

# THE NCAA: ENABLING CHEATING SINCE 1910 BY INADEQUATELY PUNISHING CHEATING COACHES

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## INTRODUCTION

If you keep too busy learning the tricks of the trade, you may never learn the trade. — John Wooden<sup>1</sup>

Formed in 1910,<sup>2</sup> the National Collegiate Athletic Association (“NCAA”) has developed a complicated and thorough set of bylaws

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<sup>1</sup> JOHN R. WOODEN & JACK TOBIN, *THEY CALL ME COACH* 109 (2004).

over the past century, in an effort to regulate Division I intercollegiate athletics. Printed in a 444-page manual, these often-criticized bylaws are problematic both for their technical nature and inherent ambiguity.<sup>3</sup> Rather than attack the bylaws themselves, however, this paper takes issue with the NCAA's failure to enforce the bylaws effectively in many cases when a head coach has violated such bylaws. Further, it advocates for the adoption of new bylaws directed towards the behavior of coaches designed to reduce the amount of cheating by coaches in collegiate athletics.<sup>4</sup>

With the growing media "race" to be the first to report major college athletic program scandals, college athletics are under a microscope as never before.<sup>5</sup> And this increased scrutiny has resulted in an unprecedented year of scandals in 2011.<sup>6</sup>

The allegations surrounding Cam Newton tarnished Auburn's 2011 BCS Championship.<sup>7</sup> Connecticut won the 2011

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<sup>2</sup> *NCAA History*, NCAA.org, <http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history>. Because of the rugged nature of early-day football, many college and universities tried to discontinue the sport. *Id.* "President Theodore Roosevelt summoned college athletics leaders to two White House conferences to encourage reforms." *Id.* "In early December 1905, Chancellor Henry M. MacCracken of New York University convened a meeting of 13 institutions to initiate changes in football playing rules." *Id.* "At a subsequent meeting, 62 colleges and universities became charter members of the Intercollegiate Athletic Association of the United States (IAAUS)." *Id.* "The IAAUS officially was constituted March 31, 1906, and took its present name, the NCAA, in 1910." *Id.*

<sup>3</sup> 2010-2011 NCAA DIVISION I MANUAL, NCAApublications.com, (2010), available at <http://www.ncaapublications.com/productdownloads/D111.pdf>.

<sup>4</sup> Overall, the NCAA is an exceptional organization that does wonderful things for amateur athletics, communities, and member institutions. Like any organization, however, the NCAA has areas where it can improve. This paper is intended to give suggestions where the NCAA can improve in one small area and not criticize the NCAA as a whole.

<sup>5</sup> Dan Wetzel, *Final Four marred by new UK, UCONN probes*, Yahoo Sports (Apr. 1, 2011, 9:13 EST), [http://rivals.yahoo.com/ncaa/basketball/news?slug=dw-wetzel\\_final\\_four\\_marred\\_by\\_new\\_probes\\_into\\_uk\\_uconn\\_040111](http://rivals.yahoo.com/ncaa/basketball/news?slug=dw-wetzel_final_four_marred_by_new_probes_into_uk_uconn_040111). "Cheating is not new; it just seems the curtain is being peeled back more often." *Id.*

<sup>6</sup> Terence Moore, *The epidemic of college football scandals*, CNN (Aug. 19, 2011, 3:07 p.m. EST), <http://www.cnn.com/2011/US/08/18/epidemic.college.football.scandals/index.html>. "For a while, it [scandals in college athletics] happened only every few years or so. Now, there rarely is a month, week or day that passes without a big-time program in college football sprinting deep into scandal while during the National Collegiate Athletic Association (NCAA) to tackle it." *Id.*

<sup>7</sup> The NCAA cleared Auburn of any wrongdoing in the recruitment of Cam Newton, but the NCAA did acknowledge Cam's father asked for money in order for

men's NCAA basketball championship, led by a head coach guilty of NCAA violations but had his suspension delayed until the beginning of Big East Conference games during the 2011-2012 season.<sup>8</sup> Last year, 2011, was the most tumultuous off-season college football has ever had, according to ESPN analyst Kirk Herbstreit.<sup>9</sup> "I do mean, EVER, and I'm referring to the entire history of the sport."<sup>10</sup>

At the heart of many of these scandals is the malfeasance of coaches.<sup>11</sup> And yet, historically, the universities and the student-athletes tend to suffer most under the NCAA's infractions system, certainly more than head coaches.<sup>12</sup> In light of the growing crisis

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Cam to play at Mississippi State University. Pete Thamel, *Auburn Is Cleared in Investigation Into Newton*, N.Y. TIMES, Oct. 12, 2011, <http://www.nytimes.com/2011/10/13/sports/ncaafotball/auburn-is-cleared-in-investigation-into-cam-newtons-recruitment.html> (the NCAA could not find any proof Auburn paid any money to Cam's father).

<sup>8</sup> *University of Connecticut Public Infractions Report* (NCAA, NCAA Comm. on Infractions, Indianapolis, IN.) Feb. 22, 2011. Instead of missing NCAA Tournament games, Jim Calhoun missed the first three Big East Conference games of the 2011-2012 season. Eamonn Brennan, *Easy schedule for Calhoun's suspension*, ESPN College Basketball Nation Blog (Aug. 31, 2011). [http://espn.go.com/blog/collegebasketballnation/post/\\_id/34807/schedule-favorable-to-calhouns-suspension](http://espn.go.com/blog/collegebasketballnation/post/_id/34807/schedule-favorable-to-calhouns-suspension). During Calhoun's suspension, Connecticut played South Florida, St. John's, and Seton Hall. *Id.* Those three games were hardly the most compelling contests on UConn's schedule. *Id.* Any potential cheater thinking of bending the rules to land a top player would only feel emboldened to do so after seeing how well Calhoun's situation worked out. *Id.* Calhoun will still be on the bench for UConn's entire nonconference schedule and for every important Big East game. *Id.* The Huskies still landed one of the top prospects in the country for the 2011-2012 season. *Id.* If you didn't know better, you'd assume Connecticut was never found to have committed violations at all. *Id.* "Three games was always a slap on the wrist." *Id.* "These three games? A slap on the wrist would look medieval by comparison." *Id.*

<sup>9</sup> Moore, *supra* note 6. The University of Miami, Ohio State University, Southern California, Auburn, North Carolina, Oregon, Tennessee, and Louisiana State University are just some of the other big-time college football programs that were in the news during 2011 for stuff other than blocking and tackling. *Id.* "Through it all, with NCAA enforcement people looking more powerless than Barney Fife from those old Andy Griffith sitcoms, there have been sordid tales involving automobiles, houses and even prostitutes. There have been recruiting violations -- gigantic ones -- of all shapes, sizes and situations. There have been cover-ups and alleged cover-ups, ranging from coaching staffs to the highest levels of universities." *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* "I [Herbstreit] just think the leadership groups -- including coaches, people who care about the sport at the end of the day -- have got to come up with some ideas and brainstorming ways on how to police [the scandals and cheating]." *Id.*

<sup>12</sup> See e.g., Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551 (2011); *Reggie Bush to Forfeit Heisman*, ESPNLosAngeles,

of confidence in the sanctity of intercollegiate athletics, the NCAA desperately needs reform to curb the violations among college athletics programs.

