

“THE ARMY YOU CREATED”: COMBATING THE ISSUE OF SEXUAL ASSAULT IN COLLEGE AND QUASI-PROFESSIONAL SPORTS¹

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INTRODUCTION

“Abusers, your time is up. The survivors are here, standing tall, and we are not going anywhere.”²

Imagine it: you have just celebrated your tenth birthday—double digits. Where most children your age spend their birthdays eating cake and ice cream and jumping in bounce castles, your birthdays are different: you are on a strict diet—there will be no cake or ice cream—and the bouncing you engage in happens in the gymnasium. You are an aspiring gymnast. You are ten.

One afternoon, your coach instructs you to perfect a move on the balance beam. You mount the beam, hearing the blood pulse in your ears. You repeat the assigned move over and over again for what you feel are hours. As you begin your dismount, someone shouts in the gymnasium and catches you off guard—you can feel yourself falling, the breath leaving your chest, as you brace for the impact of the floor.

Crunch.

You scream for your coach in pain, you do not know what happened. Your coach runs to your side and begins to quick-assess

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² Carla Correa And Meghan Louttit, *More than 160 Women Say Larry Nassar Sexually Abused Them. Here Are His Accusers in Their Own Words.*, N.Y. TIMES, (Jan. 24, 2018), <https://www.nytimes.com/interactive/2018/01/24/sports/larry-nassar-victims.html> (quoting Aly Raisman).

your injury. She determines the injury to be serious, and sends for the trainer. The trainer demands you be brought to his office for a thorough examination.

As you limp your way down the hall you stare at the tiles on the floor. You hear the trainer say to the coach, “possible anterior cruciate ligament tear...” and you don’t know what those words mean. You are crying in pain, hobbling down the hallway, wishing your mother was there. Once the trainer gets you to his office, he and your coach help you onto his examination table. It feels cold. The crunch of the sanitary paper below you feels coarse. The trainer checks on your knee and determines you do have an ACL tear. It will take several follow up visits to heal over the next few months.

To round out the examination, the trainer asks you to lie on your stomach so he can perform an important medical procedure.³ You roll your tiny frame onto your stomach as he performs this procedure, sticking his bare fingers inside you⁴—you are cold, alone, in pain, and scared.

You are ten.⁵

Alternatively, imagine you are a high school football player. You are used to the bright lights, the screams, music pouring out of loud speakers. You have accomplished a task many young men have only dreamed of: you have garnered national attention, and the recruiting eyes of several prestigious universities. You spend most of your days going to class, football practice, and watching film of your performance or opponent teams in order to perfect your talent. You are made of drive and passion. You are a determined young man who has the world at his feet.

One evening you receive a phone call from the university you have been pining for: your absolute dream school. The head football coach is on the other end of the receiver asking if you would like to come to campus for an official visit: see the town,

³ Dwight Adams, *Victims Share What Nassar Did to Them under Guise of Medical Treatment*, INDYSTAR, (Jan. 25, 2018), <https://www.indystar.com/story/news/2018/01/25/heres-what-larry-nassar-actually-did-his-patients/1065165001/>.

⁴ *Id.*

⁵ *Victims of Larry Nassar Recount Sex Abuse as Young Gymnasts*, ABC13, (Jan. 18, 2018), <http://abc13.com/victims-of-larry-nassar-recount-sex-abuse-as-young-gymnasts/2963541/> (Some of Larry Nassar’s victims were as young as six years old.).

tour the facilities, and meet the staff.⁶ You are overwhelmed with excitement.

The day comes for your visit and you walk up the hill to reveal the quad, the possible bustling center of your world for the next four or five years. You are in love. You determine at that moment that you have been correct all along: State is the university for you. As your guide walks you around you feel as though you are in a daydream. The guide suggests you walk through the locker room and adventure at your leisure.

Your heart stops.

One of the most legendary football coaches in the last hundred years is showering in the team's locker room.⁷ He urges you to join him, talk to him about football, and your choice of university. Unfortunately, he does not only want to talk about shared passions.⁸

You no longer want to go to State—your blissful daydream has become a nightmare.

These are not just hypotheticals for those who lived through the abuse and trauma of Larry Nassar and Jerry Sandusky. Young women were assaulted for decades⁹ at the hand of Dr. Larry Nassar who worked with Michigan State¹⁰ athletes as well

⁶ It should be mentioned here, that while the introductory story is about a potential recruit, the coach is referring to Jerry Sandusky. Sandusky abused children from his philanthropy, *The Second Mile*. *TIMELINE: Jerry Sandusky sex abuse case*, CHICAGO TRIBUNE, (Oct. 9, 2012), http://articles.chicagotribune.com/2012-10-09/business/sns-rt-usa-pennstate-timeline-update-11e8199cm-20121009_1_coaches-association-names-sandusky-university-police-interview-sandusky-jerry-sandusky.

⁷ *Id.*

⁸ Ann O'Neill, "The Sandusky 8" Describe Seduction, Molestation and Betrayal, CNN, (June 17, 2012), <https://www.cnn.com/2012/06/17/justice/sandusky-trial-first-week-wrap/index.html>.

⁹ *Who Is Larry Nassar? A Timeline of His Decades-Long Career, Sexual Assault Convictions and Prison Sentences*, USA TODAY, <https://www.usatoday.com/pages/interactives/larry-nassar-timeline/> (last visited May 2, 2018).

¹⁰ I find it important to mention here that it has been announced that Nassar's former boss, William D. Strampel, the past dean of Michigan State University has also been charged with sexual assault violations. Although he is not the center of this paper as his job did not revolve around sports, he is nonetheless an important peg in the wheel of university sex assault and must be dealt with. He reportedly, "solicited nude photos from at least one student who had performed poorly on a medical school exam, and investigators found dozens of pornographic images and videos on a computer in his office, including many images that appeared to be of Michigan State students. Investigators also found 'a video of Dr. Larry Nassar performing "treatment" on a

as United States Olympic athletes—all under the guise of legitimate medical procedure and true physician care.¹¹ Similarly, young boys looking for a second chance in life were subjected to assaultive showers with Jerry Sandusky—a coach and eventual Penn State booster—who sullied the campus for decades using the promise of gifts and attendance at sporting events to his advantage.¹²

Both of these men used college campuses as their hunting ground. They attacked and abused vulnerable children who were at their mercy while on campus. These schools had Title IX policies in place,¹³ they were aware of how to perform investigations and they knew of the necessity of reporting. Unfortunately for the survivors of the sexual assault, the abusers

young female patient' on the computer. The charging documents suggest that Dr. Strampel targeted women who were struggling in their classes." Steve Friess and Mitch Smith, *Larry Nassar's Former Boss at Michigan State Faces Charges*, NY TIMES, (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/us/nassar-michigan-state-dean-strampel.html>.

¹¹ Adams, *supra*, note 3.

¹² O'Neill, *supra*, note 8.

