

**How the Courts Fumbled on Sexual Assault
– and What the NCAA Can Still Do About It**

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I. Introduction

In the midst of the Me Too movement¹ and in the wake of the scandals at Baylor² and Michigan State,³ intercollegiate sports has not escaped the cultural conversation around sexual assault. Nor have institutions escaped Title IX lawsuits stemming from sexual assault committed by student-athletes. Recently denied *certiorari* in the Supreme Court,⁴ *Ross v. University of Tulsa*⁵ is one such case. The Tenth Circuit's holding in *Ross* reveals the limitations of Title IX when it comes to preventing sexual assault and other forms of sexual violence. Interpretations of Title IX like the one in *Ross* have weakened the obligations of institutions to investigate reports of peer sexual assault. However, the National Collegiate Athletics Association (NCAA) could help prevent sexual assault, at least by student-athletes, by adopting rules that would hold institutions accountable where the courts have refused to do so. This paper will argue why the Supreme Court should have granted *certiorari* and reversed the Tenth Circuit's decision in *Ross* and how strengthening the obligations of members of the NCAA would help to prevent sexual violence.

II. Legal Framework of *Gebser* and *Davis*

¹ Stephanie Zacharek, Eliana Dockterman, & Haley Sweetland Edwards, *The Silence Breakers*, Time, Dec. 18, 2017, <http://time.com/time-person-of-the-year-2017-silence-breakers/>.

² Baylor University football staff were accused of covering up rape allegations against several Bears football players. Will Hobson, *Lawsuit Alleges Baylor Football Rape Scandal More Widespread than Reported*, Wash. Post, Jan. 27, 2017, https://www.washingtonpost.com/sports/colleges/lawsuit-alleges-baylor-football-rape-scandal-more-widespread-than-reported/2017/01/27/38e93d3e-e4e0-11e6-a547-5fb9411d332c_story.html.

³ Larry Nassar, a USA Gymnastics team doctor, who also worked with Michigan State University (MSU), was recently sentenced to 40 to 175 years in prison for the sexual abuse of more than 150 women. There are still questions about what MSU knew about Nassar's behavior and when. Mitch Smith & Anemona Hartocollis, *With Larry Nassar Sentenced, Focus Is on What Michigan State Knew*, N.Y. Times, Jan. 25, 2018, <https://www.nytimes.com/2018/01/25/us/larry-nassar-michigan-state-investigation.html>.

⁴ *Ross v. University of Tulsa*, 2018 WL 325687 (2018).

⁵ 859 F.3d 1280 (10th Cir. 2017).

The legal framework for liability stemming from peer harassment under Title IX is set out in *Davis v. Monroe County Board of Education*.⁶ First, the defendant must be a recipient of federal funds.⁷ Second, an appropriate person must have had actual knowledge of the harassment. As defined in *Gebser v. Lago Vista Independent School District*,⁸ an appropriate person is “an official of the recipient entity” who “at a minimum” has “authority to take corrective action to end the discrimination.”⁹ Third, the plaintiff must show that the defendant institution acted with deliberate indifference to the harassment. Fourth and finally, the harassment must be so severe that it effectively bars the victim's access to an educational opportunity or benefit.¹⁰

III. Facts of *Ross*

While Patrick Swilling was a basketball student-athlete at the College of Southern Idaho (CSI), his head coach was told that Swilling raped another CSI student.¹¹ The coach reported this to police, but when the victim decided not to continue cooperating, the case was closed.¹² CSI never investigated the incident.¹³ Subsequently, Swilling transferred to the University of Tulsa (TU). TU coaches and athletics personnel asked CSI about Swilling’s off-court conduct, but they

⁶ 526 U.S. 629 (1999).

⁷ This is usually not much of a question as there are very few institutions that do not receive federal funds and therefore to whom Title IX is not applicable. Ibbby Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, The Atlantic, Jul. 7, 2016, <https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/>.

⁸ 524 U.S. 274 (1998).

⁹ *Gebser*, 524 U.S. at 277.

¹⁰ *Davis*, 526 U.S. at 650.

¹¹ *Ross v. University of Tulsa*, 180 F.Supp.3d 951, 957 (N.D. Okla. 2016).

¹² *Id.*

¹³ Rachel Axon, *Patrick Swilling Jr. responds to lawsuit in open letter*, USA Today, Aug. 21, 2014, <https://www.usatoday.com/story/sports/ncaab/2014/08/21/patrick-swilling-jr-letter-tulsa-idaho-sexual-assault-title-ix/14394481/>.

were not informed of the rape allegations.¹⁴ After transferring, Swilling was accused of rape by a TU soccer player in 2012 and of assault by another TU student in 2013. Both women declined to pursue the matters with police, though the 2012 incident was reported to campus police.¹⁵ In 2014, Abigail Ross alleged that Swilling raped her. She reported the incident to the Tulsa Police Department and to TU.¹⁶