As this article demonstrates, the discipline of coach behavior should be at the top of the reform agenda.<sup>13</sup> Specifically, this paper argues that the failure of the NCAA to discipline coaches properly in the past created the environment that made the recent scandals more likely to occur, and as a result, the NCAA must reform its bylaws with respect to coaches, in their form and enforcement, to curtail such scandals in the future.<sup>14</sup>

Part I of this paper discusses the problem of widespread cheating among college coaches, and links this phenomenon to the NCAA's history of handing down inadequate punishments to college coaches. In particular, cheating among coaches remains prevalent because the coaches are allowed to "jump ship" during an NCAA investigation and leave to coach at a new school.

Part II assesses potential options available to the NCAA to curb the rampant cheating among college coaches. The NCAA could adequately punish the coaches if the punishment for violations at the coach's former school followed them to their new school. The NCAA could also require its member institutions to only hire "licensed coaches" who have taken required courses on the NCAA bylaws.<sup>15</sup> Coaches who violate NCAA bylaws would also be liable to the university who employed them if sanctions are administered against the university. Athletic directors who

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<http://sports.espn.go.com/los-angeles/ncf/news/story?id=5572827>. Lane Kiffin, head football coach at Southern California, who left the University of Tennessee after committing violations, stated in reference to the NCAA penalties at USC, "[the penalties] have nothing to do with this team ... [or] the direction of the program... that's the past; obviously we're suffering from it." *Id.*

<sup>13</sup> Gene Wojciechowski, *Time to replace or overhaul the NCAA*, ESPN.com (Apr. 21, 2011), <http://m.espn.go.com/wireless/story?storyId=6381765>. ("[t]he undertow of recruiting scandals, betting scandals, one-and-dones, academic hypocrisy, quick-fix prep schools, demigod coaches, weenie university presidents, bottom-line athletic directors...has pulled the NCAA under. Its arm floaties aren't enough to keep it above water. Seriously, has there been a more depressing time in college athletics than the last five years? Check that; the last five months?"). *Id.*

<sup>14</sup> It is worth noting that the focus of this paper is Division I athletics, primarily basketball and football; however, its conclusions also apply to all intercollegiate sports within each division.

<sup>15</sup> These courses would be more in-depth and more strenuous than the annual test coaches must take under current conference and NCAA rules.

employ a coach who is found guilty of cheating would also be liable for the coach's actions under the proposed solution to the current problem of cheating among coaches in the NCAA.

The NCAA has a decision to make when it comes to punishing coaches. The NCAA can continue its free fall towards irrelevance and allow coaches to learn the tricks of the trade and get around the vague rules, or "it can grow a set."<sup>16</sup> The NCAA does not scare any coaches, evident by the rampant cheating in college sports.<sup>17</sup>

### I. WHY INADEQUATE PUNISHMENTS ENCOURAGE CHEATING

Almost every coach faces situations in which players violate team rules. Some coaches, however, may not want to punish the player for a violation of team rules because the cost of disciplining may be too great. This is particularly true where the player is the star of the team, or an important game is on the horizon. The coach will nonetheless punish the player most of the time in order to set an example for the other players on the team and deter future violations.

Despite its enforcement efforts, the NCAA has not punished coaches in this way. The NCAA thought it set the example for every institution that violates the NCAA bylaws when it punished Southern Methodist University (SMU) with the "death penalty."<sup>18</sup> The situation at SMU, however, did not provide the necessary forum for the NCAA to send a message to coaches who violate

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<sup>16</sup> Wojciechowski, *supra* note 13.

<sup>17</sup> *Id.* "I spoke . . . with a longtime head basketball coach from a major conference. He said the level of cheating, [and] the cutting of ethical and moral corners . . . has never been worse. 'You wouldn't believe it,' he said." *Id.*

<sup>18</sup> Glossary of Terms, NCAA.org, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Enforcement/Rules+Enforcement+glossary+of+terms>. The 'death penalty' is a phrase used by media to describe the most serious NCAA penalties possible. *Id.* It is not a formal NCAA term. *Id.* It applies only to repeat violators and can include eliminating the involved sport for at least one year, the elimination of athletics aid in that sport for two years, and the school relinquishing its Association voting privileges for a four-year period. *Id.* A school is a repeat violator if a second major violation occurs within five years of the start date of the penalty from the first case. *Id.* The cases do not have to be in the same sport. *Id.* For more information on the violations that occurred at SMU, *See, e.g.*, Thaddeus D. Matula, *30 for 30 Pony Excess*, <http://30for30.espn.com/film/pony-excess.html> (detailing the events and people who caused SMU's death penalty).

NCAA bylaws. There should be stricter punishments for coaches who violate each bylaw, and not just punishments for outrageous and grievous violations such as those that occurred at SMU.<sup>19</sup>

The death penalty at SMU is an extreme example of the widespread cheating that goes on in college athletics; the principle, however, should be noted. If the NCAA does not punish coaches who violate the bylaws, they will continue to do all they can to win, even if that means violating rules. Coaches know the NCAA will not strictly punish them unless they lie to NCAA investigators or commit a major violation.<sup>20</sup>

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<sup>19</sup> The current sanction policies do not achieve the objectives of deterrence and punishment. See Weston, *supra* note 12, at 574; 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.”). “There’s a boatload of people not affected at all [by the NCAA process]. They weigh what they stand to gain v. what they lose if they get caught and decide to go on and do what they do.” *Id.*

