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## Civil Conspiracy—Holding College Officials Accountable

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## CIVIL CONSPIRACY—HOLDING COLLEGE OFFICIALS ACCOUNTABLE

Landon Mignardi\*

### ABSTRACT

*College sports have always been somewhat marred by controversy—whether it be point shaving, paying off players, or academic fraud—as the money to be made from college sports and the overwhelming desire to win has always seemed to generate impropriety among schools, players, and coaches. However, in recent years, scandals within college athletics programs have escalated beyond mere efforts to “win at all costs,” with the spotlight now on instances of sexual violence committed by players against other students and the cover-ups of these assaults. Following the massive cover-up and mishandling of sexual assaults by Baylor University’s athletic department and officials, and the arrest and conviction of a sexually abusive physician at Michigan State University (MSU), it has become apparent that these instances of intra-university collusion are not “isolated incidents.” Instead, these events are evidence of a pattern of behavior employed by institutions of higher education—institutions that prioritize their image over the safety of their students. Further, these cover-ups undoubtedly involve more actors than are held accountable, with scandals leading to the removal of university “faces,” while lower-level employees, staff, and coaches are retained despite their obvious involvement.*

*This Comment will address the goings-on within college athletic programs and will argue that such catastrophic failures on the part of schools like Baylor and MSU are likely evidence of a conspiracy within those institutions to defraud their students or interfere with their civil rights, thereby jeopardizing the safety of every student enrolled. It will be a fact-intensive analysis of the tragic events at Baylor and MSU and of the lawsuits filed against both schools by victims. This analysis will show that a much greater evil is at play at these, and likely many other institutions. Not only did these universities fail to adhere to policy, protect their students, or act with any common sense or decency—they actively attempted to inhibit investigations and intentionally tried to cover up sexual harassment, sexual assault, and even gang rapes in order to protect their athletic programs, their employees’ jobs, and their schools’ reputations.*

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\* J.D. Candidate, SMU Dedman School of Law, May 2020; B.S., University of Oklahoma, May 2017. Thank you to Professor Joanna Grossman for her guidance as I wrote this Comment, and thanks to my family and friends for their constant love and support throughout law school.

Next, this Comment will discuss the shortcomings of Title IX, focusing on how the statute does little to provide an adequate remedy for the victims at Baylor and MSU. Additionally, the impotency of National Collegiate Athletic Association (NCAA) sanctions will be analyzed, illustrating how those sanctions do little to encourage athletic officials to adhere to proper Title IX or university policy. Finally, this Comment argues that the pursuit of civil conspiracy claims against athletic programs and universities would: (1) deter schools from protecting alleged rapists in order to promote their athletic programs, and (2) root out and punish individuals responsible for willfully protecting students unequally or discouraging reporting of sexual assaults. Additionally, this Comment advocates for neutral government or academic agencies to handle these cases, thereby removing these kinds of investigations entirely from the hands of ill-equipped athletic programs and coaches.

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#### I. THE DARKER SIDE OF COLLEGE ATHLETICS AND THE NATURE OF CIVIL CONSPIRACIES

“She told Michigan State University she was sexually assaulted by Dr. Larry Nassar. . . . MSU told her she wasn’t.”<sup>1</sup>

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1. Matt Mencarini, *At MSU: Assault, Harassment and Secrecy*, LANSING ST. J. (Jan. 25, 2018),

College sports have always been somewhat marred by controversy—whether it be point shaving, paying off players, or academic fraud.<sup>2</sup> As in all things, where there is money to be made, scandal is soon to follow. In recent years, these scandals have taken a much darker turn, extending beyond mere efforts to “win at all costs” into exploitation, cover-ups, and grievous misconduct by players and, more significantly, coaches and staff.

In late 2001, two women, Lisa Simpson and Anne Gilmore, were allegedly raped by football players and incoming high school recruits at the University of Colorado at Boulder.<sup>3</sup> Simpson and Gilmore had been Colorado football program “Ambassadors,” which involved showing recruits around campus; in some cases, Ambassadors were encouraged by university officials to have sex with incoming high school recruits as a lure for prospective athletes.<sup>4</sup> This “unofficial” but nevertheless school-sanctioned policy resulted in multiple reports of sexual violence against young women by football players and recruits at off-campus parties.<sup>5</sup> Even more troubling, head football coach Gary Barnett tried to cover it up; he intimidated victims<sup>6</sup> and “pressured the campus police to drop a sexual assault investigation of football players.”<sup>7</sup>

Following the events at Colorado, the spotlight on sexual violence and college athletics intensified. This national focus would only increase after two major scandals broke in the late 2010s: one involving a massive cover-up and mishandling of sexual assaults by Baylor University’s athletic department and officials,<sup>8</sup> and the other involving a sexually abusive pedophile employed by Michigan State University (MSU).<sup>9</sup>

The troubling events at Baylor began following rape allegations against football players by multiple female students.<sup>10</sup> As more accusations piled up, evidence was uncovered that Baylor had knowledge of the criminal and personal histories (including incidences of domestic violence) of the two players accused but proceeded to admit them to the university and the football team.<sup>11</sup> Two football

12:31 PM), <https://www.lansingstatejournal.com/story/news/local/2016/12/15/michigan-state-sexual-assault-harassment-larry-nassar/94993582/> [https://perma.cc/49UB-K2ZZ].

2. Alan Rubenstein, *The 25 Biggest Scandals in NCAA History*, BLEACHER REP. (Sept. 20, 2010), <https://bleacherreport.com/articles/468221-the-25-biggest-scandals-in-ncaa-history#slide17> [https://perma.cc/2YKF-UVGF].

3. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1172 (10th Cir. 2007).

4. *Id.* at 1173, 1177.

5. *Id.* at 1173–75, 1181.

6. Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 214 (2009). After discovering that a nineteen-year-old female trainer for the football team had reported being raped by a football player to the police, Barnett called the alleged victim into his office and “told her that if she pursued the charges he would ‘back his player 100%’ and that her ‘life would change.’” *Id.*

7. *Id.*

8. See, e.g., Jessica Luther & Dan Solomon, *Silence at Baylor*, TEX. MONTHLY (Aug. 20, 2015), <https://www.texasmonthly.com/article/silence-at-baylor/> [https://perma.cc/QA7S-8UV5].

9. See, e.g., Paula Lavigne & Nicole Noren, *Applications to Michigan State Drop After Nassar, Sexual Assault Scandals*, ESPN (Dec. 2, 2018), [https://www.espn.com/espn/otl/story/\\_/id/25430618/applications-michigan-state-university-drop-larry-nassar-sexual-assault-scandals-espn-lines](https://www.espn.com/espn/otl/story/_/id/25430618/applications-michigan-state-university-drop-larry-nassar-sexual-assault-scandals-espn-lines) [https://perma.cc/Y7JK-HST8].

10. See Luther & Solomon, *supra* note 8.

11. *Id.*

players were eventually arrested and convicted of sexual assault, despite being cleared by university disciplinary officials following an internal investigation.<sup>12</sup> These incidents resulted in an outside investigation of Baylor and its handling of on- and off-campus sexual assault.<sup>13</sup> The results were appalling. Baylor's Title IX office, which handles allegations of sexual misconduct and gender discrimination, and its athletic department, including head coach Art Briles and athletic director Ian McCaw, had either failed to respond to or report sexual assaults on campus, and, in some cases, actively resisted investigating allegations altogether.<sup>14</sup> One lawsuit against the university alleged "at least fifty-two acts of rape by thirty-one Baylor football players from 2011-2014."<sup>15</sup> This stream of accusations against a university regarding its handling of sexual misconduct was unprecedented—that is, until stories broke in 2016 about MSU and Larry Nassar.

MSU was implicated in equally abhorrent administrative misconduct when two former gymnasts accused Larry Nassar, a physician and assistant professor at MSU, of sexually assaulting them during treatment.<sup>16</sup> A subsequent investigation revealed similar mishandlings by MSU of reports of abuse, and ultimately resulted in allegations of abuse against Nassar by at least 150 young women.<sup>17</sup> Nassar was sentenced to 175 years in prison after pleading guilty to charges of sexual abuse.<sup>18</sup> These massive failures by institutions of higher education are not only disturbing, but ask a bigger question: why are these systematic failures rampant in our college athletic programs?

The American love affair with college athletics runs deep. Since its inception, the popularity of collegiate sports has been on the rise, with schools generating untold amounts of revenue from the draw of their all-star programs, incredible stadiums and facilities, and massive fanbases. Today, colleges and universities across the United States are making more from their athletic programs than ever before, particularly from their football programs, with the average Division I program generating \$31.9 million in revenue per year.<sup>19</sup>

And then there are coaches' salaries. In 2018, University of Alabama head

12. *See id.*

13. Andrew Solomon, *Preventing Recurrences of the Cover-Ups at Penn State & Baylor (and Now Michigan State): Where Does It End?*, 28 MARQ. SPORTS L. REV. 379, 381 (2018).

14. *See id.* at 390–400 (detailing the events at Baylor).

15. *Id.* at 415. Prior to Briles' tenure as head coach, Baylor's football program had an abysmal losing record. *Baylor Bears School History*, SPORTS REFERENCE (Feb. 18, 2021, 6:34 AM), <https://www.sports-reference.com/cfb/schools/baylor/index.html> [<https://perma.cc/P2VX-AC9B>]. However, shortly after Briles' hiring (between 2010–2015), the program went 7–6, 10–3, 8–5, 11–2, 11–2, and 10–3, respectively. *Id.*

16. Tim Evans, Mark Alesia & Marisa Kwiatkowski, *Former USA Gymnastics Doctor Accused of Abuse*, INDY STAR (Jan. 24, 2018, 4:35 PM), <https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/> [<http://perma.cc/64D7-ERYR>].

