

NCAA SANCTIONS SHOULD HAVE MORE TEETH

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Introduction	127
I. Is the NCAA Punishing the Wrong Parties?	132
II. NCAA Punishment Viewed Through the Lens of Criminal Law	136
A. A Brief History of and the Modern Theories of Punishment	136
B. The NCAA Seeks Deterrence Through Punishment	139
C. Is the NCAA Punishing Institutions Unfairly?.....	142
1. The NCAA’s Institutional Sanctions Equate to Corporate Criminal Liability	142
2. Institutional Sanctions Can Harm the Program’s “Innocents” More Than the Transgressor	145
III. A Proposed Revision of the Enforcement Model.....	147
A. Penalties Imposed on Coaches	147
B. Penalties Imposed on Student-Athletes	148
C. Penalties Imposed on Member Institutions	150
IV. The Justification.....	150
A. The NCAA Should Punish Coaches for Their Transgressions.....	150
B. The NCAA Should Punish Student-Athletes for Their Transgressions.....	151
C. The NCAA Should Impose Fair Sanctions on Member Institutions	151
D. NCAA Sanctions Should not Affect the Innocents.....	153

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INTRODUCTION

“Everyone I’ve talked to tells me that if there’s anything that coaches are, it is control freaks. They not only know what’s going on in their program, they know everything that’s going on in their program — and if they don’t, they should.”

- Ed Ray, Oregon State University President and former chair of the NCAA Executive Committee¹

In 2003, the University of Southern California (“USC”) Trojans welcomed Reggie Bush, an All-American, All-USA running back, to their football team.² Bush helped lead the Trojans to three winning seasons, the Rose Bowl, a national title, and runner-up to a national title.³ Along the way, he won national acclaim and numerous awards, including the prestigious Heisman Trophy in December 2005.⁴

But Bush was not the only beneficiary of his time at USC. For the school year following those three winning seasons, Coach Pete Carroll received over \$4 million in compensation,⁵ and USC earned millions of dollars during the years Bush played.⁶

¹ Editorial, *NCAA Smart to Make Coaches Accountable*, THE COMMERCIAL APPEAL, Nov. 1, 2012, <http://www.commercialappeal.com/opinion/editorial-ncaa-smart-to-make-coaches-accountable-ep-384489455-329183531.html>.

² See *Reggie Bush Bio*, JOCKBIO.COM, http://www.jockbio.com/Bios/Bush/Bush_bio.html (“*Parade Magazine* honored him on its annual All-American list, and *USA Today* named him All-USA.”).

³ See *id.*

⁴ See *id.* Reggie Bush was placed on several organizations’ All-America teams (AP, SI.com, Football Coaches, Cingular/ABC Sports, *The Sporting News*, ESPN.com, and CSTV), named Co-Offensive Player of the Year by the Pacific-10 conference, and voted “club MVP” by his teammates. See *id.*

⁵ See Gary Klein, *USC’s Pete Carroll Tops National Salary List*, LOS ANGELES TIMES, Feb. 23, 2009, <http://articles.latimes.com/2009/feb/23/sports/sp-college-salaries23> (“[Pete Carroll] is highest-paid private university employee in U.S. in 2006-07, according to report, earning four times as much as [USC] President Steven B. Sample.”); Clay Travis, *Pete Carroll Laughs at Nick Saban’s Piddling \$4 Million Salary*, DEADSPIN (Aug. 15, 2008, 12:00 PM), <http://deadspin.com/5037460/pete-carroll-laughs-at-nick-sabans-piddling-4-million-salary> (“Given the periodic talk about whether Carroll might leave for the NFL, a salary like this makes you wonder how

Off the field, however, Bush behaved in ways that violated the National Collegiate Athletic Association (“NCAA”) rules. In the fall of 2004, Bush, his mother, and his stepfather agreed to form a partnership in a sports agency with Lloyd Lake and Michael Michaels.⁷ All five agreed that this new agency (“New Era”) would represent Bush,⁸ even though the NCAA rules barred such a partnership and representation.⁹

Almost immediately after the partnership agreement, Bush and his parents began requesting “loans” from New Era – another violation of the NCAA rules.¹⁰ New Era acquiesced to their requests and, in the course of the 2004-2005 school year, gave Bush and his family cash and gifts totaling over \$100,000.¹¹

Then, in the summer of 2005, Bush met Mike Ornstein while interning at Ornstein’s sports marketing firm.¹² Shortly

many NFL teams could even afford Carroll. He’s already making more than all but two or three.”).

⁶ See Howard Bryant, *No Losers in the Reggie Bush Scandal*, ESPN.COM (Sept. 22, 2010), <http://sports.espn.go.com/espn/commentary/news/story?page=bryant/100922>.

⁷ See UNIVERSITY OF SOUTHERN CALIFORNIA PUBLIC INFRACTIONS REPORT 1, 7 (NCAA June 10, 2010) [hereinafter USC Infractions Report], available at <http://i.usatoday.net/sports/college/2010-06-10-usc-ncaa-report.pdf>; Charles Robinson & Jason Cole, *Reggie Bush Investigation: Cash and Carry*, YAHOO! SPORTS (Sept. 15, 2006, 2:59 AM), <http://bit.ly/1zegzrC> [hereinafter *Bush: Cash and Carry*]. Lake was a former convict who knew Bush’s stepfather. See *Reggie Bush Investigation: The Key Figures*, YAHOO! SPORTS (Sept. 14, 2006, 7:30 PM), <http://bit.ly/1vC2LKp> [hereinafter *Bush: Key Figures*]. Michaels was a “business development officer with the Sycuan tribe” and a friend of Lake. *Id.*

⁸ See, e.g., USC Infractions Report, *supra* note 7, at 8; *Bush: Cash and Carry*, *supra* note 7.

⁹ See, e.g., *Reggie Bush Investigation: The NCAA Rules*, YAHOO! SPORTS (Sept. 14, 2006, 7:30 PM), <http://bit.ly/1uQe4wP> [hereinafter *Bush: The Rules*]. NCAA Bylaw 12.1.1 states that a student-athlete will lose eligibility if he “enters into an agreement with an agent.” *Id.* Also, Bylaw 12.3.1.1 states that a student-athlete will lose eligibility if he agrees to work with an agent in the future. *Id.*

¹⁰ See, e.g., USC Infractions Report, *supra* note 7, at 4; *Bush: Cash and Carry*, *supra* note 7. NCAA Bylaw 12.3.1.2 states that a student-athlete will lose eligibility if he receives any form of benefit from an agent or marketer. See *Bush: The Rules*, *supra* note 9.

¹¹ See, e.g., USC Infractions Report, *supra* note 7, at 4-6. The family asked for “loans” to pay off credit card debt, to purchase a new car and accessories for Bush, to purchase furniture for a new house, to pay for a vacation to Hawaii, and for spending money. *Id.* See also *Bush: Cash and Carry*, *supra* note 7.

¹² See, e.g., *Bush: Key Figures*, *supra* note 7. During the investigation, the NCAA inquired into an allegation that Pete Carroll asked Ornstein to hire football players as interns. See USC Infractions Report, *supra* note 7, at 30. Although not technically

thereafter, Ornstein, hoping to become Bush's agent,¹³ provided Bush and his family with benefits in the form of airline tickets, hotel rooms, and cash¹⁴—no less a violation than taking “loans” from New Era.

When Lake realized Bush was talking to another sports marketer, he called Todd McNair, one of USC's assistant football coaches, and asked McNair to speak with Bush about either holding up his end of the agreement or paying back the “loans.”¹⁵ McNair did not report this phone call to anyone; in fact, he later denied receiving any phone call.¹⁶ In April 2006, Lake informed the NCAA that Bush had received “impermissible benefits,” and the NCAA began investigating the allegation.¹⁷ Bush was only partially cooperative, while both Bush's parents and Ornstein refused the NCAA's requests for interviews.¹⁸

In June 2010, over four years after commencing its investigation, the NCAA reported that Bush had violated the NCAA rules and thus had been ineligible to compete at USC since about December 2004.¹⁹ The NCAA sanctioned USC for lack of

against the NCAA's rules, the request to hire did place a presumption of responsibility on the institution—through the coach—to “assess and monitor the employment situation and the relationship between student-athlete and [sports marketer].” *Id.* at 31.

