable doubt” that the defendant committed the criminal act. This is a high order for the prosecutor to meet, and it should be. In a Title IX administrative proceeding, a defendant's enrollment in higher education at that particular institution is in the balance—which are much lower stakes, resulting in a lower burden of proof for finding the defendant responsible. This situation is no different than O.J. Simpson being found not guilty of murder but having lost a wrongful death civil suit under the same set of facts. *See generally* Rufo v. Simpson, 103 Cal. Rptr. 2d 492 (Ct. App. 2001). For further explanation on the differing standards of proof in Title IX versus criminal sexual assault cases, *see* Ember Milstead, *The O.J. Simpson Trial: Distinctions Between Criminal and Civil Law*, LAW OF THE LAND (Jan. 30, 2020), <https://sites.psu.edu/emberpassion/2020/01/30/the-o-j-simpson-trial-distinctions-between-criminal-and-civil-law/>; *Title IX: Implications for the Accused*, BERRY LAW (last visited Dec. 1, 2021), <https://jsberrylaw.com/blog/title-ix-implications-for-the-accused/>; *Understanding How Title IX Differ From Criminal Court Proceedings*, LAWTERYX (last visited Dec. 1, 2021), <https://www.lawteryx.com/knowledge-center/criminal-law/title-ix-proceedings.html>; *Distinction Between Title IX Investigation Disciplinary Process and Criminal Procedures*, DUFFY LAW (last visited Dec. 1, 2021), <https://www.duffylawct.com/title-ix/college-disciplinary-process-vs-criminal-process/>. *See generally* Meghan Racklin, *Title IX and Criminal Law on Campus: Against Mandatory Police Involvement in Campus Sexual Assault Cases*, 94 N.Y.U. L. REV. 982 (2019); Mackenzie Wilfong & Bandee Hansock, *Title IX - The Basics and Recent Changes*, 86 OKLA. B.J. 1053, 1054 (2015).

99. *See supra* Part I.

IV. THE NCAA IS A PRIVATE ASSOCIATION AFFORDED WIDE DISCRETION IN RULEMAKING

Before offering proposed legislation, it is important to understand the legal underpinnings of the NCAA as a private association. For years, courts have held that the NCAA is not a state actor,¹⁰⁰ and that it is a private association with wide latitude in managing its own internal affairs.¹⁰¹ This deference towards the NCAA is apparent in the enforcement of the NCAA operating bylaws.¹⁰² Whether it is a ruling on athletics eligibility,¹⁰³ or a penalty in an NCAA infractions case,¹⁰⁴ courts have commonly held that the NCAA must meet these minimum thresholds as a private association when enforcing its own rules: (1) the Association must follow its own rules and procedures when enforcing its bylaws, and (2) the penalty imposed by the Association is not arbitrary or capricious.¹⁰⁵ The only time courts have not offered deference to NCAA rules enforcement is when the rule or business of the Association crosses into an issue with the government.¹⁰⁶

Another important legal underpinning of the NCAA enforcement schema is that courts have commonly held that student-athletes do not have a legal property right to athletics participation.¹⁰⁷ This is critical to the proposed legislation in this article, because while there have been instances of recourse for student-athletes at public universities who are stripped of their athletics

100. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 196 (1988). *See generally* Kenneth R. Kohlberg, *Constitutional Law - United States Supreme Court Finds NCAA Not State Actor Under Fourteenth Amendment*, 23 SUFFOLK UNIV. L. REV. 1124 (1989).

101. *See, e.g.*, Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 624 (Colo. App. 2004); *see also* Nat'l Collegiate Athletic Ass'n v. Brinkworth, 680 So.2d 1081, 1085 (Fla. Ct. App. 1996); *Hisp. Coll. Fund v. Nat'l Collegiate Athletic Ass'n*, 826 N.E.2d 652, 657 (Ind. App. 2005).

102. *See* MATTHEW J. MITTEN ET. AL., *SPORTS LAW AND REGULATION* 225-35 (2d ed. 2017).

103. *Nat'l Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77, 85 (Ky. 2001).

104. *O'Brien v. Ohio St. Univ.*, No. 06AP-946, 2007 Ohio App. LEXIS 4316 at *24 (Ohio Ct. App. 2007) (quoting the trial court's opinion that the determination whether O'Brien committed a major infraction of NCAA rules and what sanctions, if any, may be imposed upon OSU will be made by the NCAA Committee on Infractions and not the court).