17. *See id.*

18. *Id.*

19. Cork Gaines & Mike Nudelman, *The Average College Football Team Makes More Money Than the Next 35 College Sports Combined*, BUS. INSIDER (Oct. 5, 2017, 2:36 PM), <https://www.businessinsider.com/college-sports-football-revenue-2017-10> [<https://perma.cc/S4TM-AY36>].

coach Nick Saban signed an eight-year deal for approximately \$74 million.<sup>20</sup> Given the immense amount of pressure and stress coaches are subjected to and the countless hours they spend planning, traveling, and recruiting, many believe this high salary is justified.<sup>21</sup> In turn, coaches, universities, and athletic programs now have more to lose than ever before;<sup>22</sup> this, plus pressures from schools' boards of regents<sup>23</sup> and other sources, likely contributes to the conspiratorial nature of athletic departments and their efforts to cover up reports of sexual assaults and dissuade victims from seeking justice.

This Comment will address the goings-on within college athletic programs and will present arguments that the catastrophic failures of schools like Baylor and MSU are likely evidence of a conspiracy within those institutions to defraud their students or interfere with their civil rights, thereby jeopardizing the safety of all who are enrolled. It will be a fact-intensive analysis of the events at Baylor and MSU, and of the recent lawsuits filed against both these schools by victims, which will tend to show that a much greater evil is at play at these, and likely many other institutions. Not only did these universities fail to adhere to policy, protect their students, or act with any common sense or decency—these universities *actively* attempted to inhibit investigations and intentionally sought to cover up sexual harassment, sexual assault, and even gang rapes<sup>24</sup> in order to protect their own athletic programs, their jobs, and their schools' reputations.

Next, this Comment will discuss the shortcomings of Title IX and focus on how the statute does little to provide an adequate remedy for victims like those at Baylor and MSU. It will further analyze the impotency of the National Collegiate Athletic Association (NCAA) sanctions and how such sanctions do little to encourage athletic officials to adhere to proper Title IX or university policy. These cover-ups undoubtedly involve more actors than are held accountable—with scandals leading to the removal of university “faces” while retaining lower-level employees, staff, and coaches, who eventually end up replacing the people fired in the first place.<sup>25</sup>

Finally, this Comment argues that the pursuit of civil conspiracy claims against

20. Associated Press, *Alabama Gives Nick Saban New Deal with One-Year Extension Through 2025*, SPORTS ILLUSTRATED (July 27, 2018), <https://www.si.com/college-football/2018/07/27/nick-saban-contract-alabama-extension-term-value> [https://perma.cc/5N4G-XUQJ].

21. See, e.g., Leigh Steinberg, *Massive Coaching Salaries Are Justified*, FORBES (Dec. 8, 2012, 12:15 PM), <https://www.forbes.com/sites/leighsteinberg/2012/12/08/massive-coaching-salaries-are-justified/?sh=25c52cf13099> [https://perma.cc/8JSA-VFK6].

22. See Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), [https://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/?utm\\_term=.cd1e4c90be5e](https://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/?utm_term=.cd1e4c90be5e) [https://perma.cc/R43E-D9CN].

23. Defendants Cary Gray, Ron Murff, and David Harper's Original Answer at 28, *Shillinglaw v. Baylor Univ.*, No. DC-17-01225 (116th Dist. Ct., Dallas County, Tex. Feb. 2, 2017) [hereinafter *Baylor Regents' Answer*] (quoting a Baylor donor: “If you mention Baylor's [institutional] mission one more time, I'm going to throw up. . . . I was promised a national championship.”).

24. See Second Amended Complaint & Jury Demand ¶¶ 69, 73, *Doe v. Baylor Univ.*, No. 6:17-CV-27 (W.D. Tex. May 26, 2017), 2017 WL 4680374 [hereinafter *Elizabeth Doe Complaint*].

25. See Associated Press, *Baylor Football Keeping Assistant Coaches in Wake of Scandal*, USA TODAY (June 9, 2016, 12:44 PM), <https://www.usatoday.com/story/sports/ncaaf/big12/2016/06/09/baylor-football-keeping-assistant-coaches-wake-scandal/85648436/> [https://perma.cc/6VGJ-F23B].

athletic programs and universities would: (1) deter schools from protecting alleged rapists in order to promote their athletic programs, and (2) root out and punish individuals responsible for willfully protecting students unequally or discouraging reporting of sexual assaults. Additionally, this Comment advocates for neutral government or academic agencies to handle these cases, thereby insulating these kinds of investigations from interference by athletic programs, coaches, and university officials.

These conspiracies are abhorrent—even more so when they occur in the context of universities that fail to protect their own students. These conspiracies are not isolated incidents; they are evidence of a pattern of behavior employed by institutions of higher education.<sup>26</sup> Ultimately, pursuing conspiracy claims against these actors will protect future victims, raise awareness of the intricacies of intra-university collusion, and deter school officials from repeating the mistakes made at MSU and Baylor.

#### A. A FLOOR, NOT A CEILING: THE STRUCTURAL WEAKNESSES OF UNIVERSITIES AND THE INADEQUACIES OF TITLE IX

Title IX has not always been the blunt instrument of litigation that it is today. Part of the Education Act of 1972, Title IX was “derived . . . from the language of Title VII of the Civil Rights Act of 1964” and like its predecessor, prohibited discrimination in activities which receive federal funding.<sup>27</sup> In addition to barring the use of federal resources for “discriminatory purposes,” Title IX also ensures equality of treatment for students<sup>28</sup> and even sets out requirements schools must satisfy when responding to reports of sexual harassment and sexual violence.<sup>29</sup>

The penalties for violating Title IX could be as extreme as “the termination of all or part of an institution’s federal funding” or in other circumstances, the loss of “grants, subsidies, and other program funds from the federal government.”<sup>30</sup> Nevertheless, to date, “no institution has actually lost any federal money.”<sup>31</sup> Further, Title IX provides a private right of action for students against a non-complying university.<sup>32</sup> However, a major issue with Title IX suits is their inability to hold individuals accountable. Oftentimes, universities merely fire the “faces” of their programs, like head coaches and athletic directors, while retaining other

26. See generally Solomon, *supra* note 13, at 400–01 (discussing the lack of response or improvements made by football programs following the tragedies at Penn State despite nationwide negative publicity, NCAA sanctions, and even criminal convictions of the university’s former president, vice president, and athletic director).

27. Hillary Hunter, *Strike Three: Calling Out College Officials for Sexual Assault on Campus*, 50 TEX. TECH. L. REV. 277, 283 (2018).

28. *Id.* at 283–84.

29. *Summary of Major Provisions of the Department of Education’s Title IX Final Rule*, DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf> [<https://perma.cc/SDU9-D792>].

30. *Title IX*, TYLER JUNIOR COLL., <http://www.tjc.edu/TitleIX> [<https://perma.cc/MV68-Q7CF>].

31. *Title IX Questions & Answers*, FEMINIST MAJORITY FOUND., <https://feminist.org/wp-content/uploads/2020/06/TitleIXQA2010.pdf> [<https://perma.cc/M4HN-GCQ7>].

32. Hunter, *supra* note 27, at 285–86.

employees who likely actively interfered with investigations.<sup>33</sup>

Under current precedent, “courts cannot hold coaches, teachers, administrators, and other officials personally accountable” under Title IX without the finding of a special relationship.<sup>34</sup> Additionally, Title IX lawsuits highlight shortcomings within our legal system. When Title IX cases are settled out of court, the public is not informed on the exact details of a coach’s misconduct which may lead to their hiring at other institutions.<sup>35</sup> The lack of individual accountability in a Title IX action leaves lower-level assistant coaches and athletic trainers unaccountable for their actions which promulgate sexual discrimination and create a hostile environment for students.

Another major problem with Title IX requirements is that they are vague standards that universities must meet in order to “protect” their students.<sup>36</sup> In reality, once a scandal breaks, universities settle out of court (using insurance), fire their high-level administrators such as head coaches, presidents, and athletic directors (with severance), and “agree” to amend their institutional policies without any admission of guilt or wrongdoing on the part of the university.<sup>37</sup>

Likewise, the NCAA has been extraordinarily ineffective in administering institutional discipline despite its potential for oversight. Initially founded in 1906 to “protect young people from the dangerous and exploitive athletics practices of the time,” the NCAA’s role has evolved into a rulemaking and administrative body for all of college sports.<sup>38</sup> For example, the NCAA establishes “levels of membership [in different athletic conferences and divisions], numbers of scholarships, [and] recruitment policies . . . to an enormously detailed degree.”<sup>39</sup> However, until 2017, the NCAA had “no rules prohibiting either sexual harassment or sexual assault by college athletes, nor any remedies against athletes . . . [or] institutions” whose athletic programs presented heightened risks of sexual misconduct.<sup>40</sup> Hopefully these new guidelines will be enforced and will encourage

33. See Associated Press, *supra* note 25.

34. Hunter, *supra* note 27, at 288, 291.

35. Tim Doherty, *Art Briles ‘Not a Candidate’ for Position in USM Football Program*, WLOX (Feb. 6, 2019, 11:29 PM), <https://www.wlox.com/2019/02/06/art-briles-not-candidate-position-usm-football-program/> [<https://perma.cc/AF4R-9QDV>] (“I have interviewed Art Briles for an assistant position at Southern Miss and believe he is a man who deserves a second chance. . . . He committed no crime.”).

36. See Solomon, *supra* note 13, at 417 (“The case was settled only after the plaintiffs were satisfied that the university made significant progress in sexual assault prevention education and the way in which the school responded to assault claims, which included the hiring of six more people in Title IX compliance positions.”).

37. See *id.*

38. Dan Treadway, *Why Does the NCAA Exist?*, HUFFPOST (Aug. 6, 2013, 1:39 PM), [https://www.huffpost.com/entry/johnny-manzel-ncaa-eligibility\\_b\\_3020985](https://www.huffpost.com/entry/johnny-manzel-ncaa-eligibility_b_3020985) [<https://perma.cc/6PDV-XVED>].