¹³ See, e.g., *Bush: Key Figures*, *supra* note 7. Bush did sign a contract with Ornstein's marketing agency in February 2006. See USC Infractions Report, *supra* note 7, at 29.

¹⁴ See *id.* at 28-29. See also *Bush: Key Figures*, *supra* note 7 (“Ornstein is alleged to have given thousands in cash and gifts to Bush and his family during USC's 2005 season.”).

¹⁵ See USC Infractions Report, *supra* note 7, at 23.

¹⁶ See *id.* at 23-24. But phone records showed a call placed from Lake's phone to McNair's phone, lasting over two minutes. See *id.*

¹⁷ *Id.* at 65. The NCAA investigation also involved allegations against the men's basketball and women's tennis programs. See *id.* at 1. This article discusses only the football investigation.

¹⁸ See *id.* at 2, 32; Ed Graney, *Reggie Bush's Remorse Too Little, Too Late*, LAS VEGAS REVIEW-JOURNAL, Aug. 14, 2010, 12:00 AM, <http://www.reviewjournal.com/ed-graney/reggie-bushs-remorse-too-little-too-late> (“Bush agreed to be interviewed by NCAA enforcement officials but refused to cooperate fully. He wouldn't provide requested information. He continued for years to sidestep all opportunities to be truthful . . .”).

¹⁹ See *NCAA Delivers Postseason Football Ban*, ESPN.COM, (June 11, 2010, 3:03 AM), <http://sports.espn.go.com/los-angeles/ncf/news/story?id=5272615> (“The NCAA threw the book at storied Southern California . . . for improper benefits to Heisman Trophy winner Reggie Bush dating to the Trojans' 2004 national championship.”).

institutional control.²⁰ The sanctions included four years of probation, a two-year postseason ban, a loss of ten scholarships for each of the following three seasons, and forfeiture of its football wins from December 2004 through the 2005 season.²¹ Although the NCAA did not officially name Coach Carroll in the investigation, it did criticize him for running a loose ship.²² Additionally, McNair received a one-year show-cause order,²³ because the NCAA determined he “knew or should have known” about Bush’s situation.²⁴

But the sanctions did not affect everyone. By the time the NCAA announced the sanctions, Bush was out of the NCAA’s reach and making millions of dollars through a National Football League (“NFL”) contract and lucrative endorsement deals.²⁵ Coach Carroll had left USC for a multi-million dollar contract to coach the Seattle Seahawks, and, accordingly, the sanctions did not

²⁰ See Nakia Hogan, *Reggie Bush Investigation Results in Major Sanctions for Southern Cal*, NOLA.COM, (June 11, 2010, 6:36 AM), http://www.nola.com/saints/index.ssf/2010/06/reggie_bush_investigation_resu.html (“[T]he governing body [of the NCAA] chose to levy all penalties against USC and not go after . . . former USC football coach Pete Carroll.”).

²¹ See *id.* (“The Trojans will pay a hefty price, as the NCAA handed down the toughest penalties since levying Southern Methodist with the ‘death penalty’ in 1986.”). See *infra* text accompanying notes 90-95 regarding Southern Methodist’s death penalty.

²² See USC Infractions Report, *supra* note 7, at 1-2 (“[T]here was relatively little effective monitoring of, among others, football locker rooms and sidelines, and there existed a general post-game locker room environment that made compliance efforts difficult. . . . These activities . . . fostered an atmosphere in which student-athletes could feel entitled to special treatment and which almost certainly contributed to the difficulties of compliance staff in achieving a rules-compliant program.”). The report also criticized Carroll for holding open practice sessions in which anyone could attend. See *id.* at 60.

²³ A show-cause order is one of the NCAA’s sanction options for coaches or other individuals involved in transgressions. See Nicole Auerbach, *The Perception and Reality of NCAA Show-Cause Penalties*, USA TODAY, May 27, 2014, <http://usat.ly/1yo0azp>. Basically, the coach or individual cannot work for another collegiate institution during that time, unless the institution petitions the NCAA with a legitimate reason for why the school should hire the coach and how the school will monitor the coach. See *id.*

²⁴ See, e.g., Gary Klein, *Ex-USC Assistant Todd McNair Seeks Vindication From Reggie Bush Saga*, L.A. TIMES, June 8, 2014, <http://lat.ms/SI10ct>.

²⁵ See JOCKBIO, *supra* note 2 (“[Reggie] signed a six-year contract with the Saints worth more than \$60 million. Reggie also scored big with endorsements . . .”).

affect him.²⁶ Even many of Bush's former teammates were not very upset over the forfeiture of their wins.²⁷

Instead, the sanctions primarily affected innocent individuals, including: the current (at the time of sanctions) USC football players—most, if not all, of whom were not members of the team when the violations occurred; the new head football coach; the incoming football players; and the Trojans' fans. Furthermore, the university itself received the majority of the penalties, even though its administration had not known about Bush's dealings with the agents.

This article argues that the NCAA's penalties often affect innocent people more than the actual transgressors because the transgressors frequently leave the school before the NCAA announces its sanctions.²⁸ This article seeks to address this problem by viewing NCAA sanctions through a criminal law lens, resulting in a stronger enforcement model for the NCAA that also minimizes the effect on those innocent of any wrongdoing.

Specifically, this article proposes a revision to the NCAA's enforcement model to ensure that its sanctions not only attempt to deter future violations but also penalize the actual transgressors, rather than the innocents. Punishing transgressors with the goal of deterrence alone does not work if persons contemplating a transgression realize that they can escape punishment by leaving the school, and, therefore, the punishment affects only those

²⁶ See *Instant Analysis: NCAA Didn't Buy USC's Defense*, ESPN.COM (June 10, 2010, 3:46 PM), <http://es.pn/1AKFhUI> ("Carroll signed a five-year, \$33 million contract with the Seahawks."). Pete Carroll's Seahawks won the Super Bowl in February 2014, making Carroll "only the third coach to win a college football national championship and Super Bowl." Gary Klein, *Pete Carroll Continues to Defend USC as Sanctions Come to End*, L.A. TIMES (June 7, 2014, 4:33 PM), <http://lat.ms/1kYSFay>.

²⁷ See Mike Florio, *Reggie Bush Situation Costs USC 2004 Title*, NBC SPORTS (June 6, 2011, 7:39 PM), <http://profootballtalk.nbcsports.com/2011/06/06/reggie-bush-situation-costs-usc-2004-title/> ("[T]he fact that it took so long for the NCAA to reach a conclusion makes it easy for the men who played for USC to shrug at the outcome. 'We all got our rings, we've moved on, and I don't think this decision has affected the way we view that season,' quarterback Matt Leinart told ESPN . . .").

²⁸ See Timothy Davis & Christopher T. Hairston, *Majoring in Infractions: The Evolution of the National Collegiate Athletic Association's Enforcement Structure*, 92 OR. L. REV. 979, 986 (2014); Christopher Davis, Jr. & Dylan Oliver Malagrino, *Hold Your Fire: The Injustice of NCAA Sanctions on Innocent Student Athletes*, 11 VA. SPORTS & ENT. L.J. 432, 440 (2012); Mary Elizabeth Kane, *When the NCAA Strikes, Who is Called Out?*, 7 DEPAUL J. SPORTS & CONTEMP. PROBS. 119, 141 (2011).

remaining in the program. The proposed new enforcement model would add penalties to its current structure, such as financial penalties on coaches and student-athletes whose behavior leads to NCAA sanctions. The new model would also limit the institutional penalties to probation, public reprimand and censure, and/or severe financial penalties.

Part I of this article addresses a flaw in the current NCAA enforcement model whereby the NCAA often punishes the wrong people. Part II views the NCAA enforcement model through a criminal law lens, discussing the theories of punishment and the NCAA's focus when it determines its sanctions. Part III proposes a revision to the NCAA enforcement model to include retributive punishment, which has the added benefit of deterrence when potential transgressors realize that the penalties will hit them where it hurts the most. Part IV discusses how the revised enforcement model can improve outcomes for the NCAA, institutions, and innocent individuals.

