

Harassment, Abuse, and Mistreatment in College Sports: Protecting Players through Employment Laws

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NCAA athletes who experience harassment, injuries, or other forms of mistreatment are poorly protected by Title IX, negligence torts, and other laws. This conclusion draws from a statistical analysis of 59 federal and state court cases and 110 rulings. The analysis shows: (1) a disproportionate number of plaintiffs in these harassment and abuse cases are women; (2) sexual assault is a pervasive issue in the context of college sports; (3) player-coach interactions are the most common source of legal disputes involving harassment and abuse; (4) negligence laws often fail to protect male plaintiffs in these abuse and injury cases; and (5) litigation involving claims of harassment and abuse has rapidly accelerated in recent years. This Article also includes case studies from published accounts of player and parent complaints of a sexual assault by a football player at the University of Iowa and of verbal harassment and medical mistreatment of a men's basketball player at the University of Illinois at Urbana-Champaign.

The NCAA's present amateur model lacks complaint systems outside the control of schools, provides few positive outcomes for plaintiffs who allege significant wrongdoing and damages, and does little to alter risk-management practices of athletic departments by these schools.

This Article provides justification for an NCAA athletic employment model beyond the pay-for-play argument. Under such a model, schools would be subject to (1) greater culpability under discrimination laws, (2) a broader duty of care for negligence under tort doctrines of negligent hiring and

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[†]. Professor, School of Labor and Employment Relations and College of Law, University of Illinois at Urbana-Champaign. This research article is dedicated to parents of two basketball players at the University of Illinois at Urbana-Champaign who reported concerns to the author about the physically, emotionally, and racially abusive treatment of their sons on the men's basketball team during the 2017-2018 season. This Article was initially prepared for the Berkeley Journal of Employment and Labor Law symposium *Players at Work: Litigating Justice in Sports*, and contains updates to reflect subsequent developments prior to publication.

supervision, and (3) state workers' compensation laws for physical and psychological injuries.

The recent upsurge in reports of coaching racism and schools' widespread use of "pledges" and waivers to absolve themselves of COVID-related liabilities further underscore the need to ensure that schools can be held accountable for misconduct. As of the time of publication, schools have faced public scrutiny and embarrassment—but no school has suffered legal consequences.

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I. INTRODUCTION

A. Abuse, Harassment, and Mistreatment in College Sports:
Perpetrators and Victims

College athletes have increasingly sued their schools with claims of harassment, abuse, and mistreatment. Some suits allege that coaches seriously injured¹ or recklessly killed² players with abusive practices. Others allege that coaches battered³ or raped their athletes.⁴ Some coaches have been accused of pressuring injured players to compete.⁵ Coaches have allegedly engaged in racial intimidation,⁶ sexual degradation,⁷ homophobic behavior,⁸ and bullying, causing psychological problems, including suicidal thoughts.⁹ Coaches have run off players from their teams with harassment and harsh tactics.¹⁰

1. *E.g.*, *Feleccia v. Lackawanna Coll.*, No. 2012-CV-1960, 2016 WL 409711, at *4 (Pa. Com. Pl. Civ. Div. 2016) (two football players sued the college for negligence and gross negligence due to vertebral and shoulder nerve injuries arising from a tackling drill and inadequate medical care at the time they were injured).

2. *E.g.*, *Lee v. La. Bd. of Trs. for State Colls.*, 280 So. 3d 176, 181 (La. Ct. App. 2019) (as punishment for reporting late to pre-season training, Grambling basketball players were subjected to punitive discipline by running 4.5 miles in excessive heat and humidity after an intense weightlifting session, leaving one player dead and another with permanent injuries).

3. *E.g.*, *Rutledge v. Ariz. Bd. of Regents*, 711 P.2d 1207, 1211 (Ariz. Ct. App. 1985) (a football coach grabbed a player by face mask and shook his head violently, and once the helmet was off, punched the player in the face).

4. *E.g.*, *J.B. v. Lawson State Cmty. Coll.*, 29 So. 3d 164, 167 (Ala. 2009) (a basketball player sued her college after a coach raped her in a motel room).

5. *E.g.*, *In re Tex. Christian Univ.*, 571 S.W 3d 384, 390 (Tex. App. 2019) (a football player injured in a game alleged that he received improper medical care, and some coaches and athletic trainers harassed, pressured, and threatened him into returning to the field before his injury healed).

6. *E.g.*, *Shepard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 2d 829, 831 (Ct. App. 2002) (coach created racially discriminatory and hostile environment).

7. *E.g.*, *Jennings v. Univ. of N.C. at Chapel Hill*, 240 F. Supp. 2d 492, 510 (M.D.N.C. 2002) (male coach of the women's soccer team routinely used sexually charged language—for example, questioning a player in front of the team about “who [her] fuck of the minute is, fuck of the hour is, fuck of the week [is]”).

8. *E.g.*, Don Van Natta Jr., *Video Shows Mike Rice's Ire*, ESPN (Apr. 2, 2013), https://www.espn.com/espn/otl/story/_id/9125796/practice-video-shows-rutgers-basketball-coach-mike-rice-berated-pushed-used-slurs-players [<https://perma.cc/4YGQ-P6GW>].

9. *E.g.*, Paul Newberry, *Georgia Tech Fires Women's Basketball Coach MaChelle Joseph*, AP (Mar. 26, 2019), <https://apnews.com/7e2db119ac884b388ebe16f5361446b6> [<https://web.archive.org/web/20200917160823/https://apnews.com/7e2db119ac884b388ebe16f5361446b6>].

10. *E.g.*, Andy Berg, *Rutgers Softball Players Allege Abuse by Coach*, ATHLETIC BUSINESS (Oct. 2019), <https://www.athleticbusiness.com/civil-actions/rutgers-softball-players-allege-abuse-by-coach.html> [<https://perma.cc/K4TH-UNSN>]. (Rutgers softball head coach, Coach Kristen Butler, who allegedly engaged in abusive treatment of at least seven players, attempted to revoke the scholarship of two players who eventually transferred).

Coaches are not the only accused parties in these lawsuits. Players have been accused of abuse. They have allegedly sexually assaulted,¹¹ raped,¹² and hazed peer athletes at their schools¹³ or in other athletic programs.¹⁴ Some have harassed team managers or teammates because of their gender¹⁵ or race.¹⁶

Some universities have ignored or tolerated depravity. Coaches and trainers who work in gyms, training rooms, and locker rooms have sexually assaulted athletes—women,¹⁷ men,¹⁸ and young minors.¹⁹ University officials have looked the other way after being informed of abuses.²⁰

University administrators, including coaches, have compounded injurious experiences by doing too little when they received complaints of

11. *E.g.*, *Simpson v. Univ. of Colo. Boulder*, 372 F. Supp. 2d 1229, 1232 (D. Colo. 2005), *rev'd*, 500 F.3d 1170 (10th Cir. 2007) (dismissing lawsuit by two women claiming they were sexually assaulted at an off-campus University of Colorado football recruiting party, because a “reasonable fact finder could not find that the University was deliberately indifferent to the risk that CU football players and recruits would sexually assault female University students as part of the recruiting program”).

12. *E.g.*, *Kinsman v. Fla. State Univ. Bd. of Trs.*, No. 4:15cv235-MW/CAS, 2015 WL 11110848, at *1 (N.D. Fla. Aug. 12, 2015) (alleging a star quarterback, Jameis Winston, raped a female student and that campus officials took no action for ten months).

13. *E.g.*, *Cameron v. Univ. of Toledo*, 98 N.E.3d 305, 309-10 (Ohio Ct. App. 2018) (player alleged negligence on the part of coaches for failing to supervise post-practice hazing on the football field that resulted in his injury).

14. *E.g.*, *Doe v. Brown Univ.*, 270 F. Supp. 3d 556, 558 (D.R.I. 2017) (a female player at Providence College alleged that she was drugged at a bar, taken by taxi to Brown University, and sexually assaulted by three Brown University football players).

15. *E.g.*, *Summa v. Hofstra Univ.*, No. CV 08-0361, 2011 WL 1343058, at *2 (E.D.N.Y. Apr. 7, 2011) (football players allegedly harassed female team manager with vulgarity).

16. *E.g.*, *Stafford v. George Washington Univ.*, No. 18-CV-2789, 2019 WL 2373332, at *2-5 (D.D.C. June 5, 2019) (Black tennis player observed and experienced racist treatment).

17. *E.g.*, Dan Barry et al., *As F.B.I. Took a Year to Pursue the Nassar Case, Dozens Say They Were Molested*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/03/sports/nassar-fbi.html> [<https://perma.cc/N23T-7LMV>] (reporting that Larry Nassar, the former U.S. Gymnastics national team doctor and Michigan State University employee, was sentenced for sexually abusing athletes).

18. *E.g.*, Mike Householder, *U. of Michigan Reaching Out to Ex-Athletes about Late Doctor*, AP (Apr. 7, 2020), <https://apnews.com/2efedab5693816ba644649b13eef5410> [<https://web.archive.org/web/20200917160500/https://apnews.com/2efedab5693816ba644649b13eef5410>] (reporting that the university contacted 6,800 former student-athletes to investigate complaints of sex abuse committed by a university physician).

19. *E.g.*, Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES (June 22, 2012), <https://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html> [<https://perma.cc/RGD9-7T8G>] (reporting that former Penn State football coach was convicted of sexually assaulting minors).

20. *E.g.*, *Doe 12 v. Baylor Univ.*, 336 F. Supp. 3d 763, 768 (W.D. Tex. 2018) (four Baylor students alleged that they were sexually assaulted by their peers, including football and rugby players).

rape,²¹ bullying,²² race-²³ and gender-based²⁴ discrimination, medical mistreatment,²⁵ and unsafe practice conditions.²⁶ Administrators have allegedly minimized,²⁷ ignored,²⁸ discouraged,²⁹ covered up,³⁰ misrepresented,³¹ and tried to alter witness accounts³² relating to player complaints about abuse and harassment in their athletic programs. The list of

21. *E.g.*, *Ruegsegger v. W. N.M. Univ. Bd. of Regents*, 154 P.3d 681, 683 (N.M. Ct. App. 2006) (scholarship athlete alleged that two football players raped her, and her coach recommended not contacting the police or receiving medical treatment, while administrators directed her coach to cease helping her).

22. *E.g.*, STATE OF IOWA BD. OF REGENTS, SPECIAL COUNSEL'S REPORT 10 (2008), <https://www.iowaregents.edu/media/cms/stolarreport-pdf5CCE987B.pdf> [<https://perma.cc/XGM6-KZBZ>].

23. *E.g.*, *Mackey v. Bd. of Trs. of Cal. State Univ.*, 242 Cal. Rptr. 3d 757, 764 (Ct. App. 2019) (five Black players on the women's basketball team alleged racist treatment by their head coach).

24. *E.g.*, *Colli v. S. Methodist Univ.*, No. 3:08-CV-1627, 2010 WL 7206216 (N.D. Tex. Aug. 17, 2010) (coach persistently asked player if she was a lesbian).

25. *E.g.*, *Ramsey v. Auburn Univ.*, 191 So. 3d 102, 104-05 (Miss. 2016) (involving a football player who, returning from back surgery with specific instructions not to do "power clean" lifts, reinjured his back after weight coach cajoled and harassed the player to engage in activities that violated the doctor's orders).

26. *E.g.*, *Pelham v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1B11CV245, 2012 WL 13118387, at *1-2 (Ga. Super. Ct. June 14, 2012) (a Georgia State University football player sued the school, its football coach, and a university board member for negligence after he was injured in a practice-related fight that the coach allegedly ordered among players).

27. *E.g.*, Sara Agnew, *Sally Mason Apologizes for Sexual Assault Remark*, DES MOINES REG. (Feb. 26, 2014), <https://www.desmoinesregister.com/story/news/2014/02/26/sally-mason-apologizes-for-sexual-assault-remark/5827897/> [<https://perma.cc/UHV6-Z95U>].

28. *E.g.*, *Simpson v. Univ. of Colo. Boulder*, 372 F. Supp. 2d 1229, 1232 (D. Colo. 2005), *rev'd*, 500 F.3d 1170 (10th Cir. 2007).

29. *E.g.*, *Kesterson v. Kent State Univ.*, No. 5:16CV298, 2018 WL 827864, at *1 (N.D. Ohio Feb. 12, 2018) (softball player was raped by her coach's son, a fellow athlete at the university, and was told not to report the assault).

30. *E.g.*, *S.S. v. Alexander*, 177 P.3d 724, 729-32 (Wash. Ct. App. 2008) (alleging that a freshman student was raped by a football player).

31. *E.g.*, *Spencer v. Univ. of N.M. Bd. of Regents*, No. 15-CV-141, 2016 WL 10592223, at *2 (D.N.M. Jan. 11, 2016) (alleging that football players video-recorded as they raped a female student and that the moments preceding the alleged "gang rape" were memorialized on a video that announced an impending "gangbang").

32. *E.g.*, *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 793 (M.D. Tenn. 2016) (eight anonymous plaintiffs alleged that from 2013 through 2016 they were raped by football and basketball players, and had evidence that a vice chancellor's efforts to address these concerns to the chancellor were repeatedly rebuffed).

officials accused of gross inaction includes university presidents,³³ chancellors,³⁴ campus counsel,³⁵ and athletic directors.³⁶

While this Article takes a historical approach, two major developments in 2020 have shed new light on the findings described herein. First, as the NCAA and its member schools attempt to resume athletic competition amidst a global pandemic, players are being asked to sign COVID-19 “pledges” that operate as waivers of liability.³⁷ Such waivers are reminiscent of the player mistreatment cases examined in this Article, where players were harmed not by on-field injuries but by the negligence and recklessness of their coaches³⁸ and medical personnel.³⁹ Second, following George Floyd’s brutal killing by a police officer, the nation has begun to experience a shift in attitudes about the prevalence of institutional racism. Current and former players have come forward to expose coaches who have used racist stereotypes, insults, and vulgarities.⁴⁰ This, too, relates to the research in this Article, which shows that

33. *E.g.*, *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, No. CIV.A.103CV2531CAP, 2004 WL 5545037, at *2-3 (N.D. Ga. June 30, 2004) (a female student, who had consensual intercourse with a University of Georgia basketball player, was raped when the player brought two other players into the room and encouraged them to assault her).

34. *E.g.*, *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 793 (M.D. Tenn. 2016).

35. *E.g.*, *Mills v. Iowa*, 924 F. Supp. 2d 1016, 1025 (S.D. Iowa 2013) (independent investigation of a student’s complaint that she was sexually assaulted by two members of the football team concluded that university counsel’s attorney “contributed to allegations of a University cover-up).

36. *E.g.*, *Feleccia v. Lackawanna Coll.*, No. 2012-CV-1960, 2016 WL 409711, at *4 (Pa. Com. Pl. Civ. Div. 2016).

37. Dennis Dodd, *Senators to Submit Bill Prohibiting Schools from Compelling Athletes to Sign Coronavirus Waivers*, CBS SPORTS (June 29, 2020), <https://www.cbssports.com/college-football/news/senators-to-submit-bill-prohibiting-schools-from-compelling-athletes-to-sign-coronavirus-waivers/> [<https://perma.cc/MPV6-3GMC>] (reporting that some schools, such as Southern Methodist University, required players to sign a form that absolved the school and its employees of COVID-19 related claims).

38. *E.g.*, *Feleccia*, 2016 WL 409711, at *10.

39. *E.g.*, *In re Texas Christian Univ.*, No. 05-18-00967-CV, 2018 WL 6716935, at *2 (Tex. App. Dec. 21, 2018), *withdrawn*, 571 S.W.3d 384 (Tex. App. 2019).

40. Jeff Borzello & Myron Medcalf, *Texas State Coach Danny Kaspar Made Many Racist Remarks, Former Players Say*, ESPN (June 5, 2020), https://www.espn.com/mens-college-basketball/story/_id/29269697/texas-state-coach-danny-kaspar-used-many-racist-remarks-former-players-say [<https://perma.cc/AV9D-453Y>]; Myron Medcalf, *Erik Helland Resigns as Badgers Coach, Says He Used Racial Slur While Telling Story*, ESPN (Feb. 6, 2020), https://www.espn.com/mens-college-basketball/story/_id/28649010/erik-helland-resigns-badgers-coach-says-used-racial-slur-telling-story [<https://perma.cc/42DB-MGJS>] (reporting that racial epithet was used in the presence of several Wisconsin men’s basketball players); Mark Schlabach, *Utah Suspends DC Morgan Scalley for Texting Racial Slur in 2013*, ESPN (June 5, 2020), https://www.espn.com/college-football/story/_id/29272833/utah-suspends-dc-morgan-scalley-texting-racial-slur-2013 [<https://perma.cc/6JPT-AFUV>] (reporting that investigation launched into a 2013 text message in which the coach used a racial slur); Jane Coaston, *College Football Players are Taking a Stand Against Racism — and Taking a Big Risk*, VOX (June 17, 2020), <https://www.vox.com/2020/6/17/21284501/college-football-race-iowa-george-floyd> [<https://web.archive.org/web/20200930151744/https://www.vox.com/2020/6/17/21284501/college-football-race-iowa-george-floyd>] (reporting that black players in the Iowa football program have reported racist bullying they received from coaching staff).

players have sued their schools over racial harassment.⁴¹ In sum, while it is too soon to determine how these new historical milestones will play out, this Article's analysis suggests that players will face significant obstacles in lawsuits that challenge how schools, coaches, administrators, and medical staff treat them.

B. How Employment Law Would Provide Greater Protection to Student-Athletes

Universities and colleges often present themselves as islands of safety, with students who are screened for academic and character qualifications, and professors, staff, and other employees who are hired according to strict standards. This idyllic view does not match reality. NCAA players who are raped on or near campus, or suffer physical or verbal abuse from a coach, or complain about these appalling conditions are stonewalled by administrators who exploit a school's internal complaint system to ignore or hide complaints.

