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## Institutional Control and Corporate Governance

*Geoffrey Christopher Rapp* \*

When they write obituaries on the National Collegiate Athletics Association (NCAA), the demise of which would have been unthinkable a decade ago<sup>1</sup> but today seems increasingly plausible,<sup>2</sup> they may describe the beginning of the end of college sports<sup>3</sup> as we know it as having originated, like so many college sports stories, in State College, Pennsylvania. Jerry Sandusky, once heir apparent to college football's most heralded coach, is a soulless<sup>4</sup> pedophile now safely behind bars.<sup>5</sup> The conduct causing harm to his victims

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1. In 2001, the NCAA had a \$325 million revenue budget. Julia L. Higgs & John T. Reisch, *Testing NCAA Compliance at Southeastern State University: A Case Study*, 17 ISSUES IN ACCT. EDUC. 95, 95 (2002).

2. In a recent presentation, I described the "Four Horsemen of the NCAA's Apocalypse" as the Sandusky affair, unionization at Northwestern, antitrust and Name/Image/Likeness litigation, and the potential workers' compensation and/or tort exposure connected with traumatic brain injuries and concussions. For a discussion of some of these fundamental challenges to the NCAA, see Nicolas A. Novy, "The Emperor Has No Clothes": *The NCAA's Last Chance as the Middle Man in College Athletics*, 21 SPORTS L.J. 227 (2014).

3. As one author argued, "in the long run, the NCAA's model will eventually collapse." Scott Lemieux, *The NCAA's Business Model is About to Collapse—And That's a Good Thing*, GUARDIAN (Aug. 11, 2014, 6:45 AM), <http://www.theguardian.com/commentisfree/2014/aug/11/ncaa-business-model-court-ruling-obannon-case>.

4. Maureen Dowd commented that Joe Paterno sold his soul, but Jerry Sandusky was a man without a soul to sell. *JoePa Sold His Soul. As for Jerry Sandusky, He Didn't Have One to Sell*, PITT. POST-GAZETTE (July 23, 2012, 12:00 AM), <http://www.post-gazette.com/opinion/Op-Ed/2012/07/23/Maureen-Dowd-JoePa-sold-his-soul-As-for-Jerry-Sandusky-he-didn-t-have-one-to-sell/stories/201207230127>.

5. Jenna Johnson, *Jerry Sandusky Sentenced to 30 to 60 Years in Prison*, WASH. POST (Oct. 9, 2012), [http://www.washingtonpost.com/local/education/jerry-sandusky-sentenced-to-30-to-60-years-in-prison/2012/10/09/6d5ed134-1184-11e2-ba83-a7a396e6b2a7\\_story.html](http://www.washingtonpost.com/local/education/jerry-sandusky-sentenced-to-30-to-60-years-in-prison/2012/10/09/6d5ed134-1184-11e2-ba83-a7a396e6b2a7_story.html).

amounts to his greatest sin. But Sandusky may also be remembered as the first straw in a pile that broke the NCAA's back.

The Sandusky affair was shocking and, to the NCAA's leaders, especially disgusting.<sup>6</sup> It was something they wanted to move past—and quickly.<sup>7</sup> But it was also, in a sense, a “rope-a-dope.”<sup>8</sup> It lured the NCAA's top leaders into mounting a moral high horse, condemning Sandusky and his protectors, and acting without the usual process<sup>9</sup> to administer a punishment that seemed quick and decisive and that, the leaders no doubt hoped, would relegate the incident to the pages of history books.

But once the NCAA jumped onto the moralism podium, it found itself in a curious position.<sup>10</sup> If the NCAA could impose draconian sanctions on Penn State—even though there was considerable question even among NCAA staff<sup>11</sup> as to whether the institution violated NCAA rules—because of moral outrage associated with Sandusky's crimes, how could the NCAA also deny the fundamental immorality of its seeming exploitation of “amateur athletes”?<sup>12</sup> Forced to defend itself against antitrust litigation<sup>13</sup> and

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6. Michael Rosenberg, *NCAA Sanctions Against Penn State Reinforce Overemphasis on Winning*, SPORTS ILLUSTRATED (July 23, 2012), <http://www.si.com/more-sports/2012/07/23/penn-state-ncaa-sanctions-mark-emmert> (“Mark Emmert had enough. He could no longer stomach the disgusting, sickening idea of Penn State winning football games.”).

7. Geoffrey Rapp, *Opposing View: Penn State Deserved the ‘Death Penalty’*, USA TODAY (July 23, 2012, 8:24 PM), <http://usatoday30.usatoday.com/news/opinion/story/2012-07-23/NCAA-Penn-death-penalty/56444576/1> (“The NCAA's decision to act without a full investigation . . . means we might never learn the full extent of this story, which will hamper the healing process.”).

8. Douglas E. Abrams, *Sports in the Courts: The Role of Sports References in Judicial Opinions*, 17 VILL. SPORTS & ENT. L.J. 1, 38 n.201 (2010).

9. Rapp, *supra* note 7. Matt Mitten describes the NCAA's Executive Committee's actions as having “usurped the NCAA's customary disciplinary process.” Matthew J. Mitten, *The Penn State ‘Consent Decree’: The NCAA's Coercive Means Don't Justify Its Laudable Ends, but is There a Legal Remedy?*, 41 PEPP. L. REV. 321, 333 (2014).

10. As one author put it, “the whole process reeked of a desire by the NCAA to put itself on the right side of a moral issue to move the conversation, if only temporarily, away from its own moral failings.” Stephen A. Miller, *The NCAA Needs to Let Someone Else Enforce Its Rules*, ATLANTIC (Oct. 23, 2012), <http://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012>.

11. Joe Nocera, Opinion, *The N.C.A.A.'s Big Bluff*, N.Y. TIMES (Dec. 1, 2014), [http://www.nytimes.com/2014/12/02/opinion/joe-nocera-the-ncaas-bluff.html?\\_r=0](http://www.nytimes.com/2014/12/02/opinion/joe-nocera-the-ncaas-bluff.html?_r=0).

12. Nabeel Gadit, Note, *An End to the NCAA's Exploitation of Former Student-Athletes: How O'Bannon v. NCAA Highlights the Need for an Inalienable Reversionary Interest in the Right of Publicity for Former Student-Athletes*, 30 CARDOZO ART & ENT. L.J. 347, 351 (2012).

watching a growing push toward unionization by student athletes,<sup>14</sup> the NCAA had now accepted that moral arguments<sup>15</sup> were legitimate in what otherwise could have been defined as the “business” of college sports. Unfortunately for the NCAA, its moral position regarding athlete unionization and student-athlete pay was even more conspicuously defective than its legal one.<sup>16</sup> The use of morality to drive punishment in spite of a lack of clarity regarding authority in the Penn State matter also invited a skeptical view of the NCAA’s inaction in subsequent cases involving alleged sexual crimes by star athletes at big-time schools. If Penn State broke the rules and deserved punishment for not stopping Sandusky, could Florida State University be held responsible for its lackadaisical and dilatory response regarding the rape accusations against Jameis Winston?<sup>17</sup>

The Penn State scandal came to a curious end in January, 2015, when the NCAA agreed to restore previously vacated wins to the university in order to resolve a lawsuit that originated with the question of where the funds associated with a \$60 million financial penalty should be spent.<sup>18</sup> Although the NCAA asserted that the January 2015 developments confirmed its authority to act against Penn State, others viewed them as an act of “surrender” by the Association.<sup>19</sup>

In this paper, I step back to examine an as-yet unexplored aspect of the Sandusky affair. The NCAA’s quick and precipitous

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13. *O’ Bannon v. Nat’l Collegiate Athletic Ass’n*, Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190, at \*1 (N.D. Cal. Feb. 8, 2010).

14. See generally William B. Gould IV et al., *Full Court Press: Northwestern University, a New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1 (2014).

15. For a discussion of the moral arguments surrounding amateurism in athletics, see J. Patrick Dobel, *A Beleaguered Ideal: Defending NCAA Amateurism*, Mar. 23, 2012, <http://ssrn.com/abstract=2028182>.

16. Kemper C. Powell, *A Façade of Amateurism: An Examination of the NCAA Grant-in-Aid System Under the Sherman Act*, 20 SPORTS L.J. 241, 243 (2013).

17. See Complaint & Demand for Jury Trial at 4, *Doe v. Fla. State Univ. Bd. of Trs.*, No. 6:15-cv-00016-GAP-KRS (M.D. Fla. Jan. 7, 2015), [http://www.al.com/sports/index.ssf/2015/01/jameis\\_winstons\\_accuser\\_files.html](http://www.al.com/sports/index.ssf/2015/01/jameis_winstons_accuser_files.html) (alleging that “FSU did nothing to investigate Plaintiff’s report of rape while the FSU Athletics Department continued to keep the incident a secret”).

18. *NCAA Restores Penn State’s Wins Under Paterno*, INSIDE HIGHER ED (Jan. 19, 2015), <https://www.insidehighered.com/quicktakes/2015/01/19/ncaa-restores-penn-states-wins-under-paterno>.

19. *Id.*

sanction of Penn State<sup>20</sup>—without the usual time-consuming<sup>21</sup> (and perhaps feared-to-be-embarrassing) investigation—was grounded in the so-called Freeh Report, commissioned by the Penn State Board of Trustees.<sup>22</sup> Based on the Freeh Report, the NCAA concluded that Penn State’s reaction, or failure to react, to Sandusky’s crimes amounted to a lack of institutional control,<sup>23</sup> as required by the NCAA’s rules (“Articles 2.1 [and] 6.01.1 . . . of the NCAA Constitution”).<sup>24</sup>

For its part, the Freeh Report found that the Penn State Board of Trustees failed in its responsibilities to exert proper oversight.<sup>25</sup> To demonstrate this, the report quoted several Delaware decisions on the fiduciary obligations of for-profit company boards to engage in oversight as part of their duties to corporate shareholders.<sup>26</sup> What is striking about this reliance on Delaware fiduciary duty decisions is that an NCAA member institution’s obligations to exert institutional control are contractual in nature.<sup>27</sup> The NCAA is a voluntary association.<sup>28</sup> In consideration for participation and the benefits it is believed to offer to schools, colleges agree to abide by the NCAA’s

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20. Professor Mitten describes the sanctions imposed on Penn State as “unprecedented.” Mitten, *supra* note 9, at 321.

21. 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).

22. FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (2012) [hereinafter FREEH REPORT], [http://health-equity.pitt.edu/3956/1/REPORT\\_FINAL\\_071212.pdf](http://health-equity.pitt.edu/3956/1/REPORT_FINAL_071212.pdf).

23. See BINDING CONSENT DECREE IMPOSED BY THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND ACCEPTED BY THE PENNSYLVANIA STATE UNIVERSITY 2 (2012) [hereinafter CONSENT DECREE], <http://www.ncaa.com/content/penn-state-conclusions>. The NCAA actually went further, concluding that Penn State’s conduct was “an unprecedented failure of institutional integrity” that “far exceed[ed] a lack of institutional control.” *Id.* at 1, 4.

24. *Id.* at 2. See *infra* notes 76–78 and accompanying text.

25. FREEH REPORT, *supra* note 22, at 15.

26. *Id.* at 100.

27. *Miller v. NCAA*, 795 F. Supp. 1476, 1486 (D. Nev. 1992) (“[T]he record establishes that the NCAA and the . . . member institutions have a contractual relationship . . .”); Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws that Regulate them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 267 (2010).

28. *NCAA v. Lasege*, 53 S.W.3d 77, 82 (Ky. 2001).

rules, including those requiring “control” over athletics.<sup>29</sup> In essence, when imposing a sanction, the NCAA finds that an institution failed to adhere to its side of the bargain. Yet the Freeh Report turned to Delaware cases dealing with fiduciary obligations—which arise in the absence of formal contract—in order to understand the meaning of an institution’s contractual obligations as an NCAA member. Fiduciary law serves to fill gaps left when formal contracts either do not exist or where, due to transaction costs, contracts are incomplete because it would have been inefficient for the parties to develop them more fully.<sup>30</sup> Here, a contract existed. As such, the Freeh Report’s recourse to gap-filling rules to understand the meaning of an institution’s contractual commitments is odd.<sup>31</sup>

### I. INTRODUCTION

This paper explores the parallels and divergence between the Freeh Report on the Penn State child sex abuse scandal and a body of case law emerging out of Delaware since the mid-1990s. Its important contribution is to highlight the differences produced by governance regimes created by private associations (in the Sandusky case, by the NCAA) and those produced for corporations through the development of Delaware’s common law of corporate fiduciary duties. As the story I tell will reveal, Delaware’s approach involves vigorously contested litigation producing nuanced doctrine easily applied in practice. The NCAA’s private associational governance does not involve the same level of adversarialism, resulting in a less workable body of decisions.

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29. *Miller v. NCAA*, 10 F.3d 633, 636 (9th Cir. 1993) (“As a condition of membership, each institution is obligated to apply and enforce all NCAA legislation related to its own athletic programs.”).

30. Mariana Pargendler, *Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered*, 82 TUL. L. REV. 1315, 1318 (2008). While the NCAA’s legislative apparatus is hardly efficient, according to the conventional sense of the word, it does not on its face present an instance of bargain-impeding transaction costs. Rule changes can be implemented largely without creating obligations for member institutions to breach existing contracts. It may be that a true and frank consensus on appropriate institutional oversight would be difficult to spell out due to failed internal political processes at member institutions, but that does not constitute something that would ordinarily be considered a bargain-impeding transaction cost.

31. Fiduciary duties “are untailored defaults that strike the hypothetical bargain to decide what most parties would have wanted.” *Id.* at 1353. But where parties have struck a contract, as is the case in the relationship between schools and the NCAA, one would expect the transaction costs associated with greater specification of member obligations to be surmountable.

The basics of the Sandusky affair are probably known to all.<sup>32</sup> A football coach for decades at Penn State University, and at one time the heir apparent<sup>33</sup> to Joe Paterno, Sandusky committed heinous acts of child sex abuse starting in at least 1998 (and likely long before). Many of these acts were committed on Penn State's campus in university facilities. Even though some of the university employees witnessing the abuse came forward, the university took no action to stop Sandusky's crimes for almost two decades.

The Penn State Board of Trustees retained the law firm<sup>34</sup> of former FBI Director Louis Freeh to investigate the failure of university employees to take appropriate action in the Sandusky matter and to recommend changes to university policies and governance structures based on the Sandusky affair. The firm's report was published on July 12, 2012.<sup>35</sup>

In a sudden turn that surprised many observers,<sup>36</sup> the NCAA used the Freeh Report, rather than an independent compliance investigation, to strong-arm<sup>37</sup> the university into accepting a major punishment—tens of millions in fines, bowl bans, the vacating of wins and records, and scholarship reductions.<sup>38</sup>

The NCAA found sufficient evidence in the Freeh Report to conclude that the university lacked adequate institutional control over its athletic programs.<sup>39</sup> The Principle of Institutional Control and Responsibility—Article 2.1 of the NCAA Constitution—requires

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32. For a recap, see Zachary D. Crowe, *The NCAA "Death Penalty"—Death for Penn State or Death for Competition?*, 14 U. DEN. SPORTS & ENT. L.J. 79 (2013).