I. IS THE NCAA PUNISHING THE WRONG PARTIES?

The Reggie Bush scandal illustrates a flaw in the current NCAA enforcement model. The punishment the NCAA imposes often affects the innocents in the situation rather than the transgressors. In other words, those bearing the brunt of the punishment are not the persons responsible for the malfeasance. Additionally, the NCAA member institutions often receive harsh punishment for actions over which they have little to no control.²⁹

Bush and his parents escaped the NCAA sanctions, and Bush went on to make millions of dollars playing in the NFL.³⁰ Shortly before the NCAA's ruling, Coach Pete Carroll left USC to coach the Seattle Seahawks.³¹ Bush and Coach Carroll were beyond the reach of the NCAA and any penalty it might impose. Instead, the sanctions affected the current Trojans football players, the new

²⁹ USC Athletic Director Pat Haden was asked whether a school could experience "something like the Bush situation" again. See Gary Klein, *For USC Athletics, NCAA Sanctions are Ending, But Effects Remain*, L.A. TIMES (June 7, 2014, 9:21 PM), <http://lat.ms/1yogJLA>. "Yes," he said without hesitation. "There's nothing you can do to prevent poor decisions." *Id.*

³⁰ See *supra* note 25 and accompanying text.

³¹ See *supra* note 26 and accompanying text.

football coach, the newly recruited football players, and the Trojans fans.

Such a result appears to run contrary to the NCAA's infractions program mission, which is

to uphold integrity and fair play among the NCAA membership, and to prescribe appropriate and *fair penalties* if violations occur. One of the fundamental principles of the infractions program is to *ensure that those institutions and student-athletes abiding by the NCAA constitution and bylaws are not disadvantaged by their commitment to compliance*. The program is committed to the fairness of procedures and the timely resolution of infractions cases. The ability to investigate allegations and penalize infractions is critical to the common interests of the Association's membership and the preservation of its enduring values.³²

The current football players do not find it "fair" when they committed no violations and yet "are disadvantaged" by the postseason ban or a team weakened by the sanctions' effects on recruiting. The newly recruited football players do not find it "fair" and "are disadvantaged" when the school cannot offer the usual number of scholarships, so fewer players will receive a free education. Additionally, they arrive on campus to find a different team than the one for which they signed up due to a new coach, vacated record, and/or postseason ban, along with other penalties that disrupt the structure of the team.³³

The new coach does not find it "fair" and "is disadvantaged" when the NCAA bans his team from postseason play or he cannot provide the usual number of scholarships, thus hampering his recruitment of future players. Furthermore, the fans—especially those that purchase season tickets and/or make donations to the athletic program—do not find it "fair" when their team must

³² *Mission of the Infractions Program*, 2014-15 NCAA DIVISION I MANUAL art. 19.01.1 (2014) [hereinafter NCAA MANUAL], available at <http://www.ncaapublications.com/productdownloads/D115.pdf> (emphasis added).

³³ One recruit stated "that harsh penalties could cause him to rethink his decision [to attend a school under investigation], as he doesn't want to get punished for something that he didn't participate in." Steve Megargee, *Sanctions Aren't Deterring Recruits from Scandal-Ridden Programs*, SPORTS ILLUSTRATED (Mar. 22, 2012), <http://www.si.com/college-football/2012/03/22/ncaa-sanctionsrecruiting>.

forfeit a winning season, cannot play in the postseason, and may have difficulty recruiting future talented players due to the stigma of the sanctions.³⁴

The member institutions also have a right to complain about the unfairness of the NCAA infraction process. Even if an institution establishes a compliance program that strictly monitors the athletic programs, the NCAA can find fault, and thus sanction it, for the independent acts of one employee, student-athlete, or athletic representative—even though the school has no control over that individual's acts.

The NCAA has attempted to hold head coaches more accountable. Recognizing that institutional sanctions were not necessarily deterring head coaches, the NCAA, after numerous scandals in 2011,³⁵ established a committee to research and propose a strengthened enforcement model.³⁶ The resulting proposal became effective in August 2013.³⁷ The new model allows the NCAA Committee on Infractions to impose tougher penalties

³⁴ Fans have even sued over the 'unfairness' caused by NCAA violations and the resulting sanctions. See *John Calipari, Derrick Rose Settle Suit*, ESPN.COM (Oct. 7, 2011, 7:08 PM), <http://es.pn/1vHEbrx>. Calipari and Rose paid "certain [season] ticket holders" \$100,000 to avoid a lawsuit in which the ticket holders claimed they "bought tickets under false pretenses." *Id.* The plaintiffs alleged that the NCAA violations "potentially could hurt the value of their tickets for . . . future seasons." *Id.*

³⁵ See Jerry Hinnen, *New NCAA Enforcement Model Goes Into Effect*, CBSSPORTS.COM (Aug. 1, 2013, 1:59 PM), <http://cbsprt.co/1vdfNMi> ("The new model was originally developed by the NCAA's Enforcement Working Group after a scandal-plagued 2011."); Pete Thamel, *College Football's Ugly Season, Facing Scandals of Every Stripe*, N.Y. TIMES (Aug. 20, 2011), <http://nyti.ms/11oTNm2> ("[College football's] reputation has never been more damaged. . . . It can be debated whether the current string of scandals is the worst in the history of college sports, but few would dispute that this has been the ugliest stretch in terms of publicity.").

³⁶ See Gary Brown, *DI Board of Directors Approves Overhauled Enforcement Structure*, NCAA (Oct. 30, 2012, 4:41 PM), <http://on.ncaa.com/1v6hKZC>. A thirteen-member committee spent a year creating a proposal for a "more stringent and efficient enforcement structure." *Id.*

³⁷ See *id.* The new four-tier model replaced a two-tier model that had labeled violations as "major" or "secondary." See *id.* Violations are now viewed as "Severe" (Level I), "Significant" (Level II), "Breach of Conduct" (Level III), or "Incidental" (Level IV). See Hinnen, *supra* note 35. The NCAA designed the new model "to focus on the conduct breaches that seriously undermine or threaten the integrity of the NCAA constitution." *Id.*

on a head coach who does not foster “an atmosphere of compliance or . . . monitor[] his or her staff, or both.”³⁸

Now, rather than having to show whether the head coach knew or should have known about the violations, the NCAA assigns a presumption of responsibility on the coach, and the coach bears the burden of overcoming that presumption.³⁹ The coach must show that he “care[d] enough to set standards and take responsibility for [his] program[].”⁴⁰ To date, however, not enough time has passed to test the effectiveness of the new model.

The NCAA also added a new “Accountability” section to its bylaws, stating “[t]he infractions program shall hold institutions, coaches, administrators and student-athletes who violate the NCAA constitution and bylaws accountable for their conduct, both at the individual and institutional levels.”⁴¹ Nevertheless, the penalty structure still allows for sanctions that will adversely affect uninvolved individuals.⁴²

Although the revised enforcement model addressed the responsibility of the head coach, it did not address other flaws in the enforcement process. For instance, if the head coach leaves the school for a professional coaching job, then the NCAA loses its authority to penalize him. Any suspension or show-cause order the NCAA imposes will have no effect on an individual coaching in a professional sports league.

Further, the new model does not address the situation of a student-athlete who violated the NCAA rules but then left the school before the NCAA imposed any sanctions (which is highly likely given the time it routinely takes the NCAA to receive notice of an allegation and complete an investigation⁴³). The NCAA’s

³⁸ Brown, *supra* note 36. If a coach can show that compliance procedures were in place and the coach trained and monitored his staff on the rules, then the NCAA would consider that “mitigating evidence,” which could reduce the sanctions on the head coach. *Id.*

³⁹ *See id.*

⁴⁰ Allie Grasgreen, *Upping the Stakes*, INSIDE HIGHER ED, (Oct. 31, 2012), <http://bit.ly/1S7vf8s>.

⁴¹ *Accountability*, NCAA MANUAL, *supra* note 32, at art. 19.01. The “Accountability” article immediately follows the “Mission of the Infractions Program” article. *Id.*

⁴² *See Penalties*, NCAA MANUAL, *supra* note 32, at art. 19.9.