In these grave or troubling situations, students find that few statutes and common law actions apply to their specific situations—and the few that apply to their situations offer weak legal protections. Title IX of the Education Amendments Act of 1972 applies to sexual assault cases.⁴² In the realm of torts, courts apply only a general duty of care standard, rejecting players' arguments that schools owe them a special duty of care—even though these institutions take on unique supervisory and protective roles relating to their students.⁴³ This Article reveals the flimsy nature of these legal protections for NCAA athletes who experience harassment, injuries, and mistreatment.⁴⁴ If NCAA students were employees, they would have more legal protection from these injurious experiences.⁴⁵

41. *E.g.*, Shephard v. Loyola Marymount, Univ., No. BC 228705, 2001 WL 35914726 (Cal. Super. Ct. Feb. 23, 2001).

42. Title IX of the Education Amendments of 1972 provides, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]” 20 U.S.C. § 1681. The roughly 7,000 postsecondary institutions that receive financial assistance from the federal government are subject to Title IX. Off. for C. R., *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC. (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [<https://perma.cc/6PRX-CD4N>].

43. *E.g.*, Howell v. Calvert, 1 P.3d 310 (Kan. 2000) (holding that where a basketball player was killed and another was hurt when a truck struck them during a pre-dawn mandatory training session on a route that their coach selected, the defendant college does not owe its student-athletes a special duty of care); *see also* Molly McDonough, *Forced Settlement Can’t Relieve a Mother’s Grief*, 4 No. 35 A.B.A. J. E-REPORT 1 (2005) (Northwestern University settled a tort claim for \$16 million in a matter growing out of the death of Rashidi Wheeler during a summer football practice, though detailed facts of the case are not a matter of public record).

44. *See infra* Section II.C.

45. *See infra* Sections IV.A, IV.B.

The empirical analysis in this Article divides into two main parts. Part II presents a statistical analysis of court cases where NCAA athletes alleged harassment, abuse, and mistreatment.⁴⁶ Part II.A explains the relevance of Richard E. Miller and Austin Sarat's study, "Grievance, Claims, and Disputes: Assessing the Adversary Culture,"⁴⁷ to this analysis. Part II.B details how I created a sample of 59 federal and state cases and 110 initial and subsequent opinions from these cases.⁴⁸ Part II.C presents a statistical analysis of this sample.⁴⁹ Table 1 summarizes key data extracted from the cases, including the gender of complainants; number of cases involving coaches, administrators, and peer students as subjects of court complaints; and data on misconduct relationships.⁵⁰ Table 2 shows the alleged legal violations in these lawsuits.⁵¹ Tables 3A and 3B show how frequently complainants and defendants win rulings. The data are broken down by win rates for players, schools, administrators, coaches, and trainers.⁵² Tables 4A and 4B show how frequently these parties win court rulings in Title IX and negligence cases, respectively.⁵³

Part III is a qualitative empirical analysis,⁵⁴ building on Miller and Sarat's finding that court filings represent only a fraction of grievances, complaints, and disputes in American society.⁵⁵ This Part focuses on news reports of injurious college player experiences that were not in the sample of court cases analyzed in Part II. Part III.A collects published accounts from 2009 through 2019 of NCAA coaches who abused, harassed, or otherwise mistreated players.⁵⁶ This broadens the Article's lens to encompass a wider range of players' injurious experiences. However, the filter of published news reports still operates as a limitation on this lens. Part III.B uses public records from two schools to delve more deeply into two cases of player injuries.⁵⁷ The first case study involves a female player at the University of Iowa who alleged that a football player sexually assaulted her.⁵⁸ Her mother wrote distressed letters to the university complaining of the University of Iowa's

46. *See infra* notes 71-111.

47. *See infra* notes 71-74.

48. *See infra* notes 75-90.

49. *See infra* notes 91-111.

50. *See infra* Section II.C. Misconduct relationships include coach-player (e.g., coach imposes injurious discipline), player-on-player (e.g., football player sexually assaults a softball player), or administrator-player (e.g., administrator disallows a key part of a complainant's presentation of evidence of an assault during a formal hearing).

51. *Id.*

52. *Id.*

53. *Id.*

54. *See infra* notes 112-153.

55. *See infra* note 74.

56. *See infra* notes 112-130.

57. *See infra* notes 131-153.

58. *See infra* notes 131-147.

mishandling of her daughter's assault.⁵⁹ The second case study involves a basketball player at the University of Illinois at Urbana-Champaign whose parent reported that players were verbally harassed and subjected to injurious, punitive discipline.⁶⁰ The son was allegedly taunted by the coach for not playing with a disabling injury, and the injury was allegedly not treated properly.⁶¹ Neither player sued nor were they personally identified in news reports.

Part IV expands on the discussion of these two case studies, showing how the players would have had greater legal protection if they were classified as employees rather than as amateur athletes. As an employee, the Iowa player would have access to the Equal Employment Opportunity Commission to file a Title VII sex discrimination complaint,⁶² to Iowa state courts to bring claims under the state's employment discrimination law and tort law,⁶³ and to Iowa's worker's compensation system for psychological injuries suffered in the course of enduring ongoing harassment.⁶⁴ In the case of the Illinois basketball player, Part IV focuses on published reports that the coach used a treadmill at courtside and ordered players who made mistakes in practice to jump on the machine at a high speed, sometimes resulting in players being thrown to the floor.⁶⁵ This situation demonstrates how a player with a treadmill injury incurred as punitive discipline could sue for negligent hiring and negligent supervision of the coach who exposed the player to an unreasonable risk of bodily harm.⁶⁶ In addition, the Illinois basketball player with a reportedly disabling injury would be compensated under the Illinois Worker's Compensation Act if he were an employee.⁶⁷

Part V concludes with two key points.⁶⁸ First, the research outlined in this Article expands the rationale for creating an employment relationship for NCAA players. Most arguments for employment focus on allowing players to receive pay-for-play.⁶⁹ This Article demonstrates that the amateur status of NCAA athletes fails to provide robust legal protections from harassment, abuse, and mistreatment—another reason that an employment relationship would better serve these athletes. Second, Part V points to a long history of exploitative work arrangements ranging from Roman slavery, to involuntary

59. *See infra* note 139.

60. *See infra* notes 150-153.

61. *See infra* note 193.

62. *See infra* notes 161, 163-164.

63. *See infra* notes 165-176.

64. *See infra* notes 177-184.

65. *See infra* notes 187-190, 193-195.

66. *See infra* notes 196-206.

67. *See infra* notes 207-209.

68. *See infra* notes 232-250.

69. *See infra* notes 232-239.

servitude in colonial America, to peonage in twentieth century America.⁷⁰ These labor regimes were deeply entrenched. However, in time, legal reforms tempered them and improved conditions for workers. I conclude that the NCAA's self-regulated amateur athlete model will be supplanted by more protective employment laws.

II. EMPIRICAL STUDY OF HARASSMENT, ABUSE, AND MISTREATMENT OF NCAA PLAYERS: DATA AND FINDINGS FROM COURT FILINGS

A. Analytical Model: "Grievance, Claims, and Disputes: Assessing the Adversary Culture"

People rarely litigate their disputes. This has significance for the empirical analysis in this Article: the court opinions studied herein are likely the tip of a larger iceberg of disputes that NCAA players have with their schools. To support this premise, this Article draws upon a large-scale empirical study that shows how rarely disputes, and their underlying grievances, are litigated. The study, Richard E. Miller and Austin Sarat's "Grievance, Claims, and Disputes: Assessing the Adversary Culture," analyzed how individual grievances become lawsuits.⁷¹ Miller and Sarat conducted telephone surveys of approximately one-thousand randomly selected households in five judicial districts.⁷² Their most striking finding is that for every 1,000 grievances, 449 disputes remain—and only 50 court filings occur.⁷³ Figure 1 illustrates this finding.⁷⁴ Miller and Sarat's study shows how dramatically grievances dissipate—whether resolved or unresolved. In short, the U.S. court system is rarely used by people to resolve their grievances.

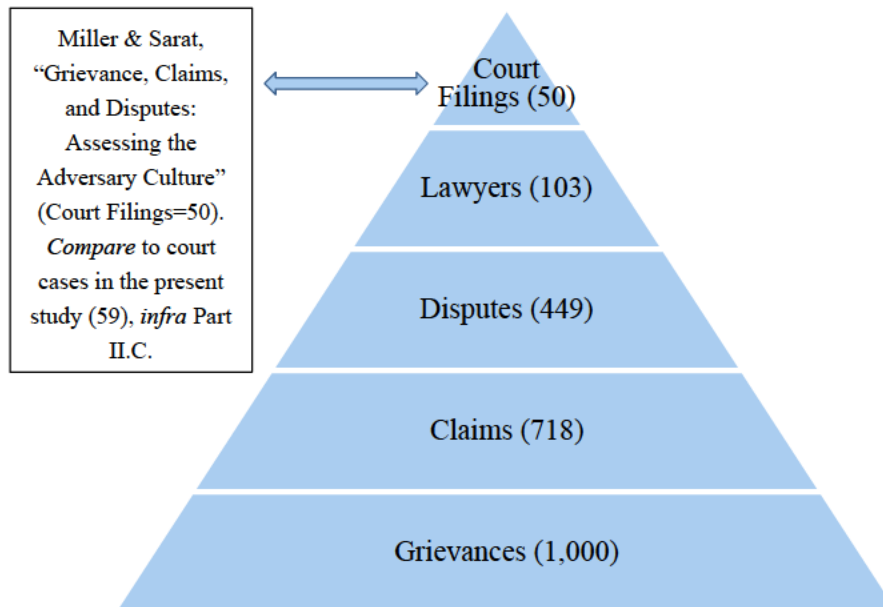
70. See *infra* notes 240-246.

71. Richard E. Miller & Austin Sarat, *Grievance, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525 (1980-81).

72. *Id.* at 534.

73. *Id.* at 544 fig.1A.

74. Miller and Sarat defined "grievance" as an "individual's belief that he or she . . . is entitled to a resource which someone else may grant or deny." *Id.* at 527. Some people "lump" their grievance, taking no action. *Id.* Others "register a claim to communicate their sense of entitlement to the most proximate source of redress." *Id.* A person or organization can grant the claim. However, a "dispute exists when a claim based on a grievance is rejected either in whole or in part. It becomes a civil legal dispute when it involves rights or resources which could be granted or denied by a court." *Id.*

Fig. 1: Court Filings Are a Small Fragment of Grievances

To put Miller and Sarat’s dispute pyramid in Figure 1 in context, the sample studied in this Article consists of 59 court cases. This relatively low number fails to account for a much larger universe of NCAA player grievances with their school, a coach, or an administrator. My analysis is not limited to the 59 court opinions and 110 rulings from these cases. Part II.C presents a table of recently reported cases of NCAA coaches who lost their jobs over allegations of harassment or abuse of players. These reports are not as detailed as court opinions. However, they offer enough details to place them somewhere on Miller and Sarat’s dispute pyramid. Most news reports reference player complaints—thus, these cases seem similar to “claims” in the analytical model. Some news reports involve a pattern of coaching misconduct. These reports may be similar to Miller and Sarat’s “disputes” category, where initial claims were ignored. Another subset of reports reference police or legal action. They may belong in the “lawyer” or “court filing” categories.

B. The Sample and Empirical Results

I derived the sample of fifty-nine court cases examined in this Article by searching Westlaw’s federal and state databases for cases involving harassment, abuse, or medical mistreatment related to NCAA sports. Some cases emerged readily—for example, where players claimed that a coach

assaulted,⁷⁵ harassed,⁷⁶ or abused them.⁷⁷ Other cases emerged where players were not complainants but accused of sexually assaulting other athletes⁷⁸ or non-athlete students.⁷⁹ Cases that named coaches, athletic directors, or other campus officials as defendants for deterring reporting, concealing information, or failing to protect victims were included in the sample. Other cases alleged that coaches, trainers, and medical staff either caused or aggravated players' injuries.⁸⁰

75. *E.g.*, *J.B. v. Lawson State Cmty. Coll.*, 29 So. 3d 164, 166 (Ala. 2009); *Rutledge v. Ariz. Bd. of Regents*, 711 P.2d 1207, 1211 (Ariz. Ct. App. 1985); *Randall v. Rutgers, State Univ. of N.J.*, No. 13-CV-07354, 2014 WL 6386814 (D.N.J. Nov. 14, 2014), at *1, stating that it “was later revealed that Coach Rice had frequently abused members of the team, including Randall, both physically and emotionally.”

76. *E.g.*, *Colli v. S. Methodist Univ.*, No. 3:08-CV-1627, 2010 WL 7206216 (N.D. Tex. Aug. 17, 2010); *Jennings v. Univ. of N.C. at Chapel Hill*, 240 F. Supp. 2d 492 (M.D.N.C. 2002); *DeCecco v. Univ. of S.C.*, 918 F. Supp. 2d 471, 481-82 (D.S.C. 2013) (a male soccer coach locked the door and met one-on-one with a female player, touching her thigh and making her feel uncomfortable); *Ericson v. Syracuse Univ.*, 35 F. Supp. 2d 326, 327 (S.D.N.Y. 1999) (a coach engaged in sexually harassing conduct over years); *Morrison v. N. Essex Cmty. Coll.*, 780 N.E.2d 132 (Mass. App. Ct. 2002) (plaintiffs alleged that coach verbally harassed them, and unhooked one player's bra while massaging her); *Heike v. Cent. Mich. Univ. Bd. of Trs.*, No. 10-11373-BC, 2011 WL 2602004 (E.D. Mich. July 1, 2011) (coach harassed two players because they identified as heterosexual and wore makeup); *Shephard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 2d 829, 831 (Ct. App. 2002).

77. *E.g.*, *Lee v. La. Bd. of Trs. for State Colls.*, No. 593,312, 2016 WL 7659526 (La. Dist. Ct. Apr. 6, 2016); *Pelham v. Bd. of Regents of Univ. Sys. of Ga.*, No. 1B11CV245, 2012 WL 13118387 (Ga. Super. Ct. June 14, 2012); *Ramsey v. Auburn Univ.*, No. 45C112011CV00233, 2014 WL 12680503 (Miss. Cir. Ct. Sept. 5, 2014); and *Feleccia v. Lackawanna Coll.*, No. 2012-CV-1960, 2016 WL 409711, at *3-4 (Pa. Com. Pl. Civ. Div. Feb. 2, 2016).

78. *E.g.*, *Brzonkala v. Va. Polytechnic & State Univ.*, 935 F. Supp. 772, 773-74 (W.D. Va. 1996) (a female softball player was gang raped by football players in her dorm and received little assistance from the school); *Kesterson v. Kent State Univ.*, No. 5:16CV298, 2018 WL 827864, at *1-2 (N.D. Ohio Feb. 12, 2018); *Tackett v. Univ. of Kan.*, 234 F. Supp. 3d 1100, 1103 (D. Kan. 2017) (alleging that a Kansas football player raped a rower in a dormitory); *Doe v. Lenoir-Rhyne Univ.*, No. 5:18-CV-00032, 2018 WL 4101520, at *1 (W.D.N.C. Aug. 28, 2018) (scholarship athlete from England was raped by another scholarship athlete in a campus dormitory); *Jameson v. Univ. of Idaho*, No. 3:18-cv-00451, 2019 WL 5606828 (D. Idaho Oct. 30, 2019) (a football player sexually assaulted a female diver); *Ruegsegger v. W. N.M. Univ. Bd. of Regents*, 154 P.3d 681, 683 (N.M. Ct. App. 2006); *Cavalier v. Catholic Univ. of Am.*, 306 F. Supp. 3d 9, 16 (D.D.C. 2018) (a lacrosse player alleged that a football player raped her while she was too inebriated to give consent).

79. *E.g.*, *Simpson v. Univ. of Colo. Boulder*, 372 F. Supp. 2d 1229, 1231-33 (D. Colo. 2005), *rev'd*, 500 F.3d 1170 (10th Cir. 2007); *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 794 (M.D. Tenn. 2016); *Doe 12 v. Baylor Univ.*, 336 F. Supp. 3d 763, 768 (W.D. Tex. 2018); *Lozano v. Baylor Univ.*, 408 F. Supp. 3d 861, 875 (W.D. Tex. 2019) (alleging that a female student was violently and repeatedly assaulted by a Baylor football player, but university officials and police did nothing to help after she contacted them); *S.S. v. Alexander*, 177 P.3d 724, 728 (Wash. Ct. App. 2008); *Kinsman v. Fla. State Univ. Bd. of Trs.*, 4:15cv235-MW/CAS, 2015 WL 11110848, at *4 (N.D. Fla. Aug. 12, 2015); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, No. Civ.A.103CV2531CAP, 2004 WL 5545037, at *1 (N.D. Ga. June 30, 2004); *Doe v. Bd. of Trs. of Univ. of Ala. in Huntsville*, No. 5:14-cv-02029-HGD, 2016 WL 8604320, at *4 (N.D. Ala. Nov. 4, 2016) (a university hockey player who raped a minor female student was bailed out of jail by team staff member); *Spencer v. Univ. of N.M. Bd. of Regents*, No. 15-CV-141 MCA/SCY, 2016 WL 10592223, at *1, 7 (D. N.M. 2016).

