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BEHIND THE VEIL: CONCEALED CHARGES OF SEXUAL ASSAULT AND ACADEMIC CHEATING IN COLLEGE ATHLETICS

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INTRODUCTION

Throughout the existence of higher education institutions, one fundamental element has remained unchanged: society's value on collegiate athletics. Because of the high impact of athletics on the notoriety, financial status, and overall success of higher education institutions, some universities are willing to go the extra mile to ensure their respective athletic programs never falter. Institutions have repeatedly 'covered up' instances of Title IX violations: sexual assault and academic cheating amongst student-athletes to maintain premiere athletic programs.¹ These institutions continually elevate the value of athletic achievement over properly disciplining student-athletes for various offenses.²

I. THE OVERWHELMING SUPPORT OF ATHLETICS ON COLLEGE CAMPUSES

There is no doubt that athletics have a strong prevalence in the higher education community. The inclusion of sports in higher education stems from three main reasons: sports provide support for the overall development of young people, sports contribute to academic performance of the athletes, and sports add increasing financial support to the associated institution of higher education.³ Specifically, financial support reigns. There is a split view of athletics and its dominance in higher education.⁴

¹ See, e.g., *infra* note 52; *infra* note 58; *infra* note 70; *infra* note 92.

² See *infra* note 1.

³ Ryan Miller, *The Role of Athletics in Higher Education*, 5 MAJOR THEMES IN ECON. 31, 33 (2003), <https://scholarworks.uni.edu/cgi/viewcontent.cgi?article=1031&context=mtie>.

⁴ Robert E. Litan et al., *The Empirical Effects Of Collegiate Athletics: An Interim Report*, NCAA (Aug. 2003), https://www.ncaa.org/sites/default/files/empirical_effects_of_collegiate_athletics_interim_report.pdf.

A. *The Financial Effects*

Athletics is a key revenue-earning element of higher education institutions. Athletic success has correlated to a successful image of a university, and a successful image of a university is shown to correlate with increased donations.⁵ Athletics revenues have “risen sharply in recent years.”⁶ Attributing most of the revenue to broadcast agreements, the NCAA found in a recent study that Division I schools have increased their athletics spending.⁷ The NCAA’s study showed an increase of more than 149% in revenues for the universities and a 159% increase in spending generated toward the athletic departments.⁸ In 2019, between more than 1,100 NCAA schools, athletics raised over \$18.9 billion in revenue.⁹ The median net revenue among Division I schools was over \$1.67 million.¹⁰ Overall, thirty-six percent of the revenue came from institutional and governmental support while a combined twenty-eight percent came from media rights and tickets.¹¹ Schools also received fifteen percent of their revenue from donors and endowments.¹²

Additionally, spending in college athletics has been described as both an “arms race” and a “runaway train.”¹³ Financially, college athletics reigns supreme for many Division I schools.¹⁴ Schools continue to foster an

⁵Adam G. Walker, *Division I Intercollegiate Athletics Success and the Financial Impact on Universities* (Oct. 14, 2015), <https://journals.sagepub.com/doi/full/10.1177/2158244015611186>.

⁶*Finances of Intercollegiate Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (last visited Nov. 20, 2020).

⁷*Id.*

⁸*See id.* (noting that on average schools spend more on athletics than what athletics make in revenue).

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²*Finances of Intercollegiate Athletics Database, Where the Money Comes From (Revenues)*, NCAA, <http://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics-database> (last visited Nov. 20, 2020).

¹³*See id.* (describing the “arms race” or “runaway train” as the concept of institutions increasing spending on athletics to maintain similar spending to other schools while also continually increasing spending to out-spend other institutions).

¹⁴*Id.*

environment that appears athletics-driven to raise funds from donors and present a positive image to the public.

B. *The Cultural Significance and Psychological Effects*

College athletics play a large role in the American society. Every year, Americans travel, tune in, and pay for the opportunity to cheer on their teams. Fandom is a phenomenon that encompasses not only alumni, but those who have always been a (blank) fan. This fandom is often a source of identity and belonging, can be a vehicle for memories, and provides an emotional release.¹⁵ Athletics support goal attainment as a collective group,¹⁶ which creates psychological adaptation of universities as sports organizations.¹⁷

Schools have been criticized for prioritizing athletics over academics.¹⁸ The media has criticized schools such as the University of Alabama for decisions such as “cancel[ing] three days of classes . . . so that students, faculty and, staff could attend the [national championship] game.”¹⁹ This decision, similar to the University of North Carolina’s (UNC) decision to require the early release of employees on gamedays,²⁰ “was criticized as an example of misplaced priorities.”²¹ When schools make decisions as “sports entities,” their actions are often incongruous with their

¹⁵ Janice Beyer & David Hannah, *The Cultural Significance of Athletics in U.S. Higher Education*, 14 J. OF SPORT MGMT. 105 (Apr. 2000), https://www.researchgate.net/publication/290048609_The_Cultural_Significance_of_Athletics_in_US_Higher_Education.

¹⁶ *Id.* at 119.

¹⁷ *Id.* at 118.

¹⁸ See generally Charles T. Clotfelter, *Is Big-Time Sports a Core University Function?*, DUKE U. (Jan. 2011), <https://cepa.stanford.edu/sites/default/files/Is-Big-Time-Sports-a-Core-Function.pdf>.

¹⁹ See *id.* at 2 (discussing the University of Alabama’s decision to cancel three days of classes for the National Championship game).

²⁰ See *id.* (discussing UNC’s decision to instruct employees to leave early on gamedays to avoid traffic jams for the nationally televised games).

