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NCAA SANCTIONS: ASSIGNING BLAME WHERE IT BELONGS

MAUREEN A. WESTON*

Abstract: Success in a major intercollegiate athletic program, particularly a National Collegiate Athletic Association (NCAA) Division I national championship, can translate into millions of dollars and immense pride for the players, coaches, alumni, fans, and university. It can also be a determinative factor in a highly recruited high school student-athlete's program selection decision. In this intensely competitive environment, temptations to cheat, exploit, or circumvent the rules lurk, not only for agents, but also for institutional personnel, certain student-athletes, boosters, and even parents. Acting on behalf of over 1200 member institutions, the NCAA regulates and enforces rules of amateurism in college. In recent cases involving high-profile student-athletes and programs found to have engaged in cheating and major infractions of NCAA rules on amateurism, agents, and extra-benefits to players, the NCAA imposed stringent sanctions, including bans on postseason competition, against member institutions and the offending athletic programs. This Article analyzes the effectiveness of these sanctions on the offending programs, actual wrongdoers, and student-athletes most impacted by sanctions. The Article asserts that the sanctions' reach is both overly limited and overly broad. NCAA sanction powers are narrow in that they extend only to member institutions, not to individual coaches, players, agents, boosters, or other involved individuals. The sanctions are broad in that they negatively impact current student-athletes, who are restricted in their ability to transfer without penalty. The Article makes proposals for holding coaches and institutions financially accountable for infractions, while protecting uninvolved student-athletes.

INTRODUCTION

Without a doubt, everyone loves a winning team. Success in a major athletic program, particularly a National Collegiate Athletic Association (NCAA) Division I national championship, translates into millions

* © 2011, Maureen A. Weston, Associate Dean for Research and Professor of Law, Pepperdine University School of Law. The author would like to thank the *Boston College Law Review* for hosting "The NCAA at 100 Years: Perspectives on Its Past, Present, and Future," and gratefully acknowledges co-panelists Professor Alfred Yen and Petrina Long, and the helpful research assistance of Pepperdine Law student Jacob Houmand.

of dollars and immense pride for the players, coaches, alumni, students, and the university.¹ A major intercollegiate athletics program can also have a positive impact on the academic mission of a university.² Revenues from broadcast rights and merchandise sales, admissions applications, and fundraising for the entire university are enhanced. A winning program can also catapult the recruiting process and be a determinative factor in a sought-after high school student-athlete's choice of university.³

¹ See, e.g., Stephanie F. Hughes & Matthew D. Shank, *Assessing the Impact of NCAA Scandals: An Exploratory Analysis*, 3 INT'L J. SPORT MGMT. & MARKETING 78, 80–81 (2009) (reporting a positive relationship between athletic success and donor contributions and stating that “athletic success increases national exposure regardless of the school’s academic reputation and post-season appearances appear to increase general giving to universities”); Dionne L. Koller, *How the United States Government Sacrifices Athletes’ Constitutional Rights in the Pursuit of National Prestige*, 2008 BYU L. REV. 1465, 1488–89 n.121 (describing the use of sport to enhance national prestige and image, while also demonstrating national morality through “zero tolerance” discipline of rule-breakers, such as doping offenders); Billy Witz, *Trojans’ Culture of Fun Meets Era of Compliance*, N.Y. TIMES, July 22, 2010, at B16, available at <http://www.nytimes.com/2010/07/22/sports/ncaafootball/22usc.html> (noting a “boom in university fundraising and an increased academic profile” accompanied the University of Southern California (USC) football program’s success—and revenue totaling \$35.2 million in the 2008–2009 academic year, and quoting University of Kentucky Professor John Thelin who stated, “In the case of U.S.C., whatever excesses they’ve had in football have been parlayed into good things for the institution. . . . It hasn’t drained off money from other places; it’s probably had a multiplier effect.”).

² See Matthew J. Mitten et al., *Commercialized Intercollegiate Athletics: A Proposal for Targeted Reform Consistent with American Cultural Forces and Marketplace Realities*, 2 J. INTERCOLLEGIATE SPORT 202, 203 (2009) (noting that universities “rationally invest substantial resources in their athletic departments, as a means to achieve a wide range of legitimate objectives that further their missions . . . [including] attracting faculty, students, and student-athletes,” as well as diversifying the student body and strengthening relationships with alumni and the local community, and conferring an enhanced reputation).

³ See, e.g., Hughes & Shank, *supra* note 1, at 80–81. In 2010, the NCAA signed a fourteen-year, \$10.8 billion contract with CBS Sports and Turner Broadcasting to televise the popular “March Madness” Division I basketball tournament. See Alan Scher Zagier, *Knight Commission Blasts Runaway Spending in College Sports*, DIVERSE: ISSUES HIGHER EDUC., June 18, 2010, <http://diverseeducation.com/article/13897/>; see also JAMES A. R. NAFZIGER, INTERNATIONAL SPORTS LAW 10 (2d ed. 2004) (“Revenue from ticket sales alone normally exceeds \$100 million. Business enterprises pay millions of dollars for official designation of their products. Rights to broadcast the Olympic Games . . . have soared to about U.S. \$2.5 billion in 2006 and 2008.”). The money focus in college sports became pronounced in the summer 2010 conference realignment negotiations, where smaller schools risked being squeezed out of the multi-million dollar revenues earned as conference members. See Courtney Linehan, *Breaking Down the Money in Conference Realignment*, LUBBOCKONLINE: LUBBOCK AVALANCHE-JOURNAL (June 9, 2010), <http://lubbockonline.com/interact/blog-post/courtney-linehan/2010-06-09/breaking-down-money-conference-realignment> (“All this realignment stuff has nothing to do with academics, research, rivalries or any of the myriad other reasons fans and alumni love their schools. It’s all about money from TV contracts, plain and simple.”); Jim Reeves, *Eyes of Pac-10, Big Ten, SEC on Texas*, ESPNDAL-

Along with the tangible benefits and lure of winning is the intense pressure to win.⁴ The pressure in competitive sports starts at an early age for student-athletes. The love of the sport, as well as the prospects for a collegiate scholarship and a potentially lucrative professional sports career, motivate young athletes to devote years to intense training and competition. Many families spend thousands of dollars to provide instruction and competitive development opportunities to their children.⁵ Coaches are certainly invested as well, with their job security, status, and compensation packages largely dependent upon producing winning programs.⁶ For better or worse, scouts and agents are on watch to identify and attract star athletes as future professional sport clients.⁷ Likewise, the professional sport leagues are eager to sign young talent to their rosters (not necessarily waiting until the players are college graduates).⁸ The opportunity to participate in a major collegiate athletic program provides not only an opportunity for higher education, but also a venue to showcase athletic prowess, and opens doors to professional play and seemingly attendant fame and fortune.

LAS.COM, http://sports.espn.go.com/dallas/ncb/columns/story?columnist=reeves_jim&id=5263837 (last updated June 8, 2010) (describing the power of the University of Texas in terms of the Big 12 realignment).

⁴ See Mitten et al., *supra* note 2, at 204 (describing the psychological, cultural, and economic underpinnings of intercollegiate athletics). The “primal competitive drive” to win was firmly rooted long before the NCAA’s inception. *See id.*

⁵ See Christy Rakoczy, *How Much Do Americans Spend on Sports Each Year?*, YOURDICTIONARY.COM, <http://answers.yourdictionary.com/answers/sports/how-much-do-americans-spend-on-sports-each-year.html> (last visited Feb. 27, 2011) (estimating that American parents spend nearly \$300 million annually on registration fees for their children’s sporting programs and that, when the cost of equipment and travel is included, the figure drastically increases to \$900 million).

⁶ See Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws that Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 263 (2010) (“Coaches are under great pressure to win, particularly in the Division I FBS revenue-producing sports. They are hired, compensated, and fired based on their win-loss records.”).

⁷ See Jamie Nomura, *Refereeing the Recruiting Game: Applying Contract Law to Make the Intercollegiate Recruitment Process Fair*, 32 U. HAW. L. REV. 275, 282 (2009) (“Because recruiting efforts are increasingly competitive, universities are making verbal scholarship offers to recruits as young as thirteen years old.”); Scott Powers, *Summer Session: College Coaches Setting Sights Younger and Younger*, ESPN MAG., July 17, 2008, <http://sports.espn.go.com/espnmag/story?id=3490678> (reporting that college coaches are increasingly concerned with “scouting and possibly securing commitments from incoming eighth graders, freshmen, sophomores and juniors”). *See generally* Alfred C. Yen, *Early Scholarship Offers and the NCAA*, 52 B.C. L. REV. 585 (2011) (discussing the disturbing trend of recruitment at even younger ages and proposing reform).

⁸ Tariq Engineer, *How Young is Too Young?*, LAWRENTIAN (Lawrence Univ., Appleton, Wis.), Jan. 29, 2002, <http://www.lawrentian.com/2.15232/how-young-is-too-young-1.1988878>.

The relatively few student-athletes talented, able, and fortunate enough to compete in major intercollegiate sports are highly recruited.⁹ The courtship includes promises of scholarships, extensive playing opportunities, and prospects for a professional athletic career.¹⁰ The lure of an opportunity to play for a university in an NCAA national championship tournament, or to compete in a Bowl Championship Series (BCS) game among select NCAA Division I football teams can prove pivotal in a recruit's decision.

Founded in 1906, the NCAA was formed for the purpose of administering intercollegiate athletics. A fundamental purpose of the organization today is to ensure that the competitive athletics programs of member institutions are a vital part of the education process, that student-athletes are an "integral part of the student body," and that college sports retain their hallmark—amateurism.¹¹ As an association of over 1200 member institutions, the NCAA has promulgated and enforced rules that govern nearly every aspect of competition, and the student-athlete's experience, with an aim to ensuring competitive fairness and protecting the interests of student-athletes.¹² In the practical reality of the "arms race" in major collegiate sports, however, these principles are often violated.¹³ Some rule violations are minor and relatively inconsequential. Other violations are egregious, such as payments or a range of impermissible extra benefits provided to players or their families, academic fraud, and recruiting abuses by coaches or agents.¹⁴ Unfortu-

⁹ See sources cited *supra* note 7 and accompanying text.

¹⁰ For an example of the benefits available to a highly touted athlete, see *infra* note 18 and accompanying text regarding Reggie Bush.

¹¹ See NCAA CONST. arts. 1–2, in DIVISION I MANUAL (2009), available at <http://www.ncaapublications.com/productdownloads/D110.pdf>; *History*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/About+the+NCAA+history> (last updated Nov. 8, 2010); see also, e.g., Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000). The NCAA Constitution states that the "basic purpose" of the NCAA is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA CONST., *supra*, art. 1.3.1.

¹² See NCAA CONST., *supra* note 11, arts. 1–2.

¹³ See, e.g., Daniel L. Fulks, *Arms Race Debate Open to Interpretation*, NCAA NEWS (April 12, 2004), <http://fs.ncaa.org/Docs/NCAANewsArchive/2004/Editorial/arms+race+debate+open+to+interpretation+-+4-12-04.html>; *NCAA Eyes Ban to Certain Early Offers*, ESPN, <http://sports.espn.go.com/ncaa/news/story?id=5372984> (last updated July 12, 2010).

¹⁴ NCAA OPERATING BYLAWS art. 16, in DIVISION I MANUAL (2009) (Awards, Benefits and Expenses for Enrolled Student-Athletes), available at <http://www.ncaapublications.com/productdownloads/D110.pdf>; see *id.* art. 16.02.3 (defining an "extra benefit" as "any special arrangement by an institutional employee or a representative of the institution's

nately, such cheating may yield huge profits and competitive advantages for the involved individuals, athletic program, and institutions.

