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## On the Same Team: Locker Room Talk, Student Athletes, and a Call for a Restorative Justice Approach to Sexual Assault Education

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## **On the Same Team: Locker Room Talk, Student Athletes, and a Call for a Restorative Justice Approach to Sexual Assault Education**

### **Cover Page Footnote**

Assistant Professor of Public Policy and Administration and Director of Dispute Resolution and Conflict Management, Boise State University. At the time of the symposia, the author was Clinical Professor of Law and Law College Title IX Coordinator, Michigan State University College of Law.

# ON THE SAME TEAM: LOCKER ROOM TALK, STUDENT ATHLETES, AND A CALL FOR A RESTORATIVE JUSTICE APPROACH TO SEXUAL ASSAULT EDUCATION

Brian A. Pappas\*

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Locker room talk came to the forefront during the second presidential debate of 2016. Anderson Cooper asked Donald Trump about his comments on an Access Hollywood audiotape. “You bragged that you have sexually assaulted women...” noted Cooper.<sup>1</sup> “No, I didn’t say that at all,” Trump replied.<sup>2</sup> “I don’t think you understood what was said –this was locker-room talk . . . .”<sup>3</sup> Trump’s implication of a different standard for men’s conversations and athletics harkened back to an age in which female reporters were not welcome in men’s locker rooms and Title IX was seen, incorrectly, as a zero-sum game pitting men’s against women’s sports.<sup>4</sup> Pat Summitt played and coached in that era, and as the University of Tennessee women’s basketball coach in four different decades she won 1098 games, and

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<sup>1</sup> Pamela Engel, *Anderson Cooper confronts Donald Trump over lewd comments: ‘You bragged that you have sexually assaulted women—do you understand that?’*, BUSINESS INSIDER (Oct. 9, 2016), <http://www.businessinsider.com/trump-clinton-debate-anderson-cooper-2015-comments-women-2016-10>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Lily Rothman, *This is Why Female Sportswriters Can Go in Men’s Locker Rooms*, TIME (Oct. 5, 2015), <http://time.com/4061122/ludtke-kuhn-jaguars-colts/>; Kate Fagan and Luke Cyphers, *Five myths about Title IX*, ESPN THE MAGAZINE (Apr. 29, 2012), <http://www.espn.com/espnw/title-ix/article/7729603/five-myths-title-ix>.

eight national championships.<sup>5</sup> Trump's statements perpetuate the belief that boys will be boys, a view that normalizes sexual misconduct and can foster predatory all-male campus subcultures. The President's views regarding the harmlessness of locker room talk speaks to the necessity and importance of changing the campus culture through education, the primary function of our institutions of higher education.

In reflecting on her thirty-eight years as coach, Pat Summitt was most proud of graduating 100 percent of her players<sup>6</sup>. She noted, "One thing we could do from year to year without fail was to make sure that we were about education first, and basketball second."<sup>7</sup> Summitt was proud that for all her years as a coach she did her best never to cut corners or to sacrifice principles.<sup>8</sup> This symposium article honors Pat Summitt by focusing on how colleges and universities can avoid cutting corners and sacrificing their principles when addressing athletes and campus sexual misconduct.

Changes to Title IX compliance in 2011 made colleges and universities responsible for peer-to-peer sexual misconduct in any university-related activity, whether on or off campus.<sup>9</sup> While always implicit in Title IX, the renewed focus on campus sexual misconduct led to the two major dilemmas facing college and universities today. The first dilemma is how universities can create fair, consistent, and reliable processes that respect the rights of both alleged perpetrators and victims,<sup>10</sup> while at the same time encouraging people to bring complaints forward. In seeking to solve this problem, university Title IX coordinators face uncertainty regarding the definition of compliance, the lack of resources and staff necessary to handle dramatically increased numbers of complaints, and the threat of legal liability amid intense public scrutiny. While scrambling to change processes and procedures, the second dilemma of how to do the educational work necessary to change the culture and norms surrounding campus sexual misconduct often takes a back seat in terms of devoted staff time and resources. This article addresses the second dilemma of cultural change and argues major-sport male college athletes are the ideal audience on which colleges should use their limited resources.

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<sup>5</sup> PAT SUMMITT & SALLY JENKINS, SUM IT UP: 1098 VICTORIES, A COUPLE OF IRRELEVANT LOSSES, AND A LIFE IN PERSPECTIVE 361 (2014).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 368.

<sup>8</sup> *Id.*

<sup>9</sup> Russlynn Ali, Dear Colleague Letter, U.S. Dep't of Educ., Off. for C.R. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> [hereinafter 2011 Dear Colleague Letter].

<sup>10</sup> This article uses the term victim in order to be consistent with the terms "victim" and "offender" frequently used in Restorative Justice. The author means no disrespect to survivors of sexual misconduct.

First, this article confronts the myth that college athletes are the primary perpetrators of campus sexual misconduct. In reality, the problem is more widespread than college athletics and relates more specifically to all-male campus subcultures. Next, the article describes the dangers of all-male campus subcultures and the challenges and realities of college aged students; recent problems in athletic departments are reviewed and described. Third, the article proposes utilizing male major-sport athletes as an integral part of efforts to transform campus culture. Despite enormous time commitments and intense scrutiny to perform athletically, student athletes have a key role to play in changing campus norms regarding sexual misconduct. Utilizing a Restorative Justice philosophy, universities must educate their student athletes and then utilize athletes' considerable social capital to begin to influence other all-male campus group subcultures. First and foremost, it starts with athletic department administrators and coaches owning their responsibility for creating a culture that educates their athletes and encourages and empowers them to use their leadership skills to make a difference. It is also important that athletic department leadership reflect the diversity of student athletes. Accountability starts at the top, and so university administrators must put education first and not preference money, institutional reputation, or playing field performance over doing what is right. Instead of viewing athletes as part of the problem, and campus sexual misconduct as a topic to be avoided, universities need to innovate and utilize athletes as part of the solution.

## I. THE MYTH OF THE PREDATOR ATHLETE

In a context in which incidents are under-reported and college athletes (particularly those playing basketball and football) receive a great deal of publicity, labeling college athletes as the primary perpetrators of sexual misconduct is easy. Studies demonstrate college athletes are at a higher risk of perpetrating a wider range of sexual misconduct than other students because they are more likely to identify with hyper-masculine values, including the "sexual conquest" of women.<sup>11</sup> Athletes are also more likely than other students to accept

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<sup>11</sup> Sarah K. Murnen & Marla H. Kohlman, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-analytic Review*, 2007 *SEX ROLES* 145, 146 (2007); see also Kristy Lee McCray, *Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study*, 16 *TRAUMA, VIOLENCE, & ABUSE* 438, 438–43 (2015). But see DEBORAH WILSON, ET AL., ADDRESSING SEXUAL ASSAULT AND INTERPERSONAL VIOLENCE: ATHLETICS' ROLE IN SUPPORT OF HEALTHY AND SAFE CAMPUSES 11 (2014), <https://www.ncaa.org/sites/default/files/Sexual-Violence-Prevention.pdf>

rape myths to justify sexual assault, such as “women ask for it,” or “rapists are sex-starved or insane.”<sup>12</sup> Rape myth acceptance and attitudes toward traditional gender roles are notable differences in the prevalence of sexual coercion between athletes and non-athletes.<sup>13</sup>

Despite the increased risk, it is inaccurate to broadly label male college athletes as the sole source of the problem. First, the type of sport played contributes to the risk factors. Whether the sport is a contact sport like football, for example, influences the level of sexual aggression and acceptance of rape myths.<sup>14</sup> Second, no significant differences exist in the risk factors between recreational and intercollegiate athletes.<sup>15</sup> A far larger number of college students participate in intramural and club athletics than participate formally through athletic departments. While NCAA Division I athletes comprised, on average, four percent of their school’s enrollment in 2014,<sup>16</sup> a national survey published the same year found 41% of undergraduates participated in intramural or club sports.<sup>17</sup> Third, sports cultures can decrease the risk for sexual violence as pro-social rape prevention factors are present in values associated with sports, including accountability, social cohesion, and self-control.<sup>18</sup>

Fourth, incidents involving athletes receive a lot of press, increasing the perception of persisting college team rape cultures. A 1995 study found male intercollegiate athletes comprised 3% of the student population, but accounted for 19% of reported sexual violence cases.<sup>19</sup> The changing Title IX requirements, and specifically the 2011

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(stating that there are no significant differences between student athletes and non-student athletes in probability of perpetuating acts of violence).