39. Scales, *supra* note 6, at 224.

40. *Id.* But see NCAA Board of Governors Policy on Campus Sexual Violence, NAT’L COLLEGIATE ATHLETIC ASS’N (Apr. 30, 2020), <https://www.ncaa.org/sport-science-institute/topics/ncaa-board-governors-policy-campus-sexual-violence> [<https://perma.cc/GN83-KG7E>].

Each university chancellor/president, director of athletics and campus Title IX coordinator must attest annually that:

1. The athletics department is informed on, integrated in, and compliant with



universities to become proactive in overseeing their Title IX operations as well as the disciplinary conduct, or lack thereof, in their athletic departments. Unfortunately, history shows that investigating and amending a school's policies is an arduous task, with some investigations taking years to complete.<sup>41</sup> Therefore, a more effective action is to bring private lawsuits against athletic departments that engage in conspiratorial practices.

#### B. THE ANATOMY OF CIVIL CONSPIRACIES

Generally, actions of civil conspiracy arise through state common law or statutes, as well as federal statutes.<sup>42</sup> More specifically, federal law provides a cause of action against those who conspire to deprive anyone of the equal protection of the laws.<sup>43</sup> A civil conspiracy has five elements: (1) “an association of two or more persons”; (2) “an unlawful objective”; (3) “an agreement or understanding with regard to the objective and the manner in which it was to be achieved”; (4) “commission of an unlawful, overt act in furtherance of the conspiracy”; and (5) “injury as a result of the overt act.”<sup>44</sup> Actions of civil conspiracy against university athletic programs could pose a great advantage to plaintiffs based on the damages available. Defendants in a civil conspiracy are held jointly and severally liable for the damages suffered by the plaintiff; moreover, a plaintiff can recover compensatory damages and attorney's fees, as well as punitive damages in “egregious cases.”<sup>45</sup>

Damages aside, the most important aspect of civil conspiracy claims for

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institutional policies and processes regarding sexual violence prevention and proper adjudication and resolution of acts of sexual and interpersonal violence.

2. The institutional policies and processes regarding sexual violence prevention and adjudication, and the name and contact information for the campus Title IX coordinator, are readily available within the department of athletics, and are provided to student-athletes.
3. All student-athletes, coaches and staff have been educated each year on sexual violence prevention, intervention and response, to the extent allowable by state law and collective bargaining agreements.

....

Further, the athletics department *will cooperate* with college or university investigations into reports and matters related to sexual and interpersonal violence involving student-athletes and athletics department staff in a manner compliant with institutional policies for all students.

If a school is not able to attest their compliance with the above requirements, it will be prohibited from hosting any NCAA championship competitions for the next applicable academic year.

*Id.* (emphasis added).

41. See generally Sara Lipka, *How 46 Title IX Cases Were Resolved*, CHRON. OF HIGHER EDUC. (Jan. 15, 2016), <https://www.chronicle.com/article/How-46-Title-IX-Cases-Were/234912> [<https://perma.cc/72QK-HXB8>].

42. James L. Buchwalter, *Cause of Action for Civil Conspiracy*, in 54 CAUSES OF ACTION 2D 603 § 1 (2012).

43. 42 U.S.C. § 1985(3); see also 20 U.S.C. § 1681.

44. Buchwalter, *supra* note 42.

45. *Id.* §§ 38–42.

plaintiffs lies in the joint and several liability imposed on members of the conspiracy. This stipulation provides that all involved in covering up sexual assaults at the behest of a superior would be held liable for such injustice, as opposed to only the “faces” of the institution.<sup>46</sup> Liability of co-conspirators extends to those who “encouraged, facilitated, or planned the tort in furtherance of the conspiracy.”<sup>47</sup> In other words, all those implicated in the conspiracy may be charged with an actionable deed charged to one member.<sup>48</sup> The issue with current actions in these cases is the lack of personal accountability for the individuals involved and the subsequent settlements by parent institutions<sup>49</sup> who take the brunt of the backlash in the courtroom and in the media.

This distinction could provide a powerful argument for potential plaintiffs who will be able to implicate officials who may not have carried out the unlawful act but saw to its completion. Interestingly, the plaintiff does not have to prove that all members of the conspiracy were in contact with one another, and it is possible that a conspiracy existed despite conspirators not knowing all of the other members.<sup>50</sup> Additionally, there are policy reasons which might encourage courts to allow the assertion of civil conspiracy claims against university officials due to issues with disclosure. Under the Violence Against Women Act (VAWA), the Family Educational Rights Privacy Act, Title IX requirements, and institutional policy, universities are subject to confidentiality clauses which make it difficult for plaintiffs to get all of the facts and know who was involved without a chance for formal discovery.<sup>51</sup>

As previously discussed, institutions often retain their lower-level employees who likely carried out the cover-up and pressured victims to not come forward. Universities then either fire their seated high-level officials, like head coaches or athletic directors, or encourage them to resign (with full severance of course), all the while maintaining secrecy and keeping the public in the dark about the extent of the damage done.<sup>52</sup>

Thus, properly applied, claims of civil conspiracy against university officials

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46. See generally Phillip Ericksen, *Federal Judge Allows New Lawsuit Against Baylor, Briles, McCaw, Waco PD*, WACO-TRIBUNE HERALD (July 25, 2018), [https://www.wacotrib.com/news/city\\_of\\_waco/federal-judge-allows-new-lawsuit-against-baylor-briles-mccaw-waco/article\\_442f904e-8b28-5923-b103-337c01762e78.html](https://www.wacotrib.com/news/city_of_waco/federal-judge-allows-new-lawsuit-against-baylor-briles-mccaw-waco/article_442f904e-8b28-5923-b103-337c01762e78.html) [<https://perma.cc/T98X-GVFW>].

47. *Reuter v. MasterCard Int'l, Inc.*, 921 N.E.2d 1205, 1217 (Ill. App. Ct. 2010).

48. *Mireles v. Wells Fargo Bank, N.A.*, 845 F. Supp. 2d 1034, 1064 (C.D. Cal. 2012).

49. See Mitch Smith & Anemona Hartocollis, *Michigan State's \$500 Million for Nassar Victims Dwarfs Other Settlements*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/larry-nassar-michigan-state-settlement.html> [<https://perma.cc/ZVT4-UCTA>] (referencing massive settlements by MSU and Penn State after the Nassar and Sandusky scandals, respectively); see also Solomon, *supra* note 13, at 382 (citing a \$2.48 million settlement by the University of Tennessee following a Title IX lawsuit by eight female students).

50. Buchwalter, *supra* note 42, § 10.

51. See Baylor Regents' Answer, *supra* note 23, at 6.

52. See *id.* at 25. Despite being the “the most comprehensive document that a University has ever issued,” the “Findings of Fact” was still a vague summary of the complete investigative report made by the law firm Pepper Hamilton, hired by Baylor. *Id.*; see Baylor Univ. Bd. of Regents, *Findings of Fact*, BAYLOR UNIV. 1 (2016) [hereinafter *Findings of Fact*], available at <https://www.baylor.edu/thefacts/doc.php/266596.pdf> [<https://perma.cc/YE7A-5BM7>].

who cover up criminal conduct will hold them responsible for their own actions as well as the actions of their co-conspirators, deterring university faculties across the country from attempting to pull off a “Baylor” or “MSU” type cover-up. However, before analyzing how plaintiffs like those in the Baylor and MSU cases might bring such suits, one must review the pertinent facts in those two cases. For the purposes of this Comment, civil conspiracies will be discussed in their general terms, followed by potential applications of state civil conspiracy law and a focus on 42 U.S.C. § 1985(3) conspiracy claims in the federal context.

## II. A CLOSER EXAMINATION OF THE FAILURES OF BAYLOR AND MICHIGAN STATE UNIVERSITY

### A. “A BUNCH OF BAD DUDES”: BAYLOR UNIVERSITY

*“I think as long as they’re catching footballs and scoring touchdowns, the school won’t do anything.”<sup>53</sup>*

As one sports law expert put it:

[T]he Baylor saga makes it abundantly clear that Penn State’s situation<sup>54</sup> did not cause fundamental legal or institutional changes to occur within big-time college athletics and shows that a dark and troubling culture continues to exist even within highly prestigious universities: a culture built on intense loyalty to protect the interests of the athletic program, almost at any cost. At both Penn State and Baylor, prestigious universities—led by both prominent university presidents and high-profile head football coaches—systematically protected its football program at the expense of victims of sexual violence.<sup>55</sup>

Starting as early as 2011, Baylor, and even the Waco Police Department, made clear that they would be playing by different rules when it came to investigating any crimes allegedly committed by football players.<sup>56</sup> One physical altercation between athletes and nonathletes at an off-campus event led to three football players being charged with assault; although, the police allegedly “took extraordinary steps to keep [the incident] from public view.”<sup>57</sup> According to a police report, the Waco police pulled the case file from the computer system and kept it in a locked office.<sup>58</sup> In another incident, “a football operations staff official

53. Paula Lavigne & Mark Schlabach, *Police Records Detail Several More Violence Allegations Against Baylor Football Players*, ESPN (May 19, 2016), [http://www.espn.com/espn/otl/story/\\_/id/15562625/waco-police-records-reveal-additional-violence-allegations-baylor-football-players](http://www.espn.com/espn/otl/story/_/id/15562625/waco-police-records-reveal-additional-violence-allegations-baylor-football-players) [https://perma.cc/K9XB-DD2P] (quoting an alleged victim).

54. Solomon, *supra* note 13, at 401 (referring to the 2011 scandal at Penn State involving Jerry Sandusky, a former Penn State football coach, who had been using university facilities to sexually abuse young boys while Penn State officials knew of the abuse and failed to report it).