In this competitive environment, some coaches, players, agents, boosters, institutional members, and even parents succumb to the temptation to cheat.¹⁵ For example, a recent case drawing national attention involved the University of Southern California (USC).¹⁶ The case involved allegations of cheating in football and men's basketball by two of the most high-profile student-athletes ever to attend USC.¹⁷ Heisman Trophy winner Reggie Bush, who led the Trojans to a national football championship in 2004, was found to have accepted thousands of dollars in cash payments, airline tickets for his parents to attend away football games, a free limousine service, expensive clothing, a vehicle, free lodging in Las Vegas, and a rent-free home and cash for his parents.¹⁸ Tragically, Reggie Bush's mother and stepfather were at the center of the cheating scandal: they promised to deliver Bush as a client to prospective agents Lloyd Lake and Michael Michaels in exchange for free housing and the expectation of additional payments.¹⁹ When Bush declared for the National Football League (NFL) draft and signed with a different agent, Lake and Michaels sued to get their money back and thus made the allegations public.²⁰ Similarly, the USC basketball program

athletics interests to provide a student-athlete or the student-athlete's relative or friend a benefit not expressly authorized by NCAA legislation"); George Dohrmann, *Confessions of an Agent*, SPORTS ILLUSTRATED, Oct. 18, 2010, at 64–70 (reporting that ex-NFL player agent Josh Luchs admitted to having paid thousands of dollars, in addition to other benefits, to more than thirty college football players from 1990 to 1996).

¹⁵ See, e.g., *supra* text accompanying note 14; see also *infra* text accompanying note 20.

¹⁶ See NCAA, UNIVERSITY OF SOUTHERN CALIFORNIA PUBLIC INFRACTIONS REPORT I (2010) [hereinafter USC INFRACTIONS REPORT], available at <http://ncaa.org/wps/wcm/connect/public/NCAA/Resources/News+Releases/2010+News+Releases> (follow "June 10, 2010—Division I Committee on Infractions Issues Decision on University of Southern California" hyperlink; then follow "Related Links: University of Southern California—Public Infractions Report" hyperlink).

¹⁷ See *id.* The NCAA report does not refer to the student-athletes by name other than "student-athlete 1," who is Reggie Bush, and "student-athlete 2," O.J. Mayo. *Id.* at 2. Reports have confirmed the identities. See *USC Trojans Hit Hard by NCAA*, USCFOOTBALL.COM (June 10, 2010), <http://usc.rivals.com/content.asp?CID=1093088>.

¹⁸ See USC INFRACTIONS REPORT, *supra* note 16, at 4–22.

¹⁹ See *Bush Says Family Has Done 'Absolutely Nothing Wrong'*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=2419079> (last updated Apr. 25, 2006) ("The Pac-10 said Sunday it will investigate the reported connection between Bush's family and Michaels, who sought to market the Southern California star tailback.")

²⁰ See Jill Lieber Steeg, *Lloyd Lake, Figure in Reggie Bush Probes, Breaks Silence*, USA TODAY, Jan. 18, 2008, http://www.usatoday.com/sports/college/football/2008-01-17-reggiebush-book_N.htm?loc=interstitialskip. Similarly, the father of Auburn quarterback and Heisman Trophy winner Cam Newton engaged in a "pay for play" scheme where he marketed his talented son to prospective college football programs, seeking a substantial amount of money in

infractions case involved violations in the recruiting process and allegations that a booster, considered a representative of an institution's athletics interests per the NCAA bylaws,²¹ made payments to an influential Amateur Athletic Union (AAU) coach in order to ensure that O.J. Mayo, then the top high school recruit in the country, signed with USC.²²

After an extensive investigation and hearing involving USC, the NCAA determined that the institution knew or should have known about these violations and that it thus breached its duty of maintaining institutional control over its athletics programs.²³ In a sixty-seven-page report dated June 10, 2010, the NCAA Committee on Infractions (the

exchange for his son's commitment to play. See Pete Thamel, *Auburn's Newton May Leave a Legacy in Scrutiny*, N.Y. TIMES, Jan. 10, 2011, at D1, available at http://www.nytimes.com/2011/01/10/sports/ncaafootball/10auburn.html?_r=1&scp=5&sq=cam%20newton&st=cse; Press Release, NCAA, NCAA Addresses Cam Newton's Eligibility (Dec. 1, 2010), available at <http://ncaa.org/wps/wcm/connect/public/NCAA/Resources/News+Releases/2010+News+Releases> (follow "Dec. 1, 2010—NCAA Addresses Cam Newton's Eligibility" hyperlink).

²¹ See NCAA BYLAWS, *supra* note 14, art. 13.02.13. The Bylaws require that

a "representative of the institution's athletics interests" is an individual, independent agency, corporate entity (e.g., apparel or equipment manufacturer) or other organization who is known (or who should have been known) by a member of the institution's executive or athletics administration to: (a) Have participated in or to be a member of an agency or organization promoting the institution's intercollegiate athletics program; (b) Have made financial contributions to the athletics department or to an athletics booster organization of that institution; (c) Be assisting or to have been requested (by the athletics department staff) to assist in the recruitment of prospective student-athletes; (d) Be assisting or to have assisted in providing benefits to enrolled student-athletes or their families; or (e) Have been involved otherwise in promoting the institution's athletics program.

Id.

²² See USC INFRACTIONS REPORT, *supra* note 16, at 2. Allegations were also made that a member of the USC coaching staff was involved, but findings were only made as to the booster and as to the fact that USC knew or should have known that such payments were being made to Mayo, but chose to look the other way. *Id.* at 4, 37–38, 45. The NCAA report also made findings that the former head football coach violated the coaching staff limitations in hiring a consultant for the entire 2008 playing season, impermissible recruiting contacts by a booster. See *id.* at 37–38. A major violation involving a former women's tennis student-athlete making unauthorized personal international telephone calls was also found. See *id.* at 45.

²³ See *id.* ("From December 2004 through March 2009, the institution exhibited a lack of control over its department of athletics by its failure to have in place procedures to effectively monitor the violations of NCAA amateurism, recruiting and extra benefit legislation in the sports of football, men's basketball and women's tennis."); see also *College Basketball: USC Punishes Itself for O.J. Mayo Scandal*, SEATTLE TIMES, Jan. 3, 2010, http://seattletimes.nwsourc.com/html/collegesports/2010689048_mhoop04.html (reporting that USC announced that it would penalize its basketball team after there were reports O.J. Mayo received improper gifts, including cash, clothes, and a flat-screen television).

“COI”) set forth extensive findings of agent and amateurism violations involving the two key athletes.²⁴ With respect to the men’s basketball program, the NCAA accepted USC’s self-imposed sanctions, which included a reduction in the number of scholarships, a reduction by one in the number of basketball coaches involved in off-campus recruiting for summer 2010, a reduction in the number of recruiting days by twenty days, and disassociation with Mayo.²⁵ But the COI also ordered a return of revenues gained from Pacific-10 (Pac-10) Conference distributions for USC’s participation in the NCAA men’s “Final Four” basketball championship.²⁶

USC did not impose sanctions on itself as to the football program allegations regarding Reggie Bush. The NCAA, however, did it for them. Finding USC a “repeat violator” with respect to its football program, the NCAA imposed stringent sanctions, including a two-year ban on postseason football competition and bowls, for seasons 2010 and 2011, vacatur of all wins in which these students had competed (since December 2004), and a reduction by thirty in the number of football scholarships for 2011–2014.²⁷ The NCAA also required USC to inform prospective student-athletes of the violations committed in these programs, of the probationary status until June 9, 2014, and of the associated penalties.²⁸

²⁴ See USC INFRACTIONS REPORT, *supra* note 16, at 3–55.

²⁵ See *id.* at 58–60.

²⁶ See *id.* at 59. The NCAA distributes money to the respective conferences, who in turn distribute revenue to individual institutions based on formulas and policies specific to each conference. For example, USC received \$206,020 through its participation in the men’s 2008 basketball championship. See *id.*

²⁷ See *id.* at 3; Baxter Holmes, *USC’s History of Major NCAA Infractions*, L.A. TIMES, June 10, 2010, <http://articles.latimes.com/2010/jun/10/sports/la-sp-0611-ncaa-sanctions-chart-20100611>. USC has been sanctioned by the NCAA six times for major infractions, each of which has involved football. Holmes, *supra*. The prior cases were in 2001, where the NCAA found that tutors committed academic fraud by writing academic papers for football players; 1986, involving improper distribution of complimentary tickets, recruiting contact, minor recruiting inducements, and out-of-season practices and tryouts in football programs; 1982, focusing on a ticket scheme used to funnel cash to football players—allegations also included academic fraud, improper employment and eligibility; 1959, where football players received air transportation beyond what is permitted by NCAA rules; and 1957, where football players received monthly cash allowances from an outside foundation. See USC INFRACTIONS REPORT, *supra* note 16, at 3. Sanctions in these cases included two-year probation, scholarship reductions, recruiting limitations for coaches, a two-year television ban, and a one-year postseason ban. See *id.*

²⁸ See USC INFRACTIONS REPORT, *supra* note 16, at 60. In April 2007, Bush reportedly settled the lawsuit with Michaels for between \$200,000 and \$300,000. See DON YAEGER, TARNISHED HEISMAN: DID REGGIE BUSH TURN HIS FINAL COLLEGE SEASON INTO A SIX FIGURE JOB? 187 (2008). In April 2010, Bush settled the lawsuit with Lake. See Gary Klein, *USC Foot-*

Obviously, the NCAA rule violations require accountability and consequences. But who really pays for the sins of a few former student-athletes, sleazy agents, or other unscrupulous individuals who associate themselves with an athletic program? Innocent teammates on USC's 2004 national football championship team now have their title vacated.²⁹ Current student-athletes and incoming recruits who had committed to USC months before the USC sanctions were imposed found themselves on a team much different from what they envisioned, and are not allowed to experience postseason bowl play. Although the NCAA allows, with the school's permission, juniors and seniors to transfer without sitting out one year—and several USC players have since transferred³⁰—incoming recruits and sophomores are bound and may transfer only if willing to lose an entire year of play due to the “one year in residence” requirement.³¹ In addition, neither Bush nor the agents can be penalized by the NCAA.³²

Life is not always fair, but cheating never is. Consequences are necessary, and NCAA sanctions intentionally provide penalties for major infractions. But do NCAA sanctions adequately punish the actual wrongdoers, or do they disproportionately impact current student-athletes? NCAA bylaws provide for a process to ensure compliance with

ball: Depositions Canceled as Reggie Bush Settles Lawsuit Brought by Lloyd Lake, L.A. TIMES FABULOUS F. (Apr. 21, 2010, 1:20 PM), http://latimesblogs.latimes.com/sports_blog/2010/04/usc-football-reggie-bush-lloyd-lake-michael-michaels-ncaa-investigation-1.html; *see also* Total Econ. Athletic Mgmt. of Am., Inc. v. Pickens, 898 S.W.2d 98, 109 (Mo. Ct. App. 1995) (upholding a verdict for an agent against a player for wrongful termination of the agency agreement despite the agent's violation of NCAA extra benefit rules); O'Brien v. Ohio State Univ., No. 2004-10230, 2006 WL 571043, at *22 (Ohio Ct. Cl. Feb. 15, 2006) (holding university liable for breach of contract for terminating coach, despite coach's admitted violations of NCAA bylaws).

²⁹ *See* Jack Carey, *NCAA Hits USC with Two-Year Bowl Ban, Scholarship Cuts*, USA TODAY, June 11, 2010, http://www.usatoday.com/sports/college/football/pac10/2010-06-10-ncaa-sanctions-southern-cal_N.htm.