<sup>12</sup> Katie Herman Swope, *Rape Myth Acceptance: An Exploration of Influential Factors Among College Students* 91–92 (June 6, 2012) (unpublished Ph.D. dissertation, Indiana University of Pennsylvania) (available at: <http://knowledge.library.iup.edu/cgi/viewcontent.cgi?article=1407&context=etd> (last visited June 5, 2017)).

<sup>13</sup> Belinda-Rose Young, Sarah L. Desmarais, Julie A. Baldwin, & Rasheeta Chandler, *Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, 23(7) *VIOLENCE AGAINST WOMEN* 795, 805 (2017).

<sup>14</sup> Swope, *supra* note 12, at 37–39.

<sup>15</sup> Young et al., *supra* note 13, at 805.

<sup>16</sup> NCAA, *NCAA RECRUITING FACTS: COLLEGE SPORTS CREATE A PATHWAY TO OPPORTUNITY FOR STUDENT-ATHLETES* (July 2016), <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf>.

<sup>17</sup> JOHN P. DUGAN, MARK A. TORREZ, & NATASHA T. TURMAN, *LEADERSHIP IN INTRAMURAL SPORTS AND CLUB SPORTS: EXAMINING INFLUENCES TO ENHANCE EDUCATIONAL IMPACT* 9 (2014), [http://nirsa.net/nirsa/wp-content/uploads/NIRSA-MSL-Leadership\\_In\\_Intramural\\_Sports\\_and\\_Club\\_Sports-Dugan\\_2014.pdf](http://nirsa.net/nirsa/wp-content/uploads/NIRSA-MSL-Leadership_In_Intramural_Sports_and_Club_Sports-Dugan_2014.pdf).

<sup>18</sup> *See generally* NICHOLAS L. HOLT, *POSITIVE YOUTH DEVELOPMENT THROUGH SPORT* (2nd ed., 2016).

<sup>19</sup> Todd W. Crosset, Jeffrey R. Benedict, & Mark A. McDonald, *Male Student Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices*, 19 *J. SPORT & SOC. ISSUES* 126, 132 (1995).

Dear Colleague Letter, have led to a re-examination of our assumptions regarding campus sexual assault. Instead of a few serial predators, primarily basketball and football players and fraternity members, our understanding of sexual assault and its dynamics have broadened considerably. In reality, the problem is more widespread than college athletics and relates to campus all-male subcultures. Anna Voremberg, the managing director of End Rape on Campus, defines rape culture as “the idea that women and other people’s bodies are for the taking and that conquest is the key to sexuality...[c]ampus sexual assault is because of rape culture.”<sup>20</sup> At Ryerson University in Canada, rape culture is defined as “a culture in which dominant ideas, social practices, media images and societal institutions implicitly or explicitly condone sexual assault by normalizing or trivializing sexual violence and by blaming survivors for their own abuse.”<sup>21</sup> All-male campus groups, including athletic teams and fraternities, often constitute rape cultures, and members of these groups are more likely than non-members to commit sexual assault.<sup>22</sup> Fraternity men, for example, are identified as more likely to perpetrate sexual crimes than non-fraternity men.<sup>23</sup> As one-third of reported rapes take place in a fraternity houses, negative fraternity subcultures increase the risk of perpetrating sexual assault.<sup>24</sup> It is far too simplistic, however, to label every all-male campus group as constituting a rape culture. As researcher Todd Crosset notes:

“Most collegiate sports teams do not constitute rape-prone cultures. Particular institutional structures, team culture and practices, combine with the male-privileged, sometimes violent, and sex-segregated world of collegiate sport to create a rape-prone culture.”<sup>25</sup>

The national statistics indicate a problem of campus sexual misconduct much more widespread than athletics. In a national survey

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<sup>20</sup> Jake New, *Defining Rape Culture* (Nov. 7, 2016), INSIDE HIGHER ED, [https://www.insidehighered.com/news/2016/11/07/students-urge-colleges-define-rape-culture-their-sexual-assault-policies\\_](https://www.insidehighered.com/news/2016/11/07/students-urge-colleges-define-rape-culture-their-sexual-assault-policies_)

<sup>21</sup> *Id.*

<sup>22</sup> Murnen & Kohlman, *supra* note 11, at 153.

<sup>23</sup> The Campus Sexual Assault Study Final Report from Christopher P. Kerbs, et. al., to National Institute of Justice 2–11 (Oct. 2007) (available at: <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>).

<sup>24</sup> Jacqueline C. Minow & Christopher J. Einolf, *Sorority Participation and Sexual Assault Risk*, 15 VIOLENCE AGAINST WOMEN 835, 849 (2009).

<sup>25</sup> Todd W. Crosset, *Athletes, Sexual Assault, and Universities’ Failure to Address Rape-Prone Subcultures on Campus*, in THE CRISIS OF CAMPUS SEXUAL VIOLENCE: CRITICAL PERSPECTIVES ON PREVENTION 76 (Sara C. Wooten & Roland W. Mitchell, eds., 2015).

of undergraduates at 27 institutions of higher education, 23.1% of females indicated experiencing penetration or sexual touching by physical force or incapacitation since enrollment.<sup>26</sup> Sexual harassment is widespread and was reported by 61.9% of females.<sup>27</sup> Notably, the study found even the most serious incidents often go unreported, as across categories 28% or fewer incidents are reported.<sup>28</sup> There is an established association between alcohol use by college students and interpersonal violence, and a high percentage of campus sexual assaults involve the use of alcohol.<sup>29</sup>

Despite heightened awareness, widespread misconduct, and a new compliance regime that began in 2011, a 2014 survey of more than 300 schools indicated more than 40% of U.S. colleges and universities conducted no investigations of sexual assault allegations over the past five years.<sup>30</sup> It found nearly 73% of schools did not have protocols for how campus authorities and local law enforcement should work together on cases.<sup>31</sup> Given the lack of processes and protocols in place, it should come as no surprise that only 9% of colleges in 2014, and 11% of colleges in 2015, reported any incidents of rape.<sup>32</sup> It is not an overstatement to argue universities are overwhelmed, and despite rising caseloads and the need for preventative educational programming, only

<sup>26</sup> DAVID CANTOR ET AL., REPORT ON THE AAU CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 56–58 (2015), [https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf) [hereinafter 2015 AAU Climate Survey] (Incapacitation is defined at viii as “...unable to consent or stop what was happening because you were passed out, asleep or incapacitated due to drugs or alcohol.”).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at iv.

<sup>29</sup> ANTONIA ABBEY ET AL., *Alcohol and Sexual Assault*, NATIONAL INSTITUTE ON ALCOHOL ABUSE & ALCOHOLISM, <https://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm> (last visited Sep. 29, 2017); U. S. Dep’t of Justice Office of Justice Programs, *Violent Victimization of College Students 1995-2002* 1 (2003), <https://www.bjs.gov/content/pub/pdf/vvcs00.pdf>. See generally Thomas C. Harford, Henry Wechsler, & Bengt O. Muthen, *Alcohol-related Aggression and Drinking at Off-campus Parties and Bars: A National Study of Current Drinkers in College*, 64 J. STUD. ALCOHOL 704, 710 (2003); Sara E. Ullman & Leanne R. Brecklin, *Alcohol and Adult Sexual Assault in a National Sample of Women*, 11 J. SUBSTANCE ABUSE 405, 405–420 (2000).

<sup>30</sup> Mary Beth Marklein & Deirdre Shesgreen, *Colleges Ignoring Sexual Assault, Senator Charges*, USA TODAY (July 9, 2014), <http://www.usatoday.com/story/news/nation/2014/07/09/claire-mccaskill-college-sexual-assault-report/12400401/>

<sup>31</sup> *Id.*

<sup>32</sup> American Association of University Women, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014* (Nov. 23, 2015), <http://www.aauw.org/article/clery-act-data-analysis/>; American Association of University Women, *89 Percent of Colleges Reported Zero Incidents of Rape in 2015*, (May 10, 2017), <http://www.aauw.org/article/clery-act-data-analysis-2017/>.