105. *See Lasege*, 53 S.W.3d at 85; *see also* Cal. State Univ. Hayward v. NCAA, 121 Cal. Rptr. 85, 88-89 (Cal. Ct. App. 1975). For a review on the remedies available to members of a private association, *see generally* *Exhaustion of Remedies in Private, Voluntary Associations*, 65 YALE L.J. 369 (1956); Peter F. Sloss, *Procedural Due Process in Voluntary Associations*, 48 CAL. ST. BAR. J. 138 (1973).

106. *See, e.g.*, U.S. Dep't. of Educ. v. Nat'l Collegiate Athletic Ass'n, 481 F.3d 936, 938 (7th Cir. 2007).

107. *See, e.g.*, La. State Bd. of Educ. v. Nat'l Collegiate Athletic Ass'n, 273 So.2d 912, 916 (La. App. 3rd Cir. 1973); *Mancuso v. Mass. Interscholastic Athletic Ass'n*, 900 N.E.2d 518, 522 (Mass. 2009); *Lesser v. Neosho Cnty Cmty. Coll.*, 741 F. Supp. 854, 865 (D. Kan. 1990).

scholarships,¹⁰⁸ or are expelled from the university,¹⁰⁹ the legal system has largely distinguished participation in college athletics as a privilege rather than a legal right. Distinguishing participation in college athletics as a privilege (versus a right that would be subject to due process protections) means that any rule impacting athletics eligibility would likely withstand a legal challenge due to the less heightened standard of review.

Finally, remember that the NCAA is a private association that governs intercollegiate athletics and competition among its member schools. The NCAA's main concern in fulfilling its mission is competitive equity and education of its student-athletes. Therefore, the NCAA should always ground its operating bylaws within this context—athletics competition.

V. THE PROPOSED LEGISLATION

The NCAA Policy is cumbersome and tries to solve many issues related to sexual assault all at once. While the approach is comprehensive and holistic, it lacks force.¹¹⁰ Trying to implement the current NCAA Policy as an operating bylaw could open up a host of legal issues. For example, implementing background checks on student-athletes could be problematic for member schools by subjecting them to many different forms of liability.¹¹¹

Instead, the NCAA should focus on a simple first step towards rectifying the campus sexual assault issue by punishing student-athletes who commit sexual assault while in school. The proposed legislation reads as follows:

“Any enrolled student-athlete who has been found responsible for sexual assault, based upon a ‘preponderance of the evidence’ evidentiary standard, shall be declared permanently ineligible from athletics participation in the NCAA. The student-athlete shall become ineligible beginning on the date they committed the sexual assault.”

It is a simple solution to a major problem: student-athletes currently enrolled

108. *See, e.g.*, *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 944 (D. Kan. 1987); *Hall v. Univ. of Minn.*, 530 F. Supp. 104, 108-10 (D. Minn. 1982).

109. *See, e.g.*, *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985); *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

110. Meyer, *supra* note 17, at 404.

111. *See* Jeffrey F. Levine et al., *Legal Implications of Conducting Background Checks on Intercollegiate Student Athletes*, 30 MARQ. SPORTS L. REV. 85, 91-101 (2019) (detailing the legal issues related to implementing background checks for student-athletes to combat sexual assaults on NCAA campuses).

who have committed sexual assault. This legislation addresses most of the anecdotal situations noted at the beginning of the article. While it does not proactively keep previous offenders off campus, it should serve as a much more effective deterrent for those potential offenders than the current status quo.

Of course, this legislation will no doubt be met with some criticism. The first concern would be that it really does not solve the problem of schools botching a Title IX sexual assault investigation or intentionally delaying the investigation so that the student-athlete can continue to participate in college athletics. Like any rule in the Manual, campus compliance offices usually vet the issue first before the NCAA enforcement staff ever gets involved.¹¹² The NCAA National Office does not have the resources to investigate all rules violations of its member schools.¹¹³ There is a legislated expectation as a member school to actively monitor rules compliance,¹¹⁴ and this would be no exception. Like any other NCAA violation, the NCAA enforcement staff could “audit” the school’s internal investigation and findings to ensure compliance with the proposed legislation, or simply adopt the school’s findings if the school found the student-athlete responsible for sexual assault. This schema is nothing new for NCAA schools.¹¹⁵

Regarding the concern of the institution delaying an investigation to allow for the student-athlete to continue competing, the proposed legislation clearly demarcates the starting point for ineligibility of the student-athlete as the day the sexual assault occurred. With other eligibility inquiries, member schools must investigate the matter to determine the student-athlete’s eligibility status. If the member school decides to allow the student-athlete to participate in athletics during the time of the inquiry, the school runs the risk of playing an ineligible student-athlete, which has historically resulted in significant penalties for the institution, including vacation of wins.¹¹⁶ Again, this schema is nothing new for NCAA schools.