¹³ See, Michigan State and Penn States' Title IX Policies. *Title IX and Michigan State*, MICHIGAN STATE, (last viewed Apr. 27, 2018), <http://titleix.msu.edu>, ("It is the mission of the Title IX program at Michigan State University to cultivate a campus community that is free of sex discrimination and sexual harassment, including relationship violence and sexual misconduct. We do this by: Raising awareness through education and training programs, Encouraging individuals impacted to report incidents, Holding individuals accountable for violations of university policy, Providing students and employees with resources and supportive services to facilitate ongoing academic and professional success, Offering opportunities for community engagement."); AD85 Sexual and/or Gender-Based Harassment and Misconduct (Including Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking, and Related Inappropriate Conduct) (Formerly Discrimination, Harassment...), Penn State, (last viewed Apr. 27, 2018), <https://policy.psu.edu/policies/ad85#B>, ("The University is committed to equal access to programs, facilities, admission and employment for all persons. It is the policy of the University to maintain an environment free of harassment and free of discrimination against any person because of age, race, color, ancestry, national origin, religion, creed, service in the uniformed services (as defined in state and federal law), veteran status, sex, sexual orientation, marital or family status, pregnancy, pregnancy-related conditions, physical or mental disability, gender, perceived gender, gender identity, genetic information or political ideas. Discriminatory conduct and harassment, as well as sexual misconduct and relationship violence, violates the dignity of individuals, impedes the realization of the University's educational mission, and will not be tolerated. Gender-based and sexual harassment, including sexual violence, are forms of gender discrimination in that they deny or limit an individual's ability to participate in or benefit from University programs or activities.").

held more power at these institutions than the students/children did. Both men were reported before they were arrested.¹⁴ Both schools failed in protecting and preventing further abuse after being informed of the assaults.

This Article seeks to address the problem of sexual assault on college campuses, specifically within the realm of athletics. It focuses on why athletes are being abused by their authority figures, and why others placed in positions of trust have failed them. Part I gives background on the Michigan State and Penn State scandals involving Larry Nassar and Jerry Sandusky, respectively. Part II provides the relevant Title IX protections extended to students on college campuses who believe they are the victims of sex-based discrimination or abuse, and the corresponding responsibilities undertaken by universities. Part III looks into state criminal statutes in relevant states where Olympic assault or college sport assault has occurred. Part IV provides the current attempts at creating safe campuses for athletes, attempts, which seem to have failed. Lastly, Part V dictates the purpose of this Article, which is to propose the creation of a new agency and to support that agency with more adequate policies.

I. COLLEGE SPORTS, THE OLYMPICS, AND THE CULTURE OF SEXUAL ASSAULT

While most athletes would prefer to spend their time going to class, watching game film, building trust and camaraderie with their teammates, and engaging in practice to hone their sport, unfortunately for some, the world of sports had something else in mind for them. There are several survivors of sexual abuse who were victimized at the hands of authority figures in sports programs.¹⁵ The most prominent and abhorrent examples of which are the Michigan State and Penn State scandals. Michigan State employed and protected convicted sexual assailant Larry Nassar,¹⁶ while Penn State maintained ties with convicted sexual assailant

¹⁴ Tracy Connor and Sarah Fitzpatrick, *Gymnastics Scandal: 8 Times Larry Nassar Could Have Been Stopped*, NBC, (Jan. 25, 2018), <https://www.nbcnews.com/news/us-news/gymnastics-scandal-8-times-larry-nassar-could-have-been-stopped-n841091>; TIMELINE, *supra*, note 6.

¹⁵ Correa & Louttit, *supra*, note 8 and O'Neill note 2.

¹⁶ Who Is Larry Nassar?, *supra*, note 9.

Jerry Sandusky.¹⁷ The Michigan State scandal is an example of collegiate as well as Olympic sports sex assault and institutional indifference, whereas the Penn State scandal is an example of sex assault on minors and institutional indifference. Both of these scandals are important because they both include victims that were not necessarily members of the university, but were assaulted on the university's property, by university employees.

a. Michigan State

The most recent example of college campus and Olympic sex assault is what happened at Michigan State University (MSU).¹⁸ Dr. Larry Nassar was an osteopathic doctor and athletic trainer at MSU, and for the United States Olympic Gymnastics team.¹⁹ For several decades he used his position at MSU to prey on collegiate athletes as well as athletes who used MSU's facilities.²⁰ In his role as athletic trainer and physician to the Olympic gymnasts, Nassar was able to prey on young aspiring athletes at several camps and training sites across the country.²¹ Using kindness as his snare, Nassar would entice the young women with candy or other luxuries that the Olympic trainees or college athletes were not usually allowed, making himself their one ally during particularly difficult bouts of training and practice.²² When called upon to examine and give care to these young girls and women, Nassar would sexually assault them by attempting a medical procedure meant for pelvic issues without the use of lubricant or gloves.²³ Nassar was so brazen in his assault, he was able to do it in the presence of his victims' parents without their knowledge.²⁴

¹⁷ *Penn State Scandal Fast Facts*, CNN, (Mar. 28, 2018), <https://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts/index.html>.

¹⁸ Who Is Larry Nassar?, *supra*, note 9.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² David Eggert And Mike Householder, *Larry Nassar, Former USA Gymnastics Doctor, Sentenced for 40 to 175 Years in Prison*, DENVER POST, (Jan. 24, 2018), <https://www.denverpost.com/2018/01/24/larry-nassar-sentenced/>.

²³ Adams, *supra* note 3.

²⁴ Kathleen Joyce, *Mom Says She Was in Exam Room When Larry Nassar Sexually Abused Daughter*, FOX NEWS, (Feb. 10, 2018), <http://www.foxnews.com/sports/2018/02/10/mom-says-was-in-exam-room-when-larry-nassar-sexually-abused-daughter.html>.

Although Nassar was reported several times over his decades of practice, it was not until the *Indianapolis Star* published an exposé on how MSU was handling their investigations that Rachael Denhollander was able to file criminal charges against Nasser in August of 2016—Nassar subsequently lost his job the next day.²⁵ In December of 2016, Nassar was also indicted for child pornography.²⁶ After several more charges and indictments, Nassar pled guilty to child pornography charges in July of 2017, and then in November of that year pled “guilty to seven counts of first-degree criminal assault.”²⁷ On December 7, 2017, Nassar was sentenced to federal prison for child pornography, and on January 24, 2018, Nassar was sentenced to 175 years for the sexual assault charges.²⁸ Nassar will be in prison for the rest of his life for the previous sentences, as well as pending trials he has coming up.

b. Penn State

One of the most pervasive examples of assault on a college campus by an authority figure is that of Penn State and Jerry Sandusky.²⁹ Jerry Sandusky was the Penn State assistant football coach under Joe Paterno from 1969 to 1999 when he retired as the defensive coordinator.³⁰ After his retirement he stayed on as an important booster with special privileges regarding the use and access to facilities at Penn State.³¹ In 1977 Sandusky founded The Second Mile, which was a philanthropic organization intended to help disadvantaged children.³² In 1994, Sandusky plucks his first victim from The Second Mile, an eight-year-old boy who he molested in the football locker room showers.³³ In 1996, Sandusky

²⁵ Who Is Larry Nassar?, *supra*, note 9.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* To make things even more infuriating, Nassar requested that he not have to be present for his victims’ testimonies about his abuse, as it was “too hard to listen” to them. Tracy Connor, *Larry Nassar Complains it’s Too Hard to Listen to Victim Stories*, NBC News, (Jan. 18, 2018), <https://www.nbcnews.com/news/us-news/larry-nassar-complains-it-s-too-hard-listen-victim-stories-n838731>.

²⁹ Penn State Scandal Fast Facts, *supra*, note 17.

³⁰ TIMELINE, *supra*, note 6.