10% of Title IX Coordinators surveyed in 2015 indicated they held no other major responsibilities.<sup>33</sup> Half of the coordinators also noted their institution had no specific budget devoted to Title IX.<sup>34</sup> There are currently 344 open U.S. Department of Education Office of Civil Rights cases against colleges and universities for possibly mishandling reports of sexual misconduct.<sup>35</sup>

The picture of who is responsible for the widespread occurrence of campus sexual misconduct is more complex than simply labeling the college athlete a frequent predator. The risk of sexual assault occurs, in part, due to negative all-male campus subcultures.

## II. THE REALITY OF THE ALL-MALE CAMPUS GROUP SUBCULTURE

While not all athletes are predators and not all teams constitute rape cultures, members of all-male groups on campus are more likely to commit sexual assault than nonmembers.<sup>36</sup> These all-male subcultures are segregated, benefit from male privilege, and often foster expressed peer support for violence against women, a strong predictor that an individual will commit an assault.<sup>37</sup> The structure of sports, where athletes are sex-segregated into groups that can often become patriarchal or privileged, is a distinction that differentiates athletic teams from the broader university.<sup>38</sup> High status athletes, typically those in basketball and football, if they choose to hold and act on hyper-masculine beliefs, are able to act “with greater impunity than their peers.”<sup>39</sup> Similar to Trump’s now public Access Hollywood tape, locker room conversation is not easily overheard. As illustrated by the following examples of negative all-male campus subcultures, the normalization and trivialization of violence against women is still too commonplace on college campuses.<sup>40</sup>

<sup>33</sup> Sarah Brown, *Many Title IX Coordinators Are New to the Job and Juggling Many Duties*, CHRON. HIGHER EDUC. (July 9, 2015), available at: <http://www.chronicle.com/article/Many-Title-IX-Coordinators-Are/231457>.

<sup>34</sup> *Id.*

<sup>35</sup> *Campus Sexual Assault Under Investigation*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/> (listing 351 open federal investigations).

<sup>36</sup> Murnen & Kohlman, *supra* note 11, at 153.

<sup>37</sup> Derek A. Kreager, *Unnecessary Roughness? School Sports, Peer Networks, and Male Adolescent Violence*, 75(2) AM. SOC. REV. 705, 710 & 718–20 (2007).

<sup>38</sup> Crosset, *supra* note 25, at 79.

<sup>39</sup> Lisa Wade, *Rape on Campus: Athletes, Status, and the Sexual Assault Crisis*, THE CONVERSATION (Mar. 6, 2017), <http://theconversation.com/rape-on-campus-athletes-status-and-the-sexual-assault-crisis-72255>.

<sup>40</sup> Elizabeth A. Sharp, Dana A. Weiser, Don E. Lavigne, & R. Corby Kelly, *From Furious to Fearless: Faculty Action and Feminist Praxis in Response to Rape Culture on College Campuses*, 66(1) FAMILY RELATIONS 75, 79 (2017); John B. K. Purcell, C. Rebecca Oldham, Dana A. Weiser, & Elizabeth A. Sharp, *Lights*,

In November 2016, Columbia University suspended their wrestling team's season over lewd and racist text messages that were also misogynistic and homophobic.<sup>41</sup> In one example, a member of the wrestling team stated, "Columbia bitches feel entitled to something when in reality they are all ugly socially awkward cunts."<sup>42</sup> After the university canceled a wrestling event due to the messages, one of the team members wrote to his teammates, "I hope someone actually gets sexually assaulted."<sup>43</sup> Columbia later punished the offending wrestlers and lifted the team suspension.<sup>44</sup> That same month Harvard University canceled the remainder of the men's soccer team season after it was found the team produced vulgar and explicit documents rating female soccer recruits on perceived sexual appeal and physical appearance.<sup>45</sup> The reports included photographs, gave the recruits nicknames, and speculated about their favorite sexual positions.<sup>46</sup> The practice was first discovered in 2012 and continued until discovered again during the 2016 season.<sup>47</sup> Athletics Director Robert Scalise noted "Harvard Athletics has zero tolerance for this type of [b]ehavior."<sup>48</sup> In a statement, the men's soccer coach Pieter Lehrer expressed the team is "beyond disappointed that our season has ended in this way, but we respect the decision made by our administration."<sup>49</sup>

One month later, in December, 2016, Harvard University placed the men's cross country team on "Athletic Probation" due to a spreadsheet that the Harvard women's soccer team brought forward that showed a lewd ranking of them, created by the men's soccer team.<sup>50</sup> The spread sheets in the past included sexualized comments about the

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*Camera, Activism: Using a Film Series to Generate Feminist Dialogue About Campus Sexual Violence*, 66(1) FAMILY RELATIONS 139, 140 (2017).

<sup>41</sup> Max Kutner, *When 'Locker Room Talk' Leads to Suspensions from College Sports*, NEWSWEEK (Jan. 26, 2017), <http://www.newsweek.com/2017/02/03/college-athletes-suspended-locker-room-talk-548819.html>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Andrew M Duehren, C. Ramsey Fahs, and Daphne C. Thompson, *Harvard Cancels Men's Soccer Season After Finding Sexually Explicit 'Reports' Continued Through 2016*, THE HARVARD CRIMSON (Nov. 4, 2016), <http://www.thecrimson.com/article/2016/11/4/soccer-suspended-scouting-report-harvard/> (last visited July 20, 2017).

<sup>46</sup> Kutner, *supra* note 41.

<sup>47</sup> Duehren, *supra* note 45.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Heidi Landecker, *Harvard Places Men's Cross-Country Team on 'Athletic Probation'*, CHRON. HIGHER EDUC. (Dec. 3, 2016), <http://www.chronicle.com/blogs/ticker/harvard-places-mens-cross-country-team-on-athletic-probation/115928>.

women.<sup>51</sup> The soccer team was suspended and forfeited their remaining games.<sup>52</sup> The probation, according to the men's captain, would not affect the team's season or competition: "... they are going to keep a close watch on us and have us go through some training seminars with some Title IX Coordinators...and also talk with an outside consultant about just working on our team culture."<sup>53</sup>

Also in December, 2016, Princeton University suspended the men's swimming team after finding "vulgar and offensive" content of a misogynistic and racist nature on the team's email list.<sup>54</sup> The two remaining meets and the Ivy league championship were all cancelled.<sup>55</sup> The athletic director noted the behavior "is antithetical to the values of the program and will not be tolerated."<sup>56</sup> That same month, Amherst College suspended the men's cross-country team after discovering the team had for several years' been exchanging racist, sexist, and homophobic email messages and social media posts.<sup>57</sup> It was a part of how new members were taught team culture.<sup>58</sup> In one example, a team member referred to a woman online as "a walking STD."<sup>59</sup> Washington University also sanctioned an athletic team in December, 2016, suspending the men's soccer team over members' "degrading and sexually explicit comments" online about the women's soccer team.<sup>60</sup> Lori White, Washington University's Vice Chancellor for Student Affairs, responded by stating "[t]here is absolutely no place at Washington University for sexism, discrimination, or harassment of any kind."<sup>61</sup> In February 2017, the suspension was lifted after a probe found the team did not violate the school's sexual harassment policy.<sup>62</sup> Not

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Andrew Mytelka, *Princeton Suspends Men's Swim Team over 'Misogynistic and Racist' Email*, CHRON. HIGHER EDUC. (Dec. 16, 2016), <http://www.chronicle.com/blogs/ticker/princeton-suspends-mens-swim-team-over-misogynistic-and-racist-email/116172>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Scott Jaschik, *Amherst Suspends Men's Cross-Country Team*, INSIDE HIGHER ED (Dec. 13, 2016), <https://www.insidehighered.com/quicktakes/2016/12/13/amherst-suspends-mens-cross-country-team> (last visited July 20, 2017).

<sup>58</sup> *Id.*

<sup>59</sup> Kutner, *supra* note 41.

<sup>60</sup> Andrew Mytelka, *Washington U. in St. Louis Suspends Men's Soccer Team Over 'Degrading' Comments*, CHRON. HIGHER EDUC. (Dec. 17, 2016), <http://www.chronicle.com/blogs/ticker/washington-u-in-st-louis-suspends-mens-soccer-team-over-degrading-comments/116194>.