IV. The Tenth Circuit's Decision

In *Ross*, the plaintiff put forward two theories: first, that the University of Tulsa “acted with deliberate indifference by failing in 2012 to adequately investigate reports that Mr. Swilling had raped another student,”¹⁷ and second, that TU’s decision to exclude evidence of prior reports of sexual misconduct in Swilling’s student conduct hearing amounted to deliberate indifference.¹⁸ Both the district court and the Tenth Circuit applied the law correctly when dispensing with the second theory. The district court noted that even if the university had misapplied its rule on excluding evidence of past sexual history in student conduct hearings, “[a] possible misapplication of a school’s evidentiary policy, particularly where the school sought and received advice of outside counsel, is not ‘clearly unreasonable’ as a matter of law.”¹⁹ The Tenth Circuit cited Office for Civil Rights guidance, which “does not recommend use of prior reports in the absence of a finding of responsibility.”²⁰

¹⁴ *Ross*, 180 F.Supp.3d at 957.

¹⁵ *Id.*

¹⁶ *Id.* at 959.

¹⁷ *Ross*, 859 F.3d at 1282.

¹⁸ *Id.* at 1292.

¹⁹ *Ross*, 180 F.Supp.3d at 973.

²⁰ *Ross*, 859 F.3d at 1293.

The problem in this case, instead, is the Tenth Circuit's holding with regard to the first theory. The university did not dispute that rape constitutes a severe form of harassment that if treated with deliberate indifference by the institution would deny the victim "access to the university's educational benefits or opportunities,"²¹ and the Tenth Circuit held that "a fact-finder could justifiably infer" that campus police had actual knowledge of the 2012 rape and acted with deliberate indifference by "dropping the investigation."²² Under the *Gebser* and *Davis* framework, then, the only issue in the case was whether campus police officers were "appropriate persons."²³ The Tenth Circuit, in an confounding application of the law, found that they were not.²⁴

In holding that campus police officers were not appropriate persons under *Gebser*, the Tenth Circuit addressed three arguments put forward by the plaintiff, all with which the district court had agreed.²⁵ First, Ross argued that the university's Sexual Violence Policy designated campus security as "a proper recipient of a sexual violence report"²⁶ and that campus police were *required by university policy* to "automatically report sexual assaults to the Office of Student Affairs."²⁷ The Tenth Circuit characterized this argument as asserting that "anyone who participates in the initiation of a corrective process" has authority to "institute corrective measures" and is therefore an appropriate person under *Gebser*.²⁸ That university policy delegated the responsibility for receiving reports of sexual violence to campus police and

²¹ *Id.* at 1283.

²² *Id.* at 1284.

²³ *Id.* at 1289.

²⁴ *Id.*

²⁵ The district court awarded summary judgment to the University of Tulsa because it found that campus police officers, while appropriate persons, did not have actual knowledge of the rape because the report was too vague. *Ross*, 180 F.Supp.3d at 965.

²⁶ *Id.* at 966.

²⁷ *Ross*, 859 F.3d at 1289.

²⁸ *Id.*

imposed a duty on campus police officers to convey any such reports to the Office of Student Affairs was not addressed by the Tenth Circuit. Instead, the court contended that “Ross’s ... interpretation of *Gebser* would create Title IX liability for clerical errors by ministerial personnel who lack any discretionary authority to take corrective measures.”²⁹ Of course, equating the honest mistake of a secretary with the intentional decision of high-ranking campus police officers³⁰ to ignore their obligation to report allegations of sexual violence to the Office of Student Affairs is intellectually dishonest, but it is also a legally untenable position. *Gebser* requires *deliberate indifference* to reports of sexual harassment in order for a recipient of federal funds to be held liable under Title IX.³¹ It seems quite clear that a clerical error would not meet such a standard.

Next, the Tenth Circuit addressed the argument that campus police were appropriate persons because of their role in the investigative process. Although campus police worked with the Office of Student Affairs directly to investigate reports of violence on campus, making them an integral part of the corrective process, the court again held that this would mean anyone involved with the investigative process could be an appropriate person.³² The court does not explain how this conclusion follows from the argument. Instead, the court dismissed this argument as perfunctory, stating that it was “not clear” to the court what Ross was arguing.³³

The final argument considered by the court on this issue was based on “the university’s designation” of campus police officers as appropriate recipients of reports of sexual assault. The district court found that this designation created “an equitable expectation in students ... that a

²⁹ *Id.* at 1290.

³⁰ *Id.* at 1289.

³¹ *Gebser*, 524 U.S. at 1999.

³² *Ross*, 859 F.3d 1290.