³¹ *Id.*

³² *Id.*

³³ *Id.*

finds another victim, this time a ten-year-old boy who he repeatedly molested.³⁴ Between 1996 and 2009, Sandusky repeated this story to at least eight known victims.³⁵ As if being able to abuse young boys for over a decade was not problematic enough, Sandusky was reported or confronted about the assaults several times between 1994 and 2009.³⁶ In 1998, Sandusky was investigated by Penn State police, and his promise to not shower with children anymore was accepted and the whole thing dismissed.³⁷ In 2000, a Penn State witnesses Sandusky orally assaulting a boy in the football locker room showers, who tells his supervisor and his colleagues, but no one else is informed of the assault.³⁸ A year later a Penn State student witnesses Sandusky actively raping a ten-year-old boy.³⁹ In 2009, one survivor's mother reported the abuse to authorities where an investigation begins and Sandusky is restricted from the victim's school district.⁴⁰ It was not until November of 2011 that Sandusky was finally indicted for his abuse of boys on Penn State's campus—the grand jury found cause to indict for 40 counts of molestation.⁴¹ Sandusky was eventually sentenced to 30 to 60 years in jail, with his first opportunity at parole when he is 98 years old.⁴²

II. TITLE IX PROTECTIONS

While most people who understand gender issues recognize Title IX of the Education Amendments of 1972 as the federal law prohibiting sex discrimination at college universities, Title IX provides and protects so much more.⁴³ Unfortunately, most Title IX scholarship that deals with sports refers only to the

³⁴ *Id.*

³⁵ TIMELINE, *supra*, note 6.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ TIMELINE, *supra*, note 6.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Title IX of the Education Amendments of 1972*, DEPARTMENT OF JUSTICE, (last visited Apr. 25, 2018), <https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq>.

requirement of equal opportunity for sport options.⁴⁴ Title IX has a much broader scope, however, and it can be used to combat sex assault that occurs to a college athlete, which is perpetrated by a university employee, if there is negligence on behalf of the university.⁴⁵ The benefits of using Title IX are the mandatory provisions for reporting, and the university's vicarious liability for employees who commit or fail to report abuse.

a. Sex Assault on College Campuses

Title IX claims that sexual assault of a student is considered a civil rights violation, so campuses are supposed to take Title IX reports extremely seriously.⁴⁶ When sex assault occurs on college campuses, there are policies and procedures in place to investigate and help the survivor.⁴⁷ To avoid or mitigate these occurrences, however, universities are also supposed to ensure that their campus is equipped with a statement of nondiscrimination (to include sexual assault violence), maintain an office for a Title IX Coordinator whose job it is to monitor gender discrimination on campus, and to create and make available, "grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints."⁴⁸ This, however, is a

⁴⁴ See, Brandon Kai Golden, *Evaluating Opportunity in College Sports (Title IX)*, 22 *Cardozo J.L. & Gender* 313 (2016); Jessica Constance Caggiano, *Girls Don't Just Wanna Have Fun: Moving Past Title IX's Contact Sports Exception*, 72 *U. PITT. L. REV.* 119 (Fall 2010).

⁴⁵ *Alexander v. Yale University*, 459 F. Supp. 1 (D. Conn. 1977) (holding that if a school fails to adequately and promptly assign a remedy to any sexual harassment complained of by a student, it would be considered a civil rights violation under Title IX—it essentially made sexual harassment a sexual discrimination claim).

⁴⁶ Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 *GEO. J. GENDER & L.* 563, 569 (2014).

⁴⁷ Haley O. Morton, *License to Abuse: Confronting Coach-Inflicted Sexual Assault in American Olympic Sports*, 23 *WM. & MARY J. WOMEN & L.* 141 (2016) (citing, Russlynn Ali, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. 2-3, 10, 19 (2011).) ("They include: invoking a school's administrative hearing procedure, reporting to the police, submitting a complaint to an administrative agency like the [Office for Civil Rights], or filing a civil cause of action against the school if it had notice and remained deliberately indifferent.")

⁴⁸ Russlynn Ali, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. 6 (2011).

huge job for one person. To expect a Title IX coordinator to be able to handle all the gender discrimination reports on campus, all the while trying to keep a handle on sex assault violations, is a lot to ask. Title IX coordinators at state schools have received reports from approximately 23.1% of all undergraduate female students in the United States.⁴⁹ This is an even more baffling number when considering the fact that “only 20% of female student victims, age 18-24, report.”⁵⁰ We are asking Title IX coordinators to be university detectives for sexual assault for 23% of the entire student body nation-wide, as well as monitor gender nondiscrimination compliance.

Once a Title IX coordinator is told of the abuse, an investigation begins to determine, “(1) whether or not the conduct occurred; and (2) if [so], what actions the school will take to end sexual violence, eliminate the hostile environment, and prevent its recurrence.”⁵¹ This investigation is, according to the Office for Civil Rights, supposed to be a fair, swift, objective and unequivocal.⁵² In the cases of Sandusky and Nassar, these investigations were anything but. In fact, both were reported for several decades and in the spirit of camaraderie, their colleagues looked the other way.⁵³

⁴⁹ RAINN, Campus Sexual Violence: Statistics, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited May 3, 2018).

⁵⁰ *Id.*

⁵¹ Russlynn Ali, *Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights*, U.S. DEP'T OF EDUC. 1, 24 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁵² 34 C.F.R. PART 668 (“Summary of the Major Provisions of This Regulatory Action: The final regulations will...Require institutions to provide for a prompt, fair, and impartial disciplinary proceeding in which: (1) Officials are appropriately trained and do not have a conflict of interest or bias for or against the accuser or the accused; (2) the accuser and the accused have equal opportunities to have others present, including an advisor of their choice; (3) the accuser and the accused receive simultaneous notification, in writing, of the result of the proceeding and any available appeal procedures; (4) the proceeding is completed in a reasonably prompt timeframe; (5) the accuser and accused are given timely notice of meetings at which one or the other or both may be present; and (6) the accuser, the accused, and appropriate officials are given timely and equal access to information that will be used during informal and formal disciplinary meetings and hearings.”).

⁵³ John Barr and Dan Murphy, *Nassar Surrounded by Adults Who Enabled His Predatory Behavior*, ESPN, (Jan. 16, 2018), http://www.espn.com/espn/otl/story/_id/22046031/michigan-state-university-doctor-larry-nassar-surrounded-enablers-abused-athletes-espn; Steve Friess and Mitch Smith, *supra*, note 10.

Importantly, Title IX does not only protect enrolled students who are assaulted on college campuses.⁵⁴

Under the Clery Act, when a complaint involves sexual assault, institutions must disclose the finding(s), sanctions and rationale to the complainant...this provision is not student-specific, and therefore applies to all acts of sexual assault on campus, regardless of the status of the complainant or respondent.⁵⁵

This shows that in situations like Sandusky and Nassar, where the victims were either members of the community or aspiring Olympic athletes, Title IX still applies to protect them from sex assault.

b. Heightened Duty to Report by Staff

One of the responsibilities of a staff or faculty member of any university is to recognize the signs of sexual abuse and to report it.⁵⁶ As a member of the university's employee body, you become a Campus Security Authority under the Clery Act, which makes you responsible to report immediately any and all sexual assault that you come to know if it occurs on any of the university's property and if it involves and university-related individuals.⁵⁷ If a sexual assault occurs outside the parameters of that laid out in the Clery Act, it is still desirable that a CSA will report the incident anyway—as it is still an assault to a university-related individual.⁵⁸

Nassar's ability to sexually assault those children who attended sports camps at MSU,⁵⁹ or Sandusky's proclivity for

⁵⁴ Title IX of the Education Amendments of 1972, *supra*, note 43.

⁵⁵ W. Scott Lewis, J.D. Sandra K. Schuster, J.D. Brett A. Sokolow, J.D. Daniel C. Swinton, J.D., Ed.D., *The Top Ten Things We Need to Know About Title IX (That the DCL Didn't Tell Us)*, ATAXIA.ORG, (Jan. 18, 2013), <https://atixa.org/wordpress/wp-content/uploads/2012/01/2013-NCHERM-Whitepaper-FINAL-1.18.13.pdf>.