<sup>20</sup> Mark Schlabach, *NCAA, schools come down hardest on lying about violation*, *ESPN.com* (Feb. 13, 2008), [http://sports.espn.go.com/ncb/columns/story?columnist=schlabach\\_mark&id=3244720](http://sports.espn.go.com/ncb/columns/story?columnist=schlabach_mark&id=3244720). (“[h]onesty is one of the sacred qualities the NCAA expects of its athletes, coaches, and staff members, and recent history shows the NCAA disciplines those people who don’t tell the truth more severely than those who do.”); See, e.g., Pat Forde, *Head coaches can’t escape accountability*, *ESPN College Basketball Nation Blog* (Feb. 22, 2011), [http://espn.go.com/blog/collegelbasketballnation/post/\\_id/23883/the-cult-of-the-head-coach-slowly-dying](http://espn.go.com/blog/collegelbasketballnation/post/_id/23883/the-cult-of-the-head-coach-slowly-dying). (providing examples of the “ridiculous dodge” coaches use to not face consequences if get caught cheating). *Id.* If caught, assistant coaches would be punished or fired and head coaches would get letters of reprimand and other empty verbiage. *Id.* The old way of protecting the head coach at all cost is slowly changing and penalties assessed are incremental proof that “Cult of the Head Coach” isn’t the ivory tower it used to be. *Id.* In the past year, the NCAA has come down hard on two coaches, Bruce Pearl and Jim Tressel, but these coaches were punished severely because Pearl lied to NCAA investigators and Tressel did not report known violations to the NCAA. Marlen Garcia, *NCAA gives ex-Tennessee coach Bruce Pearl heavy penalty*, *USAtoday.com* (Aug. 24, 2011), <http://content.usatoday.com/communities/campusrivalry/post/2011/08/ncaagives-ex-tennessee-coach-bruce-pearl-1> (Bruce Pearl was given a three-year show-cause penalty and assistants Tony Jones, Jason Shay, and Steve Forbes received one-year show-cause penalties. Tennessee Athletic Director Mike Hamilton resigned due to the violations); Mark Schlabach, *NCAA sends message to Ohio State*, *ESPN.com* (Dec. 20, 2011) [http://espn.go.com/college-football/story/\\_id/7373708/ncaa-sends-message-sanctions-ohio-state-buckeyes](http://espn.go.com/college-football/story/_id/7373708/ncaa-sends-message-sanctions-ohio-state-buckeyes) (“The NCAA hit Tressel with a five-year show-cause penalty, under which any school that wants to hire him must submit a report to the NCAA detailing why it needs to employ him and how it would monitor him to ensure he doesn’t cheat again. Any school hiring Tressel during the five-year period would be subject to more severe sanctions if he cheats again.”).

A. Coaches “Jumping Ship” and Leaving One School for Another

Most penalties assessed by the NCAA for violations apply to the schools rather than to the coaches. The NCAA does possess, however, sufficient authority to punish coaches, before or after the coach leaves.<sup>21</sup> The problem is that, historically, the NCAA has not punished coaches after they leave, so coaches often choose to leave once an investigation begins. By the time that the NCAA sanctions the institution, the coach has escaped to a new position. While “innocent” student-athletes at the old institution receive the adverse consequences of the NCAA sanction, the coach has no punishment for his role in the NCAA violation.

The list of coaches who left one school for another school, or a professional league, while the previous school endured NCAA penalties, is lengthy.<sup>22</sup> Part of why the schools have to suffer for

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<sup>21</sup> 2011 NCAA Division I Manual, *supra* note 3, Bylaw 19.02.1, at 319. A show-cause order requires a member institution to demonstrate why it should not be subject to a penalty (or additional penalty) for not taking appropriate action against an institutional staff member or representative of the institution’s athletics interests identified by the committee as having been involved in a violation of NCAA regulations that has been found by the committee. *Id.*

<sup>22</sup> See, e.g., Noah A. Winkeller, *Do You Really Wanna Love Me Forever? Oh, Oh, or Am I Caught in a Hit and Run? The Problem of College Coaches Switching Schools in Order to Avoid NCAA Penalties*, 8 WILLAMETTE L. REV. 39 (2011) (Jim Harrick, John Calipari, Lane Kiffin, etc.). Kelvin Sampson was able to leave Oklahoma while Oklahoma was under NCAA investigation and yet was hired by the University of Indiana with a substantial pay raise. See *NCAA lists 5 major violations; IU AD ‘profoundly disappointed’*, ESPN, <http://sports.espn.go.com/ncb/news/story?id=3243793>. Pete Carroll left Southern California under a cloud of a NCAA investigation and was hired by the Seattle Seahawks. Pat Forde, *Future uncertain for USC football, hoops*, ESPN (Jan. 11, 2010), [http://sports.espn.go.com/ncf/columns/story?columnist=forde\\_pat&id=4815412](http://sports.espn.go.com/ncf/columns/story?columnist=forde_pat&id=4815412). Jim Tressel resigned from Ohio State amid a scandal involving the football team, and less than three months later was hired by the NFL’s Indianapolis Colts. Doug Farrar, *Colts hire Jim Tressel as ‘gameday consultant’, but where’s his suspension?*, Yahoo! Sports (Sep. 02, 2011), [http://sports.yahoo.com/nfl/blog/shutdown\\_corner/post/colts-hire-jim-tressel-as-gameday-consultant-but-wheres-his-suspension?urn=nfl,wp6368](http://sports.yahoo.com/nfl/blog/shutdown_corner/post/colts-hire-jim-tressel-as-gameday-consultant-but-wheres-his-suspension?urn=nfl,wp6368). While the USC football and basketball programs were hammered by the NCAA with an assortment of postseason bans and vacated wins, new UTEP basketball coach Tim Floyd escaped with little more than a bit of embarrassment for his role in the saga. Iliana Limón, *UTEP basketball coach Tim Floyd dodges big NCAA bullet while rest of USC program takes a hit*, Orlando Sentinel (June, 11, 2010), [http://blogs.orlandosentinel.com/sports\\_college\\_ucf/2010/06/utep-basketball-coach-tim-floyd-dodges-big-ncaa-bullet-while-rest-of-usc-program-takes-a-hit.html](http://blogs.orlandosentinel.com/sports_college_ucf/2010/06/utep-basketball-coach-tim-floyd-dodges-big-ncaa-bullet-while-rest-of-usc-program-takes-a-hit.html).

violations committed by a previous coach no longer employed by the school is because of the NCAA's inability to monitor all the programs and enforce the bylaws within a reasonable time after the violations are discovered.<sup>23</sup>

It would not be unprecedented for the NCAA to punish a coach once he has left, but the infrequency of the punishments is the reason why no coach thinks twice when leaving the school behind after knowingly violating bylaws.<sup>24</sup> Although the NCAA lacks efficiency in discovering and punishing coaches' violations, this is not the sole cause of the problem. As explained below, the NCAA typically does not want to punish a coach for "minor" or secondary violations.