33. *Jerry Sandusky's Son Details Abuse*, ESPN (July 18, 2014), [http://espn.go.com/college-football/story/\\_/id/11230179/son-former-penn-state-assistant-jerry-sandusky-alleges-more-severe-abuse-originally-stated](http://espn.go.com/college-football/story/_/id/11230179/son-former-penn-state-assistant-jerry-sandusky-alleges-more-severe-abuse-originally-stated).

34. The firm is known as Freeh Sporkin and Sullivan, LLP. Among other notable partners in the firm is Judge Thomas Sporkin, a former chief of the SEC's enforcement division. See *Our People*, <http://www.freehsporkinsullivan.com/leaders?leader=10#leader>.

35. FREEH REPORT, *supra* note 22, at 1.

36. Andy Staples, *Justice in Penn State Case Should Come from Courts, Not NCAA*, SPORTS ILLUSTRATED (July 2, 2012), <http://www.si.com/more-sports/2012/07/02/penn-state-jerry-sandusky-ncaa>. Professor Mitten argues that Penn State's "egregious" conduct "arguably does not violate any then-existing NCAA rules, whose primary objectives are to maintain and promote academic integrity, amateurism, and competitive balance as well as the health, safety, and welfare of student-athletes." Mitten, *supra* note 9, at 334.

37. Christian Dennie, *Post-Penn State: Protecting Against Sexual Harassment and Misconduct in Athletics*, 75 TEX. B.J. 828, 828 (2012).

38. Crowe, *supra* note 32, at 80–81.

39. CONSENT DECREE, *supra* note 23, at 2.

a university to “control its intercollegiate athletics program in compliance with”<sup>40</sup> NCAA rules and regulations. Institutional control violations have been at the core of most recent major NCAA actions against universities.

While the Freeh Report was used to support a finding of lack of institutional control, its authors, interestingly, were not trained in NCAA compliance,<sup>41</sup> nor did they make the violation of NCAA rules part of their investigation.<sup>42</sup> Likely more experienced in corporate internal investigations than NCAA compliance, the Freeh Report drafters, perhaps unsurprisingly, turned for inspiration to Delaware fiduciary duty law in outlining the responsibility of Penn State’s board and leadership with regard to criminal activity by university employees and affiliated persons.<sup>43</sup>

Since the mid-1990s, Delaware law has seen a noticeable shift in the treatment of corporate boards accused of failure to monitor or to engage in proper oversight.<sup>44</sup> In the 1963 *Graham v. Allis-Chalmers* decision, the Delaware Supreme Court declined to impose an obligation on board members to engage in “corporate espionage.”<sup>45</sup> That decision was effectively overruled in 1996<sup>46</sup> by

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40. NCAA, 2013–14 NCAA DIVISION I MANUAL 3 (2013) [hereinafter NCAA MANUAL], <http://www.ncaapublications.com/productdownloads/D114.pdf>.

41. However, there was some interaction between Freeh’s team and NCAA staff during the course of the former’s investigation into Penn State. See Don Van Natta Jr., *Docs: NCAA, Freeh Worked Together*, ESPN (Nov. 12, 2014), [http://espn.go.com/espn/otl/story/\\_/id/11863293/court-documents-indicate-ncaa-freeh-investigators-worked-together-penn-state-nittany-lions-investigation](http://espn.go.com/espn/otl/story/_/id/11863293/court-documents-indicate-ncaa-freeh-investigators-worked-together-penn-state-nittany-lions-investigation).

42. Notably, the Freeh Report does not mention the words “institutional control.”

43. While it is not surprising that the Freeh Report’s attorney authors used cases recollected from their corporate law classes to define the scope of a board’s responsibility, it was perhaps a mistake for the NCAA to transplant the report’s finding of a lack of corporate-fiduciary-level oversight to the contract definition of institutional control. When parties to contracts agree on what their duties to one another are (as where the NCAA’s members have agreed to exert “control”), they rarely agree to “wide open, ‘litigation-breeder’ duties.” Scott FitzGibbon, *Fiduciary Relationships are not Contracts*, 82 MARQ. L. REV. 303, 321 (1999). Instead, they aim to draft “rules rather than principles.” *Id.*

44. Andrew D. Appleby & Matthew D. Montaigne, *Three’s Company: Stone v. Ritter and the Improper Characterization of Good Faith in the Fiduciary Duty “Triad”*, 62 ARK. L. REV. 431, 431 (2009) (describing debate regarding doctrinal issues).

45. 188 A.2d 125, 130 (Del. Ch. 1963).

46. *Caremark* represented “a departure from precedent” in its suggestion “that a director could face personal liability for . . . failure to take steps to assure the corporation’s compliance with the law.” H. Lowell Brown, *The Corporate Director’s Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1, 16 (2001).

Chancellor Allen in *In re Caremark Derivative Litigation*.<sup>47</sup> Although the chancellor found that the directors of Caremark did in fact have in place adequate information and reporting systems, he took the opportunity to sketch the proper structure of a fiduciary duty claim based on the failure to engage in oversight.<sup>48</sup> The Delaware Supreme Court accepted the *Caremark* theory a few years later in *Stone v. Ritter*.<sup>49</sup>

In its description of the failures of the Penn State board, the Freeh Report uses language that echoes the vision of board responsibility in *Caremark* and *Stone*. In fact, the report quotes both cases to show how the Penn State board failed in its duties to demand information about major risks to the university from the school's president.<sup>50</sup> The influence of *Caremark* on the Freeh Report is prominent.

A critical difference between the NCAA's treatment of "institutional control" and the Delaware courts' treatment of "corporate oversight" has to do with the manner in which they articulate obligations of the governed. NCAA compliance decisions relating to institutional control take one of two forms: the NCAA may find a lack of institutional control and impose punishment, or it may find that other NCAA rules were violated but that no institutional control violation occurred<sup>51</sup> (perhaps concluding that the institution violated only the lesser standard imposing an obligation to "monitor")<sup>52</sup>. In the cases where no institutional control failure occurred, the NCAA will not impose its more draconian sanctions<sup>53</sup> even though some rules were violated (and typically self-reported). There are essentially no instances in which the NCAA will issue an opinion where *no* rules were violated.<sup>54</sup> As a

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47. *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959, 969–70 (Del. Ch. 1996).

48. *Id.*

49. 911 A.2d 362, 365 (Del. 2006).

50. FREEH REPORT, *supra* note 22, at 15, 100.

51. *See, e.g.*, NCAA Committee on Infractions, *Drake University Infractions Report*, Oct. 24, 1990, [https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=91&publicTerms=\(%20institutional%20AND%20control\)](https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=91&publicTerms=(%20institutional%20AND%20control)).

52. NCAA MANUAL, *supra* note 40, at 312.

53. Typically, an institution would already have imposed some self-sanctions by this point, and the NCAA might accept as sufficient the institution's own self-sanction.

54. The NCAA's database of infractions decisions often contains nothing more than a summary entry for cases in which no major violations were found—with reference to the legislation at issue but no narrative description of why the committee found no violations.

result, the NCAA's published opinions focus on negatives—steps to avoiding violations. They do not focus on best practices in terms of institutional control.<sup>55</sup> Focusing on negatives may make sense where a set of rules provides a specific set of violations. For a more amorphous concept like institutional control, however, best practices might be more useful in crafting and designing compliance programs.

Compared to the NCAA's approach, Delaware case law (often in dicta<sup>56</sup> in cases finding no fiduciary breach for oversight failures)

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55. Professor Jo Potuto describes as an “unusual aspect” of the NCAA's practices that the Committee on Infractions, which resolves grievances, does not have the power to “render authoritative interpretations”; instead, that function rests with the NCAA's Board of Directors and Legislative Council. Potuto, *supra* note 27, at 274. Acknowledging that this is a “topsy-turvy” approach, she argues that it is nonetheless “integral to NCAA governance.” *Id.* She argues that this is so because most decisions in an athletic department are made not by a university employee reading and interpreting published infractions decisions, but instead by consulting with various NCAA committee staffers. Major violations are “by no means the bread and butter of the compliance job.” *Id.* While I find this argument for the practical benefits of devolved, non-adjudicative guidance persuasive regarding run-of-the mill rules compliance, when we turn to the question of what constitutes that most serious violation (lack of institutional control) the NCAA's structure does not facilitate clarity, since no university compliance officer is ever likely to call the NCAA and offer a description of years of violations and leadership failings and ask, “Is this an institutional control issue?” In other words, the NCAA's staff-driven interpretation process provides clarity on technical rule violations but a level of opacity not found in the Delaware decisions on corporate governance when it comes to the larger issue of institutional control.

Another advantage of adversarial decision-making is clarity. Each side presents an argument and the decision-maker crafts a solution to the disagreement. Administrative “interpretation” tends to be mired in bureaucrat-speak and, divorced from the facts of specific cases, lacks a tie to real-world scenarios. This reduces the value of administrative interpretations from a planning perspective. Moreover, the question of whether or not NCAA Infractions decisions have precedential value is one on which the NCAA itself is not entirely clear. The Committee on Infractions “cannot be strictly bound to decisions made years earlier.” NCAA Committee on Infractions, *Supplemental Report of Infractions Report No. 355—Boise State University*, Oct. 12, 2012, at 5, <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=appeal&seqnumber=126&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED>. D. The COI views its role as follows: “past cases do provide some guidance, but each case stands on its own.” NCAA Committee on Infractions, *University of Arkansas at Pine Bluff Public Infractions Report*, November 5, 2014, at 12–13, <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=850&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED>. Other times, the NCAA COI justifies its approach by reference to specific past practices: “In adhering to case precedent . . .” NCAA Committee on Infractions, *University of Alaska, Anchorage Public Infractions Report*, May 2, 2014, at 6, <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=840&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED>.

56. The fact that Delaware courts may offer a new clarification in dicta does not “seem to affect its importance as an addition to Delaware law.” Jill E. Fisch, *The Peculiar*

does something different. Delaware's judges have gone to great length to give readers a sense of what kinds of things one must *do* to avoid liability under the doctrines those judges have articulated. The resulting body of jurisprudence has provided direction and incentive for a rapid modernization of corporate reporting and compliance regimes.<sup>57</sup> Although the NCAA has issued various kinds of policy guidance relating to institutional control, its process of writing lengthy opinions only where violations are found leaves many questions unanswered. Perhaps most notably, the NCAA requires institutional control but does not provide much guidance for the proper reporting chains within universities.<sup>58</sup> For instance, Penn State is faulted in the Freeh Report for having its athletics compliance officer report via channels other than to an overall university compliance officer.<sup>59</sup> Is a centralized compliance regime now required to exercise proper institutional control? We have no clear guidance, even though providing such guidance would be relatively simple for the NCAA to do. By comparison, Delaware's post-*Caremark* jurisprudence has generated specific, tangible insights that corporations have put into place as part of their internal compliance regimes. For instance, *Caremark* has led corporations to adopt new processes for reporting violations (and sending them up the chain of command).<sup>60</sup> *Disney* led boards to adopt new practices utilized in negotiating executive compensation packages.

The relative lack of clarity in regard to the NCAA institutional control rule<sup>61</sup> arises in part because of the lack of scrutiny and in part because of a lack of a truly contested, adversarial enforcement process. Associational governance rules (and decisions) are

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*Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1080 (2000).

57. See *infra* Section V.B.

58. As a result, universities have "many different paths" for how athletics departments report to higher university officials, and, in practice, interaction may "depend[] very much upon personalities." JAMES J. DUDERSTADT, *INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE* 102-03 (2003). The lack of clarity in regard to best practices thus leaves governance of athletics to develop in an ad hoc, unpredictable way.

59. FREEH REPORT, *supra* note 22, at 139.

60. Dawn-Marie Driscoll et al., *Business Ethics and Compliance: What Management is Doing and Why*, 99 BUS. & SOC'Y REV. 35, 37 (1998), <http://onlinelibrary.wiley.com/doi/10.1111/0045-3609.00006/epdf>.

61. The institutional control rule is the most "frequently misunderstood" of the NCAA's rules. DUDERSTADT, *supra* note 58, at 231.

protected from scrutiny under the so-called law of voluntary associations—in essence, a principle of judicial abstention.<sup>62</sup> In the NCAA's case, further protection is provided by the apparent non-state-actor status of the Association,<sup>63</sup> which means courts do not scrutinize the NCAA from a “due process” perspective. Immune from scrutiny, the NCAA's processes also lack vigorously contested disputes: when institutions are accused of infractions, they tend to roll over and accept punishment (in the hope of avoiding a more draconian sanction).<sup>64</sup>

While board decisions on corporate governance are protected from judicial review, to a degree, by the business judgment rule<sup>65</sup> or state laws permitting the adoption of exculpatory provisions,<sup>66</sup> the fact is that shareholder fiduciary claims are vigorously litigated—on both sides. The result is a much clearer and cleaner vision about corporate governance than the one the NCAA has articulated about university institutional control over athletics. Moreover, the regular litigation of corporate governance disputes—and the rapid pace of Delaware resolution of those disputes—means that corporate governance rules can evolve and adapt over time.<sup>67</sup> *Caremark* itself was triggered by changing organizational sentencing guidelines from the federal government.<sup>68</sup> Today, the implications of *Caremark* may be affected<sup>69</sup> by statutes like Sarbanes-Oxley<sup>70</sup> and Dodd-Frank.<sup>71</sup> Delaware's process for making a common law of fiduciary oversight is equipped to incorporate those developments in a way that the

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62. See *infra* notes 347–48 and accompanying text.

63. See *infra* notes 336–41 and accompanying text.

64. See *infra* notes 313–17 and accompanying text.

65. See generally Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

66. See, e.g., DEL. G. CORP. L. § 102(b)(7).

67. See Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 493 (2012).

68. *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959, 968–69 (Del. Ch. 1996).

69. See Alec Orenstein, *A Modified Caremark Standard to Protect Shareholders of Financial Firms from Poor Risk Management*, 86 N.Y.U. L. REV. 766 (2011).

70. Sarbanes-Oxley Act of 2002 § 308, Pub. L. No. 107-204, 116 Stat. 745, 784 (codified as amended at 15 U.S.C. § 7246(a) (2006)).

71. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 12 U.S.C.A.) (West 2010).

NCAA's shielded, from-on-high method of outlining institutional control is not.<sup>72</sup>

The picture these disparities paint is of a very different outcome for a governance regime created by private associational rulemaking<sup>73</sup> versus governance rules that result from the evolution of the common law in fiduciary duty claims asserted in shareholder derivative lawsuits. The implications of this exploration are quite significant. Calls for the deregulation of corporations—such as calls to roll back Sarbanes-Oxley<sup>74</sup> or to reduce the reach of Dodd-Frank<sup>75</sup>—are based on a notion that corporations should be permitted to voluntarily decide what kinds of compliance regimes to embrace. But that would miss out on something important: the clarity and nuance generated by the current process of litigating shareholder derivative claims.