³⁰ *See infra* notes 111–123 and accompanying text; *see also* *Transferring Juniors, Seniors Can Play*, ESPNLOSANGELES.COM, <http://sports.espn.go.com/los-angeles/ncf/news/story?id=5275644> (last updated June 12, 2010) (noting that juniors and seniors from USC can transfer schools without sitting out a season if the second school requests that the year in residence is waived).

³¹ *See* NCAA OPERATING BYLAWS, *supra* note 14, art. 14.5. (requiring one year in residence at a new institution for a student who transfers to a member institution from any collegiate institution to be eligible to compete, absent a special exception).

³² *See* Jim Henry, *Reggie Bush Agrees to Settlement in Lloyd Lake Lawsuit*, FANHOUSE (Apr. 21, 2010), <http://ncaafootball.fanhouse.com/2010/04/21/report-bush-agrees-to-settlement-in-lake-lawsuit/> (reporting that Bush settled the lawsuit filed by Lloyd Lake a few days before his scheduled deposition). Bush also reportedly settled the lawsuit brought by Michael Michaels in April 2007 for \$300,000. *Id.*

NCAA regulations and set forth a range of sanctions to be imposed where these rules are violated.³³ NCAA member institutions agree to abide by this set of bylaws to ensure accountability and consequences.³⁴ Arguably, an entire program is complicit by virtue of association with rule-breakers where there is knowing disregard by institutional officials. But NCAA sanctions impact entire programs, innocent teammates, new recruits, even conference members, and yet fail to penalize many of the actual wrongdoers.

This Article examines NCAA sanctions, exploring their intended and unintended impacts on student-athletes, amateurism, and actual wrongdoers. Part I describes the NCAA enforcement process and the range of sanctions provided under NCAA regulations.³⁵ Against this backdrop, Part II examines cases involving major infractions, including USC's violations, focusing on the types of sanctions imposed and their respective impacts.³⁶ Part III measures the effectiveness of NCAA sanctions, in light of the rationales underlying sanctioning misconduct and attendant impacts, while exploring options that might better tailor sanctions to fit the objectives of punishing the wrongdoers, deterring future misconduct, and avoiding unnecessary penalties on innocent student-athletes.³⁷

I. NCAA REGULATORY, ENFORCEMENT, AND SANCTION POWERS

The NCAA is charged, through its membership, with regulating and administering collegiate sports to ensure that athletics are part of the educational process and to retain a "clear line of demarcation between intercollegiate athletics and professional sports."³⁸ This Part discusses the NCAA's power to regulate, enforce, and sanction its member institutions and individuals involved with those institutions.³⁹

The NCAA is a voluntary association of over 1200 public and private four-year colleges and universities, athletic conferences, and sports organizations ("member institutions") committed to "the sound admini-

³³ See *infra* notes 38–62 and accompanying text.

³⁴ See *infra* notes 38–62 and accompanying text.

³⁵ See *infra* notes 38–62 and accompanying text.

³⁶ See *infra* notes 63–106 and accompanying text.

³⁷ See *infra* notes 107–136 and accompanying text.

³⁸ See NCAA CONST., *supra* note 11, arts. 1–2. The NCAA Constitution states that the "basic purpose" of the NCAA is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." *Id.* art. 1.3.1.

³⁹ See *infra* notes 40–62 and accompanying text.

stration of intercollegiate athletics.”⁴⁰ The system operates on the principle that the member institutions are the NCAA and that “[t]he NCAA exists to do what no institution can do on its own: administer championships and regulate athletics competition so as to ensure a level playing field.”⁴¹ As a private association, NCAA members contractually and collectively agree to the rules for membership and sanctions for violations of those rules.⁴²

The NCAA is charged, through its membership, constitution, and bylaws, to regulate. A stated mission of the NCAA is “[t]o maintain intercollegiate athletics as an integral part of the education program and the athlete as an integral part of the study body and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports.”⁴³ NCAA policies are intended to, among other things, improve athletic programs and promote opportunities for leadership. In addition, the NCAA regulates athletic competition among its members and also “[c]onducts championship events in the sports sanctioned by the association, enters into television and promotional contracts relating to these championship events, and enters into agreements to license the NCAA name and logos.”⁴⁴

The NCAA is often criticized as a behemoth bureaucracy that overregulates college athletics in the name of amateurism, while profiting from the commercialism and revenue generated by interest in student-athletes.⁴⁵ NCAA regulatory powers over intercollegiate sports are in-

⁴⁰ See *About the NCAA*, NCAA, <http://www.ncaa.org/wps/wcm/connect/ncaa/NCAA/About+The+NCAA/index.html?pageDesign=Printer+Friendly+General+Content+Layout> (last visited Mar. 17, 2011). The NCAA is an organization “through which the nation’s colleges and universities govern their athletics programs. It is comprised of institutions, conferences, organizations and individuals committed to the best interests, education and athletics participation of student-athletes.” *Id.*

⁴¹ Potuto, *supra* note 6, at 262.

⁴² See *id.* at 267 (“NCAA members articulate the association’s purposes and decide how it will operate, who may join, the rules governing what members are required to do, and the rules describing what is prohibited.”).

⁴³ See NCAA CONST., *supra* note 11, art. 1.3.

⁴⁴ See RAY YASSER, JAMES R. MCCURDY, PETER GOPLERUD, & MAUREEN WESTON, *SPORTS LAW: CASES & MATERIALS 2* (2006).

⁴⁵ *Cf., e.g.,* *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (holding that the “restricted earnings” rule limiting assistant coaches’ salaries violated antitrust laws); *Bloom v. NCAA*, 93 P.3d 621, 628 (Colo. App. 2004) (upholding NCAA rule restricting student-athletes endorsement and media activities); *Oliver v. NCAA*, 920 N.E.2d 203, 218–19 (Ohio Ct. Com. Pl. 2009) (holding that the NCAA “no agent” rule that also restricts attorneys from negotiating and advising student-athletes in negotiations with professional teams is arbitrary, ultra vires, and that the NCAA is without authority to promulgate a rule that prevents a lawyer from representing his client). More recently, the NCAA is under attack because of its use of student-athlete images in licensing of video games and other new

deed vast. In serving as the regulatory body for intercollegiate athletic programs, the NCAA establishes and enforces rules governing virtually every aspect of the student-athlete experience and the administration of intercollegiate athletics.⁴⁶ These rules involve, often-times in excruciating detail, regulations concerning, inter alia, initial and continuing academic eligibility, recruitment of prospective student-athletes, financial aid and athletic scholarships, play and practice limits, bans on the receipt of extra-benefits, and standards for amateurism.⁴⁷ NCAA rules impact more than 400,000 student-athletes who participate in competitive NCAA sports.⁴⁸ As a condition of participating in the privilege of

media uses. See *O'Bannon v. NCAA*, Nos. 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190, at *1 (N.D. Cal. Feb. 8, 2010) (denying the NCAA's motion to dismiss claims that the NCAA's commercial licensing of the images of former student-athletes violates antitrust principles and constitutes unjust enrichment); *Keller v. Electronic Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, at *11 (N.D. Cal. Feb. 8, 2010) (recognizing a right of publicity claim against the NCAA in its use of student-athlete images). The *Keller* and *O'Bannon* cases were consolidated on January 15, 2010 into *In re NCAA Student-Athlete Name & Likeness Litigation*. See No. C 09-1967 CW, 2010 WL 5644656, at *1, *6 (N.D. Cal. Dec. 17, 2010) (denying certain plaintiffs' motion to deconsolidate and referencing the January 15, 2010 order).

⁴⁶ See Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 558 (2009) (discussing the restriction on attorney representatives challenged in *Oliver v. NCAA* as an example warranting a new, more manageable standard definition of amateurism); see also Pat Borzi, *Settlement Sheds Little Light on N.C.A.A. No-Agent Rule*, N.Y. TIMES, July 24, 2010, at D1, available at <http://www.nytimes.com/2010/07/24/sports/baseball/24advisers.html> (noting that Andy Oliver, now a professional baseball player for the Detroit Tigers, settled his lawsuit against the NCAA for \$750,000 after the NCAA required Oklahoma State University to enforce the NCAA's "no agent rule"). Although NCAA bylaws permit baseball student-athletes to consult a legal advisor, the advisor is prohibited from directly negotiating with a professional team without jeopardizing the athlete's collegiate eligibility. See NCAA OPERATING BYLAWS, *supra* note 14, art. 12.3.2 (Legal Counsel).

⁴⁷ See NCAA OPERATING BYLAWS, *supra* note 14, arts. 12 (Amateurism), 13 (Recruiting), 14 (Eligibility: Academic and General Requirements), 15 (Financial Aid), 16 (Awards, Benefits and Expenses for Enrolled Students-Athletes), 17 (Playing and Practice Seasons), 18 (Championships and Postseason Football), 23 (Academic Performance Program); see also Potuto, *supra* note 6, at 262 ("NCAA bylaws and policies cover a myriad of substantive areas as well as competition rules and scheduling. They even cover academic matters—the bedrock, non-delegable responsibility of each institution."). The annually updated NCAA Manual, which sets forth the governing regulations and bylaws, registers in now at 434 pages, exclusive of updates. DIVISION I MANUAL 1-434 (2010), available at <http://www.ncaapublications.com/productdownloads/D111.pdf>; see Symposium, *The State of Division I College Athletics: Are We Playing by the Rules? A Debate over the Need for NCAA Regulation and Reform*, 7 VAND. J. ENT. L. & PRAC. 439 (2005) (describing the expanding scope of NCAA regulations).

⁴⁸ See John Kitchin, *The NCAA and Due Process*, KAN. J.L. & PUB. POL'Y, Spring 1996, at 71; see also Josh Centor, *Student-Athletes Peer into the Future*, NCAA NEWS, Dec. 7, 2005, <http://fs.ncaa.org/Docs/NCAANewsArchive/2006/Association-wide/student-athletes+peer+into+the+future.html>.

intercollegiate sports, these student-athletes must agree to abide by NCAA regulations that require waiver of certain rights enjoyed by the general student population.⁴⁹

Due to its role in regulating intercollegiate athletics, the NCAA experiences its share of legal challenges.⁵⁰ Popular criticisms against the NCAA include its rules against paying student-athletes, limiting pay for coaches, measuring academic eligibility requirements in the form of standardized testing and high school curriculum, and using amateurism as a guise for commercialism in college sports.⁵¹

Notwithstanding the criticism it has received, the NCAA serves a vital role in its responsibility for establishing and enforcing rules for amateurism, fair competition, and student-athlete protection among all

⁴⁹ See Fitt, *supra* note 46, at 563 (describing, for example, NCAA regulations that restrict student-athletes in employment, outside income, and require consent to waive federal educational privacy laws, drug testing, and publicity rights).