⁴³ The USC investigation lasted four years. *See NCAA Delivers Postseason Football Ban*, *supra* note 19. *See also* University of Montana Public Infractions Report 1, 2

enforcement model will still employ the harsh institutional penalties of postseason bans, loss of scholarships, and prohibition against television appearances.⁴⁴

II. NCAA PUNISHMENT VIEWED THROUGH THE LENS OF CRIMINAL LAW

A. A Brief History of and the Modern Theories of Punishment

Society has long held that it must punish transgressors. Originally, before criminal law evolved, the victim, or his heir, meted out punishment in an act of “revenge or retaliation.”⁴⁵ As

(NCAA July 26, 2013), *available at* <http://bit.ly/1HAZfTK> (twenty months to investigate violations in the football program); University of Oregon Public Infractions Report 1, 3 (NCAA June 26, 2013), *available at* <http://bit.ly/1FhAoAz> (two and a half years to investigate recruiting violations in the football program); Mississippi State University Public Infractions Report 1, 1-2 (NCAA June 7, 2013), *available at* http://www.nmnathletics.com/fls/16800/pdf/compliance/infractionsreport_060713.pdf (eighteen months to investigate violations in the football program); Eastern Michigan University Public Infractions Report 1, 26-27 (NCAA Nov. 8, 2012), *available at* <http://bit.ly/1Ffbu6z> (over two years to investigate violations in the women’s basketball program); University of Oklahoma Public Infractions Report 1, 10-11 (NCAA Nov. 10, 2011), *available at* <http://on.ncaa.com/1rbi6KO> (eighteen months to investigate, and agree to summary disposition of, violations in the men’s basketball program); University of Tennessee, Knoxville Public Infractions Report 1, 19-20 (NCAA Aug. 24, 2011), *available at* <http://on.ncaa.com/1vH2NAT> (over two years to investigate recruiting violations in the basketball program); Arizona State University Public Infractions Report 1, 50-52 (NCAA Dec. 15, 2010), *available at* <http://on.ncaa.com/1zNABKE> (two years to investigate violations in the baseball program); Adam Kramer, *NCAA Embarrassed Itself With Lengthy, Botched Investigation Into Miami*, BLEACHER REPORT (Oct. 22, 2013), <http://ble.ac/1v6h4nc> (798 days to investigate improprieties by a Miami booster); Erick Smith, *Ohio State Hit With Bowl Ban, Tressel Gets Show-Cause Penalty*, USA TODAY (Dec. 20, 2011, 8:42 PM), <http://usat.ly/1rdxBln> (one year to investigate football players’ receipts of impermissible benefits); Jon Solomon, *UNC’s Unprecedented Academic Fraud Case Will Test NCAA*, CBSSPORTS.COM (Oct. 24, 2014, 10:54 AM), <http://cbsprt.co/1FkWKmo> (ongoing, off-and-on investigation into academic fraud for past three years); Adam Wells, *Syracuse Football Reportedly Subject of NCAA Investigation*, BLEACHER REPORT (Oct. 23, 2014), <http://ble.ac/1v6hgmu> (ongoing investigation into basketball program for at least two years that may grow to include football program). It must be noted, however, that one aspect of the updated enforcement model is an increase in the number of members on the Committee on Infractions with the goal of more timely investigations and decisions. Brown, *supra* note 36.

⁴⁴ *Penalties*, NCAA MANUAL, *supra* note 32, at art. 19.9.

⁴⁵ Henry Weinhofen, *The Purpose of Punishment*, 7 TENN. L. REV. 145, 145-46 (1929) (quoting Harald Höffding, *The State’s Authority to Punish Crime*, 2 J. CRIM. L. 691, 691 (1911)).

criminal law developed, however, states attempted to create laws⁴⁶ that would make a victim whole without seeking personal retribution,⁴⁷ but many argued that the origin of “legal punishment is essentially vindicative.”⁴⁸ The evolution of criminal law has created two main theories of punishment – deterrence and retributivism.⁴⁹

Deterrence proponents believe punishment only benefits society if it deters future transgressions.⁵⁰ Proponents of deterrence seek general deterrence and/or specific deterrence. For general deterrence, the state imposes punishment on the individual in the hopes of deterring others from committing the same offense.⁵¹ To achieve specific deterrence, proponents employ the threat and/or imposition of incapacitation or rehabilitation of the offender.⁵²

⁴⁶ The Constitution vested the states with rule-making authority for criminal conduct. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 319 (2007).

⁴⁷ See *id.* at 321 (“As early as 1776, Thomas Jefferson had drafted a bill for the Virginia legislature that called for punishment based on the theory of prevention . . .”).

⁴⁸ Weinhofen, *supra* note 45, at 147 (quoting CHARLES ARTHUR MERCIER, *CRIMINAL RESPONSIBILITY* 16 (1905)). The author also quoted Professor Ballantine as saying, “While it is true that punishment is largely an instinctive matter and various factors, social and individual, enter in, yet it cannot be denied that it expresses the indignation [sic] and condemnation of society to an extent measured by the severity of punishment . . .” *Id.* at 148 (quoting Henry W. Ballantine, *Criminal Responsibility of the Insane and Feeble Minded*, 9 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 485, 495 (1919)). Weinhofen argued that “[e]ven if jurists are no longer willing to justify punishment merely as retribution, and insist that the state now inflicts punishment for purposes of determent or reformation, yet this necessity of appeasing popular wrath will continue to make punishment largely retributive in its nature.” *Id.*

⁴⁹ See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 14-18 (6th ed. 2012).

⁵⁰ See *id.* at 14 (“[Deterrence] is a form of ‘consequentialism,’ which in its pure form ‘holds that the justification of a practice depends *only* on its consequences.’”) (quoting R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 3 (2001)). Further, “[c]lassical [deterrence proponents] reason that the threat or imposition of punishment can reduce crime.” *Id.*

⁵¹ See *id.* at 15 (“[The transgressor] is punished in order to convince the *general* community to forego criminal conduct in the future. . . . [The transgressor’s] punishment serves as an object lesson to the rest of society . . .”).

⁵² See *id.* (“[The transgressor’s] punishment is meant to deter [that transgressor’s] future misconduct by intimidation. . . . [W]e provide a clear reminder to him of the risks of future offending.”).

In order for deterrence to be effective, three conditions must exist.⁵³ First, the potential transgressor must know that a rule is in effect.⁵⁴ Second, the potential transgressor must be able to weigh the benefit earned by breaking the rule against the cost of the punishment imposed if caught.⁵⁵ Finally, the potential transgressor must decide that this cost is too great and, therefore, decide not to commit the offense.⁵⁶

On the other end of the punishment spectrum sits retributivism, which is similar to the original punishment of retaliation. Retributivists believe that a transgressor warrants punishment because he chooses to commit the transgression and therefore “deserves punishment.”⁵⁷ The retributivist does not concern himself with whether the punishment improves society; he cares only that the transgressor pays for his transgressions.⁵⁸

Some scholars feel these individual theories are defective in their implementation and have proposed a mixed theory of punishment utilizing the “attractive aspects” of both deterrence and retributivism.⁵⁹ Under the mixed theory, “a person can legitimately be punished only if he committed a crime, only in proportion to that crime, and only if doing so would produce a world with less crime.”⁶⁰ Thus, punishment can serve both to punish the actual transgressor for his wrongs and to deter future violations.

⁵³ See Paul H. Robinson, *Life Without Parole Under Modern Theories of Punishment*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 138, 140 (Charles J. Ogletree Jr. & Austin Sarat eds., 2012).

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ DRESSLER, *supra* note 49, at 22; accord Michael S. Moore, *Justifying Retributivism*, 27 *ISR. L. REV.* 15, 15 (1993).

⁵⁸ See Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 *BUFF. CRIM. L. REV.* 443, 449 (2004) (stating that retributivists believe in “punishment as an end in itself”); Moore, *supra* note 57, at 15-16 (stating that, for a retributivist, any “beneficial consequences” are just “happy surplus[es] that punishment produces and form no part of what makes punishment just . . . deserving offenders should be punished [regardless of any] surplus good effects”).