³³ *Id.* at 1291.

report to [campus police] triggers any and all of [the university's] 'corrective processes.'"³⁴ The district court also noted, and Ross argued, that allowing schools to designate campus police officers to receive reports of sexual assault without holding those officers to be appropriate persons would be to allow schools to avoid Title IX liability simply by ensuring that reports were never delivered to Title IX coordinators.³⁵ Though this result would seem to completely undermine the objectives of Title IX, the Tenth Circuit rejected the argument without even addressing it. Instead, the court simply stated that "[t]o the extent that university policy indicates that [campus police] would begin the university's 'corrective processes,' that fact would not justify treating the officers as appropriate persons for purposes of Title IX."³⁶

V. Conclusions and Recommendations

This case illustrates the ways in which Title IX is ineffective in combatting sexual violence. At a base level, the current interpretation of the law clearly does not incent institutions and their employees to take seriously and investigate reports of rape and sexual assault. Although CSI knew of allegations against Swilling and was required by Title IX to investigate, the college failed to act or inform TU of the incident.³⁷ Campus police officers at TU chose not to convey the 2012 report of rape to the Office of Student Affairs as university policy required, and because the Tenth Circuit's decision protected TU from liability, they will have no reason to make sure that the same thing doesn't happen in the future.³⁸

³⁴ *Ross*, 180 F.Supp.3d at 967.

³⁵ *Ross*, 859 F.3d at 1291.

³⁶ *Ross*, 853 F.3d at 1291.

³⁷ *Axon*, *supra* note 8.

³⁸ *Ross*, 180 F.Supp.3d at 967.

The Tenth Circuit’s opinion, and the Supreme Court’s tacit affirmation, also fail to hold schools accountable and in fact provide them a new loophole to exploit. Under *Ross*, schools can designate a person or office to receive reports of sexual assault, give that person or office no power to take corrective action beyond reporting up the chain, and avoid liability by preventing higher-ups from learning of the reports. For example, University of California, Los Angeles (UCLA) head football coach Chip Kelly signed a contract in 2017 containing a provision designating him as a “responsible employee” for purposes of Title IX. The clause references Title IX directly and requires Kelly to report any instance of sexual violence or harassment to the Title IX office but gives Kelly no authority to institute corrective measures on his own. In fact, the clause specifically prohibits Kelly from investigating the report or attempting to intervene in any way.³⁹ Despite this contractual obligation to report sexual violence to the university’s Title IX office, it seems clear that under the Tenth Circuit’s holding in *Ross*, a coach with such a provision in their contract would not be an “appropriate person.” Especially given the recent sexual assault scandals at Baylor and Michigan State, schools should be under *more* pressure to maintain control over their athletics departments and other offices on campus; the *Ross* opinion instead gives schools an incentive to turn a blind eye and use ignorance as a shield against Title IX liability.

If judges and legislators decline to hold educational institutions accountable, the NCAA should step up to the task. The Southeastern Conference already has a rule prohibiting individuals who have been punished, either by an educational institution or in the criminal justice system, for “serious misconduct,” which is defined as “sexual assault, domestic violence, other

³⁹ Joe Piechowski, *UCLA Football: Chip Kelly’s Contract Has Some Interesting Provisions*, Bruins Nation, Jan. 6, 2018, https://www.bruinsnation.com/ucla_bruin_football/2018/1/6/16857272/ucla-football-chip-kellys-contract-has-some-interesting-provisions

forms of sexual violence, dating violence or stalking; or conduct of a nature that creates serious concerns about the safety of others,” from transferring to an SEC school.⁴⁰ This rule should be adopted by the NCAA as a whole and should be expanded to prohibit any individual who has committed serious misconduct from participating in NCAA athletics, including incoming freshmen and current student-athletes. To prevent situations like the one involving CSI and TU, liability should fall on the institution allowing the individual to compete, whether or not they had actual knowledge of the student-athlete’s serious misconduct. Where a school could be found in violation of NCAA rules for allowing individuals who have committed serious misconduct to participate in intercollegiate athletics, there would be an added incentive for institutions to do their due diligence when recruiting. Schools would also be more motivated to hold one another accountable for investigating allegations of serious misconduct and reporting any such misconduct to each other when student-athletes transfer, even where a student-athlete is transferring from a non-NCAA institution.⁴¹

The *Ross* case and the Supreme Court’s decision not to hear it show that Title IX is, at least at this point, not a completely effective way to combat peer sexual assault on campuses. However, with the national conversation about sexual violence and the increasing public scrutiny on college athletics and the NCAA in particular,⁴² the adoption of association-wide rules may prevent sexual violence committed by student-athletes and thereby help protect college athletics

⁴⁰ Southeastern Conference Constitution & Bylaws 2017-2018, 14.1.19, available at <http://a.espncdn.com/photo/2018/0217/2017-18%20SEC%20Constitution%20and%20Bylaws.pdf>

⁴¹ This was the case with CSI, which is part of the National Junior College Athletic Association (NJCAA). *College of Southern Idaho Golden Eagles*, <http://athletics.csi.edu> (last visited Mar. 10, 2018).

⁴² Take, for example, the current attention the NCAA is receiving over the FBI’s investigation into fraud and bribery in college basketball. Pete Grathoff, *National observers take aim at NCAA in wake of Yahoo report on basketball scandal*, Feb. 23, 2018, <http://www.kansascity.com/sports/spt-columns-blogs/for-petes-sake/article201740739.html>.

from conviction in the court of public opinion and protect students like Abigail Ross from sexual assault.