⁵⁰ See, e.g., Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity*, 20 J. LEGAL ASPECTS SPORT 35, 35–36 (2010) (describing student-athletes' ability to sue videogame producers and the NCAA, alleging violation of their rights to publicity); T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175, 177–79 (2010) (discussing a student-athlete's challenge to an NCAA bylaw that prohibits student-athletes from having a lawyer present when negotiating a potential contract with a professional organization while still playing at the collegiate level); Potuto, *supra* note 6, at 264 (describing various lawsuits against the NCAA brought by student-athletes). See generally Doug Bakker, *NCAA Initial Eligibility Requirements: The Case Law Behind the Changes*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 160, 178 (2006) (discussing challenges from student-athletes regarding the NCAA's initial eligibility requirements); Christian Dennie, *White Out Full Grant-In-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97, 124 (2007) (discussing *White v. NCAA* and student-athletes' challenges to the cap on athletics-based financial aid); Andrew M. Habenicht, *Has the Shot Clock Expired? Pryor v. NCAA and the Premature Disposal of a "Deliberate Indifference" Discrimination Claim Under Title VI of the Civil Rights Act of 1964*, 11 GEO. MASON L. REV. 551, 557 (2003) (discussing civil rights laws and the NCAA, particularly the impact of freshman academic eligibility rules the NCAA has promulgated since 1986); Diane Heckman, *Tracking Challenges to NCAA's Academic Eligibility Requirements Based on Race and Disability*, 222 EDUC. L. REP. 1, 9 (2007) (discussing challenges to the NCAA's academic eligibility requirements); Yuri Nicholas Walker, *Playing the Game of Academic Integrity vs. Athletic Success: The Americans with Disabilities Act (ADA) and Intercollegiate Student-Athletes with Learning Disabilities*, 15 MARQ. SPORTS L. REV. 601, 640–41 (2005) (discussing the legal and ethical responsibility of the NCAA to accommodate student-athletes with learning disabilities); *NCPA Wins Victories for College Athletes*, NAT'L C. PLAYERS ASS'N (March 13, 2009), http://ncpanow.articulatedman.com/news_articles?id=0003 (listing how the NCPA has pressured the NCAA to change its policies).

⁵¹ See generally Dennie, *supra* note 50; Mark Jenkins, *The United Student-Athletes of America: Should College Athletes Organize in Order to Protect Their Rights and Address the Ills of Intercollegiate Athletics?*, 5 VAND. J. ENT. L. & PRAC. 39 (2004); Lockhart, *supra* note 50; Symposium, *supra* note 47.

member institutions.⁵² Fundamentally, each member institution is responsible for ensuring compliance with NCAA regulations and for self-reporting violations to the NCAA.⁵³ Despite the rule entrusting competitors to self-report violations, the membership has, not surprisingly, provided for a formal process charging the professional enforcement staff within the NCAA to formally investigate allegations of rule violations and to enforce appropriate penalties.⁵⁴ Institutional members and representatives have a responsibility to “cooperate fully with the NCAA enforcement staff, COI, Infractions Appeals Committee, and Board of Directors to further the objectives of the Association and its enforcement program.”⁵⁵ Institutions are expected to provide full disclosure of any relevant information requested by the enforcement staff.⁵⁶ According to NCAA bylaws, the penalties imposed “should be broad and severe if the violation or violations reflect a general disregard for the governing rules.”⁵⁷

The COI conducts a hearing similar to an arbitration process in which the enforcement staff, institution, and involved individuals may present witnesses, transcripts of interviews, summaries of interviews, and other evidence gathered.⁵⁸ The COI has authority to request that specific institutional individuals appear at the hearing, including the institution’s president, head coach of the sport in question, the athletics director, legal counsel, and the current student-athlete whose eligibility may be affected.⁵⁹ The hearings typically last a full day or more in

⁵² The rules governing NCAA member institutions’ athletic programs are codified in the NCAA Manual, which contains the NCAA Constitution and Bylaws. *See* NCAA CONST., *supra* note 11, arts. 5.1.1, 5.01.1 (“All legislation of the [NCAA] that governs the conduct of the intercollegiate athletics programs of its member institutions shall be adopted by the membership in Convention assembled, or by the divisional governance structures as set forth in Constitution 4 . . .”).

⁵³ *Id.* art. 2.1 (“It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the [NCAA].”).

⁵⁴ *See Enforcement Process*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/issues/enforcement> (last visited Feb. 27, 2011).

⁵⁵ *See* NCAA OPERATING BYLAWS, *supra* note 14, art. 19.01.3 (Responsibility to Cooperate).

⁵⁶ *See id.* art. 32.3.7.2 (Responsibility to Cooperate).

⁵⁷ *Id.* art. 19.01.5.

⁵⁸ *Id.* art. 32.8.7. Hearing procedures include opening and closing statements, and the enforcement staff, institution, and any involved individuals are afforded the opportunity to present information relating to the alleged violations. *Id.* The COI may question representatives during the hearing. *Id.* art. 32.8.7.6. The hearings are recorded and a transcript is produced for appealed cases. *Id.* art. 32.8.7.7.

⁵⁹ *Id.* art. 32.8.6 (Appearance of Individuals at Hearings).

rare cases.⁶⁰ Upon adjournment of the hearing, the COI deliberates and issues a case report announcing its factual findings regarding each allegation of NCAA major violations and the attendant penalties.⁶¹ The case report, which redacts names of the involved individuals, is released to the media, although the institution is provided an advance copy of the case report prior to release.⁶² The case involving USC serves as an example of how the NCAA through the COI addresses misconduct.

II. THE IMPACTS OF NCAA SANCTIONS

Sanctions resulting from a major violation are serious and have a detrimental practical effect, at least in the short term, on the involved program and its participants.⁶³ The stigma of a major violation also chills recruiting, as high school students are justifiably wary of committing to a school that is on probation. Even probation stings, as it subjects schools to the risk of repeat violator status.

But the sanctions' reach is both overly limited and overly broad. NCAA sanction powers extend only to member institutions, not to individual coaches, players, agents, boosters, or involved individuals who are not direct members of the NCAA.⁶⁴ Member institutions contract to abide by NCAA rules as a condition of membership. Technically the NCAA does not contract with coaches or players, but those individuals generally must agree to comply with NCAA regulations through contractual arrangements with the member school.⁶⁵ The NCAA may indirectly sanction individuals, such as coaches or athletic personnel, through a penalty requiring the institution to take employment action against employed individuals or to disassociate with non-employed individuals. Rarely, however, does the NCAA issue financial sanctions that

⁶⁰ The USC infractions hearing lasted three days. Pete Thamel, *N.C.A.A. Ends Hearing About U.S.C. Infractions*, N.Y. TIMES, Feb. 21, 2010, at SP12.

⁶¹ See NCAA OPERATING BYLAWS, *supra* note 14, art. 32.8.8 (Posthearing Committee Deliberations).

⁶² *Id.* art. 32.9.2 (Release to Media).

⁶³ See, e.g., Zach Rosenfield, *History Says USC in for Long Downturn*, ESPNLOSANGELES.COM, <http://sports.espn.go.com/los-angeles/columns/story?id=5319505> (last updated June 23, 2010) ("The facts are plain: The sanctions USC now must live through are a one-way ticket to six years of mediocrity and instability.").

⁶⁴ See, e.g., *NCAA v. Tarkanian*, 488 U.S. 179, 196 (1988) (holding that the decision to fire a coach for an NCAA violation was by the university).

⁶⁵ See *id.*

require disgorgement of the profits associated with the program in violation.⁶⁶

More problematically, the reach of the sanctions has ripple effects that impair uninvolved programs and innocent student-athletes, both financially and with respect to playing opportunities.⁶⁷ Current students recruited and lured by the pretense of a successful program remain on the team but are limited in their prospects for competition or transfer.⁶⁸

A. *The Unintended Impact of Sanctions?*

1. New Recruits and Current Student-Athletes Suffer

Among the arguably unintended and unarguably unwarranted consequences of NCAA sanctions include attacks on new recruits and student-athletes. NCAA sanction rules state that “[a]n important consideration in imposing penalties is to provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions.”⁶⁹ But sanctions redressing past misconduct undeniably impact many who were not involved in the rules infraction or misconduct, or who did not even attend the violating institution (as they were likely still in high school). As the new USC football coach stated in reference to the NCAA penalties, “[t]his has nothing to do with this team . . . [or] the direction of the program. . . . That’s the past; obviously we’re suffering from it.”⁷⁰

Current players are directly impacted by the sanctions imposed on the programs for past misconduct, and NCAA bylaws restrict students’

⁶⁶ See Chris DuFresne, *Reggie Bush Still Can’t Say the Magic Word—Sorry*, L.A. TIMES, Sept. 14, 2010, at C1 (noting that, in connection with Bush’s return of the Heisman, “USC immediately distanced itself from Bush, sent its copy of the Heisman Trophy back and removed his name from the record books”). USC officials called for Reggie Bush to return his Heisman Trophy but USC’s own return of certain profits gained during Bush’s tenure was self imposed. *NCAA Delivers Postseason Football Ban*, ESPNLOSANGELES.COM, <http://sports.espn.go.com/los-angeles/ncf/news/story?id=5272615> (last updated June 11, 2010). One reporter also notes that “[Bush] ultimately got rich and earned a Super Bowl ring while leaving USC on probation, with innocent players paying for his sins with a two-year bowl ban.” DuFresne, *supra*.

⁶⁷ See NCAA OPERATING BYLAWS, *supra* note 14, art. 19.01.1.

⁶⁸ See *id.* art. 14.6.

⁶⁹ See *id.* art. 19.01.1.

⁷⁰ See *Reggie Bush to Forfeit Heisman*, ESPNLOSANGELES.COM, <http://sports.espn.go.com/los-angeles/ncf/news/story?id=5572827> (last updated Sept. 15, 2010); see also David Wharton, *Bush Forfeits Heisman Trophy*, L.A. TIMES, Sept. 15, 2010, at A1, available at <http://articles.latimes.com/2010/sep/14/sports/la-sp-reggie-bush-20100915>.

ability to transfer to another institution without sitting out one year.⁷¹ The one-time transfer exception does not apply uniformly to student-athletes in all sports.⁷² The NCAA bylaws provide for a potential waiver of the one-year sit-out transfer rule for student-athletes whose original institution is banned from postseason play, but only where the sanctions would preclude that student from “[p]articipating in postseason competition during *all* of the remaining seasons of the student-athlete’s eligibility.”⁷³ Thus, where a school is assessed a one-year postseason ban, only incoming seniors may transfer; and where the institution is under a two-year postseason ban, only incoming junior or seniors may transfer. And where the institution appeals the sanctions, uncertainty looms for months.⁷⁴

⁷¹ See NCAA OPERATING BYLAWS *supra* note 14, art. 14.6.

⁷² See *id.* art. 14.5.5.2.10 (One-Time Transfer Exception). One of the requirements of the exception reads:

The student is a participant in a sport other than baseball, basketball, bowl subdivision football or men’s ice hockey at the institution to which the student is transferring. A participant in championship subdivision football at the institution to which the student is transferring may use this exception only if the participant transferred to the certifying institution from an institution that sponsors bowl subdivision football and has two or more seasons of competition remaining in football or the participant transfers from a Football Championship Subdivision institution that offers athletically related financial aid in football to a Football Championship Subdivision institution that does not offer athletically related financial aid in football.

Id. art. 14.5.5.2.10(a). Apparently, this rule authorizes a one-time exception to the transfer rule for student-athletes who transfer from a bowl subdivision school (formerly Division I-A) to a championship subdivision school (formerly Division I-AA) or to a program that does not offer athletic aid. Athletes under this exception would transfer to a smaller athletic program than their original institution. This would not enable athletes to transfer, without penalty, to any school of their choice. See *id.*

⁷³ *Id.* art. 14.8.2(c) (emphasis added). The Bylaw provides that:

On the recommendation of the Committee on Infractions, for a student-athlete who transfers to a member institution to continue the student-athlete’s opportunity for full participation in a sport because the student-athlete’s original institution was placed on probation by the NCAA with sanctions that would preclude the institution’s team in that sport from participating in postseason competition during all of the remaining seasons of the student-athlete’s eligibility.

Id.