### *B. The NCAA Only Has Two Violation Tiers*

The current bylaws of the NCAA have punishments for secondary violations and major violations.<sup>25</sup> This "enforcement

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<sup>23</sup> Wojciechowski, *supra* note 13 (explaining that the NCAA is in charge of monitoring 345 Division I basketball programs and 120 Football Bowl Subdivision programs and the NCAA is reactive to alleged infractions). Often the NCAA does not punish the schools for violations until four years or later of the actual violation occurring. *See, e.g.,* Mathew M. Keegan, *Due Process and the NCAA: Are Innocent Student-Athletes Afforded Adequate Protection From Improper Sanctions? A Call for Change in the NCAA Enforcement Procedures*, 25 N.Ill. U. L. Rev. 297 (2005) (The University of Michigan men's basketball team was sanctioned in 2003 for violations that occurred between 1992-1999).

<sup>24</sup> Warren K. Zola, *Traveling Violations*, SPORTS LAW BLOG (Feb. 24, 2011), <http://sports-law.blogspot.com/search?q=traveling+violations>.

<sup>25</sup> 2011 NCAA Division I Manual, *supra* note 3; An NCAA group working on enforcement recommended the adoption of an expanded, four-level violation structure for infractions during the 2012 NCAA Convention held in January. NCAA Recommends Violation Structure: New structure will adopt a four-levels of violations for infractions, NCAA.com (Jan. 13, 2012), <http://www.ncaa.com/news/ncaa/article/2012-01-13/ncaa-recommends-violation-structure>. (The working group's report is preliminary, however, and the group is still working through some of the details). Julie Roe Lach, NCAA's vice president of enforcement, said the idea with the four-level violation structure is more flexibility and predictability. *Id.* The four levels would be: minor or technical issues that do not rise to the level of a serious violation, those violations currently categorized as secondary violations, serious, and most egregious. *Id.* The report described a need to more strongly punish those that deliberately violate NCAA rules as part of a risk-reward analysis and will try to accomplish this through penalties that hold coaches more accountable. *Id.* Lach agrees that the NCAA has too long allowed coaches to get away with cheating, "there seems to be a general loss of integrity in upholding the rules." *Id.* Lach, however, does not admit the changes are proposed because of the rampant cheating that has been going on, "this

gap” allows most coaches to violate the bylaws and not be punished at a new school as long as his conduct is not sufficiently egregious or constitutes lying to NCAA investigators in an attempt to hide violations.<sup>26</sup> With the two-tier violation scale the NCAA implements, coaches can commit multiple secondary or “minor” violations, which help them recruit the best players and spend more time with their current players, among other advantages, without having the NCAA bring any severe punishments down on them if they are caught.<sup>27</sup>

The NCAA is left with no middle ground to punish coaches who do not commit serious violations or blatantly lie to NCAA investigators but do commit violations which deserve a harsher penalty than a normal secondary violation would warrant.

“We have them at polar extremes, secondaries and majors,” NCAA President Emmert said. “And we may well need something in between. If you are going to use a criminal metaphor...you might say misdemeanors and felonies, but we don’t have gross misdemeanors in the middle.”<sup>28</sup>

Salaries of Division I coaches are at an all-time high, and show no sign of decreasing.<sup>29</sup> The pressure to win, and win big at

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isn’t a reactive move, it’s the right thing to do”. *Id.* NCAA President Mark Emmert is seeking a multi-tiered penalty structure that imposes tougher sanctions against programs with the most *egregious* rules violations. Top Issues at the 2012 NCAA Convention, [http://www.washingtonpost.com/sports/colleges/top-issues-at-the-2012-ncaa-convention/2012/01/10/gIQAps55oP\\_story.html](http://www.washingtonpost.com/sports/colleges/top-issues-at-the-2012-ncaa-convention/2012/01/10/gIQAps55oP_story.html) (Jan. 10, 2012). This new model, a step in the right direction, still ignores the coaches who don’t commit egregious violations but still commit multiple violations to give their team an advantage. The NCAA board does not expect to take any action on the violation structure until later in 2012, again slowing down the process and showing the inefficiencies of the NCAA. *Id.*

<sup>26</sup> Winkeller, *supra* note 22, at 43.

<sup>27</sup> *University of Connecticut Public Infractions Report*, *supra* note 8, at 25 (showing that although Jim Calhoun committed multiple secondary violations, he was only suspended the first three conference games of next season, regardless of where he is coaching, due in large part to his failure to promote atmosphere of compliance).

<sup>28</sup> Jenny Dial, *NCAA walks fine line on fairness*, *Houston Chronicle* (Apr. 1, 2011), <http://www.chron.com/disp/story.mpl/sports/bk/bkc/men/7501351.html>.

<sup>29</sup> Calipari Accepts Kentucky’s Offer, <http://nbcports.msnbc.com/id/29956570/> (Mar. 31, 2009) (detailing that John Calipari is the highest paid college basketball coach ever). In the six conferences with automatic Bowl Championship Series bids, the average salary for football coaches in 2011 was \$2.1 million, a jump of 52% from 2006 salaries. Erik Brady et al., *Salaries for college football coaches back on the rise*, <http://www.usatoday.com/sports/college/football/story/2011-11-17/cover-college-football-coaches-salaries-rise/51242232/1>.

the major level, makes even the strongest-willed coaches fall into the trap of thinking, “just this one time I will bend the rules slightly, I will not get caught, or it is not a big deal because the rule is vague.” The outrageous salaries of coaches lead to the idea that an NCAA compliance officer may have the toughest job in college sports.<sup>30</sup> With stricter penalties for each violation of a bylaw, however, and not just a two-tiered system, coaches would *know* they cannot get away with cheating and still have a lucrative job.<sup>31</sup>

### C. Coaches Not Held to Same Standard as Student Athletes

As soon as the NCAA determines a student-athlete has committed a violation, it punishes him and often deems him immediately ineligible for NCAA purposes.<sup>32</sup> This is in stark

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<sup>30</sup> Weston, *supra* note 12, at 575 (the head coach is in the best position to monitor the athletic program as well as to infuse ethical standards of compliance among the staff and players). “Money is power, and highly compensated head coaches have the power to enable, as well as to avoid, major violation in their programs.” *Id.*

<sup>31</sup> See *supra* note 29. Calipari signed an eight-year, \$31.65 million deal plus incentives at the University of Kentucky, even though he had Final Fours at two different schools (Massachusetts and Memphis) vacated due to violations while he was the head coach. *Id.*; Wetzell, *supra* note 5.