55. *Id.*

56. See *id.* at 413–14; Lavigne & Schlabach, *supra* note 53.

57. Lavigne & Schlabach, *supra* note 53.

58. Tom Fornelli, *Waco Police Reportedly Shielded Baylor Allegations from Public: 3 Things to Know*, CBS SPORTS (May 18, 2016, 3:06 PM), <https://www.cbssports.com/college-football/news/waco-police-reportedly-shielded-baylor-allegations-from-public-3-things-to-know/> [https://perma.cc/6LNH-

tried to talk [a] victim out of pressing criminal charges. Meanwhile, Coach Briles texted Athletics Director Ian McCaw: ‘Just talked to [the player] - he said Waco PD was there - said they were going to keep it quiet.’”<sup>59</sup> McCaw responded: “That would be great if they kept it quiet!”<sup>60</sup>

These communications set the tone for the factual allegations: that Baylor considered football more vital than the safety of its students, and, moreover, that “win at all costs” meant that school officials and directors would do anything they could to ensure their football team’s success.<sup>61</sup> Emails and text messages filed as part of a libel suit by former Director of Football Operations Collin Shillinglaw against Baylor further “reveall[ed] that Briles, Shillinglaw, other assistant coaches and even former athletic director Ian McCaw were all tied to a pattern of covering up wrongdoing by arranging cooperation from authorities and legal representation.”<sup>62</sup>

### 1. Elizabeth Doe v. Baylor University

This complaint, like many others, begins with allegations regarding the “Baylor Bruins,” a “female hostess program” through which young, attractive female students would accompany recruits through campus and ensure they enjoyed their time at their university visit.<sup>63</sup> Such a program is reminiscent of the female ambassador program at the University of Colorado.<sup>64</sup> An investigation concluded that “at least 52 acts of rape, including five gang rapes, by not less than 31 different football players” had occurred under Art Briles’ tenure as head coach between 2011 and 2014.<sup>65</sup> Notably, Baylor failed to take appropriate action with regard to these complaints.<sup>66</sup>

The complaint cites an internal investigation by the Baylor Regents (the Findings of Fact) which “uncovered an endemic culture in the football program of attempting to conceal and avoid reporting disciplinary problems involving players.”<sup>67</sup> Additionally, the Findings of Fact conceded that “athletics and football personnel” not only “*affirmatively* chose not to report sexual violence” but “*actively* divert[ed] cases from the student conduct or criminal processes.”<sup>68</sup> It is this action, rather than Baylor’s inaction, that is the most troubling. The school did not simply fail to follow procedures or obey Title IX; its athletic department took the

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UUFP] (“The investigating officer asked the commander that ‘the case be pulled from the computer system so that only persons who had a reason to inquire about the report would be able to access it.’”).

59. Chip Patterson, *Docs: Art Briles, Baylor Officials Actively Involved in Covering Up Player Incidents*, CBS SPORTS (Feb. 3, 2017, 3:14 PM), <https://www.cbssports.com/college-football/news/docs-reveal-art-briles-baylor-coaches-actively-involved-in-covering-up-player-incidents/> [https://perma.cc/QU5X-HRTN].

60. *Id.*

61. See Elizabeth Doe Complaint, *supra* note 24, ¶¶ 12–13, 59–60, 62.

62. Patterson, *supra* note 59.

63. Elizabeth Doe Complaint, *supra* note 24, ¶¶ 25–27.

64. See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1180 (10th Cir. 2007).

65. Elizabeth Doe Complaint, *supra* note 24, ¶¶ 40–41.

66. Findings of Fact, *supra* note 52, at 10.

67. Elizabeth Doe Complaint, *supra* note 24, ¶ 71.

68. Findings of Fact, *supra* note 52, at 10–11 (emphasis added).

law into its own hands. This is further illustrated in the following summary of Elizabeth Doe's complaint.

On April 18, 2013, Ms. Doe was allegedly raped by two Baylor football players, Tre'Von Armstead and Shamycheal Chatman.<sup>69</sup> Following a call from Doe's roommate's boyfriend, police soon arrived at the scene.<sup>70</sup> Despite a prior rape allegation against Chatman by a student athletic trainer,<sup>71</sup> Waco police failed to interview either Chatman or Armstead.<sup>72</sup> Ultimately, few meaningful consequences resulted from the incident. Baylor helped Chatman transfer to Sam Houston State University<sup>73</sup> and eventually expelled Armstead, two years after Elizabeth Doe's first complaint to police, citing a generic "violation of team rules."<sup>74</sup>

## 2. *Setting the Record Straight—Shillinglaw v. Baylor University*

In their answer to a defamation lawsuit filed by Colin Shillinglaw, the former Assistant Athletics Director for Football Operations at Baylor, the Board of Regents sought to "set the record straight" and provide greater insight into Briles and the athletic department's conduct.<sup>75</sup> According to the Board, Shillinglaw "served as a pivotal figure in an internal disciplinary system" which led to sexual assaults and other misconduct being mishandled or not reported.<sup>76</sup> In his capacity as disciplinarian, Shillinglaw allegedly conspired with Briles to structure their informational system to "insulate[] Briles from knowing about misconduct."<sup>77</sup> When Briles was actually alerted to player disciplinary issues, he "encouraged Shillinglaw and . . . his staff to keep the problems internal to the program and not alert other campus authorities," resulting in a system where football players were held to different standards than other students.<sup>78</sup> Even accusations of gang rape against his football players did not persuade Briles to investigate his players' culpability or even punish or suspend his players.<sup>79</sup>

Unsurprisingly, Shillinglaw was also uncooperative and untruthful with the Pepper Hamilton investigators who were hired for an independent investigation of Baylor affairs at the behest of the Board.<sup>80</sup> The investigators' Findings of Fact detailed evidence that Briles had relied on Shillinglaw to find legal representation for players accused of any criminal misconduct.<sup>81</sup> Moreover, Shillinglaw told Pepper Hamilton that he had no recollection of meeting with an alleged domestic violence victim of Baylor defensive end, Shawn Oakman, yet Shillinglaw had the

69. Elizabeth Doe Complaint, *supra* note 24, ¶¶ 83, 89, 97.

70. *Id.* ¶¶ 92–94.

71. *Id.* ¶ 77.

72. *Id.* ¶ 100.

73. *See id.* ¶¶ 105–06.

74. *Id.* ¶¶ 121–22.

75. Baylor Regents' Answer, *supra* note 23, at 2.

76. *Id.*

77. *Id.* at 4.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 13.

victim's contact information in his cell phone and emails showed that he had even received a police report detailing Oakman's past incidences of domestic abuse.<sup>82</sup> These allegations by the Baylor Board highlight the complexity and effectiveness of the "insulation" between head coach Art Briles and the staff underneath him—insulation which makes it far more difficult for potential plaintiffs to make factual allegations against suspected perpetrators.

### 3. Jane Doe v. Baylor University

An additional complaint against Baylor and Briles provided further insight into the structure of insulation within the football program, revealing text messages between Briles and an assistant coach about how to handle "disciplining" a player.<sup>83</sup> Assistant coaches did the dirty work while Briles advised from afar:

In fact, it would not be the first time a Baylor football player had brandished a gun at a female student-athlete. Earlier that semester, in February 2013, an assistant coach notified Briles that a football player had brandished a gun at a female student-athlete. Pepper Hamilton reportedly uncovered the following text messages between the assistant coach and Briles:

- Briles: "what a fool - she reporting to authorities."
- Assistant coach: "She's acting traumatized . . . Trying to talk her clam [sic] now . . . Doesn't seem to want to report though."
- Briles: "U gonna talk to [the player]."
- Assistant coach: "Yes sir, just did. Caught him on the way to class . . . Squeezed him pretty good."<sup>84</sup>

If nothing else, these text messages show the intention of Briles and his coaches to handle discipline "in-house," as well as their inappropriate involvement with and confrontation of alleged victims.

### B. A TOTAL SYSTEMATIC FAILURE: MICHIGAN STATE UNIVERSITY AND LARRY NASSAR

On its face, the heinous saga of Larry Nassar may seem altogether different from the events which took place at Baylor. After all, Nassar was a cunning and calculated pedophile who used his medical degree and position of authority to abuse young women and girls throughout his tenure as a "professional."<sup>85</sup> Nassar,

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82. *Id.* at 27. According to the police report, Oakman shoved a woman into "brick walls and cabinets and shoved her face onto a bed." Creg Stephenson, *Baylor's Shawn Oakman Accused of Domestic Violence in 2013, Report Says*, ADVANCE LOC. (Jan. 13, 2019), [https://www.al.com/sports/2016/04/baylors\\_shawn\\_oakman\\_accused\\_o.html](https://www.al.com/sports/2016/04/baylors_shawn_oakman_accused_o.html) [<https://perma.cc/H6A7-U8A2>].

83. Plaintiff's Original Complaint & Jury Demand ¶ 93, *Doe v. Baylor Univ.*, 313 F. Supp. 3d 786 (W.D. Tex. 2017) (No. 6:17-CV-125) [hereinafter *Jane Doe Complaint*].

84. *Id.*

85. See Evans et al., *supra* note 16.

like many serial abusers, was a master manipulator who could even fool police officers into believing the alleged abuse suffered by his victims was a legitimate medical treatment.<sup>86</sup> Nassar hid behind a shield of “good will” as well as a multitude of coaches, parents, and administrators who were willing to vouch for his character.<sup>87</sup> These distinctions aside, the story of Larry Nassar is very similar to the Baylor scandal considering MSU’s failure to investigate their own employee, all the while endangering countless students and young women from across the country.

MSU’s internal investigations into Nassar were just as troubling as Baylor’s, if not more so. Even after the arrest, guilty plea, and testimonials of more than 150 victims, the result was the same: a settlement, a sealed record, and no sign of new legislation or even institutional reform on the part of MSU.<sup>88</sup> To understand the gravity of MSU’s failures, one must understand specifically what these women told their coaches and trusted officials and that each allegation, despite being years apart, described virtually the same facts.