⁷⁴ For example, the hearing from USC’s appeal occurred over six months from the COI sanctions report date, and the IAC hearing itself occurred January 22, 2011. Practically, the athletes have to make decisions to stay or transfer under this uncertainty. Bill N., *USC Football: Trojans Win NCAA Appeal and Remaining Sanctions Canceled*, BLEACHER REP. (Jan. 30, 2011), <http://bleacherreport.com/articles/590217-usc-football-trojans-win-ncaa-appeal-and-remaining-football-sanctions-cancelled> (“USC received . . . sanctions . . . on

In 2010, the NCAA sanctioned USC for lack of institutional control.⁷⁵ After a four-year investigation, the NCAA promulgated a report that exposed myriad illicit benefits given to Reggie Bush and basketball player O.J. Mayo.⁷⁶ In the USC case, five student-athletes did transfer upon issuance of the NCAA sanctions on the USC basketball and football programs, which included bans on postseason play.⁷⁷ But the release from the transfer rule was limited to juniors and seniors.⁷⁸ To its credit, USC exercised its discretion to release certain recruits from their letter of intent.⁷⁹ Otherwise, generally, new recruits and sophomores at a school under major penalty are not free to transfer.⁸⁰ USC's

June 10, 2010. . . . USC quickly appealed some of the football sanctions and presented their case to the NCAA Infractions Appeals Committee (IAC) on [January 22, 2011].”).

⁷⁵ See Greg Beacham, *NCAA Drops the Hammer on USC Football*, NBC SPORTS, http://nbc.sports.msnbc.com/id/37621070/ns/sports-college_football/ (last updated June 10, 2010).

⁷⁶ See USC INFRACTIONS REPORT, *supra* note 16, at 4–6.

⁷⁷ See NCAA OPERATING BYLAWS, *supra* note 14, art 14.8.2(c). The Bylaws provide:

On the recommendation of the Committee on Infractions, for a student-athlete who transfers to a member institution to continue the student-athlete's opportunity for full participation in a sport because the student-athlete's original institution was placed on probation by the NCAA with sanctions that would preclude the institution's team in that sport from participating in postseason play during all of the remaining seasons of the student-athlete's eligibility.

Id. art. 13.1.1.3.3 (Transfer from Institution Placed on Probation by Committee on Infractions) (authorizing recruitment of student-athletes at an institution under sanction and restricted from postseason competition but requiring notice).

⁷⁸ See *supra* note 72 (discussing the One-Time Transfer Exception).

⁷⁹ See *Cash Bounties Reported at Miami*, N.Y. TIMES, May 21, 1994, <http://www.nytimes.com/1994/05/21/sports/sports-people-football-cash-bounties-reported-at-miami.html> (reporting that football players at the University of Miami were paid for making big plays in football games as part of a program nicknamed “pay-for-play”). While USC was under investigation, it continued to recruit, although prospective student-athletes could not then know the case outcome or effect of sanctions. See Joe Schad, *USC Releasing Recruit Henderson*, ESPNLOSANGELES.COM, <http://sports.espn.go.com/los-angeles/ncl/news/story?id=5358730> (last updated July 6, 2010). For instance, Seantrel Henderson, widely reported as the most sought-after prospective football student-athlete in the nation in 2009, signed with USC while its NCAA infractions case was pending. See *id.* Henderson did so reportedly based upon representations from USC head football coach Lane Kiffin that any sanctions imposed by the COI would be minimal. As it turns out, there would have been no opportunity to travel to and participate in a bowl game had Seantrel been forced to attend USC. See *id.* USC released Seantrel from his commitment, and he ultimately chose to attend the University of Miami, itself a school with a history of NCAA major infractions. See *id.*; see also Open Letter from Alexander Wolff, to Edward T. (Tad) Foote II, President, Univ. of Miami (June 12, 1995), available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1006688/1/index.htm> (describing the University of Miami's “Pell Grant Scandal,” which implicated fifty-seven student-athletes and was described as “perhaps the largest centralized fraud upon the federal Pell Grant program ever committed”).

⁸⁰ See *supra* note 72 (discussing the One-Time Transfer Exception).

appeal of the sanctions issued in the COI June report remained pending well into the following season.⁸¹

2. Financial Impacts on Conference Schools

Sanctions also impact other institutions, notably fellow conference members. For instance, most conferences distribute revenue from television rights fees, bowl appearances, and Final Four participation among conference members.⁸² Sanctions imposed on the offending school may decrease revenue that the school may have generated for the conference, and other members of that conference receive lesser distributions of conference revenue.⁸³

B. *Violators Escape Punishment*

1. Limited Impact on Actual Violators

Although student-athletes and conference schools may be negatively impacted by NCAA sanctions, the current sanctions inadequately motivate head coaches to supervise compliance within their programs. Indeed, many coaches of problem programs are able to escape penalties and move on.⁸⁴ An apparent trend has emerged at elite levels of NCAA sports, in particular men's basketball, where highly successful coaches leave NCAA-sanctioned programs for new, and perhaps more

⁸¹ See *supra* note 74 and accompanying text.

⁸² See SCOTT R. ROSNER & KENNETH L. SHROPSHIRE, *THE BUSINESS OF SPORTS* 516 (2004) (noting that each conference is allowed to develop its own formula to distribute revenue among member institutions.)

⁸³ For example, the University of California at Berkeley recently abandoned its storied men's baseball program due to a lack of funding, effective fall 2011. Press Release, UC Berkeley, Three UC Berkeley Athletic Teams to Be Preserved (Feb. 11, 2011), available at <http://newscenter.berkeley.edu/2011/02/11/athletics-continuation/> (explaining that, although philanthropic funding was available to save women's lacrosse, women's gymnastics, and rugby, men's gymnastics and baseball would be cut). It has been reported that revenue lost by the Pac-10 Conference, due to recent sanctions against USC, the University of Arizona, and Arizona State University, has contributed to this unfortunate downsizing. See *id.*; Jason Figueiredo-Dumpit, *Cause & Effect: Possible Ripples from NCAA Sanctions on USC*, BLEACHER REP. (Feb. 15, 2010), <http://bleacherreport.com/articles/345997-cause-effect-possible-ripples-from-ncaas-sanctions-on-usc> ("This severe sanction would also hit the Pac-10 where it hurts the most . . . their pocket book."). Similarly, commentators attribute the "death penalty" sanction against Southern Methodist University to the demise of the old Southwest Conference. See JOHN SAYLE WATTERSON, *COLLEGE FOOTBALL: HISTORY, SPECTACLE, CONTROVERSY* 372 (2000) (noting that the Southwest Conference dissolved because scandals and NCAA penalties interfered with television profits.).

⁸⁴ See *infra* notes 111–123 and accompanying text.

lucrative, positions. One example is the high-profile basketball coach John Calipari, former head coach of the University of Memphis, the University of Massachusetts, and the National Basketball Association's (NBA) New Jersey Nets.⁸⁵ Coach Calipari is one of only four coaches to direct two different colleges to a number one seed in the NCAA Tournament, and the only head coach to have a Final Four appearance vacated at more than one school.⁸⁶ Although the two programs that Calipari guided to the Final Four were sanctioned and had their records vacated, he escaped any personal sanctions.⁸⁷ Now at the University of Kentucky, he is the highest paid coach in the NCAA and again finds himself on the periphery of NCAA scandal.⁸⁸

Kelvin Sampson, former head men's basketball coach at Oklahoma and the storied Indiana program, also was able to leave behind an institution amid NCAA sanctions, yet advance to a pay raise at a new NCAA school.⁸⁹ During Sampson's tenure, Oklahoma was under NCAA investigation for recruiting violations; the NCAA concluded that more than 550 illegal calls were made by Sampson and his staff to seventeen different recruits.⁹⁰ The NCAA sanctions on Oklahoma barred Sampson from recruiting off campus and making phone calls for one year, end-

⁸⁵ See *John Calipari Profile*, U. KY. OFFICIAL ATHLETIC SITE, http://www.ukathletics.com/sports/m-baskbl/mtt/calipari_john00.html (last visited Feb. 27, 2011). Calipari was the head coach of University of Massachusetts from 1989 to 1996. *Id.* Calipari next served as head coach of the New Jersey Nets from 1997 until 1999, before he became the head coach of the University of Memphis from 2001 to 2009. *Id.* Calipari is currently the head coach at the University of Kentucky. *Id.*

⁸⁶ E.g., Michael Rosenberg, *Refuse to Lose: Master Salesman Calipari Is the Best at What He Does*, SI.COM (Mar. 17, 2010), http://sportsillustrated.cnn.com/2010/writers/michael_roseberg/03/17/calipari/index.html. At press time, a Calipari team was again set to play in the Final Four. Ian O'Connor, *Coach Cal's Third Final Four Is His First*, ESPNNEWYORK.COM, http://sports.espn.go.com/new-york/ncb/columns/story?columnist=oconnor_ian&id=6265157 (last updated Mar. 29, 2011).

⁸⁷ Letter from Paul T. Dee, Dir., NCAA Div. I Comm. on Infractions, to John Calipari, Head Men's Basketball Coach, Univ. of Ky. (May 21 2009), available at <http://www.courier-journal.com/assets/B2135763529.PDF> ("As stated in Mr. Cooper's letter, you are not alleged to have committed NCAA violations and thus are not considered to be 'at risk' in these proceedings.").

⁸⁸ Calipari recruited Enes Kanter from a preparatory school in Simi Valley, California. In November, 2010, the NCAA ruled Kanter ineligible for having received over \$33,000 in extra benefits. See *Kentucky's Enes Kanter Ruled Ineligible*, ESPN, <http://sports.espn.go.com/ncb/news/story?id=5793192> (last updated Nov. 12, 2010).

⁸⁹ See *NCAA Lists 5 Major Violations; IU AD 'Profoundly Disappointed'*, ESPN, <http://sports.espn.go.com/ncb/news/story?id=3243793> (last updated Feb. 15, 2008).

⁹⁰ *Could LeBron James Next Head Coach Be Former Sooner Kelvin Sampson?*, EXAMINER.COM OKLAHOMA CITY (May 28, 2010), <http://www.examiner.com/oklahoma-sooners-in-oklahoma-city/could-lebron-james-next-head-coach-be-former-sooner-kelvin-sampson> ("The NCAA found Sampson and his staff made more than 550 illegal calls to 17 different recruits.").

ing May 24, 2007.⁹¹ While under NCAA investigation at Oklahoma, Sampson was hired by the University of Indiana with a substantial pay raise.⁹² Months later and while subject to restrictions from making out-bound recruiting phone calls, Sampson participated in calls with recruits at Indiana.⁹³ The NCAA alleged that Sampson knowingly violated telephone recruiting restrictions imposed on him and also alleged that Sampson misrepresented to Indiana University and NCAA officials regarding his involvement in the impermissible calls.⁹⁴ On November 25, 2008, the NCAA ordered against Indiana a three-year probation term for violations largely tied to Sampson's tenure. It also imposed a five-year show-cause order on Sampson, meaning that no NCAA member school would be able to hire Sampson without demonstrating to the NCAA that Sampson has served his punishment.⁹⁵

The Sampson and Calipari cases demonstrate the problem of coaches being able to leave a university athletic program in shambles, yet upgrade personally to a position at another institution. Consider former head football coach Pete Carroll, who left to coach in the NFL and is making millions of dollars there (although he made four million dollars per year at USC).⁹⁶ This also shows the win-at-all-costs mentality

⁹¹ Prior to this incident, Kelvin Sampson was the President of the National Association of Basketball Coaches (NABC), an organization that supports basketball coaches across the country. Andy Katz, *Sampson Receives NCAA's Harsh Penalty*, ESPN, <http://sports.espn.go.com/nba/news/story?id=3725832> (last updated Nov. 25, 2008). While in this position, the NABC formed an ethics committee to deal with a myriad of recruiting issues in men's collegiate basketball. *NABC Ethics Committee Reprimands Coach Kelvin Sampson*, NAT'L ASS'N BASKETBALL COACHES (Aug. 15, 2006), <http://www.nabc.org/sports/m-baskbl/spec-rel/081506aaa.html>. Ironically, this very ethics committee would later reprimand Sampson as a result of the NCAA findings, placing him on probation for three years and declaring that he would not be eligible to serve in any official capacity for the NABC, be considered for Coach of the Year honors, or receive Final Four ticket privileges. *See id.*

⁹² *See NCAA Lists 5 Major Violations; IU AD 'Profoundly Disappointed,' supra* note 89 (reporting that Indiana hired Sampson in April 2006 with an annual base salary of \$500,000).

