YES, IT IS YOUR FAULT: CRACKING DOWN ON COLLEGE COACHES AND ADMINISTRATORS WHO IGNORE ABUSE

CODY STATUM*

Jerry Sandusky. Baylor. Urban Meyer. Michigan State. As even the casual college sports fan knows, the last decade was plagued by a seemingly unending series of scandals in which collegiate athletes or other individuals related to college sports programs suffered physical and sexual abuse at the hands of their teammates or coaches. Frequently, school officials including coaches and athletics administrators knew about this abuse but failed to take even minimal, reasonable steps to stop further harm to students. Sometimes, these officials faced personal and professional consequences, but they repeatedly escaped legal ones. Time and again, college coaches and administrators have gotten away with ignoring abuse directed at and committed by those within their supervision. This Note examines the legal background of omissions liability, that is, the imposition of civil or criminal punishment on individuals for failures to act in situations where they have a duty to do so. This Note explores how the common law system's historically lax treatment of omissions liability has led to the incomprehensible reality described above. Finally, this Note explains why, for coach and administrator accountability and for player protection, it is time to change this reality and provides practical solutions for achieving that goal.

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* J.D., 2020, University of Illinois College of Law. B.S., 2016, Miami University. This Note is dedicated to the many college athletes who trusted that they would be safe doing what they loved but were let down by those who were supposed to protect them. Thanks to the *University of Illinois Law Review* board, editors, and staff for all their work. I have so many people in my life who deserve thanks, including my fiancée, Alayna, my family, my friends, and my professors. I would not have made it to where I am without you all.

I. INTRODUCTION

"And then they all went on their merry ways, as if nothing had ever happened[,]"[1] wrote a Colorado newspaper author, describing the aftermath of light consequences for administrative failures to properly handle allegations of domestic violence by an assistant coach at the University of Colorado.[2] This glib quote, emphasizing the inertia and willful ignorance that can often provide severe impediments to lasting change, perhaps best sums up the societal problem that lies at the heart of this Note.

Currently, despite the existence of so-called "mandated reporting" laws,[3] and despite facing punishment from the NCAA, college sports coaches and athletics directors continually escape liability for doing nothing, or doing very little,

1. Kelly Lyell, *Colorado Let Mike MacIntyre Off Easy Under Circumstances Similar to Urban Meyer's at Ohio State*, COLORADOAN (Aug. 8, 2018, 2:37 PM), https://www.coloradoan.com/story/sports/csu/football/2018/08/08/university-colorado-let-football-coach-off-hook-circumstances-similar-urban-meyers-ohio-state/929955002/.

2. *Id.*

3. *See, e.g.*, 325 ILL. COMP. STAT. 5/4 (2019) ("Any physician . . . school personnel . . . home health aid . . . psychiatrist . . . or child care worker having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child shall immediately report or cause a report to be made to the Department.").

to prevent further abuse from being perpetrated within college sports programs.[4] While those who commit acts of physical or sexual violence should undoubtedly bear most of the blame, the startling lack of accountability for program administrators who enable or turn a blind eye toward abuse demands an examination of whether criminal liability, civil liability, or both should be enhanced for coaches and other college athletics officials who fail to stop physical or sexual abuse, whether the abuse is perpetrated by minors, players, coaches, or administrators.

Both primary motivating theories of punishment, utilitarianism and retribution, present compelling reasons why administrators should be punished harshly in this situation.[5] Other concerns, including morality and victim advocacy, also support this conclusion.

On a narrow level, as evidenced by the recent scandals cited above,[6] and on a broader societal level, as reflected in movements such as the "Me Too" Movement,[7] the enhanced societal concern over issues of sexual assault and harassment make this issue as timely as ever. And just as sexual violence is now under society's microscope, so are college sports. From pay-to-play schemes,[8] to increasing knowledge about the dangers of concussions from football,[9] to student-athletes being artificially passed through classes and degree programs,[10] college athletics programs have received a great deal of societal scrutiny in recent years. It is perhaps unsurprising, then, that the intersection of college sports and sexual violence is ripe for exploration and creative solutions—this Note asserts one such solution.

This Note argues that civil liability, criminal liability, or both should be enhanced by statute or common law to hold accountable college athletic officials who do not take sufficient steps to stop suspected abuse. Part II of this Note

4. Nancy Armour, *Michigan State Is a Cesspool of Abuse and Indifference Appears Bottomless*, USA TODAY (Apr. 24, 2018, 4:23 PM), https://www.usatoday.com/story/sports/columnist/nancy-armour/2018/04/24/michigan-state-cesspool-who-going-fix/547344002/; Paula Lavigne, *Former AD Alleges Baylor Regents 'Scapegoated' Black Football Players in Sexual Assault Scandal*, ESPN (June 27, 2018), http://www.espn.com/college-football/story/_/id/23928653/former-ad-alleges-baylor-regents-scapegoated-black-football-players-sexual-assault-scandal; *Penn State Scandal Fast Facts*, CNN (Nov. 27, 2019, 5:22 PM), https://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts/index.html?no-st=9999999999; Joseph Zucker, *Urban Meyer Suspended by Ohio State amid Domestic Violence Scandal*, BLEACHER REP. (Aug. 22, 2018), https://bleacherreport.com/articles/2789044-urban-meyer-suspended-by-ohio-state-amid-domestic-violence-scandal.

5. *See generally* Donald A. Dripps, *Rehabilitating Bentham's Theory of Excuses*, 42 TEX. TECH L. REV. 383 (2009).

6. *See* Armour, *supra* note 4; Lavigne, *supra* note 4; *Penn State Scandal Fast Facts*, *supra* note 4; Zucker, *supra* note 4.

7. *Our Work*, ME TOO, https://metoomvmt.org/the-work/ (last visited Aug. 4, 2020).

8. *Pay for Play*, ESPN, http://www.espn.com/college-sports/feature/index/_/page/payforplay (last visited Aug. 4, 2020).

9. Jon Solomon, *Studies Show Magnitude of College Football's Concussion Problem*, CBS SPORTS (Oct. 2, 2014, 1:11 PM), https://www.cbssports.com/college-football/news/studies-show-magnitude-of-college-footballs-concussion-problem/ ("College football players reported having six suspected concussions for every one diagnosed concussion . . . .").

10. Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html (describing how the University of North Carolina was not punished for a scheme "involving fake classes that enabled dozens of athletes to gain and maintain their eligibility.").

reviews the general backgrounds of omissions liability in common law, "mandated reporting" laws in the United States, and current liability for athletics officials who ignore suspected abuse at educational institutions. Part III analyzes the United States' general hesitance to impose omission liability and investigates why, under the two predominant theories of punishment and for a plethora of additional reasons including morality/ethics and victims' rights, states should break away from that doctrinal trend in the specific context of abuse in college athletics programs. Part IV recommends several steps that legislators, judges, and others could take to remedy the problems described herein.

II. BACKGROUND

A. Omissions Liability Generally

An omission, as opposed to an act, is tricky to define. While an act, by nature, is concrete, tangible, and committed at a specific time, an omission involves the comparatively vague status of one who simply does not, at any time, commit some act. For the purpose of this Note, however, it is sufficient to define an omission as "a violation of the duty to aid others in an emergency or a breach of the general duty to either prevent or report an imminent crime,"[11] also referred to as a simple omission. When this Note refers to omissions it does not reference what is known as the inauthentic omission, where "an individual who has not averted a criminal harm . . . is charged for the harmful result as if he or she had caused it by affirmative conduct."[12]

Generally, a person who is aware of another's ongoing or future crimes faces no omission liability, either criminally[13] or civilly,[14] for failing to intervene, stop, or prevent those crimes from being committed. There are a variety of long-understood reasons for this general principle, and societal struggles with deciding which omissions should be punished can be traced back at least to ancient Rome.[15]

Historically, the question of which omissions are punishable has been one with complicated and slowly-evolving answers.[16] St. Thomas wrote extensively

11. Jesús-María Silva Sánchez, *Criminal Omissions: Some Relevant Distinctions*, 11 NEW CRIM. L. REV. 452, 453 (2008).

12. *Id.*

13. *See, e.g.*, Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 387 (1998) ("[T]he common law rule regarding omission liability imposes no general legal duty or obligation upon one to act on behalf of anyone in peril.").

14. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 37 (AM. LAW INST. 2019) ("An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that [an exception] is applicable.").

15. Otto Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615, 615 (1942) ("The Roman law, for example, penalized homicide brought about by means of willful starvation, or by failure to complete a surgical operation.").

16. *See infra* Section II.A.

on omissions liability, and introduced the concept that liability for omissions exists only where there is some specific duty to act.[17] Unfortunately, though, St. Thomas's "warning that particular omissions may be graver than certain transgressions . . . was more or less overlooked, and even today the [idea] that commissions should be punished more heavily than omissions is often closely followed."[18]

Expanding on the definition presented above, a crime of omission, that is, a situation where society agrees to depart from this norm, is one which is "specifically defined by failure to act [or one that] may be committed . . . by failure to act under circumstances giving rise to a legal duty to act."[19] Such crimes are often found in certain carved-out areas of law; for example, property owners are liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for failing to clean up environmental waste caused by tenants.[20] Another example is the implied warranty of habitability, a contract law doctrine that requires rental property owners to maintain certain minimum conditions of safety and livability in their property, even if the owner did not act affirmatively to cause the unsuitable conditions in the first place.[21] One final example of such a legal carve-out is mandated reporting, as described in more depth *infra*.[22]

Scholar Lionel Frankel offers a different take on omissions, suggesting that four key factors have shaped the historical development of omissions liability:

> They may be restated as (1) judicial reluctance to extend the criminal law into new areas, (2) legislative and judicial conceptual difficulty in attributing harms to nonaction, (3) a resulting tendency to inculpate only those omissions where the omitter's role or status created peculiarly strong expectations that he would act and (4) the inculpation of omissions only in the face of great and pressing public need.[23]

Frankel goes on to suggest that these restrictive factors are responsible for the general hesitance of courts to impose omissions liability under common law, noting that the ultimate resulting scheme was a compromise between humanism and laissez-faire economic concerns.[24] Frankel notes that typically, omission situations present "the absence of elements inspiring that fear which is the moving emotional force for so much of the legislated counter-terror of penal sanction."[25] Frankel then concludes that, lacking the emotional impetus for punishment that

17. Kirchheimer, *supra* note 15, at 616.

18. *Id.*

19. WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIM. L. § 6.2 (3d ed. 2017); *see also* MODEL PENAL CODE § 2.01(3) (AM. LAW INST. 2018).