Obviously, some of the discussion in this article may prove outdated should the potential cracks in the NCAA that emerged in the summer of 2014—with “major” conferences breaking away from the legislative and compliance authority of the larger organization<sup>76</sup>—prove fatal. Even if the NCAA fades into separate components, those components are likely to have their own sets of rules. Because the compliance professional's voice is an increasingly powerful one within higher education-affiliated athletics, new mini-NCAA rules are most likely to be written by compliance officers and can be predicted to include *some* of the core features of existing NCAA regulations.<sup>77</sup>

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72. See *supra* notes 40–44.

73. There may be some settings in which private associational rulemaking offers advantages. See Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413, 420 (1997).

74. Cyrus Afshar & Paul Rose, *Capital Markets Competitiveness: A Survey of Recent Reports*, 2 ENTREPRENEURIAL BUS. L.J. 439, 452 (2007) (discussing calls to repeal Sarbanes-Oxley).

75. Arthur E. Wilmarth Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1319–20 (2013) (discussing industry efforts to repeal Dodd-Frank).

76. Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 8, 2014), [http://espn.go.com/college-sports/story/\\_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences](http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences).

77. For a discussion of the role of the NCAA compliance officer, see MARC EDELMAN & GEOFFREY CHRISTOPHER RAPP, CAREERS IN SPORTS LAW 73–84 (2014).

II. INSTITUTIONAL CONTROL BEFORE *PENN STATE*

Before the Sandusky affair, the NCAA had provided rules requiring its member institutions to exert control over their athletics programs, sought to clarify the requirement by issuing interpretive releases, and reported on its investigations into specific cases of rule violation. The result was, and still is, a governance regime that does not do enough to equip schools to comply.

A. *NCAA Rules and Sanctions*

The NCAA's rules<sup>78</sup> are not law, though they are perhaps most often written and read by lawyers. They are the rules of a private association, subject to judicial deference under the abstention principle sometimes referred to as “the law of voluntary associations” and free from constitutional review due to the Supreme Court's thirty-year-old decision in *NCAA v. Tarkanian*.<sup>79</sup> Some NCAA rules are technical and specific—for instance, the “initial-eligibility index” provided by Rule 14.3.1.1.2 which sets forth the minimum necessary standardized test scores for varying levels of high school GPA in order to be eligible to participate in college sports.<sup>80</sup>

Other rules, however, are written in more open-ended, “muddier” terms.<sup>81</sup> Such is the case with the “Principle of Institutional Control and Responsibility” (as it is referred to in Article 2) or “Principle of Institutional Control” (as it is referred to in Article 6). Article 2.1 provides:

*2.1.1 Responsibility for Control.* It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association.

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78. Though I refer, for the sake of shorthand, to “NCAA rules,” in fact there are several different rulebooks for varying levels of competition and other associated legislative documents and interpretations that are relevant.

79. 488 U.S. 179 (1988). Whether *Tarkanian* was good law at the time, or remains good law in light of *Brentwood Academy*, is open to debate. See *infra* notes 336–41 and accompanying text.

80. NCAA MANUAL, *supra* note 40, at 156.

81. The use of muddy terms in setting standards for conduct is also the subject of extensive scholarly commentary. See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

The institution's president or chancellor is responsible for the administration of all aspects of the athletics program.<sup>82</sup>

*2.1.2 Scope of Responsibility.* The institution's responsibility for the conduct of its intercollegiate athletics program includes responsibility for the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interests of the institution.<sup>83</sup>

Article 6 provides:

*6.01.1 Institutional Control.* The control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference(s), if any, of which it is a member. Administrative control or faculty control, or a combination of the two, shall constitute institutional control.<sup>84</sup>

The remaining portions of Article 6 lay out the responsibilities of particular athletics department components and higher education entities.<sup>85</sup>

The penalties for violating the institutional control rule can be severe.<sup>86</sup> A violation of this rule is perceived to be the “most damning” NCAA rule violation because “it represents a failure within the institution, rather than an act—although major and important—that may have been committed by a distant booster, renegade coach, or some other variety of ‘independent contractor’ who has little or no connection to the program.”<sup>87</sup> A lack of institutional control “sometimes suggests a climate of noncompliance or a lackadaisical approach to NCAA rules compliance—akin to a climate within a corporation where there was contempt for rules, negligent disregard of rules, or ignorance of rules due to a failure in rules education.”<sup>88</sup>

The institutional control rule is the subject of many “truisms and other ‘isms’,” including the notion that it is a “shared” or “campus-

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82. NCAA MANUAL, *supra* note 40, at 3.

83. *Id.*

84. *Id.* at 41.

85. *Id.* at 41–42.

86. Higgs & Reisch, *supra* note 1, at 96.

87. Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667, 671 (2003).

88. *Id.*

wide” responsibility.<sup>89</sup> While some suggest that the rules themselves are both “brief and easy to understand,”<sup>90</sup> in real world cases that level of clarity is hard to discern. Athletics compliance “does not lend itself to easy, clear, direct, and irrefutable answers.”<sup>91</sup>

In part, the lack of clarity in NCAA rules may arise from “fierce internal battles”<sup>92</sup> within the Association and at individual colleges and universities; in response, the NCAA avoids systemic questions and instead has “implemented wave after wave of rules and regulations governing the conduct of sports, resulting in a complex, hard to understand, unusable code of conduct.”<sup>93</sup>

### *B. Infractions Releases*

The NCAA released a short guide in 1998 (updated since) titled *Principles of Institutional Control*,<sup>94</sup> which appears to be an attempt to describe the substance of its institutional control rule.

The NCAA’s description of the critical elements of institutional control is poorly worded, besotted with the passive voice, and therefore confusing and difficult to understand. Although the first section title in the document provides that institutional control is to be defined in “common-sense terms,”<sup>95</sup> the manner in which the NCAA then defines it is hardly consonant with common sense.

To decide if there is a “lack” of institutional control, “it is necessary to ascertain what formal institutional policies and procedures were in place” and “whether those policies and procedures, if adequate, were being monitored and enforced.”<sup>96</sup> The examination would look to the policies in place to see if the school failed. However, to generate a more easily applicable list of best

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89. *Id.* at 672–73.

90. *Id.* at 704. Professor Potuto writes that “Institutional control requires institutions to self-police and then to self-report if violations are uncovered.” Potuto, *supra* note 27, at 283.

91. David A. Pierce et al., *Creating Synergy Between Athletics Compliance and Academic Programs: Students in the Compliance Office*, 5 J. CONTEMP. ATHLETICS 183, 184 (2011).

92. DUDERSTADT, *supra* note 58, at 7.

93. *Id.*

94. NCAA Committee on Infractions, *Principles of Institutional Control* (2012–2013), [http://grfx.cstv.com/photos/schools/ill/genrel/auto\\_pdf/2012-13/misc\\_non\\_event/institutional-control.pdf](http://grfx.cstv.com/photos/schools/ill/genrel/auto_pdf/2012-13/misc_non_event/institutional-control.pdf).

95. *Id.* at 1.

96. *Id.*

practices, the document could instead have described what it would mean to have proper institutional control. The institutional control rule imposes *positive* obligations, but the NCAA has missed an opportunity to describe what a school needs to do. The document defines the probative inquiry in the negative, rather than positive, sense—not telling us what schools *ought* to do to exercise institutional control but instead how to decide if they have *failed*. In essence, a lack of control could be shown, under the document’s articulation, by one of four deficiencies: (1) a lack of policies and procedures; (2) inadequacy of policies and procedures; (3) failure to monitor policies and procedures (or, as it probably should have said, failure to monitor conduct potentially violating policies and procedures);<sup>97</sup> or (4) failure to enforce policies and procedures.

The document then provides an unusually short paragraph on “violations” that would not constitute a lack of institutional control and then continues into a much longer and, again, negatively phrased list of “no-nos.”<sup>98</sup> It takes some effort to reason from what one is being told *not* to do to what one *should do*, and the initial portions of the document are not drafted in a positive, best practices sense.<sup>99</sup> Instead, the document is drafted as a list of worst practices.

For instance, the NCAA notes that a lack of institutional control would be suggested by the assignment of compliance duties to a person “who lacks sufficient authority to have the confidence or respect of others.”<sup>100</sup> To exhibit institutional control, then, schools would want to make sure that compliance duties reside in the hands of a person who *does* have that authority. But who *is* that? Must that person report outside of the athletics’ chain of command? Must the person have a direct reporting line to the university president or to the board of directors? Exactly what authority is “sufficient,” and why, precisely, does the “confidence” of others matter? Would not the ability to take action to deter or arrest rule violations be sufficient even if “others” lacked confidence? And, *who* are those others?

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97. The NCAA is not sanctioning schools for failing to update the policies themselves.

98. *Principles of Institutional Control*, *supra* note 94, at 1–2.

99. NCAA rules “do not suggest or mandate specific monitoring controls.” Brian D. Shannon, *Athletic Compliance at Texas Tech*, TECHSAN, Jan. 1, 2012, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2168934](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168934).

100. *Principles of Institutional Control*, *supra* note 94, at 1–2.

The document concludes with a section featuring a cumbersome heading, “COMPLIANCE MEASURES IN PLACE AT THE TIME OF VIOLATION AS A FACTOR IN DETERMINING WHETHER OR NOT THERE HAS BEEN A LACK OF INSTITUTIONAL CONTROL.”<sup>101</sup> Apparently “BEST PRACTICES” isn’t a clearer, cleaner approach. Ever coy, the NCAA states, “Institutions are eager to learn what measures can be taken to reduce the likelihood that in the event a violation does occur, it will result in a finding of a lack of institutional control.”<sup>102</sup> Of course they are! This would seem to be a wonderful opportunity to tell them what those measures are. Not so—instead, the document lists “some of the steps” that can be taken, but it also says institutions should not assume that taking these enumerated steps would be enough: “the presence of such measures are [sic] not a guarantee against” a finding of a lack of institutional control.<sup>103</sup> What would be more helpful here is an actual listing of the elements of a “best practices” oversight program, with examples of those elements being successfully applied.

The actual list of steps is then somewhat bizarre. First, the *document* says the “NCAA rules” must be readily available. Since there is no actual document or set of documents called “rules,” the statement is a bit opaque. Even if we presume athletes and coaches can make the inference about what the guide is referring to, with the panoply of manuals, documents, interpretive releases, etc. published by the NCAA, merely making those rules available is not a best practice when the rules themselves are presented in ways difficult to understand.<sup>104</sup> Second, the document advises that “appropriate forms” must be made available.<sup>105</sup> The measure of “appropriate” is left undefined, and the bureaucratic belief that forms can solve problems seems especially prominent here.

Rather than evaluate the defects of each of the measures on this list, consider one illustrative example. The tenth and final item states that “[t]he institution and its staff members have a long history of

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101. *Id.* at 4.

102. *Id.*

103. *Id.*

104. See Geoffrey Christopher Rapp, *The Brain of the College Athlete*, 8 DEPAUL J. OF SPORTS L. & CONTEMP. PROBS. 151, 154 (2012) (discussing how presentation of NCAA rules should be targeted to the way an audience is likely to process information).

105. *Principles of Institutional Control*, *supra* note 94, at 4.

self-detecting, self-reporting and self-investigating all potential violations.”<sup>106</sup> Evidently, the best way to demonstrate control over athletics is to have a history of having control over athletics.

This *Principles of Institutional Control* document offers essentially no guidance on key oversight questions, such as proper reporting chains and lines of communication. It offers no clarity on when an institution’s compliance defects rise from a failure to monitor to the more serious level of demonstrating a lack of institutional control.

### C. Infractions “Case” Law

The NCAA’s process for investigating and punishing rules violations has evolved by fits and starts, in large part due to public criticism of its handling of particular investigations.<sup>107</sup>

Most investigations are launched after institutions self-report violations to the NCAA—only rarely do investigations begin due to a whistleblower tip or referral from a government agency. After the NCAA either receives a referral from an institution or has some other basis to believe a violation occurred, it will issue a letter of preliminary inquiry to the member institution.<sup>108</sup> If initial exploration of an athletics scandal suggests a violation of the institutional control rule, the NCAA’s investigators will issue an official letter of inquiry.<sup>109</sup> This letter will encourage the institution to conduct its own internal investigation.<sup>110</sup>

At a prehearing conference, the NCAA staff members inform the institution of witnesses and evidence in the NCAA’s possession and consider any evidence the institution has developed through its internal investigation.<sup>111</sup>

There are essentially no published infractions reports in which “no violation” is found. “The result of the Infractions Committee’s

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106. *Id.* at 6.

107. Joshua J. Despain, Note, *From off the Bench: The Potential Role of the U.S. Department of Education in Reforming Due Process in the NCAA*, 100 IOWA L. REV. 1285, 1306–10 (2015) (discussing reform of the NCAA’s compliance process in the wake of the UNLV/*Tarkanian* investigation and follow-on litigation).

108. Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 494 (1995).

109. *Id.* at 495.

110. *Id.*

111. *Id.*

official investigation is always the finding of some violation of NCAA rules.”<sup>112</sup> The critical question is whether the Infractions Committee finds a violation of the “control” rule or only of some set of less significant rules.

Those decisions that are published provide the core of what might be deemed the infractions case law.<sup>113</sup> In spite of the availability of prior cases and interpretations, however, the NCAA investigates each case *de novo*, and this creates a “glaring problem” regarding inconsistent rule interpretation.<sup>114</sup> This is particularly the case with decisions on institutional control. Although it may be the most important rule violated by a college or university, institutional control is typically the *last* thing addressed in a public infractions report (PIR). No greater clarification is provided in the decisions of the NCAA’s Infractions Appeals Committee. Typical is one case reducing a finding of lack of institutional control to the lesser included offense of “failure to monitor,” in which the Infractions Appeals Committee offered only a “brief statement” and “little additional discussion.”<sup>115</sup>

The remainder of this subsection explores five case studies involving identified or potential institutional control issues from the five years preceding the Penn State scandal in the summer of 2012 (these cases cover the years 2007–2012). These case studies are offered in an attempt to gauge whether, in its case law, the NCAA has crafted clear direction on the meaning and import of institutional control.

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112. *Id.*

113. This kind of terminology, as my co-author Marc Edelman has argued, may improperly and undeservedly confer on the NCAA a governmental imprimatur, when in fact it is little more than a private cartel.

114. Connor J. Bush, Comment, *The Legal Shift of the NCAA’s “Big 5” Member Conferences to Independent Athletic Associations: Combining NFL and Conference Governance Principles to Maintain the Unique Product of College Athletics*, 16 U. DENV. SPORTS & ENT. L.J. 5, 39 (2014).

115. Glenn Wong et al., *The NCAA’s Infractions Appeals Committee: Recent Case History, Analysis, and the Beginning of a New Chapter*, 9 VA. SPORTS & ENT. L.J. 47, 60 (2009).