80. *E.g.*, *Ramsey*, 2014 WL 12680503, at *1; *Feleccia*, 2016 WL 409711, at *3-4; *Sellers v. Rudert*, 918 N.E.2d 586 (Ill. App. Ct. 2009) (an Eastern Illinois University football player sued his coaches and trainers for negligence arising out of his severe neurologic injury incurred in a football game); *Barile v. Univ. of Va.*, 441 N.E.2d 608, 612 (Ohio Ct. App. 1981) (a football player, who broke his wrist while

I keyed cases in all three groups to search for subsequent lawsuits involving harassment and abuse tied to NCAA sports and read precedential cases in harassment, abuse, and mistreatment opinions to see if they met the criteria for the sample. Some came close in their underlying facts; however, their legal issues were not comparable. Two cases show how I drew the line for included and excluded cases. Both involved non-student campus employees who sued a university over a harassment or abuse matter related to NCAA athletics.⁸¹

This search produced 59 published opinions reported between 1981⁸² and 2019.⁸³ Because some cases had subsequent rulings, the sample grew to 110. Specific variables—including type of plaintiff,⁸⁴ type of defendant,⁸⁵ gender and race of injured party, alleged misconduct,⁸⁶ relationship between injured party and alleged wrongdoer,⁸⁷ type of court,⁸⁸ winner of ruling,⁸⁹ and category of court action⁹⁰—were extracted from each case. This data

playing for the school, continued to play without adequate care and treatment, leaving him permanently disabled); *In re Tex. Christian Univ.*, No. 05-18-00967-CV, 2018 WL 6716935, at *1 (Tex. App. Dec. 21, 2018); *Burgess v. Mich. State Univ.*, 84 Wash. App. 1012 (Ct. App. 1996) (a gymnast alleged that she was verbally abused by coaching staff and forced to participate in athletics while ill); *Voda v. Cal. State Univ. of L.A.*, No. BC224424, 2002 WL 34405402 (Cal. Super. Ct. July 3, 2002) (a soccer player sued to recover unpaid medical expenses arising from broken clavicle caused by collision in scrimmage with a coach).

81. *Fine v. Tumpkin*, 330 F. Supp. 3d 1246, 1250 (D. Colo. 2018) (assistant coach's girlfriend reported his physical and verbal abuse of her to the head coach in the hope of addressing this mistreatment); and *Mills*, *supra* note 35.

82. *Barile*, 441 N.E.2d 608.

83. *Doe v. Mich. State Univ.*, No. 18-cv-390, 2019, WL 5085567 (W.D. Mich. Aug. 21, 2019); *Lozano*, 408 F. Supp. 3d 861; *Cash v. Lees-McRae Coll., Inc.*, No. 1:18-CV-00052-MR-WCM, 2019 WL 276842 (W.D.N.C. Jan. 22, 2019); *Roohbakhsh v. Bd. of Trs. of Neb. State Colls.*, No. 8:17CV31, 2019 WL 5653448 (D. Neb. Oct. 31, 2019); *Doe v. Lenoir-Rhyne Univ.*, No. 5:18-CV-00032, 2019 WL 2399745 (W.D.N.C. June 6, 2019); *Jameson*, 2019 WL 5606828; *Mackey v. Bd. of Trs. of Cal. State Univ.*, 242 Cal. Rptr. 3d 757 (Ct. App. 2019); *In re Tex. Christian Univ.*, 2018 WL 6716935; *Lee v. La. Bd. of Trs. for State Colls.*, No. 593,312, 2016 WL 7659526 (La. Dist. Ct. Apr. 6, 2016); *Feleccia*, 2016 WL 409711, at *3-4; *Stafford v. George Washington Univ.*, No. 18-CV-2789, 2019 WL 2373332 (D.D.C. June 5, 2019); *Lozier v. Quincy Univ. Corp.*, No. 18-cv-3077, 2019 WL 409368 (C.D. Ill. Jan. 31, 2019).

84. The categories included (a) player, (b) non-player student, and (c) parent.

85. The categories included (a) school, (b) administrator, (c) coach, and (d) medical staff or trainer.

86. The categories included (a) verbal harassment, (b) physical harassment, (c) retaliation, (d) sexual assault (apart from physical harassment), (e) medical mistreatment, (f) pressure to play injured, (g) deterring reporting, (h) retaliation (threatened), (i) retaliation (actual), (j) non-reporting, (k) no investigation, (l) no action taken, (m) witness intimidation, (n) consensual sex (coach and player), (o) malpractice, and (p) abusive discipline.

87. The combinations involved alleged wrongdoers including (a) coach, (b) administrator, and (c) trainer or medical staff, and (d) player (e.g., sexual assault allegation), and victims including (1) players, (2) non-player students, (3) player's parent, and (4) non-player's parent.

88. Courts were coded as (a) state or (b) federal, and (1) trial or (2) appellate.

89. Winners of rulings included (a) plaintiff, (b) school, (c) coach, (d) administrator, and (e) trainer or medical staff, either as win-all or win-part. Multiple-winner outcomes were recorded as appropriate.

90. Categories of court action included (a) granting motion to dismiss complaint in entirety, (b) granting motion to dismiss in part, (c) denying motion to dismiss in entirety, and (d) entering judgment or verdict.

extraction was repeated for subsequent rulings, referred to herein as round-two and round-three cases rather than appellate cases because some involved motions for reconsideration, or a district court judge's ruling on a magistrate's order, or a remanded decision. These were not appellate cases. Where cases had a complex procedural trail, I limited my sample to rulings on the merits of the complaint and excluded, for example, rulings on motions for discovery.

C. Statistics and Findings

Table 1 summarizes the sample. There were 42 federal court and 17 state court cases. More than half (55.9 percent) were published between 2014 and 2019, indicating a sharp increase in litigation of these issues since the first cases in 1981. The most frequently litigated statute was Title IX of the Education Amendments Act of 1972—it appeared in 39 cases (66.1 percent of the sample). In 21 cases, plaintiffs sued under 42 U.S.C. § 1983 (35.6 percent). Sixteen cases involved Fourteenth Amendment due process or equal protections claims (27.1 percent). In cases with state law claims, the most common causes of action were negligence (16 cases, 27.1 percent), discrimination (14 cases, 23.7 percent), and contracts (14 cases, 23.7 percent) claims.

Women were plaintiffs in 44 cases (74.6 percent) compared to men in 15 cases (25.4 percent). Players were plaintiffs in 44 cases (74.6 percent), non-player students in 15 cases (25.4 percent), and a parent of a minor in one case (1.7 percent). Universities and colleges were defendants in fifty-seven cases (96.7 percent), coaches in 21 cases (35.6 percent), administrators in 20 cases (33.9 percent), and medical/training staff in 3 cases (5.1 percent).

The types of relationships between plaintiffs, defendants, and non-parties who allegedly injured a plaintiff were also categorized. Coach-player was the most common misconduct relationship, with 31 cases (52.5 percent). The administrator-player relationship was observed in 20 cases (36.4 percent), while 16 cases (27.1 percent) involved player-non-player student misconduct relationships (mostly sexual assault cases), and 10 cases (16.9 percent) involved player-player misconduct relationships (often sexual assault cases). Many cases had more than one alleged misconduct relationship.

Table 1 Empirical Findings for 59 Court Cases			
Courts		Litigants	
<i>Published Court Opinions</i>	59	<i>Gender</i>	
Federal	42	Male	15
State	17	Female	44
<i>Total Rulings</i>	110	<i>Plaintiffs</i>	
First Round Rulings	59	Player	43
Second Round Rulings	39	Non-Player Student	15
Third Round Rulings	11	Parent	1
Fourth Round Rulings	1	<i>Defendant</i>	
<i>Year (First Round Ruling)</i>		University/College	57
Range	1981-2019	Administrator	20
Median	2013-2014	Coach	21
<i>Legal Issues</i>		Medical/Trainer	3
Federal	1	<i>Misconduct Relationship</i>	
Title VI	1	Coach/Player	31
Title VII	39	Administrator/Player	20
Title IX	7	Player/Non-Player Student	16
14th Amendment	16	Player/Player	10
42 U.S.C. § 1983	21	Administrator/ Non-Player Student	8
State	10	Coach/Non-Athlete Student	4
Negligence	16	Coach/Parent	1
Discrimination	14	Administrator/Parent	1
Tort	1		
Contracts	14		
Constitution	1		
<i>Round 1 Ruling</i>			
Federal District	42		
State Trial	17		
<i>Round 2 Ruling</i>			
Federal District	12		
Federal Appeals	12		
State Appeals	16		
<i>Round 3 Ruling</i>			
Federal District	2		
Federal Appeals	6		
State Appeals	3		
<i>Round 4</i>			
Federal Appeals	1		

Table 2 shows the frequency of different types of unlawful conduct in the sample. In many cases, plaintiffs alleged more than one unlawful act. Allegations of verbal harassment were the most common complaint (19 cases, 32.2 percent), followed by sexual assault and physical assault (each with 16 cases, 27.1 percent). The latter was separate from sexual assaults and included cases such as shaking a football player’s head by his facemask and

punching him.⁹¹ The next most prevalent group was administrative misconduct: failure to act (14 cases, 23.7 percent), failure to investigate (12 cases, 20.3 percent), retaliation against a complainant (12 cases, 20.3 percent), and failure to report an unlawful situation (6 cases, 6.1 percent).

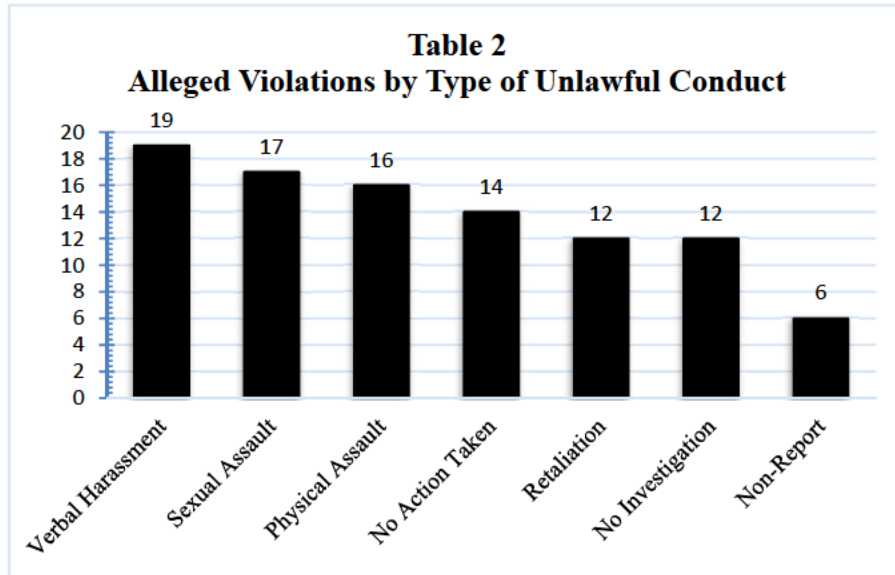
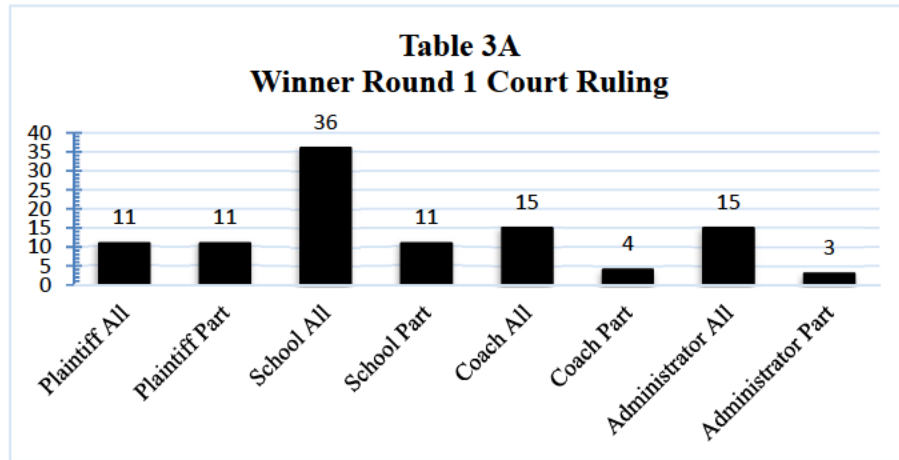


Table 3A shows how often plaintiffs and defendants won first-round rulings; some of these were motions rulings from a federal magistrate judge, while others were rulings on the merits, including a jury's award of damages. The definition of winning varied by the nature of the first-round proceeding. For example, I coded a data sheet to reflect school-wins-all when a court granted its motion to dismiss all counts; and I coded player-wins-all when the player received damages, or when a court entirely denied a defendant's motion to dismiss. As rulings were translated into data categories, multiple instances arose in which a first-round ruling had a favorable outcome for multiple parties. This explains why the sum of all the bars in Table 3A exceeds the sample of fifty-nine court cases.

91. *Rutledge v. Ariz. Bd. of Regents*, 711 P.2d 1207, 1220 (Ariz. Ct. App. 1985).



As shown in Table 3A, schools won all in first-round rulings in 36 (61 percent) cases, compared to plaintiffs who won all in 11 (18.6 percent) cases. Coaches and administrators, respectively, won 15 (25.4 percent) rulings.

Table 3B tabulates results in 39 second-round rulings. These rulings widely varied: some were federal or state appellate court decisions, others were rulings by federal district court judges after a magistrate ruled, and some were motions to reconsider a previous ruling.

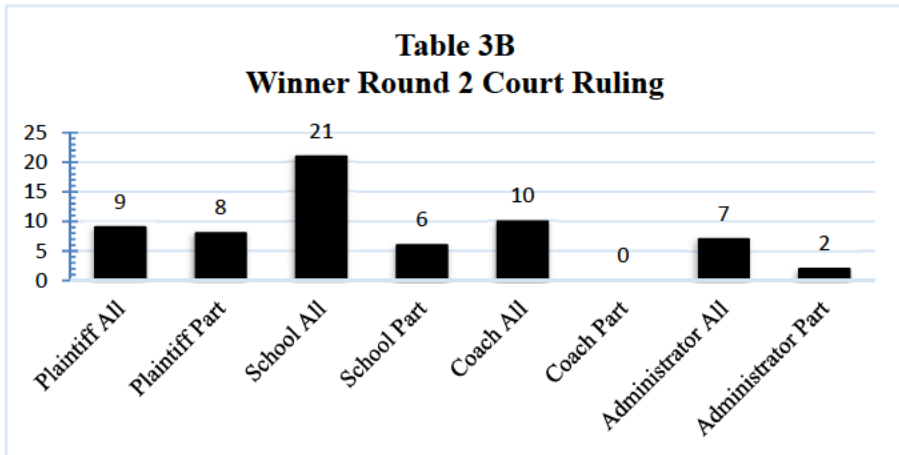
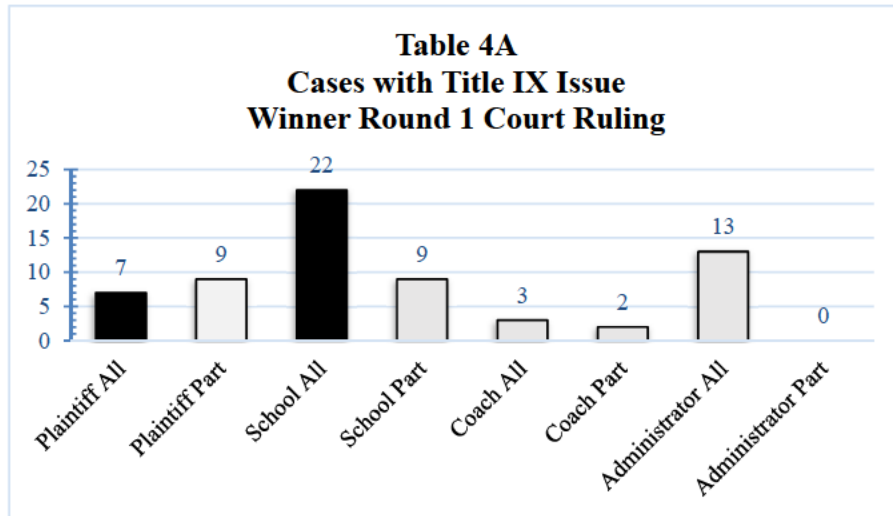
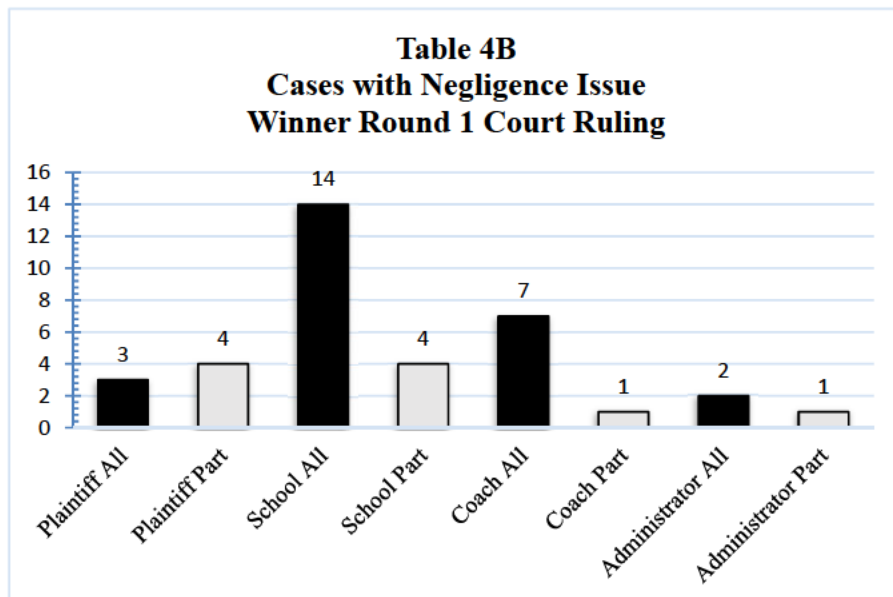


Table 3B shows that schools won all in 21 of 39 cases (53.8 percent), compared to plaintiffs who won all in 9 cases (23.1 percent). Taking a broader view of the data by comparing won-all or won-part of the rulings, schools maintained a much higher success rate than plaintiffs. Schools won all or part of 27 rulings (69.2 percent), compared to plaintiffs in 17 cases (43.6 percent). Table 3B also shows that differences in success rates for plaintiffs against

coaches and administrators narrowed in second-round cases. Coaches won all in 10 (25.6 percent) cases, compared to 9 cases (23.1 percent) where plaintiffs won all. Administrators won all in 7 (17.9 percent) cases, similar to the success experience of plaintiffs in this round.