20. *See generally* Craig N. Johnston, *Current Landowner Liability Under CERCLA: Restoring the Need for Due Diligence*, 9 FORDHAM ENVTL. L.J. 401 (1998) (providing a thorough exploration of CERCLA's strict-liability paradigm).

21. For a modern review of the implied warranty of habitability, see generally David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389 (2011).

22. *See infra* Section II.B.

23. Lionel H. Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367, 375 (1965).

24. *Id.* at 379–80.

25. *Id.* at 375.

acts often provide, "an omission is not likely to be made a crime until such time as it directly conflicts with rational and humanist principles."[26]

It is worth noting that the foreign treatment of omissions varies widely and is often quite different from the American approach. "German law has long had offen[s]es of failing to render assistance to a person in peril and similar offen[s]es are to be found in other countries such as Denmark, Finland, Italy, Russia, and Spain [standing] in contrast to the English position . . . ."[27] Unlike many other European countries, France long resisted the imposition of omissions liability, but partially relented in 1945.[28] Looking beyond Europe, China has a complicated tort law system that leaves somewhat unclear how much action would-be rescuers are required to take, as well as how much Good Samaritan protection they will be entitled to if they are ultimately unsuccessful.[29]

Michael Duttwiler provides another perspective on international criminal omissions liability, both under the criminal codes of various countries and under treaties.[30] After tracing a variety of complex academic arguments about the ability of the International Criminal Court ("ICC") to impose omissions liability, Duttwiler concludes that "[t]he fact that the states parties to the Rome Statute failed to agree on a general treaty provision on omission does not prevent the applicability of the general principle of law via the entry point of art."[31] More strikingly, Duttwiler also finds that "[t]he ICC will furthermore be able to apply the principle with regard to perpetrators from *any* jurisdiction, even if they do not recognize commission by omission."[32] These foreign and international trends toward the increasing application of liability for omissions provides further support for holding those who fail to act accountable. It is time for the United States to catch up.

B. Mandated Reporting Laws and College Athletics

One example of a situation where society has agreed to impose omission liability involves individuals who routinely work with children.[33] The statutes imposing liability in this situation are commonly known as "mandated reporting"

26. *Id.* at 376. Frankel makes a host of other noteworthy observations on this topic, noting that in 1965 when his article was written, in contrast with the usual lack of emotion stirred up by omissions, the then-recent uptick in imposing omissions liability was "precisely because recent incidents of crime committed before numerous passive spectators do create alarm." *Id.* Frankel also cautions against framing this issue exclusively in terms of special duties, noting that "[u]ndoubtedly, there are situations where the extremity of circumstances is such that even a person not duty bound to act must be expected to perceive the necessity of aiding or assisting another." *Id.* at 399.

27. Andrew Ashworth & Eva Steiner, *Criminal Omissions and Public Duties: The French Experience*, 10 LEGAL STUD. 153, 153 (1990).

28. *Id.* at 156.

29. *See generally* Mengyun Tang, *Does China Need "Good Samaritan" Laws to Save "Yue Yue"?*, 47 CORNELL INT'L L.J. 205 (2014) (examining whether China needs Good Samaritan laws).

30. *See generally* Michael Duttwiler, *Liability for Omission in International Criminal Law*, 6 INT'L CRIM. L. REV. 1 (2006).

31. *Id.* at 60.

32. *Id.*

33. *See infra* Section II.B.

laws.[34] These statutes in turn have been extended to other situations, such as elder abuse.[35] In the wake of the college athletics scandals cited above,[36] mandated reporting laws have been criticized as inadequate on several grounds.[37]

First, just because reporting is mandated does not mean that it actually occurs.[38] Two studies from the 1980s showed that professionals who knew of child abuse and neglect made only official reports in one-third and two-fifths of cases, respectively.[39] Mandated reporting laws do no good if people simply ignore them. Second, college athletics coaches often interact with underprivileged students—for whom college scholarship offers serve as a proverbial golden ticket—thereby exacerbating the worrisome power dynamics that can contribute to abuse and willful ignorance of abuse.[40] Finally, mandated reporting statutes can be overly-narrow, restricting the class of incidents of reportable abuse in a manner that "is counterintuitive to the aim of child protection laws."[41] These widespread failures of mandated reporting, then, demand reform, but also demand examination of viable alternative options.

A lack of an omission-liability based remedy often forces victims to resort to less direct ways of obtaining legal relief, such as through civil rights laws.[42]

34. *See, e.g.*, FLA. STAT. § 39.201(1)(a), (d) (2019) ("Any person who knows, or has reasonable cause to suspect that a child is abused . . . shall report such knowledge or suspicion . . . [r]eporters in [several listed] occupation categories are required to provide their names . . . ."); 325 ILL. COMP. STAT. 5/4 (2019) ("Any physician . . . school personnel . . . home health aid . . . psychiatrist . . . or child care worker having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child shall immediately report or cause a report to be made to the Department."). *See generally* Starla J. Williams, *Reforming Mandated Reporting Laws After Sandusky*, 22 KAN. J.L. & PUB. POL'Y 235 (2013) (providing an example of the use of the term "mandated reporting").

35. For discussion and criticism of this extension, see generally Joseph W. Barber, Note, *The Kids Aren't All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes*, 16 ELDER L.J. 107 (2008).

36. *See* Armour, *supra* note 4; Lavigne, *supra* note 4; *Penn State Scandal Fast Facts*, *supra* note 4; Zucker, *supra* note 4.

37. *See, e.g.*, Williams, *supra* note 34, at 257–63 (criticizing specific statutory shortcomings in Pennsylvania). Williams notes with concern that "[s]tatutory requirements for mandated reporters . . . are triggered only for a narrow class of children who are suspected victims of child abuse in Pennsylvania." *Id.* at 253. Williams also warns that Pennsylvania law "places an onerous obligation upon mandated reporters to inquire into a child's relationship with an entity to ascertain if he is 'under the care, supervision, guidance or training' of the reporter[.]" *Id*. at 255. One additional criticism of note, reminiscent of the passing-the-buck issue noted in the Penn State scandal, *Penn State Scandal Fast Facts*, *supra* note 4, is that "mandated reporters who are also employees of certain institutions are not required to report suspected child abuse directly to the state child protection authorities; rather, these staff members are required to hand over reporting duties to their supervisors." Williams, *supra* note 34, at 257.

38. Gail L. Zellman, *Child Abuse Reporting and Failure to Report Among Mandated Reporters*, 5 J. INTERPERSONAL VIOLENCE 3, 3–22 (1990).

39. *Id.* at 5.

40. Williams, *supra* note 34, at 243–44 ("Power, prominence, and position undoubtedly played a role in the questionable contact between Sandusky and his victims. Rather than use their power and position to [stop the abuse, officials] allowed him to continue asserting power, position, and prestige to victimize visitors to the Penn State campus.").

41. *Id.* at 253.

42. *See, e.g.*, Phillip Ericksen, *Federal Judge Allows New Lawsuit Against Baylor, Briles, McCaw, Waco PD*, WACO TRIB.-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.

Despite the wide variety of existing state mandated reporting laws, the most notable mandated reporting law for college athletics programs is the federal set of legislation commonly known as Title IX.[43] Under Title IX, "[s]chools [that receive federal financial assistance] have a duty to address gender discrimination, including gender-based harassment, and specifically sexual violence and domestic violence."[44] To ensure that they uphold this duty, Title IX-subject schools often create internal policies imposing mandated reporting obligations upon certain school employees, and then bind those employees to the policies via employment contracts.[45] For example, the University of Illinois's contract with head football coach, Lovie Smith, states that "[t]he Head Coach will use best efforts to comply with and implement all applicable standards and requirements of the University . . . including . . . immediately and properly reporting information related to sexual assault or abuse."[46]

At Ohio State University, football coach Urban Meyer was obligated by contract to "report any known violations of Ohio State's Sexual Misconduct Policy."[47] When Meyer failed to report an assistant coach's suspected domestic abuse of his wife, the omission was " in violation of that policy, which falls under the auspices of Ohio State's Title IX office—even if it may not [have] be[en] an actual violation of Title IX."[48] This tapestry of legal regimes—statutory, contractual, governmental, institutional—is complex and at times difficult to unravel, but is necessary to understand as each thread in the tapestry could provide an opportunity for achieving meaningful reform so as to disincentivize these troubling omissions.[49]

Non-governmental remedies may provide another path to justice.[50] The National Collegiate Athletic Association ("NCAA"), the national oversight body for college athletics, sometimes imposes punishments upon officials and programs that fail to stop internal abuse.[51] It does so inconsistently,[52] however, despite enacting a new sexual violence policy in 2017 requiring, *inter alia*, that

43. 20 U.S.C. §§ 1681–1688 (2018).

44. Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 75 (2017).

45. *See, e.g.*, EMPLOYMENT AGREEMENT, 7, https://2michy3wy0l30d34041dt1et-wpengine.netdna-ssl.com/football/wp-content/uploads/coach-contracts/loviesmith-uiuc-employment-contract.pdf (last visited Aug. 4, 2020).

46. *Id.*

47. Bill Landis, *Ohio State Reminds Employees of Crime Reporting Duties, While Experts Debate Urban Meyer's Title IX Obligations*, CLEVELAND.COM (Aug. 3, 2018), https://www.cleveland.com/osu/2018/08/confusion_over_title_ix_applic.html.

48. *Id.*

49. *See supra* Section II.B.

50. *See infra* text accompanying notes 51–58.

51. *See infra* text accompanying notes 52–53.

52. *Compare* Steve Yanda, *Penn State Football Punished by NCAA over Sandusky Scandal*, WASH. POST (July 23, 2012), https://www.washingtonpost.com/sports/penn-state-football-punished-by-ncaa-over-sandusky-scandal/2012/07/23/gJQAGNeM4W_story.html?noredirect=on&utm_term=.d7b5e250be1d (describing relatively harsh penalties imposed by NCAA upon Penn State for its scandal), *with* Jon Solomon, *Why the NCAA May Never Punish Baylor for its Rape Scandal the Way Fans Demand*, CBS SPORTS (Feb. 2, 2017, 12:02 PM), https://www.cbssports.com/college-football/news/why-the-ncaa-may-never-punish-baylor-for-its-rape-scandal-the-way-fans-demand/ (describing the NCAA's "more cautious approach" to the Baylor scandal).