*1. Boise State University*

Boise State came under fire for practices regarding football, cross country, track and field, and tennis between 2005 and 2010.<sup>116</sup> The rules violated concerned “impermissible lodging, transportation and practice sessions.”<sup>117</sup> Additional problems involving impermissible financial aid awards, participation by ineligible athletes, cash payments, and unethical conduct were identified.<sup>118</sup>

Prior to enrolling in the university, a number of football players bunked with enrolled student-athletes without paying rent.<sup>119</sup> The housing was arranged by “assistant football coaches or football staff members” and allowed incoming student-athletes to participate in voluntary summer work-outs.<sup>120</sup> The university’s compliance office requested certain information from incoming student athletes but did not monitor their summer living arrangements.<sup>121</sup> Similarly, international student-athletes on the track and field, cross country, and tennis teams resided with current student athletes rent-free during a mandatory orientation session.<sup>122</sup> The university believed this was permitted given that it was allowed under NCAA rules to pay for housing during orientation sessions, but according to the NCAA, paying for housing is not the same as arranging rent-free off-campus housing.<sup>123</sup>

In its report on athletic violations at Boise State University, the NCAA did not address institutional control until page fifty-four, and even then, the discussion is somewhat perfunctory. The report reads, “The scope and nature of the violations set forth in this report demonstrated that the institution lacked institutional control.”<sup>124</sup>

Boise State’s failure to exercise control is supported primarily by the fact that its compliance regime failed to detect and avert

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116. NCAA COMMITTEE ON INFRACTIONS, BOISE STATE UNIVERSITY PUBLIC INFRACTIONS REPORT 1 (2011), <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=722&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED> [hereinafter BOISE STATE PIR].

117. *Id.*

118. *Id.*

119. *Id.* at 4.

120. *Id.* at 8.

121. *Id.* at 9.

122. *Id.* at 11–12.

123. *Id.*

124. *Id.* at 54.

violations of other NCAA rules regarding participation and recruiting. The NCAA states, “[F]ailures over an extended time period demonstrate that the system that the institution had in place was inadequate.”<sup>125</sup>

The system’s inadequacy, to the NCAA, is proven by the fact that rules were broken. There was an “on-going ineffectiveness . . . to detect and deter potential violations.”<sup>126</sup> This sort of language is repeated in a number of other published infractions reports.<sup>127</sup>

## 2. *Kean University*

Kean University is a Division III institution located in Union, New Jersey.<sup>128</sup> The NCAA’s investigation focused primarily on three kinds of “extra benefits” provided to women’s basketball players and a broader problem in the university’s administration of financial aid to athletes.<sup>129</sup> First, a special class was created to coincide with a basketball team trip to Spain.<sup>130</sup> Since only athletes could take the class, it constituted a prohibited extra benefit available only to student-athletes.<sup>131</sup> Second, the basketball team’s head coach provided cash to players during a Florida tournament, and—unsurprisingly, given the obvious nature of this violation—did not report doing so to any higher university officials.<sup>132</sup> Third, the coach intervened on behalf of a student whose grades had rendered her academically ineligible by contacting the university’s vice president for academic affairs, who altered an “F” grade to an “incomplete” so as to preserve the student’s eligibility for competition.<sup>133</sup>

125. *Id.* at 56.

126. *Id.* at 58.

127. *See, e.g.*, NCAA COMMITTEE ON INFRACTIONS, KEAN UNIVERSITY PUBLIC INFRACTIONS REPORT (2012), <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=809&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED> [hereinafter KEAN UNIVERSITY PIR]; NCAA COMMITTEE ON INFRACTIONS, CALIFORNIA STATE POLYTECHNIC UNIVERSITY, POMONA PUBLIC INFRACTIONS REPORT (2011), [https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=725&publicTerms=\(%20pomona\)](https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=725&publicTerms=(%20pomona)).

128. *Quick Facts*, KEAN ATHLETICS, <http://www.keanathletics.com/information/quick%20facts/index> (last visited Oct. 19, 2015).

129. KEAN UNIVERSITY PIR, *supra* note 1277, at 2.

130. *Id.*

131. *Id.* at 1.

132. *Id.*

133. *Id.* at 1–2.

In addition, for a four-year period, the university awarded financial aid to athletes more generously than it did to non-athletes and factored athletic performance into its financial aid considerations.<sup>134</sup>

When the NCAA's public infractions report turned to why these failures amounted to a lack of institutional control, however, the report becomes hazy. The failures were "consistent" and undermined "an atmosphere for rules compliance," according to the NCAA.<sup>135</sup> The cash payments did not raise institutional control concerns; however, the university's financial aid practices, the Spain course, and the grade change demonstrated "lack of control over its athletics program."<sup>136</sup>

The general criticism of the special course in Spain offered by the NCAA is that the coach sponsoring the course failed to work through "appropriate athletics personnel."<sup>137</sup>

Among the findings in the PIR was that the institution's vice president of academic affairs failed to consult with the athletic department before modifying a student-athlete's grade: "[T]he former vice president for academic affairs sought no input from athletics personnel before he unilaterally changed student-athlete 1's grade . . . . To take such an action without considering the possible NCAA rules ramifications constituted a lack of institutional control."<sup>138</sup> However, modifying a student grade seems squarely within a vice president for academic affairs' scope of responsibility—one could imagine the NCAA having problems with a decision *to* consult with athletics personnel under these circumstances because it might raise questions surrounding whether athletics influenced this inherently academic decision. That someone *outside* of the athletics department made a mistake concerning an athlete does not, on its face, reveal that the institution failed to *control* its athletics program. Moreover, although the university's formal grade-change policy was not followed, the NCAA found no indication that the vice president who initiated the change was aware of the connection between the failing grade and the athlete's continued eligibility.<sup>139</sup>

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134. *Id.* at 2.

135. *Id.*

136. *Id.*

137. *Id.* at 4.

138. *Id.* at 17.

139. *Id.* at 8–9.

With regard to financial aid, the university awarded non-athletic “Dorsey Scholarships” at a much higher rate to athletes than non-athletes.<sup>140</sup> By allowing the university to offer aid packages that didn’t count against athletics scholarships limits, the practice “bestowed a significant competitive advantage” upon the women’s basketball team.<sup>141</sup>

The challenging aspect of the Kean PIR is that, other than in regard to financial aid policies, the rule violations primarily involved one bad actor—a basketball coach—who failed to bring to the attention of other university personnel her unusual and rule-violating behavior. The report contains no specific discussion of process failings either at the university or athletics department levels which *allowed* that conduct to go undetected. Even a robust compliance regime will miss wrongdoing by lower-level employees. Kean had a coach who refused to “work within the ‘chain of command,’”<sup>142</sup> but the NCAA had no specific suggestion as to how to change the command structure to avoid this kind of problem in the future.

### 3. *The Ohio State University*

The Ohio State University (OSU) came under investigation after football players received free tattoos at a Columbus tattoo parlor in 2008.<sup>143</sup> Players traded memorabilia and autographs in exchange for “free ink.”<sup>144</sup> Former head coach Jim Tressel “became aware of these violations and decided not to report the violations to institutional officials,” which was a matter of “great concern” to the NCAA.<sup>145</sup>

Because the tattoo parlor owner was an outsider and not a “booster,” the freebies constituted “preferential treatment” of athletes rather than “extra benefits.”<sup>146</sup> Over the course of the investigation it was discovered that OSU boosters had also arranged

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140. *Id.* at 13.

141. *Id.* at 19.

142. *Id.* at 11.

143. NCAA COMMITTEE ON INFRACTIONS, OHIO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT (2011), <http://www.ncaa.com/content/ohio-state-public-reportv2> [hereinafter OSU PIR].

144. Geoffrey Christopher Rapp, *Tattoo Regrets and Extra Benefits: Does Free Ink Justify an NCAA Suspension of OSU’s Terrelle Pryor?*, J. NCAA COMPLIANCE, January-February 2011.

145. OSU PIR, *supra* note 143, at 1.

146. *Id.* at 1.

“no-show” summer jobs for student athletes—that is, jobs in which the athletes were paid for work they had not performed.<sup>147</sup>

No institutional control violation, however, was found. The NCAA lauded the institution’s educational efforts with student athletes regarding prohibitions on extra benefits and preferential treatment.<sup>148</sup> While the institution did not detect the violations in question, on other occasions it had warned students about selling memorabilia to individuals who might contact them online.<sup>149</sup>

The NCAA cited Ohio State for “failure to monitor” in connection with the no-show jobs.<sup>150</sup> Although the university distanced itself from certain boosters, it failed to take “any monitoring actions” even after it became aware of the boosters’ efforts to extend unpermitted generosity to student-athletes.<sup>151</sup>

However, the PIR contains *no discussion* of why these violations failed to rise to the level of a lack of institutional control. Distinguishing the OSU case from the Boise State case is difficult.<sup>152</sup> In both instances, a head coach had knowledge of rule violations, and violations occurred over a multi-year period. At a minimum, some discussion of why the NCAA felt institutional control was not the appropriate violation would have been illuminating.

#### 4. *University of North Carolina*

The University of North Carolina (UNC) came under investigation after a tutor committed academic fraud involving football players, writing significant portions of papers handed in by the students for academic credit.<sup>153</sup> That tutor, sports agents, and

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147. *Id.* at 10–11.

148. *Id.* at 5.

149. *Id.*

150. *Id.* at 15–16.

151. *Id.* at 16.

152. Adam Bittner, *Boise State Charged with “Lack of Institutional Control” Ohio State Totally Had*, BLACK SHOE DIARIES (May 4, 2011, 10:00 AM), <http://www.blackshoediaries.com/2011/5/4/2152871/boise-state-charged-with-lack-of-institutional-control-ohio-state>.

153. NCAA COMMITTEE ON INFRACTIONS, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL, PUBLIC INFRACTIONS REPORT 1 (2012), <http://chronicle.com/blogs/ticker/files/2012/03/UNC.pdf> [hereinafter UNC PIR].

“runners” also provided tens of thousands of dollars in benefits to student athletes.<sup>154</sup>

The NCAA found that the tutor engaged in unethical conduct, rendering the athletes ineligible for competition.<sup>155</sup> Impermissible benefits were provided by agents and “runners.”<sup>156</sup> The institution itself was cited for failing to monitor in connection with agent involvement with one student athlete,<sup>157</sup> but again, not for a failure to exercise institutional control regarding impermissible services provided by the tutor.

Distinguishing the academic improprieties at issue in the UNC case from those at issue in Kean University is difficult. In both cases, the fraud did not come to the attention of athletics personnel in a timely fashion. The NCAA evidently decided that the UNC “scandal was not an athletic one,”<sup>158</sup> but was forced to reopen its investigation several years later after a public outcry.

Some observers attributed the NCAA’s decision not to charge UNC with a failure to exercise institutional control to the university’s decision to hold players out of competition during the pendency of the investigation.<sup>159</sup> In other cases, the NCAA has identified a “proactive response” as a basis for reducing an institutional control violation to failure to monitor.<sup>160</sup> While this kind of “cooperative” behavior certainly has a place in determining the severity of punishment, it does not provide clarity on the underlying standard of institutional control. What a university does during an NCAA investigation doesn’t explain how serious its failings were prior to information coming to light regarding potential violations.

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154. *Id.* at 2.

155. *Id.* at 3.

156. *Id.* at 8–9.

157. *Id.* at 10.

158. Sarah Ganim, *NCAA Reopens ‘Paper Class’ Investigation at University of North Carolina*, CNN (July 2, 2014, 2:10 PM), <http://www.cnn.com/2014/06/30/us/university-of-north-carolina-paper-class/index.html>.

159. Brett Friedlander, *UNC Allegations Are Bad, but They Could Have Been Worse*, ACC INSIDER (June 21, 2011), <http://acc.blogs.starnewsonline.com/23165/unc-allegations-are-bad-but-they-could-have-been-worse/>.

160. Wong et al., *supra* note 115, at 60.

*5. The University of Southern California*

The University of Southern California (USC) was targeted after revelations emerged involving relationships between professional sports agents and former star football player Reggie Bush and former basketball player OJ Mayo.<sup>161</sup> The NCAA's Committee on Infractions was "troubled" by the "general campus environment," which involved "relatively little effective monitoring" of locker rooms and sidelines.<sup>162</sup> Violations included impermissible benefits provided to the athletes and their family members,<sup>163</sup> including cash payments<sup>164</sup> and travel expenses.<sup>165</sup>

In finding a lack of institutional control, the NCAA noted deficiencies concerning institutional "monitoring of" student athlete "automobile registration" and employment at "the office of a sports marketing agent."<sup>166</sup> The institution "failed to heed clear warning signs" regarding elite athletes in high profile sports.<sup>167</sup> Additionally, inadequate resources were dedicated to compliance.<sup>168</sup>

One interesting piece of the committee's decision is that it uses the phrase "monitoring" to describe a lack of control, when "monitoring" also has a meaning as the lesser offense of "failure to monitor." The decision perhaps clouds the question of what "control" means by defining its absence using language echoing the necessary showing for the lesser violation. Given the obvious similarity between the terms "monitoring" and "control," some greater clarification of the difference between these two levels of offense would be helpful.

The USC PIR offers some of the most useful instructive language available in NCAA Infractions Committee reports regarding the obligations imposed by institutional control, but by its terms is somewhat limited to the "special" case of super-star, likely-to-go-pro athletes. The committee opined that the "clandestine

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161. NCAA COMMITTEE ON INFRACTIONS, UNIVERSITY OF SOUTHERN CALIFORNIA PUBLIC INFRACTIONS REPORT 1 (2010), <http://i.usatoday.net/sports/college/2010-06-10-usc-ncaa-report.pdf> [hereinafter USC PIR].

162. *Id.* at 1.

163. *Id.* at 14–15.

164. *Id.* at 5.

165. *Id.* at 16, 31.

166. *Id.* at 46.

167. *Id.*

168. *Id.*

nature of intentional rules violations” requires institutions to put in place “well-conceived processes” to “assist in uncovering potential violations.”<sup>169</sup> The failure to monitor automobile possession and use is noted, although that, of course, was also a problem in the Ohio State case,<sup>170</sup> in which the university escaped a finding of a lack of institutional control.

Once USC became aware that Reggie Bush was employed by a “sports marketing agency,” the school had a “heightened obligation” to monitor that relationship given the tremendous risks of NCAA violations that such a relationship presented.<sup>171</sup> Various “red flags” should have triggered a more aggressive effort to monitor Bush and his relationships.<sup>172</sup>

#### *D. Conclusion*

Professor Potuto describes institutional control as follows:

Among other things, institutional control requires the following: that universities comply with NCAA rules; that they monitor their programs to ensure rules compliance; that they are vigilant in detecting potential violations; that they investigate any potential violations promptly and thoroughly; that they self-impose punitive and corrective measures upon finding a violation; that they report information regarding potential violations to NCAA enforcement staff; and that they cooperate with NCAA staff in any infractions investigation.<sup>173</sup>

It is in practice where things get complicated. Releases by the Infractions Committee, the “case law,” and the NCAA rules themselves leave important questions unanswered. Some of these questions are relatively simple, and they are ones that any university consciously seeking to design a compliance regime to avoid misconduct would want to have answered. Yet, because of the “roll over and play dead” approach universities take in the face of an

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169. *Id.* at 47.

170. OSU PIR, *supra* note 143, at 3. The Ohio State PIR contains no information on whether the university had in place a system to monitor student athlete vehicle transactions or registrations.

171. USC PIR, *supra* note 1611, at 47.

172. *Id.* at 47–49.

173. Josephine R. Potuto, *Academic Misconduct, Athletics Academic Support Services, and the NCAA*, 95 Ky. L.J. 447, 452 (2006).