Tables 4A and 4B focus on the outcomes for the most common types of cases—39 cases with a Title IX claim and 16 cases with a negligence claim. In my analysis, 11 cases had both types of claims. Because of the small sample, I did not separate cases with only Title IX claims or only negligence claims. The results in Tables 4A and 4B show outcomes for cases with these claims.





Tables 4A and 4B highlight in dark bars win-all first-round cases for plaintiffs and defendants. For cases with a Title IX claim, schools won 22 of 59 cases (37.3 percent), compared to plaintiffs who won all in only 7 cases (11.9 percent). Schools, not other administrators, have Title IX exposure to plaintiff claims; therefore, Table 4A only highlights plaintiff and schools in dark bars.⁹² In lawsuits with negligence claims, all defendants have potential exposure. The same pattern continued as with Title IX cases—schools won far more than plaintiffs: 14 cases (23.7 percent), compared to 3 cases (5.15 percent). Coaches won all in 7 cases (11.9 percent)—twice the success rate of plaintiffs.

The data support the following findings:

Plaintiffs in harassment and abuse cases relating to NCAA sports are disproportionately women. Women comprised 74.6 percent of plaintiffs in this study. For perspective, in 2016, 54 percent of U.S. college students between 18 and 21 years of age were women.⁹³ In another comparison, women comprised 43.5 percent (211,886) of NCAA athletes who competed in championship sports.⁹⁴ Women were overrepresented by 17 percentage points and 31 percentage points in this sample of harassment and abuse cases compared to their presence on college campuses and NCAA teams, respectively.

Sexual assaults are a pervasive problem in the college sports context. Sexual assaults comprised 28.8 percent of the misconduct alleged in the sample. This figure is comparable to the prevalence of sexual assault allegations for the general undergraduate population of students in the United States: 23.1 percent of women and 5.4 percent of men reported being sexually assaulted through physical force, violence, or incapacitation in 2015.⁹⁵ The statistics for NCAA-related sexual violence thus parallel the statistics for campus sexual assault in general. Regardless, the percentages are alarming. The cases in this study differ from other cases because powerful university employees enabled some assaults or deterred reporting of them. In short, NCAA-related sexual assaults involved a school's institutional power over players and non-players, sometimes adding to a victim's harm.⁹⁶

92. See *supra* note 42 and accompanying text.

93. See Nat'l Ctr. For Educ. Stat., *Digest of Education Statistics*, INST. OF EDUC. SCIS., https://nces.ed.gov/programs/digest/d17/tables/dt17_303.40.asp [<https://perma.cc/K3FW-TZET>] (Table 303.40: Total fall enrollment in degree-granting postsecondary institutions, by attendance status, sex, and age: Selected years, 1970 through 2027).

94. NCAA, 45 YEARS OF TITLE IX: THE STATUS OF WOMEN IN INTERCOLLEGIATE ATHLETICS 18, http://www.ncaa.org/sites/default/files/TitleIX45-295-FINAL_WEB.pdf [<https://perma.cc/6ZXY-3V49>].

95. DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 83 (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [<https://perma.cc/FZC3-U4HY>].

96. See, e.g., *Brzonkala v. Va. Polytechnic & State Univ.*, 935 F. Supp. 772, 774 (W.D. Va. 1996).

Player-coach interactions are the most common source of legal disputes involving harassment and abuse. Player-coach interactions far outpaced others in allegations of harassment and abuse.⁹⁷ In 31 cases (52.5 percent), a plaintiff alleged that a coach played a part in the matter that led to a lawsuit. Allegations varied widely. At times, a coach recruited a player with a known or suspected criminal history, exposing players to the risk of sexual assault.⁹⁸ In a variant of this situation, coaches deterred reporting of incidents that harmed plaintiffs.⁹⁹ Coaches were also accused of physical¹⁰⁰ or verbal¹⁰¹ harassment of athletes.

Title IX often failed to protect women in harassment and abuse cases. Schools were more successful in first round Title IX rulings than plaintiffs (37.3 percent, compared to 11.9 percent). Some schools won cases because courts apply a forgiving legal standard under Title IX—requiring the plaintiff to prove the institution acted with “deliberate indifference” to sex discrimination.¹⁰² In other cases involving coaches who had consensual sexual relations with players, courts dismissed Title IX claims on procedural grounds.¹⁰³

Laws relating to negligence often failed to protect male plaintiffs in abuse and injury cases. In first-round rulings, schools won four times more negligence cases than plaintiffs (23.7 percent compared to 5.15 percent). Coaches had twice the success rate as players who sued them (11.9 percent win rate). These results affected men more than women, with football injury cases resulting from hazing,¹⁰⁴ fighting,¹⁰⁵ training against doctor’s orders,¹⁰⁶ and conducting practice with no certified trainers in charge of medical assistance.¹⁰⁷

97. Administrator-player interactions were observed in 20 cases (33.9 percent). Athletic directors and high-level campus officials (e.g., provosts, chancellors, and university presidents) were part of this statistic.

98. *See, e.g.*, *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, No. Civ.A.103CV2531CAP, 2004 WL 5545037, at *2 (N.D. Ga. June 30, 2004).

99. *See, e.g.*, *Kesterson v. Kent State Univ.*, No. 5:16CV298, 2018 WL 827864, at *1 (N.D. Ohio Feb. 12, 2018).

100. *See, e.g.*, *Morrison v. N. Essex Cmty. Coll.*, 780 N.E.2d 132, 137 (Mass. App. Ct. 2002).

101. *See, e.g.*, *Shepard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 2d 829, 831 (Ct. App. 2002).

102. *See, e.g.*, *Simpson v. Univ. of Colo. Boulder*, 372 F. Supp. 2d 1229, 1245 (D. Colo. 2005), *rev'd*, 500 F.3d 1170 (10th Cir. 2007).

103. *See, e.g.*, *Schmotzer v. Rutgers Univ.-Camden*, No. CV 15-6904(JBS/DEA), 2018 WL 547540 (D.N.J. Jan. 24, 2018) (dismissing complaint against the university and administrator by a female student who entered into a consensual relationship with a coach, because it was time-barred); *see also* *Turner v. McQuarter*, 79 F. Supp. 2d 911 (N.D. Ill. 1999).

104. *See, e.g.*, *Cameron v. Univ. of Toledo*, 98 N.E.3d 305, 309-10 (Ohio Ct. App. 2018).

105. *See, e.g.*, *Pelham v. Bd. of Regents of Univ. Sys. of Ga.*, No. 1B11CV245, 2012 WL 13118387, at *2 (Ga. Super. Ct. June 14, 2012).

106. *See, e.g.*, *Ramsey v. Auburn Univ.*, 191 So. 3d 102, 104-05 (Miss. 2016).

107. *See, e.g.*, *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1204 (Pa. Sup. Ct. 2017).

Litigation involving claims of harassment and abuse has rapidly accelerated in recent years. Tracking the year of a first-round ruling, the first quartile of cases were widely scattered from 1981 to 2006 (twenty-six years); the second quartile occurred from 2007 to 2014 (eight years); the third quartile of cases occurred from 2015 to 2017 (three years), and the most recent quartile of cases occurred in 2018 to 2019 (two years). The data suggest no reason for the sharp uptick in legal activity around harassment and abuse cases. Outside the sample, former athletes have come forward after years of silence to accuse physicians at Ohio State,¹⁰⁸ the University of Michigan,¹⁰⁹ and Michigan State.¹¹⁰ Like many cases in the sample, athletes accused not only their perpetrators but also high-level university administrators for failing to heed their concerns.¹¹¹

To summarize, the data analysis presented in Part II.C gives a detailed picture of litigation outcomes for court cases involving NCAA player claims of harassment, abuse, and mistreatment. No other study offers this statistical perspective. However, as the Miller and Sarat model shows, court cases constitute a small sliver of grievances, complaints, disputes, and court filings. Nonetheless, the data in Part II.C are useful for highlighting recurring injurious experiences for players—and for showing that courts often rule against amateur athletes in NCAA schools. The data suggest that current laws provide NCAA schools strong litigation advantages when students seek redress for serious injurious experiences.

III. EMPIRICAL STUDY OF HARASSMENT, ABUSE, AND MISTREATMENT OF NCAA PLAYERS QUALITATIVE ANALYSIS OF GRIEVANCES, CLAIMS, AND DISPUTES

This Part broadens the empirical analysis to include reports of harassment, abuse, and mistreatment of NCAA players that were not part of

108. See, e.g., Jennifer Smola, *Ohio State Trustees Move Toward Settling Strauss Lawsuits*, COLUMBUS POST-DISPATCH (Feb. 27, 2020), <https://www.dispatch.com/news/20200227/ohio-state-trustees-move-toward-settling-strauss-lawsuits> [<https://perma.cc/5XF2-6YN7>] (reporting investigation findings that Ohio State University's Dr. Strauss sexually abused at least 177 students between 1979 and his retirement in 1998 and that university personnel repeatedly failed to act).

109. Kim Kozlowski, *Former University of Michigan Team Doctor Investigated for Multiple Sex Abuse Complaints*, THE DETROIT NEWS (Feb. 19, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/02/19/university-michigan-investigates-sex-complaints-against-former-football-doctor/4712724002/> [<https://perma.cc/3AAY-EUCE>] (detailing recent allegations against a former physician at University of Michigan about sexual abuse in the 1970s through the 1990s).

110. E.g., Barry, *supra* note 17.

111. See, e.g., Corky Siemaszko, *University of Michigan Wrestler Says He Was Booted Off Team for Reporting Abusive Doctor*, NBC NEWS (Feb. 27, 2020), <https://www.nbcnews.com/news/us-news/university-michigan-wrestler-says-he-was-booted-team-reporting-abusive-n1144276> [<https://perma.cc/WZ53-SAJS>] (detailing allegations of former wrestler who said that he was punished for reporting Dr. Robert Anderson's abuse of him in a nine-page letter).

a lawsuit or published court opinion. To the extent that these injurious experiences mirror the general profile of disputes in the Miller and Sarat study, the analysis in Part III provides a broader framework for gauging the injurious experiences of NCAA players.

A. News Reports of NCAA Coaches Who Abused, Harassed, and Mistreated Players

To reiterate for clarity, the sample of court cases in Part II is only a portion of harassment, abuse, and medical mistreatment situations involving college players. It represents the peak tier in Miller and Sarat's pyramid of adversary cultures. It bears repeating that fifty court filings occurred in their survey of one-thousand respondents with grievances. The sample of fifty-nine court cases implies a universe of one-thousand NCAA harassment, abuse, and medical mistreatment grievances.

With this framework in mind, I extended my search to cases not reported in an online legal database. Using similar word search combinations to find online news stories that are similar to my sample, I found fifteen relevant reports since 2009. These reports fit the criteria of claims and disputes in the middle tiers of Miller and Sarat's general pyramid of adversary cultures. While this news reporting is not as specific nor as detailed as in court opinions, it reveals evidence of player and parent complaints about coaching harassment, abuse, and medical mistreatment. In response, coaches were fired, suspended, or elected to resign. This fits Miller and Sarat's framework of grievances that escalated to claims. The reports state or suggest that a school acted in response to a player's or parent's grievance, or similarly, that police responded to a grievance. The cases divide into two broad categories, those with physical assault, abuse, or harassment, and those with only verbal elements. Table 5 summarizes these cases.

<i>Physical Mistreatment of Players</i>	<i>Verbal Mistreatment of Players</i>
Sean Woods, Morehead State University Head Men's Basketball Coach, Resigned (2016)	Sylvia Hatchell, University of North Carolina Women's Basketball Coach, Resigned (2019)
Ric Seeley, Quinnipiac University Women's Ice Hockey Coach, Fired (2015)	MaChelle Joseph, Georgia Tech University Women's Basketball Coach, Fired (2019)
Tim Beckman, University of Illinois Football Coach, Fired (2015)	Brian Meehan, Brandeis University Men's Basketball Coach, Fired (2018)
Greg Winslow, University of Utah Head Swimming Coach, Suspended (2013)	Ehren Earleywine, University of Missouri Women's Softball Coach, Fired (2018)
Mike Rice, Rutgers University Head Men's Basketball Coach, Fired (2013)	Matt Heath, College of Charleston Head Baseball Coach, Fired (2017)
Mike Leach, Texas Tech Head Football Coach (2011), Fired	Kellie Young, University of Louisville Women's Soccer Coach, Fired (2017)
Jim Leavitt, University of South Florida Head Football Coach (2010), Fired	Larry Eustachy, Colorado State University Men's Basketball Coach, Resigned (2017)
	Mark Mangino, University of Kansas Head Football Coach, Resigned (2009)

Physical Cases: At times, coaches subjected players to dangerous conditions. Ric Seeley was fired from his women's hockey coaching position at Quinnipiac University after taking a slap shot at a player's head.¹¹² He also told players to kill themselves.¹¹³ Greg Winslow, head coach of men's swimming at the University of Utah, was suspended for a series of reckless behaviors, including, according to a parent, forcing a team member to swim underwater with his hands tied to a PVC pipe that was strapped to his back

112. Brett Bodner, *Former Quinnipiac Women's Hockey Coach Accused of Physically and Verbally Abusing Players*, DAILY NEWS (Apr. 13, 2017), <https://www.nydailynews.com/sports/college/quinnipiac-women-hockey-coach-accused-abusing-players-article-1.3052194> [<https://perma.cc/WZ53-SAJ5>].

113. *Id.*

until he blacked out.¹¹⁴ Winslow also reportedly came to practice drunk, had outbursts of anger, including punching an assistant coach, and used racial slurs.¹¹⁵ Sean Woods, head coach of men's basketball at Morehead State University, resigned after multiple players and a parent accused him of abusive behavior, including head-butting a player and a halftime locker room fight with players.¹¹⁶ He was charged with criminal battery.¹¹⁷ Jim Leavitt, head football coach at the University of South Florida, was fired after he struck a player during a game and interfered in the school's investigation.¹¹⁸ Mike Leach, head football coach at Texas Tech, was fired after a parent complained that the coach ordered his concussed son to stand in a dark shed for hours after the player said he could not practice.¹¹⁹ Tim Beckman, head football coach at the University of Illinois at Urbana-Champaign, was fired for mistreating players, including ignoring medical staff and pressuring players to compete while they were injured.¹²⁰ Mike Rice was fired as head coach of men's basketball at Rutgers University after practice videos showed him enraged while throwing basketballs at players and shouting abusive insults.¹²¹

114. AP, *Utah Hires Out for New Investigation*, ESPN (Mar. 11, 2013), https://www.espn.com/college-sports/story/_/id/9040762/utah-utes-open-new-investigation-greg-winslow [<https://perma.cc/L884-PDB6>].

115. *Id.*

116. Matt Norlander, *Morehead State Coach Resigns after Investigation, Charges, Abuse Allegations*, CBSSPORTS.COM (Dec. 15, 2016), <https://www.cbssports.com/college-basketball/news/morehead-state-coach-resigns-after-investigation-charges-abuse-allegations/> [<https://perma.cc/BB4Y-63ZR>].

117. Kyle Boone, *Report Morehead State Basketball Coach Facing Battery Charge*, CBSSPORTS.COM (Dec. 13, 2016), <https://www.cbssports.com/college-basketball/news/report-morehead-state-basketball-coach-facing-battery-charge/> [<https://perma.cc/HF4H-9FHQ>].

118. Dennis Dodd, *Jim Leavitt Back in College Game, While Player He Struck Is Struggling*, CBSSPORTS.COM (Feb. 10, 2016), <https://www.cbssports.com/college-football/news/jim-leavitt-back-in-college-game-while-player-he-struck-is-struggling/> [<https://perma.cc/3WDM-W7PA>].

119. Emily Friedman, *Texas Tech Coach Mike Leach Fired After Claim of Abuse*, ABC NEWS (Dec. 30, 2009), <https://abcnews.go.com/US/texas-tech-university-football-coach-mike-leach-fired/story?id=9449169> [<https://perma.cc/92JJ-9UA4>].

120. Vinnie Duber, *Report Contains Ugly Details of Tim Beckman's Behavior as Illini Coach*, NBC SPORTS (Nov. 9, 2015), <https://www.nbcsports.com/chicago/big-ten/report-contains-ugly-details-tim-beckmans-behavior-illini-coach> [<https://perma.cc/WT7M-6JPL>] (Beckman called injured players "pussy," discouraged them from seeking medical assistance, and in one instance, directly disregarded orders from two physicians who were treating a player for a possible spinal injury by violating their directive to remain still).

121. See Natta Jr., *supra* note 8; see also Steve Eder & Kate Zernike, *Rutgers Leaders Are Faulted on Abusive Coach*, N.Y. TIMES (Apr. 3, 2013), <https://www.nytimes.com/2013/04/04/sports/ncaabasketball/rutgers-fires-basketball-coach-after-video-surfaces.html> [<https://perma.cc/G62F-AM37>] (practice videos of Rice showed him hurling a basketball at close range at players' heads, legs, and feet; shoving and grabbing players; and screaming obscenities and homophobic slurs); Andy Berg, *Rutgers Softball Players Allege Abuse by Coach*, ATHLETIC BUSINESS (Oct. 2019), <https://www.athleticbusiness.com/civil-actions/rutgers-softball-players-allege-abuse-by-coach.html> [<https://perma.cc/K4TH-UNSN>] (reporting on coaching abuses, including one drill in which players were intentionally hit by pitches thrown by an assistant coach).