"leaders on each NCAA campus—the school president or chancellor, athletics director[,] and Title IX coordinator—must attest annually that coaches, athletics administrators[,] and student-athletes were educated in sexual violence prevention."[53] Non-governmental remedies have their own limitations as well. The NCAA cannot imprison people, nor can it ultimately force anyone to do anything if they would simply rather leave the field of college athletics (thereby putting them beyond the reach of the NCAA).

Apart from the limited remedies offered by the NCAA, there are less formal means of relief to consider as well.[54] "Naming and shaming[,]" publicly calling out one's attacker,[55] is a possibility; if one can call out his or her attacker, why not also call out those who stood by while abuse occurred? This tactic is not without controversy,[56] and the tangible relief it can offer is limited, but it is an option. One final possibility is to call on schools themselves to punish those who ignore abuse, rather than counting on the NCAA to do so. As mentioned above, this can be achieved through contractual provisions.[57] This solution may sometimes be necessary where the NCAA fails to act, given the NCAA's seemingly odd priorities. As one article points out,

> The NCAA might have been right that [Michigan State] didn't break any NCAA rules [in the Larry Nassar scandal]. That illuminates one of many problems with the NCAA, but it's the warped reality. . . . Where the NCAA punishes schools seriously, it's usually because they let athletes get paid for playing sports. The NCAA isn't built to punish actions that cause real suffering.[58]

It seems unlikely, then, that the NCAA can be relied on to enact meaningful reform, leaving it up to legal entities and schools to fill in where the NCAA has abandoned their responsibility to keep athletes safe.

C. Duty to Control Others

The above discussion primarily contemplates methods of imposing a duty upon college coaches and administrators to protect athletes. This Note, however, urges the recognition of another duty beyond this: a duty to control the actions of players and subordinate coaches against third parties such as other college students or family members. This duty would give rise to liability for Coach Meyer in the Ohio State scandal discussed above.[59] The Restatement of Torts

53. *Board Adopts Sexual Violence Policy*, NCAA (Aug. 10, 2017, 11:05 AM), http://www.ncaa.org/about/resources/media-center/news/board-adopts-sexual-violence-policy.

54. *See infra* text accompanying notes 55–58.

55. Rebecca Hamilton, *No, Naming and Shaming Sexual Offenders Doesn't Always Help*, WASH. POST (Dec. 21, 2017, 11:59 AM), https://www.washingtonpost.com/outlook/no-naming-and-shaming-sexual-offenders-doesnt-always-help/2017/12/21/4210486c-e5bb-11e7-ab50-621fe0588340_story.html?utm_term=.5bfcb1fba8db.

56. *See, e.g.*, *id.*

57. *See supra* Section II.B.

58. Alex Kirshner, *The NCAA Isn't Punishing Michigan State, but *Actual* Authorities Should*, SB NATION (Aug. 31, 2018, 8:00 AM), https://www.sbnation.com/2018/8/31/17800686/larry-nassar-michigan-state-ncaa.

59. Zucker, *supra* note 4; *see supra* notes 47–48 and accompanying text.

recognizes limited circumstances in which one is responsible for exerting control over another to prevent him or her from harming third parties.[60] Notably, parents have a duty to take reasonable action to prevent their children from harming others, so long as they know or should know of the risk of harm, and have both the ability and opportunity to exercise control.[61]

Even more importantly, the Restatement recognizes a duty to control when a special relationship exists between the actor and the harmed party sufficient to give the harmed party a right to protection,[62] or when a special relationship exists between the actor and the person inflicting harm.[63] Both of these situations could arise in the college sports context: coaches have special relationships to players giving rise to a duty to protect them, as discussed above, and coaches and administrators have special relationships to subordinates giving rise to a duty to prevent them from harming others. By way of example, the second situation would provide for liability in the Ohio State scandal in which an assistant coach inflicted domestic violence upon his wife,[64] while both scenarios would provide for liability in the Penn State scandal, in which an assistant coach sexually abused players and recruits.[65] While the duty to protect lies at the heart of this Note, this additional path to civil liability is worth careful consideration as well.

D. Legal Treatment of Imbalanced Power Dynamics

The American legal system generally presumes equality; indeed, the idea of equality is enshrined in the Declaration of Independence, which states, "[w]e hold . . . that all men are created equal,"[66] and operationalized in the Constitution, which asserts "[n]o State shall . . . deny to any person . . . the equal protection of laws."[67] In situations where equality fails to occur naturally, though, legal intervention is often necessary.[68] There are myriad examples of this, from civil rights laws meant to address racial and gender discrimination,[69] to securities laws meant to address asymmetric information in the market,[70] to labor laws meant to resolve the economic imbalance in bargaining power between employees and employers.[71]

60. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 316 (AM. LAW INST. 2019).
61. *Id.*
62. *Id.* § 315(b).
63. *Id.* § 315(a).
64. Zucker, *supra* note 4; *see supra* notes 47–48 and accompanying text.
65. *Penn State Scandal Fast Facts*, *supra* note 4.
66. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
67. U.S. CONST. amend. XIV, § 1.
68. *See, e.g.*, *infra* text accompanying notes 69–71.
69. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., *et seq.*, 28 U.S.C. *et seq.*, & 42 U.S.C. *et seq.* (2018)).
70. *See, e.g.*, Securities Act of 1933, 15 U.S.C. §§ 77a–77bbbb (2018); for additional discussion, particularly on the difficulties of determining damages in these cases, see also Frank H. Easterbrook and Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 611 (1985).
71. *See, e.g.*, National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2018).

Given their inability to control even the most basic aspects of their lives, there is perhaps no class of persons with less power than children. The legal response to this imbalance consists of the mandated reporting laws discussed throughout this Note, as well as child abuse laws and similar measures.[72] Further, even for college athletes who are legally adults, the power dynamic between coaches and players is troubling. One article notes that "[m]any collegiate athletes do incredible things because they fear losing the scholarship that supports their college education[,]"[73] before arguing that schools should adopt an informed consent model for coaches, similar to that used by doctors and patients in the medical field.[74] The inherent imbalance of power between coaches and athletes, then, suggests further justification for legislative or judicial intervention, as necessary to correct that imbalance for the safety of athletes.

E. Factual Context and College Sports Culture

Beyond the legal history of this issue, the factual context also demands consideration. Sexual assault among college athletes is neither a rare nor isolated phenomenon.[75] Regarding campus sexual assault generally, according to a 2018 survey by the American College Health Association, 10.2% of college students, including 12.4% of female students, reported experiencing "[s]exual touching without their consent" within the prior twelve months.[76] Sociology professor Lisa Wade, in research exploring the effects of status on college sexual experience, found the following:

> Among the most high-status students on campus are athletes—especially men who play the most celebrated sports. . . . On average, athletes are more likely than other students on campus to identify with hypermasculinity and to accept 'rape myths' to justify sexual assaults. Evidence also suggests they[are] more likely to be confused about consent and admit to having committed acts of sexual aggression.[77]

Despite the possible increased prevalence of sexual violence among college athletes, a 1997 study (including both collegiate and professional athletes) "re-

72. *See supra* Section II.B.

73. Kenneth Ravizza & Kathy Daruty, *Paternalism and Sovereignty in Athletics: Limits and Justifications of the Coach's Exercise of Authority Over the Adult Athlete*, 11 J. PHIL. SPORT 71, 76 (1985). Ravizza and Daruty provide troubling additional insights into this issue, finding that "[o]ften the coach seems to have gone beyond what might be considered the propriety of the unique situation presented in athletics and has used means that many would deem unethical in eliciting good performance from the athlete[,]" and that "[c]onduct that some would deem necessary to the achievement of athletic excellence may be regarded by others as unjustified coercion." *Id.* at 71.

74. *Id.* at 78.

75. *See* AM. COLL. HEALTH ASS'N, NATIONAL COLLEGE HEALTH ASSESSMENT: SPRING 2018 REFERENCE GROUP EXECUTIVE SUMMARY 5 (2018), https://www.acha.org/documents/ncha/NCHA-II_Spring_2018_Reference_Group_Executive_Summary.pdf.

76. *Id.*

77. Lisa Wade, *Rape on Campus: Athletes, Status, and the Sexual Assault Crisis*, CONVERSATION (Mar. 6, 2017, 10:14 PM), http://theconversation.com/rape-on-campus-athletes-status-and-the-sexual-assault-crisis-72255.

veals that [although] athletes are more likely to be arrested and indicted [for felony sexual assaults,] when charged with sexual assault these same athletes are far less likely to be convicted."[78]

It is worth noting that, though liability for athletes themselves is not the focus of this Note, time and again they seem to escape liability. In addition to the athletes involved in the situations referenced above,[79] consider the notorious case of former Florida State quarterback Jameis Winston.[80] After Winston was accused of sexual assault in 2013, police waited almost two weeks to try to interview him, never collected DNA, and appointed a lead investigator to the case who had done private security work for a Florida State athletics booster organization.[81] Unsurprisingly, no charges were ultimately filed against Winston,[82] who went on to win a Heisman Trophy and a national championship,[83] and to then be drafted by the NFL's Tampa Bay Buccaneers[84] before facing more recent legal trouble.[85]

This is not an isolated example either. In 2016, two University of Alabama football players were arrested for possessing marijuana and guns, including one that was stolen.[86] The district attorney in the Louisiana parish in which the players were arrested dropped all charges, explaining "that the main reason I'm doing this is that I refuse to ruin the lives of two young men who have spent their adolescence and teenage years, working and sweating, while we were all in the air conditioning."[87] In other words, because they were football players. Furthermore, also in 2016, there was national outrage after a Santa Clara County, California judge gave Stanford swimmer Brock Turner a mere six months in jail for the rape of an unconscious woman at a party.[88]

Why this attitude of indifference prevails is yet another challenging question. One possible explanation may be found in the hyper-masculine culture that

78. Jeffrey Benedict & Alan Klein, *Arrest and Conviction Rates for Athletes Accused of Sexual Assault*, 14 SOC. SPORT J. 86, 86 (1997).

79. *See supra* note 4 and accompanying text.

80. Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), https://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See* Drew Magary, *The Bucs Did This to Themselves*, DEADSPIN (June 26, 2018, 10:12 AM), https://deadspin.com/the-bucs-did-this-to-themselves-1827131980 (also discussing Winston's more recent misconduct); *see also supra* note 34.

85. Matt Baker, *Bucs' Jameis Winston, Uber Driver Reach Settlement, Court Documents Show*, TAMPA BAY TIMES (Nov. 27, 2018), http://www.tampabay.com/sports/2018/11/27/court-documents-bucs-jameis-winston-uber-driver-reach-settlement/ ("[The driver] accused [Winston] of grabbing her crotch while they waited in the drive-through of a Mexican restaurant.").

86. Patrick Redford, *DA Admits He Let Alabama Football Players Off Easy Because They Played Football*, DEADSPIN (June 21, 2016, 12:30 AM), https://deadspin.com/da-admits-he-let-alabama-football-players-off-easy-beca-1782329285.

87. *Id.*

88. Ashely Fantz, *Outrage Over 6-Month Sentence for Brock Turner in Stanford Rape Case*, CNN (June 7, 2016, 8:45 AM), https://www.cnn.com/2016/06/06/us/sexual-assault-brock-turner-stanford/index.html?no-st=9999999999.

often dominates college sports, particularly college football. The University of Maryland's football program recently came under widespread scrutiny for a "coaching environment based on fear and intimidation"[89] after offensive lineman Jordan McNair was pushed to continue rigorously practicing at a team workout on a hot May day until he ultimately collapsed, leading to his death two weeks later.[90] At Maryland, "[e]xtreme verbal abuse of players occur[ed] often,"[91] and one "player said he was forced to overeat to the point of vomiting" as punishment.[92] Despite all this, Maryland later decided to reinstate head coach DJ Durkin and only fired him after widespread protest from players and fans.[93] Even still, he received a contract buyout.[94] This kind of toxic, take-what-you-want-and-win-at-all-costs attitude can lead, as one Huffington Post columnist theorized, to "the dehumanization of women and a culture that ignores or excuses away gender violence."[95]

Jordan McNair is not the only athlete to be pushed so hard in practice that he died.[96] Unfortunately, this overly competitive culture starts for many at an even younger age.[97] In 2017, sixteen-year-old Florida football player Zach Martin-Polsenberg died of heat stroke during a practice.[98] According to one article, as Martin-Polsenberg laid moaning on the ground, his coach remarked that he "was just a little overheated."[99] Even a sixteen-year-old's death did not provide sufficient motivation for meaningful change.[100] Martin-Polsenberg's mother launched a campaign to promote the enactment of stronger heat-safety regulations among Florida high school sports programs,[101] but the Florida High School Athletic Association "bucked its own medical advisory committee by voting to 'strongly recommend,' but not mandate, a first-aid tool experts say could have saved Zach's life—a cooling tub, water[,] and some ice."[102] This presents another impediment to change, besides over-competitiveness and monetary greed: apathy. Even though "[s]ince 1995, three football players a year on average have

89. Heather Dinich et al., *The Inside Story of a Toxic Culture at Maryland Football*, ESPN (Aug. 10, 2018), http://www.espn.com/college-football/story/_/id/24342005/maryland-terrapins-football-culture-toxic-coach-dj-durkin.

90. *Id.*

91. *Id.*

92. *Id.*

93. Scott Polacek, *DJ Durkin Fired as Maryland Head Coach Amid Player, Fan Protest*, BLEACHER REP. (Oct. 31, 2018), https://bleacherreport.com/articles/2803719-dj-durkin-fired-as-maryland-head-coach-amid-player-fan-protest.

94. *Id.*

95. Jessica Luther, *Football Won't Turn Boys into Men*, HUFFPOST (Aug. 21, 2018, 11:49 AM), https://www.huffingtonpost.com/entry/opinion-football-toxic-masculinity_us_5b7c1237e4b0a5b1febf19c9.

96. *See, e.g.*, *infra* text accompanying notes 98–99.

97. *See, e.g.*, *infra* text accompanying notes 98–99.

98. James Bruggers, *'This Was Preventable': Football Heat Deaths and the Rising Temperature*, INSIDE CLIMATE NEWS (July 20, 2018), https://insideclimatenews.org/news/20072018/high-school-football-practice-heat-stroke-exhaustion-deaths-state-rankings-health-safety.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

died of heat stroke, most of them high schoolers,"[103] schools and governance bodies still resist change.

Another explanation may be found in the amount of money generated by college athletics programs. As explained by an article in The Atlantic, "[i]n 2010 . . . the [SEC] became the first to crack the billion-dollar barrier in athletic receipts. The Big Ten pursued closely at $905 million. That money comes from a combination of ticket sales, concession sales, merchandise, licensing fees, and . . . television contracts."[104] The article goes on to note that "the football teams at Texas, Florida, Georgia, Michigan, and Penn State . . . each earn between $40 million and $80 million in profits a year,"[105] and wisely concludes that "[w]hen you combine so much money with such high, almost tribal, stakes . . . corruption is likely to follow."[106]

Quite simply, when people are making such massive amounts of money, it gets easy to sweep things under the rug, even catastrophic patterns of abuse. After all, college sports are far from the first arena in which people in power have chosen to cover up wrongdoings to keep making money, from corporate scandals like Enron[107] and Volkswagen,[108] to other scandals in the sports world, such as the steroid scandals in Major League Baseball[109] and the 2015 FIFA corruption scandal.[110] Greed is a powerful motivator, and simply labeling institutions as "non-profit" does not prevent a great deal of money from flowing to the people at the top of those institutions.[111] Though beyond the scope of this Note, various other instances of corruption pervade college sports: "For example, prostitutes have been paid to lure recruits and shoe companies seeking lucrative contracts have bribed coaches and possibly players (apparently the subject of a current FBI

103. *Id.*

104. Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

105. *Id.*

106. *Id.*; *see also* Allen R. McConnell, *The Psychology of Sports Fandom*, PSYCHOL. TODAY (July 13, 2015), https://www.psychologytoday.com/us/blog/the-social-self/201507/the-psychology-sports-fandom (attempting to explain some of the factors behind the tribal nature of sports fandom, including that "[t]eam associations drive self-esteem" and that "[f]anship satisfies our need to belong[.]").

107. Troy Segal, *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA, https://www.investopedia.com/updates/enron-scandal-summary/ (last updated May 29, 2019).

108. Though full details of this scandal continue to unfold, for a recent summary of current developments, see Jan Schwartz & Emma Thomasson, *VW Seeks Damages from Ex-Managers for Emissions Scandal: Report*, REUTERS (Jan. 10, 2019, 12:17 PM), https://www.reuters.com/article/us-volkswagen-emissions-damages/vw-seeks-damages-from-ex-managers-for-emissions-scandal-report-idUSKCN1P42CS.

109. *See, e.g.*, Michael Solomon, *The Biogenesis PEDs Scandal Explained*, GUARDIAN (Aug. 2, 2013, 11:46 AM), https://www.theguardian.com/sport/2013/aug/02/biogenesis-peds-scandal-explained.

110. Rebecca R. Ruiz, *FIFA Shares Results of Investigation and Tries to Turn the Page*, N.Y. TIMES (Mar. 31, 2017), https://www.nytimes.com/2017/03/31/sports/soccer/fifa-investigation-scandal.html.

111. Susan Adams, *The Highest-Paid Public University Presidents: No. 1 Is Engulfed in Scandal*, FORBES (July 15, 2018, 7:00 PM), https://www.forbes.com/sites/susanadams/2018/07/15/the-highest-paid-public-university-presidents-no-1-is-engulfed-in-scandal/#63190ca966c1.

investigation). Academic standards are obliterated to keep underperforming students in school,"[112] making it even less surprising that sexual abuse is continually ignored.

To summarize, the relevant background of both the legal issues affecting this topic include a firm common law trend against omissions liability, and the societal context of college athlete sexual violence within the broader college sports culture.[113] Next, this Note will proceed to analyze exactly why policy changes are needed in this area and to determine how such change may be enacted in a way that achieves meaningful social progress and suitably protects college athletes, but does not unnecessarily disrupt long-established doctrinal paradigms of omission liability.

III. ANALYSIS

A. Omissions Liability in the Applicable Context

1. Liberty Concerns

In order to make the case for an exception to the general trend against omissions liability, it is necessary to examine in more detail why it is so difficult to hold people liable for their omissions. According to scholar Liam Murphy, "English-speaking lawyers continue to be resistant to the idea of positive legal obligations, whether civil or criminal [possibly because] they constitute excessive interference with individual liberty. . . ."[114] Another scholar agrees that "there is a special problem of infringing liberty when the state punishes omissions,"[115] and that

> prohibiting actions represents a lesser incursion in our liberty than requiring particular actions (that is, punishing their omission). As the argument goes, it is less intrusive to prohibit flag burning than it is to require children to pledge allegiance to the flag. The former only eliminates one of many ways of expressing contempt for the state; the latter requires people to submit their bodies to motions dictated by the state.[116]

Fletcher ultimately disagrees with this focus on bodily movement, instead finding that "[t]he duty to intervene poses a question of liberty not because it requires bodily movement, but because the duty is triggered by an unpredictable event at

112. Richard Vedder, *The Three Reasons College Sports Is an Ugly Business*, FORBES (Mar. 14, 2018, 10:36 AM), https://www.forbes.com/sites/richardvedder/2018/03/14/perpetual-madness-not-just-in-march/#22fbee0365bc.

113. *See supra* Part II.

114. Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 605 (2001).

115. George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1446 (1994).

116. *Id.*

an unpredictable time and place."[117] Regardless of what exactly triggers the liberty question, however, there is broad academic consensus that punishing omissions is typically a greater intrusion into personal liberty than punishing acts.[118]

2. Causality Concerns

In addition to the liberty concern, difficulties in demonstrating causality present another legitimate basis for exercising restraint in imposing liability for omissions.[119] Establishing that an omission caused a particular result is difficult because one who fails to intervene in a situation could be viewed as simply leaving the situation to whatever fate it was already headed.[120] As Kircheimer notes, though, there are two plausible critiques to this theory.[121] First, that one who takes some initial positive action should be liable for following omissions that do not stop the damage.[122] Second, rather than comparing the results of the omission to the results of non-interference, the results of the omission should be compared to the result of a clear expected action, if such an action exists.[123] The first critique offers little support for imposing omission liability on college sports coaches and administrators who ignore abuse because it is a great stretch to find any relevant preceding action in this case, though possibilities could include hiring an abusive assistant coach or perhaps recruiting abusive players. The second critique, though, is far more helpful. Knowing of abuse occurring among those under one's authority is exactly the kind of situation where society expects an individual to take a certain action, namely, stopping the abuse. This expectation exists primarily because of the special status relationship between a coach/administrator and an assistant coach/player, requiring examination of the next issue.