NCAA investigation and the lack of helpful dicta in the NCAA's fact-specific public releases, no guidance from the Association has been offered on these questions.

For instance, it seems relatively obvious that an athletic program's audits should be submitted directly to the university's governing board,<sup>174</sup> *not* to the institution's president and certainly not to the athletic director. Yet even as late as 2004–2005, 80% of internal audits were directed to the athletic director, and a *smaller* share were directed to the university's boards than was the case in 1993.<sup>175</sup> The lack of clarity regarding best practices has allowed this back-slide in compliance regime evolution to occur.

### III. DELAWARE FIDUCIARY DUTY ON CORPORATE OVERSIGHT

Having considered the NCAA's approach to control, this Part now turns to the Delaware fiduciary duty of corporate oversight, which the Freeh Report authors found helpful in defining the parameters of NCAA member institutions' obligations to exert proper control.

Corporate governance is typically and traditionally the province of state, rather than federal, law.<sup>176</sup> However, one state matters more than any other for reasons that have been widely discussed in legal scholarship.<sup>177</sup> That state is Delaware.<sup>178</sup> Long the choice for incorporation of publicly held entities, Delaware is the forum in which shareholder fiduciary disputes are most vigorously litigated. This adversarialism has led Delaware courts to develop a nuanced body of law concerning the fiduciary duties of corporate directors, in which the duty of oversight has recently played a prominent role.

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174. Having the auditor submit her report to the athletic director or president "raises the question of the internal auditor's reporting independence. To enhance the independence of the internal audit function, these reports need to be distributed to those individuals (Boards/Trustees) that have an oversight responsibility." Michael D. Akers & Gregory Naples, *Internal Audit, Sarbanes-Oxley and Athletic Departments: An Examination and Recommendations for Reform*, 9 REV. OF BUS. INFO. SYS. 45, 51 (2005). A clear best practice in accounting is for the internal audit department to report directly to the board, *id.*; there is no similar clarity in the athletics context.

175. *Id.* at 51. The authors refer to this as "[u]nfortunate[]" and "particularly alarming." *Id.*

176. Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2497 (2005).

177. Wells M. Engledow, *Handicapping the Corporate Law Race*, 28 J. CORP. L. 143, 146–47 (2002).

178. *Id.*

*A. Graham v. Allis-Chalmers*

The classic case on corporate oversight from Delaware involved the Allis-Chalmers Corporation,<sup>179</sup> a manufacturer of electrical equipment.<sup>180</sup> After having been found to have engaged in conduct prohibited by the federal antitrust laws, the company entered two consent decrees in 1937 with the federal government to avoid sanction.<sup>181</sup> Years later, lower-level employees engaged in further price fixing and bid rigging.<sup>182</sup> The company's board, at the time, had not put in place any system to detect violations of antitrust law.<sup>183</sup> The violations were not detected; renewed federal action, including indictments of managers, followed.<sup>184</sup>

A shareholder suit was filed and subsequently rejected by the Delaware Supreme Court (the jurisdiction's highest court). The court wrote that "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists."<sup>185</sup> The court opined that the board simply could not be expected to "know personally all the company's employees"<sup>186</sup> and that the "very magnitude of the enterprise required them to confine their control to the broad policy decisions."<sup>187</sup>

*B. Caremark*

Thirty-three years after *Allis-Chalmers*, another Delaware court faced the issue of whether the failure to exercise oversight would amount to an actionable breach of a board's fiduciary duties. This time, the statutes violated by lower-level corporate employees were federal statutes prohibiting kickbacks in connection with government-funded healthcare programs.<sup>188</sup> Employees of pharmaceutical company Caremark had paid kickbacks, and a

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179. *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125 (Del. 1963).

180. *Id.* at 128.

181. *Id.* at 129.

182. *Id.* at 128.

183. *Id.*

184. *Id.*

185. *Id.* at 130.

186. *Id.*

187. *Id.*

188. Brown, *supra* note 46, at 16–18.

shareholder lawsuit sought damages for breach of fiduciary duty associated with “failing to adequately supervise” and take appropriate “corrective measures.”<sup>189</sup> A proposed settlement—involving relatively modest concessions by the defendant<sup>190</sup>—needed to be signed off on as fair by the Delaware courts. That, in turn, provided an opportunity to evaluate the underlying strength of the plaintiffs’ legal claims along with the appropriate legal standards for such suits.

Chancellor Allen of the Delaware Chancery Court was bound by the “no espionage” precedent of *Allis-Chalmers*. However, he ended up crafting a duty that appears to most observers to have deviated from that guiding precedent.<sup>191</sup> His “provocative”<sup>192</sup> opinion asks, “[W]hat is the board’s responsibility with respect to the organization and monitoring of the enterprise to assure that the corporation functions within the law to achieve its purposes?”<sup>193</sup> Board members, he answered, have an

obligation to be reasonably informed concerning the corporation . . . assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation’s compliance with law and its business performance.<sup>194</sup>

While straining to avoid explicitly disregarding the binding precedent of a higher court, he advised,

[I]t is important that the board exercise a good faith judgment that the corporation’s information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility.<sup>195</sup>

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189. *Id.* at 18–19.

190. *In re Caremark Int’l, Inc. Derivative Litig.*, 698 A.2d 959, 965–66 (Del. Ch. 1996).

191. Brown, *supra* note 46, at 14–16.

192. *Id.* at 24.

193. *In re Caremark Int’l*, 698 A.2d at 968–69.

194. *Id.* at 970.

195. *Id.*

In addition, the individual

director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.<sup>196</sup>

Prior to the Chancellor's decision in *Caremark*, "Delaware courts expected little board involvement in the day-to-day work of the corporation, looking to the board only in the case of fundamental or self-dealing transactions."<sup>197</sup> *Caremark* represents a shift and "gave more substance to the duty to monitor."<sup>198</sup> Taking the decision to its "logical extension," *Caremark* imposed upon boards the duty "both to establish and evaluate the adequacy of its internal control and information-reporting systems and to consider the legal and economic environment of the corporation."<sup>199</sup>

Even though it took a decade for the Delaware Supreme Court to validate the *Caremark* holding, savvy corporate lawyers responded promptly. They began to market a new array of services to help corporate boards detect and prevent organizational misconduct.<sup>200</sup>

### C. *Caremark's Progeny*

The Delaware Supreme Court adopted the *Caremark* holding in *Stone v. Ritter*.<sup>201</sup> The case arose after AmSouth bank employees broke federal money laundering regulations for accounts used in a Ponzi scheme.<sup>202</sup> The 2006 decision adopted *Caremark* as

articulat[ing] the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to

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196. *Id.*

197. Eric J. Pan, *A Board's Duty to Monitor*, 54 N.Y.L. SCH. L. REV. 717, 726 (2009/2010).

198. *Id.*

199. *Id.*

200. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 967 (2009).

201. 911 A.2d 362 (Del. 2006).

202. *Id.* at 365.

monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations.<sup>203</sup>

Now endorsed by Delaware's highest court, the *Caremark* decision has taken on "iconic status" and been cited "approvingly by courts in many other states."<sup>204</sup> *Caremark* represents perhaps the most important point in an "extensive judicial exploration" of the limits of statutory protection for directors of corporations.<sup>205</sup> In subsequent cases, mostly finding that plaintiffs failed to state proper *Caremark* claims, the Delaware courts have identified the kinds of failings that could lead to a conclusion of lack of proper oversight.<sup>206</sup>

This body of law culminated in the Delaware Supreme Court's decision in the nearly decade-long *Disney* litigation,<sup>207</sup> in which, in spite of alleged "ostrich-like"<sup>208</sup> neglect, Disney's board escaped liability for the company's ill-fated decision to hire former talent agent Michael Ovitz as its chief operating officer.<sup>209</sup> Although Disney's board avoided liability, the case generated important published decisions in multiple decisions generated along its way up to, and back up to, the Delaware Supreme Court.

#### D. Synthesis

Delaware's evolving law has had "tremendous influence over prevailing corporate governance practices."<sup>210</sup> Through their decisions, opinions, and commentaries, the state's judges have helped "develop and define norms and best practices that affect director behavior."<sup>211</sup>

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203. *Id.* at 370.

204. Mercer Bullard, *Caremark's Irrelevance*, 10 BERKELEY BUS. L.J. 15, 16 (2013).

205. Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the "New" Good Faith*, 56 AM. U. L. REV. 211, 216 (2006).

206. *See, e.g.*, Guttman v. Huang, 823 A.2d 492, 507 (Del. Ch. 2003).

207. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006); Duggin & Goldman, *supra* note 205, at 216.

208. *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 288 (Del. Ch. 2003).

209. *In re* Disney, 906 A.2d at 53–60.

210. Pan, *supra* note 197, at 740.

211. *Id.*

The fiduciary duty of corporate oversight developed by Delaware courts requires a board's information and reporting system to be reasonable and tailored to the firm's operational and regulatory context. The greater the risk of violations of applicable laws and regulations, the more onerous and intrusive an information and reporting system must be. The more a firm is on notice of red flags, the more its board should regularly review the quality of its information and reporting system.

At its foundation, *Caremark* stands for a well-known proposition in corporate cases surrounding the fiduciary duty of care: board members need to *ask questions*.<sup>212</sup> Even if they may not always come upon the right answer, board members have an obligation not to simply coast along assuming lower-level corporate employees, or even top executives, will behave in a manner consistent with sound business ethics and the protection of shareholder interests. *Caremark* is not really about the choices board members make. It is about what questions they, as a corporation's officers and employees, have about the risks of legal violations associated with different corporate practices. Compliance is in large part about asking the right questions and generating compliance information and reporting systems that help frame a topic so that the board can ask the right questions.

#### IV. PENN STATE SCANDAL

The previous Parts have described the NCAA's institutional control rule and the compliance process through which the meaning of that rule has been developed and applied, and then described the Delaware fiduciary duty rules that evolved through shareholder derivative lawsuits. The two sets of oversight obligations come to a meeting point in the Penn State Sandusky child abuse scandal, when the Freeh Report authors turn to Delaware fiduciary law to interpret an obligation emanating from the NCAA institutional control rule. After reviewing the events of the Penn State scandal and detailing the substance of the Freeh Report, this discussion will turn to

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212. See E. Norman Veasey, *Separate and Continuing Counsel for Independent Directors: An Idea Whose Time Has Not Come as a General Practice*, 59 BUS. LAW. 1413, 1417 (2004) ("Counsel should continually exhort the board to ask questions until the directors have a complete understanding of the matter to be decided and its ramifications.").

contrasting the duty of corporate oversight with the concept of institutional control.

*A. The Basics of the Scandal*

The events of the scandal are, as noted previously, known to all. Timelines of how they unfolded are available.<sup>213</sup> Jerry Sandusky played football at Penn State during the 1960s and joined the university's football coaching staff in 1969. At one point, he was the heir apparent to coaching legend Joe Paterno. Sandusky engaged in multiple acts of child abuse beginning at least as early as 1994, both on and off the Penn State campus. Penn State officials knew of the allegations against Sandusky by 1998 but did not report them as required by federal law.

*B. The Freeh Report*

The Penn State Board of Trustees commissioned the firm of former FBI Director Louis Freeh to investigate the role of university employees in failing to report and respond to Sandusky's abuse.<sup>214</sup> Freeh's firm was specifically asked to make recommendations on changes to university governance.<sup>215</sup> Investigators from the firm conducted 430 interviews and had access to "pertinent electronic data and documents."<sup>216</sup>

Though the facts motivating Penn State to launch an internal investigation were highly unusual, the tool of an internal investigation (conducted by outside counsel) has become a common one. The retention of outside counsel can help make the findings of an investigation "more credible,"<sup>217</sup> and the utilization of a law firm to conduct such an investigation can shield some aspects of the investigation "from involuntary disclosure to third parties."<sup>218</sup> Moreover, law firms like Freeh's "have developed an

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213. Bill Chappell, *Penn State Abuse Scandal: A Guide and Timeline*, NPR (NOV. 3, 2015, 4:27 PM), <http://www.npr.org/2011/11/08/142111804/penn-state-abuse-scandal-a-guide-and-timeline>.

214. FREEH REPORT, *supra* note 22, at 8.

215. *Id.*

216. *Id.* at 9.

217. Lucian E. Dervan, *International White Collar Crime and the Globalization of Internal Investigations*, 39 FORDHAM URB. L.J. 361, 367 (2011).

218. *Id.*

expertise in the process of internal investigation itself and the resources to do so, to include skilled staff, and document organization and production software.”<sup>219</sup>

### *1. Limitations*

In spite of its thoroughness, the Freeh Report is not without its limitations arising from the nature of the firm’s investigation.<sup>220</sup> Some of these limitations are as follows.

*a. No subpoena power.* First, because Freeh’s firm was retained by Penn State to conduct an external self-investigation, it did not have subpoena power in connection with the parties involved in the Sandusky affair.<sup>221</sup> Individuals providing information to Freeh’s investigators were not testifying under oath; they might have lied intentionally, and there is nothing that could be done to them criminally.<sup>222</sup> Of course, this criticism of the Freeh Report has strength only when the report is compared to judicial processes, since NCAA investigators and enforcement staff also lack subpoena power and “access to court-supervised discovery.”<sup>223</sup> This has, in the past, led NCAA investigators to be unable to obtain cooperation from individuals with knowledge relating to an athletics investigation.<sup>224</sup>

*b. Evidence pursued without regard to admissibility.* As an internal report, the Freeh Report was not drafted with the idea of developing evidence that could be introduced in a legal proceeding. As a result, considerations regarding the admissibility of evidence, such as the validity of uncorroborated hearsay or whether witnesses received appropriate *Miranda* warnings,<sup>225</sup> did not play a role in the authors’ efforts to unpack the Sandusky affair.

*c. Did not talk to key witnesses.* Notably, Freeh’s investigators did not interview whistleblower Mike McQueary,<sup>226</sup> Sandusky himself,<sup>227</sup> or other key parties involved in the affair, such as the university’s

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219. J. Justin Johnston, *Corporate Investigations After the Mortgage Meltdown*, 65 J. MO. B. 70, 73 (2009).

220. A lengthy critique of the Freeh Report can be found in the form of a counter report commissioned by the Paterno family. KING & SPALDING, *CRITIQUE OF THE FREEH REPORT: THE RUSH TO INJUSTICE REGARDING JOE PATERNO 6* (2013), [http://espn.go.com/pdf/2013/0210/espn\\_otl\\_FINAL%20KING&SPAULDING2.pdf](http://espn.go.com/pdf/2013/0210/espn_otl_FINAL%20KING&SPAULDING2.pdf).

head of public safety,<sup>228</sup> who would have had responsibility for reporting criminal activity on campus under the federal Clery Act.<sup>229</sup> In most cases, the decision not to speak to a particular witness was made in response to a request of the Pennsylvania State Attorney General's Office, which was responsible for pursuing criminal prosecutions in connection with the Sandusky affair.<sup>230</sup>

*d. Protections against disclosure.* The Freeh Report's authors were employed by a law firm and their work would have been shielded by rules restricting forced disclosure to the extent it was connected with anticipated litigation.<sup>231</sup> This means that interview notes and other "work product" might never be released and could not be compelled to be released in a legal proceeding.<sup>232</sup> The university waived privilege to release the report itself, but much of the background information may forever remain outside of the public's eye.