⁵⁹ See DRESSLER, *supra* note 49, at 22 (stating that deterrence “seeks *exclusively* to prevent future crime” while retributivism “seeks *exclusively* to impose punishment based on a just-deserts philosophy”); accord Garvey, *supra* note 58, at 450.

⁶⁰ Garvey, *supra* note 58, at 450.

B. The NCAA Seeks Deterrence Through Punishment

The NCAA bases its current enforcement model on deterrence.⁶¹ It intends to send a strong message to the intercollegiate athletic community with the penalties it metes out.⁶² The NCAA seeks both general and specific deterrence; it hopes the sanctions will deter both the transgressor *and* others from committing the same type of offense.

For instance, the NCAA Appeals Committee upheld penalties handed down to the University of Nevada, Las Vegas (“UNLV”), agreeing with the Committee on Infractions’ “rationale for the penalty [which was] the need to bring these violations to the attention of the institution’s boosters, as well as to the institution.”⁶³ In this case, UNLV appealed a postseason ban that the NCAA imposed for the university’s failure to monitor multiple violations committed by individual assistant coaches, boosters, and a student-athlete.⁶⁴

UNLV asserted that the ban was too harsh and would hurt the student-athletes not involved in the violations.⁶⁵ The NCAA countered that “[t]he imposition of penalties always involves a balancing of interests. Almost every ban on competition impacts some innocent individuals. We hope the regrettable consequences of this penalty are appreciated fully by representatives of the institution’s athletics interests so that there will not be a recurrence”⁶⁶ Obviously, the NCAA reasoned that the thought of injuring an innocent would deter individuals from committing future transgressions.

⁶¹ See Kane, *supra* note 28, at 142 (“The NCAA’s primary purpose for imposing regulations on a violating university is to deter future violations.”).

⁶² See *infra* notes 66, 69-73.

⁶³ University of Nevada, Las Vegas Public Infractions Appeals Committee Report 1, 10 (NCAA Feb. 16, 2001) [hereinafter UNLV Appeals Report], available at <http://on.ncaa.com/11o7gdT>.

⁶⁴ See *id.* at 1-2. The worst of the violations had occurred three to four years prior to the sanctions, and the athlete involved ended up not playing for the school. See *UNLV Fires Coach, Put on Probation*, CBSNEWS.COM (Dec. 12, 2000, 2:25 PM), <http://cbsnews.com/news/unlv-fires-coach-put-on-probation>.

⁶⁵ See UNLV APPEALS REPORT, *supra* note 63, at 10.

⁶⁶ *Id.*

In another example, the NCAA sanctioned Florida State University (“FSU”) for failure to monitor academic fraud.⁶⁷ The sanctions included forfeiture of some football wins, which incidentally hurt coach Bobby Bowden’s chance to earn the record of the most NCAA Division I football wins.⁶⁸ The NCAA intended for the sanctions to send a message to all coaches.⁶⁹ In a final example, after USC appealed the sanctions from the Reggie Bush scandal, the NCAA, in its report, clearly stated its intent to deter others with USC’s punishment:

Thus, we believe that the penalties imposed make clear to other institutions the message which the Committee on Infractions intended to convey: “Similar strong penalties will be meted out to institutions that do [not] take the problem . . . seriously. It is not enough for institutions simply to educate student athletes about the dangers of unscrupulous [people]. Schools must have appropriate staff and procedures in place to combat this significant problem. An institution that does not foster a climate of compliance on its campus should expect serious consequences.”⁷⁰

But one can argue that, in the NCAA’s enforcement procedures, the three conditions for effective deterrence do not always exist.⁷¹ The first condition does exist. Those involved in intercollegiate athletics know, or should know, the NCAA rules—even if someone is not sure of whether a rule exists, he can access the information easily. For the second condition, the NCAA recognizes that potential transgressors will weigh the benefits gained by violating a rule against the risk of the punishment if

⁶⁷ See MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 202 (3d ed. 2013) (citing Florida State University Public Infractions Appeals Committee Report 1 (NCAA Mar. 6, 2009) [hereinafter FSU Appeals Report], available at <http://bit.ly/1kDN55h>). A learning specialist, a tutor, and an academic advisor were placed under show-cause orders for their involvement in “academic fraud with regard to online courses and typing portions of papers for students . . .” *Id.*

⁶⁸ See *id.* (citing FSU Appeals Report, *supra* note 67, at 16-17).

⁶⁹ See *id.*

⁷⁰ University of Southern California Infractions Appeals Committee Report 1, 20 (NCAA May 26, 2011) [hereinafter USC Appeals Report], <http://on.ncaa.com/1vLRZRS> (quoting USC Infractions Report, *supra* note 7, at 8).

⁷¹ See Robinson, *supra* note 53.

caught; the press release for its new enforcement model addressed that issue.⁷² But, if the persons involved in the situation know that the sanctions will not affect them (because either they plan to leave the school before the NCAA imposes sanctions or are already out of reach of any sanctions), then the final condition is not met. Additionally, the fact that the NCAA will sanction the institution in the transgressor's absence provides little incentive to stop a transgressor from violating the rules.

Members of the NCAA feel that "postseason bans, scholarship reductions, and coach suspensions offer the most effective deterrent to potential rule breakers."⁷³ Despite that, the NCAA's goal of deterrence is not succeeding;⁷⁴ violations of NCAA rules have not decreased.⁷⁵ Furthermore, as discussed above, the penalties often affect more people than just the transgressor. In fact, on some occasions, the penalties do not affect the transgressor at all. If, instead, the NCAA imposed its punishment solely on the transgressor, then, under the mixed theory of punishment, the individual who actually committed the violation would get what he deserves, and the punishment could serve as notice to others and deter them from committing the same act.

⁷² See, e.g., Brown, *supra* note 36. NCAA President Mark Emmert stated, "We have sought all along to remove the 'risk-reward' analysis that has tempted people—often because of the financial pressures to win at all costs—to break the rules in the hopes that either they won't be caught or that the consequences won't be very harsh if they do get caught."

Id.

Ed Ray, Oregon State University President and former chair of the NCAA Executive Committee, furthered the sentiment by stating, "the working group felt that the current structure didn't offer enough of a deterrent for individuals who believe the anticipated benefits and advantages resulting from premeditated rules violations outweigh the severity of punishment." *Id.*

⁷³ *Id.*

⁷⁴ See *supra* note 72 for Ed Ray's comment regarding one of the complaints that helped effectuate the 2013 revision to the enforcement model.

⁷⁵ Throughout the 1980s, the NCAA investigated eighty-nine major-violations cases. See Darren Everson & Hannah Karp, *The NCAA's Last Innocents*, WALL ST. J. (June 22, 2011), www.wsj.com/articles/SB10001424052702303936704576400052122863390. In the 1990s, the NCAA investigated sixty-four major violations, which involved fifty-four of the 120 Bowl Subdivision schools. See Doug Lederman, *Half of Big-Time NCAA Programs Had Major Violations*, USA TODAY (Feb. 7, 2011, 10:48 PM), http://usatoday30.usatoday.com/sports/college/2011-02-07-ncaa-infractions_N.htm. The first decade of the 2000s saw an increase by one: sixty-five cases involving fifty-seven schools. See *id.*

C. Is the NCAA Punishing Institutions Unfairly?

1. The NCAA's Institutional Sanctions Equate to Corporate Criminal Liability

In criminal law, a court can hold a corporation liable for any crime perpetrated by one of its employees if the crime occurs while the employee is within the scope of his employment and if the employee intended, through his act, to provide some value for the corporation.⁷⁶ Criminal corporate liability developed over time due to courts' decisions to penalize corporations that benefit from employees' transgressions.⁷⁷

The punishment for employees' acts has not always affected corporations. In English common law, from which American criminal corporate liability developed, courts originally would not hold corporations liable for crimes that required physical action.⁷⁸ Then, in the late 1800s, English courts started applying vicarious liability, but mostly in cases involving strict liability.⁷⁹ The courts did not yet extend corporate liability to crimes with a mens rea element.⁸⁰

By the mid-1800s, American courts had adopted a similar train of thought,⁸¹ but some state courts started considering the imposition of corporate liability for policy reasons that involved

⁷⁶ See Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1319 (2007).