3. Special Duties

Even the sort of relationship that tends to give rise to special duties may not necessarily be enough to impose omissions liability, because if omissions liability is to be limited to specific special relationships, then each such relationship needs to be narrowly delineated by the legislature. This sometimes results in absences of liability even where liability should obviously be imposed.[124] For example, Wisconsin did not even impose child abuse liability on parents for failing

117. *Id.* at 1453.

118. *See supra* Section III.A.1.

119. Kircheimer, *supra* note 15, at 617–19.

120. *Id.* at 617.

121. *Id.* at 617–18.

122. *Id.* Kircheimer uses the analogy of accidentally running over a dog and then not stopping to help it.

123. *Id.* at 618. Kircheimer's analogy here is that while one who refuses to offer a hand to a drowning person does not put him or her in any worse position than if the would-be rescuer had not been there at all, the non-intervenor does put the victim in a worse position than if he or she had performed the expected action: offering a hand.

124. *See, e.g.*, *infra* text accompanying note 125.

to prevent the abuse of their own children until 1986.[125] This kind of oversight is quite possibly the result of unfounded doctrinal fear about omission liability.[126]

Another option is to impose omission liability on bystanders in some situations even where no special status relationship is present. The most prominent difficulty in pursuing this option is determining exactly how much effort a bystander should be required to expend to save one whose peril they did not, in the positive-act sense of the word, cause.[127] Kircheimer summarizes this dilemma as follows:

> The law presupposes an average man. This average man usually will take a two-year-old child from the railway track when a train approaches, just as he would throw a rope to a drowning man. A problem arises when assistance can be rendered only with a considerable amount of inconvenience. Should a reasonably good swimmer, for instance, be obliged to jump into the river to save a stranger?[128]

This challenge is relevant to this Note because mandated reporting statues often require only reporting, without requiring any follow-up, creating situations where individuals can escape liability by merely reporting to others at the school and then continuing to ignore the abuse after it is reported.[129]

B. Breaking the Trend

1. The Time is Now

Before examining the doctrinal support for the recommendations of this Note, shifting societal attitudes and several public policy points must be explored, as they provide the underlying justifications for punishing college athletics coaches and administrators who fail to stop abuse occurring within their programs. To start, sexual violence is not something that involves only an abuser and a victim; in many cases, it is a community-wide issue.[130] It is troubling to recognize that widespread patterns of abuse frequently occur.[131] It is also encouraging, however, because it suggests a path to reform: meaningful bystander

125. State v. Williquette, 385 N.W.2d 145, 147 (Wis. 1986) (as discussed in Nancy A. Tanck, *Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children from Abuse*, 1987 WIS. L. REV. 659).

126. For more on doctrinal developments regarding criminal omissions liability, particularly in recent centuries, see Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 607–15 (1958) ("At this point . . . no sufficient awareness has yet developed of the potential harmful effects of failure to act; consequently, a legislative and judicial tenderness to offenses of omission, not always justified by the circumstances, is still to be found.").

127. *See infra* text accompanying note 128.

128. Kircheimer, *supra* note 15, at 629.

129. *See, e.g.*, *Penn State Scandal Fast Facts*, *supra* note 4 (describing this situation in the Penn State scandal, where some administrators claimed they reported to others, while those who supposedly received the reports claimed to have not).

130. *See* Nat'l Sexual Violence Resource Ctr., *The Impact of Sexual Violence*, NSVRC.org, https://www.nsvrc.org/sites/default/files/2016-01/saam_2016_impact-of-sexual-violence.pdf (last visited Aug. 4, 2020).

131. Such patterns can permeate entire sections of our society, one prominent example being college campuses. *See* text accompanying notes 75–76.

intervention, where "all community members [are given] a specific role, with which they can personally identify and adopt in preventing the community problem of sexual violence."[132] Community problems invite community solutions.

Beyond sexual violence, there has recently been significant attention on reforming college sports more generally,[133] focused on removing the widespread corruption that pervades them for the sake of profits and entertainment value, thereby "spoiling the reputation of institutions for higher learning and as running counter to its fundamental educational mission."[134] While reform ideas here range from changing the Family Education Rights and Privacy Act ("FERPA")[135] to creating minor leagues for football and basketball so as to put distance between college athletics and professional sports leagues,[136] surely a great place to start reforming the image of college sports programs is by taking some creative measures to eradicate physical and sexual abuse from within those programs.

Further, societal attitudes regarding what is acceptable in how coaches treat child athletes is changing.[137] The days of the traditional football coach storming back and forth across the field screaming at players until they break are fading away and facing valid recognition as "a legalized form of child abuse, which is hidden behind success."[138] This kind of behavior is psychologically, emotionally, and in some cases, physically harmful to players, such as in the University of Maryland controversy referenced above.[139] Not only is it harmful, it is common; in one study, "all the athletes reported some form of emotionally abusive [behavior] from their coaches [including] belittling[,] shouting[,] threatening[,] and humiliating . . . independent of athlete or coach gender."[140]

Zooming out from the realm of athletics, this change in thinking reflects broader societal rejection of harmful gender stereotyping, specifically the phenomenon of "toxic masculinity."[141] The historical encouragement of, among other issues, aggression, anger, and emotional distance in men, and the corresponding negative effects of those issues, such as higher suicide rates,[142] recently led the American Psychological Association to release practice guidelines for

132. Victoria L. Banyard et al., *Bystander Education: Bringing a Broader Community Perspective to Sexual Violence Prevention*, 32 J. COMMUNITY PSYCHOL. 61, 70 (2004).

133. *See generally* Robert D. Benford, *The College Sports Reform Movement: Reframing the "Edutainment" Industry*, 48 SOC. Q. 1 (2007) (examining various college sports reform studies).

134. *Id.* at 13.

135. *See generally* Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Education Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WIS. L. REV. 1053 (2003).

136. Richard Vedder, *Ending the College Sports Scandals*, FORBES (Oct. 4, 2017, 9:00 AM), https://www.forbes.com/sites/ccap/2017/10/04/ending-the-college-sports-scandals/#544f17286d39.

137. *See infra* Section III.B.1.

138. Misia Gervis & Nicola Dunn, *The Emotional Abuse of Elite Child Athletes by Their Coaches*, 13 CHILD ABUSE REV. 215, 216 (2004).

139. See discussion of Maryland situation, *supra* Section II.E.

140. Gervis & Dunn, *supra* note 138, at 219.

141. For recent controversy related to this issue, see Maya Salam, *What Is Toxic Masculinity*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/us/toxic-masculinity.html.

142. AM. PSYCHOL. ASS'N, APA GUIDELINES FOR PSYCHOLOGICAL PRACTICE WITH BOYS AND MEN, at 1 (2018).

boys and men.[143] The need for increased recognition of both young athletes as human beings, and of all people as complex individuals with emotional needs, demands additional consideration of athlete safety on and off the field, thereby providing more support for this Note's recommendations.

2. Theories of Punishment

As explained above, ignoring suspected abuse within a program over which one has supervision offends our shared public values; this is itself a valid and important reason for legislation.[144] Yet, there is also great doctrinal support for the solutions urged by this Note.[145] Imposing omission liability here would be consistent with the exception for omissions where a duty exists.[146] All that would be required is the creation of some statutory duty of protection,[147] suggesting that the jump to omission liability is not as doctrinally significant as it may first appear.

Moreover, both primary theories of punishment present strong reasons for imposing liability on college sports administrators who ignore abuse. From a utilitarian perspective, forcing coaches and administrators who know of abuse to take clear steps to stop the abuse should prevent harm to potential future victims without harming the administrators (enacting statutory protections against retaliation for actions taken to stop abuse, for example).[148] This therefore comports with the principal goal of utilitarianism, which is, in its simplest form, "that laws should be enacted to promote the public good."[149] From a retributive perspective, punishing people who ignore abuse by those under their control is deserved.[150] Think of the image of the proverbial toddler walking down railroad tracks[151]—does the bystander who, seeing the child, turns and walks away deserve punishment? If so, then there is no reason the answer should not be the same in the situation at hand. Even someone who disagrees, though, need only fall back to the utilitarian justification for the expansion of liability proposed herein.

143. *See generally id.* As the guidelines explain, "[a]lthough boys and men, as a group, tend to hold privilege and power based on gender, they also demonstrate disproportionate rates of receiving harsh discipline[,] academic challenges[,] mental health issues[,] physical health problems[,] public health concerns[,] and a wide variety of other quality-of-life issues . . . ." *Id.* at 1.

144. *See* Garrity v. New Jersey, 385 U.S. 493, 508 (1967) (Harlan, J., dissenting) ("[The process at issue exists in part] to guarantee the most generous opportunities for the pursuit of . . . public values.").

145. *See infra* Section III.B.2.

146. *See supra* Section II.A.

147. MODEL PENAL CODE § 2.01(3) (AM. LAW INST. 2018) ("Liability . . . may not be based on an omission . . . *unless*: a duty to perform the omitted act is otherwise imposed by law.") (emphasis added).

148. *See infra* text accompanying note 149.

149. Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 130 (1999).

150. *See supra* Section III.A.2 (discussing causality concerns, relevant to the retributive theory's chief concern of punishing people for harms they cause).