<sup>61</sup> *Id.*

<sup>62</sup> Ashley Jost, *Washington U Lifts Men's Soccer Team Suspension After Sexual Harassment Probe*, THE ST. LOUIS POST-DISPATCH (Feb. 7, 2017),

all of the men participated, and some members actively tried to discourage the behavior.<sup>63</sup> No individuals were held responsible for what happened, but the entire team remained on probation while the team goes through additional training and writes a letter of apology.<sup>64</sup> In most of these examples student publications revealed the information from private messages or documents, resulting in school officials initiating investigations.<sup>65</sup>

Each of these examples illustrates an all-male subculture engaging in locker room talk. Peer support for violence against women and the normativity of interpersonal violence are two factors that contribute to creating team environments conducive to promoting sexual assaults.<sup>66</sup> As athletes live in their own dorms, eat in their own dining halls, and spend most of their days with one another, their insulated environment impacts attitudes and beliefs.<sup>67</sup> According to a former college athlete turned administrator, “[t]he same corrosive cultural norms regarding sex, consent, sexual violence, sexism and the policing of women’s bodies are just as prevalent today in male student-athlete circles as they were when I was a student athlete.”<sup>68</sup> All subcultures, whether the campus marching band, fraternities, or other all-male groups, are at risk of developing environments tolerant of assault. In nearly every situation reviewed above, the university responded with investigations, sanctions, and efforts to correct the hostile environment. Whether the young men involved understood the seriousness is not known, but with the publicity and resulting punishment is the risk that locker room talk will be pushed further behind closed doors. Instead of learning about and understanding the dangers of peer normalization of sexual objectification and violent speech, the take away for team members may be to be more careful about how, and when, such messages are shared.

The challenges facing Title IX Coordinators regarding due process and the creation of reliable, consistent processes will eventually subside. Assuming some measure of continued government enforcement of Title IX and the ability of victims and alleged perpetrators to access the courts, ongoing complaints will continue to

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[http://www.stltoday.com/news/local/education/washington-u-lifts-men-s-soccer-team-suspension-after-sexual/article\\_2d87fbb8-20c1-5033-8407-8999fbf01fd4.html](http://www.stltoday.com/news/local/education/washington-u-lifts-men-s-soccer-team-suspension-after-sexual/article_2d87fbb8-20c1-5033-8407-8999fbf01fd4.html).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Kutner, *supra* note 41.

<sup>66</sup> Crosset, *supra* note 25, at 76.

<sup>67</sup> Kutner, *supra* note 41.

<sup>68</sup> DeWitt Scott, *Male Athletes Need to be Educated About Sexual Assault*, INSIDE HIGHER ED (June 9, 2017), <https://www.insidehighered.com/advice/2017/06/09/male-athletes-need-be-educated-about-sexual-assault-essay>.

test, and ultimately improve, campus sexual misconduct handling systems. The greater, more pernicious, problem is confronting the attitudes and behaviors of eighteen to twenty-two year old men arriving each year on campus. It is essential that colleges and universities work to change the culture and not simply handle complaints, although complaint handling is far from simple. The idea persists that excessive partying and a misogynistic culture is acceptable on college campuses, as evidenced by the 1978 movie *Animal House*<sup>69</sup>, and subsequent similar movies like 1984's *Revenge of the Nerds*<sup>70</sup> and 2003's *Old School*<sup>71</sup>. In order to enforce university policies, efforts to improve processes must be developed in conjunction with meaningful education and cultural change.

### III. ATHLETES: AN UNDERUTILIZED EDUCATIONAL RESOURCE

From Jesse Owens to Muhammad Ali, Caitlin Jenner to Colin Kaepernick, athletes have used their platforms for a long time to promote social change. We have a history of athletes using their power and position to break down barriers and athletes today using their platforms to encourage changes in their campus communities. In 2015, in the wake of multiple racist incidents on campus and an ineffective administrative response, the University of Missouri's football team threatened to boycott all football-related activities until the University president resigned or was fired.<sup>72</sup> Just as a negative team environment can create a rape culture, it can also establish healthy sexual consent attitudes and behavior on contact sport teams.<sup>73</sup> Harnessing athletes' status on campus and utilizing them as an educational resource is key in order to enact cultural change.

In an environment in which Title IX offices often lack the resources, personnel, and expertise to oversee the processes for handling complaints, meaningful education takes a backseat. Mandatory online trainings are ubiquitous, and while they satisfy minimal training

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<sup>69</sup> ANIMAL HOUSE (Universal Pictures 1978).

<sup>70</sup> REVENGE OF THE NERDS (20th Century Fox 1984).

<sup>71</sup> OLD SCHOOL (DreamWorks 2003).

<sup>72</sup> Scott Gleeson, *Missouri Football Players to Boycott until President Tim Wolfe Resigns*, USA TODAY (Nov. 7, 2015), <https://www.usatoday.com/story/sports/ncaaf/2015/11/07/missouri-tigers-football-players-boycott-tim-wolfe-president-resigns/75399504/>.

<sup>73</sup> JENNIFER MCGOVERN & PATRICK MURRAY, CONSENT COMMUNICATION: WHAT DOES IT MEAN FOR STUDENT ATHLETES? 21 (2016), [https://www.ncaa.org/sites/default/files/McNeil\\_Consent%20Communication.pdf](https://www.ncaa.org/sites/default/files/McNeil_Consent%20Communication.pdf).

requirements for large student populations at low cost, their effectiveness is questionable.<sup>74</sup>

In a 2017 survey of 1,828 students on a large, southern university campus, 30% of athletes found an online sexual assault education training to be valueless.<sup>75</sup> A survey of administrators indicates 85% of institutions provided some type of sexual assault training to students.<sup>76</sup> Attendance by students was found to be largely voluntary.<sup>77</sup> Specific education programming was created for targeted groups, with 80% of institutions holding programs for student athletes, and 72% of institutions with a Greek system also targeting that group for educational programming.<sup>78</sup> Peer educators provided training at roughly 19% of institutions surveyed.<sup>79</sup> Institutions delivered training content by various methods, including video, peer-led discussion, self-defense classes, theater, dance, and visual arts.<sup>80</sup> In a review of the literature on the effectiveness of prevention programs, one study found many programs reported changes in knowledge and beliefs, but few demonstrate decreased incidents of sexual assault.<sup>81</sup> Another found success in changing attitudes and knowledge surrounding rape, but likewise little success in decreasing sexual assaults.<sup>82</sup> Promising strategies now include social marketing campaigns and bystander education programs.<sup>83</sup>

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<sup>74</sup> Kassie McClung, *Experts Doubt Effectiveness of OSU's Sexual Assault Prevention Training*, DAILY O'COLLEGIAN (Aug. 19, 2014), [http://www.ocolly.com/news/experts-doubt-effectiveness-of-osu-s-sexual-assault-prevention-training/article\\_87edac1a-27f7-11e4-bac5-001a4bcf6878.html](http://www.ocolly.com/news/experts-doubt-effectiveness-of-osu-s-sexual-assault-prevention-training/article_87edac1a-27f7-11e4-bac5-001a4bcf6878.html).

<sup>75</sup> Meredith G. F. Worthen & Samantha A. Wallace, *Intersectionality and Perceptions about Sexual Assault Education and Reporting on College Campuses*, 66 FAMILY RELATIONS 180, 188 (2017).

<sup>76</sup> Angela F. Amar et al., *Administrators' Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Sexual Assault*, in PERSPECTIVES ON COLLEGE SEXUAL ASSAULT: PERPETRATOR, VICTIM, AND BYSTANDER 175 (Roland Maiuro, ed., 2015).

<sup>77</sup> *Id.* at 177.

<sup>78</sup> *Id.* at 175.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Catherine J. Vladutiu, Sandra L. Martin, & Rebecca J. May, *College- or University-Based Sexual Assault Prevention Programs: A Review of Program Outcomes, Characteristics, and Recommendations*, 12(2) TRAUMA, VIOLENCE & ABUSE 67, 77 (2011).