*e. Profit Motive.* Finally, some might wonder whether the Freeh Report should be viewed with suspicion since its authors were employed by Penn State. Perhaps the Freeh Report could not have

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221. *Id.* at 6–7.

222. Michael McCann, *Report Finds Paterno, PSU Leaders Concealed Sandusky Abuse*, SPORTS ILLUSTRATED (July 12, 2012), <http://www.si.com/more-sports/2012/07/12/freeh-report-penn-state-reaction>. Penn State employees who lied to investigators might, however, have been subject to disciplinary action by the university. Though that might favor truth-telling, it would do so far less effectively than the threat of a perjury or obstruction of justice charge.

223. Potuto, *supra* note 27, at 291.

224. Greg Heller, *Preparing for the Storm: The Representation of a University Accused of Violating NCAA Regulations*, 7 MARQ. SPORTS L.J. 295, 310 (1996).

225. Thomas R. Mulroy & Eric J. Muñoz, *The Internal Corporate Investigation*, 1 DEPAUL BUS. & COM. L.J. 49, 81–82 (2002) ("Fact-finding is a primary goal of any investigation, therefore an employee with relevant information is important to that effort. Thus, any corporate-type *Miranda* warning given to an employee must not be overstated, such that the employee refuses to offer any information.").

226. FREEH REPORT, *supra* note 22, at 12.

227. *Id.*

228. *Id.*

229. *Id.* at 34–35, 37.

230. *Id.* at 12.

231. Mulroy, *supra* note 225, at 71–72.

232. *Id.* at 72. In advising lawyers on how to conduct internal investigations, Mulroy and Muñoz advise that attorneys should "strive to include mental impressions, legal theories or potential strategies in all notes or memoranda of interviews with others, in order to afford those documents the extensive protection of opinion work product." *Id.* at 83–84.

come down either too weak or too hard on Penn State or it would have lost credibility or dissuaded other schools and companies from hiring the firm for internal investigations in the future.

Because of simple profit motives, Freeh's firm may thus have been destined to reach the kind of middle-ground conclusion about Penn State's responsibility that it did—to find serious fault and problems but to decline to attribute them to fundamental choices about, say, the proper allocation of resources between the university's academic and athletic enterprises. Saying there was no wrongdoing would not have gone far enough. Saying that Penn State should abolish its football program would have gone too far. Finding serious fault but blaming individuals more than systematic choices represents a middle-ground result. This kind of "middle ground" result of an independent investigation is not unique to the case of the Freeh Report.<sup>233</sup>

Had the firm recommended, for instance, the elimination of Penn State's football program, it would likely not have been hired by another university. Similarly, had the firm found no areas of concern, its report would not have deflected an NCAA infractions investigation, and again, the firm would not be hired for other similar projects in the future.

## *2. Basic governance findings*

Limitations notwithstanding, the Freeh Report gives thorough treatment to the governance mechanisms that were in place at Penn State before Sandusky's crimes became publicly known.

The Freeh Report tells a story not just of crimes by Sandusky himself, but also failures on the part of "[f]our of the most powerful people at The Pennsylvania State University" who "failed to protect against a child sexual predator harming children for over a decade."<sup>234</sup> These four were: its president, Graham Spanier; its senior

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233. Consider, for instance, another former FBI Director's report commissioned by the NFL to determine if the League had access to the graphic video of Ray Rice striking his then-girlfriend in an Atlantic City Casino. That report identified failings by the NFL but found no evidence the video had been received. This "middle ground" not only gave the report credibility but also let the NFL off the hook on the most serious charges. See ROBERT S. MUELLER III, REPORT TO THE NATIONAL FOOTBALL LEAGUE OF AN INDEPENDENT INVESTIGATION INTO THE RAY RICE INCIDENT (2015), <http://robertmuellerreport.com/muellerfinalreport.pdf>.

234. FREEH REPORT, *supra* note 22, at 14.

vice president, Gary Shultz; athletic director, Timothy Curley; and head football coach, Joe Paterno.<sup>235</sup> “These individuals . . . empowered Sandusky to attract potential victims.”<sup>236</sup> Motivated by a desire to “avoid the consequences of bad publicity,”<sup>237</sup> these “most powerful leaders at the University . . . repeatedly concealed critical facts relating to Sandusky’s child abuse from the authorities, the University’s Board of Trustees, the Penn State community, and the public at large.”<sup>238</sup>

Much of the report’s ire is directed toward Penn State’s former president.<sup>239</sup> “Spanier failed in his duties as President,” the report concludes, “[b]y not promptly and fully advising the Board of Trustees.”<sup>240</sup> But the failures went further—the university’s board “did not perform its oversight duties.”<sup>241</sup> Both Penn State’s senior leaders and its board members had their own role to play, and each group failed to fulfill its role. The report also identifies other circumstances at Penn State that contributed to the governance problems of the school, such as a cultural reverence for the football program that fostered an attitude of entitlement, payments to departing staff members that were unjustifiably high, and a general hesitance to ask questions when foul play was perceived.

*a. Senior leader duties.* From the Freeh Reports findings and recommendations, one can identify four duties as among those applicable to an organization’s senior leaders:

(1) Report information about major risks to the board. Senior leaders—most notably a college’s president but also its other senior administrative employees—should bring major risks to the attention of the board. To do so, such leaders must both investigate and probe potential risks and develop and support effective compliance systems to detect potential risks.

(2) Encourage discussion and dissent and welcome a diversity of opinions. Penn State had a president who “discouraged discussion

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235. *Id.*

236. *Id.* at 15.

237. *Id.* at 16, 131.

238. *Id.* at 16.

239. Spanier may have been an easy scapegoat given that he had left office by the time the report was published.

240. *Id.* at 15.

241. *Id.*

and dissent.”<sup>242</sup> Reinforcing the campus’s climate of hierarchy and dictatorship, there was very little turnover in the ranks of senior leaders at Penn State for a fifteen-year period. While stability offers some advantages, it also poses problems. Personal loyalty can come to dominate institutional obligations. Where the same tight-knit group that makes an initial decision to cover up or fail to report wrongdoing stays in place for too long, the desire or need to continue to keep secrets becomes even more intense.

(3) Share information. Penn State’s leaders operated under an “ingrained sense of secrecy” that was “hard to shed.”<sup>243</sup>

(4) Ensure the organization has structured its compliance function to ensure success. Penn State is faulted for having created “no centralized office, officer or committee to oversee institutional compliance with laws, regulations, policies and procedures.”<sup>244</sup> Instead, individual departments, including athletics, “monitored their own compliance issues with very limited resources.”<sup>245</sup> Leaders should have identified the need for improved structures and made the creation of those structures a priority recommendation to the board.

*b. Board duties.* From the Freeh Report’s findings and recommendations, we can also identify the major responsibility of the board of directors of a university:

(1) Demand and create systems to facilitate reporting of major risks. As to the board’s duties, they include, according to the Freeh Report, “oversee[ing] the President and senior University officials.”<sup>246</sup> The board must put in place an information and reporting system to ensure that senior leaders provide the board with information allowing it to exercise its governance role.

The role of a university board is “simple, at least in theory.”<sup>247</sup> The board is to be the “final authority for key policy decisions” and should “accept both financial and legal responsibility for the welfare

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242. *Id.* at 16.

243. Robert Steinbuch, *Four Easy Pieces to Balance Privacy and Accountability in Public Higher Education: A Response to Wrongdoing Ranging from Petty Corruption to the Sandusky and Penn State Tragedy*, 46 *LOY. L.A. L. REV.* 163, 167 (2012).

244. FREEH REPORT, *supra* note 22, at 31.

245. *Id.*

246. *Id.* at 15.

247. DUDERSTADT, *supra* note 58, at 97.

of the institution.”<sup>248</sup> In reality, however, the board’s ability to manage the details of athletics is limited: “[T]he level of understanding, experience, and accountability of most board members is rather limited and not well aligned with the needs of college sports.”<sup>249</sup>

Penn State’s board failed to fulfill the Freeh Report’s vision of its duties “by not inquiring about important University matters and by not creating an environment where senior University officials felt accountable.”<sup>250</sup> The board was identified by the Freeh Report “as one of the biggest culprits.”<sup>251</sup> The President of the American Council of Trustees and Alumni observed:

This really should be a clarion call to trustees across the country to ask questions, to demand answers, to insist that the president is responsible to them, not the other way around . . . . For too long, the boards have been viewed more as boosters than as legal fiduciaries. And where athletics are involved, I think there is an urgent question whether some institutions have lost touch with their purpose.<sup>252</sup>

To the extent the NCAA’s institutional control punishment of Penn State was due to the board’s failings, this may be the first time a governing board’s failures were the basis for an institutional control sanction. In part, the Freeh Report blames the board’s oversight failures for creating an environment in which top university executives failed in their roles: “Because the Board did not demand regular reporting of such risks, the President and senior University officials in this period did not bring major risks facing the University to the Board.”<sup>253</sup>

In describing its vision of the duties of the Penn State board—duties the board failed to fulfill—the Freeh Report cites two Delaware corporate law cases: *Caremark* and its confirmatory progeny, *Stone v. Ritter*.<sup>254</sup> The report provides:

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248. *Id.*

249. *Id.* at 106.

250. FREEH REPORT, *supra* note 22, at 15.

251. Brenda C. Liss, *Lessons from Penn State and Rutgers*, N.J. LAW., Dec. 2013, at 44.

252. Richard Pérez-Peña, *In Report, Failures Throughout Penn State*, N.Y. TIMES (July 12, 2012) (quoting Anne D. Neal), <http://www.nytimes.com/2012/07/13/sports/ncaafootball/in-freeh-report-on-sandusky-failures-throughout-penn-state.html>.

253. FREEH REPORT, *supra* note 22, at 97.

254. *Id.* at 100 & 158 nn.563–64.

A board can breach its duty when it “utterly fails to implement any reporting or information system or controls” or having implemented such system or controls “consciously fails to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.” The board breaches its duty not because a mistake occurs, but because the board fails to provide reasonable oversight in a “sustained or systematic” fashion.<sup>255</sup>

Against this measure of its duty, Penn State’s board “fail[ed] . . . to exercise its oversight functions . . . by not having regular reporting procedures or committee structures in place to ensure disclosure to the Board of major risks to the University.”<sup>256</sup>

The Freeh Report was not the first effort to draw a connection between corporate governance principles and regulation of intercollegiate athletics. For instance, Michael Akers and Gregory Naples, Marquette Business School professors, wrote a 2005 article suggesting that the Sarbanes-Oxley Act of 2002 and emerging financial reporting concepts designed “for publicly traded companies[] could be used by not-for-profit institutions such as colleges and universities.”<sup>257</sup> Two other authors constructed a fictional parable involving the NCAA adopting key mandates of the Dodd-Frank Act,<sup>258</sup> including a requirement that the relationship between board members and university athletics programs be disclosed.<sup>259</sup> Michigan’s former president explains that the NCAA institutional control rule “is a process, a system, and a set of values and expectations” that “is very similar to the system of audit controls governing a major corporation.”<sup>260</sup>

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255. *Id.* at 100 (quoting first *Stone v. Ritter*, 911 A.2d 362, 370 (Del. Ch. 2006); then quoting *In re Caremark Int’l, Inc. Derivative Litig.*, 698 A.2d 959, 970–71 (Del. Ch. 1996)).

256. *Id.* at 16.

257. Akers & Naples, *supra* note 174, at 45; *see also id.* at 52 (“[I]t might be more reasonably effective to take notice of some of the Sarbanes principles to demand that governing boards establish sufficient internal controls to more effectively manage intercollegiate athletics programs.”).

258. David F. Larcker & Brian Tayan, *The NCAA Adopts “Dodd-Frank”: A Fable*, STAN. CLOSER LOOK SERIES, Sept. 2011, <http://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-20-ncaa-adopts-dodd-frank.pdf>.

259. *Id.* at 1. Critics charge that “[u]niversity governing boards are all too often influenced by athletics boosters, sports media, or perhaps the personal interest and inappropriate involvement of some board members with intercollegiate athletics.” DUDERSTADT, *supra* note 58, at xi.

260. DUDERSTADT, *supra* note 58, at 231.

The Freeh Report offers failure-damning criticism of the university's board and the leaders who helped provide that board with information. To a large degree, the board's failings are no different from the failings of boards of other organizations—both for-profit corporations and non-profits—that have failed to detect and deter significant scandals and criminal misconduct.

*c. Institutional culture*

(1) Athletics vs. academics. The most damning dimension of the Freeh Report may very well be an indictment of big-time college athletics generally. The Freeh Report echoes complaints that have been offered by many individuals over the years regarding the role of athletics in American higher education—in particular, the place of football. One commentator stated that “[t]he culture of football in American universities is completely out of control.”<sup>261</sup>

The benefits of a robust and competitive athletics program are clear. Evidence suggests that universities are able to attract donations (and to broaden their donor pool) through operating successful athletics programs,<sup>262</sup> and universities obtain “great exposure” from the “publicity generated through television and media coverage” of college sports.<sup>263</sup> Recent data exploitation suggests that success in football and basketball “significantly increases” student applications to a particular school.<sup>264</sup> Student-athletes themselves benefit tremendously from intercollegiate participation, which provides an “important educational opportunity.”<sup>265</sup> Athletics can also “act as a unifying force for the university community and beyond.”<sup>266</sup>

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261. Steven Salzberg, *Get Football Out of Our Universities*, FORBES, Feb. 15, 2011, <http://www.forbes.com/sites/sciencebiz/2011/02/15/get-football-out-of-our-universities/>.

262. See Jeffrey L. Stinson & Dennis R. Howard, *Winning Does Matter: Patterns in Private Giving to Athletic and Academic Programs at NCAA Division I-AA and I-AAA Institutions*, 11 SPORT MGMT. REV. 1, 17–18 (2008).

263. Joel G. Maxcy, NCAA: Une Gouvernance Qui Maximise La Création De Valeur Économique [*The NCAA and University Sports in America: Governance to Maximize Economic Value*], 137 JURISPORT: THE REVUE JURIDIQUE ET ECONOMIQUE DU SPORT 42, 43 (2013) (Fr.), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2405242](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405242).

264. Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, 75 SO. ECON. J. 750, 750 (2009).

265. DUDERSTADT, *supra* note 58, at ix.

266. *Id.*

The question is not whether athletics has a place in higher education, or is of benefit to individual schools, but instead whether it is given its proper place. Critics continue to decry the prominence of athletics in educational institutions. Particular criticism is levied against the so-called “revenue sports” of men’s basketball and football: “They now threaten not only the academic welfare of their participants but the integrity and reputation of the very institutions that conduct them, our colleges and universities.”<sup>267</sup>

(2) Penn State’s failings. Penn State operated under “[a] culture of reverence for the football program that [was] ingrained at all levels of the campus community.”<sup>268</sup> The Freeh Report called for the university “to undertake a thorough and honest review of its culture.”<sup>269</sup>

Penn State, of course, is hardly unique in elevating the importance of athletics in its campus culture. The usual victims of sexual crimes “are not children but college students, usually young women.”<sup>270</sup> As one advocate put it, the “culture of entitlement for athletes on teams” is “a culture that doesn’t only exist at Penn State.”<sup>271</sup>

*d. Additional observations.* In this section, I offer a few additional thoughts on what went wrong at Penn State in connection with the Sandusky scandal.