²¹ *Id.*

university mission statements.²² These mission statements invariably support academics, but may be ignored in support of athletics.²³

Because a school's overall success has shown to correlate with "[t]elevision revenues, alumni donations, sales of school merchandise, the support of state legislatures, and the number and quality of student applications," schools tend to face the danger of losing "their educational focus and becom[ing] just another form of big business."²⁴ This psychological adaptation creates the notion that schools associated with a winning team are more prestigious than others; however, certain schools, such as the Ivy League, have avoided this connection.²⁵ Even third party ranking systems, such as U.S. News and World Report, have shown correlation between athletic success and institutional prestige.²⁶ Studies have found that athletic program success could attract more students to middle tier-ranking public institutions.²⁷ This correlation between school prestige and athletic prowess places a strong pressure on higher education institutions to invest in athletic programs to maintain adequate enrollment and funding.

Otherwise known as the "Flutie Effect," studies have shown that "undergraduate applications increase dramatically" after a schools go from "good to great" in football or basketball.²⁸ The study shows that schools that have "eye-catching" plays throughout an athletic season often see an

²² See *id.* at 6-7 (analyzing different school mission statements compared to actions in support of athletics).

²³ *Id.* at 7.

²⁴ Beyer & Hannah, *supra* note 13, at 118.

²⁵ *Id.*

²⁶ Eric T. Vanover & Michael M. DeBowes, *The Impact of Intercollegiate Athletics in Higher Education*, 2013 ACAD. PERSP. HIGHER EDUC. J. 40, 51 (2013), <https://www.odu.edu/content/dam/odu/col-dept/efl/docs/intercollegiate-athletics-in-higher-education.pdf>.

²⁷ *Id.* (citing Brian Fisher, *Athletics Success and Institutional Rankings*, 2009 NEW DIRECTIONS FOR HIGHER EDUC., 45, 45-53).

²⁸ Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013), <https://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/?sh=793e65316e96> (discussing Douglas J. Chung's study of athletic success in undergraduate institutions).

increase in student applications.²⁹ Athletic programs provide a “[p]rimary form of mass media advertising” for institutions.³⁰ Additionally, higher education institutions invest in sports to increase brand awareness.³¹ Due to the “sports-heavy American culture,” students are more apt to “find it appealing to be part of a college’s social whirl.”³² In short, a winning college program is naturally attractive to students.³³

Further, individuals place a strong emphasis on their sports teams.³⁴ Studies show that when comparing sports to other aspects of life, people find it more important to be identified with their favorite team than being identified with their work or social groups.³⁵ People also find identification with their favorite team as important as identification with their religion.³⁶ Sports fans have a “connection to the team . . . [through] points of attachment and identification.”³⁷ Overall, there is a psychological connection with the team that holds implications for the person’s self-image.³⁸ These connections satisfy “the human need for belonging.”³⁹ Being a member of fan base is a “very psychologically healthy activity” because one is surrounded by “like-minded people.”⁴⁰ Fans receive the “psychological

²⁹ See *id.* (discussing the thirty percent increase in applications for two years following Boston College’s “Hail Mary” pass win against Miami in 1984).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Frederick G. Grieve, *Sport Fandom and the NCAA Athletes*, ASS’N FOR APPLIED SPORT PSYCH.: ATHLETES AND OTHER PERFORMERS (July 31, 2014), <https://appliedsportpsych.org/blog/2014/07/sports-fandom-and-the-ncaa-student-athlete/>.

³⁵ *Id.*

³⁶ Shelley E. Smith et al., *How Does Sport Team Identification Compare to Identification with Other Social Institutions?*, 6 J. CONTEMP. ATHLETICS 69, 75 (2011).

³⁷ Grieve, *supra* note 34 (citing Daniel C. Funk & Jeff James, *The Psychological Continuum Model: A Conceptual Framework for Understanding an Individual’s Psychological Connection to Sport*, 4 SPORT MGMT. REV. 119, 119-50 (2001)).

³⁸ *Id.*

³⁹ Cory Stieg, *Sports Fans Have Higher Self-Esteem and Are More Satisfied With Their Lives (Whether Their Teams Win or Lose)*, CNBC (July 23, 2020, 10:13 AM), <https://www.cnbc.com/2020/07/23/why-being-a-sports-fan-and-rooting-for-a-team-is-good-for-you.html>.

⁴⁰ See *id.* (quoting Daniel Wann, professor at Murray State University)

benefits of winning, even if they have nothing to do with the [team].”⁴¹ When a team wins, its fans feel like they win.⁴² This drive to win can change how someone connected to a team addresses critical, sometimes negative, issues affecting the team.⁴³

II. TITLE IX: SEXUAL ASSAULT/HARASSMENT CLAIMS

Title IX 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 . . .”⁴⁴ Since 1979, students have had a private right of action against their higher education institute for student-to-student harassment under Title IX.⁴⁵ The test created to determine valid claims under Title IX when the conduct is student-on-student is the “deliberate indifference” standard.⁴⁶ The standard requires that:

the recipient of federal funding may be held liable under Title IX when (1) they are deliberately indifferent to sexual harassment, (2) of which they have actual knowledge, (3) that is so severe, pervasive, and objectively offensive that it deprives the victims of access to the educational opportunities or benefits provided by the school.⁴⁷

⁴¹ See *id.* (quoting Stephen Reysen, associate professor at Texas A&M University-Commerce).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 20 U.S.C. § 1681(a) (2018).

⁴⁵ See *Davis v. Monroe City Bd. of Educ.*, 526 U.S. 629 (1999); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 677-79 (1979).

⁴⁶ See *Davis*, 526 U.S. 629 (applying the “deliberate indifference” standard to Title IX claims for student-to-student sexual harassment).

⁴⁷ *Doe v. Mich. State Univ.*, No. 1:18-cv-390, 2019 U.S. Dist. LEXIS 178023, at *14 (W.D. Mich. Aug. 21, 2019) (citing *Davis*, 526 U.S. at 651).