<sup>82</sup> Linda A. Anderson & Susan C. Whiston, *Sexual Assault Education Programs: A Meta-analytic Examination of Their Effectiveness*, 29 PSYCHOL. WOMEN Q. 374, 381 (2005).

<sup>83</sup> Victoria L. Banyard, Mary M. Moynihan, & Elizabeth G. Plante, *Sexual Violence Prevention through Bystander Education: An Experimental Evaluation*, 35 J. COMMUNITY PSYCHOL. 463, 463–481 (2007); Sharyn J. Potter & Jane G. Stapleton, *Bringing in the Target Audience in Bystander Social Marketing Materials for*

In a survey and focus group studying 197 male student athletes on the subject of bystander intervention, more than 50% of respondents “definitely” believed they could confront a friend planning to have sex with an unwilling female.<sup>84</sup> An additional 29% “probably” believed they could confront the friend.<sup>85</sup> The numbers however dropped to 16% for definitely and 22% for probably in answering whether they could confront a friend who already committed a sexual assault.<sup>86</sup> The study also found less of a willingness to confront assaultive behavior when the confronter did not know someone who had been sexually assaulted.<sup>87</sup> Further, the closeness of the team’s bond (more prevalent for contact than for non-contact sports) was found to predict willingness to intervene.<sup>88</sup> Notably, many student-athletes are willing to intervene but need training about how to do so.<sup>89</sup> Athletes’ high social status causes issues for bystander intervention as an athlete’s social power makes it harder for peers, who know they are in a social hierarchy, to interrupt a potential assault by a well-known athlete.<sup>90</sup> Changing students’ minds about the role popularity and social status plays in sex is a key determinant in altering the climate of misconduct on college campuses.<sup>91</sup>

Athletes are aware of their status on campus, with one male athlete from a contact sport noting: “People do look up to us because we are [division I athletes]. We get looked up to as leaders because people respect that.”<sup>92</sup> Another noted “we’re like a step below professional athletics and kids really look up to us. I think if we go into high schools or even middle schools, that we could get the point across.”<sup>93</sup> Effective community-level prevention strategies are needed for subcultures with a higher risk of perpetuating sexual violence.<sup>94</sup> Utilizing college athletes as peer educators, especially those recognizable to students, is one way of reaching males in at-risk campus subcultures.

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*Communities: Suggestions for Practitioners*, 17(6) VIOLENCE AGAINST WOMEN 797, 797–812 (2011).

<sup>84</sup> Sarah McMahan & G. Lawrence Farmer, *The Bystander Approach: Strengths-Based Sexual Assault Prevention with At-Risk Groups*, 19 (8) J. HUM. BEHAV. SOC. ENV’T. 1042, 1052 (2009).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1054.

<sup>88</sup> *Id.* at 1053–55.

<sup>89</sup> *Id.* at 1060.

<sup>90</sup> Wade, *supra* note 39.

<sup>91</sup> *Id.*

<sup>92</sup> McMahan & Farmer, *supra* note 84, at 1058.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1043.

The idea of using athletes as peer educators is not a new one.<sup>95</sup> The University of Maine utilizes a unique peer education program, known as “Athletes for Sexual Responsibility” that utilizes athletes as role models for appropriate social and sexual behavior.<sup>96</sup> In 2014, The Union College men’s hockey team challenged other campus groups and other hockey teams to commit to preventing sexual assaults.<sup>97</sup> All 27 Union Hockey team members signed the White House “It’s on US” pledge to step in to prevent assault, becoming the first campus group to be trained in bystander intervention techniques.<sup>98</sup> Before training athletes as bystander interventionists or peer educators, it is important to educate individuals about the definition of rape, which athletes often view as ambiguous.<sup>99</sup> In one study, athletes were more willing to intervene in a clear case of teammate fault, but would side with their teammate if it were a more ambiguous situation (i.e. one involving alcohol).<sup>100</sup>

The first step is to reach and effectively train student athletes. Programs have found success in treating athletes and fraternity members as potential bystanders in a framework stressing sexual violence as a broader community problem instead of labeling them frequent perpetrators.<sup>101</sup> In one example, a program significantly improved male participants’ knowledge of interventions and decreased the number of times they answered “don’t know” to specific knowledge questions.<sup>102</sup> Measures indicating a helping attitude and bystander efficacy did not significantly improve, however, leading the authors to conclude that fraternities and men’s athletic teams may require a longer program compared to the general university population.<sup>103</sup>

To reach student athletes, a different philosophy of training is required: one rooted in restorative justice. The 2011 Dear Colleague Letter specifically restricts the use of informal processes like mediation

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<sup>95</sup> See, e.g., Sandra L. Caron, *Athletes as Rape-Awareness Educators: Athletes for Sexual Responsibility*, 41 J. AM. C. HEALTH 275 (1993); Ray Tricker, *College Student-Athletes as Peer Educators for Substance Abuse Prevention: An Interactive Program*, 16 PREVENTION RESEARCHER 10 (2009).

<sup>96</sup> *Athletes for Sexual Responsibility*, U. MAINE, <https://umaine.edu/athletesforsexualresponsibility/>.

<sup>97</sup> Robin Wilson, *Protecting The Party: With Focus on Sexual Assault, Students Look Out for One Another While Drinking Just as Much*, CHRON. HIGHER EDUC. (Dec. 3, 2014), [http://www.chronicle.com/interactives/alcohol\\_sex.pdf](http://www.chronicle.com/interactives/alcohol_sex.pdf).

<sup>98</sup> *Id.*

<sup>99</sup> McMahan & Farmer, *supra* note 84, at 1060.

<sup>100</sup> *Id.* at 1061.

<sup>101</sup> Mary M. Moynihan & Victoria L. Banyard, *Community Responsibility for Preventing Sexual Violence: A Pilot Study with Campus Greeks and Intercollegiate Athletes*, 36 J. PREVENTION & INTERVENTION COMMUNITY 23, 24 (2008).

<sup>102</sup> *Id.* at 32.

<sup>103</sup> *Id.* at 33–34.

in efforts to handle cases of sexual violence.<sup>104</sup> Mediation is restricted due to concerns over re-victimization and an imbalance of power between perpetrators and victims.<sup>105</sup> A 2017 Dear Colleague Letter and Q&A document provides schools with greater discretion.<sup>106</sup> However, restorative justice is not mediation, but due to the same concerns, the use of Restorative Justice is typically not even contemplated for sexual misconduct.<sup>107</sup> While many campuses utilize restorative justice, including the University of Michigan who pioneered restorative practices in their conflict resolution office and university housing, restorative justice is not used for cases of sexual misconduct.<sup>108</sup>

Restorative Justice views crime as a violation that causes harm to people and interpersonal relationships in which offenders and communities are accountable for repairing the harm.<sup>109</sup> The group harmed includes the victim, their family and friends, as well as the offenders, who have caused harm to themselves and to their family and friends.<sup>110</sup> The group harmed also includes “community members who experience less safety and social connection.”<sup>111</sup> Restorative justice seeks to address “victims’ harms and needs, to hold offenders accountable to address those harms and the underlying causes, and to involve victims, offenders, and communities in the process.”<sup>112</sup> There

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<sup>104</sup> 2011 Dear Colleague Letter, *supra* note 9, at 8 (“... in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.”).

<sup>105</sup> Mary P. Koss, et. al., *Campus Sexual Misconduct: Restorative Justice Approach to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 242, 245–46 (2014).

<sup>106</sup> Candice Jackson, Dear Colleague Letter, U.S. Dep’t of Educ., Off. for C.R. (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>; Q&A on Campus Sexual Misconduct, U.S. Dep’t of Educ., Off. for C.R. (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>. In order to avoid a full investigation and adjudication, the school must determine the complaint is appropriate for informal resolution, and all parties must agree to participate after receiving a full disclosure of the allegations and their formal options (Q&A p. 4).

<sup>107</sup> HOWARD ZEHR & ALI GOHAR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 7–8 (2002); Koss et. al., *supra* note 100, at 254.

<sup>108</sup> Katherine Knott, *How One University Went All-In on Restorative Justice*, CHRON. HIGHER EDUC. (Dec. 18, 2016), <http://www.chronicle.com/article/How-One-University-Went-All-In/238093>.