⁵⁶ 34 C.F.R. PART 668, *supra*, note 52 (defines the term Campus Security Authority [all faculty and staff except physical and mental healthcare professionals] and their mandatory duty to report campus sex assault).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Alanna Vagianos, *140 Women Have Accused Larry Nassar Of Abuse. His Victims Think We Don't Care.*, HUFFINGTON POST, (Jan. 14, 2018), https://www.huffingtonpost.com/entry/larry-nassar-abuse-victims-public-outrage_us_5a58f619e4b03c4189654efe.

molesting young boys in the locker room showers⁶⁰ are examples of how, although these survivors were only children and not athletes within the confines of Penn State's care, the abuse happened on the Penn State campus, and there was therefore a heightened duty to report it to authorities. This heightened duty to report sex assault by all employed individuals⁶¹ means that in the situations of Nassar and Sandusky, everyone who knew about the assaults and did nothing are in direct violation of federal law. By violating Title IX, and the Clery Act, CSAs open up the university to vicarious liability.

c. Vicarious Liability for Universities

Since employees of the university are an extension of the university, when they fail to report sex assault against students, the university itself becomes liable under the implied theory of vicarious liability in Title IX and the Clery Act.⁶²

In *Gebser et al. v. Lago Vista Independent School District*, a student in middle school was sexually assaulted by her teacher while on a field trip.⁶³ The student and her mother brought a suit against the school district alleging that because the teacher was an extension of the school district, under a Title IX analysis, his actions should be absorbed by the district.⁶⁴ Unfortunately, the Fifth Circuit Court of Appeals decided that a vicarious liability claim under Title IX was not the same as that under Title VII.⁶⁵

⁶⁰ TIMELINE, *supra*, note 6.

⁶¹ Except, of course, physical and mental health professionals.

⁶² Title IX of the Education Amendments of 1972, *supra*, note 43 and 34 C.F.R. PART 668, *supra*, note 52.

⁶³ *Gebser et al. v. Lago Vista Independent School District*, 524 U.S. 274 (5th Cir. 1998).

⁶⁴ *Id.*

⁶⁵ *See*, CIVIL RIGHTS ACT OF 1964 § 703(a) (1), 42 U.S.C.A. § 2000e-2(a)(1) (2016); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *Title VII of the Civil Rights Act of 1964*, <https://www.eeoc.gov/laws/statutes/titlevii.cfm>, ("Under antidiscrimination provisions of Title VII, employer is subject to vicarious liability to victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over employee; when no tangible employment action is taken, employer may raise an affirmative defense to liability or damages, subject to proof by preponderance of evidence and comprising two necessary elements: (a) that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that employee unreasonably failed to take advantage of

Instead, the *Gebser* court found that, vicarious liability, and therefore damages, cannot be found for sexual harassment in school under Title IX unless the situation was reported to someone with a modicum of authority who had actual knowledge and acted with complete indifference to the situation.⁶⁶

This sounds vaguely familiar to the examples of Nassar and Sandusky. The various administrators and colleagues that knew of their behavior on their respective campuses had a heightened duty to report their behavior under Title IX, and because after receiving actual knowledge from the victims,⁶⁷ they refused to do anything about the situation, both Michigan State and Penn State should have been found vicariously liable under Title IX.⁶⁸

III. STATE LAWS AND CHILD SEX ASSAULT

As a society, we have determined that protecting our citizens from sexual assault is imperative. Further, we have deemed that the sexual assault of a child is one of the worst types of assault. Subsequently, each state in the union has enacted their own laws prohibiting and codifying the repercussions for perpetrating sexual assault on minors.⁶⁹ As many training Olympic athletes are not college students, and most are not at the age of majority,⁷⁰ state statutes that prohibit the sexual assault of minors are

any preventive or corrective opportunities provided by employer or to avoid harm otherwise.”).

⁶⁶ *Gebser et al. v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

⁶⁷ John Barr and Dan Murphy, *supra*, note 53; Jonathan Oosting, *Nassar Victims Push Changes to Michigan Law*, (Feb. 26, 2018), <https://www.detroitnews.com/story/news/politics/2018/02/26/nassar-victims-sexual-assault-legislation/110876874/>.

⁶⁸ Mitch Smith and Anemona Hartocollis, *With Larry Nassar Sentenced, Focus Is on What Michigan State Knew*, NY TIMES, (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/larry-nassar-michigan-state-investigation.html>.

⁶⁹ *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, NCSL, (May 20, 2017), <http://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx>.

⁷⁰ The average age for an Olympic competitor is 26 years old. *Could You Be An Athlete? Olympics 2012 By Age, Weight and Height*, THE GUARDIAN, <https://www.theguardian.com/sport/datablog/2012/aug/07/olympics-2012-athletes-age-weight-height> (last visited May 4, 2018). More importantly, however, is that most Olympians begin their training by age 4-7. Sarah Fielding, *What Age Do Most Olympians Start Training? Many Are Children When They Begin Learning Their Sport*, BUSTLE, (Feb. 2018), <https://www.bustle.com/p/what-age-do-most-olympians-start-training-many-are-children-when-they-begin-learning-their-sport-7935404>.

particularly important, as any assault which occurred in a particular state's jurisdiction is now subject to its sexual assault statutes.⁷¹ Essentially, if the trainee is moving across state lines with their abuser, they are able to pick the state with the longer statute of limitations, as long as the sexual assault was committed within that state's borders.⁷²

The following sex assault statutes deal with both minor and adult sexual assault in Michigan, Texas, Colorado, and Pennsylvania. These may seem like arbitrary locations, but in reality these are some of the most important locations for the college and Olympic sex assault conversation. Michigan, as previously stated, is where Larry Nassar used Michigan State as a hunting ground for minor and college-aged athletes to assault;⁷³ Texas is where the Karolyi Ranch is located, a U.S. Olympic training site where many survivors allege they were assaulted;⁷⁴ Colorado is the location of one of the most prominent Olympic training centers in the country;⁷⁵ and lastly, Pennsylvania, as previously stated, is where Jerry Sandusky used Penn State as a location to bring underprivileged boys to assault them in the locker room showers or trade gifts and sports game tickets for sexual favors.⁷⁶

a. Michigan

Under Michigan state law, criminal sexual conduct in the first degree is defined as the sexual penetration of another person

⁷¹ *Statutes of Limitations for Sexual Assault: A State-by-State Comparison*, NATIONAL CENTER FOR VICTIMS OF CRIME, (Aug. 21, 2013), <https://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check-chart—final—copy.pdf?sfvrsn=2>.

⁷² Sam Walker, *Forum Shopping for State Claims: Statute of Limitations and Conflict of Laws*, 23 AKRON L. REV. 19 (Summer 1989).

⁷³ Mitch Smith and Anemona Hartocollis, *supra*, note 68.

⁷⁴ *USA Gymnastics Agrees to Purchase Karolyi Ranch Gymnastics Facilities*, USAGYM.ORG, (July 25, 2016), <https://usagym.org/pages/post.html?PostID=18960>; ERIC LEVENSON, *USA Gymnastics Cuts Ties With Karolyi Ranch and Its Memories of Abuse*, (Jan. 19, 2018), <https://www.cnn.com/2018/01/18/us/usa-gymnastics-karolyi-ranch/index.html>.