Verbal Cases: News reports only disclosed vague information when coaches were fired or quit in connection with verbal mistreatment and harassment of players. Kansas head football coach Mark Mangino was fired in response to complaints that he verbally and emotionally abused players.¹²² After allegations surfaced that he treated players abusively, Colorado State University men’s basketball coach Larry Eustachy resigned.¹²³ Similarly, University of Louisville’s women’s soccer coach Kellie Young was fired after repeated concerns were raised that she created an abusive team culture.¹²⁴ The athletic director at the University of Missouri fired women’s softball coach Ehren Earleywine, stating “we have lost confidence in Coach Earleywine’s leadership to foster the type of healthy environment we expect for our student-athletes”¹²⁵ Matt Heath, College of Charleston head baseball coach, was fired in connection with allegations of abusive behavior toward his players.¹²⁶ MaChelle Joseph, head women’s basketball coach at Georgia Tech University, was fired for “bullying” and a coaching style that was “emotionally, mentally and verbally ‘abusive.’”¹²⁷ Brandeis University fired men’s basketball coach, Brian Meehan, after an outside investigation corroborated allegations of racism and abusive behavior towards his

122. AP, *Kansas Coach Quits Under Fire*, N.Y. TIMES (Dec. 3, 2009), <https://www.nytimes.com/2009/12/04/sports/ncaabasketball/04kansas.html> [https://perma.cc/MM9W-B8PQ].

123. Mike Rutherford, *Larry Eustachy Resigns as Colorado State Head Coach Amid Abusive Behavior Allegations*, SBNATION (Feb. 26, 2018), <https://www.sbnation.com/college-basketball/2018/2/3/16968434/colorado-state-basketball-larry-eustachy-administrative-leave-scandal-investigation> [https://web.archive.org/web/20200917161121/https://www.sbnation.com/college-basketball/2018/2/3/16968434/colorado-state-basketball-larry-eustachy-administrative-leave-scandal-investigation]. The same school retained the coach after investigating complaints that he created a culture of fear and intimidation. Matt L. Stephens & Kelly Lyell, *CSU Larry Eustachy Intimidated, Emotionally Abused Players*, COLORADAN (Feb. 15, 2017), <https://www.coloradoan.com/story/sports/csu/mens-basketball/2017/02/15/colorado-state-basketball-larry-eustachy-investigation/97949522/> [https://perma.cc/5QKM-2ASM]. A mental health services employee for student-athletes with CSU called the coach a “rage-aholic.” *Id.*

124. Danielle Lerner, *University of Louisville Owes Former Lacrosse Coach Kellie Young \$80K After Firing Her Without Cause*, COURIER J. (Dec. 4, 2017), <https://www.courier-journal.com/story/sports/college/louisville/2017/12/04/former-louisville-lacrosse-coach-kellie-young-fired-without-cause-contract/919406001/> [https://perma.cc/Z9MY-V9WA] (reporting that reports of player abuse surfaced in 2013 and resurfaced in 2017 after a former player accused coach of negligence).

125. Graham Hays, *Missouri Fires Softball Coach Ehren Earleywine After 11 Seasons*, ESPN (Jan. 26, 2018), https://www.espn.com/college-sports/story/_/id/22224960/missouri-tigers-dismiss-softball-coach-ehren-earleywine-11-seasons [https://perma.cc/ES8F-MWJU].

126. Andrew Miller, *College of Charleston Fires Baseball Coach Matt Heath*, POST & COURIER (June 30, 2017), https://www.postandcourier.com/sports/college-of-charleston-fires-baseball-coach-matt-heath/article_36f02ebc-5ded-11e7-8673-e7801f3a3aa9.html [https://perma.cc/VT7H-CESV].

127. Paul Newberry, *Georgia Tech Fires Women’s Basketball Coach MaChelle Joseph*, AP (Mar. 26, 2019), <https://apnews.com/7e2db119ac884b388ebe16f5361446b6> [https://web.archive.org/web/20200917160823/https://apnews.com/7e2db119ac884b388ebe16f5361446b6].

players.¹²⁸ Two recent reports gave more specific information about a coach's forced departure. Sylvia Hatchell, University of North Carolina women's basketball coach, resigned after players and parents raised concerns about her racial insensitivity, including warning black players that a loss would lead to "nooses."¹²⁹ Rutgers women's swim head coach Petra Martin was fired reportedly because she "shamed athletes over their weight, used abusive language during training sessions, and demanded they stop using medication prescribed by their doctors for anxiety and other issues."¹³⁰

B. University of Iowa Football and University of Illinois at Urbana-Champaign Basketball: Case Studies of Grievances

Part III.B extends this Article's analysis to accounts of grievances that did not escalate to court filings or involve lawyers. These accounts show high-level university administrators responding to grievances related to sexual assault, medical mistreatment, and discrimination. By the Miller and Sarat pyramid, these are base-level grievances—not intermediate or peak dispute levels. These accounts round out the empirical profile of my study.

The first case involves a University of Iowa women's athlete who alleged that an Iowa football player sexually assaulted her on October 14, 2007.¹³¹ At the early stages of investigating the player's complaint, Athletic Director "Gary Barta seemed to be more concerned with the Student-Athlete's underage drinking in the dormitories than with the alleged sexual assault."¹³² For two weeks, the athletic department did its own inquiry before handing off the investigation to the Office of Equal Opportunity and Diversity.¹³³ Eventually, the player's parents complained about the campus-led inquiry.¹³⁴

On June 11, 2008, a campus official reported to the university's Board of Regents that the "University had 'fully complied' with internal procedural requirements, had offered the Student-Athlete appropriate accommodation and had expressed full support for the Student-Athlete."¹³⁵ Crucially,

128. PRINCE LOBELL, SUMMARY REPORT OF THE INDEPENDENT INVESTIGATION OF COMPLAINTS RELATED TO THE BRANDEIS UNIVERSITY MEN'S BASKETBALL PROGRAM: PART ONE 1 (2018), <https://www.brandeis.edu/president/letters/pdfs/independent-investigation-report.pdf> [<https://perma.cc/PS4C-JESX>].

129. Marc Tracy & Alan Blinder, *Sylvia Hatchell Is Out at U.N.C. After Inquiry Supports Team's Complaints*, N.Y. TIMES (Apr. 19, 2019), <https://www.nytimes.com/2019/04/19/sports/basketball/north-carolina-sylvia-hatchell.html> [<https://perma.cc/SL4R-9D7Y>].

130. *Rutgers Fires Head Swimming Coach Petra Martin*, SWIMMING WORLD (Nov. 16, 2017), <https://www.swimmingworldmagazine.com/news/rutgers-fires-head-womens-swimming-coach-petra-martin/> [<https://perma.cc/WGN2-SW7E>].

131. See STATE OF IOWA BD. OF REGENTS, *supra* note 22, at 2.

132. *Id.* at 34.

133. *Id.* at 35.

134. *Id.* at 6.

135. *Id.* at 7.

however, this report omitted two anguished letters from the victim's mother.¹³⁶ The University of Iowa disclosed in July 2008 that the mother's letters were improperly withheld during its internal investigation.¹³⁷ The Regents commissioned an outside counsel to investigate the campus's handling of the victim's complaint.¹³⁸

The resulting Stolar Report concluded:

The investigation uncovered conflicting information regarding whether and to what extent the Student-Athlete was encouraged to handle the incident within the Department of Athletics. AD officials were adamant in their interviews that the Student-Athlete was never pressured to choose one avenue of investigation over another and was told she would be supported in whatever decision she made. However, the Student-Athlete and her family stated that they felt strong pressure to handle the incident within AD.¹³⁹

The Stolar Report also revealed that other Iowa athletes harassed the player after she was assaulted; that she complained to the university's Equal Opportunity and Diversity office; and that this office's response to some players engaging in "bullying and abusive tactics toward a fellow student-athlete in need of support and nurturing"¹⁴⁰ amounted to "inaction"¹⁴¹ that was "fundamentally inconsistent with the 'substance' and intent of those [equal opportunity] policies."¹⁴² The Stolar Report also concluded that the campus general counsel's "micromanaging the University's response to the incident presented a serious conflict of interest."¹⁴³ The university attorney's responses to the incident were "consistent with a culture of a lack of transparency at the University General Counsel's Office and likely contributed to allegations of a University cover-up."¹⁴⁴

The student dean¹⁴⁵ and campus general counsel¹⁴⁶ were fired for their roles in this matter. Their subsequent lawsuits are not included in the database because these plaintiffs were not players nor subjected to player misconduct. However, their cases provide detailed accounts of how an NCAA school, like others in this database, suppresses reporting of information related to a player-on-player sexual assault. Thus, it adds unusual detail about an alleged

136. *Id.* at 66.

137. *Id.*

138. Press-Citizen, *UI President Mason Responds to Regents' Request* (July 22, 2008), reprinted in STATE OF IOWA BD. OF REGENTS, *supra* note 22, App. T.

139. STATE OF IOWA BD. OF REGENTS, *supra* note 22, at 10.

140. *Id.* at 18.

141. *Id.*

142. *Id.*

143. *Id.* at 60.

144. *Id.*

145. *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 133 (Iowa 2013).

146. *Mills v. Iowa*, 924 F. Supp. 2d 1016, 1043 (S.D. Iowa 2013).

cover-up. The president of the University of Iowa issued a public statement that delves into some details about how the investigation was mishandled.

On Friday of last week, I learned that the mother of the alleged victim of an assault on the University of Iowa campus sent a letter to the University in November of 2007 expressing her profound distress about the way that her daughter's case was handled by University officials.

I have now read the letter, as well as a subsequent letter from May, and they are heart wrenching. At a time when her daughter desperately needed our support, from this mother's perspective, they did not find it. Both of those letters have been provided to all of the Regents.

When I was told of the existence of these letters, I was dumbfounded. First, because the allegations contained in those letters placed into question the University's commitment to what must be our most important priority, the well being of each of our students. Second, because this is information that this Board should have received eight months earlier.

On November 16, 2007, then Board President Michael Gartner ordered a review by the Board's legal counsel into the University's actions with regard to this alleged sexual assault. The President of the University of Iowa was informed of the investigation and the full cooperation of the University was expected.

In the course of the review, Board counsel interviewed numerous University of Iowa officials. Those individuals were informed that he was seeking to get a complete picture of how the University handled the assault, both to determine whether the University's policies and procedures were followed, but also to determine whether the policies themselves were appropriate or required modification.

In that context, for the University to have failed to inform the Board of the existence of the letters is a serious breach of trust. The November letter should have been delivered to the Board counsel at the earliest opportunity. The questions raised in the letter deserve answers. In fact, the letter should have served as the roadmap for the Board's inquiry. The emergence of the November letter some eight months after the fact undermines the credibility of the report that counsel prepared and delivered to the Board on June 12th and the actions we took in response to that report. Worse, the matter in which this has unfolded undermines confidence in the University of Iowa.

In order to get to the bottom of this situation, to do right by the alleged victim and her family, and to restore confidence in the University of Iowa and the Board of Regents, I am today asking this Board to reopen the investigation into this alleged sexual assault and the actions of all University employees involved in responding to this event.

An action item has been distributed to the Regents and will be distributed to the public and the press at this point.¹⁴⁷

147. Memorandum from Univ. of Iowa President Sally Mason to the Bd. of Regents (July 22, 2008), <https://www.iowaregents.edu/media/cms/0908-item02a-pdfC8747EC5.pdf> [https://perma.cc/QF33-GEJM]. Later, Mason was criticized by *The Daily Iowan* student newspaper for tone-deaf remarks. Agnew, *supra* note 27.

The second case study involved two professors of the University of Illinois Athletic Board—Professor Michael H. LeRoy (author of this Article) and Professor Michael Raycraft. In December 2018, a parent of a former Illinois basketball player reported concerns about the men’s basketball coach to these faculty members. Some background is helpful in understanding these events. The Athletic Board was formed in 1988 after the school’s free-standing Athletic Association came under scrutiny for “business and personnel irregularities.”¹⁴⁸ In response, the Athletic Board imposed a limited form of shared governance between academic and athletic parts of the university. In the University Senate bylaws, the Athletic Board was given an advisory role for “financial management, *personnel*, and other operational aspects of the . . . Division of Intercollegiate Athletics.”¹⁴⁹ Both professors were on the Athletic Board in 2015¹⁵⁰ when the university fired head coach Tim Beckman for pressuring football players to compete while injured and not medically cleared. Illinois women’s basketball players and parents also complained of a culture of racial degradation and discrimination.¹⁵¹

Figure 2 presents a condensed timeline of events relating to the interactions between the professors, the athletic director, faculty representatives to the Big 10 and NCAA, and university administrators. Like in the Iowa football case, the internal investigation of the Illinois men’s basketball coach was eventually reported in news accounts. After the first news report was published, a second parent immediately contacted one of the professors. This message is reproduced in highly redacted form in Figure 3.¹⁵²

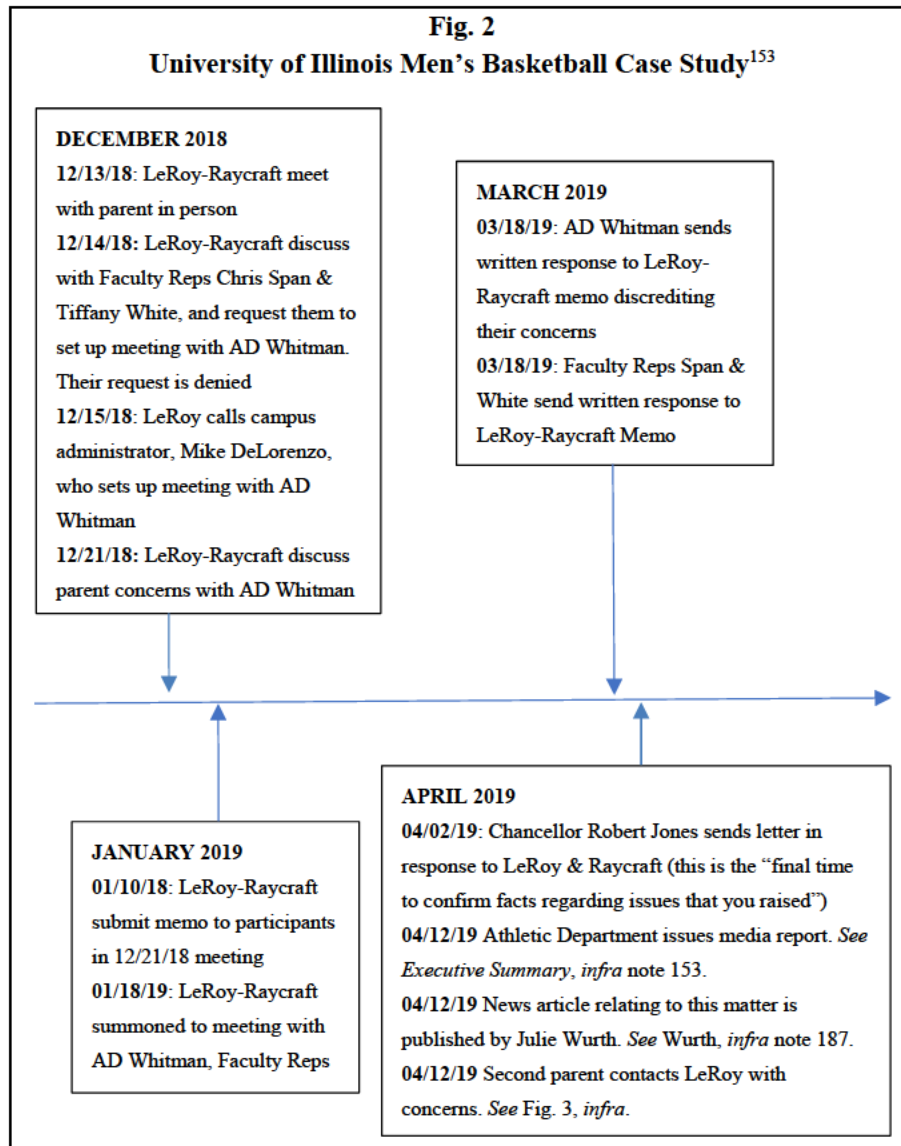
148. Report from the Governance Rev. Task Force for the Intercollege Athletics Programs Univ. of Illinois at Urbana-Champaign 14 (Nov. 30, 1988) (on file with author).

149. Senate of Urbana-Champaign Campus, *Senate Bylaws*, UNIV. OF ILL., <https://www.senate.illinois.edu/bylaws.asp#ab> [<https://perma.cc/9SPM-SYED>] (emphasis added).

150. See UNIV. OF ILL. AT URBANA-CHAMPAIGN SENATE, COMMITTEE ON COMMITTEES (FINAL ACTION), CC.18.13, FACULTY NOMINATIONS TO THE ATHLETIC BOARD (Mar. 5, 2018), <https://www.senate.illinois.edu/cc1813.pdf> [<https://perma.cc/N7MG-E5W2>]. For more on the firing of Coach Tim Beckman, see Duber, *supra* note 120.

151. See PUGH, JONES & JOHNSON, P.C., INVESTIGATIVE REPORT: UNIVERSITY OF ILLINOIS WOMEN’S BASKETBALL TEAM 3 (July 31, 2015), https://will.illinois.edu/nfs/NEWS20150803_Investigative_Report_UofI_Womens_Basketball_Team.pdf [<https://perma.cc/J2KB-G3W4>].

152. The author obtained the parent’s written consent to publish the redacted email in Figure 3 on May 1, 2020. The author informed the *Berkeley Journal of Employment and Labor Law* of the parent’s consent.



153. The timeline of events is based on the reporting in a University of Illinois at Urbana-Champaign press release preserved by Rob McColley's fan website, Illini Report. *See Executive Summary of Events Involving Illinois Men's Basketball Program*, ILLINI REP. (Apr. 12, 2019), <http://illinireport.info/wp-content/uploads/2019/04/The-Mark-Smith-Report.pdf> [https://perma.cc/3ZQ5-8893] [hereinafter *Executive Summary*]. For 12/13/2018, *see id.* at PDF 8; for 12/14/2018, the FARs (Faculty Athletic Representatives) are Chris Span and Tiffany White, *id.* at PDF 1, 2, and referred to by the FAR title in the LeRoy-Raycraft Memo, *id.* at PDF 8-9; for 12/15/2018, *see id.* at PDF 9; for 12/18/2018, *see* Prof. LeRoy's calendar (on file with BJELL); for 01/10/2019, *see Executive Summary* at PDF 7-16; for 01/18/2019, *see* Prof. LeRoy's calendar (on file with BJELL); for 03/18/2019, *see Executive Summary* at PDF 18-32; for 03/25/2019, *see* Prof. LeRoy's calendar (on file with BJELL); for 04/02/2019, *see Executive Summary* at PDF 34-35.