<sup>109</sup> Symposium, *Restorative Justice in Action: Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 255 (2005). See ZEHR & GOHAR, *supra* note 105, at 17.

<sup>110</sup> Mary Koss & Mary Achilles, *Restorative Justice Responses to Sexual Assault*, VAWNET 1 (Feb. 2008), [http://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_RestorativeJustice.pdf](http://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJustice.pdf).

<sup>111</sup> *Id.*

<sup>112</sup> ZEHR & GOHAR, *supra* note 107, at 23.

is no one process utilized, but options include circles, dialogues, impact panels, reparation boards, and conferencing.<sup>113</sup> Through a restorative process, victims are able to “tell their own stories about their experiences, obtain answers to questions, experience validation as a legitimate victim, observe offender remorse for harming them...[and have] input into the resolution.”<sup>114</sup> By focusing on restoration, offenders are able to see and better understand the consequences of their actions.<sup>115</sup> As a result, offenders acknowledge their responsibility and have an opportunity to be accountable in a more fundamental sense.<sup>116</sup>

The recognition engendered by restorative justice is ideal for reaching male student athletes. Research suggests student athletes report presentations by sexual assault victims and offenders would be most effective among students with the biggest misperceptions about consent.<sup>117</sup> It may help for sexual assault victims from outside the institution to share their stories with male student-athletes. As a first step to reframing male student-athletes’ approaches to sexual encounters, it is helpful for them to “confront and wrestle with the toll sexual assault and violence has taken on others.”<sup>118</sup> Former college athlete, and current administrator, DeWitt Scott argues “the complexity of sexual violence has never been explained to [athletes], mainly because [it]...is the elephant in the room in college athletic departments.”<sup>119</sup> As a result, the subject must be confronted head on, using respected former athletes “who look like them and...can drive the point home.”<sup>120</sup> Additionally, former athletes who perpetrated sexual violence should be utilized to discuss the shame they experienced, the negative stigma attached to their actions, and what the investigative and criminal process was like.<sup>121</sup> As a next step, athletes can delve into their own experiences. Provided there is confidentiality, trained counselors could work with groups of athletes to explore their own experiences in an empathic environment that transforms shame into opportunities for responsibility and deeper understanding. A process of education that encourages greater integration into the team community and greater support for non-violence is essential.

As athletics are the face of the institution, it is student-athletes, especially major sport athletes, that receive the most attention on a per

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<sup>113</sup> Koss & Achilles, *supra* note 110, at 1.

<sup>114</sup> *Id.* at 2.

<sup>115</sup> ZEHR & GOHAR, *supra* note 107, at 15.

<sup>116</sup> *Id.*

<sup>117</sup> MCGOVERN & MURRAY, *supra* note 73, at 1.

<sup>118</sup> Scott, *supra* note 68.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

student basis from administrators. As such, universities have the resources and control over players to ensure rape-prone cultures do not develop. If it is not possible to create healthy team environments on athletic teams, it is likely an unhealthy environment exists in other all-male campus group subcultures. One of the reasons for push back against programs specifically targeting athletes is the belief that it is felt “as an unfair stigmatization.”<sup>122</sup> Another reason is the belief that specific training further segregates athletes from the general student population.<sup>123</sup> By reaching out to athletes in a way that does not label, but instead uses a restorative approach to education, athletes can then be trained and empowered to lead the peer education effort that will provide a bridge from athletics to the rest of campus. Athletes can then present educational programs and be active in promotional campaigns specifically targeting other all-male groups at risk of becoming rape cultures. In reality, “athletic departments sponsor various athlete-only programs . . . that attempt to mitigate the [stress] of being [both] an athlete and a student.”<sup>124</sup> Major sport athletes are role models for the rest of the institution and utilizing their profiles will create the largest impact in an era of overwhelming college students with information about sexual assault.

The NCAA is already supportive of the idea of athletes as leaders on preventing sexual misconduct. In 2014, the NCAA released “Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture.” The report recommends that “student-athletes receive leadership training and actively support assault prevention efforts within the athletic department and across campus.”<sup>125</sup> The 2014 NCAA report called for “leadership at the highest levels [to] . . . empower student-athletes through education, training, and involvement to effect positive culture change with their peers, on their teams, in athletics and across campus.”<sup>126</sup> Simply put, the NCAA believes “student-athletes [should] contribute to the development and implementation of the sexual violence education program[s].”<sup>127</sup> While use of restorative justice or mediation in processing sexual violence is prohibited by the 2011 Dear Colleague Letter<sup>128</sup>, a philosophy of restorative justice can go a long way to influencing the attitudes of college athletes so they can then

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<sup>122</sup> Crosset, *supra* note 25, at 78.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 79.

<sup>125</sup> NCAA SEXUAL ASSAULT TASK FORCE, SEXUAL VIOLENCE PREVENTION: AN ATHLETICS TOOL KIT FOR A HEALTHY AND SAFE CULTURE 4 (Oct. 2016), [https://www.ncaa.org/sites/default/files/SSI\\_Sexual-Violence-Prevention-Tool-Kit\\_20161117.pdf](https://www.ncaa.org/sites/default/files/SSI_Sexual-Violence-Prevention-Tool-Kit_20161117.pdf) [hereinafter NCAA Tool Kit].

<sup>126</sup> *Id.* at i.

<sup>127</sup> *Id.* at 6.

<sup>128</sup> 2011 Dear Colleague Letter, *supra* note 9, at 8.

reach other all-male groups. As programs must be reinforced and not only presented once, a variety of methods are needed and “buy-in and support of coaches and administrators” is especially important.<sup>129</sup> The next section addresses coach and administrator support as the greatest challenge to improving campus rape cultures.

#### IV. BUY-IN REQUIRED FROM ADMINISTRATORS AND COACHES.

“Members of an all-male group on campus are more likely to commit a sexual assault if they think the consequences will be minimal and/or there are people with power on campus that will protect them.”<sup>130</sup> Coaches take on a variety of roles, including being “mentors, career advisors, and moral guides.”<sup>131</sup> According to researcher Todd Crosset, “[c]oaches, for better or worse, have the most power to shape student athlete behavior and to hold them accountable for their actions.”<sup>132</sup> The NCAA report called for “[c]oaches and other athletics staff [to] encourage and support student-athlete involvement in campus-wide prevention efforts.”<sup>133</sup> When coaches are not held accountable, rape cultures are allowed to persist, as evidenced by the following examples.

At Michigan State University, former MSU Women’s gymnastics coach Kathie Klages was reported to be protecting University Doctor Larry Nassar.<sup>134</sup> Nassar was awaiting trial alleged to have abused dozens of female USA Gymnasts and MSU athletes.<sup>135</sup> Klages allegedly told the mother of one gymnast that “Nassar’s digital penetration...was a proven treatment.”<sup>136</sup> In 1997, Klages reportedly asked a teenage girl if Nassar had performed similar procedures.<sup>137</sup> “When the girl said yes, ‘Klages told her that there [was] no reason to bring up Nassar’s conduct.’”<sup>138</sup> Klages later told another girl that “filing a complaint could lead to ‘serious consequences’ not only for Nassar, but for her.”<sup>139</sup> Klages retired after 27 years as coach when MSU

<sup>129</sup> MCGOVERN & MURRAY, *supra* note 73, at 1.

<sup>130</sup> Crosset, *supra* note 25, at 84.

<sup>131</sup> *Id.* at 77.

<sup>132</sup> *Id.*

<sup>133</sup> NCAA Tool Kit, *supra* note 125, at 13.