Another concern that will undoubtedly be raised by critics is the situation

112. See NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 86, art. 2.8 at 3.

113. The NCAA Enforcement Staff only numbers around sixty full-time employees. This group of people is tasked with enforcing all the bylaws across all sports and divisions of the NCAA. For reference, there are over 1,000 NCAA member institutions, each institution sponsoring multiple sports. Given these figures, the NCAA must rely on its schools to self-police to a certain degree, while the NCAA Enforcement staff typically gets more involved with complex, high-profile infractions issues.

114. NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 86, art. 19.2.1, at 360.

115. NCAA, BERTAM LOVELL GRAMBLING STATE UNIVERSITY 1-2 (July 28, 2017), <https://www.gram.edu/news/wp-content/uploads/2017/07/2-NCAA-Lovell-Infractions-Decision.pdf>; *Inside the Division I Infractions Process: Summary Disposition*, NCAA (last visited Dec. 1, 2021), https://ncaa.org.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionsProcessSDRFactSheet.pdf (explaining the disposition process in NCAA infractions cases).

116. Lasege, 53 S.W.3d at 87-88.

where an athlete has been wrongfully accused of sexual assault (or there is not enough evidence to find them responsible for the assault) and the institution withholds them from athletics competition while completing its investigation. It would be unfair to the student-athlete who had to miss competing in their sport when it turns out they were not found responsible for the sexual assault. This is a fair concern; however, it is one that NCAA Bylaws regarding athletics eligibility have already addressed.

Individual institutions certify their athletics teams' eligibility before any contests—not the NCAA National Office. So, if an institution is about to engage in competition and the institution has a question about a particular student-athlete's eligibility to compete, it is up to the institution to decide whether it is comfortable enough to certify the student-athlete's eligibility. If the institution errs in its determination and the student-athlete competes, the institution has competed with an ineligible player and the contest (if the institution wins) is likely to be vacated.¹¹⁷ Making tough calls on whether to play a star athlete in the midst of a potential NCAA issue is, yet again, nothing new for NCAA schools.¹¹⁸

Another criticism of the legislation could be the qualifications of NCAA enforcement staff members who are going to be investigating sexual assaults or auditing institutional sexual assault investigations. However, this concern can be applied to any other bylaw the NCAA decides to legislate and enforce.¹¹⁹ In fact, the NCAA is not a stranger to sexual assault and interviewing sexual assault victims.¹²⁰ Further, the campus personnel who conduct Title IX sexual assault investigations or hearings are hardly uniquely qualified themselves.¹²¹ At least NCAA investigators would provide an unbiased perspective when evaluating an inquiry. As mentioned earlier, it would be beneficial for schools to use an independent body reviewing these investigations because of some competing interests at the institutional level.¹²²

The legislation would also likely be criticized by advocates for sexual

117. See, e.g., *id.* at 80-86.

118. See *supra* notes 1-6 and accompanying text.

119. See, e.g., NCAA DIVISION I INFRACTION APPEALS COMM., DECISION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, DECISION NO. 473, UNIVERSITY OF LOUISVILLE 2 (Feb. 20, 2018). NCAA investigators were tasked with charging an "extra benefits" case. Typically, extra benefits provided to student-athletes in a recruiting case were not the kind provided here: prostitution. NCAA investigators needed to verify the value of the "extra benefits" related to the prostitution. You can be sure that NCAA investigators are not uniquely qualified to investigate matters related to sex solicitation or the nuances/market values of sexual services provided to minors; but the NCAA still investigated and charged the infractions case.