⁷⁷ See *id.* ("The theory that has evolved is simple and seemingly logical: a corporation, being merely a person in law only, and not a real one, can act only through its employees for whom it should be held responsible.")

⁷⁸ See Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 419 (2007) ("[C]ommon law judges . . . struggled with the question of whether a corporation, being a juridical entity without physical form, was capable of the requisite physical action to substantiate a prosecution for . . . crimes with an element of physical action.")

⁷⁹ See *id.* ("English courts continued to be constrained by the limits of the corporation-as-person metaphor, finding that corporations could only be guilty of misfeasance in the context of crimes of strict liability . . .").

⁸⁰ See *id.* (discussing the English courts' difficulty in finding corporations guilty of "crimes with a 'moral dimension' . . . which required a mens rea that the corporation was presumed to be incapable of manifesting").

⁸¹ See *id.* at 420 ("[C]ourt decisions were carefully circumscribed and continued to stop short of holding corporations responsible for crimes requiring evil intent.")

both retribution and deterrence.⁸² Then, in the early- to mid-1900s, the United States Supreme Court and Ninth Circuit Court of Appeals each decided a case against the corporation, which began the evolution of corporate criminal liability to where it stands today.⁸³

However, if a corporation clearly states its stance on regulations and puts a strong compliance system in place, one could argue that the corporation has done everything it can within its control and, therefore, does not deserve harsh punishment.⁸⁴ It does not seem fair that courts can penalize such a corporation out of expediency and the hope that the punishment will deter others.⁸⁵

NCAA member institutions could make the same argument. Once a school has implemented a compliance program and clearly explained the regulations to its employees and student-athletes, the school can maintain compliance only through strict monitoring and ongoing training. Such actions do not always eliminate the commission of violations,⁸⁶ but the school will have fulfilled its duty, as it could not have done any more to stop the violation.

Additionally, it is debatable as to whether the second element of corporate criminal liability—the intent of providing value to the corporation—applies in these situations. The school could argue that, although the transgression might have produced some value to the school (e.g., a winning program, revenues from postseason play, or some other benefit), the transgressor did not intend to

⁸² See *id.* (citing *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339 (Mass. 1854); *State v. Morris & Essex E.R. Co.*, 23 N.J.L. 360 (N.J. 1852)) (“[T]he corporation . . . ought to be made to bear the costs of its criminal conduct . . . [C]ourts also advanced a deterrence rationale, noting it was often easier for law enforcement to punish the corporation as a whole than to arrest and prosecute individual agents who could not be located or whose relative culpability was difficult to ascertain.”).

⁸³ See *id.* at 420-22 (citing *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909); *Dollar S.S. Co. v. United States*, 101 F.2d 638 (9th Cir. 1939)).

⁸⁴ See Weissmann, *supra* note 76, at 1319-22.

⁸⁵ See *supra* note 82.

⁸⁶ See Ryan McGee, *Year of the Scandal*, ESPN THE MAGAZINE (May 22, 2011, 2:07 PM), <http://sports.espn.go.com/ncaa/news/story?id=6562381> (questioning, among other things, why Jim Tressel did not make The Ohio State University’s compliance office aware of violations once he learned of them). See also O’Neil, *infra* note 89 and accompanying text.

benefit the school; typically, a transgressor commits a violation solely with the intention of self-promotion.

Furthermore, the school has an argument against receiving NCAA sanctions for the transgressions of individuals that the school does not employ, such as boosters and sports agents. In those cases, the NCAA can punish the school as harshly as if an employee or student-athlete committed the transgression, and yet the school has absolutely no authority over the individuals. The most severe punishment the NCAA can impose on the individual is a disassociation from the school,⁸⁷ but such punishment does not seem to deter others from committing similar transgressions.⁸⁸

Many NCAA sanctions involve a burden imposed on the institution regardless of whether the school was aware of or involved in the transgression.⁸⁹ These burdens are unfair because the institution can only be reactionary in most cases; it cannot stop something for which it has no knowledge or control. The only way the school can be proactive is by training the participants, monitoring the activities, and disclosing any violations it discovers.

⁸⁷ See *Additional Penalties for Level I and Level II Violations*, NCAA MANUAL, *supra* note 32, at art. 19.9.7(i).

⁸⁸ See Jerry Hinnen, *Montana Hit With NCAA Sanctions Over Booster Benefits*, CBSSPORTS.COM (July 26, 2013, 4:33 PM), <http://cbsprt.co/1vCT5ic>; *NCAA Punishes University of South Carolina for Booster, Recruiting Violations*, HUFFINGTON POST (Apr. 30, 2012, 11:16 AM), <http://huff.to/163BFk4>; *Players Got Gifts From Ex-Miami Booster*, ESPN (Aug. 17, 2011), <http://es.pn/1zfMoAn>; Aaron Suttles & Tommy Deas, *D.J. Fluker Cooperating With Alabama Compliance Officers Regarding Improper Benefits Investigation*, TUSCALOOSA NEWS (Sept. 11, 2013, 4:26 PM), <http://bit.ly/1z398ol>.

⁸⁹ See Dana O'Neil, *Memphis Also Gets 3 Years' Probation*, ESPN.COM (Aug. 21, 2009), <http://sports.espn.go.com/ncb/news/story?id=4412279> ("Memphis president Shirley Raines said shortly after the NCAA's announcement that the school is appealing what she called an unfair penalty. 'We know the rules,' Raines said. 'We did our due diligence. We did everything we could to determine the student-athlete was eligible and that the rules were being followed.'"); *see also* McGee, *supra* note 86 (stating that the first time UNC learned of a sports agent's connection to school football players was through a tweet); *Ohio State Gets One-Year Bowl Ban*, ESPN.COM (Dec. 22, 2011), http://espn.go.com/college-football/story/_/id/7372757/ohio-state-buckeyes-football-penalties-include-bowl-ban ("Tressel was tipped to the violations in April 2010 but didn't tell anyone . . .").

2. Institutional Sanctions Can Harm the Program's "Innocents" More Than the Transgressor

The NCAA sanctions imposed on the schools often do not place any hardship on the individual transgressor. Rather, the sanctions damage the image of the school, the current roster of student-athletes, the incoming recruiting class, the new coach of the program, and the fans.

The NCAA most likely recognizes this issue. In 1987, the NCAA banned Southern Methodist University ("SMU") from practicing and playing football for a full year, a sanction known as the "death penalty."⁹⁰ Further, the NCAA penalized SMU with a restricted season for the following year, two years of postseason bans, and a loss of fifty-five scholarships over four years.⁹¹

Admittedly, SMU had committed some abhorrent violations and was a repeat violator.⁹² The NCAA stated that the intent of its sanctions was to "*eliminate* a program that was built on a legacy of wrongdoing, deceit and rule violations."⁹³ The NCAA wanted to send a strong message to other schools that it would not tolerate cheating.⁹⁴

That 'elimination' worked; it took twenty years for SMU's football program to recover, although it may never be a powerhouse again.⁹⁵ Nevertheless, the intended general

⁹⁰ See, e.g., Darren Rovell, *SMU's "Death Penalty": What Price Did it Pay?*, CNBC (Jan. 8, 2008, 9:55 AM), <http://www.cnbc.com/id/22553608#>.

⁹¹ See *id.*

⁹² See David Whitford & Peter Elkind, *SMU's Death Penalty: The Recruiting Scandal That Refuses to Die*, FORTUNE (Aug. 29, 2013, 1:00 PM), <http://fortune.com/2013/08/29/smus-death-penalty-the-recruiting-scandal-that-refuses-to-die> ("No reasonable person disputes that SMU got what it deserved. SMU boosters were paying players; SMU coaches knew all about it; and numerous SMU officials . . . were actively involved."); *Before Miami's Mess, There Was SMU's Death Penalty*, CBS DALLAS FORT WORTH (Aug. 21, 2011, 3:38 PM), <http://dfw.cbslocal.com/2011/08/21/before-miamis-mess-there-was-smus-death-penalty> ("SMU had been sanctioned multiple times in the 10 years leading up to receiving the death penalty . . .").

⁹³ David McNabb, *Flashback: SMU Gets NCAA 'Death Penalty'*, THE DALLAS MORNING NEWS (July 23, 2012, 12:59 PM), <http://bit.ly/1vHI53K> (emphasis added).