<sup>134</sup> Matt Mencarini, 3rd *Allegation Emerges Against Ex-MSU Gymnastics Coach*, LANSING ST. J. (Feb. 15, 2017, 3:05 PM), <http://www.lansingstatejournal.com/story/news/local/2017/02/15/3rd-allegation-against-klages-emerges/97938422/>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

suspended her pending an investigation.<sup>140</sup> In 2014, Michigan State University investigated Larry Nassar under the then current Title IX processes, but cleared Nassar of wrongdoing.<sup>141</sup>

In 2016, two Texas A&M football coaches were suspended for two weeks without pay and ordered to complete 20 hours community service after organizing a “women’s football clinic” that included a sexist version of the university’s fight song and faux instructions filled with sexual innuendo about how female fans should play football.<sup>142</sup> Run blocking rules instructed the women to “spread your legs, enter-Front, not-Behind, push hard, and finish on top.”<sup>143</sup> The revised fight song included the lyrics, “[m]aroon and white are the colors we love, we are putting down our dish towels and taking off our gloves, no more Lysol or Cascade we want to score touchdowns and walk in the parade.”<sup>144</sup>

At Kent State University, a former softball player alleged being raped in 2012 by a baseball player, and that university officials declined to investigate.<sup>145</sup> The player also alleged the University colluded with the accused student’s mother (who was also the softball coach) to cover up the case.<sup>146</sup> Allegedly, the coach never reported the allegation to the Title IX Coordinator, but called and apologized to the student’s mother, and asked the student not to tell anyone else.<sup>147</sup> The coach resigned in 2015.<sup>148</sup> In 2017, a court ruled the player’s lawsuit may proceed.<sup>149</sup>

At Baylor University, “17 women accused 19 football players of domestic violence or sexual assault between 2011 and 2015.”<sup>150</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> Matt Mencarini, *At MSU: Assault, Harassment and Secrecy*, LANSING ST. J. (Dec. 15, 2016), <http://www.lansingstatejournal.com/story/news/local/2016/12/15/michigan-state-sexual-assault-harassment-larry-nassar/94993582/>.

<sup>142</sup> John Taylor, *A&M Got Down & Dirty—And Crude & Sexist—at Football Clinic for Women*, NBC SPORTS (Jul. 29, 2016), <http://collegefootballtalk.nbcsports.com/2016/07/29/am-got-down-dirty-for-football-clinic-for-women/>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (see embedded tweet in article for lyrics).

<sup>145</sup> Karen Farkas, *Judge Rules Former Kent State Softball Player’s Lawsuit on How Coach and University Handled Rape Investigation Can Proceed*, CLEV. PLAIN DEALER (May 3, 2017), [http://www.cleveland.com/metro/index.ssf/2017/05/former\\_kent\\_state\\_softball\\_pla\\_1.html](http://www.cleveland.com/metro/index.ssf/2017/05/former_kent_state_softball_pla_1.html) (last visited July 20, 2017).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* (citing *Kesterson v. Kent State Univ.*, No. 5:16-CV-298, 2017 WL 995222, at \*3 (N.D. Ohio Mar. 15, 2017))

<sup>148</sup> Farkas, *supra* note 145.

<sup>149</sup> *Id.*

<sup>150</sup> Fernanda Zamudio-Suarez, *Baylor U. Settles With Women Who Reported Gang Rape*, CHRON. HIGHER EDUC. (Nov. 23, 2016),

Additionally, Baylor settled with two women in 2016 who said they were gang raped in 2012 by multiple football players.<sup>151</sup> The scandal led to the firing of the head football coach, and the eventual resignation of the President and Athletic Director.<sup>152</sup> In a 2009 email to a Greek Organization's faculty advisor, a Baylor Regent referred to women he suspected of drinking alcohol as "insidious and inbred," "perverted little tarts," and "the vilest and most despicable of girls."<sup>153</sup> Law firm Pepper Hamilton conducted an investigation in May 2016 that produced 105 recommendations and found that "everything that could be wrong with Baylor's treatment of sexual assault was wrong."<sup>154</sup> In many cases, Baylor is alleged to have protected the athletes at the expense of women's rights. In October 2016, Baylor Title IX Coordinator Patty Crawford resigned, accusing Baylor of not providing her with enough authority.<sup>155</sup> In response to the negative publicity, Baylor set up a website, The Truth, which it used to challenge Crawford's assertions.<sup>156</sup> In February of 2017, the Baylor Women's basketball coach, following her 500<sup>th</sup> win told the crowd "[i]f somebody is around you and they ever say, 'I will never send my daughter to Baylor,' you knock them right in the face."<sup>157</sup> She later said, "I'm tired of hearing it...it's over. It's done. The problems we have at Baylor are no different than the problems at any other school in America."<sup>158</sup>

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<http://www.chronicle.com/blogs/ticker/baylor-u-settles-with-women-who-reported-gang-rape/115727>.

<sup>151</sup> *Id.*

<sup>152</sup> Katherine Mangan, *Feuding Over Sex-Assault Scandal Intensifies Spotlight on Baylor*, CHRON. HIGHER EDUC. (Nov. 3, 2016),

<http://www.chronicle.com/article/Feuding-Over-Sex-Assault/238291>.

<sup>153</sup> Fernanda Zamudio-Suarez, *Former Baylor U. Regent Referred to Female Students as 'Perverted Little Tarts'*, CHRON. HIGHER EDUC. (July 3, 2017),

<http://www.chronicle.com/blogs/ticker/former-baylor-u-regent-referred-to-female-students-as-perverted-little-tarts/119225>.

<sup>154</sup> Tom Steele, *Former Baylor Student was Gang-Raped by Football Players, She Claims in Title IX Lawsuit*, DALL. MORNING NEWS (May 17, 2017),

<https://www.dallasnews.com/news/baylor/2017/05/17/former-baylor-student-gang-raped-baylor-football-players-claims-title-ix-lawsuit>; Fernanda Zamudio-Suarez, *How Baylor's First Female President Plans to Move Past the Sex-Assault Scandals*, CHRON. HIGHER EDUC. (May 22, 2017), <http://www.chronicle.com/article/How-Baylor-s-First-Female/240141>.

<sup>155</sup> Robin Wilson, *Title IX Officers Pay a Price for Navigating a Volatile Issue*, CHRON. HIGHER EDUC. (Oct. 16, 2016), <http://www.chronicle.com/article/Title-IX-Officers-Pay-a-Price/238081>.

<sup>156</sup> Mangan, *supra* note 152.

<sup>157</sup> Emily Tate, *Baylor Coach Says of Skeptics: 'Knock Them Right in the Face'*, INSIDE HIGHER ED (Feb. 27, 2017),

<https://www.insidehighered.com/quicktakes/2017/02/27/baylor-coach-says-skeptics-knock-them-right-face>.

<sup>158</sup> *Id.*

The coach is right. At the core of the problem is sexual misconduct, and Baylor's problems are no different than the problems at any other school. Every school faces these issues, but too many believe they do not and as a result wait too long to address underlying problems. Evidence indicates Baylor allowed a rape culture to develop in its athletic department due to a lack of institutional accountability. Given the resources, time, and costs of a U.S. Department of Education Office of Civil Rights investigation, parents may be well advised to send their daughters to schools that have been investigated. An open investigation encourages university administrators to act, leads to revised processes, and an increase in resources and staff to ensure the institution is doing things correctly.

In order to actualize an educational program utilizing student athletes as peer educators, coaches and administrators must be on board with the mission of meaningfully changing cultures prone to sexual misconduct. "Institutional support for male privilege[] and institutional practices that fail to hold athletes accountable" are two of the factors that lead team environments to become rape cultures.<sup>159</sup> Pat Summitt herself experienced institutional support for male privilege. When her team at UT-Martin won the league title, the athletic department's way of rewarding the team was to invite them to the men's team banquet.<sup>160</sup> That season the men had won just three games while the women's team was 16-3.<sup>161</sup> According to Summitt, "we sat for hours, watching guys receive plaques and awards and congratulations for their efforts. Finally, they paused the proceedings to briefly introduce us. That was our recognition: we got to stand up for a minute."<sup>162</sup>

According to researcher Todd Crosset, "[c]ollege and university administrators generally acknowledge that athletes, along with fraternities, marching bands, and other male-dominated campus groups can become rape-prone subcultures on campus."<sup>163</sup> A good first step is for institutions to begin to define rape culture in their policies. In a review of more than 60 U.S. colleges' and universities' sexual misconduct policies, *Inside Higher Ed* found no reference to rape culture.<sup>164</sup> Advocates argue such a definition would signal to victims that colleges acknowledge the broader social issues and are taking them seriously.<sup>165</sup>

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<sup>159</sup> Crosset, *supra* note 25, at 76.

<sup>160</sup> SUMMITT & JENKINS, *supra* note 5, at 65.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Crosset, *supra* note 25, at 78.

<sup>164</sup> New, *supra* note 20.