Additionally, there is an element of control that requires liability only when the school “exercises substantial control over both the harasser and the context in which the known harassment occurs.”⁴⁸

Title IX claims against schools for sexual harassment from student-athletes are applicable when the discrimination under Title IX “is so severe, pervasive, and objectively offensive, and . . . so undermines and detracts from the victim[s’] educational experience, that the victim-student[] [is] effectively denied equal access to an institution’s resources and opportunities.”⁴⁹ Universities may be held liable when they “have ‘actual knowledge of sexual assault(s) committed in a *particular* context or program or by a *particular* perpetrator.’”⁵⁰ However, in order to satisfy the knowledge requirement when alleging liability, something more than common knowledge of sexual assault prevalence on campus is required.⁵¹

A. *Simpson v. Univ. of Colo. Boulder*

Simpson v. University of Colorado Boulder involved the issue of sexual assault during a recruiting visit for high school students.⁵² Ms. Simpson was assaulted in her apartment by Colorado football players and high school recruits.⁵³ Along with the allegation of assault, Simpson alleged that the University of Colorado Boulder (CU) was aware of the risk of sexual assault by student-athletes by explaining the history of sexual assault during past recruiting visits.⁵⁴ The Tenth Circuit found that the university could be found liable for deliberate indifference to the risk of sexual assault when it had “sanctioned, supported, even funded, a program . . . that, without proper control, would encourage young men to engage in opprobrious acts.”⁵⁵ Here,

⁴⁸ *Id.*

⁴⁹ *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1176 (10th Cir. 2007) (citing *Davis*, 526 U.S. at 651).

⁵⁰ *Roskin-Fraze v. Columbia Univ.*, 2018 U.S. Dist. LEXIS 28937, at *14 (S.D.N.Y. Feb. 21, 2018) (citing *Tubbs v. Stony Brook Univ.*, No. 15-cv-0517, 2016 U.S. Dist. LEXIS 28465 at *8 (S.D.N.Y. Mar. 4, 2016)).

⁵¹ *Tubbs*, 2016 U.S. Dist. LEXIS 28465 at *8.

⁵² *Simpson*, 500 F.3d at 1173.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1177.

the court found that the university, through its football coach, was deliberately indifferent toward the threat of sexual assault for three reasons: (1) the coach was aware of the risk of sexual harassment during football recruiting visits, (2) knew that assault had previously occurred during football visits, and (3) continued the unsupervised recruiting visits that could possibly lead to additional sexual harassment or assault.⁵⁶

Simpson highlights an important issue in Title IX coverups by universities and athletics. Specifically, it shows that universities and athletics programs may be on notice of sexual assault cases within the athletics community but neglect to do anything to prevent future assaults.⁵⁷ *Simpson* was a baseline case that showed the need for Title IX action against schools that continue to disregard threatening programs to ensure athletic success.

B. *Doe v. Mich. State Univ.*

Doe v. Michigan State University involved three members of the basketball team raping a freshman student at an off-campus apartment.⁵⁸ When Doe mentioned that the attackers were Michigan State University (MSU) basketball players during her report to the MSU Counseling Center, the “counselor’s demeanor completely changed” and “announced . . . that [they] needed another person in the room.”⁵⁹ The Center instructed her to either file a police report or “deal with the aftermath of the rape(s) on her own.”⁶⁰ The counseling staff also warned Doe that if she reported her rape, she would face “media scrutiny.”⁶¹

⁵⁶ The court reversed and remanded the district court’s grant of summary judgment for the university finding that a reasonable juror could find that “the need for more or different training [of player-hosts was] so obvious, and the inadequacy so likely to result in [Title IX violations].” *Id.* at 1184-85.

⁵⁷ *Id.* at 1185.

⁵⁸ *Doe v. Mich. State Univ.*, No. 1:18-cv-390, 2019 U.S. Dist. LEXIS 178023, at *2 (W.D. Mich. Aug. 21, 2019).

⁵⁹ *Id.* at *3.

⁶⁰ *Id.*

⁶¹ *Id.* at *4. Doe also asserted that the staff failed her by not informing her about the option to report the rape to the Office of Institutional Equity, not informing her of her Title IX rights, not advising her to seek STD or pregnancy testing; and not advising her to seek medical treatment or a physical exam. *Id.*

Doe later amended the complaint to identify MSU's pattern of indifference to sexual assault of female students committed by male athletes.⁶² She alleged that MSU "fostered a culture" that "discouraged" reporting of sexual assaults by male athletes.⁶³ She explained that MSU actively concealed names of athletes in public records and permitted the MSU athletic department staff, including coaches, to investigate complaints involving sexual assault with athletes.⁶⁴ A former MSU counselor explained that when an athlete was involved, "normal protocol and policy were 'swept away' and the complaint was handled . . . 'behind closed doors.'"⁶⁵ The counselor identified the policy as a prevention program to "suppress public knowledge" while allowing male athletes to "commit acts of sexual assault without consequence."⁶⁶

Four other victims' stories supported the assertions made by the counselor.⁶⁷ The complaint also included a summary of the actions MSU took to minimize or ignore sexual misconduct including: using "[u]ntrained professionals [that] discouraged victims from reporting sexual assaults;" neglect of administrators to sexual harassment complaints; and the discouragement of employees to disclose reports of sexual assault by athletes and questioning if the reports were "valid."⁶⁸

Doe v. Michigan State University revealed a broad scheme by administrators to protect student-athletes from sexual assault claims. Although the counselors may have been right to tell the victims that potential news scrutiny would occur because of the influential assailants, the manner that it was presented was counter-productive to the cause. The staff at MSU used procedures similar to scare-tactics to ensure MSU could monopolize the sexual assault complaints.⁶⁹ These policies and actions danced around

⁶² *Id.* at *5.

⁶³ *Id.*

⁶⁴ *Doe*, 2019 U.S. Dist. LEXIS 178023 at *6.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at *11. The court found, in denying a motion to dismiss, that claims of assault that occur outside of the campus are actionable and the long list of MSU's actions to minimize scrutiny and punishment of athletes was a plausible cause of Doe's assault. *Id.*

⁶⁹ *Id.*

Title IX protocols and avoided significant steps in the sexual assault reporting process. The conglomeration of cases at MSU highlights how a higher education institution along with its athletics program, can dominate reporting policy to guarantee favorable outcomes for its players.