<sup>32</sup> Jamar Samuels was forced to sit out Kansas State’s third-round game in the 2012 NCAA Basketball Tournament due to his receipt of money from his AAU coach. See, Nicole Auerbach, *K-State: Samuels ineligible due to receipt found in trash*, USA Today, Mar. 27, 2012, <http://content.usatoday.com/communities/campusrivalry/post/2012/03/k-state-samuels-ineligible-due-to-receipt-found-in-trash/1#.T343Q0f9ySo>. Samuels committed an NCAA violation; however he was suspended from the game by Kansas State officials out of fear of the NCAA vacating the result of the game if Samuels had played before he could repay the improper benefit he received. Coaches on the other hand, have the benefit of committing violations while they coach and waiting months, if not years, before the NCAA hands down a punishment. See, e.g. Joe Nocera, *N.C.A.A.’s Double Standard*, N.Y. TIMES, Apr. 8, 2011, <http://www.nytimes.com/2011/04/09/opinion/09nocera.html> (discussing how athletes are not allowed to “delay” their suspensions, with the exception being the Ohio State players and the “lucrative Sugar Bowl”, and the NCAA bends over backward to accommodate marquee coaches). Although the NCAA does allow student-athletes to have legal representation during their investigatory hearings, most of the athletes cannot afford a lawyer and the school makes the athlete its sacrificial lamb to the NCAA. The coaches, however, have the money and resources to have a defense team prepare them for the NCAA and accompany them to the hearings. See, Joe Nocera, *N.C.A.A.’s ‘Justice’ System*, N.Y. TIMES, Jan. 6, 2012, <http://www.nytimes.com/2012/01/07/opinion/nocera-ncaas-justice-system.html> (telling the story of Devon Ramsay, a fullback at the University of North Carolina). Although Ramsay did not cheat on a sociology paper, “University officials were pressuring

contrast to the way the NCAA treats coaches, a problem admitted by NCAA President Emmert. He explained, “We [the NCAA] certainly want to uphold the standards for coaches—who are the teacher and the authority figure in that relationship—to at least the same standards that we hold our students.”<sup>33</sup> The NCAA, however, has not yet adopted this approach.

For example, Jim Calhoun is a recent beneficiary of the NCAA’s leniency to coaches. The NCAA sanctioned the head coach weeks before his team went on to win the National Championship.<sup>34</sup> Calhoun was cited for “failing to create an atmosphere of compliance” because of the numerous violations his staff committed.<sup>35</sup> The NCAA does not use the failure to create an atmosphere of compliance for isolated incidents of unintentional cheating; Calhoun and his staff cheated multiple times. The NCAA, however, let Calhoun continue to coach and, not surprisingly, deferred his suspension until the 2011-2012 season.<sup>36</sup>

In stark contrast to how the NCAA punished Calhoun are the cases of Jamar Samuels and Perry Jones III.<sup>37</sup> Jones, far from the multimillionaire status of Calhoun, violated an NCAA rule when

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Ramsay to admit wrongdoing. Such an admission, they said, was needed to sway the N.C.A.A.” *Id.* Often the school tells the athletes what to do during the investigations and the “athletes are still kids, often naïve and overly trusting of their school.” *Id.* “The fact that the N.C.A.A. is willing to destroy an athlete’s career without even a nod to a fundamental right like due process is simply wrong. It needs to change.” *Id.*

<sup>33</sup> Posting of Mike DeCourcy to AOL Sporting News Blog, <http://aol.sportingnews.com/ncaa-basketball/story/2010-12-15/ncaa-chief-hold-coaches-to-higher-standards> (Dec. 15, 2010). Although Emmert said this in December, the NCAA did not follow this standard in subsequent punishments handed down. Emmert did not dispute the notion that a suspension from coaching in the NCAA tournament even if the coach’s team is allowed to participate could serve as a form of punishment for coaches who violate rules. *Id.* “That would be a really interesting outcome,” Emmert said. *Id.* The NCAA however did not follow this course of punishment for Jim Calhoun. Calhoun had his suspension delayed to the 2011-2012 season even though his team was in the NCAA tournament, and eventually won the NCAA Championship. Forde, *supra* note 20 (explaining how the NCAA has tried to shift accountability to the head coach beginning in October 2009). The NCAA Board of Directors, acting on recommendations from the Enforcement Department’s Basketball Focus Group, asked its Infractions Committee to get serious about [coaches] penalties. *Id.*

<sup>34</sup> *University of Connecticut Public Infractions Report*, *supra* note 8; Nocera, *supra* note 32.

<sup>35</sup> *University of Connecticut Public Infractions Report*, *supra* note 8, at 25.

<sup>36</sup> Nocera, *supra* note 32.

<sup>37</sup> Auerbach, *supra* note 32; Nocera, *supra* note 32.

he was in the 10th grade, according to the findings of the NCAA.<sup>38</sup> The NCAA suspended Jones literally hours before Baylor's first game in the 2011 Big XII conference tournament.<sup>39</sup>

It is difficult to imagine a justification for the NCAA's practice of punishing student-athletes, who are at the core of the mission of the NCAA, immediately while letting the coaches defer their punishments to a "better time." Stacey Osburn, an NCAA representative said, "[e]very situation is different."<sup>40</sup> The despicable "difference" is not in the intricate facts of the violations; rather, the "difference" is the identity of the individual violating the bylaw: a player or a coach.

## II. SOLUTION THAT WOULD HOLD COACHES RESPONSIBLE

Cheating in collegiate athletics is not new.<sup>41</sup> Coaches continue to learn the "tricks of the trade" by going around the vague NCAA rules or pleading a lack of education of the rules.<sup>42</sup>

The problem is less the cheating itself, which is endemic, and more the perpetuation of unfairness and inequality. Teams will keep cheating so long as the punishments are not rigorous, and those doing the cheating are already at the top of the game. As sportswriter Lucas Shaw commented, "[t]hink [schools] will

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; Baylor Athletics, Men's Basketball, <http://www.baylorbears.com/sports/m-baskbl/sched/bay-m-baskbl-sched.html>. Without Jones playing, Baylor lost 67-84 to Oklahoma in their first tournament game. *Id.*

<sup>40</sup> Nocera, *supra* note 32. After the NCAA started the investigation at the University of North Carolina, the school declared Ramsay ineligible for the season. *Id.* After Ramsay secured the services of a lawyer and "new evidence" was uncovered, Ramsay's eligibility was restored—after the season had ended. *Id.* The NCAA did agree to grant Ramsay an extra year of eligibility after he suffered a terrible knee injury in his first game during his senior season. *Id.*

<sup>41</sup> See generally Francis T. Cullen et al., *Scandal and Reform in Collegiate Athletics: Implications from a National Survey of Head Football Coaches*, 60 J. HIGHER EDUC. 50 (1990).