⁷⁵ *About the Colorado Springs Olympic Training Center*, TEAMUSA.ORG, <https://www.teamusa.org/about-the-usoc/olympic-training-centers/csotc/about> (last visited May 1, 2018).

⁷⁶ TIMELINE, *supra*, note 6.

when they are under 13 years old; between the ages of 13 and 16 if the perpetrator is an authority figure, is a member of a school, a government employee working for or within a school; or if the perpetrator acted in concert with at least one other person and uses physical force or coercion.⁷⁷ This statute brings with it a sentence of:

Imprisonment for life or for any term of years.

For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially

⁷⁷ MICH. COMP. LAWS ANN. § 750.520b (“Sexual penetration with another person and if any of the following circumstances exists: That other person is under 13 years of age; That other person is at least 13 but less than 16 years of age and any of the following: The actor is a member of the same household as the victim; The actor is related to the victim by blood or affinity to the fourth degree. The actor is in a position of authority over the victim and used this authority to coerce the victim to submit; The actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled; The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person; or The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home in which that other person is a resident, and the sexual penetration occurs during the period of that other person’s residency; Sexual penetration occurs under circumstances involving the commission of any other felony; The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists: The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless; [or] The actor uses force or coercion to accomplish the sexual penetration.”).

corresponding to a violation committed against an individual less than 13 years of age.⁷⁸

Therefore, anyone who commits sexual assault against either a minor or an adult (with the help of others and the use of coercion—like holding someone’s Olympic career over their heads) is subject to this sentence.

Thankfully, under criminal sexual conduct in the first degree, Michigan has enacted no statute of limitations. This means that while it may take years and years for survivors to come forward with their stories, they are protected and allowed to bring their claims.⁷⁹ Unfortunately, however, for anything falling below the criminal sexual conduct in the first degree charge, the statute of limitations runs at 10 years or by the “victim’s 21st birthday.”⁸⁰ In light of Nassar, one positive has arisen: survivors have fought to change Michigan law to extend statute of limitations for sex crimes falling under first degree criminal sexual conduct.⁸¹

b. Texas

In Texas, the sexual assault statute is similar but more flexible than that in Michigan.⁸² In order to commit sex assault in Texas, a perpetrator must intentionally penetrate the victim in any way, including forced oral sex actions, without the consent of

⁷⁸ *Id.*

⁷⁹ MICH. COMP. LAWS §767.24.

⁸⁰ *Id.* For example, if Larry Nassar’s six-year-old victim and neighbor had suppressed the memories of his abuse, she would only be allowed to bring the claim until her 21st birthday, even though it may take decades for her to come to terms with the ordeal. CNN WIRE, *Victims Confront Larry Nassar in Court: “Little Girls Don’t Stay Little Forever,”* WGNTV, (JAN. 16, 2018), [HTTP://WGNTV.COM/2018/01/16/VICTIMS-CONFRONT-LARRY-NASSAR-IN-COURT-LITTLE-GIRLS-DONT-STAY-LITTLE-FOREVER/](http://wgntv.com/2018/01/16/victims-confront-larry-nassar-in-court-little-girls-dont-stay-little-forever/).

⁸¹ Jonathan Oosting, *supra*, note67 (There is an attempt to “extend the statute of limitations for victims to pursue criminal charges against their assailants. Prosecutors could file second-degree charges at any time and file third-degree charges within 30 years — or the survivors’ 48th birthday — against someone identified by DNA evidence. Sexual assault victims would also have up to 30 years to file civil lawsuits against the individuals or institutions that harmed them, and minors would have up to 30 years beyond their 18th birthday. Current law only allows suits by the victim’s 19th birthday or three years after the alleged abuse. The proposed changes to the civil statute of limitations would provide retroactive address for assaults dating back to 1993 — ‘when Larry Nassar got his medical license.’”).

⁸² TEXAS PEN. CODE § 22.011.

the victim.⁸³ There is no consent for children under the age of 17 when the perpetrator is not the child's spouse.⁸⁴ This statute has two differing time frames for the statute of limitations. If the sex assault was perpetrated against a child, there is no statute of limitations.⁸⁵ However, all other sex assault has a statute of limitations of ten years.⁸⁶ Texas has prescribed a "Maximum of life in prison and/or a maximum fine of \$10,000," for sex assault found in TEXAS PEN. CODE § 22.011.⁸⁷

If Larry Nassar had committed any of his sexual assault at the training facility in Texas, which there are claims that he did, he would be liable under Texas law for the abuse of all victims under 17 as well as those older than 17, and could be sentenced to life.

⁸³ *Id.* ("(a) A person commits [Sex Assault] if the person:

(1) intentionally or knowingly:

(A) causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent;

(B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or

(C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or

(2) intentionally or knowingly:

(A) causes the penetration of the anus or female sexual organ of a child by any means;

(B) causes the penetration of the mouth of a child by the sexual organ of the actor;

(C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

(b) A sexual assault under Subsection (a)(1) is without the consent of the other person if:

(8) the actor is a public servant who coerces the other person to submit or participate;

(9) the actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor.").

⁸⁴ *Id.* ("(c) In this section: (1) 'Child' means a person younger than 17 years of age who is not the spouse of the actor.").

⁸⁵ TEX. CODE CRIM. PROC. ART. 12.01.

⁸⁶ *Id.* (It should be noted that it does not qualify ten years from the date of the act, or from the date of majority—this is because any act performed on a minor automatically does not have a running statute of limitations.).

⁸⁷ *Supra*, n. 82.

c. Colorado

In Colorado, sex assault is defined as any intentional sexual penetration or sexual intrusion against a victim where the victim is coerced, the victim can't understand what is happening, the victim is between fifteen years old and seventeen and the perpetrator is ten years older, the perpetrator under the false pretense of offering medical services to the victim actually molests them.⁸⁸ For child sex assault in Colorado, a perpetrator must fondle a child (or force a child to fondle them) who has not yet turned fifteen, and the perpetrator must be four years older than the victim.⁸⁹ For sex assault on an adult, the statute of limitations is 10 years, but for a sexual crime against a child, there is no statute of limitations.⁹⁰ The sentence available for adult sex assault is wholly dependent on the fact in the case, but can range anywhere between one year and life imprisonment.⁹¹ The sentence for child sex assault is “2-6 years in prison, and/or a fine of \$2,000-

⁸⁸ COLO. REV. STAT. § 18-3-402 (2016) (“(1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if:

- (a) The actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will; or
- (b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or
- (c) The actor knows that the victim submits erroneously, believing the actor to be the victim's spouse; or
- (d) At the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or
- (e) At the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim; or
- (f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority to coerce the victim to submit, unless the act is incident to a lawful search; or
- (g) The actor, while purporting to offer a medical service, engages in treatment or examination of a victim for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices; or
- (h) The victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented.”).

⁸⁹ 18-3-405 C.R.S.

⁹⁰ COLO. REV. STAT. § 16-5-401.

⁹¹ Jessika Shipley, *Laws Governing Sex Offenders in Colorado*, COLORADO LEGISLATIVE COUNCIL, (Nov. 2008), <http://www.law.du.edu/images/uploads/library/CLC/574.pdf>.