⁹³ *Indiana Dealing with Sampson Allegations*, ACCESSNORTHGA.COM (Feb. 14, 2008), <http://www.accessnorthga.com/detail.php?n=206960&c=5> ("[L]ess than two months after Sampson took the Indiana job . . . the Sooners coaches made 577 illegal calls between 2000 and 2004. The NCAA banned Sampson from calling recruits and making off-campus visits for a year.")

⁹⁴ *See Sampson, IU Part Ways After Buyout*, NEWS 5 WLWT.COM (Feb. 22, 2008), <http://www.wlwt.com/r/15377934/detail.html>.

⁹⁵ *See Katz, supra* note 91; *see also* Seth Davis, *End of a Sad Saga: IU Had Few Good Options in Getting Rid of Sampson*, SI.COM (Feb. 22, 2008), http://sportsillustrated.cnn.com/2008/writers/seth_davis/02/22/kelvin.sampson/index.html (implying that Indiana officials had already decided Sampson was guilty, based on the fact that its internal investigation would last only a week).

⁹⁶ *See* Gary Klein, *Carroll of USC Tops Salary List*, L.A. TIMES, Feb. 23, 2009, at D3, available at <http://articles.latimes.com/2009/feb/23/sports/sp-college-salaries23>; Gary Klein & Sam Farmer, *Carroll Takes Seattle Job: USC Players Are Told By Text*, L.A. TIMES, Jan. 11, 2010, at C1,

of some institutions that hire a coach known to have violated NCAA rules and whose program at a previous institution is subjected to major NCAA bylaw violations. The process is flawed where innocent student-athletes who remain at a sanctioned program are penalized, but the responsible coach is permitted to retain bonuses for “winning” and is hired by a member institution willing to take the risk in the desire to win.

2. The One-and-Done Problem and Involved Athletes Turning Pro

As with coaches who can leave a program, often times the student-athletes involved in the offending conduct are able to leave the sanctioned program far behind. A particular rule from the NBA, that opens draft eligibility to players one year out of high school, has a detrimental impact on the discipline and enforcement aspects of college basketball programs.⁹⁷ Under this “one and done” system, elite college men’s basketball players may leave for the NBA after one year out of high school. O.J. Mayo was thus unscathed in his NBA berth, although he violated NCAA rules while at USC and left behind a program and teammates hit by the sanctions. Unfortunately, the cases of coaches and star student-athletes able to evade sanction are not isolated.⁹⁸

available at <http://articles.latimes.com/2010/jan/11/sports/la-sp-carroll11-2010jan11> (reporting that Carroll’s five-year contract with the Seattle Seahawks is worth an estimated \$33 million); Danny O’Neil, *Pete Carroll Among Country’s Highest Paid Coaches*, SEATTLE TIMES SEAHAWKS BLOG (May 24, 2010, 9:35 AM), http://seattletimes.nwsourc.com/html/seahawks_blog/2011941825_pete_carroll_am.html (reporting that Carroll is the third highest paid football coach in the country with his \$7 million salary).

⁹⁷ See NBA COLLECTIVE BARGAINING AGREEMENT art. X (2005) (Player Eligibility and NBA Draft), *available at* <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf>; see also Roscoe Nance, *Teen Draftees Grounded Until 19 Under New Deal*, USA TODAY, June 21, 2005, http://www.usatoday.com/sports/basketball/nba/2005-06-21-teens-cba_x.htm. Beginning in 2005, the NBA required new draftees to be either nineteen years old, or have completed one year of college. NBA COLLECTIVE BARGAINING AGREEMENT, *supra*, art. X; Nance, *supra*. This rule was given the nickname “one and done,” because athletes would spend one year in college before bolting for the NBA. See Michael Lee, *Debate Flares over ‘One-and-Done’ Rule*, WASH. POST, June 24, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/06/23/AR2009062302079.html>.

⁹⁸ For example, the *New York Times* recently reported that Eric Bledsoe, a star point guard who lacked the grades to meet the NCAA’s minimum standards, enrolled in A. H. Parker High School, where his grades increased. Pete Thamel & Thayer Evans, *N.C.A.A. Is Looking into Former Kentucky Player*, N.Y. TIMES, May 29, 2010, at D1, *available at* <http://www.nytimes.com/2010/05/29/sports/ncaabasketball/29recruit.html>. After one season at the University of Kentucky, Bledsoe awaits a lucrative payday in the upcoming NBA draft. See *id.* The changes in Bledsoe’s academic and athletic prospects have prompted an NCAA investigation in Alabama. See *id.* These allegations are strikingly similar to the violations at the University of Memphis, where the star guard Derrick Rose (now an NBA star) had his SAT test

The incentives for these star athletes to comply with NCAA rules to preserve eligibility are not insubstantial; yet, the NCAA's report in the USC case suggests that institutions have a higher responsibility to monitor their star athletes.⁹⁹ The COI report, issued by the NCAA, states:

Universities may not hide their heads in the sand and purport to treat all programs and student-athletes similarly when it comes to the level of scrutiny required. The more potential there is for big payoffs to student-athletes once they turn professional, then the more potential there is for illicit agent and third party involvement in the provision of significant cash and other benefits. In turn, heightened scrutiny is required.¹⁰⁰

Although this proposition is not the basis of a specific provision in NCAA bylaws and neither the NCAA nor member schools can restrict a student-athlete opting to leave school for professional play, the likelihood these star athletes may be sought after by agents and offered extra benefits is obvious. The appreciation for the value star athletes bring to a collegiate program should not overtake the risks to the school and to other players where the institution enables or fails to monitor.

3. Agents Unscathed

NCAA bylaws render ineligible any student-athlete who has agreed to be represented by an agent or who accepts, directly or indirectly, transportation or other benefits from prospective agents.¹⁰¹ The rule applies not only to registered agents, but includes "street agents," "recruiters," and "runners" for an agent.¹⁰² Federal and some state legislation restrict agents from recruiting, soliciting, and giving improper benefits to student-athletes.¹⁰³ Despite laws intended to address agent

scores invalidated, resulting in the sanctions that caused Memphis to vacate its Final Four appearance and seriously impacted the current student-athletes at Memphis. *See Derrick Rose's SAT Scores Wipe out Memphis' Record 38-Win Season*, HUFFINGTON POST (Mar. 22, 2010), http://www.huffingtonpost.com/2010/03/23/derrick-roses-sat-scores_0_n_510309.html.

⁹⁹ See *supra* notes 75–76 and accompanying text.

¹⁰⁰ USC INFRACTIONS REPORT, *supra* note 16, at 3.

¹⁰¹ NCAA OPERATING BYLAWS, *supra* note 14, arts. 12.3.1 (General Rule), 12.3.1.2 (Benefits from Prospective Agents).

¹⁰² USC INFRACTIONS REPORT, *supra* note 16, at 11.

¹⁰³ See, e.g., Sports Agent Responsibility and Trust Act (SPARTA), 15 U.S.C. § 7801 (2006) (addressing agent contact with student-athletes); Uniform Athlete Agents Act (UAAA), 15 U.S.C. § 7807 (2006) (focusing on agent practices in recruiting student-athletes). According to NCAA.com, the UAAA is a "model state law that [regulates] the conduct of athlete agents.

solicitation of student-athletes, the problem persists because some agents are able to disclaim knowledge and circumvent the rules through the use of runners or middlemen. Ultimately, cooperation by the professional leagues and player unions to refuse to certify or work with such agents is needed.

4. Involved High School or AAU Coaches

Other individuals and representatives who operate outside the NCAA's regulatory reach, or outside of the member institutions themselves, include the highly influential roles of high school coaches, summer league AAU coaches, and athletic shoe company representatives at the high school level. Top Division I basketball prospects play in summer leagues, which are a showcase for collegiate recruiting.¹⁰⁴ In close association with the young athletes, these coaches are in a position, known by recruiters, to influence a player's selection of schools. NCAA rules prohibit paying AAU coaches.¹⁰⁵ And yet although a penalty ensues against the NCAA coach and member school if payment is made to an AAU coach, the AAU coach is able to keep the money and stay in business.¹⁰⁶

III. POSTGAME ANALYSIS AND PROPOSALS FOR TAILORED PENALTIES AND IMPROVED COMPLIANCE

Sanctions are undeniably required to address major rule infractions by member institutions. As the foregoing discussion suggests, however, current sanctions may unfairly impact innocent student-athletes and also fail to address problematic conduct of the involved coaches, agents,

. . . [Generally] the UAAA . . . requires an athlete agent to register with a state authority. . . . [I]n order to act as an athlete agent in that state . . . an athlete agent must provide . . . background information, both professional and criminal in nature." *FAQ on Uniform Athlete Agents Act*, NCAA (July 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/FAQ+on+Uniform+Athlete+Agents+Act>. Moreover, as of July 2010, "the UAAA has been passed in 40 states, the District of Columbia and the U.S. Virgin Islands." *Id.* For an example, see *Miller-Ayala Athlete Agents Act*, CAL. BUS. & PROF. CODE § 18895 (West 2010).

¹⁰⁴ See *infra* note 106 and accompanying text.

¹⁰⁵ NCAA OPERATING BYLAWS, *supra* note 14, art. 11.4 (Employment of High School, Preparatory School, or Two-Year College Coaches, or Other Individuals Associated with Prospective Student-Athletes).

¹⁰⁶ See Eric Prisbell & Steve Yanda, *A Whole New Ballgame That Williams Won't Play*, WASH. POST, Feb. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/12/AR2009021202299.html> (arguing that the NCAA should either ban or reduce the ability of NCAA coaches to recruit at AAU summer camps).

players, and representatives out of reach of NCAA regulation. The following sanctions proposals are intended to better align penalties with misconduct, thus better reflecting the underlying purposes of sanctions.

A. *Are the Current Sanctions Alright?*

Do current sanction policies in sport adequately achieve the objectives of deterrence, punishment, and the NCAA's policies for protecting student-athletes and the integrity of intercollegiate athletics? Professor Gene Marsh, who served on the COI for nine years, questions whether the current sanctioning process effectively deters violations.¹⁰⁷ Marsh writes that the NCAA enforcement process is “[n]o better or worse [as a deterrent] than the [Internal Revenue Service] is [as] a deterrent to tax cheating or the Securities and Exchange Commission is to securities fraud.”¹⁰⁸ He also suggests that the lack of subpoena power in the NCAA enforcement processes renders it less effective than other administrative compliance programs.¹⁰⁹ But is there a better way?¹¹⁰

B. *Proposals for Improving the Sanctioning Process and Penalties*

The current sanctions system insufficiently deters or penalizes those responsible for violations, and at the same time unfairly impacts

¹⁰⁷ See Gene A. Marsh, *A Call for Dissent and Further Independence in the NCAA Infractions Process*, 26 CARDOZO ARTS & ENT. L.J. 695, 697 (2009) (“I question the deterrent effect of the penalties self-imposed by the institutions and those additional penalties imposed by the Committee [on Infractions].”).