151. For the case from which this hypothetical originated, see Buch v. Amory Mfg. Co., 44 A. 809, 809–11 (N.H. 1898). Note that the court in that case answered the relevant question in the negative. *Id.*

3. Morality

Beyond the theories of punishment lens, omissions liability implicates complex questions of morality. After all, "[i]t is obvious to the observer that in certain situations, the intentional failure to prevent harm can be just as repulsive and shocking as active criminal behavio[r]. This moral equivalence of action and omission is the theoretical foundation of liability for omission."[152] Notable questions raised in this context include the following: is it more wrong to kill someone than to let them die? Is it wrong at all to let them die? Is it slightly less wrong? These questions are explored in an article by scholar Ken Levy, who tries to answer them from a variety of perspectives, often invoking consequentialist and deontological theories, before ultimately concluding that Bad Samaritans should be punished, but only mildly, as a compromise between the conflicting answers offered by the examined theories.[153] These same questions may be asked here: is it more wrong to allow a student to be abused than to abuse them? Is it wrong at all? Is it slightly less wrong? The answers are, of course, debatable, but this Note asserts that ignoring abuse is at least wrong enough that morality concerns should not impede the imposition of liability that is justifiable for the reasons above.

British law professor John Coggon addresses the morality of omissions in another context: active versus passive euthanasia.[154] Coggon directly addresses the general squeamishness that some scholars, and no doubt some citizens as well, feel towards imposing omissions liability, noting accurately that "[t]his lack of comfort is not, of itself, a satisfactory basis on which to found moral rights."[155] Coggon asserts that searching for a single, absolutely-responsible cause for any event is a fiction, one that we acknowledge, if only subconsciously, in everyday phrases such as "[w]ho left the window open?"[156]

This concept may well be analogized to the topic of this Note. Whenever an abuse scandal is uncovered, what are the first questions people ask? "Who let this happen?" "How did nobody catch this?" "Why did no one investigate when misconduct was reported?" This is because people understand that often, when abuse occurs unchecked for years, there may be just one abuser but there is often a plethora of people who watched from the shadows for years rather than step forward.[157] There is simply no justifiable basis for considering such willful ignorance moral; it is wrong, a truth that people intuitively understand, and a reality

152. Duttwiler, *supra* note 30, at 61.

153. Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 695 (2010).

154. John Coggon, Commentary, *On Acts, Omissions and Responsibility*, 34 J. MED. ETHICS 576 (2008).

155. *Id.* at 578.

156. *Id.*

157. *See, e.g.*, Catherine Thorbecke, *Women Accuse Ex-USC Campus Doctor of Sexual Abuse, Say the School 'Let It Happen'*, ABC NEWS (July 23, 2018, 6:32 AM), https://abcnews.go.com/news/story/women-accuse-usc-campus-doctor-sexual-abuse-school-56747840 (explaining how, according to a lawsuit, the University of Southern California "concealed years of complaints" about a campus gynecologist who abused students for years).

that is sufficient to impose punishment so long as morality remains a reason for legislation at all.[158]

It is also noteworthy that people's moral judgments of harmful omissions vary depending on the relationship between the bystander and the victim, with one study finding that "[f]or actors in high solidarity or authority roles, the moral distinction between acting and omitting was at its minimum."[159] This only furthers the case for holding college coaches liable for ignoring abuse because coaches often form very close (or "high solidarity") relationships with their players; as one youth sports governing body points out, "[r]elationships are the foundation of coaching[.]"[160] Additionally, "[b]y virtue of their position of authority, power, and superordination, coaches wield enormous influence over the lives of players."[161] Further, the study's authors point out that by limiting omissions liability to people in special role relationships, it is possible to "avoid the apparently unlimited obligations that would appear to arise from a general prohibition on harmful omissions."[162] Given, then, that the coach-player relationship falls squarely into that category of relationships that the authors allude to, in which people find harmful omissions to be the most morally offensive,[163] morality concerns provide another strong reason for punishing college athletics coaches and administrators who take inadequate action to stop violent sexual and physical abuse that occurs within their programs.

4. Victims' Rights

Yet another justification for punishing failures to stop abuse within college sports programs is victims' rights. The victims' rights movement, broadly, seeks to enhance the voice of victims in a fundamentally adversarial process of which crime victims are not a party.[164] This has led to a shift in cultural attitudes and more concretely, legislative reforms in several states.[165] Perhaps most notably, this movement also resulted in federal legislation when Congress enacted the Crime Victims' Rights Act[166] in 2004, which includes a variety of rights including "[t]he right to full and timely restitution,"[167] and "[t]he right to be treated

158. And indeed, it does. *See generally* Kelly Egan, *Morality-Based Legislation Is Alive and Well: Why the Law Permits Consent to Body Modification but Not Sadomasochistic Sex*, 70 ALB. L. REV. 1615 (2007).

159. Jonathan Haidt & Jonathan Baron, *Social Roles and the Moral Judgment of Acts and Omissions*, 26 EUR. J. SOC. PSYCHOL. 201, 217 (1996).

160. James Gels, *The Importance of a Strong Coach-Athlete Relationship*, NAT'L FED'N ST. HIGH SCH. ASS'NS (Sept. 18, 2017), https://www.nfhs.org/articles/the-importance-of-a-strong-coach-athlete-relationship/.

161. Patricia A. Adler & Peter Adler, *Intense Loyalty in Organizations: A Case Study of College Athletics*, 33 ADMIN. SCI. Q. 401, 405 (1988).

162. Haidt & Baron, *supra* note 159, at 217.

163. *Id.*

164. For general history and basics of the victims' rights movement, see Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 14, 2018), https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement.

165. *Id.*

166. 18 U.S.C. § 3771 (2018).

167. *Id.* § 3771(a)(6).

with fairness and with respect for the victim's dignity and privacy."[168] If crime victims are to be treated with dignity, then those who stood by while they were victimized must be punished. Victims of abuse should (theoretically) want to punish all those who played a part in the continuation of their abuse. Therefore, achieving full justice for victims within college sports programs requires that coaches and administrators face punishment when they know of the abuse, but fail to stop it.

5. Primary and Secondary School Applications

While this Note focuses on, as does current public dialogue, athletics abuse scandals at the collegiate level, most of the core concepts in this Note can easily be applied to primary and secondary education as well. In fact, certain factors, including that nearly all such students are minors and that school attendance is compulsory in many states,[169] suggest that there is an even stronger case for holding primary and secondary school coaches and administrators liable for facilitating abuse. The potential victims are in a more vulnerable situation, with less ability to escape of their own volition.[170] They may even have parents forcing them onto sports teams.[171] With these factors in mind, future consideration should be given to applying the recommendations below to grade-school coaches and administrators, in addition to those at the collegiate level.

C. Potential Criticisms

1. Libertarianism

While the liberty argument against omissions liability is generally addressed above,[172] it is also worth examining this argument in the specific factual context of this Note's topic. The thrust of this argument would be that requiring college coaches and administrators to go out of their way to stop harms occurring within their programs is an unfair restriction on their freedom. This concern is not without merit. In addition to the general concerns outlined above, Justice Brandeis perhaps best articulated this concern as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[173] Intrusion upon this comprehensive right should be rare, but is justified here by

168. *Id.* § 3771(a)(8).

169. *See* Stephanie Aragon, *Free and Compulsory School Age Requirements*, EDUC. COMMISSION STS. 1 (May 2015), https://www.ecs.org/clearinghouse/01/18/68/11868.pdf ("To date, 24 states and the District of Columbia require students to attend school until they turn 18.").

170. *See* Mike Sosteric, *The Emotional Abuse of Our Children: Teachers, Schools, and the Sanctioned Violence of Our Modern Institutions*, SOCJOURN (Mar. 2, 2012), https://www.sociology.org/the-emotional-abuse-of-our-children-teachers-schools-and-the-sanctioned-violence-of-our-modern-institutions/.

171. This may well be a bad idea. *See* Baldwin Ellis, *Negative Effects of Parents that Push Their Children into Playing Sports*, HOW TO ADULT (Dec. 5, 2018), https://www.livestrong.com/article/523031-negative-effects-of-parents-that-push-their-children-into-playing-sports/ (pointing out negative effects such as "self-esteem issues," "burnout," and "resentment").

172. *See supra* Section III.A.1.

173. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

one of Kircheimer's positions articulated above, that when there is a clear societal expectation that one is obligated to act, then that obligation should be supported by legal mandate.[174] Here, such an expectation exists: by granting coaches tremendous amounts of authority and control over young athletes, society intuitively expects those coaches to ensure the athletes safety. Beyond intuition, society has, in some instances, expressed this expectation through mandated reporting laws.[175] Therefore, the situation contemplated in this Note falls squarely within one of the exceptions to the general trend against omissions liability outlined above, thereby minimizing the impact of liberty-based criticism.

2. Unfair to Expect Omniscience

Another potential criticism of holding coaches and administrators liable for failing to stop abuse within their programs is that it is unfair to expect anyone to know what other people are doing at all times; that while one can be expected to be aware of one's own actions, it is wholly unreasonable to expect one to be aware of the actions of others. This criticism, however, is outweighed by the special relationship between coaches/administrators and subordinates/players, "giv[ing] rise to a duty to protect another from a foreseeable risk of criminal victimization."[176] Keeping in mind that the recommendations[177] suggested in this Note would only require action by a coach or administrator where there was at least some awareness of prior abuse by the acting individual (that is, where future abuse was indeed foreseeable, at least to some reasonable extent), this proximate cause concern is unfounded in this context. Coaches are not being asked to know everything, only to act appropriately with their knowledge of what happens in their programs.

3. This Is Not Part of My Job

A final plausible criticism is that preventing abuse is not within the job duties of a coach or athletic director, and that it is therefore wrong to impose additional job-related legal obligations that are beyond those in the traditional scope of that occupation. Indeed, a "coach" is defined (in the relevant context), as "one who instructs players in the fundamentals of a sport and directs team strategy,"[178] while an "athletic director" is one "responsible for administering the athletic program of an educational institution[.]"[179] There is nothing in these definitions about stopping crime or ensuring player safety. To this, two rebuttals may be offered. First, as part of the broader legal framework, individuals with

174. *See supra* Section III.A.2.

175. *See supra* Section II.B.

176. Gregory A. Crouse, *Negligence Liability for the Criminal Acts of Another*, 15 J. MARSHALL L. REV. 459, 468 (1982).

177. *See infra* Part IV.

178. *Coach*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/coach (last visited Aug. 4, 2020).

179. 15 U.S.C. § 7801(3) (2018).

special statutorily-defined status relationships, such as a parent to a child,[180] owe a duty of protection to that other person.[181] Second, these relationships are sometimes created not by statute but by contract, and this does in fact already happen in some coaching contracts.[182] Both of these realities, along with a healthy dose of common sense, suggest that keeping players safe is fairly within the scope of a college coach's or athletic director's job duties, and that those who abdicate that responsibility should share liability for the consequences that follow their omissions.