(1) Fixation on soft landings and golden parachutes. In addition to the neglect of their duties of oversight and reporting and the culture of entitlement that pervaded their football program, Penn State’s leaders fixated on soft landings—providing golden parachutes to departing staff rather than making what might seem to be painful personnel decisions.<sup>272</sup> Sandusky retired one year after the first report of an incident of child abuse on campus. While the Freeh

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267. *Id.* at x.

268. FREEH REPORT, *supra* note 22, at 17.

269. *Id.* at 18.

270. Linda C. McClain, *Against Agnosticism: Why the Liberal State Isn’t Just One (Authority) Among the Many*, 93 B.U. L. REV. 1319, 1357 (2013).

271. *Id.*

272. It is hard to envision firing a child abuser to be painful, but it evidently was for Penn State’s leaders.

Report found no evidence that he retired *because* of the report,<sup>273</sup> the timing is highly suggestive of a connection.

Let's say, however, for the sake of argument, that Sandusky was retiring because he was told he would not succeed Paterno, and further suppose that *that* decision had nothing to do with reports of abuse. Even if these things were true, the circumstances of his retirement were highly unusual. He received an unheard-of \$168,000 lump-sum payment to "make[] him whole" for reduced retirement benefits due to the timing of his retirement.<sup>274</sup>

(2) Leaders failed to ask "why" in the face of unusual decisions. Moreover, Sandusky was awarded an emeritus rank even though he did not meet the stated requirements.<sup>275</sup> The provost approving that rank—Rodney Erickson, who took over as interim president after Spanier's downfall—admitted unease with the decision to award the rank.<sup>276</sup> "He told [a] staff member that he hoped that 'not too many others take that careful notice'" of the decision.<sup>277</sup> Yet Erickson—who emerged from the Penn State scandal relatively untarnished—failed to ask his boss, Spanier, *why* he was being asked to make such an unusual decision. Perhaps in private conversations Erickson did ask Spanier for an explanation, but there is nothing in the Freeh Report to make it clear that occurred.

Even after he retired, Sandusky continued to be the beneficiary of Penn State largesse. In 2001, the Board of Trustees approved a favorable land deal involving Sandusky's charity, Second Mile, selling a parcel of university-owned property to the charity for the same price the school had paid sometime prior.<sup>278</sup> This unusual deal—with the university apparently not getting market value for the property<sup>279</sup>—along with the unusual terms of Sandusky's retirement should have prompted questions, but they did not.(3) Two brutal facts of life for potential whistleblowers in small-town state universities. The question of why Sandusky was able to get away with his crimes, even as evidence presented itself to various athletics and university employees over the years, is one we may never be able to

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273. FREEH REPORT, *supra* note 22, at 59.

274. *Id.* at 58–59.

275. *Id.* at 60.

276. *Id.* at 61.

277. *Id.* at 61 (quoting Erickson).

278. *Id.* at 79.

279. *See id.*

answer.<sup>280</sup> But the reality is that, given his power and prominence in the university's cherished football program, Sandusky was a fearsome figure on whom to blow the whistle.<sup>281</sup> Whistleblowers in all settings face severe disincentives when considering raising concerns outside the chain of command,<sup>282</sup> including financial losses stemming from termination<sup>283</sup>, social ostracism,<sup>284</sup> psychological suffering<sup>285</sup>, "blacklisting" in an industry,<sup>286</sup> and even legal exposure.<sup>287</sup> But for employees at a state university in a small town, the downsides of whistleblowing are particularly pronounced.

In a setting like State College, Pennsylvania, there are simply no other viable employment options at similar salaries. To consider leaving the university if blowing the whistle should trigger retaliation, an employee would need to be willing to relocate to another geographic setting to have any chance of securing a comparable position. But since state employees are often the recipients of defined benefit pensions with "cliff" vesting,<sup>288</sup> the consequences of termination prior to acquiring eligibility for retirement benefits are severe. As a result, it is not surprising that various Sandusky whistleblowers either remained silent or were not persistent in their efforts.

### *C. NCAA Response and Aftermath: Legal Challenges Continue*

The NCAA acted promptly after the publication of the Freeh Report. It "coerced Penn State into accepting draconian institutional sanctions, including a \$60 million fine, a four-year ban on any postseason football games, a significant reduction of football

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280. Notably, two janitors separately witnessed incidents of abuse in 2000 and did not report it out of fear that "they would be fired for disclosing what they saw." *Id.* at 62.

281. Timothy L. Epstein, *NCAA May Use Bylaws to Manage Penn State and Syracuse Cases*, 158 CHI. DAILY L. BULL., Jan. 3, 2012, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2276975](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2276975).

282. Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 118 (2007).

283. *Id.* at 119–20.

284. *Id.* at 120–22.

285. *Id.* at 122–24.

286. *Id.* at 124–25.

287. *Id.* at 125–26.

288. See Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1513 (2004).

scholarships over a four-year period, and vacation of 112 football wins from 1998–2011.”<sup>289</sup>

Though the NCAA’s sanctions following the completion of the Freeh Report were intended to close the door on this messy scandal, they were hardly successful. A variety of legal disputes broke out in the months after Penn State accepted its punishment. For instance, Joe Paterno’s estate and family “filed a lawsuit in Pennsylvania state court against the NCAA . . . on May 30, 2013.”<sup>290</sup> But because “[n]one of the plaintiffs . . . [had] a direct contractual relationship with the NCAA,” they may have lacked standing to bring these claims.<sup>291</sup>

The Commonwealth of Pennsylvania brought an antitrust claim against the NCAA, which was dismissed by the federal district court.<sup>292</sup> Because the antitrust claims were “bootstrap[ped]”<sup>293</sup> on contractual and process-oriented claims,<sup>294</sup> they were doomed to failure. The lawsuit was widely perceived “to be a plainly political move for [Pennsylvania Governor Tom] Corbett,” under fire for his handling of the Sandusky investigation during his tenure as state attorney general.<sup>295</sup>

Former Penn State President Spanier sued the university “to obtain his old e-mails,” which “were being used in the investigation.”<sup>296</sup> Whistleblower Mike McQueary filed a defamation lawsuit against Penn State.<sup>297</sup> Penn State sued its insurance company for denying coverage of other Sandusky-related lawsuits.<sup>298</sup> The result, in short, was a “legal labyrinth.”<sup>299</sup>

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289. Mitten, *supra* note 9, at 322.

290. *Id.* at 338.

291. *Id.* at 339.

292. *Id.* at 341 (citing *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416 (M.D. Pa. 2013)).

293. *Id.* at 340.

294. The complaint essentially challenged the process leading to the Freeh Report, yet it attempted to frame its argument in the language of competition law.

295. Sarah J. Kropp, *Solving the Penn State Problem: Holding the Institution Accountable for Its Conspiracy of Silence*, 42 CAP. U. L. REV. 167, 192 (2014).

296. Steinbuch, *supra* note 243, at 167.

297. Lori Falce, *Sandusky Case Leads to Legal Labyrinth*, CTR. DAILY TIMES (Dec. 28, 2014), <http://www.centredaily.com/2014/12/28/4527715/sandusky-case-leads-to-legal-labyrinth.html>.

298. *Penn State Sues PMA Insurance over Alleged Breach of Contract*, INS. J. (Mar. 6, 2013), <http://www.insurancejournal.com/news/east/2013/03/06/283862.htm>.

299. Falce, *supra* note 297.

## V. CONTRASTING CORPORATE GOVERNANCE WITH INSTITUTIONAL CONTROL

Penn State's failings amounted to what the Freeh investigators analogized to a lack of proper monitoring and oversight of the organization's operations. While the NCAA concluded that its requirement that universities exercise institutional control was violated, the precise contours of institutional control remain murky when compared to the relative clarity offered by Delaware's law of fiduciary duties, upon which the Freeh investigators relied.

### *A. The Contested Nature of Fiduciary Litigation*

Delaware's fiduciary duty doctrine arises as the result of highly contested shareholder derivative lawsuits. In these cases, both sides are well represented<sup>300</sup> and present persuasive and cogent arguments. Courts produce opinions which directly engage the arguments advanced by each side. For instance, in the *Disney* shareholder litigation, litigants battled for almost ten years and the courts produced five published decisions—three by the Delaware Chancery Court and two by the state's Supreme Court.<sup>301</sup> Over time, Delaware has developed “an extensive body of common law addressing fiduciary duties imposed on managers.”<sup>302</sup> The fact that fiduciary duties are “often litigated” leads to the production of a “substantial body of case law that provides some reasonable degree of predictability, consistency, and clarity.”<sup>303</sup>

Even when a court sides with a defendant—or finds, as Chancellor Allen did in *Caremark*,<sup>304</sup> that there was insufficient evidence on record to find defendants had breached their duty—it may choose to articulate standards of liability that create new theories that plaintiffs can advance in future cases. The courts demonstrate “self-conscious attention to influencing the conduct of future transactions, independent of the case before the court,” and

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300. See, e.g., *In re Lucent Technologies, Inc., Sec. Litig.*, 327 F. Supp. 2d 426 (D.N.J. 2004).

301. Franklin A. Gevurtz, *Disney in a Comparative Light*, 55 AM. J. COMP. L. 453, 458 (2007).

302. Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 6 (2007).

303. *Id.* at 28.

304. *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959, 968–72 (Del. Ch. 1996).

thus “give[] special meaning to the phrase ‘mere dicta.’”<sup>305</sup> Their decisions provide “guidance on how to conduct future transactions” even when such guidance is offered as a “lecture” (dicta) rather than by deciding the outcome of the case one way or the other.<sup>306</sup>

More importantly, the evolving articulation of fiduciary duty standards in Delaware case law helps perform a “moral education” role, providing guidance and insight to corporate leaders regarding the scope of their obligations.<sup>307</sup> The “ready-made vocabulary” flowing from judicial decisions provides the tools for rejuvenated “moral discourse.”<sup>308</sup> The language used by the courts matters not just because it shapes “the advice that counsel provide to their clients”<sup>309</sup> but because “what people say influences what they do.”<sup>310</sup> The courts’ rhetorical choices

play an important role in constituting our moral and social worlds. . . . [T]he most distinguishing characteristic of fiduciary law is its operation as a system of moral education that promotes and reinforces trust and honesty in commercial transactions. The sermon-like style of fiduciary rhetoric captivates our moral consciousness and contributes to an understanding of fiduciary obligation in ways that reason alone cannot. . . . [F]iduciary rhetoric seeks to intrude into the psyches of fiduciaries to create feelings of guilt for violation of duty and feelings of honor for upholding the tradition. This language encourages readers to internalize the message, to change their ways of thinking and being.<sup>311</sup>

The language of fiduciary duty opinions creates a “legal lore that influences actors in a positive way.”<sup>312</sup> It “speaks to our better side to desire noble aspirations, while simultaneously reprimanding our other side by instilling fear of fiduciary breach.”<sup>313</sup>

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305. Ronald J. Gilson, *The Fine Art of Judging: William T. Allen*, 22 DEL. J. CORP. L. 914, 917 (1997).

306. *Id.* at 916.

307. Duggin & Goldman, *supra* note 205, at 271–72 (quoting Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1318–19 (2003)).

308. Lyman Johnson, *Reclaiming an Ethic of Corporate Responsibility*, 70 GEO. WASH. L. REV. 957, 965 (2002).

309. Duggin & Goldman, *supra* note 205, at 271.

310. *Id.*

311. O’Connor, *supra* note 307, at 1318–19.

312. Duggin & Goldman, *supra* note 205, at 271.

313. O’Connor, *supra* note 307, at 1319.

The language of these opinions, crafting robust and moralistic fiduciary obligations, including obligations to engage in monitoring and oversight, would not have arisen absent the contested battles between plaintiff shareholders and defendant boards. Vigorous litigation produces published decisions (even when reviewing proposed settlements<sup>314</sup>) that offer greater clarity on rules and standards.<sup>315</sup> Without plaintiffs and defendants willing to contest important aspects of the application of law to the facts of a case, as well as to contest the law itself, Delaware courts would not be able to “aggressively adopt and modify corporate law doctrine” and “exhibit[] a degree of activism that more closely resembles the legislative process.”<sup>316</sup> “The nature of the litigation process provides courts with information” that allows “tailoring of the legal structure to the particular factual context presented.”<sup>317</sup> Because the development of Delaware law is “litigant driven,” it allows parties to, in effect, “force the court” to evaluate the legality of a particular transaction or business practice.<sup>318</sup>

Some have gone so far as to describe Delaware’s corporate law as a kind of narrative—the courts’ fiduciary jurisprudence is a “set of parables or folktales of good and bad managers and directors, tales that collectively describe their normative role.”<sup>319</sup> Delaware judges “transmit[]” the “most important and dramatic tales” in a direct fashion, while other tales are “mediated by corporate lawyers who digest them.”<sup>320</sup> Shareholder litigation thus offers far “greater

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314. Interestingly, in the usual scholarly account of the benefits of adversarial litigation, settlements are criticized for undermining the ability of courts to clarify the law by offering an interpretation of its application to the facts of a particular case. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984). In shareholder derivative litigation, settlements must be approved by a court. Geoffrey Miller, *Political Structure and Corporate Governance: Some Points of Contrast Between the United States and England*, 1998 COLUM. BUS. L. REV. 51, 68. This consideration typically requires the court to assess the strength of the underlying claims advanced by the plaintiffs. Courts must evaluate the “risks of establishing liability”—how hard it will be for plaintiffs to win their case if a settlement is not reached—to determine whether the settlement falls within the range of reasonableness. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 814 (3d Cir. 1995).

315. Geoffrey Christopher Rapp, *Rewiring the DNA of Securities Fraud Litigation: Amgen’s Missed Opportunity*, 44 LOY. U. CHI. L.J. 1475, 1491 (2013).

316. Fisch, *supra* note 56, at 1080.

317. *Id.* at 1084.

318. *Id.* at 1089–90.

319. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1106 (1997).