Fig. 3
Parent Email (Redacted) to Prof. Michael LeRoy after News Report of Coach Investigation

[REDACTED]

Sent: Friday, April 12, 2019 10:59 PM
To: Leroy, Michael H <mhl@illinois.edu>
Subject: "Give-and-take between AD, faculty pair hints at tension"

Dear Dr. LeRoy -

I saw a mention on Twitter this evening regarding a recent investigation of Illini basketball [REDACTED]. When I clicked on the article, I saw that you and another faculty member were referenced, and that you both had doubts about the scope and thoroughness of the review.

[REDACTED] He played basketball for the Illini during the 2017-2018 season, and he was one of several players who left the team with remaining eligibility.

I can talk to you firsthand about the emotionally, physically and racially abusive atmosphere in the Illini men's basketball program, [REDACTED]. The fact that no former players or their parents were interviewed regarding the possible toxicity of Illini basketball automatically delegitimizes the investigation. [REDACTED] absolutely should have reached out to us and others regarding what he learned in his "exit interviews."

To see the comments on social media and loyalty boards insulting and blaming the players is sickening. There is a very ugly truth there that nobody wants to see.

I would be happy to talk with you.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

To put Part III in context, Part III.A addresses a possible criticism of the small sample examined in Part II. Limiting the analysis in Part III.A to published news reports of coaches who were accused of harming their players—a stringent filter because news organization avoid publishing defamatory accusations—demonstrates that harassment, abuse, and mistreatment of NCAA players is not limited to the cases in the sample. Part III.B allows the reader to see more detailed reporting of how a university runs investigations when an NCAA player or parent alleges serious misconduct related to the athletic department.

There are striking similarities between the Iowa and Illinois case studies:

First, in both cases the athletic departments initiated investigations. This is not inherently objectionable—an athletic department should investigate all misconduct complaints. In both cases, however, the athletic departments tried to control the investigation, and appeared to resist independent investigation.

Second, both athletic departments involved their highest campus officers in resisting efforts to have a more transparent and independent inquiry.

Third, senior officers at both institutions sided with the athletic departments, not the people who reported concerns.

Fourth, while administrators at Iowa and Illinois did not want these matters revealed in news reports, parts of these complaints were made public, albeit months after people privately reported their concerns.

Fifth, while Iowa eventually fired its campus counsel and its equal opportunity dean, and Illinois counseled its coach to improve his language and player interactions, there is no evidence that either school implemented

structural reforms to allow independent investigation of injurious experiences that are reported in connection with their athletic departments.

If the Iowa and Illinois case studies represented uncommon situations, the detailed accounts of them in this Part would be unjustified. In reality, these case studies parallel legal cases in the sample examined in Part II—indeed, the Iowa and Illinois cases presented less serious concerns than did some cases that evolved into lawsuits and court rulings. The players wronged in these two cases would fare poorly in lawsuits against their schools and school administrators because current legal protections for players are weak. However, if courts treated these players as employees of their universities, their legal protections would significantly improve—and their schools might make a greater effort to address the underlying problems of assault, discrimination, and mistreatment.

IV. HOW EMPLOYMENT FOR NCAA PLAYERS WOULD MITIGATE ABUSE, HARASSMENT, AND MISTREATMENT

Since the 1970s, experts have suggested that the NCAA's amateur model is outdated, while professional sports is a more appropriate model for college athletics.¹⁵⁴ Two federal appeals courts have disagreed, ruling that the amateur student-athlete model remains in place and precludes a court ruling that NCAA athletes are employees under the Fair Labor Standards Act.¹⁵⁵ A more recent lawsuit in the Eastern District of Pennsylvania has survived the NCAA's motion to dismiss.¹⁵⁶ The case is notable because the court rejected the NCAA's motion to dismiss a player's FLSA lawsuit, concluding: "Plaintiff has alleged sufficient facts to plausibly state his entitlement to relief under the FLSA."¹⁵⁷

154. This literature has steadily increased since the 1970s. A pioneering article is Stephen Horn, *Intercollegiate Athletics: Waning Amateurism and Rising Professionalism*, 5 J.C. & U.L. 97, 98 (1978) (noting "[t]oo often the jockeying for power within the NCAA has reflected the economic positions between institutions rather than concerns about what should be the basic purpose of the organization: the protection of student-athletes from unscrupulous actions by those who would exploit them for their own purposes"). More recently, see Richard Smith, Comment, *The Perfect Play: Why the Fair Labor Standards Act Applies to Division I Men's Basketball and Football Players*, 67 CATH. U. L. REV. 549 (2018); Sam C. Ehrlich, *The FLSA and the NCAA's Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. L.A. ENT. L. REV. 77 (2019); Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a "Pay for Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1137 (2017); Richard T. Karcher, *Big-Time College Athletes' Status as Employees*, 33 A.B.A. J. LAB. & EMP. L. 31 (2017); Jay D. Lonick, *Bargaining With the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135 (2015).

155. *Dawson v. NCAA*, 932 F.3d 905, 909 (9th Cir. 2019); *Berger v. NCAA*, 843 F.3d 285, 293 (7th Cir. 2016).

156. *Livers v. NCAA*, No. CV 17-4271, 2018 WL 3609839 (E.D. Pa. July 26, 2018).

157. *Id.* at *6.

Assuming that courts do not rule that NCAA players are employees, there is a growing possibility that states will step in to legislate this change in status. California offers an analogous development. In 2019, the state enacted a “pay-to-play” law that allows NCAA athletes to market their name, image, and likeness (NIL) for monetary compensation without incurring a penalty from a California public university or college.¹⁵⁸ By early 2020, dozens of states considered similar legislation.¹⁵⁹ It is possible that NIL legislation will achieve a workable adjustment of allowing NCAA players to receive some compensation without an employment relationship—though the NIL legislation might also be a precursor to employment.

This study adds to the rationale for establishing an employment relationship for NCAA athletes, apart from paying them for their play. The present amateur competition model for NCAA athletes lacks complaint systems outside the control of schools; provides few positive outcomes for plaintiffs who allege significant wrongdoing and damages, including for players who suffer permanently disabling injuries from competing; and does little to alter risk-management practices of athletic departments by these schools.

A. University of Iowa Case Study

How would an athletic employment relationship arising out of athletic employment improve the University of Iowa player’s legal options to address her sexual assault complaint? As an employee, she could pursue legal avenues that are unavailable to an amateur athlete. Under Title VII of the 1964 Civil Rights Act, she could allege that her employer was vicariously liable for the sex discrimination of her coworkers.¹⁶⁰ She could file a

158. S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019) (approved by Governor, Sept. 30, 2019). Section 2 adds to Section 67456 of the Education Code, stating:

67456. (a) (1) A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student’s name, image, or likeness. Earning compensation from the use of a student’s name, image, or likeness shall not affect the student’s scholarship eligibility.

159. Alan Blinder, *After California Law, Statehouses Push to Expand Rights of College Athletes*, N.Y. TIMES (Jan. 13, 2020), <https://www.nytimes.com/2020/01/13/sports/ncaa-athletes-pay-california.html> [<https://perma.cc/TKD3-54CH>]. More recently, the NCAA has announced plans to allow players to accept NIL compensation. See Billy Witz, *N.C.A.A. Outlines Plans for Players to Make Endorsement Deals*, N.Y. TIMES (Apr. 30, 2020), <https://www.nytimes.com/2020/04/29/sports/ncaabasketball/ncaa-athlete-endorsements.html> [<https://perma.cc/F9HK-GV9M>].

160. The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action. See *Employer Liability for Harassment*, EEOC, <https://www.eeoc.gov/laws/types/harassment.cfm> [<https://perma.cc/6HR6-ZQEM>].

complaint with the Equal Employment Opportunity Commission (EEOC),¹⁶¹ and she could seek an independent investigation by a state agency.¹⁶² The law would protect her from retaliation for reporting her complaint outside of the university.¹⁶³ The EEOC has aggressively litigated sexual harassment in Iowa.¹⁶⁴

In addition, the player would have viable state causes of action. The Iowa Civil Rights Act (ICRA) provides legal protections against sex discrimination.¹⁶⁵ Iowa courts award damages for severe sexual harassment under ICRA.¹⁶⁶ Iowa tort law could also provide relief. The player could allege intentional infliction of emotional distress against her employer, because the Iowa Supreme Court has applied this tort to the employment relationship.¹⁶⁷ However, a plaintiff must meet a high threshold to hold an employer liable for intentional infliction of emotional distress.¹⁶⁸ The

161. The University of Iowa player would be able to file a charge online, by phone, by mail, or in person. See *How to File a Charge of Employment Discrimination*, EEOC, <https://www.eeoc.gov/employees/howtofile.cfm> [<https://perma.cc/22A3-BR76>].

162. The player would also be able to file a complaint with the State of Iowa fair employment agency, called the Iowa Civil Rights Commission. The agency receives and investigates discrimination complaints that arise under the Iowa Civil Rights Act of 1965, as amended. See Iowa C.R. Comm'n, *File a Complaint*, IOWA, <https://icrc.iowa.gov/file-complaint> [<https://perma.cc/6RPL-ZVX7>].

163. See *Questions and Answers Enforcement Guidance on Retaliation and Related Issues*, EEOC, <https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm> [<https://perma.cc/RKF4-R9RR>].

164. See the long and tortuous case of *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2013 WL 3984478 (N.D. Iowa Aug. 1, 2013), a case that devolved into a dispute over attorney's fees. The EEOC sued a trucking firm on behalf of women who alleged a pattern of severe and pervasive sexual harassment by their male lead drivers. *Id.* at *1. The EEOC's appellate brief summarizes evidence of this harassment, in pertinent part:

[S]ixty-eight women (besides Monika Starke), had trial-worthy claims of sexual harassment; CRST either never moved for summary judgment for them (realizing their potential merit), or the district court or this Court held that EEOC presented enough evidence for a jury to find discrimination . . . See XVIII-Apx.4973 (characterizing sixty-seven claimants dismissed for presuit requirements as "potentially meritorious sexual harassment claims"); XVIII-Apx.5034-38 (adding Starke and T. Jones as potentially meritorious). The district court itself acknowledged that EEOC's evidence showed that "146 female drivers variously suffered physical, mental, and/or emotional abuse at the hands of their male co-drivers and lead drivers." XVIII-Apx.4799. CRST's Human Resources Director, Jim Barnes, told claimant Stacy Barager he received "20 or so" sex harassment complaints a week, adding "if he fired everybody, they wouldn't have [any] drivers left." VII-Apx.1828. EEOC lost, but its claims did not lack "merit" in the sense that nothing happened to these women, and the record refutes CRST's denial of "widespread" harassment.

Reply Brief of Appellant at 2-3, *EEOC v. CRST Van Expedited, Inc.*, 774 F.3d 1169 (8th Cir. 2014) (No. 18-1446), 2018 WL 4641689, at *2-*3.

165. IOWA CODE § 216.6(1) (2018).

166. *E.g.*, *Haskenhoff v. Homeland Energy Sols., LLC*, No. LACV003218, 2015 WL 13830763 (Iowa Dist. Ct. Mar. 2, 2015), *rev'd*, 897 N.W.2d 553 (Iowa 2017) (jury verdict for female employee for \$1.4 million arising from claims under the ICRA for employment discrimination based on sexual harassment by a direct supervisor and co-employees). On remand, and with a new jury provided with different instructions, the Iowa district court awarded the plaintiff \$1,050,000 in damages. *Haskenhoff v. Homeland Energy Sols., LLC*, 2019 WL 4458174 (Iowa Dist. Ct. Aug. 15, 2019).

167. *E.g.*, *Smith v. Iowa State Univ.*, 851 N.W.2d 1 (Iowa 2014).

168. See *id.* at *26, defining the elements of this claim as:

elements of proof are less demanding, however, for negligent hiring because this cause of action does not require proof intentional misconduct.¹⁶⁹ Employers are liable for supervisory failure to address sexual harassment by employees against coworkers.¹⁷⁰ To prevail in an allegation of negligent hiring, training, retention, or supervision in Iowa, a plaintiff must prove “an underlying tort or wrongful act committed by the employee.”¹⁷¹ This tort does not require physical harm.¹⁷²

One Iowa case illustrates how the University of Iowa player would have a plausible negligent supervision claim if courts treated her as an employee. In that case, a golf course employee sued her employer after her complaints to management about a supervisor’s sexual misconduct, including assault, did not end her harassment.¹⁷³ She alleged several torts, including negligent supervision.¹⁷⁴ The issue in this lawsuit was whether the employer’s liability insurance applied to these facts. Although the Iowa Supreme Court ruled that the insurance policy excluded coverage for negligent supervision, at no point did its opinion abrogate the state’s adoption of the negligent hiring tort.¹⁷⁵ In short, Iowa continues to recognize the tort of negligent supervision.

(1) outrageous conduct by the defendant; (2) the defendant intentionally caused, or recklessly disregarded the probability of causing, the emotional distress; (3) plaintiff suffered severe or extreme emotional distress; and (4) the defendant’s outrageous conduct was the actual and proximate cause of the emotional distress.

The plaintiff proved these elements by showing that his supervisor “engaged in unremitting psychological warfare against Smith” and “did all this to cover up what basically amounted to her theft from ISU.” *Id.* at 29.

169. See *Johnson v. Moody*, 2016 WL 8904418 (S.D. Iowa 2016), at *4-*5, stating:

To be liable for negligent hiring of an unfit employee, the plaintiff must prove: (1) that the employer knew, or in the exercise of ordinary care should have known, of its employee’s unfitness at the time of hiring; (2) that through the negligent hiring of the employee, the employee’s incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries; and (3) that there is some employment or agency relationship between the tortfeasor and the defendant employer.

170. Causes of action for negligent hiring, supervision, and retention are “separate and distinct” from claims based on respondeat superior liability, which imposes strict liability on employers for their employees’ actions within the scope of their employment. *McGraw v. Wachovia Sec., L.L.C.*, 756 F. Supp. 2d 1053, 1066-67 (N.D. Iowa 2010).

171. *West v. Abendroth & Russell L. Firm*, 45 F. Supp. 3d 959, 968 (N.D. Iowa 2014).

172. *Kiesau v. Bantz*, 686 N.W.2d 164, 173 (Iowa 2004) (“Therefore, to the extent Graves holds a negligent hiring, supervision, or retention claim requires physical injury, we overrule it.”).

173. *IMT Ins. Co. v. Crestmoor Golf Club*, 702 N.W.2d 492 (Iowa 2005). Tabitha Cottrell claimed that her supervisor made sexual comments to her, touched her inappropriately, and sexually assaulted her. *Id.* at 494. She later complained to her employer’s personnel office. *Id.* She further alleged that when she returned to work, other managers ridiculed her for complaining. *Id.* She claimed that Crestmoor constructively discharged her. *Id.* Cottrell then sued the club, claiming that the actions of her supervisor and the club management caused her to suffer humiliation, alienation, severe emotional distress, and economic harm. *Id.* The district court determined the club’s insurance coverage existed for the negligent supervision and retention claims, and required the insurer to defend and indemnify Crestmoor on those claims. *Id.* at 495. The Iowa supreme court reversed, holding that the insurance policy excluded coverage for negligent supervision. *Id.* at 498.

174. *Id.*

175. *Id.* at 496-97.

Turning to the player's complaints against the university, the Stolar Report found an element of post-reporting harassment that was similar to the golf course employee's complaint:

RESPONSE: The Investigators found the Student-Athlete's assertions that she was subjected to harassment and retaliation from members of the football team, as well as other student-athletes, to be credible. This alleged harassment included physical threats and shouts of insulting and offensive language. The Student-Athlete told the Investigators that the behavior was at its worst when the Student-Athlete was in areas where large numbers of student-athletes were present, such as in the Hillcrest Hall dining area and the student-athlete Learning Center. The response by University officials to this harassment was ineffectual.¹⁷⁶

If she decided to forego a tort remedy, the Iowa player would be eligible to file a claim for workers' compensation.¹⁷⁷ In Iowa, this employment-based insurance system provides an exclusive remedy for injuries incurred in the course of employment, and arising out of employment.¹⁷⁸ Iowa's workers' compensation scheme provides a remedy for psychological injuries.¹⁷⁹ Sexual assault likely would not qualify as an injury arising in the course of employment,¹⁸⁰ but the university's subsequent failure to protect her from harassment and retaliation from football team members after she reported the assault could be compensable.¹⁸¹

The harassment that the Iowa player experienced suggests similarities to the psychological stress experienced by a claimant in another Iowa case, *Blocker v. East Marshall School*, in which a teacher who handled a disruption in study hall was falsely accused by students on Facebook of having an inappropriate sexual relationship with a high school student.¹⁸² She developed

176. STATE OF IOWA BD. OF REGENTS, *supra* note 22, at 14-15.

177. See Iowa Workers' Compensation, IOWA CODE § 85.1 *et seq.* (2007). The Code's coverage extends even to students in a "school-to-work program." IOWA CODE § 85.60 (2007).

178. IOWA CODE §85.20 (2018) ("The rights and remedies provided in this chapter, . . . for an employee . . . on account of injury, occupational disease or occupational hearing loss for which benefits under this chapter . . . are recoverable . . . shall be the exclusive and only rights and remedies of the employee . . ."). In IOWA CODE §85.2, the exclusive remedy provision of the law is "mandatory" for "state, county, municipal corporation, school corporation, area education agency, or city" employers and their employees.