<sup>42</sup> See, e.g., Pat Forde, *NCAA ruling defies common sense*, [http://sports.espn.go.com/nfl/columns/story?columnist=forde\\_pat&id=5951832](http://sports.espn.go.com/nfl/columns/story?columnist=forde_pat&id=5951832) (criticizing the NCAA and the "we didn't know defense" as cited by the NCAA as one mitigating factor in suspending Ohio State University football players).

reform its practices because of such minor suspensions? No. Forget about it.”<sup>43</sup>

If the NCAA would set a precedent by consistently punishing a coach who is still at the school or the coach who has left a school after committing *any* violations, coaches would have no option remaining but to strictly obey the rules or face *serious consequences*. The NCAA can adopt rules, put out multiple memorandums, and even have clinics that warn coaches of possible punishments, but until the NCAA actually punishes a coach who “violates and runs” to a point that he is truly affected, the problems will continue to get worse.<sup>44</sup> The NCAA, however, does have procedures in place that would allow them to punish the coach, and if the NCAA does not, the individual schools could “step up to the plate” and protect themselves.

A. *NCAA Punishments Could Follow Coach to New School*

The NCAA has been hesitant in previous years to punish a coach for violations the coach committed during previous employment.<sup>45</sup> The NCAA, however, does have the power and authority to impose penalties on either the institution or the individual coach with no restrictions on whether the coach is still at the institution at which they committed the infraction.<sup>46</sup> The NCAA has punished coaches who left the university where the violations occurred at least twice in the last decade.<sup>47</sup>

Punishments that follow a coach to a new school would decrease the amount of cheating among college coaches for two reasons: first, schools would be less likely to hire a coach who is likely to face NCAA sanctions; and second, coaches would be less

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<sup>43</sup> Lucas Shaw, *In NCAA, cheating not taken seriously*, COLUMBIA SPECTATOR, Apr. 5, 2011, <http://www.columbiaspectator.com/2011/04/05/cheating-not-serious-offense-college-sports>.

<sup>44</sup> See Winkeller, *supra* note 22.

<sup>45</sup> *Id.*

<sup>46</sup> Zola, *supra* note 24; 2011 NCAA Division I Manual, *supra* note 3.

<sup>47</sup> Zola, *supra* note 24. Rick Neuheisal was punished in 2002 while at the University of Washington for violation he was deemed to have made at the University of Colorado and in 2008 Kelvin Sampson was punished while at Indiana University for conduct he engaged in while at the University of Oklahoma. *Id.*

likely to cheat if they knew they would be punished even if they left the school where violations occurred.<sup>48</sup>

*B. The NCAA Mandated “Coaching License”*

As the United States Supreme Court stated in *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, the NCAA cannot punish the individuals, but instead only the member institutions.<sup>49</sup> The NCAA could impose licensing requirements for coaches instead, which would give them greater influence on individuals allowed to coach in the NCAA and thereby allowing them the power to punish coaches, even if indirectly.<sup>50</sup> The requirements for obtaining an NCAA license *and keeping it* would be similar to the average driver’s license: coaches would be required to know the general “rules of the road” and pass a test before obtaining the license.

With the level of control the NCAA would have with a license requirement, it could define levels of violations and the effect each violation has on license privileges.<sup>51</sup> The license would replace the show-cause order, and if the NCAA revokes the license, coaches would have to pay a substantial fine and undergo extensive rules education before the NCAA reinstates the license.<sup>52</sup>

Potential legal restrictions of a licensed coaching system would not hinder the NCAA in imposing a license requirement.<sup>53</sup>

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<sup>48</sup> The NCAA show-cause order provides for this, but it is not rigorously enforced. 2011 NCAA Division I Manual, *supra* note 3, Bylaw 19.02.1, at 319. Often coaches leave schools when they “feel the heat” of NCAA violations coming. Speculation surrounds Pete Carroll and people believe he left the University of Southern California in part because of his knowledge of the severity of NCAA sanctions.

<sup>49</sup> *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 197 (1988) (noting NCAA cannot “assert sovereign authority over any individual” but can only directly impose disciplinary measures on its member schools). Member institutions contract to abide by NCAA rules as a condition of membership. *Id.*

<sup>50</sup> Posting of Publius to The Fourth Branch Blog, <http://www.thefourthbranch.com/why-arent-coaches-accountable/> (Jul. 1, 2010).

<sup>51</sup> *Id.* The levels of violations would be more than two tiers and be analogous to a driver’s license and local laws, which have many violations ranging from a simple headlight being out to driving under the influence.

<sup>52</sup> *Id.* As aforementioned, the NCAA is hesitant to punish a coach with a show-cause order without evidence of major violations; therefore, a license program would allow the NCAA to punish coaches who commit secondary violations, major violations, or any violation in-between.

<sup>53</sup> *Id.*

Universities would have to include a “for-cause” termination provision to protect the school against having a coach who is not licensed by the NCAA to coach. The for-cause would include suspension or termination of the coach’s license by the NCAA.<sup>54</sup> The NCAA would also need a formal hearing process (similar to the one already used by the NCAA) to satisfy due process concerns if a license is revoked or restrictions are placed on the license.<sup>55</sup>

### *C. Individual Schools Need to Hold Coaches Liable*

Contract law is well-settled.<sup>56</sup> The “coaching carousel” has left schools with no option but to include enormous buyout clauses in a contract when hiring a coach.<sup>57</sup> If a coach at School A is hired by School B before his contract term is expired, the coach will owe School A the buyout amount.<sup>58</sup> The buyout protects School A from losing their coach without compensation; however, the universities need to protect themselves from a coach who leaves because of pressure from NCAA investigators, or when the NCAA sanctions the school for violations the coach committed.<sup>59</sup>

Contract stipulations would allow universities to recover from coaches who leave the university with NCAA sanctions. The provisions of the contract could include but are not limited to,

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g.*, 17 AM. JUR. 2D *Contracts* § 222 (2011). Parties are free to contract as they see fit, on any terms regarding a subject matter in which they have an interest, provided that the contract does not impose obligations that are contrary to statute, public policy, or an established rule of the common law. *Id.* Thus, competent persons ordinarily have the utmost liberty of contracting, and may incorporate in their agreements any provisions that are not illegal or violates public policy. *Id.* The law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes, and courts generally enforce private agreements between parties. *Id.*

<sup>57</sup> Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2009); *See, e.g.* Rogelio V. Solis, *Buyout clauses prove to be another obstacle in U search*, THE STAR TRIBUNE, Dec. 1, 2010, <http://www.startribune.com/sports/gophers/111012084.html> (discussing how buyout clauses make it tougher for other schools to hire away a coach). Multiple coaches’ buyout clause caused the University of Minnesota not to be able to afford to hire the coach they sought, including Mississippi State University coach Dan Mullen. *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Publius, *supra* note 50.

repayment of salary, cost of investigation, and liquidated damages.