C. *Kinsman v. Fla. State Univ. Bd. Of Trs.*

In *Kinsman v. Florida State University Board of Trustees*, a former student alleged that a Florida State University (FSU) student football player, Jameis Winston, raped her and that FSU failed to properly investigate or respond to the assault.⁷⁰ Kinsman claimed that the failure of FSU to respond to the assault denied her educational benefits.⁷¹ Kinsman asserted that FSU officials knew of her report and that FSU had been deliberately indifferent to the matter.⁷² FSU argued that “neither its associate athletics director nor its head football coach is an ‘appropriate person’ under Title IX.”⁷³ In Title IX cases, an appropriate person is someone “with authority to take corrective action to end the discrimination.”⁷⁴ However, the court found that this was a question of fact and could not rule as a matter of law whether the officials were appropriate persons under Title IX.⁷⁵ Kinsman also claimed that “[s]enior FSU Athletics Department . . . officials had actual knowledge that [she] reported being raped . . .”⁷⁶ Regarding this claim, the court stated that there was a strong possibility FSU was creating a hostile environment for Kinsman on campus by allowing her assailant to remain on campus.⁷⁷ Courts have previously held that the “constant potential for interactions”⁷⁸ can lead to an “environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university.”⁷⁹ Ms. Kinsman

⁷⁰ *Kinsman v. Fla. State Univ. Bd. Of Trs.*, No. 4: 14cv235-MW/CAS, 2015 U.S. Dist. LEXIS 180599, at *1 (N.D. Fla. Aug. 12, 2015).

⁷¹ *Id.* at *1-2.

⁷² *Id.* at *4.

⁷³ *Id.* at *6.

⁷⁴ *Williams v. Bd. Of Regents*, 477 F.3d 1282, 1293 (11th Cir. 2007).

⁷⁵ *Kinsman*, 2015 U.S. Dist. LEXIS 180599 at *6.

⁷⁶ *Id.* at *8 (citing ECF No. 1 ¶ 78).

⁷⁷ *Id.* at *11.

⁷⁸ *Id.* (citing *Doe ex rel. Doe v. Derby Bd. Of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006)).

⁷⁹ *Id.* (citing *Kelly v. Yale Univ.*, No. CIV.A. 301-CV-1591, 2003 U.S. Dist. LEXIS 4543, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003)).

emphasized that if FSU had taken the proper protocols when the initial report was filed, then the athlete assailant “would have been removed as a threat to [her] long before ever suiting up to play football.”⁸⁰

Kinsman explained that much of her stress and burden was from the pressures and criticism she received from the press and FSU community.⁸¹ She also explained that FSU took a considerable amount of time between her initial police report and interviews to conduct a disciplinary hearing.⁸² Additionally, the complaint alleged that the dean of students and the chief of police discussed a second student’s accusation against Winston during which the dean “assured the chief that a code of conduct proceeding against Mr. Winston *would not* move forward.”⁸³ FSU claimed that it waited for criminal investigation by the state attorney to conclude before reviewing the evidence and concluding that there was not enough evidence to bring charges.⁸⁴

The case was eventually settled out of court.⁸⁵ FSU touted the settlement as a “win” for students, parents, and taxpayers as the case was dealt with in a financially responsible manner.⁸⁶ FSU also listed the efforts it made to improve its response to sexual assaults including the formation of a sexual assault task group, hiring a new Title IX coordinator, adding new positions relating to on-campus safety, and implementing student training programs.⁸⁷

The FSU case is a prime example of media and community involvement in a case. Because the assailant was so famous, the *Kinsman*

⁸⁰ *Kinsman*, 2015 U.S. Dist. LEXIS 180599 at *13 (quoting ECF No. 44, at 19.).

⁸¹ *Id.*

⁸² *Id.* at *9-10.

⁸³ *Id.* at *16 (citing ECF No. 1 ¶¶ 27, 101).

⁸⁴ *Id.* at *17.

⁸⁵ *FSU Announces Settlement in Erica Kinsman Matter*, FLORIDA STATE UNIVERSITY NEWS (Jan. 25, 2016 11:57AM), <https://news.fsu.edu/news/university-news/2016/01/25/fsu-announces-settlement-erica-kinsman-matter/>. The Court ruled that the complaint stated a plausible claim under claim under Title IX by alleging deliberate indifference by FSU. *Id.*

⁸⁶ *Kinsman*, 2015 U.S. Dist. LEXIS 180599 at *9.

⁸⁷ *See supra* note 85.

case was broadcast across the media,⁸⁸ and Ms. Kinsman received criticism for her allegations.⁸⁹ Many members of the FSU community simply did not want sexual assault allegations to supersede football success, and some fans even made death threats.⁹⁰ FSU's handling of the allegations surrounding Jameis Winston shows how schools may be incentivized to ignore sexual assault allegations for the prolongment of athletic success; arguably, FSU dragged its feet in its investigation in order to keep its star player on the field. Although the case was settled,⁹¹ it shows the lengths athletic programs and higher education administration will go to ensure that athletics are successful.

D. *Doe v. Univ. of Tennessee*

In *Doe v. University of Tennessee*, a class of women alleged that they were subjected to sexual assault by student-athletes.⁹² The plaintiffs alleged that the school had “actual notice (and itself created) a long-standing, severely hostile sexual environment of rape by male athletes . . . that was condoned and completely unaddressed by the University of Tennessee (UT) officials.”⁹³ A former Director of Student Judicial Affairs with knowledge of the attempted coverups “voiced concerns relating to a pattern and practice of active interference by the Athletic Dept.’ with disciplinary investigations

⁸⁸ See, e.g., Michael McCann, *Analyzing Civil Lawsuit Against Former Florida State Star Jameis Winston*, SPORTS ILLUSTRATED (Apr. 20, 2015), <https://www.si.com/nfl/2015/04/20/jameis-winston-lawsuit-erica-kinsman>.