179. *Dunlavy v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 851 (Iowa 1995) (stating that "personal injuries" as used in in Iowa Code § 85.3(1) applies to mental injuries and includes recovery for a nontraumatic mental injury).

180. See *Koehler Elec. v. Wills*, 608 N.W.2d 1, 3 (Iowa 2000) (stating that a compensable injury under this statute must be a "rational consequence of a hazard connected with the employment" and not merely incidental to the employment).

181. See *Miedema v. Dial Corp.*, 551 N.W.2d 309, 311 (Iowa 1996) (stating that an injury arises out of the employment when it is caused by or related to the working environment or conditions of employment).

182. See *Blocker v. E. Marshall Sch.*, No. 5040747, 2014 WL 3361836, at *1-2 (Iowa Workers' Comp. Comm'n July 1, 2014).

a psychological disorder with anxiety and depressed mood,¹⁸³ and was awarded substantial worker compensation benefits.¹⁸⁴

B. *University of Illinois at Urbana-Champaign Case Study*

Most player negligence claims analyzed in this Article were unsuccessful.¹⁸⁵ Often, college athletes lose negligence lawsuits in which they argue that the nature of their relationship requires a special duty of care.¹⁸⁶ As an employee, however, a player is more likely to succeed on a negligence claim than as an amateur athlete.

If the Illinois basketball player were an employee, he would have greater access to remedies, both under state negligence law and through the Illinois workers' compensation scheme. As in the foregoing analysis of the Iowa player's circumstances, this discussion of the Illinois player's situation is limited to public information.¹⁸⁷ These public disclosures do not mention specifics about his injury and medical treatment after leaving Illinois. In pertinent part, the DIA Report publicly stated:

The allegations involved verbal abuse, racial harassment, and punitive use of physical activity. An internal review confirmed that Underwood's coaching style, while intense and challenging, was not abusive or in violation of applicable University or DIA policies¹⁸⁸

183. *Id.* at *3.

184. *Id.* at *9 (ordering award of 42.857 weeks of healing-period benefits from January 5, 2012 through October 31, 2012 at \$394.49 per week, and 200 weeks of permanent partial disability benefits starting on November 1, 2012 at \$394.49, plus interest, totaling approximately \$95,000).

185. Ramsey, 2014 WL 12680503, at *1; Feleccia, 2016 WL 409711, at *3-4; Sellers v. Rudert, 918 N.E.2d 586 (Ill. App. Ct. 2009); Barile v. Univ. of Va., 441 N.E.2d 608, 612 (Ohio Ct. App. 1981); In re Tex. Christian Univ., No. 05-18-00967-CV, 2018 WL 6716935, at *1 (Tex. App. Dec. 21, 2018).

186. See, e.g., Howell v. Calvert, 1 P.3d 310, 313 (Kan. 2000) (rejecting plaintiff's argument that schools owe their athletes a special duty of care); Orr v. Brigham Young Univ., 108 F.3d 1388 (10th Cir. 1997) (dismissing negligence lawsuit in which plaintiff claimed that BYU owed a special duty to protect his physical well-being by not playing him while his back was injured). Cf. Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001) (finding a special relationship between university and cheerleader and, therefore, that university had an affirmative duty of care to cheerleader); Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1366-69 (3d Cir. 1993) (imposing a high duty of care on universities and colleges).

187. These materials are published in a 35-page report. See *Executive Summary*, *supra* note 153. The DIA Report containing information about punitive use of treadmill was also reported in Julie Wurth, *Underwood Cleared in Probe, but Faculty Questions Remain*, NEWS-GAZETTE (Apr. 12, 2019), https://www.news-gazette.com/news/underwood-cleared-in-probe-but-faculty-questions-remain/article_dd6d526d-7d90-5004-a3de-1aa96316fddf.html [<https://perma.cc/5F8N-EGQD>], which reported:

In December, UI Professors Michael LeRoy and Michael Raycraft, who serve on the UI Athletic Board, heard similar allegations from another source about [Coach] Underwood's conduct toward student-athletes during the 2017-18 season, with photos and other documentation, according to emails released by the university. The allegations involved "verbal abuse, racial harassment, medical mismanagement and punitive use of a treadmill," according to their Jan. 10 memo to Whitman.

188. *Executive Summary*, *supra* note 153, at PDF 1.

The only new topic introduced in the meeting involved the potential misdiagnosis and mistreatment of a player's injury. All medical decisions are made by independent, certified medical personnel, without input or involvement by any member of the DIA coaching staff.¹⁸⁹

As noted in this public report—and also reported in a news article—a parent described “punitive use of a treadmill” by the coach.¹⁹⁰ The parent also reported “medical mistreatment” of the player, and said the “coach repeatedly taunted [the player], calling [the player] a ‘pussy’ or ‘fucking pussy’ for not playing with pain.”¹⁹¹ However, the DIA Report specifically refuted these allegations, stating that “[c]laims related to . . . harassment and punitive use of physical activity were specifically discredited.”¹⁹²

The coach's unconventional use of a treadmill is independently documented, however, in news articles from his previous stint as the head men's basketball coach at Oklahoma State University in 2016. One news report gave a player's perspective:

After the Cowboys' first practice, Leyton Hammonds had nightmares, and the antagonist was a treadmill. During Oklahoma State's open practice Saturday, the dreaded treadmill sat on the northeast corner of Eddie Sutton Court, waiting for victims. “It's not your friend, that's the main thing,” Hammonds said.¹⁹³

The coach reportedly ordered players to the courtside treadmill for high-speed running as a teaching strategy.¹⁹⁴ Another news story reported a nearly identical account of the coach's practice methods, adding that players were put immediately back into drills without time to recover or replenish their water supply.¹⁹⁵

Illinois courts recognize the tort of negligent hiring and supervision by an employer.¹⁹⁶ A recent decision makes clear that “employers have a duty to

189. *Id.* at 2.

190. *Id.* at 8.

191. *Id.*

192. *Id.* at 1.

193. Marshall Scott, *Underwood Uses Treadmill as Teaching Tool*, O'COLLY (Oct. 8, 2016), https://www.ocolly.com/sports/underwood-uses-treadmill-as-teaching-tool/article_1239f244-8d8f-11e6-b614-4b687e8d0a03.html [<https://perma.cc/WK7V-W9L7>].

194. *Id.* (Hammonds saying, “[t]he treadmill can only make you go up to about 17 mph, I think coach can make me go faster than that if he wanted to”).

195. Mark Cooper, *Oklahoma State Basketball One Brad Underwood Teaching Tool That Has Cowboy Players Focusing—The Treadmill*, TULSA WORLD (Oct 18, 2016), https://www.tulsaworld.com/sports/college/osu/oklahoma-state-basketball-one-brad-underwood-teaching-tool-that-has/article_8e176b7b-0efe-5bf1-8933-075561587665.html [<https://perma.cc/KDD7-298R>]. When players failed to execute a drill or assignment properly, the coach said “treadmill” and the player complied. *Id.* The treadmill was used “for a sprint of around one minute at about 15 miles per hour.” *Id.* The report quoted the player: “‘Once you hop off, there's no just going and getting some water, having a break,’ he said. ‘He's like, alright, get back in the drill.’” *Id.*

196. See *Escobar v. Madsen Const. Co.*, 589 N.E.2d 638, 640 (Ill. App. Ct. 1992) (citing cases in which the court applied the principles of Restatement (Second) of Torts § 317 (Am. Law Inst. 1965),

act reasonably in hiring, supervising, and retaining their employees”—in other words, the duty applies from the start of the employment relationship and continues throughout.¹⁹⁷ This tort applies when a negligently hired or negligently supervised employee harms a third party.¹⁹⁸ Illinois courts also apply this tort when an employee alleges that an employer negligently hired or supervised a manager or coworker.¹⁹⁹

Public information shows how the Illinois player could utilize this tort if he were an employee. While the coach did not intend to harm any player, a court could find that the coach’s use of the treadmill created “an unreasonable risk of bodily harm” because it went beyond the machine’s intended use.²⁰⁰ For example, the safety instructions for Precor’s C954 and C956—treadmills used at training gyms and fitness clubs—include: “Do not overexert yourself or work to exhaustion.”²⁰¹ The manual also states: “Use the treadmill only for its intended use as described in this manual.”²⁰² Precor states that exercise is the only intended use of the C954 and C956.²⁰³

which reads: “[A]n employer may be liable for harm caused by an employee acting outside the scope of his employment if the employee is on the employer’s premises or using chattel of the employer, and the employer has reason to know of the need an opportunity for exercising control over the employee”).

197. *Anicich v. Home Depot U.S.A., Inc.*, 852 F.3d 643, 649 (7th Cir. 2017).

198. Illinois law recognizes a cause of action against an employer for negligently hiring, or retaining in its employment, an employee it knew, or should have known, was unfit for the job so as to create a danger of harm to third persons. *See, e.g.*, *Doe v. Boy Scouts of Am.*, 4 N.E.3d 550, 560 (Ill. App. Ct. 2014); *Mueller v. Comty. Consol. Sch. Dist.*, 678 N.E.2d 660, 663 (Ill. App. Ct. 1997); *Johnson v. Mers*, 664 N.E.2d 668, 672 (Ill. App. Ct. 1996); *Carter v. Skokie Valley Detective Agency, Ltd.*, 628 N.E.2d 602, 604 (Ill. App. Ct. 1993); *Bryant v. Livigni*, 619 N.E.2d 550, 557 (Ill. App. Ct. 1993); *Escobar v. Madsen Const. Co.*, 589 N.E.2d 638, 639 (Ill. App. Ct. 1992); *Fallon v. Indian Trail Sch.*, 500 N.E.2d 101, 103-04 (Ill. App. Ct. 1986); *Malorney v. B & L Motor Freight, Inc.*, 496 N.E.2d 1086, 1088 (Ill. App. Ct. 1986); *Bates v. Doria*, 502 N.E.2d 454, 458 (Ill. App. Ct. 1986); *Gregor v. Kleiser*, 443 N.E.2d 1162, 1166 (Ill. App. Ct. 1982).

199. *See, e.g.*, *Fuesting v. Uline, Inc.*, 30 F. Supp. 3d 739, 745-46 (N.D. Ill. 2014) (holding that claims for negligent hiring, supervision, and retention were not entirely preempted where former employees alleged that two co-workers repeatedly groped them); *French v. STL Distrib. Servs., LLC*, Nos. 10–511, 10–660, 2010 WL 4684016, at *1-2 (S.D. Ill. Nov. 10, 2010) (holding that employee’s allegations of negligent retention, negligent supervision, assault, battery, and intentional infliction of emotional distress were not preempted insofar as claims alleged that co-workers assaulted and battered her); *Harris v. City of Chi.*, No. 07-CV-3982, 2008 WL 2622830, at *4 (N.D. Ill. June 30, 2008) (holding that discharged employee’s negligence claims were not preempted by mention of discrimination in his complaint); *Sinkule v. Fisher Dev., Inc.*, No. 01 C 9969, 2002 WL 1308642, at *5 (N.D. Ill. June 14, 2002) (holding claim of negligent supervision was not preempted where two female employees alleged that co-workers subjected them to unwanted touching and pornography at work, and the employer did not address their complaints).

200. *O’Rourke v. McIlvaine*, 19 N.E.3d 714, 721-22 (Ill. App. Ct. 2014) (denying application of negligent hiring and retention theories where claim arose after the employer terminated the alleged wrongdoer, and explaining Illinois’s judicial adoption of the Restatement (Second) of Torts § 317 (Am. Law Inst. 1965)).

201. *Commercial Treadmill Owner’s Manual: Commercial Products Division C954 C956*, PRECOR USA 3 (Oct. 28, 2003), https://www.precor.com/sites/default/files/manuals/44291-106%20C956C954%20Lit%20Kit_1003_EN.pdf [<https://perma.cc/XJ8X-TVAG>].

202. *Id.* at 2.

203. *See id.* at 33-36.

Published news reports from 2016 about the coach's time at Oklahoma State University could create a jury question as to whether the coach used a treadmill at courtside during practice in a manner that creates an unreasonable risk of bodily harm.²⁰⁴ This would be one element of proof that Illinois negligently hired the coach in 2017.²⁰⁵ Further evidence of Illinois's negligent supervision of this coach emerged when a March 2020 news report revealed that an Illinois player fell at a high speed from a treadmill after being ordered to jump on the machine. This report confirmed the concerns about player mistreatment that had been privately reported to the athletic director in December 2018.²⁰⁶ However, the player would still need to prove that this specific coaching method proximately caused the injury that required his medical treatment after leaving the Illinois basketball program.

Workers' compensation could provide an alternative remedy for the player if he were an employee. A claimant in Illinois is entitled to recover reasonable medical expenses when "incurrence" is "causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury."²⁰⁷ A former player for the Chicago Bears petitioned under this law for "open medical rights" related to progression of an injury incurred during games he played for the team.²⁰⁸ Illinois workers' compensation law has been applied to some work-related injuries incurred on treadmills.²⁰⁹

204. See Cooper, *supra* note 195 ("'It's a reminder, it's an encouragement,' Underwood said. 'It's not meant as actual punishment as it is 'Hey, let's focus on what we're trying to do here.' Our guys, there are days that we use it more than others. It's very, very minimal. But I hope our guys don't look at it as punishment. I don't.'").

205. Under the negligent hiring or retention theory, the proximate cause of a plaintiff's injury is the employer's negligence in hiring or retaining the employee, rather than the employee's wrongful act. See *Young v. Lemons*, 639 N.E.2d 610, 612-13 (Ill. App. Ct. 1994).

206. Scott Richey, *Oladimeji Not Only Brings Workmanlike Attitude to Practice but Lightens Mood Around the Team*, NEWS-GAZETTE (Mar. 8, 2020), https://www.news-gazette.com/sports/illinois-sports/mens-basketball/oladimeji-not-only-brings-workmanlike-attitude-to-practice-but-lightens-mood-around-team/article_1fe517c4-ec17-5028-ac97-acab062f9be8.html [<https://perma.cc/NV2L-9AC8>] (characterizing Oladimeji's treadmill-related incident from practice a "*face plant*") (emphasis added to indicate the unsafe use of treadmill). This published report was similar to the information that was reported to the two faculty members in December 2018 and communicated to Athletic Director Whitman at that time.

207. *Absolute Cleaning/SVMBL v. Ill. Workers' Comp. Comm'n*, 949 N.E.2d 1158, 1165 (Ill. App. Ct. 2011) (applying Section 8(a) of the Workers' Compensation Act, codified at 820 ILL. COMP. STAT. ANN. 305 / 8(a) (West 2012)).

208. *Davis v. Chi. Bears Football Club*, Nos. 08 W.C. 2862, 10 W.C. 13601, 10 W.C. 13602, 18 I.W.C.C. 0671, 2018 WL 6626117, at *2 (Ill. Workers' Comp. Comm'n Nov. 2, 2018). After his career ended, the player was entitled to open medical rights under Section 8(a) of the Act "for any reasonable and related medical expenses relating specifically to neck or cervical spine, subject to review per provisions of the Act." *Id.* The Commission also ordered the team to authorize and pay for recommended spinal disc surgery and related medical expenses prospectively. *Id.* at *10.

209. See *Vill. of Lake Zurich v. Ill. Workers' Comp. Comm'n*, 2018 IL App (2d) 170117WC-U, ¶ 14 (upholding finding that the claimant injured his left knee while walking on a treadmill during a functional capacity evaluation and that the injury was causally related to a work accident). The claimant

C. An Employment Relationship Would Improve Legal Protections for NCAA Players

The case studies from the University of Iowa and the University of Illinois at Urbana-Champaign provide specific examples of how an employment relationship would provide better legal protections for the players who alleged injurious experiences. Part IV.C outlines two general frameworks relating to legal protections for employees.

The first framework compares remedies under Title VI²¹⁰ and Title VII,²¹¹ the education and employment laws passed as part of the Civil Rights Act of 1964, and Title IX,²¹² a law enacted in 1972 to prohibit sex discrimination in publicly funded educational institutions. Title VII offers employees more robust remedies, including compensatory and punitive damages,²¹³ than Title VI and Title IX. This manifested in the data examined in this Article: only one legal complaint, out of fifty-nine cases, alleged a Title VI violation, even though there were seventeen cases with sexual assault allegations.²¹⁴ On the other hand, there were thirty-nine Title IX complaints.²¹⁵ However, one case in my study, *Mercer v. Duke University*,²¹⁶ set a disappointing precedent when the Fourth Circuit ruled that punitive damages are never available to a successful Title IX plaintiff. Title VII, by comparison, can yield large damages and substantial settlements.

Holcomb v. Iona College provides compelling evidence that Title VII gives employees stronger legal protections against discrimination than any legal recourse available to an NCAA player.²¹⁷ Craig Holcomb, an assistant basketball coach at Iona College, alleged in a lawsuit that he was fired because he married a black woman.²¹⁸ He said that his athletic director told him and another coach who married a black woman not to bring their spouses

was awarded temporary total disability (TTD) benefits of \$971.67 per week for 118 weeks, and temporary partial disability (TPD) benefits of \$642.67 per week for 67 and 1/7 weeks. *Id.* at ¶ 3.

210. Title VI of the 1964 Civil Rights Act, called “Nondiscrimination in Federally Assisted Programs,” applies to all public schools, and other federally funded education programs and activities. Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 (1964) (codified as amended at 42 U.S.C. § 2000d et seq.). Title VI states: “No person in the United States shall, on the ground of race . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d.

211. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17) (also called Title VII).

212. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

213. The Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981(b)) (Compensatory and Punitive Damages).

214. *Supra*, Table 1.

215. *Id.*

216. *Mercer v. Duke Univ.*, 50 F. App’x 643, 645 (4th Cir. 2002) (vacating the district court’s award of punitive damages).

217. *See Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008).