¹⁰⁸ *Id.* at 697. Marsh opines that the NCAA process

[s]cares some people and they act better because of it. But there's a full boatload of people not affected at all. They weigh what they stand to gain vs. what they lose if they get caught and decide to go on and do what they do. . . . If people were really scared of the infractions process, we wouldn't have so many repeat cases. In nine years on the committee, we've had (programs) in front of us again before the ink is dry on the last opinion (ruling against them).

Id. at 697 n.5.

¹⁰⁹ See *id.* at 697.

¹¹⁰ See *id.* at 697 n.6. On June 17, 2008, a panel on “NCAA Infractions: An Examination of Trends, Recommendations to Restructure Penalties and Challenges,” convened at a meeting of the Knight Foundation Commission on Intercollegiate Athletics. See *id.* (noting that although university presidents publicly call for more strict penalties, most “[s]ing an entirely different tune before the Committee and in their public announcements of appeal from the penalties imposed by the Committee”). For more information, see *NCAA Infractions: An Examination of Trends, Recommendations to Restructure Penalties, and Challenges* (June 19, 2008) (downloaded using iTunes). See generally KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION (2001), available at http://www.knightcommission.org/images/pdfs/2001_knight_report.pdf.

innocent and uninvolved parties, typically student-athletes who were not on campus when violations occurred. Perhaps this is an unavoidable circumstance, given the limited regulatory reach of the NCAA to institutional members. But consider options for improvement. Is it just a matter of institutions needing to do a better job of screening coaches and athletic department personnel? Do the existing sanctions need to be applied more severely? Can the existing sanctions be applied in a tailored manner to avoid unnecessarily punishing innocent student-athletes? Or is the answer to completely revamp the entire infractions enforcement and sanctions landscape? Perhaps, the answer lies somewhere in the middle. This Section offers four proposals for consideration.

1. Hold Head Coaches Financially Accountable for Program Violations

NCAA regulations hold university presidents ultimately responsible for the institutions' compliance with NCAA regulations.¹¹¹ Institutional control is certainly a bedrock principle of NCAA membership.¹¹² Realistically, ensuring compliance with *all* of the NCAA regulations is an overwhelming task. As this Article certainly recognizes, an NCAA compliance officer may have "the toughest job in college sports."¹¹³ In this environment, the head coach of an athletic program is in the best position to monitor his or her program as well as to infuse ethical standards of integrity and compliance among the coaching staff, players, and representatives.¹¹⁴ Head coaches in major sport programs, such as football or basketball, are highly compensated, and in some instances paid more than the university president and even the highest paid public

¹¹¹ See NCAA CONST., *supra* note 11, art. 6.1.1 ("A member institution's president or chancellor has ultimate responsibility and final authority for the conduct of the intercollegiate athletics program and the actions of any board in control of that program.").

¹¹² See *supra* note 23 and accompanying text.

¹¹³ Seth Wickersham, *Internal Affairs: NCAA Compliance Officer May Be the Toughest Job in College Sports*, ESPN INSIDER, <http://insider.espn.go.com/insider/insider/news/story?id=5455740> (last updated Aug. 17, 2010).

¹¹⁴ See KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, RESTORING THE BALANCE: DOLLARS, VALUES, AND THE FUTURE OF COLLEGE SPORTS 3 (2010), *available at* http://www.knightcommission.org/images/restoringbalance/KCIA_Report_F.pdf (stating that the "rates of spending growth" in college sports are "breathtaking" and that this increase "threatens the continued vitality of athletics programs and the integrity of our universities. It cannot be maintained"). The Commission recommends, *inter alia*, greater transparency in athletic and academic spending, rewarding practices that value academics, and treating college athletes as students first and foremost, rather than as professionals. *See id.* at 10–13.

official in the state.¹¹⁵ Money is power, and highly compensated head coaches have the power to enable, as well as to avoid, major violations in their programs.

As Wall Street is forced to better match executive compensation to risk and to the long-term health of the company,¹¹⁶ collegiate athletics should also try to better match compensation practices and risk taking. Coaches of revenue-generating sports at major institutions, like many financial executives and managers, are extremely well compensated.¹¹⁷ They also have a certain incentive to take extreme risks which may result in personal benefit, yet place their employers in jeopardy.

The incentives for both the coach and institution to ensure long-term compliance need to be better aligned. Current regulations are an insufficient mechanism to hold coaches responsible for the integrity of the program or actions of their subordinates.¹¹⁸ Collegiate institutions should better protect themselves from NCAA violations by tying coach compensation and bonuses to a violation-free program.¹¹⁹ Federal legis-

¹¹⁵ See Steve Wieberg et al., *College Football Coaches See Salaries Rise in Down Economy*, USA TODAY, November 10, 2009, http://www.usatoday.com/sports/college/football/2009-11-09-coaches-salary-analysis_N.htm (noting that even the “salaries of assistant coaches . . . [are] approaching and even exceeding presidents’ compensation and most eclipsing that of full professors”).

¹¹⁶ For instance, a significant portion of compensation may be held back from an individual or paid in restricted stock, which may not be sold until some period of years later, until the company’s earnings have proven to be solid and not illusory based on risks that would not appear until later. If compensation is in restricted stock, which may not be sold until three to five years after the stock is issued, then the theory is that the executive’s interests would be better aligned with the interests of long term investors in the company and the executive would have less incentive to take extreme risks for short term personal gain. For information on executive pay restrictions and claw back proposals, see Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009 § 956, 12 U.S.C. § 5641 (2006). See Press Release, U.S. Dep’t of the Treasury, Treasury Announces New Restrictions on Executive Compensation (Feb. 4, 2009), available at http://www.whitehouse.gov/the_press_office/TreasuryAnnouncesNewRestrictionsOnExecutiveCompensation/; Roger A. Lane et al., *Securities Litigation Alert: Dodd-Frank’s Mandatory Executive Compensation Clawback: A Practical Review and Assessment*, PEPPER HAMILTON LLP (Aug. 18, 2010), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=1868.

¹¹⁷ Stephen Smith, *As NCAA Coaches Get Paid, Schools Pay Price*, CBS NEWS (Apr. 2, 2010), http://www.cbsnews.com/8301-503983_162-20001638-503983.html.

¹¹⁸ See Roya R. Hekmat, *Malpractice During Practice: Should NCAA Coaches Be Liable for Negligence?*, 22 LOY. L.A. ENT. L. REV. 613, 620–21 (2002) (arguing that NCAA coaches should owe student-athletes a higher level of care); *supra* notes 84–96 and accompanying text (discussing instances of former head coaches who move on to lucrative contracts with new employers, although their former programs suffer major infraction sanctions).

¹¹⁹ For example, universities could defer significant portions of a coach’s compensation until a period of years have passed without the coach’s previous athletic program being implicated in any major NCAA violations. See KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS, *supra* note 114, at 18 (reporting that escalating coaches’ salaries are the single

lation in the financial industry now requires the Chief Executive Officer (CEO) to personally certify financial reports of public companies.¹²⁰ Similarly, head coaches—CEOs of their teams—should be accountable for their programs and violations that occur on their watch.

The NCAA has attempted to embrace this practice by adopting a bylaw that provides for a violation when head coaches fail to monitor their programs.¹²¹ Adding a financial consequence gives “teeth” to enforcement of this provision. The NCAA does not directly contract with the coaches, and antitrust considerations may preclude such NCAA legislation regarding coach compensation;¹²² institutions may, however, consider such “clawback” provisions in individual coach employment contracts.¹²³

2. Institutional Disgorgement of Winnings and Financial Penalties

NCAA leadership should make better use of existing sanctions, particularly financial penalties, while placing less emphasis on penalties that have a direct impact on uninvolved student-athletes. Universities benefit financially from winning programs in the major fan-interest

largest contributor to the “unsustainable growth” of athletics expenditures). Antitrust law constrains the NCAA’s efforts to limit coach salaries; individual programs can and should, however, consider coach compensation in context of institutional values. The Knight Commission counsels that institutions should not permit coaches and athletic staff members to have separate contracts with companies that award staff financially for merchandising deals; rather the contracts should be between the university and corporate sponsor. *See id.*

¹²⁰ *See, e.g.*, Sarbanes Oxley Act of 2002 § 302, 15 U.S.C. § 7241 (2006) (requiring CEO certification of financial reports filed with the Securities Exchange Commission).

¹²¹ NCAA OPERATING BYLAWS, *supra* note 14, art. 11.1.2.1 (“It shall be the responsibility of an institution’s head coach to promote an atmosphere for compliance within the program supervised by the coach and to monitor the activities regarding compliance of all assistant coaches and other administrators involved with the program who report directly or indirectly to the coach.”).

¹²² *See Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (compelling the NCAA to pay damages of \$67 million for limiting the earnings of coaches, in violation of the Sherman Antitrust and Clayton Acts).

¹²³ *See* Randy Youngman, *NCAA Sanctions Need Adjustment*, ORANGE COUNTY REGISTER, June 11, 2010, <http://www.ocregister.com/articles/ncaa-253107-coach-violations.html>. One commentator also advocates that:

[a]ny coach who is hired by a school should be required to sign an agreement in which he promises to report any violations of which he becomes aware or if hears of possible violations. If it is found that he knowingly violated this agreement, he will be required to pay back his salary. This certainly will make coaches more vigilant in following rules instead of looking the other way.

Id.

sports, and the financial impact reaches much more than just the athletic department. For example, from the beginning of the Pete Carroll era at USC until his final year, donations to the school's endowment increased by 284%, and incoming freshman applications jumped by 167%.¹²⁴ Although USC called for Reggie Bush to give back his Heisman, USC did not immediately offer to return any of the financial donations or revenue obtained in connection with the years Bush helped bring the national championship to the school.¹²⁵

With tremendous financial incentives to win, the temptation to hire a coach who may push the compliance envelope too far is significant. There must be an equal or greater incentive for institutions not to cut corners by trading compliance for success in the competitive venue; relatively insignificant penalties from the NCAA do not provide such an incentive. Schools may take risks in hiring a coach knowing of prior violations, calculating that the benefits of a winning program outweigh the penalties that may ensue.

Devising a financial penalty that truly gets the attention of decisionmakers on campus, but does not unnecessarily harm uninvolved student-athletes or unduly punish fellow conference members, is admittedly difficult. Perhaps the answer is already on the NCAA books. For example, Bylaw 19.5.2.2(f) provides for the imposition of a financial penalty on wrongdoers.¹²⁶ The financial penalty, however, has only re-

¹²⁴ See Klein, *supra* note 96 (reporting that donation and endowment income increased from \$13.7 million in 2001–2002 to \$39 million in 2009); see also Bruin Steve, *Different Version*, BRUIN ZONE (June 17, 1999), <http://www.bruinzone.com/classics/0002.shtml> (reporting that USC received 21,400 freshmen applications in 1998); *Undergraduate Admission*, U. S. CAL., <http://www.usc.edu/admission/undergraduate/apply/index.html> (last visited Feb. 27, 2011) (stating that USC currently receives over 35,000 freshmen applications a year). Alan Zagier observes about the Knight Commission report:

The report notes that from 2005 to 2008, athletics spending increased at more than twice the rate of academic spending at nearly all of the 103 Football Bowl Subdivision schools. On average, FBS schools spend more than six times as much on athletics per capita than on academics. And most schools are forced to tap general university funds to balance their athletics budgets.

Zagier, *supra* note 3, at 1.

¹²⁵ See sources cited *supra* note 1 (discussing donations that universities accrue as a result of successful athletics programs); *supra* note 66.