⁸⁹ Polly Mosendz, *Jameis Winston's Lawyer: Alleged Rape Victim's Lawsuit a 'Stunt,'* NEWSWEEK (Apr. 17, 2015, 2:55 PM), <https://www.newsweek.com/jameis-winstons-lawyer-alleged-rape-victims-lawsuit-stunt-323126>.

⁹⁰ See Marissa Payne, *Erica Kinsman, Who Accused Jameis Winston of Rape, Tells Her Story in New Documentary, 'The Hunting Ground'*, Wash. Post (last updated Jan. 25, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2015/02/19/erica-kinsman-who-accused-jameis-winston-of-rape-tells-her-story-in-new-documentary-the-hunting-ground/> (“[*The Hunting Ground*] showed death threats [Kinsman] received, as well as clips of ESPN's ‘First Take’ hosts Skip Bayless and Stephen A. Smith defending Winston when the allegations first surfaced. They both defended Winston, calling Kinsman's allegations ‘terribly unfair,’ while noting the timing of the investigation ‘stinks.’”).

⁹¹ Erica Kinsman and FSU settled in 2016 for \$950,000. *Id.*

⁹² *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788 (M.D. Tenn. 2016).

⁹³ *Id.* at 792.

and proceedings.”⁹⁴ The UT Athletic Department had a pattern of interfering with the discipline process, concealing charges, providing specialized defense counsel for male athletes, discouraging reporting, and “misusing the Tennessee Uniform Procedures Act by . . . selecting judges to hear cases involving athletes in a delaying process not in compliance with Title IX.”⁹⁵

The pattern of sexual hostility and interference in the disciplinary process included: the replacement of female staff in athletics “to create a ‘good ol’ boys club,” the coaching of witnesses before investigations, and the refusal to address a number of cases of sexual assault allegations involving male athletes.⁹⁶ Individually, the plaintiffs presented a number of situations where the university neglected to support a potential victim or to bring claims through “a pattern of discounting the victim’s statement and credibility,” and “bias[] toward the athlete’s version of events.”⁹⁷

In many situations, a faculty member, administrator, or coach knew of the incident. One coach allegedly told a victim advocate on the football team that “he was disappointed in [the advocator] and that [he] had betrayed his team” by reporting the incident.⁹⁸ A victim also reported receiving several texts and calls from her assailant and his teammates to convince her to not pursue an investigation, proving that the UT Athletic Department had not “properly instruct[ed the] athletes about appropriate behavior” after an assault allegation.⁹⁹ Further, a victim asked her own coach to schedule a conference with the UT Title IX Coordinator, but the coach neglected to schedule an appointment.¹⁰⁰

The accounts of the UT program in *Doe v. University of Tennessee* make it seem like it is an extreme example by showing multiple cases of

⁹⁴ See *Doe v. Univ. of Tenn.*, No. 3:16-cv-199, 2016 U.S. Dist. LEXIS 41226, at *6-7 (M.D. Tenn. Mar. 29, 2016) (emphasizing a number of cases of sexual assault dating back to 1995 supporting that the UT Athletic Department knew of, and actively attempted to cover up incidents of sexual assault by failing to report to police or UT administration).

⁹⁵ *Doe*, 186 F. Supp. 3d at 793.

⁹⁶ *Id.* at 794.

⁹⁷ *Id.* at 798.

⁹⁸ *Id.* at 796.

⁹⁹ *Id.* at 797.

¹⁰⁰ *Id.*

sexual abuse. Instead, it is likely that many other athletic programs are just like UT and are plagued with similar issues.

E. *Analysis of the Prevalence of Hidden Sexual Assault and Harassment Claims*

The present climate calls for accountability in Title IX harassment and sexual assault claims. Court cases such as *Simpson* and *Kinsman* have opened the public's eyes to the dangers of allowing institutions to self-monitor and regulate their own Title IX proceedings.¹⁰¹ Although there is some federal guidance on how schools can and should evaluate Title IX claims,¹⁰² there needs to be a definite guide for institutions.¹⁰³ Because institutions still have the ability to unilaterally investigate Title IX claims,¹⁰⁴ it is easier for privileged officials to sweep claims under the rug. As the *Michigan State* and *Tennessee* cases have revealed, those who have "actual notice" of the incident often fail to report, fail to intervene, and fail to discipline overall.¹⁰⁵ By requiring a heightened policy for Title IX claims and investigations, it could reduce the amount of cases that are undermined by those in power, specifically administrations preferring athletic success over justice.

¹⁰¹ See, e.g., *Kinsman v. Fla. State Univ. Bd. of Trs.*, No. 4:15cv235-MW/CAS, 2015 U.S. Dist. LEXIS 180599, at *5 (N.D. Fla. Aug. 12, 2015) (describing FSU's lack of disciplinary action for an athlete accused of raping a fellow student).

¹⁰² See 34 C.F.R. § 106 (2020); Office for Civil Rights, *Revised Sexual Harassment Guidance*:

Harassment Of Students By School Employees, Other Students, Or Third Parties Title IX, U.S. DEPARTMENT OF EDUCATION (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (formally rescinded by the Department of Education).

¹⁰³ A guide for institutions should explain in detail required reporting protocols for each higher education institution, where and with whom a report should be filed, how to maintain the proper counseling services for reporting, etc. The guide should also include consequences for failing to follow reporting steps such as fines, probations, and investigations. By providing a step-by-step uniform plan for reporting for schools, it will decrease an institution's ability to avoid protocol.

¹⁰⁴ *Kinsman*, 2015 U.S. Dist. LEXIS 180599, at *9.

¹⁰⁵ *Doe v. Mich. State Univ.*, No. 1:18-cv-390, 2019 U.S. Dist. LEXIS 178023, at *5 (W.D. Mich. Aug. 21, 2019); *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 792 (M.D. Tenn. 2016).