<sup>165</sup> *Id.*

Next, the practice of delaying adjudication for athletes, thus allowing them to transfer to another school without repercussions, needs to end.<sup>166</sup> Additionally, schools must do a better job of diligently researching their potential future players. At Oregon, a basketball player played the 2016-2017 season while under criminal investigation for an alleged sexual assault that occurred prior to transferring to Oregon.<sup>167</sup> “The University of Oregon police [were] aware of the investigation [beginning] September 28[,] [b]ut...the allegations were not shared with [the] college coaching staff.”<sup>168</sup> On June 20, 2017, the player announced his intent to transfer to another school.<sup>169</sup> In another example, a golf team member at Loyola University Chicago was on campus for three years, all the while “charged with rape and...awaiting a trial since 2013.”<sup>170</sup> Loyola received no information about the crime until discovering the student had agreed to plead guilty.<sup>171</sup> While privacy laws restrict what information can be released to other schools and the broader campus community, Indiana University, in April 2017, adopted a policy disqualifying students “convicted of or pleaded no contest to a felony sexual violence charge.”<sup>172</sup> The SEC, the Southeastern Athletic Conference, passed a similar rule, although it only applies “to transfer students across the conference.”<sup>173</sup> Currently, administrators are “under no obligation to investigate athletes...[and] institutions rely on all students to be truthful and disclose past indiscretions.”<sup>174</sup> Despite an “incentive...to stay oblivious to prior sex offenses,” athletic departments must do their diligence and not recruit or enroll students with questionable histories regarding sexual misconduct.<sup>175</sup>

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<sup>166</sup> Crosset, *supra* note 25, at 87.

<sup>167</sup> Suhauna Hussain, *U. of Oregon Athlete Played a Season While Under Investigation for Sexual Assault*, *THE CHRON. HIGHER EDUC.* (June 22, 2017), <http://www.chronicle.com/blogs/ticker/u-of-oregon-athlete-played-a-season-while-under-investigation-for-sexual-assault/119065>.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Scott Jaschik, *Anger Over Accused Rapist on Campus for 3 Years*, *INSIDE HIGHER ED* (Dec. 21, 2016), <https://www.insidehighered.com/quicktakes/2016/12/21/anger-over-accused-rapist-campus-3-years>.

<sup>171</sup> *Id.*

<sup>172</sup> Jeremy Bauer-Wolf, *Why Do Colleges Recruit Athletes Who Have Committed Sexual Assault?*, *INSIDE HIGHER ED* (May 18, 2017), <https://www.insidehighered.com/news/2017/05/18/indiana-ban-sexual-assault-offenders-applauded-not-adopted-elsewhere>.

<sup>173</sup> *Id.*

<sup>174</sup> Jeremy Bauer-Wolf, *Tracking Athletes' Sex Offenses*, *INSIDE HIGHER ED* (June 20, 2017), <https://www.insidehighered.com/news/2017/06/20/colleges-have-lots-leeway-how-they-track-sexual-offenses>.

<sup>175</sup> *Id.*

Third, coaches must receive extensive training on sexual misconduct. Research indicates high school coaches trained to be knowledgeable on principles of gender equity can impact student athlete beliefs and behaviors by lowering the likelihood of dating violence, increasing the likelihood of bystander intervention, and creating less acceptance for violence against women.<sup>176</sup> Research shows that “when coaches and athletic departments clarify expectations for off-field conduct and strongly sanction violations...they may be indirectly encouraging team members to engage in bystander intervention.”<sup>177</sup> In order to effectuate buy-in, coaches must be knowledgeable and invested in the issue.

A fourth and related issue is for universities to hire coaches who represent the diversity of their athletes. A study released in November by the University of Central Florida’s Institute for Diversity and Ethics in Sport found “more than three-quarters of presidents at the 128 Football Bowl subdivision colleges [are] white men, as [are] nearly 79% of athletics directors.”<sup>178</sup> Only “7% of athletics directors [are] women, and all of them [are] white. Nearly 90% of faculty athletics representatives [are] white, as were 100% of conference commissioners...[and] 87% of Football Bowl Subdivision head coaches.”<sup>179</sup> This comes nowhere close to representing the diversity of the students and student athletes on campus. Since 1972, the “number of female college athletes [has increased] 500%” while “women account for more than half of students at NCAA institutions.”<sup>180</sup> Despite this, “women receive 44% of athletic participation opportunities...28% of the total money spent on athletics and 42% of athletic scholarship funds[,]...[and] 31% of...recruiting dollars.”<sup>181</sup> In the last 40 years, “the percentage of women’s teams being coached by women has fallen from 90% to 40” with “60% of women’s teams now coached by men, [but] 3% of men’s teams are coached by women.”<sup>182</sup> Only “7% of

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<sup>176</sup> Elizabeth Miller et al., *One-Year Follow-up of a Coach-Delivered Dating Violence Prevention Program: A Cluster Randomized Controlled Trial*, 45 AM. J. PREVENTATIVE MED. 108, 108–12 (2013).

<sup>177</sup> Emily Kroshus, Tom Paskus, & Lydia Bell, *Coach Expectations About Off-Field Conduct and Bystander Intervention by U.S. College Football Players to Prevent Inappropriate Sexual Behavior*, 2015 J. INTERPERSONAL VIOLENCE 1, 17 (2015).

<sup>178</sup> Jake New, *Seeking ‘Culture of Integrity’ in College Sports*, INSIDE HIGHER ED (Dec. 13, 2016), <https://www.insidehighered.com/news/2016/12/13/ace-report-urges-college-leaders-ensure-culture-integrity-athletics>.

<sup>179</sup> *Id.*

<sup>180</sup> Jake New, *‘Supposed to Be Our Brothers’*, INSIDE HIGHER ED (Nov. 8, 2016), <https://www.insidehighered.com/news/2016/11/08/harvard-sexism-scandal-reveals-larger-concerns-over-how-female-athletes-are-treated>.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

athletic directors are women.”<sup>183</sup> The lack of gender balance in athletic department leadership and coaches has an impact in terms of team cultures.

Finally, this educational issue may require rethinking how universities accomplish their core function. Certainly, accountability requires realigning athletic departments with schools’ academic missions. More fundamentally we need to foster open and informed dialogue. If teachers, administrators, and coaches create a comfortable space for everyone to share, something not easy to accomplish, students will be honest about their beliefs. And if done without judgment, an educational process begins that will change fundamental assumptions. Faculties have an equally large role to play in creating informed dialogue that enables all students to express their views without judgment. It is a difficult balance to maintain between allowing free expression while educating students. There is no place for hateful speech in classrooms, but difficult conversations provide opportunities for student growth and learning. If it is not happening on our college campuses, where will it happen? Who will do it? Rethinking our academic function more broadly requires taking a restorative justice approach to education. University centers for teaching and learning provide an excellent resource for faculty seeking to improve their teaching and facilitation skills.

## V. CONCLUSION

With administrators and coaches leading the way, student athletes must work to change the stigma linking abusive behaviors to locker room talk. Student athletes by definition are not predators. All-male campus groups are at risk for developing a rape culture that exacerbates the risks of sexual violence. Attitudes that marginalize or objectify women are inappropriate and dangerous. Universities must change the minds and hearts of men who misunderstand these fundamental truths. By utilizing a restorative approach to education, athletes can be educated and positioned as peer educators and leaders in the fight to transform campus subcultures.

All of Pat Summitt’s life, she had “preached ‘taking ownership’ to athletes.”<sup>184</sup> Summitt “insisted they commit to themselves, not just by working at the things they were good at, but by admitting the things they weren’t good at.”<sup>185</sup> No one feels strong when examining their own weaknesses, she argued, but in doing so individuals can “find a blueprint

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<sup>183</sup> *Id.*

<sup>184</sup> SUMMITT & JENKINS, *supra* note 5, at 20.

<sup>185</sup> *Id.*

for real strength.”<sup>186</sup> She urged her athletes “[d]on’t look away from the difficult things . . . . ‘Take ownership!’”<sup>187</sup> Taking ownership is what Summitt did with her diagnosis of Alzheimer’s.<sup>188</sup> It is what universities must do in confronting a crisis of campus sexual misconduct.

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