D. Final Analysis

1. Extending the Principle

Though not directly the subject of this Note, it is worth mentioning that many of its concepts, as well as its final conclusions, are applicable to situations far beyond college sports programs. Most clearly, there is potential for expanding the duty to aid in any situation where one person has some authority and responsibility over another person in a vulnerable position, such as medical care providers with patients[183] and prison guards with prisoners.[184] While some of these situations are covered in some jurisdictions by mandated reporter statutes,[185] expanded liability may provide much-needed relief to victims in those situations as well.

2. Summary

None of the justifications offered above are perfect, but taken together, they paint a compelling picture and point to the same answer: we must punish those who allow abuse to happen within their organizations, particularly within the unique dynamics of college sports programs. Doing so would benefit society, prevent abuse, protect the rights of victims, and allot proper moral responsibility to people who willfully look the other way as those under their authority are

180. *See* Anne T. Johnson, *Criminal Liability for Parents Who Fail to Protect*, 5 L. & INEQ. 359, 368 (1987) (noting that, as of that writing, "[t]hirty-five states have recognized that parental duties extend beyond the duty not to abuse children. . . . [and] acknowledge that parents owe a duty of care and protection to their children.").

181. *See* RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 2019). Note, though, that the parent-child relationship is not expressly listed here.

182. *See supra* notes 45–48 and accompanying text in Section II.B.

183. *See generally* June M. McKoy, *Obligation to Provide Services: A Physician-Public Defender Comparison*, 8 VIRTUAL MENTOR 332, (2006).

184. Due to the Eighth Amendment's prohibition on cruel and unusual punishment, this issue in the guard-prisoner context raises constitutional questions as well. *See* James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QUINNIPIAC L. REV. 407, 407 (2001) ("While it is now well-established that the Eighth Amendment's prohibition against cruel and unusual punishments regulates prison conditions, translating that prohibition into liability standards to govern the behavior of prison officials and afford remedies to injured prisoners has been difficult.").

185. *See generally, e.g.*, Lee Black, *Liability for Failure to Report Child Abuse*, 9 VIRTUAL MENTOR 819 (2007) (discussing physicians as mandatory reporters of child abuse, and, notably, examining the extension of this concept to negligence civil suits).

harmed. Questions remain, though, such as whether punishment should be criminal, civil, or both, when and how exactly we should impose such punishment, how severe such punishment should be, and what forms it should take. These questions are of considerable importance because resolving that the omissions discussed here are worthy of punishment presents an incomplete answer, given the wide variety of civil and criminal penalties available.

IV. RECOMMENDATION

A. Impose Statutory Duties

As suggested above, the context of college athletic programs is one of the rare situations where criminal omissions liability is appropriate. Requiring reporting to a superior alone is not enough, some follow-through must be required to ensure that the abuse stops. This statutory mistake contributed to the Penn State scandal.[186] There are an untold number of possibilities as to how exactly a statute should look, but one example is as follows:

> In the State of [X], it shall be a [low-to-mid level] misdemeanor [the idea here being that the punishment should be a hefty fine and, ideally, relevant community service, such as teaching high-school students about consent, and possibly restitution, but that the punishment should not include jail time] for an athletic coach or administrator at a college [defined as necessary] who, having belief to a high probability that a coach or player within the sports program under which that coach or administrator has control has committed an act of physical, sexual, or domestic violence, fails to take all reasonable measures necessary to stop further such abuse from occurring.[187]

This model is admittedly far from perfect but serves as a viable model of what a statute punishing failure to stop abuse could look like. One crucial element of such a statute, though, is a high *mens rea*, such as "belief to a high probability" or something similar to the common law standard of knowledge.[188] This is because a negligence *mens rea* would simply impose incredibly broad duties on coaches to constantly investigate everyone within their programs for possible abuse, or face harsh criminal penalties. This would be unreasonably burdensome, which is why negligent omissions are best handled by civil claims, where specific parties who feel a coach has caused them harm through a failure to act may pursue an action for monetary damages.[189]

Less clear is whether omissions that are reckless, that is, that are made when the defendant "consciously disregards a substantial and unjustifiable risk,"[190]

186. *See Penn State Scandal Fast Facts*, *supra* note 4.

187. This model statute was drafted off-hand by the author, though as explained in the following text, it incorporates the Model Penal Code standard for knowledge.

188. *See* MODEL PENAL CODE § 2.02(2)(b) (AM. LAW INST. 2018) (providing the MPC standard); *see also, e.g.*, 31 U.S.C. § 3729(a)(1) (2018) ("[A]ny person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment of approval . . . is liable to the United States Government . . . .").

189. *See infra* Section IV.B.

190. MODEL PENAL CODE § 2.02(2)(c).

should be punished criminally or civilly. This is primarily because recklessness is generally a mess of a standard to work with, as has been written on extensively.[191] Reckless omissions, however, do sometimes face severe civil penalties, such as for material nondisclosures under securities laws,[192] and there is some precedent for criminal punishment as well, such as when a Massachusetts nightclub owner was found guilty of involuntary manslaughter for failing to take adequate fire safety precautions.[193] Given this, there is a plausible argument that when someone consciously chooses to disregard a substantial risk that a player under his or her supervision will be abused, that person should be held criminally liable for the consequences of that choice.

Federal statutory solutions warrant exploration as well. The federal government of course lacks the ability to impose general criminal prohibitions.[194] Through its specifically delegated powers, however, the federal government does have some options for preventing coaches and administrators from ignoring abuse within their college sports programs. As mentioned above,[195] through the Title IX regime, the federal government can, and already does, condition schools' receipt of federal funds upon compliance with certain sexual violence-related conditions.[196] This regime could plausibly be expanded to mandate that for schools to receive federal funding, they must include provisions in each coaches' and athletic administrator's contracts requiring reporting of known abuse, such as the provisions discussed above in Urban Meyer's and Lovie Smith's contracts.[197]

Federal administrative action is also a possibility. The Department of Education's Office for Civil Rights occasionally promulgates regulations and issues policy letters furthering the statutory goals of Title IX.[198] Regulatory action has the benefit of not requiring congressional approval by officials who must seek

191. *See, e.g.*, Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 652 (2001) (expressing frustration that the recklessness standard "fails to capture" the article's topic, a situation that arises often in the real world).

192. *See generally* Kevin R. Johnson, *Liability for Reckless Misrepresentations and Omissions Under Section 10(b) of the Securities Exchange Act of 1934*, 59 U. CIN. L. REV. 667 (1991).

193. Edward W. Hautamaki, *The Element of Mens Rea in Recklessness and "Criminal Negligence"*, 2 DUKE B.J. 55, 65–66 (1951) (discussing Commonwealth v. Welansky, 55 N.E.2d 902, 910 (Mass. 1944)). Of general note, Hautamaki concludes that "[t]he main problem in the law of 'criminal negligence' is a terminological one, which involves reconciling the continuance of *mens rea* as a fundamental of criminal law with the non-criminal connotations of 'negligence.'" *Id.* at 68.

194. *See* U.S. CONST. amend. X.

195. *See supra* Section II.B.

196. 20 U.S.C. §§ 1681–1688 (2018); *see* U.S. CONST. art. I, § 8 ("The Congress shall have Power to . . . provide for the . . . general Welfare of the United States . . . ."). For further explanation of the limits of this power, see generally South Dakota v. Dole, 483 U.S. 203 (1987); Craig Eichstadt, *Twenty-Year Legacy of* South Dakota v. Dole, 52 S.D. L. REV. 458 (2007).

197. *See supra* notes 45–48 and accompanying text Section II.B.

198. *See Reading Room (eFOIA Index)*, U.S. DEPT. ED. OFF. CIV. RIGHTS, https://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX-Pubs (last modified Jan.10, 2020).

reelection.[199] Additionally, non-binding policy documents such as "Dear Colleague" letters[200] could encourage schools to take firmer action against coaches and administrators who ignore abuse while minimizing accusations of federal overreach. Just as congressional solutions are constitutionally limited,[201] federal administrative solutions are limited to enforcing the provisions of Title IX,[202] but the bottom line is that the federal government's hands are not tied here; rather, there are several legislative and executive actions that the federal government, through Title IX, could take to encourage colleges to punish sports coaches and administrators who fail to intervene in cases of known abuse within their programs.[203] So while the federal government has fewer options available than state governments, federal solutions remain a useful possibility.[204]

B. Recognize Negligence Tort Claims

While restitution in a criminal case is an option, a civil remedy offers a more direct way to compensate victims for coaches' and administrators' failures to stop abuse.[205] The simplest way to craft an effective civil remedy in this situation is to adopt the basic negligence test known as the "reasonable person standard,"[206] which generally asks what a "reasonable" person would do in the circumstances of the defendant, and then asks if the defendant's conduct met that standard of care.[207] Omissions can be judged under such a standard just as well as acts. The prosecution must merely ask the jury members if, presented with whatever facts indicating abuse that the coach or administrator-defendant was presented with, they believe a reasonable person would have made the same omissions.[208] If not, the defendant should be found liable for his or her negligence, and should be required to pay damages for the plaintiff's suffering that he or she failed to prevent.[209]

The leading alternative standard for negligence is the Hand formula, which, roughly, provides that a defendant acted negligently if the burden he or she would have incurred in taking adequate precautions against a harm was less than the probability of the harm multiplied by its severity.[210] Utilizing this approach to

199. *See generally* Gary Biglaiser & Claudio Mezzetti, *Politicians' Decision Making with Re-Election Concerns*, 66 J. PUB. ECON. 425 (1997).

200. For several examples, *see Reading Room*, *supra* note 198.

201. *See generally* U.S. CONST. amend. X.

202. *Id.*

203. *See supra* text accompanying notes 194–200.

204. *See supra* text accompanying notes 194–200.

205. *See infra* Section IV.B.

206. *See, e.g.*, Charles R. Korsmo, *Lost in Translation: Law, Economics, and Subjective Standards of Care in Negligence Law*, 118 PENN ST. L. REV. 285, 297 (2013).

207. *See id.*

208. *See* Suja A. Thomas, *Summary Judgment and the Reasonable Jury Standard: A Proxy for a Judge's Own View of the Sufficiency of the Evidence*, 97 JUDICATURE 222, 223 (2014) ("[T]he reasonable jury standard has become a proxy for a judge's own view of the evidence.").