The actions, or lack thereof, of UT's administration show the extent that universities will go to support athletics. The attitude and stigma of "betrayal" for reporting serious crimes and offenses does not foster a community of support.¹⁰⁶ Instead, it creates a mentality of "don't ask, don't tell," that lets college athletes act without repercussions.¹⁰⁷ Institutions ignoring sexual assault by athletes are continually uncovered. Recently, Louisiana State University was exposed for ignoring complaints of sexual assault for over seven years, allowing players to continue to practice and compete.¹⁰⁸ The emphasis on athletic success—driven by fans, donors, and the media—pressures schools into overlooking protocol and making false Title IX reports.¹⁰⁹ This pressure critically inhibits the education opportunities for victims and frames college campuses as dangerous environments.¹¹⁰

Sexual assault and harassment awareness has increased in recent years. With the "Me Too" movement, women are feeling increasingly empowered to come forward with claims against privileged assailants.¹¹¹ Despite still facing the pressures of media scrutiny, women today are now more emboldened to share their experience as victims of sexual misconduct.¹¹² "Me Too" has changed the narrative for victims and supports those who come forward with a badge of honor.¹¹³ Hopefully, this empowerment will fuel victims to stand their ground, even if athletic-leaning administrations pressure them to not seek restitution.

¹⁰⁶ *Tennessee*, 186 F. Supp. 3d 788.

¹⁰⁷ See *id.*; Kenny Jacoby et al., *LSU Mishandled Sexual Misconduct Complaints Against Students, Including Top Athletes*, USA TODAY (Nov. 16, 2020), https://www.usatoday.com/in-depth/sports/ncaaf/2020/11/16/lsu-ignored-campus-sexual-assault-allegations-against-derrius-guice-drake-davis-other-students/6056388002/?build=native-web_i_t.

¹⁰⁸ Kenny Jacoby, *supra* note 107.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Tarana Burke, *History & Inception*, ME TOO, <https://metoomvmt.org/get-to-know-us/history-inception/> (last visited Nov. 20, 2020).

¹¹² *Id.*; *Doe v. Mich. State Univ.*, No. 1:18-cv-390, 2019 U.S. Dist. LEXIS 178023, at *4 (W.D. Mich. Aug. 21, 2019).

¹¹³ *Id.*

Regardless of the recent empowerment, victims should not have to overcome administrative pressure. Reporting students face adverse conditions, like in *Michigan State*, where the staff used procedures similar to scare-tactics to ensure that MSU could monopolize sexual assault complaints.¹¹⁴ These tactics make it extremely difficult and emotionally painful for victims to report critical issues. Instead, institutions should diligently monitor their staff and programs, especially in cases of Title IX reporting. Policies should not allow internal handling by athletic programs when it comes to claims against athletes. Because of these issues, students may worry about the effects of reporting and do not feel comfortable with the administration. By allowing athletic programs to handle the issue, there is no “check” on the ability to overpower or persuade a victim to not report. Incentives, such as an increase in finances and overall enrollment due to prevailing athletic programs, discourage universities from taking the appropriate actions through self-policing.¹¹⁵ The incentives of money and notoriety encourage coaches and staff to cover up claims. Additionally, heightened reporting requirements for administrations and coaches could create an obligation to report through the chain of command and eventually to an advisory committee.¹¹⁶ Because athletes are students of the institutions, athlete-assault cases should be dually monitored by the athletic program and Title IX/Student Affairs offices to ensure no preferential treatment exists. The desire to maintain athletic performance should not undermine the school’s responsibility to impose regulations for disciplinary action for Title IX claims.

¹¹⁴ *Id.*

¹¹⁵ *See, e.g.,* Silverthorne, *supra* note 28.

¹¹⁶ This is similar to the reporting requirements for in-house counsel attorneys created by the Securities and Exchange Commission in response to ENRON through the Section 307 of the Sarbanes-Oxley Act of 2002. This heightened reporting system requires an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer up-the-ladder within the company to the chief legal counsel or the chief executive officer of the company and potentially to other advisory committees. *See* 17 C.F.R. § 205 (2003).

III. ACADEMIC MISCONDUCT AND FRAUD

Academic misconduct and fraud among student-athletes continues to be prevalent issue on college campuses.¹¹⁷ Colleges have been motivated by an athlete's busy schedule to help the students cheat and receive the "bare-minimum grade" to maintain enrollment.¹¹⁸

A. *University of North Carolina*

For a span of over eighteen years, student-athletes at the University of North Carolina Chapel Hill (UNC) enrolled in fake courses to receive academic credit.¹¹⁹ The "phantom" classes stemmed from the African American Studies Department allowing students to take "paper classes" with no attendance and sometimes no instructor required.¹²⁰ The strategy for these courses was to help maintain player eligibility.¹²¹ While an academic assistant, who was admittedly also a UNC basketball fan, was the mastermind behind the paper classes, the department, the coaches, and athletic directors all admitted to being aware of the scheme.¹²²

¹¹⁷ Joseph Rauch, *Why North Carolina Student-Athlete Cheating Scandal is More Exploitive than Shocking*, THE HECHINGER REP. (Oct. 28, 2014), <https://hechingerreport.org/north-carolina-student-athlete-cheating-scandal-exploitive-shocking/>. See Ravi Lulla, *10 Worst Scandals in NCAA History*, BLEACHER REP. (Sep. 28, 2011), <https://bleacherreport.com/articles/869007-10-worst-scandals-in-ncaa-history> (describing instances of academic cheating at Florida State University). See also Doug Lederman, *NCAA Punishes Missouri in Blatant Academic Fraud Case*, INSIDE HIGHER EDUC. (Feb. 1, 2019), <https://www.insidehighered.com/news/2019/02/01/ncaa-punishes-missouri-blatant-case-academic-fraud> (explaining an academic cheating scandal between a math tutor and student-athletes at the University of Missouri).

¹¹⁸ *Id.*

¹¹⁹ Rauch, *supra* note 117.