A contract that allows the university to recover from the coach if he or his staff commits violations would have to be adopted by conferences as a whole or every member institution of the NCAA.<sup>60</sup> The contracts would be enforceable, but coaches who know how prevalent cheating is would be hesitant to sign a contract with those provisions when other schools are offering a contract with no such provisions which would allow the university to recover even if the coach is found to have cheated.<sup>61</sup>

The most effective provision universities could include in the coach's contract is loss of salary for the seasons in which violations occur.<sup>62</sup> The terms of the contract would have to set out what type of violations would amount to a breach and also have clear terms to determine how much of the coach's salary would be owed to the university for a violation.

Universities that have received notice of possible NCAA violations often hire an outside firm to conduct an investigation for the university into possible violations and reforming procedures within the athletic department.<sup>63</sup> The head coaches of

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<sup>60</sup> See Martin J. Greenberg, *Termination of College Coaching Contracts: When Does Adequate Cause to Terminate Exist and Who Determines Its Existence?*, 17 MARQ. SPORTS L. REV. 197 (2006) (providing examples of termination provisions in coaching contracts and discussing barriers to enforcement).

<sup>61</sup> Wojciechowski, *supra* note 13; Forde, *supra* note 20. This provision in contracts would gain traction if a conference, such as the Southeastern Conference (SEC), mandated it for all universities to include in any new coaching contract. The SEC took a step forward this past year by suspending Bruce Pearl for eight conference games for his actions, even before the NCAA concluded its investigation.

<sup>62</sup> The contract may be barred by the statute of limitations if the breach is not discovered within 3-4 years, depending on jurisdiction. The general rule governing the commencement of the running of the statute of limitations in an action based on a contract, accrual occurs as soon as there is a breach of contract, with some courts qualifying this by stating that accrual occurs when the promisee discovers or should have discovered the breach, and others stating that accrual occurs upon breach, whether or not the promisee is then aware of the breach. Richard A. Lord, 31 WILLISTON ON CONTRACTS § 79:14 (4th ed. 2010).

<sup>63</sup> See, e.g. Joe Drape, *Facing N.C.A.A., the Best Defense Is a Legal Team*, N.Y. TIMES, Mar. 4, 2007, <http://www.nytimes.com/2007/03/04/sports/ncaabasketball/04ncaa.html> (discussing how much firms get paid working for a university under NCAA investigation). For two years of legal work, University of Kansas paid the law firm, Bond, Schoeneck & King, nearly \$480,000. *Id.* Ohio State paid the firm nearly \$511,000 from 2003 to 2006 to investigate its men's and women's basketball teams and to examine accusations of academic misconduct by Maurice Claret, a former star

the teams found to be in violation should bear some of the cost of the outside firm's investigation. Multiple teams are often the subject of the NCAA's letter of inquiry, but upon finding of actual violations, the coaches should pay for the firm's bill pro rata.<sup>64</sup>

The coach's contract should also contain a liquidated damages provision in addition to the salary loss and payment for the outside firm. The "set amount" of damages for a breach would be very similar to the buyout provision. A liquidated damages clause could be stated in a fashion that allows the school to collect a predetermined payment if the coach commits a major violation while employed by the school.<sup>65</sup> If the school hires a "known" cheater, the liquidated damages amount would be substantially higher than if the school hired a first time head coach, and would serve to put the coach on notice that neither the school nor the NCAA will tolerate cheating.<sup>66</sup>

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running back for the Buckeyes. *Id.* Payments to firms are a small investment to protect programs like Ohio State that generate more than \$73 million in revenue annually. *Id.*

<sup>64</sup> The payments made to outside counsel would be based on an estimated amount of time spent by the outside firm on each sport, and the demands of the investigation (similar to any law firm's billing program). The hired counsel would be able to divide the hours spent in categories for each sport or a general time for the whole athletic department. See Winkeller, *supra* note 22; See Karcher, *supra* note 57 (noting that the University of Michigan paid \$1.5 million in liquidated damages to the University of West Virginia after hiring West Virginia's football coach, Rich Rodriguez); Institutions can collect liquidated damages from coaches who breach contract, but these damages cannot be excessive or they will constitute penalties and be unenforceable on public policy grounds. See, e.g., *Contractual Provisions for Per Diem Payments for Delay in Performance As One for Liquidated Damages or Penalty*, 12 A.L.R. 4th 891, 899 (2009).

<sup>65</sup> If the university were required to pay back monies received for post-season tournaments or games, the contract stipulation would also require the coach to return post-season bonuses received for the team's accomplishments if vacated.

<sup>66</sup> Despite the stain of scandal from his tenure at Southern California and the recruitment of OJ Mayo, Tim Floyd was hired as head coach at the University of Texas at El Paso in 2010. Dana O'Neil, *Tim Floyd gets another chance at UTEP*, ESPN, Sept. 10, 2010, [http://sports.espn.go.com/nbc/columns/story?columnist=oneil\\_dana&id=5551010](http://sports.espn.go.com/nbc/columns/story?columnist=oneil_dana&id=5551010). Jim Harrick is the most egregious example of coaches leaving a school and being hired by another school even though the coach is a "known" cheater. Harrick was fired by UCLA in 1996 after he falsified an expense report from an illegal recruiting dinner and lied to UCLA's NCAA faculty representative about the expense report. See Winkeller, *supra* note 22. The University of Rhode Island hired Harrick just one year after he was fired from UCLA. *Id.* While at URI, the NCAA uncovered more violations Harrick committed while he was the coach at UCLA. *Id.* Harrick was investigated by the NCAA during the time he was head coach of URI for multiple infractions. *Id.* After two seasons at URI, Harrick was hired by the University of Georgia. *Id.* Harrick resigned from UGA after four years. *Id.* All three schools, UCLA, URI, and UGA, were

*D. Athletic Directors Would Also Be Liable for Coaches*

Just as a coach is in charge of his team and can discipline players for on the field and off the field conduct, an athletic director is superior to the coach.<sup>67</sup> Athletic directors and college presidents/chancellors control the actions of the institution. They have the right to, and should, terminate subordinates who continue to violate workplace standards.<sup>68</sup>

It would be unreasonable for a university to sue the athletic director for one mistake or violation a coach commits. The university should, however, also include a condition in the athletics director's contract that if the university's athletic department is found to have a "lack of institutional control," then the university may recover from both the coaches who commit violations *and* the athletic director.<sup>69</sup> Furthermore, an athletic

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placed on probation by the NCAA after Harrick left the program but yet Harrick was not punished for his involvement in any of the violations (players being paid by boosters, arranging for players' grades to be changed, and Harrick and his son both submitting false expense reports). *Id.*