209. *See* Korsmo, *supra* note 206, at 297–98.

210. While this formula has been reworded and reexamined endlessly, it was originally drafted in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) ("the owner's duty . . . to provide against resulting

determine negligence usually leads to the same conclusion as the Reasonable Person standard.[211] The burden coaches or administrators would incur in stopping abuse in their program is often as insignificant as a phone call or email, possibly with some paperwork to follow. Sometimes a report to a superior may be enough, while sometimes calling the police may be needed. It is possible that reporters may need to testify in court, or have an uncomfortable conversation in which they fire a subordinate or dismiss a player.

This burden pales in comparison to both the likelihood that someone who has abused once will abuse again[212] and the severity of the harm that physical or sexual violence can cause.[213] According to the Rape, Abuse & Incest National Network ("RAINN"), sexual violence can result in depression, flashbacks, post-traumatic stress disorder, unwanted pregnancy, substance abuse, and many more extreme consequences, including suicide.[214] The math here is easy and the answer is clear: a college sports coach or administrator who ignores abuse within their program acts negligently when they do so. They deserve punishment for that negligence and owe compensation to those victimized as a result of their inaction.

While an argument is made above for including reckless omissions in the criminal regime,[215] reckless omissions in this context could certainly give rise to tort liability as well. Recklessness has long been recognized in criminal law, including under the Model Penal Code,[216] but has a far less clear status in tort law.[217] If nothing else, though, claims for reckless omissions could give rise to the same compensatory damages as negligent omissions, making little practical difference to the injured plaintiff.[218]

Admittedly, calculating damages for omissions is quite difficult—after all, the majority of any money owed to the victim should be paid by the abuser him or herself. There is no clear solution to this problem, though perhaps the best option is simply to leave this determination to each jury to make in light of all the circumstances of a given case. Apart from compensatory damages to make a

injuries is a function of three variables . . . if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B is less than PL.").

211. *See supra* text accompanying notes 206–209.

212. For a comparative analysis of sex offender recidivism studies, see Steven Yoder, *What's the Real Rate of Sex-Crime Recidivism*, PAC. STANDARD (May 27, 2016), https://psmag.com/news/whats-the-real-rate-of-sex-crime-recidivism.

213. *Effects of Sexual Violence*, RAINN, https://www.rainn.org/effects-sexual-violence (last visited Aug. 4, 2020).

214. *Id.* The harmful effects listed above are not the end of the story either. RAINN provides information about several more negative effects of sexual violence including self-harm, sexually transmitted infections, dissociation, and eating and sleeping disorders. *Id.*

215. *See supra* Section IV.A.

216. MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 2018).

217. For general discussion and some proposed solutions to the problematic relationship between recklessness and tort law, see generally James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133 (2001).

218. *See infra* text accompanying notes 219–221.

plaintiff whole, punitive damages are by nature even more vague to calculate.[219] Determining whether these damages should be paid by the coach or administrator personally, or by the school for which they work is another complication, one that schools face not only regarding abuse, but also regarding concussions suffered by players as well.[220] This complication, though, could be resolved via employment contract provisions.[221]

C. Implement Training Requirements

One final, though less direct, method of reform is for state legislatures to impose mandatory training requirements on college sports coaches and administrators, teaching them how to recognize sexual and domestic violence within their programs, and how to effectively stop it. Of course, training is already provided at many schools and does not serve to punish coaches and administrators who choose to look the other way.[222] That said, acting on the front-end to ensure coaches and administrators are armed with relevant knowledge about stopping abuse might also contribute greatly to cutting down sustained patterns of abuse.

A vital component of implementing effective training is ensuring that it works as intended. "The limited evidence available suggests [workplace sexual harassment] training is ineffective at presenting harassment."[223] Developing research has explored a wide variety of ways to improve sexual harassment and assault prevention training, including utilizing innovative methods, such as Acceptance and Commitment Therapy,[224] and focusing on making training more useful in the real world through approaches such as "adjust[ing] the content of trainings to reflect the relative frequency of different causes of action."[225] The training recommended here should be driven by this kind of research, rather than merely following the norm, if it is to truly accomplish its purpose.

Additionally, training has the potential to make a significant difference without punishing well-intentioned coaches and administrators who just do not know how to deal with suspected abuse. Research shows that even police officers, who encounter abusive situations daily, are not always adequately equipped to

219. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 870 (1998) ("Courts have struggled for years to develop a rational set of principles for the imposition of punitive damages . . . .").

220. *See* Emma Nicolas, *Are High School Coaches Liable for Sports-Related Concussions?*, USA TODAY HIGH SCH. SPORTS (Mar. 22, 2018), https://usatodayhss.com/2018/are-high-school-coaches-liable-for-sports-related-concussions.

221. *See supra* text accompanying notes 45–48.

222. *See generally* Bronfenbrenner Ctr. for Translational Research, *Sexual Harassment Training Is Largely Ineffective*, PSYCHOL. TODAY (Dec. 13, 2017), https://www.psychologytoday.com/us/blog/evidence-based-living/201712/sexual-harassment-training-is-largely-ineffective.

223. *Id.*

224. Jelena Kecmanovic, *How Do We Improve Sexual Harassment Training?*, PSYCHOL. TODAY (Dec. 14, 2017), https://www.psychologytoday.com/us/blog/science-practice/201712/how-do-we-improve-sexual-harassment-training.

225. Elizabeth C. Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 520 (2018).

intervene effectively in such situations.[226] If police officers are not, surely many coaches and administrators, whose daily job duties have nothing to do with such situations, are not either. Mandatory training could thereby provide a way to reach those who want to help, even if it is ignored by less well-intentioned coaches and administrators.

D. Stop Giving Them Money

There is one final solution to the problems described in this Note, and though the least direct, it is perhaps the most obvious of all, and perhaps the only option available to most readers, who are not legislators, judges, NCAA officials, or school administrators. College sports fans can simply choose to stop supporting schools that take inadequate action to stop or prevent abuse within their programs. A tremendous amount of money flows through college sports programs, and a lot of it comes from fans.[227] As just one example, the University of North Carolina "set a school record for ticket revenue in 2017–2018 at $25.9 million, up from $23.8 million the year before."[228] This financial success is particularly instructive because during those two years, a massive academic fraud scandal erupted at North Carolina.[229] So long as fans continue to support unethical programs, these programs will not change on their own.

Fans can motivate this change by walking away, finding other entertainment, demanding better, or at the very least, demanding that schools stop allowing athlete abuse on their watch. Unlike most legal mechanisms of change, the vote-with-your-pocketbook variety of change described here is of course nonbinding and would therefore fail to provide results that may be as immediately satisfying as legal solutions. In an industry driven by massive amounts of money, however, this solution could have the strongest lasting impact in the end.

V. CONCLUSION

The United States' civil and criminal systems should implement harsher penalties for failures to stop known abuse within college athletics programs. This is necessary because, quite simply, people are currently getting off too easy (or not being punished at all), and this is morally, socially, and doctrinally the incorrect result. Such a system is no longer in keeping with social values. Rather, it is

226. Martha L. Coulter et al., *Police-Reporting Behavior and Victim-Police Interactions as Described by Women in a Domestic Violence Shelter*, 14 J. INTERPERSONAL VIOLENCE 1290, 1296–97 (1999).

227. *See generally Finances of Intercollegiate Athletics*, NCAA, http://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics (last visited Aug. 4, 2020).

228. Michael Smith, *Road to Revenue*, SPORTS BUS. J. (Aug. 20, 2018), https://www.sportsbusinessdaily.com/Journal/Issues/2018/08/20/In-Depth/Main.aspx. Smith provides several other interesting examples of college sports programs finding new ways to make money, including "Florida State . . . introducing three areas where fans can tailgate before a game, each with a different price point and experience." *Id.* Smith quotes the University of Texas' athletic director as explaining grandly, "[i]t's the Disney concept—it's about more than just the rides. . . ." *Id.*

229. *See* Tracy, *supra* note 10.

a relic from a past age, when abuse, exploitation, and discrimination were frequently swept under the rug for the sake of power and profits.

Further, instituting liability for failure to report known abuse is appropriate because even though there is a general trend against omissions liability in the United States, the situation at hand here falls into a common exception: situations where someone has undertaken some duty of care for another. When someone in such a position ignores abuse happening on his or her watch, punishment is warranted, and compensation is owed to the victim for the decision to place his or her own money, power, or comfort above the victim's safety. It is not only appropriate, but necessary because, as demonstrated in the news articles discussed above, situations like these keep occurring, and punishing people who help to cover up these scandals would help stop these repeated instances of abuse.

There are several valid reasons, most notably concerns of liberty and causality, for not punishing omissions, but they all fall short in this context. An exception to the general rule is warranted here, given both the special relationship between coaches/administrators and students, and the complicated dynamics that play into the uniquely abuse-prone environment of college athletics, such as money (of which there is often tens of thousands of dollars on the line for student-athletes, which could make them hesitant to report abuse), power, privilege, and toxic masculinity.

The scandals cited above[230] are reprehensible. They are not isolated incidents but are representative of pervasive problems throughout modern society, and specifically throughout a college athletics culture driven by a singular focus on developing winning programs, no matter the cost. We must stop allowing powerful individuals to callously disregard the safety of those entrusted to their care.[231] While the decision of whether to impose liability for omissions is undoubtedly a complex mess of often-conflicting concerns, if ever there was a situation that called for imposing omissions liability, this is it. This is necessary, this is right, and federal and state legislatures, judges, schools, and even fans must step up. Enacting change is always difficult, and may involve sacrifice, such as of personal relationships between coaches or of profits for programs. These sacrifices, though, are necessary to protect vulnerable athletes. The endless shifting of blame and denial of accountability must end—it is their fault.

230. *See* Armour, *supra* note 4; Lavigne, *supra* note 4; *Penn State Scandal Fast Facts*, *supra* note 4; Zucker, *supra* note 4.

231. As an aside, it should be noted that college sports is far from the only field in which the safety concerns of those at the bottom of the food chain are ignored. For just one example in a different industry, see Sandy Smith, *Brooklyn Construction Company Owner Indicted for Manslaughter*, EHS TODAY (May 22, 2017), https://www.ehstoday.com/construction/brooklyn-construction-company-owner-indicted-manslaughter.