\$500,000...”⁹² If the offense is representative “of a pattern of sexual abuse... [in which case the sentence is] 4-12 years in prison, and/or a fine of \$3,000-\$750,000.”⁹³

As for someone like Nassar who was present at the Colorado training camps, this law would make his assault on any trainee under the age of fifteen subject to 4-12 years in prison, because as the evidence shows, it would have been in the course “of a pattern of sexual abuse.”⁹⁴

d. Pennsylvania

In Pennsylvania, there are two courses for sex assault as are relevant to this paper: sex assault and sexual abuse of children.⁹⁵ Sex assault occurs, “When the offender engages in sexual intercourse or deviate sexual intercourse with a victim without the victim’s consent.”⁹⁶ The other option is sexual abuse of children, which occurs when sex assault is committed against children, or when child pornography is involved.⁹⁷ The statute of limitations for sex crimes involving an adult is twelve years, while the statute of limitations for sex crimes against a minor last until the survivor turns 50 years old.⁹⁸ Sex assault carries with it a sentence of “[a] maximum of 10 years in prison and up to \$25,000 in fines.”⁹⁹ While the first offense under the sexual abuse of a child is “[a] maximum of 7 years in prison and up to \$15,000 in fines,” and for a second offense, or for child pornography charges, “[a] maximum of 10 years in prison and up to \$25,000 in fines.”¹⁰⁰

Jerry Sandusky’s main place of perpetuating abuse was Penn State, and therefore, abusers like him can expect to be awaiting

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ PENN. ANN. CODE § 3124.1; PENN. ANN. CODE § 6312.

⁹⁶ *Sexual assault - Pennsylvania Sexual Assault Laws*, AGEOFCONSENT, <https://www.ageofconsent.net/laws/pennsylvania/sexual-assault> (last visited May 3, 2018) (citing PENN. ANN. CODE § 3124.1).

⁹⁷ *Sexual abuse of children Crime & Punishment in Pennsylvania*, AGEOFCONSENT, <https://www.ageofconsent.net/laws/pennsylvania/sexual-abuse-of-children> (last visited May 3, 2018) (citing PENN. ANN. CODE § 6312).

⁹⁸ 42 PA. CONS. STAT. § 5552.

⁹⁹ *Sexual assault - Pennsylvania Sexual Assault Laws*, *supra*, note 96.

¹⁰⁰ *Sexual abuse of children Crime & Punishment in Pennsylvania*, *supra*, note 97.

justice for 32 years after their minor victims become adults—and will face 10 years in prison for each act they performed.

These are the most notable locations for college and Olympic sex assault in the United States, where an authority figure, like a coach, booster, or doctor abused minors and collegiate athletes alike. Although state laws against sex assault only protect those willing to come forward with their story, there are several solutions currently in place to mitigate the damage of sex assault on college campuses and in the Olympics. The success or failure of their initiatives remain to be fully seen.

IV. CURRENT SOLUTIONS

With all the problems surrounding college and Olympic sports, an honest criticism of current solutions seems appropriate. The Michigan State and Penn State scandals came to light in the last decade—which means that the current system does not work.¹⁰¹ That current system of combating sexual assault in sports includes: Title IX policies and procedures,¹⁰² the advent of Olympic clinics,¹⁰³ and a new education and prevention organization—SafeSport.¹⁰⁴

a. University Policies

Title IX policies on university campuses have been in place since 1972, with the advent of The Education Amendments,¹⁰⁵ but were most stringently applied after 1977 and *Alexander v. Yale University*.¹⁰⁶ As previously discussed, these policies are an attempt to put in place a plan to adequately and quickly get to the bottom of sexual assault on campuses, involving those with ties to

¹⁰¹ *People v. Nassar*, DN: 341004 (Mich. Ct. App. 2017); *Commonwealth v. Sandusky*, 77 A.3d 663 (Pa. Super. Ct. 2013).

¹⁰² Michigan State and Penn States' Title IX Policies, *supra*, note 13.

¹⁰³ Willa Frej, *Sexual Assault Clinics Offered at Winter Olympics for the First Time*, HUFFINGTON POST, (Feb. 16, 2018), https://www.huffingtonpost.com/entry/sexual-assault-clinics-olympics_us_5a82950fe4b0892a03526a8d.

¹⁰⁴ SafeSport, (last visited Apr. 25, 2018), <https://safesport.org>.

¹⁰⁵ Title IX of the Education Amendments of 1972, *supra*, note 43.

¹⁰⁶ *Alexander v. Yale University*, 459 F. Supp. 1 (1977) (holding that if a school fails to adequately and promptly assign a remedy to any sexual harassment complained of by a student, it would be considered a civil rights violation under Title IX—it essentially made sexual harassment a sexual discrimination claim).

the university.¹⁰⁷ Instead of rehashing what these policies are comprised of, and what they are intended to accomplish, it is important instead to discuss whether or not they are working.

The Office for Civil Rights (OCR) follows and reports which schools are under investigation for mishandling sexual assault allegations in Title IX situations.¹⁰⁸ The OCR has never instituted punishment for any school, even those that were “found [to have] acted indifferently or even retaliated against students who reported that they had been raped or otherwise sexually assaulted on campus.”¹⁰⁹ Essentially, the requirements laid out in Title IX, are repercussion-less, with campuses performing Title IX compliance duties in every which way they prefer, with little to no actual oversight or reprimand.

Also, while Title IX coordinators are trained, they are still employees of the university. There are very few loyal employees who would seek to endanger their jobs by going against the interest of their employer.¹¹⁰ On this point, it seems unlikely that Title IX coordinators can be expected to be wholly loyal to the interests of Title IX compliance, when in reality, they are bombarded by pressures from the schools that retain them as employees.¹¹¹

At its most basic point: policies can only work as well as those who are assigned to implement them. Without specialized investigators with specific sex assault-based employment scopes, and by allowing the universities to employ them, Title IX coordinators are left in a sea of work, institutional pressure, and

¹⁰⁷ *Supra*, Part II, Subsection a.

¹⁰⁸ *Title IX: Tracking Sexual Assault Investigations*, THE CHRONICLE OF HIGHER EDUCATION, <https://projects.chronicle.com/titleix/> (last viewed Apr. 28, 2018).

¹⁰⁹ Diana Moskovitz, *Why Title IX Has Failed Everyone on Campus Rape*, DEADSPIN, (Jul. 7, 2016), <https://deadspin.com/why-title-ix-has-failed-everyone-on-campus-rape-1765565925>.

¹¹⁰ *Declining Employee Loyalty: A Casualty of the New Workplace*, WHARTON UNIVERSITY OF PENNSYLVANIA, (May 9, 2012), <http://knowledge.wharton.upenn.edu/article/declining-employee-loyalty-a-casualty-of-the-new-workplace/>.

¹¹¹ Tyler Kingkade, *For Years, Students Have Accused Virginia Universities Of Botching Sexual Assault Cases*, HUFFINGTON POST, (July 1, 2014), https://www.huffingtonpost.com/2014/07/01/virginia-universities-sexual-assault_n_5545486.html; AMANDA EPSTEIN, *Student Says College Botched Her Assault Investigation*, THE PHOENIX, (Jan. 23, 2014), <http://swarthmorephoenix.com/2014/01/23/college-botched-investigation/>.

the lack of wherewithal to successfully and adequately resolve Title IX measures.

b. Olympic Clinics

During the 2018 Winter Olympics in Pyongchang, South Korea, the International Olympic Committee (IOC) implemented clinics for athletes to report alleged sexual assault or harassment.¹¹² These clinics included approximately ten medical professionals to help any athlete that may need to report any sexual misconduct—to include mental health professionals.¹¹³ The IOC ensured the clinics were open for eight hours every day, and when closed, a number was provided for athletes with operators speaking thirteen different languages.¹¹⁴ This sparked the beginning of a more sex-assault prevention focused Olympics.¹¹⁵

These clinics, however, are not present in the Olympic training centers; they're not present on the college campuses. If the way to prevent and to immediately combat sex assault, according to the IOC was to implement these clinics, then why are they not involved in our current system of athletics in America? It seems as though a disinterested location for athletes who have been victims of sexual abuse would be an excellent idea in locations where Olympic as well as university sports exist.

c. SafeSport

SafeSport is an organization whose main mission is to, ensure the “well-being the centerpiece of our nation’s sports culture[, because a]ll athletes deserve to participate in sports free from bullying, hazing, sexual misconduct or any form of emotional or physical abuse.”¹¹⁶ SafeSport uses both outreach and education

¹¹² Willa Frej, *supra*, note 103.