<sup>67</sup> The Supreme Court has rejected the concept of vicarious liability as applied to suits under 42 U.S.C. § 1983. Russell G. Donaldson, Annotation, *Vicarious liability of superior under 42 U.S.C.A. § 1983 for subordinate's acts in deprivation of civil rights*, 51 A.L.R. Fed. 285 (1981). The court, however, has yet to rule specifically on a case involving an effort to impose vicarious liability for damages on an individual public official under 42 U.S.C. § 1983. *Id.*; Mike Rogers and Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON H. L. Rev. 749, 761 (discussing how the doctrine of respondeat superior does not apply in NCAA proceeding). Instead, the NCAA Bylaws impose a much broader obligation that makes institutions responsible for all persons who are representatives of the institution's athletics interest. *Id.* Thus, no frolic-and-detour or course-and-scope-of-employment exceptions exist in enforcement proceedings as they would if any entity were being sued for actions of its agents in a civil court. *Id.*

<sup>68</sup> See Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy To College Basketball*, 12 MARQ. SPORTS L. REV. 595, 599 (2002) (comparing university presidents and athletic directors and discussing who bears burden of responsibility). As Mark Emmert now realizes, presidents and boards of the universities and colleges need to be "fully in charge of and responsible for their athletic programs." Emmert embraces collegiate model, <http://www.ncaa.com/news/ncaa/article/2012-01-12/emmert-embraces-collegiate-model> (Jan. 13, 2012) (Emmert called for a renewed definition of "who's in charge").

<sup>69</sup> Zola, *supra* note 24. The cheating that occurred in both major programs, football and basketball, at the University of Tennessee presented an opportunity for the NCAA to punish an athletic director who has failed to adequately monitor more than one sport at his university. Although the NCAA did not punish Mike Hamilton individually, he did resign from the university under pressure stemming from the NCAA violations that occurred under his watch. Garcia, *supra* note 20.

director who hires a “known” cheater should be held liable for expenses incurred by the athletic department if the NCAA finds the coach committed violations while employed at the university under the same athletic director’s supervision.<sup>70</sup>

President Emmert agrees that it is not only the coach that should be held liable: “We have to hold everyone in the enterprise accountable — administrators, coaches, ADs . . .”<sup>71</sup>

If the NCAA does not take the aforementioned necessary steps to punish coaches, then the athletic directors have to be more proactive in their hiring practices. If the athletic director is willing to take the risk of hiring a known cheater, the university should hold him or her to a stricter standard if the coach commits violations while employed by the athletic director.

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<sup>70</sup> For the purposes of this article, a “known” cheater includes one who has been found to be in violation of the NCAA bylaws previously, or has been the head coach of a program that is sanctioned by the NCAA for violations committed during the time the coach was employed as the head coach. The athletic director being held responsible for hiring a known cheater could be analyzed in a similar fashion to the standard for negligent hiring, with the university, players, or players’ parents representing the third party injured by the defendant’s (coach’s) actions. The athletic director who hires a coach has to, at the minimum, have some due diligence in making a hire. Did the University of Georgia even look at news stories concerning Jim Harrick’s cheating? Did they call UCLA or URI before making him their head coach? This liability is not based on the rule of agency but on the law of torts. Many jurisdictions recognize this tort. *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316 (Colo. 1992); *Tichenor v. Roman Catholic Church of Archdiocese of New Orleans*, 32 F.3d 953 (5th Cir. 1994) (applying Louisiana law). To sustain a negligent hiring claim based on a failure to screen, a plaintiff must show that anything found in a background check would cause a reasonable employer to not hire the employee, or would be sufficient to put the employer on notice that hiring the employee would create a risk of harm to the public. *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Tex. 2010). Coastal Carolina University President David A. DeCenzo hired Cliff Ellis despite Ellis’s history of running programs that were later punished by the NCAA. Pete Thamel, *Coastal Carolina Struggles on Way to Tournament*, N.Y. TIMES, Feb. 24, 2011, <http://www.nytimes.com/2011/02/25/sports/ncaabasketball/25coastal.html>. After Ellis left Clemson and Auburn, both programs were found guilty of major NCAA infractions and each school was placed on two years’ probation. *Id.* Ellis was never directly implicated in either case, but his assistants were. *Id.* The NCAA’s enforcement staff is now investigating Coastal Carolina’s leading scorer. *Id.* Coastal Carolina was on probation for major violation in women’s golf until December 2010, and if violations occurred with Ellis’s basketball team during this time, Coastal Carolina could be subject to harsher penalties. *Id.* This could serve as a prime example of negligent hiring.

<sup>71</sup> Dial, *supra* note 28.

## CONCLUSION

The NCAA is in charge of monitoring and enforcing rules against 345 Division I basketball programs and 120 Football Bowl Subdivision programs.<sup>72</sup> Light punishments against a coach who left a school with sanctions will not get the attention of *all* of the coaches. The NCAA has the power, authority, and capability to send a clear message to all coaches, on all levels: cheating at any school, no matter when the violations are discovered, will not be tolerated. The NCAA must punish the coach even if the coach is at a new school. It is time for the NCAA to take a stand against coaches who escape liability by running from their current job and leaving innocent students-athletes with sanctions for violations they did not commit.<sup>73</sup>

President Emmert knows that NCAA must reform its rules, especially those rules governing cheating by coaches: “[w]e have to acknowledge there are real problems that need to be dealt with.”<sup>74</sup> He added, “[w]e need to figure out how to do as good a job as possible attacking all those threats to the integrity of the intercollegiate athletics; we agree that many of our rules and bylaws need to be addressed. We’ll keep working on that.”<sup>75</sup>

To catch Al Capone (cheating coaches in this instance) you have to do it the Chicago way.<sup>76</sup> “They pull a knife, you pull a gun. He sends one of yours to the hospital, you send one of his to the morgue. That’s the Chicago way! And that’s how you get Capone.”<sup>77</sup> Now, does the NCAA want to do that? Is the NCAA ready to do that?<sup>78</sup> Regardless, the NCAA needs to do it. For the well-being of collegiate athletics, the NCAA cannot let the coaches

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<sup>72</sup> Wojciechowski, *supra* note 13.

<sup>73</sup> See James Hopkins, *NCAA Penalties: Corporate Accountability for Coaches and Presidents*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 179 (2003) (discussing accountability for coaches and presidents when teams are left out of postseason tournaments).

<sup>74</sup> Lynch, *supra* note 68.

<sup>75</sup> Dial, *supra* note 28.

<sup>76</sup> *The Untouchables*, directed by Brian De Palma (Paramount Pictures, 1987); Wojciechowski, *supra* note 13.

<sup>77</sup> *Id.*

<sup>78</sup> Wojciechowski, *supra* note 13.

continue to cheat without them going “to the morgue.” That should be, and needs to be, the *Indianapolis* way.<sup>79</sup>

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<sup>79</sup> The National Collegiate Athletic Association headquarters are in Indianapolis, Indiana.