¹²⁰ Jeremy Bauer-Wolf, *NCAA: No Academic Violations at UNC*, INSIDE HIGHER EDUC. (Oct. 16, 2017), <https://www.insidehighered.com/news/2017/10/16/breaking-ncaa-finds-no-academic-fraud-unc>.

¹²¹ Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN INVESTIGATIONS (Oct. 23, 2014, 10:28AM), <https://www.edition.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html>.

¹²² *Id.*

Although the UNC faculty admitted to knowledge of the scheme, the NCAA's three-year investigation resulted in UNC skating by virtually unpunished.¹²³ The NCAA Committee on Infractions was unable to conclude that the school created the paper classes exclusively for the benefit of athletes alone.¹²⁴ The NCAA dropped the original charges for "failure to monitor" and "lack of institutional control" over athlete academics because there was no evidence that athletes received "extra benefits."¹²⁵ The NCAA allows the academic institutions to self-monitor and self-report academic fraud.¹²⁶ Because of this policy, a ruling panel could not refute UNC's decision to support the paper course.¹²⁷ Critics on athletic ethics found the NCAA's decisions not to punish UNC shameful and a hole in the system.¹²⁸

The UNC scandal is a prime example of higher education institutions boosting athletic GPAs through academic fraud without sanctions by the NCAA Infractions Committee. The blatant UNC scandal emphasizes how schools can use their power to get around the NCAA's lax rules.

B. Syracuse University

At Syracuse University, the NCAA found a plethora of academic infractions amongst the athletic community.¹²⁹ The former Syracuse director of basketball operations "collected and maintained players' usernames and passwords to email accounts" to distribute to tutors in the school's "athlete support services."¹³⁰ The Syracuse athletic staff sent emails from the student-athletes' accounts directly to professors.¹³¹ The correspondence included

¹²³ Bauer-Wolf, *supra* note 120.

¹²⁴ *See id.* (stating that UNC offered fake courses to non-athlete students to boost GPAs).

¹²⁵ *See id.* To be held liable for "failure to monitor" and "lack of institutional control" over athlete academics, there must be definitive proof that the benefits received are solely for athletes.

¹²⁶ *See id.* (explaining that there is no committee that oversees academic fraud in higher institutions).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Jon Solomon, *What Syracuse's NCAA Case Revealed About Academic Fraud*, CBS SPORTS (Mar. 7, 2015, 7:31 AM), <https://www.cbssports.com/college-football/news/what-syracuses-ncaa-case-revealed-about-academic-fraud/>.

¹³⁰ *Id.*

¹³¹ *Id.*

emails with coursework “necessary to maintain the required grades for [eligibility].”¹³² An investigation uncovered that the Syracuse players did not do the work and the submitted documents were attributed to someone else.¹³³

Although aware of signs of academic fraud, the director of athlete support services noted that he did not originally report his findings because of the “fear[] he would not be taken seriously” since the “basketball [team] might have ‘a little bit of special treatment.’”¹³⁴ Instead, the director circulated an email to the coaches describing the protocol to not share email passwords, but the director of basketball operations and his staff continued to access the athletes’ accounts.¹³⁵

During the NCAA investigation, Syracuse could not report many issues of academic integrity because “each course instructor could not locate a copy of the submitted work.”¹³⁶ The school noted that it had a policy of shredding documents yearly.¹³⁷ The NCAA found that regardless of Syracuse’s determination that the athletes did not violate the school’s academic integrity policy, the school still committed infractions because “academic misconduct” includes allegations of extra benefits.¹³⁸ After the final ruling of the NCAA, the chief hearing officer on the case noted: “Ultimately you have a situation where desires to be achieved on the basketball court override the academic integrity . . . [i]t really demonstrated misplaced priorities.”¹³⁹

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* Many that report infractions in the athletic community face similar David versus Goliath pressures feeling that the athletic department is “too big” to accurately investigate a report. *Id.*

¹³⁵ Solomon, *supra* note 129.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* *But see* Bauer-Wolf, *supra* note 120 (noting that UNC avoided sanctions because alleged “extra benefits” were not confined to student-athletes).

¹³⁹ *Id.*

C. *Florida State University*

In 2009, FSU placed blame on a “rogue tutor” and instructor to lessen the repercussions on the athletes that were found with answers to test questions.¹⁴⁰ Additionally, it was found that FSU had allowed tutors to write athletes’ papers.¹⁴¹ The school maintains that the athletes are innocent and that they received “inappropriate help.”¹⁴² The cheating scandal spanned sixty-one student-athletes and resulted in the NCAA placing FSU on probation, reducing scholarships, and stripping the university of all wins involving athletes that participated in the fraud.¹⁴³

The FSU president noted that the school was embarrassed by the incident.¹⁴⁴ The president also commented on the way the university had conducted its investigation finding that “[s]tudents who cooperated . . . were ultimately penalized more than those who were evasive.”¹⁴⁵ The cheating included: a “rogue tutor” distributing copies of a test with answers to students, and a learning specialist who typed, edited, and wrote papers on behalf of students.¹⁴⁶ This specialist also admitted to distributing a study guide with answers to exam questions for an online music course.¹⁴⁷ Additionally, the specialist instructed a student-athlete to take an online psychology quiz for another student-athlete.¹⁴⁸

Although FSU’s cheating scandal is not as complex as Syracuse’s, it still puts forth a strong case that schools provide preferential treatment to athletes over regular students. In these instances of cheating, the “rogue tutor” or the instructor each preferred student-athletes over non-athletes.¹⁴⁹ FSU commented that for ten years, the music course at issue had no incidents

¹⁴⁰ Lynn Zinser, *NCAA Penalizes Florida State for Academic Fraud*, N.Y. TIMES (Mar. 6, 2009), <https://www.nytimes.com/2009/03/07/sports/ncaaf/07ncaa.html>.