120. See *supra* notes 51-53 and accompanying text.

121. MAJORITY STAFF OF S. SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, *supra* note 57, at 6.

122. Meyer, *supra* note 17, at 417.

assault victims for not being punitive enough—because it simply renders a student-athlete ineligible. The legislation does not address the student-athlete’s: scholarship, continued enrollment at the school, involvement with the team, or even benefits they could receive from their NIL. The student-athlete could theoretically receive all of those benefits without having to actually participate in athletics. While that criticism is a fair one in theory, it generally does not hold up practically. Student-athletes prioritize playing time over mostly anything else in their athletics experience.¹²³ If a student-athlete is unable to participate in athletics, they usually have little interest in keeping their scholarship or being involved with the team (the exception being when they have suffered a career-ending injury).¹²⁴ Athletics eligibility is a very suitable deterrent for student-athletes violating NCAA rules.¹²⁵

Further, the NCAA should focus on its core governance responsibility: athletics competition. Rendering a student-athlete ineligible for sexual assault is well within its mission as a governing athletics body. Individual schools can make their own decisions and consider their own legal context and potential reputational harm when considering student-athlete scholarships and their continued enrollment at the institution after being found responsible for a sexual assault. The NCAA should be concerned solely whether this student-athlete is participating in athletics. While that focus seems narrow in theory, it has much greater impacts practically, and a student-athlete violating this proposed legislation would likely not be a member of the campus community anymore.

In sum, a simple first step by the NCAA is to enact an operating bylaw that penalizes student-athletes who commit sexual assault while enrolled in school by rendering them permanently ineligible. The legislation would not only clean up many of the sexual assault issues within its athletic programs, but the

123. See *Five Themes from the NCAA GOALS Study of the Student-Athlete Experience*, NCAA (2020), https://ncaaorg.s3.amazonaws.com/research/goals/2020D1RES_GOALS2020con.pdf (showing that playing time was 75 % in men’s sports and 71% in women’s sports in deciding on where to go to a division I college); cf. *Supporting Student-Athlete Mental Wellness*, NCAA, <https://www.ncaa.org/sport-science-institute/supporting-student-athlete-mental-wellness> (last visited Dec. 1, 2021).

124. *Id.*

125. During my time as an NCAA investigator, I interviewed several student-athletes and prospective student-athletes. We would never alert them to the specific subject of the interview so we could ensure that their recollection of the facts surrounding their involvement in an NCAA case was unfiltered. Without fail, every time we arrived at the interview, the student-athletes’ first question would be whether this was going to impact their eligibility. Oftentimes, it would not, as long as they were truthful in the interview--and I would candidly share that insight with them. I am confident that a commanding majority of student-athletes I interviewed told the truth when they knew their athletics eligibility hung in the balance. In one case, a high-profile recruit boldly implicated an SEC assistant coach in recruiting violations involving the student-athlete I was interviewing. His reason for complying with the interview so frankly: “Mr. Hernandez, I ain’t going to let no coach mess up my playing time. I’m going to the NFL.”

legislation would also fit well into the NCAA's current regulatory schema. The NCAA should adopt this legislation and let individual schools address the other issues related to sexual assault prevention at the institutional level.

V. THE POTENTIAL LEGAL HURDLES FOR THE NCAA

A number of legal issues are raised by commentators whenever discussing the NCAA legislating solutions to the sexual assault problem in its membership. The issues are usually the following: (1) equal protection and due process claims; (2) heightened duty of care owed to other students by member institutions because of the more rigorous approach to sexual assault through background checks of student-athletes; (3) gender and racial discrimination claims; (4) privacy claims; and (5) partiality in a Title IX investigation.¹²⁶

However, these issues are distinguishable for the proposed NCAA legislation in this article for two principal reasons: (1) the governance of the NCAA regulating athletics participation and eligibility is generally given deference by courts because of its status as a private association; and (2) the only interest impacted by the rule would not be rooted in a right, but rather a privilege—athletics participation.¹²⁷

Therefore, the common issues that arise when discussing the problems member NCAA institutions would face when strengthening their approach to combating sexual assault are moot when discussing our proposed legislation. The proposed NCAA legislation does not impact property rights and stays squarely within the mission of the private Association executing and enforcing its eligibility rules, focusing on the governance of athletics competition.

A respondent student-athlete could challenge an NCAA ruling if the NCAA inquiry conflicts with the institution's own Title IX sexual assault investigative results. The student-athlete would have to show that: (1) the NCAA did not follow its own procedures; and (2) its ruling was arbitrary and capricious. Similarly, if a school declared a student-athlete eligible following a Title IX inquiry, it could challenge the NCAA finding the same athlete ineligible if the Association did not follow its own rules or it acted arbitrarily in its ruling. Challenging the Association enforcing its own rules has proven to be very difficult historically.¹²⁸ The student-athlete/school would have to clearly show

126. Levine, *supra* note 111, at 91-101; *see also* Meyer, *supra* note 17, 394-96.

127. *See, e.g.*, La. State Bd. of Educ. v. Nat'l Collegiate Athletic Ass'n, 273 So.2d 912, 916 (La. App. 3rd Cir. 1973); Mancuso v. Mass. Interscholastic Athletic Ass'n, 900 N.E.2d 518, 522 (Mass. 2009); Lesser v. Neosho Cnty Cmty. Coll., 741 F. Supp. 854, 865 (D. Kan. 1990).