¹²⁶ NCAA OPERATING BYLAWS, *supra* note 14, art. 19.5.2.2(f) (listing a financial penalty among the range of disciplinary measures that may be imposed against an institution for a major violations).

cently been used, and then for relatively minor financial penalties, given the size of athletic budgets.¹²⁷

Another option is a penalty structure for NCAA major infractions akin to the “luxury tax” in major league baseball.¹²⁸ A schedule of penalties can be based on total athletic department revenues (not expenses), including donations by booster organizations, with the range dependent on the existing criteria for seriousness and aggravating and mitigating factors.¹²⁹ Such a scheme could have the fine money go into the pool of revenue that gets redistributed to all schools within the

¹²⁷ See, e.g., NCAA, HOBART COLLEGE PUBLIC INFRACTIONS REPORT 1, 4 (2011), available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/News+Releases/> (follow “Jan. 6, 2011—NCAA Committee on Infractions Issues Findings for Hobart College” hyperlink; then follow “Division I Committee on Infractions Public Report” hyperlink) (assessing a \$70,500 financial penalty, inter alia, against Hobart for lack of institutional control in monitoring compliance of its Division I men’s lacrosse team); NCAA, REPORT NO. 294, FLORIDA STATE UNIVERSITY 11 (2010), available at <http://ncaa.org/wps/wcm/connect/public/NCAA/Resources/News+Releases/2010+News+Releases> (follow “Jan. 5, 2010—NCAA Division I Infractions Appeals Committee Upholds Penalties for Florida State University” hyperlink; then follow “Division I Infractions Appeals Committee Public Report—Florida State University” hyperlink) (affirming penalties against an institution and programs after finding widespread academic fraud); Press Release, NCAA, Division I Committee on Infractions Issues Decision for University of Nevada, Reno (March 18, 2010), available at <http://www.ncaa.org/wps/wcm/connect/ncaa/ncaa/media+and+events/press+room/news+release+archive/2010/infractions/20100318+d1+coi+nevada+reno+summ+rls> (imposing a \$1,500 financial penalty against the University of Nevada at Reno for, inter alia, for an extra benefits violation, unethical conduct, and failure to promote rules compliance); Press Release, NCAA, NCAA Division I Infractions Appeals Committee Upholds Penalties for University of Memphis (Mar. 22, 2010), available at http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2010/Infractions/20100322+NCAA+News+Release+-+Division+I+Infractions+Appeals+Committee+Decision+on+Memphis (reporting that the IAC upheld a financial penalty against the University of Memphis of forfeiture of championship revenue gained from the Division I Men’s Basketball Championship, for player ineligibility due to an invalid SAT score); *Infractions Case: University of Colorado, Boulder*, NCAA (July 2, 2007), <http://fs.ncaa.org/Docs/NCAANewsArchive/2007/Division+I/index.html> (follow “Jul 2, 2007 1:01:30 AM Infractions case: University of Colorado, Boulder” hyperlink).

¹²⁸ *Four-Year Deal Includes Luxury Tax, No Contraction*, ESPN (Aug. 30, 2002), <http://static.espn.go.com/mlb/news/2002/0830/1425253.html> (“Teams whose payrolls exceed set thresholds will be taxed on the portions above the thresholds, with the money to be used for player benefits, including player benefit plans, or the industry growth fund, or developing baseball players in countries lacking organized high school baseball.”).

¹²⁹ For example, a penalty for a major infraction could range from 2% to 10% of athletic department revenue. Alternatively, a penalty could be based as a higher percentage of expenses of a particular sports program, with the range dependent on the existing criteria for seriousness and aggravating and mitigating factors. For a football program such as the one at USC, that would amount to a penalty of millions of dollars, which might really deter even the wealthiest sports programs from looking the other way at wrongdoing within that program. Such a penalty scheme would truly punish and deter the involved sports program while not impinging on the competitive opportunities of existing student-athletes.

NCAA division. For a school like USC, this penalty structure could have amounted to a financial penalty of as much as \$25 million, with the money then distributed to schools that play by the rules. Such a penalty structure might be considered fairer than a uniform set of fines.

Approval of the NCAA Board of Directors may be required for the COI and the Infractions Appeals Committee (the "IAC") to consider imposing and upholding such penalties, but it is feasible. Increased use of financial penalties would likely garner criticism from some of the bigger conferences as just another example of NCAA overregulation. It may also add further fuel to the contention that BCS conference schools would be better suited to leave the NCAA to form an organization that better allows them to capture more of the revenue they generate without having to share with their smaller brethren. The existing penalties, however, particularly the penalty of probation, are more symbolic and do not appear really to deter the sort of wrongdoing that has captured media attention and has embarrassed the entire NCAA membership.

3. Open Transfer for Current Students in Programs Under Major Sanction

Lastly, the transfer rules should be modified to permit a current student to transfer without penalty where he or she is in a program under sanction for a major infraction.¹³⁰ As it now stands, coaches can leave an institution at any time, even mid-season, without prohibition on or limitation in duties at a new NCAA member institution.¹³¹ Students should be allowed to do the same.

There are several benefits of amending the rule. An open transfer rule would mitigate the imbalance in commitment by institutions that offer student-athletes grants-in-aid only on a yearly basis.¹³² Because of NCAA and conference transfer rules, student-athletes are not able to transfer and play without a significant delay. When compounded by the "four-in-five" rule that requires student-athletes to complete four years of NCAA competition in only five years of enrollment, student competi-

¹³⁰ See Youngman, *supra* note 123 (proposing a delay on postseason ban sanctions so that upperclassmen could finish at the original institution and underclassmen could have the right to transfer when the bowl ban takes effect). In such case, however, the ban becomes even more remote from the period of offending conduct.

¹³¹ See NCAA OPERATING BYLAWS, *supra* note 14, art. 19.02.1 (Show-Cause Order) (allowing the NCAA to issue a "show cause" order to the institution hiring the coach in question).

¹³² See Libby Sander, *Justice Department Examines NCAA Scholarship Rules*, CHRON. HIGHER EDUC., May 6, 2010, <http://chronicle.com/article/Justice-Department-Examines/65430/>.

tive playing opportunities are unduly restricted.¹³³ That the responsible coaches can continue to coach elsewhere, but the remaining student-athletes, entitled only to the assurance of a one year scholarship, sit out or pay the sanctions, is incongruous.

An open transfer rule would certainly provide deterrence and incentives. A transferring athlete should be aware of the practical implications of transfer on academic record (for example, a class credit might not transfer). The prospect of an exodus of players would certainly provide deterrence and incentives for playing by the rules. An obvious drawback of an open transfer rule is the impact on rostered players at the receiving institution whose playing positions may be affected. That contest for playing time, however, is a coaching decision. Ultimately the decision to transfer is best made by the individual student-athletes, their families, and their new program, rather than via a blanket prohibition by the NCAA.¹³⁴

4. Cooperation with Professional Leagues and Player Unions on Agents

Although rules bar agents from contacting or providing benefits to NCAA student-athletes, reported cases show that in fact some agents do so.¹³⁵ College sports need the cooperation of professional sports organizations to refrain from hiring coaches who have been sanctioned

¹³³ See NCAA OPERATING BYLAWS, *supra* note 14, art. 14.2.1 (The Five Year Rule). The bylaws provide as follows:

A student-athlete shall complete his or her seasons of participation within five calendar years from the beginning of the semester or quarter in which the student-athlete first registered for a minimum full-time program of studies in a collegiate institution, with time spent in the armed services, on official religious missions or with recognized foreign aid services of the U.S. government being excepted. For international students, service in the armed forces or on an official religious mission of the student's home country is considered equivalent to such service in the United States.

Id.

¹³⁴ This would also lessen the criticism that the NCAA membership exploits student-athletes for the profit of the schools. Commercialism of NCAA policies in college sports is highly critiqued. See generally Christian Dennie, *Amateurism Stifles a Student-Athlete's Dream*, 12 SPORTS LAW. J. 221 (2005); Lockhart, *supra* note 50; Lindsay J. Rosenthal, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA Is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORTS L. 321 (2003).

¹³⁵ See, e.g., Dohrmann, *supra* note 14 (reporting that ex-NFL player agent Josh Luchs admitted to having paid thousands of dollars, in addition to other benefits, to more than thirty college football players from 1990 to 1996).

by the NCAA.¹³⁶ Professional sports presumably are similarly concerned with the reputation and public perceptions of their franchises. As such, professional sports franchises should refrain from hiring sanctioned personnel and admonish franchises that engage in such practices. Similarly, athlete-agents are bound by the laws of the state in which they operate. States should pass legislation aiming to effectively bar agents from practicing within the state if the agent (or a representative of the agent) induces a student-athlete to violate an NCAA bylaw.

CONCLUSION

Elite intercollegiate sports competition involves more than a village: the student-athletes, parents and supporters, coaches, teammates, university, fans, agents, and professional leagues are all stakeholders. It also requires fair competition, compliance with agreed-upon rules of competitive play, and a process to ensure enforcement of those rules. The temptations to gain a competitive advantage through payment of extra benefits to a prospect or student-athlete, his or her family, or an AAU coach can surround participants in a successful athletic program. Perhaps the short-term benefits of cheating, such as the reward of being “put on the college sports map,” may be a calculated advantage outweighing the risk of sanctions. But that the win-at-all-costs mentality may pay off for an NCAA member institution or coach, while penalizing others who have played by the rules, warrants a reassessment of how sanctions can be more effective.

In the exciting world of intercollegiate sports, a single organization, the NCAA, can only do so much. This Article suggests a variety of ways to better match the punishment to the infraction and responsible party: hold head coaches financially accountable for program violations, mandate institutional disgorgement of winnings and financial penalties, permit transfer for innocent students stuck in the current sanctioned programs, and facilitate cooperation with the professional leagues and players unions on unscrupulous agents. Ultimately, it is up to all of us to stop feeding the arms race beast and put sports in perspective. Coaches, students, institutions, agents, boosters, and player families need to realize that cheating is not an option to consider in a

¹³⁶ See *NFLPA Decertifies Agent Who Says He Paid College Players*, NFL (Oct. 21, 2010), <http://www.nfl.com/news/story/09000d5d81b8277b/article/nflpa-decertifies-agent-who-says-he-paid-college-players> (reporting that through recommendation by its Committee on Agent Regulations and Discipline, the NFL Players Association decertified Josh Luchs, the agent who paid players).

cost-benefit analysis; rather, those involved must take responsibility, refuse to cheat, and report those who do. Schools need to police themselves and implement safeguards, as well as hire coaches to be exemplary leaders and mentors who institute a culture of compliance. Integrity, student-athlete development, and a healthy sport experience should be rewarded as much as, or more than, wins. The spirit of the late John Wooden should not be lost. Kareem Abdul-Jabbar, reflecting on his former coach, put it best: “Coach Wooden enjoyed winning, but he did not put winning above everything. He was more concerned that we became successful as human beings, that we earned our degrees, that we learned to make the right choices as adults and as parents. . . . In essence . . . he was preparing us for life.”¹³⁷

¹³⁷ Frank Litsky & John Branch, *John Wooden, Who Built an Incomparable Dynasty at UCLA, Dies at 99*, N.Y. TIMES, June 6, 2010, at A26, available at http://www.nytimes.com/2010/06/05/sports/ncaabasketball/05wooden.html?pagewanted=3&_r=1. Among Coach Wooden’s maxims was the following: “Be more concerned with your character than your reputation, because your character is what you really are, while your reputation is merely what others think you are.” *Id.* For more information about Coach John Wooden, see OFFICIAL SITE COACH JOHN WOODEN, <http://www.coachwooden.com/> (last visited Feb. 27, 2011).