¹¹³ *Id.* (“For athletes, medical clinics are equipped with a team of 10 psychologists and psychiatrists prepared to respond to any complaints of abuse.”).

¹¹⁴ *Id.*

¹¹⁵ While there is currently no available information regarding use of these clinics, the Olympics have a history of sex-offense issues, and to see the IOC take such a serious step toward eradicating, or at the very least, mitigating the prevalence of sex assault is promising.

¹¹⁶ WHO WE ARE, SAFESPORT, <https://safesport.org/who-we-are> (last visited Apr. 14, 2018).

to decrease the chances of sex assault in the culture of sports.¹¹⁷ It engages in trainings at Olympic training centers, and provides an online training option for those in the Olympic Committee body as well.¹¹⁸

SafeSport sounds like a wonderful tool in the fight against athlete sex assault—except when confronted with the fact that it is only available to those involved with the Olympics. The United States Olympic National Governing Body gave SafeSport full autonomy to be the one in charge of sexual assault disputes and reports.¹¹⁹ The policies of SafeSport require that all sexual assault reports be concluded by arbitration, which also includes requirements of confidentiality, requests for discovery, review of evidence, a hearing, and an appeal.¹²⁰ It is important to recognize that SafeSport is doing good work in the Olympic Committee, but they could be doing more to help advance the fight against sports sex assault. For one thing, the members of the board only meet four times a year.¹²¹ It seems like an increase in the meeting of such an important organization might increase its flexibility and effectiveness.

While SafeSport is important, it is not the answer, as it is an organization, much like the National Collegiate Athletic Association (NCAA) in that, it only has jurisdiction and power where other submit to it. Instead, it seems imperative that an organization that is investigating sex assault must have government-mandated power to ensure that justice is both swift and accomplished.

¹¹⁷ WHAT WE DO, SAFESPORT, <https://safesport.org/what-we-do> (last visited Apr. 14, 2018).

¹¹⁸ *SafeSport Online Training Request*, SAFESPORT, <https://docs.google.com/forms/d/e/1FAIpQLSfQmzLocEJO-ghJs1lWqHaHswbK0cZZ4Ujye5QPVLsiPc3ajA/viewform> (last visited Apr. 14, 2018).

¹¹⁹ *Supplemental Rules for Arbitration*, SAFESPORT, <https://safesport.org/files/index/ag/policies-procedures> (last viewed Apr. 14, 2018).

¹²⁰ *Id.*

¹²¹ WHO WE ARE, *supra*, note 116.

V. PUBLIC POLICY DICTATES A GOVERNMENTAL AGENCY MUST
BE CREATED TO MONITOR AND IMPLEMENT SEXUAL ABUSE
ALLEGATION POLICIES IN UNIVERSITIES AND SPORTS
ORGANIZATIONS

As previously discussed, the current model of prevention of college and Olympic sex assault does not work. The best solution to this problem is to create an agency like the Equal Employment Opportunity Commission (EEOC)¹²² to monitor, report, investigate, and deter sexual assault on college campuses. Such an organization would draft and enforce regulations, as well as monitor and conduct investigations. Such regulations would include policies outlining the procedure for sexual assault reporting including: education and training for both athletes and employees, sporadic interviewing and counseling for athletes, mandatory and immediate reporting to the university and state and local officials, and immediate removal of alleged abusers. One way this organization might be enacted is by amending the Amateur Sports Act (ASA)¹²³ to include collegiate sports (and potentially all other sports programs), and to create under that act the Safe Athletics Commission (SAC). While the ASA has been used solely for the creation and maintenance of the United States Olympic Committee, the text of the Act states that it was enacted “[t]o promote and coordinate amateur athletic activity in the United States [and] to recognize certain rights for United States amateur athletes.”¹²⁴ The language in the ASA directly ties to collegiate and other sports programs that fall short of professional status.¹²⁵

¹²² EEOC, (last visited Apr. 25, 2018), <https://www.eeoc.gov>.

¹²³ AMATEUR SPORTS ACT, 92 STAT. 3045 (Nov. 8, 1978) (The Amateur Sports Act created the United States Olympic Committee and the national governing bodies for sports involved in the Olympics, as well as rights and eligibility for Olympic athletes).

¹²⁴ *Id.*

¹²⁵ While there have been heated debates recently surrounding college amateurism status for sports, it currently still stands that college sports are considered amateur endeavors, and thereby they are directly tied to the preamble of the ASA. For some amateurism opinions, see, William W. Berry, *Employee-Athletes, Antitrust, and the Future of College Sports*, 28 STANFORD L. & POL’Y. REV. 245 (2017); William W. Berry III, *Amending Amateurism: Saving Intercollegiate Athletics Through Conference-Athlete Revenue Sharing*, 68 ALABAMA L. REV. 551 (2016); Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE WESTERN RESERVE L. REV. 61 (2013).

Alternatively, there have been propositions of just strengthening SafeSport into its own agency and allowing it to regulate and investigate sex-assault in sports.¹²⁶ In Morton's article, *License to Abuse: Confronting Coach-Inflicted Sexual Assault in American Olympic Sports*, she claims just that—however, she only seeks to investigate Olympic sex assault, and resigns college sex assault to Title IX.¹²⁷ However, as has been previously discussed, Title IX is not doing the best job of protecting college athletes from sex assault, just as SafeSport is not fulfilling the need under quasi-professional sports like the Olympics.¹²⁸ The freedom of being employed by the federal government will alleviate the stress of working for a university or governing body under the Olympic Committee, which would likely result in more objective and fair resolutions to sports sex assault cases—especially those types of cases that arise under Title IX.

Since the creation of SAC would be the best solution to the problem of rampant sports sexual assault, originating from the ASA, the government would be able to better combat sexual assault in collegiate and Olympic sports. Just as the EEOC is able to draft policies and regulations regarding the practice of fair and just employment practices, the SAC would be able to draft more unifying and concrete regulations regarding sex assault in amateur sports situations.¹²⁹ SAC would also have subpoena power, as well as the ability to bring suits against universities and national governing bodies under the Olympic Committee.

SAC would mandate universal annual education and training, allowing for its investigators to be up-to-date on the newest and best ways to combat sex assault. It would also need to implement a program of monitoring university campuses as well as Olympic sports. Monitoring can take many forms, but the most affective is to observe, ask, listen, reinforce, and assure those

¹²⁶ Haley O. Morton, *supra*, note 47 (arguing that converting SafeSport into an independent agency to investigate national governing bodies in the Olympics world would better suit fighting sex assault in the Olympics).

¹²⁷ *Id.* at 147-150.

¹²⁸ *Supra*, Part II subsection a, and Part IV subsection c.

¹²⁹ There is no denying that SafeSport has created a viable model for dealing with Olympic sex assault. Their procedures for investigation and arbitration would be excellent models for SAC.

survivors of sports sex assault.¹³⁰ This might look like a SAC investigator periodically attending a practice or training at a university or Olympic training center. Once there, the SAC investigator can watch the interactions between the athletes and their authority figures; she can ask if any of the athletes have experienced anything that made them uncomfortable; actively listen to their responses with a plan in mind; and lastly reinforce to the athletes that SAC is an agency on their side, and assure them that the investigator will immediately open an investigation into the situation.