128. *See, e.g.*, Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 624 (Colo. App. 2004); *see also* Nat'l Collegiate Athletic Ass'n v. Brinkworth, 680 So.2d 1081, 1085 (Fla. Ct. App. 1996); *Hisp. Coll. Fund v. Nat'l Collegiate Athletic Ass'n*, 826 N.E.2d 652, 657 (Ind. App. 2005).

that the NCAA did not follow its own infractions process procedures/protocols. As long as the Association followed its own procedures, the penalties resulting from the legislation would be difficult to challenge in court.

Courts have also held that students at public institutions generally have a liberty interest in their reputations when facing school discipline,¹²⁹ so student-athletes could challenge an NCAA ruling on their sexual assault findings based on this protected interest. However, once again, the proposed legislation is an entirely separate process where the consequence is loss of a privilege (athletics participation) in a private association. Therefore, the reputational interest student-athletes may possess at public institutions remains squarely tethered to that institution and their other property rights therein (i.e., enrollment, scholarship, etc.).¹³⁰

In sum, it is easy to get lost in the potential legal issues NCAA schools may face when enacting legislation that addresses sexual assault on campus.¹³¹ However, the legislation proposed in this article clearly distinguishes itself from the higher scrutiny surrounding constitutional interests. The proposed NCAA legislation is part of an entirely private infractions process where the ultimate punitive action is the loss of a privilege, athletics eligibility—a privilege in which the student-athlete possesses no property, equal protection, or due process rights. The Title IX process on individual campuses may involve a public institution where these rights are in play because the ultimate punitive action could result in expulsion from the school, reputational harm, and loss of scholarship. The latter process has many more legal consequences. The infractions process of the NCAA is not subject to such strict protections and the NCAA is generally afforded judicial deference in enforcing its own rules as a private association. As long as the government continues to show a lack of interest in this area of NCAA governance, the proposed legislation is something the NCAA could pass and the legislation could easily withstand legal challenges.

CONCLUSION: WHY THIS IS IMPORTANT

When I began writing this article, my mother asked me what I was writing about. I explained to her that I thought the NCAA should enact a rule making sexual assault an enforceable rules violation. Her immediate response: “It’s not?!”

129. *See, e.g.*, *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985); *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

130. *See, e.g., Id.*; *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 944 (D. Kan. 1987); *Hall v. Univ. of Minn.*, 530 F. Supp. 104, 108-10 (D. Minn. 1982).

131. Levine, *supra* note 111, at 91-101; *see also* Meyer, *supra* note 17, at 394-96.

Mom was not the only person to react that way when I would explain my idea for the law review article. My previous work as an NCAA investigator led me to this same conclusion. When I was speaking to a sexual assault victim as part of an NCAA investigation into Baylor in 2016, I was informed by the victim that she had already settled her Title IX civil suit against the university and her aggressor had been criminally convicted for raping her. When trying to assess her credibility as a witness, I asked her what she thought the NCAA could do to benefit her since she had already exhausted all of her legal recourse. Her response was sobering. She said the school would continue to mishandle sexual assaults by star athletes until the school felt the pain of NCAA penalties that would materially impact the athletics program. It was a sad referendum on the school and higher education generally, but her reasoning made sense. Her settlement was a proverbial “drop in the bucket” when compared to the university endowment. The student-athlete being jailed and removed from the team was an isolated consequence that the athletics program could recoup quickly in recruiting. However, the shroud of an NCAA investigation and the possibility of considerable penalties impacting the competitiveness of the athletics program would certainly get the university’s attention.¹³²

The worst part of the whole Baylor case was when I was trying to set realistic expectations of a potential NCAA infractions case for the victim and her attorney. I gave a disclaimer before going further into my conversation with her that would dive into the sordid details of her being raped. I still clearly remember what I told her: “Now, I do not want you to get the wrong impression here or get false hopes that this will lead somewhere, because rape by itself is actually not an NCAA violation.”

My statement was accurate. It was also probably needed to set an appropriate context for my interview with her as an NCAA investigator. However, it felt awful saying aloud: “rape by itself is not an NCAA violation.” Why on earth not? I remember thinking, “How is it that our member schools are concerned with the amount of time teams can practice during the spring, or how much food you can feed athletes, or whether athletes could be hosted beyond a certain radius from campus during an official recruiting visit, etc., but these same member institutions decided not to be as concerned with this woman’s rapist continuing to play football?”