¹⁴¹ Katie Thomas & Ken Belson, *Documents in Fraud Case Made Public by Florida State.*, N.Y. TIMES (Oct. 14, 2009), <https://www.nytimes.com/2009/10/15/sports/15ncaa.html/>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Zinser, *supra* note 140, at 2.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

until its “academic integrity was compromised in . . . 2006.”¹⁵⁰ The school blamed the individual instructors for the academic misconduct and claimed that the scandal will not be repeated.¹⁵¹

D. Analysis of the Effects of Hidden Academic Misconduct and Fraud in Athletics

Although some schools—like FSU—claim that academic misconduct incidents are committed by rogue actors in one-time incidents,¹⁵² the pattern of preferential treatment towards athletes in higher education is rampant. Schools are not allowed to create fraudulent courses for athletic success like Syracuse University¹⁵³ but they will provide additional advantages for their athletes to ensure success and eligibility on the field.¹⁵⁴ The NCAA and Legislative Council have interpreted “academic misconduct” to apply to extra benefits given to athletes outside of a “university’s academic integrity policy.”¹⁵⁵ This interpretation means that schools and athletic programs have to carefully monitor their programs to ensure academic success amongst athletes. Whether it is an individual compelled to support athlete success or a program as a whole, it should be done fairly. The answer to a successful university is not to “boost” athlete academics. This eliminates the integrity of the school and, according to the NCAA precedent, can take away a school’s coveted championship title.¹⁵⁶

The self-monitor and self-report systems are not a valid check on the system of fraudulent academics in athletics. Although measuring academic rigor is difficult and setting national standards for higher education has no precedented weight, there needs to be a monitoring and accountability system for the programs. Higher education programs’ alleged primary goal

¹⁵⁰ *Id.*

¹⁵¹ See Thomas & Belson, *supra* note 141.

¹⁵² *Id.*

¹⁵³ See Solomon, *supra* note 129.

¹⁵⁴ See, e.g., *id.*

¹⁵⁵ *Id.*

¹⁵⁶ Richard Johnson, *What Actually Happens When the NCAA Vacates Your Wins?*, SB NATION (Feb. 20, 2018), <https://www.sbnation.com/college-basketball/2018/2/20/17032636/what-does-it-mean-when-the-ncaa-vacates-wins>.

is academics. By allowing an outside panel to monitor higher education academics, it would create a stronger sense of accountability. The NCAA could enlist a dual system of panel evaluation for potential academic fraud cases, which would foster an incentive for schools to adequately self-monitor. Institutions would need to constantly review their own academic strategies for athletics to ensure they avoid penalties from the NCAA through the reviewing panel.

IV. THE STIGMA ASSOCIATED WITH REPORTING MISCONDUCT

Overall, the pressures of athletic success have shown many faults in higher education institutions. Schools will go to great lengths to ensure that an athlete remains eligible to compete. This mindset clouds the judgment of administrators and athletic directors, pushing them to commit fraud, lies, and deceit. A study showed that the win-at-all-cost attitude creates “pressure” for institutions.¹⁵⁷ Because of these pressures, “[c]oaches may feel the odds of not being caught are in their favor, and administrators may look the other way in order to keep the revenue streams flowing.”¹⁵⁸ These situational ethics create an environment where rules are bent to support fraudulent outcomes.¹⁵⁹

Additionally, sexual assault cases have detrimental effects on the victims.¹⁶⁰ Victims face issues such as shame, guilt, denial, trust, and safety issues.¹⁶¹ Victims who are ostracized by schools, such as Erica Kinsman, face issues of isolation causing them to feel that “they do not deserve support, that they are tainted, and that others will not want to be their friends or lovers.”¹⁶² These victims face dissociation from their communities along with physical and emotional disturbances.¹⁶³ Sexual assault victims need to

¹⁵⁷ Bradley Ridpath et al., *NCAA Academic Fraud Cases and Historical Consistency: A Comparative Content Analysis*, 25 J. LEGAL ASPECTS OF SPORTS 75, 82 (2015).

¹⁵⁸ *Id.* (quoting Hums et al., *The Ethical Issues Confronting Managers In The Sport Industry*, J. OF BUS. ETHICS, 51-66 (1999)).

¹⁵⁹ *Id.*

¹⁶⁰ *Effects of Sexual Assault*, WASHINGTON COALITION OF SEXUAL ASSAULT PROGRAMS, <https://www.wcsap.org/help/about-sexual-assault/effects-sexual-assault> (last visited Jan. 13, 2021).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

be supported by adequate reporting measures and advocates within the school community.

By adequately punishing athletes for sexual assault crimes, our society can show the importance of sanctioning sexual assault offenders, regardless of their athletic clout. Additionally, by holding athletes accountable for their academic eligibility instead of creating loopholes, institutions will emphasize the importance of honor in academics.¹⁶⁴ Athletes are portrayed as leaders on campus and are highly regarded by the public.¹⁶⁵ By holding athletes to the standards of transparency and justice, the general public's mentality of win-at-all-cost could be changed to a realistic perspective.¹⁶⁶ This change in societal perspective could lead to a decrease in the pressures athletic departments and intuitions face to succeed; thus, altering the overall mentality towards the importance of a winning athletic program.

CONCLUSION: ATHLETIC "COVER UPS" CREATE A FLAWED SYSTEM

Higher education institutions continue to preference athletic success over disciplinary actions. The ability to self-monitor and self-report both Title IX claims and academic fraud claims gives institutions the power to "cover up" their flawed systems. The desire to maintain athletic success to ensure the school receives praise from fans, boosters, and the public shifts administrative priorities to protecting athletes. Higher education institutions need a heightened monitoring system with effective "checks" on internal disciplinary action. Without external monitoring, institutions will continue to conceal their flawed systems to promote athletic achievement.

¹⁶⁴ Ganim & Sayers, *supra* note 121.

¹⁶⁵ Keith Eiche et al., *An Exploration of Leadership Characteristics in University Athletics: Research Report 6-97*, UNIV. OF MD. COUNSELING CENTER, <http://williamsedlacek.info/publications/articles/exploration697.html> (last visited Nov. 20, 2020).

¹⁶⁶ *Id.*