In addition to objective monitoring, SAC would implement a system of mandatory reporting to both the entity involved with the athlete as well as any state and local officials with jurisdiction into the matter. This will insure that if a university's investigation fails, or the SAC investigator misses something, state and local officials will also be investigating the matter. This will help stamp out the problem of ineffective Title IX coordinators, or those Campus Security Agents (CSAs) that fail to mandatorily report as they are supposed to under the Clery Act.

Lastly, in conjunction with implementing policies of monitoring and mandatory reporting, SAC will also create a powerful system of enforcement. By creating it as a government agency, it will have subpoena power under the ASA. This will give it a better chance to get to the truth of the alleged assault, and to ensure that investigations are quickly and positively resolved. Enforcement would include an immediate removal of alleged abusers while the investigation occurred—this will both put a temporary stop to the abuse that is alleged, and will incentivize those investigating the matter to do so quickly as either the alleged abuser will be receiving pay during their suspension, or will be without pay and pressuring the agency for an immediate resolution to the investigation. If there is found to be any truth to the allegations of sex assault made by an athlete, SAC will work directly with state and local officials to ensure criminal charges

¹³⁰ These factors arise from a military primary care directive to combat depression in active duty soldiers and veterans. *Depression in Primary Care: A Military Healthcare Perspective*, BRAINLINE: ALL ABOUT BRAIN INJURY AND PTSD, (Sept. 26, 2011), <https://www.brainline.org/article/depression-primary-care-military-healthcare-perspective>.

are filed against the abuser, ensuring that the statute of limitations does not run out, and that the case is not quietly dismissed by way of a non-disclosure agreement or any other settlement.¹³¹

By creating a governmental agency that regulates all amateur sports under the ASA, the United States Government can effectively and substantially combat sex assault on athletes. In the cases of Nassar and Sandusky, if there had just been a disinterested, objective investigator sooner, many athletes would have been saved the horror of being abused by them. With mandatory monitoring, reporting, and enforcement, SAC can effectively protect both children and young adults that are involved in the Olympics, college athletics, or just use college athletic facilities.

CONCLUSION

Sexual assault is committed regardless of age, race, color, education, clothing, or sex.¹³² Sexual assault can happen to anyone in any circumstance where there is an imbalance of power.¹³³ The college and Olympic sports arenas lend themselves to this power imbalance by matching young athletes with coaches, doctors, teachers, boosters, who wield authority over them in both their personal and athletic lives.

The Michigan State and Penn State scandals prove that athletes in both the university system as well as the Olympics are susceptible to being taken advantage of by those in positions of authority. Larry Nassar, celebrated Olympic doctor and Michigan State employee, used the authority found in the letters “M.D.” to convince both young athletes as well as their parents that his

¹³¹ Nikki R. Breeland, *“All the Truth I Could Tell”: A Discussion Of Title VII’s Potential Impact On Systemic Entertainment Industry Victimization*, 25 UCLA WOMEN’S L. J. 135, 168 (forthcoming 2018)(“While many industries and markets use NDAs to protect their intellectual property, trade secrets, or any other necessary information, the [Sports] Industry has perverted the NDA into a way to protect its sexual assailants by way of contract law.”).

¹³² *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/vic-tims-sexual-violence> (last visited May 3, 2018).

¹³³ Willa Frej, *supra* note 103 (“Sport’s an odd place fraught with some of the nuances of abuse,’ Dieffenbach said. ‘You have a whole realm of issues related to just the power dynamic and what constitutes abuse—is it screaming at an athlete, pushing them to be their best? There are a lot of people who would debate where that line is.”).

assault was legitimate treatment¹³⁴—showing that it does not matter what age a victim is, they are willing to believe someone in a position of authority. He used his position at Michigan State to assault dozens of young women¹³⁵ who were university, Olympic, or camp athletes.¹³⁶ Compounding fault, Nassar was reported several times in his tenure at Michigan State—this indifference to sexual assault by an employee is seen at Michigan State as well. Jerry Sandusky, a retired coach, Penn State booster, and philanthropist used his organization to seek out vulnerable young boys and assault them.¹³⁷ Sandusky traded gifts and sports game tickets, as well as using coercion and cornering minors for sex.¹³⁸ Similar to Nassar, Sandusky was reported for the first time in 1994, and several times thereafter, but an investigation did not ensue until 2009, and charges were not filed until November 5, 2011.¹³⁹

While Title IX policies and procedures were put in place to combat these exact situations, both Michigan State and Penn State failed to take appropriate measures to promptly remove Nassar and Sandusky, and instead, actually protected them from those who sought to report them.¹⁴⁰ State laws only came into effect once police were notified, and then both Nassar and Sandusky were convicted for sexual assault.¹⁴¹ Nassar received approximately 175 years for his sexual assault crimes spanning several decades,¹⁴² and Sandusky received 30 to 60 years in prison.¹⁴³

Current solutions to the problem of sports sex assault are not fully solving the problem. University policies that have been

¹³⁴ Kathleen Joyce, *supra*, note 24.

¹³⁵ *First Male Victim of Disgraced Gymnastics Doctor Larry Nassar Speaks Out*, TIME, (Mar. 6, 2018), <http://time.com/5187441/larry-nassar-male-victim-jacob-moore/>.

¹³⁶ Alanna Vagianos, *supra*, note 59.

¹³⁷ TIMELINE, *supra*, note 6.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ John Barr and Dan Murphy, *supra*, note 53 and Steve Friess and Mitch Smith, *supra*, note 10.

¹⁴¹ Eric Levenson, *Larry Nassar Sentenced to up To 175 Years in Prison for Decades of Sexual Abuse*, (Jan. 24, 2018), <https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html>; TIMELINE, *supra*, note 6.

¹⁴² *Id.*

¹⁴³ TIMELINE, *supra*, note 6..

enacted for 40 years are not effective when Title IX coordinator loyalty lies with the university they are employed by. Additionally, Olympic clinics may have been effective during the Olympic Games, but they do little to aid in sex assault that occurs daily either on university campuses or at Olympic training centers. And further, while SafeSport provides a commendable attempt to regulate and protect athletes when it comes to sex assault, their status as a non-government entity and their minimal scope of only dealing with the Olympic Committee makes them an incomplete solution.

Therefore, the best way to combat the ever-increasing issue of sex assault in both collegiate and quasi-professional sports is to create a government agency under the Amateur Sports Act that will act as a sister organization to the EEOC. This will affectively allow such an organization the freedom and flexibility to use a subpoena power to quickly get to the bottom of sex assault investigations, as well as give them the power to enforce their anti-sex assault regulations.

As a society, we cannot continue to allow men like Nassar and Sandusky a hiding place in inefficient and inept college Title IX offices, and the back halls and shady non-disclosure deals of the Olympic Committee. By creating a government agency, there is at least a hope and presumption that such a body would be able to objectively, promptly, and professionally snoop out abusers within our sports programs through regulated systems of monitoring, reporting, and enforcement. One thing is absolutely for certain, amateur sports cannot maintain itself on its current path.

“The abuse that happened to us survivors is something that will affect us for the rest of our lives... others need to know we aren’t just Jane [or John] Does — we are individuals with feelings.”¹⁴⁴

¹⁴⁴ Alanna Vagianos, *supra*, note 59 (quoting Christine Harrison, a Michigan State dancer).