⁹⁴ See Whitford & Elkind, *supra* note 92 ("The NCAA's stated purpose in punishing SMU so severely was to give other potential cheaters something to think about. The theory being . . . that SMU's example would serve as a general deterrent.")

⁹⁵ See *id.* SMU was a top football program with one national title, ten Southwest Conference titles, and numerous Hall of Fame players. See David Williams,

deterrence did not work; cheating and violations have not significantly decreased among the NCAA's member institutions.⁹⁶

The NCAA has never again imposed the 'death penalty' on a Division I school,⁹⁷ even though several schools have committed violations just as severe as those of SMU.⁹⁸ Instead, the NCAA has employed institutional sanctions such as postseason bans and loss of scholarships. While such sanctions do not "eliminate a program," they can harm an athletic program for years.⁹⁹ Yet, the sanctions are not necessarily deterring the individual transgressors.

Additionally, in criminal law, the judicial system cannot punish an individual more harshly for not confessing to the crime. While a confession might mitigate the punishment, the lack of one does not aggravate it. The NCAA, however, imposes tougher sanctions on member institutions that do not "come clean" during an investigation of violations.¹⁰⁰

Overcoming the NCAA Death Penalty: Southern Methodist, 21 Years Later, BLEACHER REPORT (Apr. 7, 2008), <http://ble.ac/1ya9FFq>.

⁹⁶ See Whitford & Elkind, *supra* note 92 ("The dismal parade of recruiting violations, academic fudging, and general bad behavior by athletes, agents, boosters, coaches, and administrators continues unabated."); Everson & Karp, *supra* note 75 and accompanying text.

⁹⁷ See Williams, *supra* note 95 ("No penalty with such severity has been inflicted on another program since."); Greg McFarlane, *NCAA Sports Programs That Were Given the Death Penalty*, INVESTOPEDIA (Aug. 10, 2012), <http://investopedia.com/financial-edge/0812/ncaa-sports-programs-that-were-given-the-death-penalty.aspx> (stating that only three major programs have received the death penalty—University of Kentucky basketball in 1952, University of Southwestern Louisiana basketball in 1973, and SMU football in 1987).

⁹⁸ See Whitford & Elkind, *supra* note 92 (pointing out the scandals at USC and Penn State); see also Eric Prisbell, *'Death Penalty' A Relic of the Past*, THE WASHINGTON POST (Oct. 10, 2007), <http://wapo.st/15jhkqS> ("Since SMU received the punishment, 29 programs in various sports have been eligible for the death penalty . . . according to an NCAA database. All were spared. And because of the long-lasting effect on SMU, some observers familiar with NCAA investigations question whether the penalty ever will be imposed again.")

⁹⁹ Similar to USC, the NCAA sanctioned the University of Alabama in 2002 with two postseason bans and the loss of twenty-one scholarships over three years. See Lynn Zinser, *U.S.C. Sports Receive Harsh Penalties*, N.Y. TIMES (June 10, 2010), <http://nyti.ms/1FllsBh>. Alabama's coach, Dennis Franchione, was quoted as saying, "It's a three- to five-year process to get back to where you were [before such a penalty]." *Id.*

¹⁰⁰ *Aggravating Factors*, NCAA MANUAL, *supra* note 32, at art. 19.9.3(e). When handing down sanctions, the NCAA considers "failing to cooperate during an

The NCAA repeatedly penalizes the institutions for the actions of individuals, some of whom are outside the control of the institution, and its sanctions are harsher on institutions that do not come clean during the investigation. The NCAA's goal in imposing such punishment is deterrence, but, despite that goal, new NCAA scandals appear in the news on a routine basis.¹⁰¹ Deterrence does not appear to be doing its job. Perhaps it is time for the NCAA to impose a retributive punishment on the individual transgressors that has the added bonus of deterring others.

III. A PROPOSED REVISION OF THE ENFORCEMENT MODEL

To ensure that its sanctions affect the transgressors and not the innocents, the NCAA should propose another revision to its enforcement model—one that strengthens the revision enacted in 2013.¹⁰² This new revision would approach punishment from a mixed theory of deterrence and retribution. Sanctions would still deter future transgressors but would also be fair by determining who is responsible for the violation and punishing that person rather than any innocent individuals and/or schools. The NCAA should hit the malfeasant where it hurts the most with the least effect on the innocents.

A. Penalties Imposed on Coaches

If a head coach acts irresponsibly and causes an institution to receive NCAA sanctions, the institution should be able to demand remuneration from the coach at an amount proportional to the severity of the transgression. This remuneration could take the form of repayment of bonuses or endorsement monies or some other compensation the institution chooses. The remuneration should be reasonable and in relation to the transgression, such as

investigation or refusing to provide all relevant or requested information" an aggravating factor. *Id.*

¹⁰¹ See Samantha Kiesel, *NCAA Violations More Common Than Public Knows*, THE DAILY ILLINI (May 1, 2013, 12:00 AM), <http://bit.ly/1rkXIMO> ("The NCAA typically receives 3,500 to 4,000 secondary violations and 20 major violations cases annually.")

¹⁰² The author agrees with the changes made in 2013 but argues that the punishment does not always target the actual transgressor.

compensation paid during a time within which the transgressor committed the violation.

A significant number of current intercollegiate coaches' contracts include a clause requiring the coach to pay a percentage of his remaining salary if he terminates his employment to coach at another institution.¹⁰³ Several institutions also include a clause that requires the repayment of bonuses awarded to the coach if the NCAA imposes sanctions for a violation in the coach's program.¹⁰⁴ In fact, a clause in the University of Memphis's head coach contract states that the school can impose its repayment penalty on the coach up to two years after the termination of the coach's contract to cover any possibility that the NCAA will impose sanctions after the coach has departed the institution.¹⁰⁵

There are many schools, however, that would back down from demanding such a clause if the 'star coach' they are attempting to hire refused to agree to it. The NCAA could create a new bylaw, which states that a Division I coach is subject to a repayment penalty if he commits a transgression that harms his institution, regardless of whether the coach is still an employee of the institution when the NCAA imposes the sanctions.

B. Penalties Imposed on Student-Athletes

The current penalty structure imposes certain sanctions on student-athlete transgressors, including suspension, probation, or, if the athlete is not yet a student, termination of recruitment.¹⁰⁶ Many times, however, the NCAA's sanction does not affect the student-athlete because he or she has already left the school.

¹⁰³ See Richard T. Karcher, *The Coaching Carousel in Beg-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 47-48 (2009).

¹⁰⁴ See Erik Brady, Steve Berkowitz, & Jodi Upton, *Schools Seek Protection if Coach Breaks NCAA Rules*, USA TODAY (Nov. 20, 2012, 2:59 AM), <http://usat.ly/1vHJgzy>. The University of Memphis began using such a clause after the school was required to pay back revenue earned in Memphis's vacated 2008 tournament wins but could not require Coach John Calipari to pay back his bonus. See *id.* Rutgers University, University of Kansas, and Ohio State University also have included a repayment clause in their coaches' contracts. See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *Penalties*, NCAA MANUAL, *supra* note 32, at art. 19.9.8(a).

Some have argued that the NCAA should form an agreement with the professional sports leagues whereby the athlete's professional sports team would enforce a NCAA sanction on the athlete.¹⁰⁷ Such an argument is not practical inasmuch as the NCAA does not have any authority over the professional sports leagues. Also, the professional sports team would not have any incentive to punish a player, whom the team drafted and is paying a large salary to help win games, for an infraction that occurred while the player was on an intercollegiate team. Furthermore, an agreement with the professional sports leagues would not affect any student-athlete transgressor who has left the school but does not play for a professional sports team.

Instead, the NCAA should institute a policy of punishment for *any* student-athlete who violates the rules—including any who have left the institution before the NCAA determines the sanctions. The NCAA should require the student-athlete to pay back scholarship money received during his or her tenure at the institution. The percentage of time that the NCAA establishes that the student-athlete participated while ineligible could determine the percentage of scholarship money the student-athlete owes, with an option to increase the amount based on the severity of the transgression. The increased amount, however, should never exceed all scholarship dollars that the school gave the student-athlete.