During physical examinations and physical therapy of female athletes, Nassar, in a closed room, without wearing gloves, using lubricant, or obtaining the patient’s consent, would digitally penetrate the patient vaginally and anally, cup their buttocks, and massage their breasts.<sup>89</sup> Nassar would even become visibly aroused during these examinations.<sup>90</sup> When confronted about his “procedures” by MSU and the police, Nassar explained that he was performing a legitimate medical procedure known as a “pelvic adjustment” and that his patients simply misunderstood what he was doing.<sup>91</sup> Doctors (all of them Nassar’s colleagues) who were consulted about the legitimacy of Nassar’s “treatments” concluded that Nassar’s actions were “not of a sexual nature.”<sup>92</sup> In turn, MSU’s Title IX office dismissed complaint after complaint and charges were not filed.<sup>93</sup> All the while, more and more women were subjected to Nassar’s abuse.

As early as 1997, the cover-up began at MSU.<sup>94</sup> A complaint filed against MSU stated that the university and Kathie Klages, former MSU gymnastics coach, were

86. See Solomon, *supra* note 13, at 425–26.

87. John Barr & Dan Murphy, *Nassar Surrounded by Adults Who Enabled His Predatory Behavior*, ABC NEWS (Jan. 16, 2018, 2:25 PM), <https://abcnews.go.com/Sports/nassar-surrounded-adults-enabled-predatory-behavior/story?id=52387364> [<https://perma.cc/P93J-K5QE>].

88. Matt Mencarini & Justin A. Hinkley, *Michigan State and 332 of Larry Nassar’s Victims Reach ‘Historic’ \$500 Million Settlement*, LANSING ST. J. (May 16, 2018, 5:44 PM), <https://www.lansingstatejournal.com/story/news/local/2018/05/16/larry-nassar-michigan-state-settlement-lawsuit/614502002/> [<https://perma.cc/D322-RJRX>].

89. Complaint & Jury Demand ¶¶ 56, 82, 89, *Brown v. Mich. St. Univ.*, No. 1:18-cv-1005 (W.D. Mich. Sept. 6, 2018) 2018 WL 4275601 [hereinafter *Brown Complaint*].

90. *Id.* ¶ 89; Mencarini, *supra* note 1.

91. *Brown Complaint*, *supra* note 89, ¶¶ 60–61; see Tracy Connor & Rehema Ellis, *Michigan Police Department Apologizes for Doubting 2004 Larry Nassar Accuser*, NBC NEWS (Jan. 31, 2018, 6:20 PM), <https://www.nbcnews.com/news/us-news/michigan-police-department-apologize-doubting-larry-nassar-accuser-n843126> [<https://perma.cc/FYK8-2THK>].

92. Monica Davey & Mitch Smith, *In Nassar Case, Michigan State Wanted Famed Ex-Prosecutor to Both Examine and Defend It*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/us/michigan-state-nassar-fitzgerald.html> [<https://perma.cc/8BZP-SU2E>].

93. See *id.*

94. See *Brown Complaint*, *supra* note 89, ¶ 58.

made aware of Nassar's conduct by a minor female athlete, Larissa Boyce.<sup>95</sup> Boyce told Klages that Nassar had abused her on multiple occasions during "treatment."<sup>96</sup> Klages then asked another gymnast if she had received the same "treatment" from Nassar as Boyce, who responded that she had; ultimately, instead of investigating or reporting the alleged incidents, Klages convinced both athletes to not "bring up Nassar's conduct" or file a formal complaint.<sup>97</sup> Klages was later convicted of lying to police during the Nassar investigation and was sentenced to 90 days in jail.<sup>98</sup>

The complaint's allegations did not end there. It went on to name many other employees or former employees from MSU who were notified of Nassar's conduct:

- 1999: Kelli Bert, head coach of the women's track and field team, as well as other track trainers;<sup>99</sup>
- 2000: "the highest-ranking employees within MSU's Training Staff";<sup>100</sup>
- 2001: Lianna Hadden, MSU athletic trainer;<sup>101</sup>
- 2004: Gary E. Stollak, former MSU psychologist whose license was revoked in September 2018, following Nassar's conviction, for failing to report child abuse to authorities;<sup>102</sup>
- 2004: Meridian Township Police Department in Meridian Township, Michigan;<sup>103</sup>
- 2014: William Strampel, former dean of MSU College of Osteopathic Medicine and boss of Larry Nassar,<sup>104</sup> who allegedly sent Nassar a list

95. *Id.* ¶ 59.

96. *Id.*

97. *Id.* ¶¶ 60-61.

98. Eric Levenson & Kristina Sgueglia, *Ex-Michigan State Gymnastics Coach Turns Herself in on Charges Related to Nassar Case*, CNN (Aug. 30, 2018, 12:25 PM), <https://www.cnn.com/2018/08/30/us/michigan-state-coach-kathie-klages-nassar/index.html> [<https://perma.cc/455U-2QTV>]; Dan Murphy & John Barr, *Judge Sentences Ex-Michigan State Gymnastics Coach Kathie Klages to Jail*, ESPN (Aug 4, 2020), [https://www.espn.com/college-sports/story/\\_/id/29594880/judge-sentences-ex-michigan-state-gymnastics-coach-kathie-klages-jail](https://www.espn.com/college-sports/story/_/id/29594880/judge-sentences-ex-michigan-state-gymnastics-coach-kathie-klages-jail) [<https://perma.cc/5UCE-S2TM>].

99. Brown Complaint, *supra* note 89, ¶ 63.

100. *Id.* ¶ 65.

101. *Id.* ¶ 73.

102. *Id.* ¶ 76; Kara Berg, *Former MSU Psychologist Surrenders License After Failing to Report Nassar Abuse*, LANSING ST. J. (Sept. 28, 2018, 11:08 AM), <https://www.lansingstatejournal.com/story/news/local/2018/09/28/msu-psychologist-larry-nassar-sex-abuse-license/1453742002/> [<https://perma.cc/TU92-QR3F>]. Stollak also sat down with the parents of an abuse victim and Nassar to discuss the allegations. Berg, *supra*.

103. Brown Complaint, *supra* note 89, ¶ 80.

104. John Counts, *Ex-MSU Dean William Strampel Has Criminal Case Adjourned*, MICH. LIVE (Jan. 30, 2019), [https://www.mlive.com/news/index.ssf/2018/07/ex-msu\\_dean\\_william\\_strampel\\_h.html](https://www.mlive.com/news/index.ssf/2018/07/ex-msu_dean_william_strampel_h.html) [<https://perma.cc/627A-SAZA>]. In 2019, Strampel was convicted of felony misconduct in office and willful neglect of duty and was sentenced to a year in jail. See Megan Banta, *Former MSU Dean William Strampel Sentenced to One Year in Jail*, LANSING ST. J. (Aug. 7, 2019, 2:20 PM), <https://www.lansingstatejournal.com/story/news/local/2019/08/07/former-msu-dean-william-strampel-sentenced-larry-nassar-michigan-state/1933906001/> [<https://perma.cc/LR9A-BD3P>]. Strampel's retirement from MSU included full benefits. Counts, *supra*.



of “guidelines” to adhere to during his “treatments”;<sup>105</sup>

- 2017: Brooke Lemmen, D.O., who resigned amidst allegations that she “[r]emoved several boxes of confidential treatment patient records from . . . MSU’s Sports Medicine clinic at . . . Nassar’s request . . . [and m]ade a staff member feel pressured not to fully cooperate in an internal investigation . . . against . . . Nassar.”<sup>106</sup>

With so many complaints against Nassar over such a long period of time, MSU’s intent was clear: no one was to get to Nassar. From 1997 to 2014, approximately eight different women informed or notified MSU of Larry Nassar’s abuse, yet MSU took no action.<sup>107</sup> Even worse, MSU’s Title IX office told victims that they simply did not “understand the ‘nuanced difference’ between sexual assault and an appropriate medical procedure,”<sup>108</sup> further dismissing victims while providing Nassar opportunity to continue abusing his patients. MSU protected Nassar by presenting the illusion to the outside world that it had things under control.

Nassar was temporarily suspended in 2014 after he was accused of sexually assaulting a graduate student during a medical examination.<sup>109</sup> Despite this complaint, MSU cleared Nassar from internal discipline and let him come back to work.<sup>110</sup> Upon his return, some “mandatory guidelines” were put into place by Strampel, the dean of the college of osteopathic medicine at the time, which stated Nassar could no longer treat patients alone, had to alter his “procedure” to minimize skin-to-skin contact, and new staff members were to be educated on these new restrictions.<sup>111</sup> Those guidelines were no more than a smoke screen:

In a March 14, 2017 interview with Michigan State University Police Department Detective Sergeant Christopher Rozman, Defendant Strampel admitted that the institutional restrictions and guidelines that Defendant Nassar was subject to were illusory in nature because he only shared them with [another one of Nassar’s supervisors] and took no action whatsoever to ensure that the institutional restrictions and guidelines were implemented, followed, or enforced.<sup>112</sup>

MSU’s failure to respond to allegations against Nassar was part of an ongoing systematic failure. There were also multiple instances of MSU failing to respond to complaints of sexual harassment of employees and dating violence.<sup>113</sup> The

105. Brown Complaint, *supra* note 89, ¶ 95.

106. *Id.* ¶ 139.

107. *Id.* ¶ 243; Kim Kozlowski, *What MSU Knew: 14 Were Warned of Nassar Abuse*, DETROIT NEWS (Jan. 19, 2018, 4:58 PM), <https://www.detroitnews.com/story/tech/2018/01/18/msu-president-told-nassar-complaint-2014/1042071001/> [<https://perma.cc/H9ZK-NAWH>].

108. Mencarini, *supra* note 1.

109. John Barr & Nicole Noren, *Lawsuit: MSU Failed to Act on Early Claims of Sex Abuse by School and USA Gymnastics Doctor*, ESPN (Dec. 21, 2016), [https://www.espn.com/espn/otl/story/\\_/id/18325512/lawsuit-alleges-msu-failed-act-claims-sex-abuse-school-usa-gymnastics-doctor](https://www.espn.com/espn/otl/story/_/id/18325512/lawsuit-alleges-msu-failed-act-claims-sex-abuse-school-usa-gymnastics-doctor) [<https://perma.cc/7D5C-GY8U>].