132. Lens, *supra* note 9, at 183; see Jerry R. Parkinson, *NCAA Rules Enforcement: Missouri, Alternative Resolution, and Imposing Penalties in an Age of “Reform”*, 61 SANTA CLARA L. REV. 59, 84 (2020); see also Parrish Alford, *NCAA Investigation into Ole Miss Show up in Recruiting Rankings*, DAILY J. (Sep. 23, 2017), https://www.djournal.com/sports/ncaa-investigation-into-ole-miss-shows-up-in-recruiting-rankings/article_ff29ba9a-b15d-59cf-9ed8-5e2e248fd9be.html. See generally Craig A. Deepken II & Dennis P. Wilson, *NCAA Enforcement and Competitive Balance in College Football*, 72 S. ECON. J. 826-845 (Apr. 2006).

This imbalance in priorities is so problematic for an Association that prides itself as primarily executing a mission versus conducting a business function. And by the way, how badly did Baylor miscarry justice for this poor woman that she had to seek three tracks of recourse (civil, criminal, and the NCAA infractions process), versus just executing the Title IX processes at an institutional level to protect her and other members of the student population? And why did the NCAA have to charge that the football player who raped her received extra benefits in the internal disciplinary process, versus just charging that rape in and of itself (in this particular case, it was a student-athlete who raped another student-athlete) was the problem?

This is hardly an issue isolated to the Baylor Football Program under Art Briles—though that one was a particularly shocking episode.¹³³ The University of Wisconsin, Notre Dame, and LSU are all examples of schools who had these problems at an institutional level. In many of the cases, these schools did not prioritize the health of the sexual assault victims, they prioritized their star players seeing the field of play. Like the woman I interviewed in the Baylor case, these sexual assault victims are crying for help—help they are not receiving at an institutional level.

Beginning the journey to punish sexual assault as an NCAA violation and taking comprehensive steps to combat the issue undoubtedly will create more work for: institutional personnel investigating the case and making eligibility determinations, NCAA Enforcement staff members auditing the case through their own inquiry, and legal teams at member institutions trying to navigate the myriad of potential legal issues that will come with the next steps that comprehensively solve the sexual assault problem on college campuses. But that work is worth it.

When I reflect on my career as an investigator at the NCAA, the most rewarding moments in the job were when these brave women trusted me with stories of the worst moments of their life and thanked me for helping them. It gave me a sense of pride and purpose in my work. The consequences of money and potential violations of NCAA amateurism paled in comparison to this work—because this work dealt with the lives and safety of women who had been physically and mentally harmed. I had the opportunity to play a part in repairing their life that had been broken to pieces by someone who was still playing football at an NCAA school. It was worth the work and the anguish of dealing with the awful situations these women recited for me and forever burned into my conscience. The value of helping their cause has been one of the most rewarding parts of my life. The Association should realize this value as well, and it can start the journey to combating this sexual assault pandemic with a

133. LAVIGNE & SCHLABACH, *supra* note 51.

simple first step.¹³⁴

134. NCAA, *supra* note 55. As mentioned in note 55, a panel of the NCAA Division I Committee on Infractions failed to hold Art Briles, Ken Starr, and other Baylor Athletics administrators responsible for the awful episode at Baylor University (after the writing of this law review article). Briles' attorney even commented that his client had been fully vindicated by the results of the NCAA inquiry. Ironically, Baylor's self-investigation and penalties held Baylor more accountable than the Division I COI panel. With the COI panel proving its level of resolve (or lack thereof) in this area, the NCAA cannot continue to rely on its current regulatory scheme to solve the issue of sexual assault. The COI is not bound by precedent or "stare decisis"—but they will have you believe that concept when shirking responsibility to make tough decisions. As a private association, an administrative panel like the COI should have the flexibility to respond to the grave problems of its member schools—and it clearly did not respond to the NCAA sexual assault problem. The NCAA Enforcement staff did its job and recognized the problem—the COI panel punted the responsibility. Art Briles is an employable coach in the NCAA. That idea shocks my conscience and torpedoed my faith in this particular COI panel. My hope is that power brokers in the Association are also shocked by this idea and that they realize the importance of specifically legislating solutions to sexual assaults on NCAA campuses. In the meantime, the lives of countless women hang in the balance.