The NCAA could add a repayment penalty clause to the Athletic Financial Aid Agreement¹⁰⁸ that each scholarship student-athlete signs when committing to an institution. Through the proposed clause, the student-athlete would certify that, as of the time of the signing, he or she has not committed any violations, and he or she will not commit any violations going forward.

¹⁰⁷ See Kane, *supra* note 28, at 145.

¹⁰⁸ The Athletic Financial Aid Agreement details the terms and conditions for receipt of the athletic scholarship. An example can be found at <http://www.athleticscholarships.net/wp-content/uploads/2013/01/Example-Athletic-Aid-Agreement.pdf>.

C. Penalties Imposed on Member Institutions

This proposed revision of the enforcement model would reduce the options for penalties on the institution to include just a few. Admittedly, the NCAA should hold the institution to the same standard as it currently holds the coaches under the 2013 enforcement model—the presumption of responsibility. An institution is responsible for initiating a compliance program and monitoring the sports programs for adherence to the regulations.

Upon investigation of an allegation, if the institution has satisfied the compliance and monitoring requirement, then the NCAA should limit any sanction it imposes on the institution to probation or public reprimand and censure. Should the NCAA find that the institution failed to establish a compliance department and monitor its programs or that the institution clearly violated a NCAA rule, it could expand its sanction to include severe financial penalties, the amount of which would be proportional to the severity of the transgression and any benefits received as a result of the transgression.

IV. THE JUSTIFICATION

A. The NCAA Should Punish Coaches for Their Transgressions

The NCAA's 2013 revised enforcement model was a step in the right direction for assigning responsibility—and potential blame—on the head coach. As this article's opening quote stated, if a student-athlete or someone on the coaching staff is violating a rule, the head coach is very likely to know about it—or at least suspect something. Of course, the head coach, like the institution, cannot control every single person around him, but, as long as he is training his staff and student-athletes and monitoring their actions, then the enforcement model's mitigating factors will reduce any blame placed on him.

If, however, the head coach fails to follow through on his supervising responsibility, then the NCAA will sanction him accordingly. The typical sanction in this situation is a suspension or show-cause order, which is retributive in that it affects the coach where it can hurt: his reputation and hiring potential. It is also a deterrent in that it might encourage other coaches to

establish an environment of compliance to avoid such a punishment.

But the head coach must also act responsibly as an individual. If he chooses to ignore or violate a rule, then the NCAA and/or institution should punish him. Since the coach's actions resulted in the sanctions, he should share in the consequences.

A repayment penalty would hit a coach where it hurts—through his pocketbook. Even a coach who commits a transgression and then leaves the institution to coach for a professional sports team would feel the repercussions of his actions. Such a penalty would also deter other coaches and encourage them to run a tighter ship—especially to pay more attention to the athletic program's environment and outsiders' access to any elite student-athletes.

B. The NCAA Should Punish Student-Athletes for Their Transgressions

The current sanctions of suspension, probation, and termination of recruitment can hurt a student-athlete who hopes to make a career in his or her sport because lack of playing time results in a lack of exposure to professional sports leagues. But if, as is often the case, the student-athlete has left the school before the NCAA imposes the sanctions, then the penalty does not affect him or her.

Repayment of a student-athlete's scholarship, however, would hit a student-athlete where it hurts—in his or her wallet. Therefore, a student-athlete who analyzes the risk versus the reward of his or her conduct will have more to consider on the risk side of the analysis. Knowing that money is at stake, and seeing other student-athlete transgressors required to pay back their scholarship money, should deter many other student-athletes from violating regulations.

C. The NCAA Should Impose Fair Sanctions on Member Institutions

Currently, the schools themselves receive sanctions for a majority of transgressions, whether committed by the institution

or an individual.¹⁰⁹ In addition, the sanction can be harsher if the institution does not divulge all information during the investigation. The current penalty options are postseason bans, loss of scholarships, financial penalties, recruiting restrictions, probation, public reprimand and censure, forfeiture of wins, and prohibition against television appearances.¹¹⁰

The NCAA should think twice about sanctioning institutions with postseason bans, loss of scholarships, recruiting restrictions, and restricted television appearances. Those penalties primarily hurt the individuals who were not involved in the violation and therefore should not be punished by it, such as the current and incoming student-athletes, innocent coaches, and fans.

For institutions that are following through with compliance and monitoring programs, probation or public reprimand and censure would serve as notice that, even though the school is doing its duty, it may need to fine-tune its compliance program or tighten its monitoring procedures. Anything harsher would be unfair, especially since the institution has done everything the NCAA requires of it.

Punishing institutions for the actions of individuals is a retroactive fix. The school would have difficulty implementing a program to avoid similar transgressions in the future because it has no control over those renegade transgressors.¹¹¹ The incentive to spend the money and resources on compliance and monitoring diminishes if the schools believe the punishment is the same regardless of their compliance measures.

¹⁰⁹ See, e.g., Hogan, *supra* note 20; *supra* note 89 and accompanying text; *Sanctions Levied Against Miami (Fla.)*, NCAA (Oct. 23, 2013, 4:11 PM), <http://www.ncaa.com/news/ncaa/article/2013-10-23/sanctions-levied-against-miami-fla> (university sanctioned for lack of control over a booster, coaches, student-athletes, and prospects); Rodger Sherman, *Oregon Football Learns NCAA Sanctions Fate: No Bowl Ban, Chip Kelly Penalized*, SBNATION (June 26, 2013, 10:28 AM), <http://www.sbnation.com/college-football/2013/6/26/4028244/oregon-football-ncaa-sanctions-penalties> (“After two years—and the departure of almost every person involved in the 2011 recruiting scandal—Oregon has finally learned the scope of its NCAA sanctions.”).

¹¹⁰ See *Penalties*, NCAA MANUAL, *supra* note 32, at art. 19.9; The financial penalties can include a fine, disgorgement of money earned from an athletic event, or reduced distribution from the NCAA. See *id.* at art. 19.9.5.2.

¹¹¹ See *supra* note 29.

If the NCAA sanctions the school due to the lack of a compliance program or monitoring, then probation would still serve as notice while a severe financial penalty would hit the school where it hurts. The financial penalty should be stiff enough to reflect the seriousness of the offense so that the school recognizes the consequences of not running a tight ship. Such a harsh penalty would also send a message to other schools.

D. NCAA Sanctions Should not Affect the Innocents

The enforcement model needs to consider the innocent individuals involved when the NCAA imposes sanctions. Currently, the NCAA allows its sanctions to have an impact on innocents as a means of deterring future violations.¹¹² But as discussed in Part IIB, *supra*, this form of deterrence has not succeeded. Instead, the NCAA should ensure that only the transgressors feel the repercussions of the sanctions.

The NCAA should allow current student-athletes to continue to play as they signed on. Although its sanctions may result in coaching personnel changes, the NCAA should neither deny these student-athletes the opportunity for postseason play nor force them to play on a team weakened by loss of scholarships. The same applies to the innocent coaches and incoming student-athletes. Additionally, the NCAA should allow the fans to enjoy watching their team play unencumbered by the consequences of the sins of just a few.

CONCLUSION

The NCAA currently imposes sanctions designed to deter others from behaving a certain way rather than focusing on punishing the actions of the actual transgressors. Punishments ought to be fair but should give people what they justly deserve. The transgressors deserve to feel the consequences of their actions, and the innocents deserve to continue in their sports programs without being punished for the actions of others.

If an individual or an institution commits a violation, then the NCAA has a valid reason to impose a punishment severe

¹¹² See *supra* note 66.

enough to ensure that the transgressor feels the consequences of his or its actions. But, if the NCAA cannot reach the transgressor with its sanctions, it should not punish the institution for the sake of punishing *someone*. The NCAA should have a consequence in place that actually reaches the transgressor.

This article proposes that the NCAA adjust its enforcement model to be retributive with the added benefit that such punishment will deter others. The article proposes that coaches and student-athletes receive financial sanctions for their violations and that institutions receive probation or public reprimand and censure and financial sanctions for their transgressions. Such punishment would hurt the transgressors, making them, and not the innocents remaining in the program, suffer the consequences of their actions.