110. Brown Complaint, *supra* note 89, ¶ 108.

111. *Id.* ¶ 94.

112. *Id.* ¶ 109.

113. *See id.* ¶ 240.

inaction, phony guidelines, and illusory protective measures made clear to Nassar's victims that they were not to be believed and that MSU would prioritize Nassar's well-being over theirs, despite multiple allegations from multiple sources.

### III. CIVIL CONSPIRACY IN ACTION

*"The football program was a black hole into which reports of misconduct such as drug use, physical assault, domestic violence, brandishing of guns, indecent exposure and academic fraud disappeared."*<sup>114</sup>

#### A. STATE LAW ANALYSIS

State law claims of civil conspiracy have many advantages for plaintiffs in positions similar to those at Baylor and MSU. One of these benefits lies in the way of evidence. Generally, a party does not need direct evidence to prove a civil conspiracy; instead "[i]t may be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished."<sup>115</sup> Thus, depending on the purpose of the alleged conspiracy, plaintiffs may not necessarily have to show a single outright act.<sup>116</sup> Additionally, plaintiffs may have some leeway when it comes to proving an agreement between conspirators.<sup>117</sup> Some courts have held that a conspiracy can be established based on an implied agreement between conspirators.<sup>118</sup>

##### 1. *Involvement of Two or More Persons*

First, a civil conspiracy requires the participation of two or more individuals "acting together to achieve a shared goal that results in injury to another."<sup>119</sup> In Baylor's case, it is likely that text messages and other correspondence between Briles and his assistant coaches as well as discussions between Briles and Shillinglaw are evidence of an agreement between at least two individuals.<sup>120</sup> However, civil conspiracy claims are restricted by the so-called intracorporate-conspiracy doctrine (ICD) which instructs that "an agreement between or among agents of the same legal entity . . . is not an unlawful conspiracy."<sup>121</sup> At first glance, it would appear that such a doctrine would wipe out any claim of civil conspiracy against employees of a university, but a closer analysis shows a potential opening in the law.<sup>122</sup>

114. Baylor Regents' Answer, *supra* note 23, at 13.

115. DeNourie & Yost Homes, LLC v. Frost, 854 N.W.2d 298, 316 (Neb. 2014).

116. *See id.*

117. *See id.*

118. *Id.*; Scherer v. Balkema, 840 F.2d 437, 442 (7th Cir. 1988).

119. Macomber v. Travelers Prop. & Cas. Corp., 894 A.2d 240, 254 (Conn. 2006) (quoting Harp v. King, 835 A.2d 953, 972 (Conn. 2003)).

120. *See* Baylor Regents' Answer, *supra* note 23, at 14.

121. Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769–771 (1984)).

122. *See* J.S. Nelson, *The Corporate Conspiracy Vacuum*, 37 CARDOZO L. REV. 249, 254 (2015) (arguing for reimposing liability for an intracorporate conspiracy to prevent crime, regulate actions of agents, and provide more effective recourse for victims).

The most recent discussion of the ICD is in the 2017 Supreme Court case, *Ziglar v. Abbasi*.<sup>123</sup> In *Ziglar*, the Court discussed the validity of applying the ICD to a § 1985(3) civil rights claim against federal officials for holding plaintiffs, all of whom were of “Arab or South Asian descent,” in “harsh pretrial conditions” because of racial animus.<sup>124</sup> The majority acknowledged that the current “law on the point is not well established” and that the Court had yet to approve of the application of the ICD in the context of § 1985(3).<sup>125</sup> While the majority’s discussion of the application of the ICD to civil rights conspiracy claims is certainly not an outright denouncement of the rule,<sup>126</sup> it does acknowledge the possibility that “different considerations apply to a conspiracy respecting equal protection guarantees, as distinct from a conspiracy in the antitrust context” where the ICD has traditionally been employed.<sup>127</sup> Importantly, the Court’s policy concerns about restricting open communication between federal officers would not be applicable to a sex discrimination case involving members of a university athletic department, where there is no concern of national security.<sup>128</sup>

Additionally, the Supreme Court recognized that for the ICD to thwart civil conspiracy claims, the conspirators must have made an agreement while acting in their “official capacities.”<sup>129</sup> Applying this reasoning to the events at Baylor, when “football coaches and staff took improper steps in response to disclosures of sexual assault or dating violence that precluded the University from fulfilling its legal obligations” or “had inappropriate involvement in disciplinary or criminal matters,” they were likely acting outside their capacity as university employees.<sup>130</sup> Ultimately, there is virtually no federal case law discussing application of the ICD to § 1985 claims or any federal case law under any other civil conspiracy statute in the context of sex discrimination by university officials, so it is certainly an open question as to how a court might rule.

The potential issue of official immunity should also be addressed. “Official immunity is protection from tort liability afforded to public officers and employees for acts performed in the *exercise* of their discretionary functions.”<sup>131</sup> Thus, the main focus of the analysis is on *what* the official was doing, not their status or role as an official. Courts have also found liability if there is a danger of imminent harm imposed by the official’s inaction or if a special relationship existed between the official (or the school) and the student.<sup>132</sup> The essential argument for holding officials liable, particularly coaches and athletic staff, is that they have elected to take the role of disciplinarian and investigator and, by doing

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123. 37 S. Ct. at 1867–69.

124. *Id.* at 1847, 1853, 1867–68.

125. *Id.* at 1868 (noting a circuit split on ICD’s application to a § 1985 conspiracy claim).

126. *Id.* (“When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability.”).

127. *Id.*

128. *See id.*

129. *Id.* at 1867 (referring to agents of the same legal entity making agreements “in the course of their official duties”).

130. Findings of Fact, *supra* note 52, at 11.

131. Hunter, *supra* note 27, at 293 (internal quotation marks omitted) (emphasis added).

132. *Id.* at 294–95.

so, have formed a “special relationship” which could result in liability.<sup>133</sup> Likewise, given the repeated failures of college officials to protect their students, it is in the interest of public safety for a court to hold those officials accountable for their actions.

## 2. An Unlawful Objective

The second element of a civil conspiracy is an “unlawful objective.”<sup>134</sup> This broad terminology has various interpretations in different jurisdictions, but generally requires that the plaintiff prove the defendants acted with malice or intent to harm them.<sup>135</sup> Currently, there is a large disagreement among states as to whether the conspiracy itself gives rise to a cause of action or if a separate underlying tort must also be present.<sup>136</sup> The Texas Supreme Court has held that “merely proving a joint ‘intent to engage in the conduct that resulted in [an] injury’” is not enough to bring an action for civil conspiracy.<sup>137</sup> By contrast, the Supreme Court of Florida has held that if the plaintiff can show the conspirators held a “peculiar power of coercion” as compared to an individual, “then conspiracy itself becomes an independent tort.”<sup>138</sup> While this approach has been heavily criticized for its vagueness,<sup>139</sup> it does illustrate that at least one state supreme court has been willing to recognize the inherent power imbalance a conspiracy imposes on individuals.<sup>140</sup>

In the context of the Baylor or MSU scandals, finding an “unlawful objective” outside of the federal statute presents some hurdles. For one, Texas does not recognize negligence as an unlawful objective giving rise to a civil conspiracy claim “[b]ecause negligence by definition is not an intentional wrong,” so no group can agree or conspire to be negligent.<sup>141</sup> Problematically, most of the state law claims filed by victims against Baylor have been for negligence or gross negligence.<sup>142</sup> Likewise, Michigan has similar laws requiring proof of a separate tort.<sup>143</sup> And while survivors of Larry Nassar have also tended to file claims of negligence against MSU,<sup>144</sup> one survivor did include a claim of civil conspiracy against MSU, Nassar,

133. See *id.* at 295.

134. Buchwalter, *supra* note 42, § 1.

135. *Id.* § 9.

136. Norman L. Greene, *Civil Conspiracy and the Rule of Law: A Proposal for Reappraisal and Reform*, 64 ARK. L. REV. 301, 333–35 (2011).

137. *Tri v. J.T.T.*, 162 S.W.3d 552, 557 (Tex. 2005) (quoting *Juhl v. Arlington*, 936 S.W.2d 640, 644 (Tex. 1996)).

138. *Churruca v. Miami Jai-Alai, Inc.*, 353 So.2d 547, 550 (Fla. 1977).

139. See Greene, *supra* note 136, at 335.

140. See *Churruca*, 353 So.2d at 550 (“[I]n certain circumstances mere force of numbers acting in unison may comprise an actionable wrong.”).

141. *Juhl*, 936 S.W.2d at 644.

142. See, e.g., *Elizabeth Doe Complaint*, *supra* note 24, ¶¶ 133–47.

143. *Advoc. Org. for Patients & Providers v. Auto Club Ins. Ass’n*, 670 N.W.2d 569, 580 (Mich. Ct. App. 2003) (quoting *Early Detection Ctr., PC v. N.Y. Life Ins. Co.*, 403 N.W.2d 830 (Mich. 1986)).

144. See, e.g., *Fifth Amended Complaint & Reliance on Jury Demand, Denhollander v. Mich. St. Univ.*, No. 1:17-cv-00029 (W.D. Mich. Feb. 28, 2018), 2018 WL 4961851 [hereinafter *Denhollander Complaint*].

USA Gymnastics, and former MSU staff, but that plaintiff has since settled.<sup>145</sup> As of March 2020, litigation continues against MSU, its employees, and USA Gymnastics.<sup>146</sup>

Additionally, the events at MSU present some unique opportunities to bring claims of civil conspiracy based on the claims of fraud and fraudulent concealment made by survivors against Nassar and MSU. Complaints allege that when officials and coaches at MSU denied pursuing victims' complaints and stated that Nassar was simply performing a "new procedure" or "medical treatment," they were knowingly making false statements or recklessly making statements without knowledge of the truth and then concealing their fraudulent statements with more material misrepresentations.<sup>147</sup> These torts of fraud and fraudulent concealment would perfectly fit within current understanding of "unlawful objectives" in any state, regardless of whether they required a separate underlying tort or not.