218. *Id.* at 131-32.

to alumni events.²¹⁹ In addition, a vice president of Iona who was close to the basketball program made comments such as “[e]verybody at Fordham thinks they have these good black kids, and Iona has n*****s,”²²⁰ and the Iona basketball program needed to “keep [its] n*****s in line.”²²¹ In regard to Holcomb and his wife, the Iona vice president said, “[Y]ou’re really going to marry that Aunt Jemima? You really are a n***** lover.”²²² Holcomb’s complaint sought punitive damages of \$1.5 million.²²³ The Second Circuit ruled that racial discrimination based on a white person’s marriage to a black person was covered by Title VII and Holcomb’s lawsuit could proceed to trial.²²⁴

The second framework of comparison relates to negligence claims. To begin with, Congress enacted the Occupational Safety and Health Act for the purpose of protecting workers.²²⁵ In *Teal v. DuPont*, an employee of a contractor was seriously injured when he fell about seventeen feet above a floor.²²⁶ He and his wife alleged that he fell from a ladder that DuPont had affixed to a wall—a ladder that did not comply with an OSHA regulation.²²⁷ An essential aspect of his case was his claim that an OSHA violation could establish *per se* proof of negligence.²²⁸ The Sixth Circuit ruled in favor of Teal on this point.²²⁹

The Teal case has potential application to a case in my sample. *Lee v. Louisiana Board of Trustees for State Colleges* involved the death of a basketball player and serious injury to a teammate when their coach ordered them to run over four miles in high heat and humidity.²³⁰ While OSHA has no rule on heat stress, it has issued lengthy and specific recommendations to

219. *Id.* at 134.

220. *Id.*

221. *Id.*

222. *Id.*

223. Complaint at ¶ 47, *Holcomb v. Iona Coll.*, No. 05 CV 828, 2005 WL 451723 (S.D.N.Y. Jan. 25, 2005).

224. *Holcomb v. Iona Coll.*, 521 F.3d 130, 142-44 (2d Cir. 2008).

225. Congress’s primary purpose for enacting the Occupational Safety and Health Act was “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” 29 U.S.C. § 651(b) (2018)

226. *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 801 (6th Cir. 1984).

227. *Id.* at 801.

228. *Id.* at 803 n.4 (“If the plaintiff proves that the defendant breached a statutory or regulatory obligation, and that the statutory or regulatory duty was enacted for the plaintiff’s benefit, then the defendant is considered negligent as a matter of law. A determination that the defendant is negligent *per se*, however, does not require necessarily an award of damages. Negligence *per se* only establishes a defendant’s duty and breach thereof.”).

229. *Id.* at 805 (“Because Richard Teal is a member of the class of persons that the OSHA regulation was intended to protect, the appellants were entitled to a jury instruction on their negligence *per se* claim.”).

230. *Lee v. La. Bd. of Trs. for State Colls.*, 280 So. 3d 176, 181 (La. Ct. App. 2019).

employers.²³¹ If NCAA athletes were employed, OSHA rules would provide them the same heat-safety guidance as for all workplaces in Louisiana and elsewhere, where high heat in a work environment is a clear health hazard. The Grambling State coach might not have required players to engage in such hazardous activities if coaching practices were informed by this workplace guidance. In terms of remedies, a player injured by heat stress could allege a count of per se negligence based on a violation of an OSHA heat stress regulation in addition to any other common law claims they asserted.

V. CONCLUSION

This Article shows that discrimination and negligence laws do not adequately protect NCAA players who are harassed, abused, and mistreated. With infrequent legal consequences, campus leaders have tolerated, acquiesced, and resigned themselves to an athletic culture that protects players and coaches who injure others. Perpetrators have enjoyed lenience and munificent second and third chances at the expense of injured parties. Many campus leaders offer tone-deaf reactions to credible concerns about the health and safety of players and non-player students.

Two examples from the study are typical. As president of the University of Iowa, Sally Mason failed to communicate a zero-tolerance policy for sexual violence after a student-athlete complained that a football player assaulted her:

I'm not pleased that we have sexual assaults, obviously. The goal would be to end that, to never have another sexual assault. *That's probably not a realistic goal just given human nature*, and that's unfortunate, but the more we understand about it, the better we are at trying to handle it and help people get through these difficult situations.²³²

Illinois Athletic Director, Josh Whitman, struck a similar tone in a news interview, implying that concerns raised by faculty about the men's basketball coach had merit while at the same time shielding the coach from an independent investigation:

Whitman also said he had spoken to Underwood before the allegations surfaced about ways to improve his 'use of language' and his interactions with players . . . *'He coaches in a certain way, and I don't*

231. See OSHA, *OSHA Technical Manual Section III Chapter 4 Heat Stress*, U.S. DEP'T OF LABOR, https://www.osha.gov/dts/osta/otm/otm_iii/otm_iii_4.html#introduction [https://perma.cc/5NVT-2FAX]. Under OSHA law, employers are responsible for providing workplaces free of known safety hazards. This includes protecting workers from extreme heat. An employer with workers exposed to high temperatures should establish a complete heat illness prevention program. Responsibilities include: providing workers with water, rest, and shade; allowing new or returning workers to gradually increase workloads and take more frequent breaks as they acclimatize, or build a tolerance for working in the heat; planning for emergencies and train workers on prevention; and monitoring workers for signs of illness.

232. Agnew, *supra* note 27 (emphasis added).

expect him to change the way he coaches. He's intense, he creates an environment where he makes his players uncomfortable to get them to go to places they didn't think they could go.²³³

Mason and Whitman indicated that, in their roles as campus leaders, they were limited in stopping the problems that confronted them. These attitudes are not atypical: other cases in this study reported on-campus leaders who minimized serious concerns about players or coaches.²³⁴

These exonerating attitudes and, more generally, the findings and case studies in this Article, cast kaleidoscopic shadows on the NCAA's amateur athlete model. This research opens a wider lens for viewing the NCAA's inequitable sharing of wealth with the athletes whose labors are exploited by colleges and universities.²³⁵ Apart from legislating an employment relationship, there is no viable alternative to provide players a fairer share for generating so much wealth. Antitrust efforts have failed.²³⁶ This result is unsurprising. Even in professional sports—where leagues rely on severe restrictions on player mobility and compensation in order to create competitive balance among teams—courts have often dismissed players' antitrust complaints.²³⁷ Antitrust law offers faint hope for reforming the NCAA's outdated model amateur competition.

233. Wurth, *supra* note 187 (emphasis added). About ten years before the events on this timeline, the athletic director published a law review article while he was a University of Illinois at Urbana-Champaign student. As a law student writing a critical analysis of professional sports, Whitman observed that the drive to win incentivizes some competitors to break rules to gain a competitive advantage. See Joshua H. Whitman, *Winning at All Costs Using Law & Economics to Determine the Proper Role of Government in Regulating the Use of Performance-Enhancing Drugs in Professional Sports*, 2008 UNIV. ILL. L. REV. 459 (2008).

234. See, e.g., *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1290-91 (11th Cir. 2007) (alleging that Michael Adams, president of the University of Georgia, involved himself in recruiting and admitting a men's basketball player accused of sexually assaulting a student at Georgia, after Adams knew the player had disciplinary and criminal issues); *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 794 (M.D. Tenn. 2016) (alleging that Vice-Chancellor Tim Rogers was rebuffed by Chancellor Jimmy Cheek when he raised concerns about the Athletic Department's refusal to address or discuss the "inordinate" number of disciplinary cases and sexual assault allegations involving UT athletes); *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1182 (10th Cir. 2007), *rev'd*, 500 F.3d 1170 (10th Cir. 2007) (alleging that Chancellor Richard Byyny instructed Athletic Director Richard Tharp to implement a zero-tolerance rule on athletic recruiting parties with alcohol and sex, but Tharp argued that the policy would hold players to a higher standard than other students).

235. See Patrick Hruby, *How Fighting the NCAA Became a Bipartisan Sport*, WASH. POST MAG. (Mar. 17, 2020) <https://www.washingtonpost.com/magazine/2020/03/17/how-fighting-ncaa-became-bipartisan-sport/?arc404=true> [<https://perma.cc/WJ65-P79H>] (reporting that in 2019, college football and basketball coaches were the highest-paid public employees in 40 states, but NCAA rules prevented athletes from being paid more than their scholarships and small cost-of-living stipends).

236. See *Dawson v. NCAA*, 932 F.3d 905, 909 (9th Cir. 2019); *Livers v. NCAA*, No. CV 17-4271, 2018 WL 3609839 (E.D. Pa. July 26, 2018). Courts have only infrequently allowed pro players to proceed with antitrust claims. See *White v. NFL*, 822 F. Supp. 1389 (D. Minn. 1993); *Powell v. NFL*, 764 F. Supp. 1351 (D. Minn. 1991); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975).

237. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 234 (1996); *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011); *NBA v. Williams*, 45 F.3d 684, 688 (2d Cir. 1995), and *Powell v. NFL*, 930 F. 2d 1293, 1295 (8th Cir. 1989).

The current wave of name-image-likeness (NIL) legislation allows players to exploit their personal brand.²³⁸ This improves the status quo. TV contracts in college sports are highly lucrative.²³⁹ With NIL legislation, star players will be able to cash in on their exposure, especially via internet platforms that cost little or nothing while enabling them to reach a national audience. At the same time, NCAA schools will not have to share revenue with players. Financially, this is a “grow-the-pie” solution.

However, the NIL model will further underscore the hypocrisy inherent in treating NCAA players primarily as college students who play sports for their schools. Superstar college athletes could bank a small fortune and others could earn income exceeding that from a part-time job, but most could earn nothing in the NIL market. While the NIL model is an evolutionary advance for college players, it is not an ultimate solution. It merely extends large-scale income inequality from coaches and administrators to a handful of brand-savvy superstar college players. More importantly, NIL legislation does nothing to address the player welfare concerns identified in this Article, because it does not create an employment relationship.

An examination of the history of work suggests that an employment model will eventually win out in college sports. Slaves in Rome were eventually allowed to purchase their freedom and work as citizens.²⁴⁰ Serfs in medieval England eventually worked in now-familiar occupations, and were regulated by modern-type wage laws.²⁴¹ Guilds—the functional equivalents of contemporary labor unions—were prevalent in France by the fifteenth century.²⁴² American colonies were settled by people who were under contracts for involuntary servitude.²⁴³ Chattel slavery flourished in

238. See *supra* notes 158-159.

239. See NCAA, *Finances of Intercollegiate Athletics Database Where the Money Comes From (Revenues)*, NCAA (Sept. 2020), <http://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics-database> [<https://perma.cc/AZW4-3LC3>] (showing that in 2019, “FBS DI Autonomy Schools” generated \$8.2 billion, with 35.2 percent coming from media rights, yielding approximately \$2.9 billion); see also Steven Zeitchik, *For the Sports-Entertainment Business, Coronavirus Is Taking a Huge Toll*, WASH. POST (Mar. 28, 2020), <https://www.washingtonpost.com/business/2020/03/20/sports-broadcast-impact-coronavirus/> [<https://perma.cc/KY8H-AX9C>] (reporting that CBS and Turner pay the NCAA approximately \$785 million a year to broadcast March Madness, the men’s basketball tournament).

240. David Cherry, *The Minician Law Marriage and the Roman Citizenship*, 44 PHOENIX 244, 262 (1990).

241. Robert Braid, *Behind the Ordinance of Labourers Economic Regulation and Market Control in London before the Black Death*, 34 J. OF LEGAL HIST. 3, 28 (2013) (explaining that the Ordinance of Labourers of 1349 reacted to wage inflation by capping wages across many trades and occupations).

242. *KGB, Inc. v. Giannoulas*, 164 Cal. Rptr. 571, 577 (Ct. App. 1980) (referring to a guild in 1415 that tried to enforce a local labor market restriction).

243. William P. Quigley, *Work or Starve Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 72 (1996) (“Indentured servants were the principal labor supply for the colonies until they were superseded by slaves in the eighteenth century.”).

antebellum America,²⁴⁴ and remained legal until the Thirteenth Amendment ended this barbaric work arrangement in 1865.²⁴⁵ Peonage—partly a paternalistic work model, and partly a debt bondage labor system—flourished in the United States after the Civil War.²⁴⁶ When viewed through this long historical lens, the NCAA amateur athlete model fits a common human experience: a powerful group exploits the labor of many others who are unorganized, necessitous, vulnerable, and unable to change their work arrangements. In time, however, the most egregious abuses under these exploitative models were tempered. The woeful experiences of athletes under the NCAA’s current amateur athlete model would similarly improve if the law treated them as employees.

What does this Article’s analysis mean for future consideration of an employment model for NCAA players? This Article strengthens and broadens the player-welfare arguments to justify an employment relationship between NCAA schools and their athletes.²⁴⁷ The thesis is bolstered by the recent upsurge in reports of coaching racism and widespread use by schools of “pledges” and waivers to absolve themselves of COVID-related liabilities

244. Walter Scheidel, *Human Mobility in Roman Italy, II The Slave Population*, 95. J. ROMAN STUD. 64, 78 (2005) (“US slavery is commonly recognized as unique: after the official end of the Atlantic slave trade, the southern slave population more than trebled from 1,191,364 in 1810 to 3,953,760 in 1860.”).

245. U.S. CONST. amend. XIII.

246. The less restrictive form of peonage—a view that parallels, to some extent, the NCAA amateur model because of its benevolent paternalism—is analyzed in Arnold J. Bauer, *Rural Workers in Spanish America Problems of Peonage and Oppression*, 59 HISP. AM. HIST. REV. 34, 62 (1979):

The closer we get to social reality, to the everyday workings of society, the better we understand that rural people are not merely passive victims; rather, they make choices, work out of self-interest. They and landowners alike make compromises and strike accommodations which are often mutually beneficial.

The oppressive side of peonage is succinctly captured in William Wirt Howe, *The Peonage Cases*, 4 COLUM. L. REV. 279, 285 (1904) (describing a judge’s statement in a peonage prosecution that “we may take into consideration in each case the relative inferiority of the person so contracting to perform the service when compared with the person exercising the force”). The U.S. Supreme Court overturned the peonage laws of Alabama. *Bailey v. Ala.*, 219 U.S. 219, 245 (1911) (striking down a state law that criminalized a debt-laborer’s failure to repay his advancement of money).

247. See Anita M. Moorman & Barbara Osborne, *Are Institutions of Higher Education Failing to Protect Students? An Analysis of Title IX’s Sexual Violence Protections and College Athletics*, 26 MARQ. SPORTS L. REV. 545 (2016); Grayson Sang Walker, Note, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95 (2010); Diane Heckman, *Title IX and Sexual Harassment Claims Involving Educational Athletic Department Employees and Student-Athletes in the Twenty-First Century*, 8 VA. SPORTS & ENT. L.J. 223 (2009); Deanna DeFrancesco, Note, *Jennings v. University of North Carolina at Chapel Hill Title IX, Intercollegiate Athletics, and Sexual Harassment*, 15 J.L. & POL’Y 1271 (2007); Jesse Mendelson, Note, *Sexual Harassment in Intercollegiate Athletics by Male Coaches of Female Athletes What It Is, What it Means for the Future, and What the NCAA Should Do*, 9 CARDOZO WOMEN’S L.J. 597 (2003); Erika Tripp, Comment, *Sexual Harassment in Sports How “Adequate” is Title IX?*, 14 MARQ. SPORTS L. REV. 233 (2003); Nancy Hogshead-Makar & Sheldon Elliot Steinbach, *Intercollegiate Athletics’ Unique Environments for Sexual Harassment Claims Balancing the Realities of Athletics with Preventing Potential Claims*, 13 MARQ. SPORTS L. REV. 173 (2003) (in Canada, one-fifth of female athletes have been sexually harassed or abused by their coaches); Annmarie Pinarski, Note, *When Coaches “Cross the Line” Hostile Athletic Environment Sexual Harassment*, 52 RUTGERS L. REV. 911, 915 (2000).

growing out of the NCAA's efforts to resume the 2020 to 2021 season. So far, schools have faced scrutiny and some degree of embarrassment—but no school has been sued, nor has any school suffered legal consequences.

An employment relationship would subject a university or college to more robust enforcement under federal and state discrimination laws. It would supplement the Title IX model of internal investigation with external investigation and anti-retaliation protections.²⁴⁸ In addition, an employment model would expand the duty of care owed by a school to its NCAA athletes by enabling athletic directors to be held liable for negligent hiring and negligent supervision.²⁴⁹ Finally, NCAA athletes would be eligible for medical treatment, long-term care, partial income replacement, and compensation for physical or psychological impairment under state workers' compensation laws.²⁵⁰ These proposals are not radical—they are practical. The fact that NCAA players take classes and earn degrees is no longer an acceptable pretext for denying them access to legal protections.

248. Adding more urgency to my proposal to enable players to file employment discrimination claims, the U.S. Department of Education announced on May 6, 2020 a major overhaul of Title IX enforcement regulations. See Erica L. Green, *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*, N.Y. TIMES (May 6, 2020), <https://www.nytimes.com/2020/05/06/us/politics/campus-sexual-misconduct-betsy-devos.html> [<https://perma.cc/FF5Z-FMB5>] (“[N]ew regulations adopt the Supreme Court’s definition of sexual harassment . . . and they require colleges to hold live hearings during which accusers and accused can be cross-examined to challenge their credibility.”); see also U.S. DEP’T OF EDUC., U.S. DEPARTMENT OF EDUCATION TITLE IX FINAL RULE OVERVIEW, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf> [<https://perma.cc/52W8-UK5S>]; U.S. DEP’T OF EDUC., SUMMARY OF MAJOR PROVISIONS OF THE DEPARTMENT OF EDUCATION’S TITLE IX FINAL RULE AND COMPARISON TO THE NPRM, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-comparison.pdf> [<https://perma.cc/RV7D-M6M6>].

249. See *supra* notes 169-175, 196-206.

250. See *supra* notes 177-184, 207-209.