Similarly, following the events at Baylor, one plaintiff has alleged that Baylor's concealment of football players' misconduct as well as its attempt to discourage the plaintiff from pursuing a sexual assault claim against her attacker constituted fraudulent concealment.<sup>148</sup> By showing that the defendants agreed to make fraudulent statements and conceal misconduct with their fraud, a plaintiff can likely establish the first two elements of a civil conspiracy claim.

### 3. *An Agreement or Understanding of the Means to be Used*

The third element requires a showing that the parties agreed to achieve by concerted action an unlawful purpose or a lawful purpose by unlawful means.<sup>149</sup> This has also been formulated as a "meeting of the minds" between the conspirators and an understanding of their mutual goal.<sup>150</sup> This mutual understanding can be proven by circumstantial evidence but usually requires proof of vital facts by more than a scintilla of evidence.<sup>151</sup>

For the Baylor plaintiffs, they would have to prove that Briles and other coaches or officials met, or discussed in some way, their unlawful objectives. Possible proof could come in the form of text messages, correspondence between Briles and his staff, other kinds of formal correspondence between coaches, as well as any discussions of "unofficial policies" which were generally understood by the

145. Brown Complaint, *supra* note 89, ¶¶ 527–30 (claim for civil conspiracy and concerted action); see, e.g., Plaintiff's Motion & Brief for Voluntary Dismissal with Prejudice of Claims, Denhollander v. Mich. St. Univ., Nos. 1:18-cv-01005 (W.D. Mich. Dec. 17, 2019), ECF No. 1380; Order Granting Plaintiff's Motion & Brief for Voluntary Dismissal with Prejudice of Claims, Denhollander v. Mich. St. Univ., Nos. 1:17-cv-00029, 1:18-cv-01005 (W.D. Mich. Mar. 4, 2020), ECF No. 1422.

146. See, e.g., Plaintiff's Brief in Opposition to Defendant MSU's Motion to Dismiss, Epple v. Mich. St. Univ., Nos. 1:17-cv-00029, 1:18-cv-01047 (W.D. Mich. Mar. 10, 2020) 2020 WL 1678305.

147. *Id.* ¶¶ 174–200; Denhollander Complaint, *supra* note 144, ¶¶ 1753–68.

148. Jane Doe Complaint, *supra* note 83, ¶¶ 136–44.

149. Greene, *supra* note 136, at 331–32.

150. Lamont v. Vaquillas Energy Lopeno, Ltd., 421 S.W.3d 198, 220 (Tex. App.—San Antonio 2013, pet. denied).

151. *Id.* at 209, 220.

coaching staff.<sup>152</sup>

#### 4. *An Overt Act in Furtherance of the Conspiracy*

Unlike in a criminal conspiracy, where the “gravamen of the offense is the agreement itself,” a civil conspiracy requires “damage resulting to the plaintiff from an overt act done pursuant to a common design.”<sup>153</sup> Common law does not require that all involved in the conspiracy commit the overt act.<sup>154</sup> Instead, “[i]t is only necessary to prove that *one* of the participants committed an unlawful act in furtherance of the conspiracy.”<sup>155</sup> It should be noted that the overt act in question usually requires specific intent to commit a tort or some other unlawful act.<sup>156</sup>

A Delaware Supreme Court case provides an illustrative analysis for a claim involving alleged misrepresentations by an asbestos manufacturer.<sup>157</sup> In *Nicolet, Inc. v. Nutt*, the Delaware Supreme Court, in a case of first impression, addressed “whether a cause of action exists against a party whose asbestos products did not cause . . . injury, but who allegedly conspired with other . . . manufacturers to actively suppress and intentionally misrepresent medical evidence.”<sup>158</sup> The court answered in the affirmative.<sup>159</sup> In its reasoning, the court pointed out that the active suppression of information about the dangers of asbestos and the specific “intent to induce plaintiffs’ continued exposure to asbestos” would result in joint and several liability for all members of the conspiracy, regardless of whether their product actually caused the injury.<sup>160</sup>

The cases at Baylor and MSU provide a structure similar to that of *Nicolet*. Applying *Nicolet* under a theory of fraudulent concealment, the plaintiffs would have to show that their universities actively suppressed information regarding sexual assaults on their campus or misinformed plaintiffs as to what events transpired with the specific intent to deceive or defraud the plaintiffs.<sup>161</sup> A court may be more inclined to find for plaintiffs here given the seriousness and prevalence of Baylor and MSU’s efforts to suppress evidence, the damage done to past victims, and the fact that the misrepresentations stopped victims from pursuing claims against their attackers.

#### 5. *Injury Resulting from the Overt Act*

The final element requires an actual injury to the plaintiff as a result of the conspiracy’s overt, unlawful act.<sup>162</sup> That is to say, the conspirators’ actions must be the proximate cause of the plaintiff’s injuries.<sup>163</sup> For example, a tugboat

152. See Baylor Regents’ Answer, *supra* note 23, at 13–14.

153. Buchwalter, *supra* note 42, § 2.

154. *Id.* § 12.

155. *Id.* (emphasis added).

156. *Id.* §§ 12–13.

157. *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 147 (Del. 1987).

158. *Id.*

159. *Id.* at 150.

160. *Id.*

161. See *id.*

162. Buchwalter, *supra* note 42, § 16.

163. *Walters v. McMahan*, 684 F.3d 435, 443 (4th Cir. 2012) (citing *Anza v. Ideal Steel Supply*

captain's civil conspiracy claim against a marine towing company was unsuccessful because the captain failed to allege that his financial problems were caused by a "covert agreement" between the defendants and not by losing his job.<sup>164</sup>

This issue can be resolved with proper pleading by plaintiffs. Another formulation of proximate cause is "whether the injuries and damages to the plaintiff [were] a reasonable and probable consequence of the act or omission of the defendant."<sup>165</sup> This element can be met if the defendant knew or should have known there was "an appreciable chance" that their conduct would cause injury.<sup>166</sup>

Plaintiffs could easily meet this burden by alleging that Baylor or MSU's inaction and suppression of evidence created an appreciable chance of injury to plaintiffs and, for many plaintiffs, in fact caused their injuries. Had Baylor's coaching staff or its Title IX office properly addressed accusations against the football team, many women would not have been assaulted by the repeat offenders in the program.<sup>167</sup> Likewise, had MSU athletic staff or medical staff appropriately classified Nassar's behavior as assault, then not nearly as many women would have been abused.<sup>168</sup>

While civil conspiracy claims in this context are somewhat of a new frontier, plaintiffs have a unique opportunity to hold all the bad actors responsible. Moreover, such lawsuits will give plaintiffs the opportunity to delve into what really transpired behind closed university doors and to more effectively pursue claims against those with substantial roles in the cover-ups.

#### B. FEDERAL ANALYSIS: CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

Fortunately for plaintiffs, claims of civil conspiracy are built into federal statutes which seek to prevent the deprivation of civil rights; one example is 42 U.S.C. § 1985(3), which does not require that the plaintiff allege a separate tort or act of discrimination.<sup>169</sup> Instead, the language of the statute provides a civil cause of action against "two or more persons in any State or Territory" that "conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws."<sup>170</sup> Unlike state law civil conspiracy claims, actions under § 1985(3) do not require a separate actionable underlying tort; as a matter of law, the mere proof of a conspiracy to deprive someone of equal protection is sufficient to establish a claim.<sup>171</sup>

However, current judicial interpretation of the statute creates some constitutional challenges for plaintiffs that are not present when bringing civil

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Corp., 547 U.S. 451, 453 (2006).

164. *Alonso v. McAllister Towing of Charleston, Inc.*, 595 F. Supp. 2d 645, 652 (D.S.C. 2009) (applying South Carolina law).

165. See *Envirotech, Inc. v. Thomas*, 259 S.W.3d 577, 588 (Mo. Ct. App. 2008).

166. *Id.*

167. See Elizabeth Doe Complaint, *supra* note 24, ¶ 144.

168. See Denhollander Complaint, *supra* note 144, ¶ 21.

169. 42 U.S.C. § 1985(3).

170. *Id.*

171. See *id.*

conspiracy claims under state law. The Supreme Court has held that “[t]he language requiring intent to deprive of equal protection . . . means that there must be some . . . class-based, invidiously discriminatory animus behind the conspirators’ action.”<sup>172</sup> In *Bray v. Alexandria Women’s Health Clinic*, the Supreme Court refused to specifically address whether “women in general” were a “qualifying class under § 1985(3).”<sup>173</sup> The Court held that animus does not require “maliciously motivated . . . discrimination against women,” but concluded that “animus does demand . . . at least a purpose that focuses upon women *by reason of their sex*,” such as denying women into the practice of law simply because they were women.<sup>174</sup> Furthermore, the Court pointed out that the underlying purpose behind the requirement of animus was to avoid the conversion of § 1985(3) into “general federal tort law.”<sup>175</sup> With all this in mind, the question presented is: Can a Title IX claim for sex discrimination fulfill the requirement of animus posed by § 1985(3)?

The standards for proving damages liability under Title IX are significantly different from an action under the Equal Protection Clause. In the context of sexual harassment, Supreme Court precedent states that bringing a Title IX lawsuit only requires a finding that the school acted with deliberate indifference to known claims of sexual harassment “regardless of any allegations of gender-motivated animus or differential treatment.”<sup>176</sup> By contrast, “the class of individuals protected by . . . [§ 1985(3)] are those so-called ‘discrete and insular’ minorities that receive special protection under the Equal Protection Clause.”<sup>177</sup> It is altogether possible that these claims are interchangeable. As one scholar notes, “Title IX and the Equal Protection Clause are the same” because of their mutual “right to be free from discrimination based on sex.”<sup>178</sup> Applying this reasoning, plaintiffs might have a valid argument for a § 1985(3) claim based on violations of Title IX, particularly given the growing prevalence of these kinds of scandals in college athletics.

While bringing claims of civil conspiracy against universities and their athletic departments is not without hurdles, it is certainly an option for plaintiffs who seek to hold all individual actors accountable for their actions. Alternatively, some extralegal solutions may exist or could soon come into existence to help plaintiffs in this same way.

### C. POSSIBLE ALTERNATIVE SOLUTIONS

The main policy reason supporting a plaintiff’s claim of civil conspiracy is that

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172. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

173. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 269–70 (1993).

174. *Id.* at 270.

175. *Id.* at 269 (internal quotation marks omitted).

176. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 253 (2005).

177. Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 583 (1985) (quoting *Browder v. Tipton*, 630 F.2d 1149, 1150 (6th Cir. 1980)).

178. Cohen, *supra* note 176, at 283 n.129; Michael A. Zwiabman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1479 (1998).



allowing these claims would hold those involved in sexual assault cover-ups accountable and would deter others from hiding information from investigators, thus preventing more assaults.<sup>179</sup> Alternative means to the same end, while novel, may very well be viable. These mainly involve completely removing coaches and athletic personnel from their role as disciplinarians of student-athletes.<sup>180</sup> Clearly, after the events at Colorado, Baylor, Penn State, and MSU (to name a few), the temptation is too great for coaches to prioritize their athletes and institutions over victims.

Schools could mandate that discipline for any off-field misconduct be handled by an independent university panel.<sup>181</sup> Although a university panel would not be totally unbiased in their handlings of discipline, this would be a proper step toward impartiality. Additionally, the university panel could also consist of a few non-athlete students or members of the community who might provide even more objectivity.

Likewise, state legislatures have an opportunity to implement policies which promote transparency in reporting and impose a higher duty of care on universities and their officials. For example, the state of Illinois has “passed laws mandating that colleges create a detailed policy for responding to reports of sexual assault and requiring the submission of data, on an annual basis, to the State’s Attorney General’s Office.”<sup>182</sup> These higher reporting standards may result in more individual accountability and internal investigations by universities.

Legislatures could also create “regional centers for investigation and adjudication” based on a proposal by members of the law firm Pepper Hamilton who investigated Baylor.<sup>183</sup> These regional centers would function as independent investigative and adjudicative centers where victims could safely report incidences of sexual violence and be provided forensic examination services and accurate information regarding their rights as victims and plans of action after an assault.<sup>184</sup>

These centers could take many forms, including an “independent non-profit organization, an arm of a prosecutor’s office, or a newly created government agency.”<sup>185</sup> Moreover, these regional centers would harmonize efforts of governments, law enforcement, and universities by coordinating their efforts to investigate claims of sexual violence.<sup>186</sup> Commentators have identified five major benefits to facilities of this nature: (1) they would function as an independent and objective body of investigation and their off-campus locations might encourage more victims to report abuse; (2) centers would encourage collaboration between law enforcement and higher education, increasing transparency on both sides; (3) cooperative measures would streamline investigative and disciplinary action taken

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179. See, e.g., Solomon, *supra* note 13, at 395–96.

180. *Id.* at 430.

181. *Id.*

182. *Id.* at 431.

183. Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 120 PENN. ST. L. REV. 977, 997–1000 (2016).

184. *Id.* at 997–98.

185. *Id.* at 998.

186. *Id.*

by either the university or law enforcement; (4) the investigative nature of the facilities would allow for a clean separation between a center of victim advocacy and an investigative center, further promoting higher accuracy of findings of fact; and (5) these centers “would eliminate the inefficiency and enormous drain on resources associated with building and maintaining in-house investigative and adjudicative processes at educational institutions.”<sup>187</sup>

Finally, universities could alter their policies regarding new contracts with school officials, professors, and coaches. Such amendments could deny severance to an employee should they violate school sexual assault reporting policies. This might also function as an effective deterrent for any would-be conspirator who found themselves in the position of Art Briles or the officials at MSU. With these measures in place, university employees would be deterred from failing to report a sexual assault or intimidating a victim.

#### D. THE STATE OF AFFAIRS TODAY

MSU has continued to experience institutional upheaval in the wake of the Nassar scandal.<sup>188</sup> In September 2019, the university was fined \$4.5 million by the U.S. Education Department for its failure to respond to the sexual assault complaints against Nassar.<sup>189</sup> Additionally, two university presidents have resigned since the scandal broke, one of whom was charged with two felonies and two misdemeanors for allegedly lying to a peace officer who was investigating complaints against Nassar.<sup>190</sup> In June 2019, William Strampel, Nassar’s boss, was not only found guilty of “willful neglect of duty” in his supervision of Nassar but also of “misconduct in office” stemming from allegations that he made sexually explicit comments to several female students and grabbed one student’s buttocks.<sup>191</sup> He was sentenced to a year in jail, but only served 8 months.<sup>192</sup>

As of December 2020, Baylor was still under criminal investigation by Texas state law enforcement and McLennan County District Attorney Barry Johnson.<sup>193</sup>

187. *Id.* at 998–99.

188. Associated Press, *How the Larry Nassar Scandal has Affected Others*, TAMPA BAY TIMES (Feb. 25, 2021), <https://www.tampabay.com/news/latest/2021/02/25/how-the-larry-nassar-scandal-has-affected-others/> [https://perma.cc/5RNS-MF75].

189. *Id.*

190. *Id.*; Evan Jones, *Ex-MSU President Lou Anna K. Simon’s Preliminary Exam Ends with Closing Statements*, STATE NEWS (July 24, 2019), <https://statenews.com/article/2019/07/ex-msu-president-lou-anna-k-simons-preliminary-exam-concludes-with-closing-statements> [https://perma.cc/YD77-Z5M6]. The criminal charges were ultimately dropped. Associated Press, *supra* note 188.

191. Beth LeBlanc, *Strampel Guilty of Misconduct in Office, Not Guilty of Criminal Sexual Conduct*, DETROIT NEWS (June 12, 2019, 5:16 PM), <https://www.detroitnews.com/story/news/local/michigan/2019/06/12/strampel-guilty-misconduct-office-not-guilty-criminal-sexual-conduct/1429780001/> [https://perma.cc/YPU6-3R9K].

192. Mark Hicks, *Ex-Nassar Boss William Strampel Set for Early Release from Jail*, DETROIT NEWS (Jan. 31, 2020, 12:11 AM), <https://www.detroitnews.com/story/news/local/michigan/2020/01/31/ex-msu-dean-william-strampel-early-release-jail-nassar-scandal/2861875001/> [https://perma.cc/G7W6-2KQN].

193. Mark Schlabach & Paula Lavigne, *Baylor Bears Officials Scheduled to Appear Before NCAA Committee on Infractions Over Sexual Assault Scandal*, ESPN (Dec. 14, 2020), [https://www.espn.com/college-football/story/\\_/id/30518346/baylor-bears-officials-scheduled-](https://www.espn.com/college-football/story/_/id/30518346/baylor-bears-officials-scheduled-)

Four lawsuits against the school are still ongoing, including a federal lawsuit involving fifteen women.<sup>194</sup> After being fired from Baylor in 2016, former head coach Art Briles was hired to lead an East Texas high school football program in 2019.<sup>195</sup> Following their dismissals from Baylor, Briles and former university president Ken Starr were paid \$15.1 million and \$4.5 million in severance, respectively.<sup>196</sup>

#### IV. CONCLUSION

*“Come hell or high water we’ll take every last one of you down that could have stopped this monster.”*<sup>197</sup>

The bottom line is this: had the coaches, athletic department officials, or university authorities at Penn State, Colorado, Baylor, or MSU responded to allegations with any semblance of impartiality or objectivity, as is expected from those who run our institutions of higher education, there would have been fewer victims. More women and children would have been spared abuse had policies been followed or improved. The facts and results of these scandals all sing the same tune and, if anything, encourage universities to cover up *more* allegations, not less.

As things stand, the cover-up formula is simple and effective: (1) prioritize reputation (and therefore revenue) over student safety and well-being; (2) selectively hide or obfuscate any allegations which may jeopardize the university’s athletic program; (3) once the scandal breaks, let the top administrators resign and pay them a large severance package; (4) settle with the victims, limiting as much public exposure as possible, using school insurance or tuition funds—passing expenses onto the student body; and (5) rinse and repeat. This pattern has gone on long enough and will only continue if drastic measures are not taken to ensure the safety of students.

No longer should education administrators and coaches be able to pull the strings of their own systems of “discipline,” putting countless young women at risk, only to receive a full severance package when caught. At any level and in any context, such a result is illogical and appalling. Hopefully, through either application of state law, federal law, or even extralegal solutions, plaintiffs will soon be able to hold these bad actors responsible, accelerating the healing process.

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appear-ncaa-committee-infractions-sexual-assault-scandal [https://perma.cc/A7FC-PLBE].

194. *Id.*

195. Associated Press, *Art Briles, Who was Fired Amid a Sexual Assault Scandal at Baylor, Has Been Hired to Lead an East Texas High School Football Program*, CHI. TRIB. (May 25, 2019, 9:05 AM), <https://www.chicagotribune.com/sports/breaking/ct-spt-art-briles-baylor-high-school-20190525-story.html> [https://perma.cc/P86X-B8PP].

196. Kristin Hoppa, *Baylor Paid Briles \$15.1 Million, Starr \$4.5 Million After Removal Amid Sexual Assault Scandal*, WACO TRIBUNE-HERALD (Mar. 30, 2018), [https://wacotrib.com/news/higher\\_education/baylor-paid-briles-million-starr-million-after-removal-amid-sexual/article\\_2bdda9a043d6-5e13-94dc-72b28c1db737.html](https://wacotrib.com/news/higher_education/baylor-paid-briles-million-starr-million-after-removal-amid-sexual/article_2bdda9a043d6-5e13-94dc-72b28c1db737.html) [https://perma.cc/57J9-LEX5].

197. 164 CONG. REC. H642 (daily ed. Jan. 29, 2018) (statement of Amy Labadie).