320. *Id.*

benefits than the current skepticism recognizes.”<sup>321</sup> Despite a judge resolving only the case before her at a particular time and according to the facts it presents, Delaware opinions “yield reasonably determinate guidelines.”<sup>322</sup> These judgments are communicated to business leaders by their corporate counsel, and thus “play an important role in the evolution of (nonlegal) norms of conduct.”<sup>323</sup>

For instance, although the defendants prevailed and avoided liability in the *Disney* litigation, the various judicial decisions along the way directly stimulated corporations to “increasingly hire[] compensation experts” to review the hiring of senior leaders; post-*Disney*, compensation consultants have “become an established part of corporate best practices.”<sup>324</sup> What effectively amounted to dicta given the outcome of the case acquired tremendous “value” as a “written blueprint[] for board decision-making.”<sup>325</sup>

A more discrete benefit of litigated fiduciary duty doctrine manifests not in published decisions but in discovery conducted in connection with suits that may, more often than not, end in negotiated settlement. The very “threat of discovery and the episodic legal demands for detailed corporate internal information have induced incremental improvements in corporate governance practices, including more exacting decision procedures, internal monitoring, recordkeeping, and securities disclosure.”<sup>326</sup> Corporate “responses to the demands of litigation discovery contribute to the effectiveness of internal monitoring.”<sup>327</sup>

Delaware’s fiduciary duty case law is also remarkably resilient and flexible, capable of evolving over time to adjust to new concerns and realities. Delaware’s fiduciary law, whose “genius . . . arises from its adaptability,”<sup>328</sup> is “the quintessential application of

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321. *Id.*

322. *Id.* at 1017.

323. *Id.*

324. Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 96 (2011).

325. *Id.*

326. Erica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the “Genius of American Corporate Law”*, 63 EMORY L.J. 1383, 1395 (2014).

327. *Id.* at 1454.

328. Duggin & Goldman, *supra* note 205, at 270 n.372.

the common law process.”<sup>329</sup> As “business norms and mores change over time,” Delaware fiduciary concepts “acquire more defined content and doctrinal status over time as cases emerge addressing new business dynamics.”<sup>330</sup>

*B. The NCAA’s Lack of Adversarial Infractions Affects Decision-Making*

The NCAA investigation process differs fundamentally from the adversarial character of civil litigation.<sup>331</sup> With the possibility of severe sanctions, universities find themselves “facing down the barrel of a gun.”<sup>332</sup> The last major program to receive the so-called “death penalty” sanction—a ban on competition in a sport for a season or more—was Southern Methodist University in the 1980s, and the severity of the sanction left the program (if not the university) in ruins.<sup>333</sup> “[T]he mere threat of the ‘death penalty’ has yielded a chilling effect on member colleges’ independent decision-making.”<sup>334</sup> Schools can avoid the death penalty only through “vigorous cooperation,”<sup>335</sup> not through vigorous defense. According to one attorney with experience in NCAA enforcement, “Most institutions bow down without a whimper.”<sup>336</sup>

329. E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1413 (2005).

330. *Id.*

331. Marsh & Robbins, *supra* note 87, at 703.

332. *Alabama Girds for Battle with NCAA*, 3 LEG. ISS. COLLEGIATE ATHLETICS 1 (Mar. 2002).

333. Sean Sheridan, *Bite the Hand That Feeds: Holding Athletics Boosters Accountable for Violations of NCAA Bylaws*, 41 CAP. U. L. REV. 1065, 1068 (2013). The death penalty would also have a serious negative effect on “other members of the offending institution’s conference.” See DUDERSTADT, *supra* note 58, at 219.

334. Marc Edelman, *The NCAA’s “Death Penalty” Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise?*, 18 LEWIS & CLARK L. REV. 385, 419 (2014).

335. Tim Layden, *The Loneliest Losers*, SPORTS ILLUSTRATED (Nov. 18, 2002), <http://www.si.com/vault/2002/11/18/8116719/the-loneliest-losers-fifteen-years-ago-smus-powerhouse-football-program-was-obliterated-by-a-pay-for-play-scandal-and-the-ncaas-first-quotdeath-penaltyquot-since-then-20-other-college-programs—including-alabama-football-this-year—have-qualified-for-the-ultimate-sanction-but-all-have-been-spared-why-hasnt-the-ncaa-dropped-the-death-bomb-again-much-of-the-answer-lies-in-the-athletic-rubble-at-smu>.

336. DON YAEGER, *UNDUE PROCESS: THE NCAA’S INJUSTICE FOR ALL* 39 (1991).

The inability of schools to mount a vigorous defense when targeted is due not just to the severity of potential sanction but the uncertainty of the NCAA's investigative and enforcement process. Schools feel "vulnerable" in the face of the NCAA's "unfair and haphazard enforcement of the rules governing college athletics programs."<sup>337</sup> The NCAA's process has been called simply "appalling"<sup>338</sup> and its problems attributed to "structural deficiencies in the NCAA enforcement process."<sup>339</sup> "[I]nconsistency in results from one infractions case to another reduce[] the deterrent effect of penalties and the entire enforcement process."<sup>340</sup> Attorneys with experience in civil litigation find the entire NCAA process—with its emphasis on cooperation—to be foreign.<sup>341</sup> As Michigan's former president explains, "[N]either the language nor the enforcement of the rules [of the NCAA] . . . are subject to the long-established principles of jurisprudence that cover civil and criminal violations in our society."<sup>342</sup>

The Penn State case provides perhaps the clearest example of a university capitulating rather than adopting an adversarial position. William Devine asks, "What if the Penn State trustees had challenged the bylaws instead of acquiescing?"<sup>343</sup> After all, "an acceptable legal argument" existed regarding the "irrelevance" of NCAA rules to the unusual circumstances of the Sandusky sex abuse scandal.<sup>344</sup> "[S]omehow" the Penn State board members were persuaded to "submit to the Association's authority,"<sup>345</sup> even though, had they challenged the NCAA's position, the saga may have played out differently.

The nonadversarial approach taken by target universities permeates the entire NCAA compliance apparatus in higher

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337. Ray Yasser, *A Comprehensive Blueprint for the Reform of Intercollegiate Athletics*, 3 MARQ. SPORTS L.J. 123, 156 (1993).

338. *Id.*

339. Davis & Hairston, *supra* note 21, at 984.

340. *Id.* at 985.

341. See Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749, 759–60 (2007); YAEGER, *supra* note 336, at 164–65.

342. DUDERSTADT, *supra* note 58, at 220.

343. William Devine, *NCAA Magic Bylaws*, INST. ECON. RENAISSANCE (Feb. 1, 2013), <http://www.iene.us/comment.magic.html>.

344. *Id.*

345. *Id.*

education. Compliance personnel do not view an infractions investigation as an adversarial process, but instead as a “cooperative enterprise” governed by “NCAA rules initiatives and proceedings, which are in no way adversarial.”<sup>346</sup> Attempts by an institution to “spin” the facts of an investigation in a way that minimizes the likelihood of sanction “are setting up the institution and the CEO for a fall.”<sup>347</sup>

Institutions adopt a deferential approach because of the rewards for “cooperating” and the dangers of being found “uncooperative.” NCAA Rule 19.2.3 provides that “[a]ll representatives of member institutions have an affirmative obligation to cooperate fully with . . . the NCAA” and requires “full and complete disclosure of any relevant information.”<sup>348</sup> The representatives also “have an affirmative obligation to report instances of noncompliance to the Association in a timely manner and assist in developing full information to determine whether a possible violation has occurred and the details thereof.”<sup>349</sup>

When challenges are made, they tend to be on ancillary issues<sup>350</sup> (e.g., USC arguing about booster status rather than disputing the underlying allegations<sup>351</sup>). With regard to the core questions in an NCAA investigation, counsel is far more compliant. Consider, for instance, the way that Boise State’s outside attorney described that case in trying to argue that repeated violations associated with housing benefits for ineligible prospective students on a variety of teams did not amount to a lack of institutional control but were simply the “lesser” offense of failing to monitor: “You bring up an excellent point, and I don’t think the institution is shying away from saying this is absolutely without question not a lack of institutional

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346. Marsh & Robbins, *supra* note 87, at 703–04.

347. *Id.* at 704.

348. NCAA MANUAL, *supra* note 40, at 312.

349. *Id.*

350. That representatives of target institutions do not adopt an adversarial approach in a setting in which they lack the basic tools of a typical defense attorney is not meant to criticize such representatives. For instance, institutional representatives have no right in Committee on Infractions hearings to cross examine hostile witnesses, which is one of the basic tools of mounting a successful defense in a civil or criminal proceeding. Brian L. Porto, *Can the NCAA Enforcement Process Protect Children from Abuse in the Wake of the Sandusky Scandal?*, 22 WIDENER L.J. 555, 565–66 (2013).

351. USC PIR, *supra* note 161, at 40.

control case. I think that is close.”<sup>352</sup> This is from the “defense” lawyer, but it reflects a lack of willingness to directly engage the NCAA on the meaning and scope of its institutional control rule—an entirely rational reluctance, of course, because of the danger of appearing recalcitrant and thus inviting more severe sanctions.

The lack of a truly adversarial process is embedded in the NCAA’s rules and reinforced by the Association’s treatment in the courts. Courts apply a deferential law of voluntary associations approach to the NCAA,<sup>353</sup> meaning that there is relatively little pressure on the NCAA arising from a fear of second-guessing. Three concerns motivate courts to avoid judicial review of NCAA decisions:

- (1) individuals should have the freedom to choose their associations and their rules;
- (2) judicial review of private associations would impinge on the right to freedom of association;
- and (3) rules and regulations of private associations are often unclear and are better evaluated by the association rather than by the courts.<sup>354</sup>

Protected from subsequent scrutiny in the courts, the NCAA rarely goes beyond either finding a violation or *not* finding a violation. In addition, the NCAA rarely gives any account to alternative views on a particular scandal, and does not provide “dicta” to guide future decisions or publish dissenting opinions which would reveal diversity of position on whether particular misconduct violated the association’s rules.

Coupled with this principle of judicial deference is the evident constitutional reality that the NCAA is not a “state actor,” which has an obligation to afford its targets due process of law.<sup>355</sup> Private organizations are not subject to the due process provisions of the Fourteenth Amendment unless they are deemed state actors.<sup>356</sup> While

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352. BOISE STATE PIR, *supra* note 116, at 59.

353. Aaron Hernandez, *All Quiet on the Digital Front: The NCAA’s Wide Discretion in Regulating Social Media*, 15 TEX. REV. ENT. & SPORTS L. 53, 63 (2013).

354. Stephen F. Ross et al., *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J.C. & U.L. 79, 88 (2014) (calling for arbitration of NCAA eligibility decisions by an outside entity).

355. NCAA v. Tarkanian, 488 U.S. 179, 191, 195–99 (1988).

356. James Potter, Comment, *The NCAA as State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA. L. REV. 1269, 1271 (2007).

there may be some ambiguity on whether today's Supreme Court would continue to adhere to the *Tarkanian* notion<sup>357</sup> that the NCAA is not a state actor in light of its decision in *Brentwood Academy*,<sup>358</sup> the fact is the Supreme Court has yet to consider a case offering an opportunity to revisit this holding.<sup>359</sup>

Without an adversarial framework or the threat of litigation, the NCAA's rules enforcement mechanism is also lacking in discovery,<sup>360</sup> which may be as important as published judicial decisions in enforcing internal self-governance for corporations. Targets in NCAA investigations lack the ability to force those with knowledge to provide information.<sup>361</sup> We often never find out, in NCAA enforcement actions, who knew what, and when.

NCAA compliance is also missing a sufficient number of published decisions identifying best practices that could avoid findings of a lack of institutional control in the future.<sup>362</sup> The NCAA infractions process produces a list of "don'ts" but far less clear guideposts than Delaware fiduciary law as to the best courses of conduct for universities and their governing leaders. Without vigorously contested disputes producing published decisions that must be internally consistent and defensible, universities also lack the kind of moral terminology and ethical guidance that permeates fiduciary duty law. Universities lack the narrative and parable of Delaware law. Universities miss the "generation and promulgation of role-specific standards" that is "so critical," with the vaguely defined idea of institutional control representing at best a "kindergarten

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357. Some have argued that "the facts leading to [the *Tarkanian*] holding can be sufficiently distinguished to warrant another review of the NCAA's enforcement process requiring it to be held to the same constitutional scrutiny as the government." Nolan McCready, Note, *Former Student-Athletes' Property and Due Process Rights: The NCAA as State Actor in the Wake of the Penn State Sanctions*, 19 NEXUS: CHAP. J.L. & POL'Y 111, 113 (2013).

358. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001). In *Brentwood*, the Court found that a non-governmental association with membership consisting of many state entities but also private ones, could be a state actor as a result of entwinement. Under that theory, the NCAA might be deemed a state actor due to the involvement of public actors (state universities) in its governance.

359. Kadence A. Otto & Kristal S. Stippich, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEG. ASPECTS SPORT 243, 244-45 (2008).

360. See C. Peter Goplerud III, *NCAA Enforcement Process: A Call for Procedural Fairness*, 20 CAP. U. L. REV. 543, 551-52 (1991).

361. Broyles, *supra* note 108, at 513.

362. NCAA rulings are "untethered to any defined principle." Miller, *supra* note 10.

norm[.]”<sup>363</sup> The stories are not told in a way that becomes “part of the definition and description of the roles” that various university and athletics leaders are expected to play.<sup>364</sup>

Institutional control is principle-based regulation. But without an adversarial process at the enforcement stage, this principle lacks elucidation. The *Caremark* standard of corporate law is similarly principle-based, in that it avoids detailed prescriptions in favor of an ethical or moral approach to the fiduciary duty of care.<sup>365</sup> To be effective, such an approach depends upon the existence of an “interpretive community that collectively develops, on a rolling basis, the detailed content of statutory principles.”<sup>366</sup> Delaware’s judiciary and corporate counsel play that role through the adversarial structure associated with litigation and settlement of derivative claims. In the NCAA setting, there is no robust “interpretive community” to create detailed content.

Ultimately, what the NCAA infractions process may be missing is not guidance on the little things, but instead on the big picture. Because of the lack of true adversarial engagement on the meaning of “institutional control,” NCAA rules tend to operate in a vacuum divorced from moral imperative. The broad fiduciary concepts crafted in Delaware cases and then applied to particular facts are missing from NCAA “jurisprudence.” Compliance officers, unlike lawyers counseling corporations, are simply not equipped to offer advice in robust terms about affirmative responsibilities<sup>367</sup> to manage the well-being of the organizations their “clients” lead.

The lack of clarity in the meaning of the norm-like standard of institutional control is especially surprising given that universities’ obligations to act according to that standard are a product of contract.<sup>368</sup> Typically, courts would not “superimpose an overlay of common law fiduciary duties, or the judicial scrutiny associated with them, where the parties have not contracted for those governance

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363. Rock, *supra* note 319, at 1018–19 (internal quotation marks omitted).

364. *Id.* at 1019 (internal quotation marks omitted).

365. Chancellor Allen’s decision relied upon “moral suasion.” David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1855 n.177 (2001).

366. Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 458 (internal quotation marks omitted).

367. Johnson, *supra* note 308, at 966.

368. *See supra* notes 25–28 and accompanying text.

mechanisms in the documents forming their business entity.”<sup>369</sup> What is amazing is that schools have not demanded greater clarity of contract in regard to the meaning of this powerful NCAA rule.

### C. *Broader Implications*

The comparison of the NCAA’s approach to institutional control, ostensibly, according to the implication of the Freeh Report and the Penn State sanctions, consonant with corporate oversight duties under Delaware law, reveals critical failings associated with the NCAA’s approach to dispute resolution. Moreover, it offers broader lessons about the impact of different kinds of governance regimes and the best mechanisms for administering oversight and compliance systems to deter organizational misconduct.

#### *1. Deregulation and privatization of governance regimes can lead to a lack of clear-cut rules and standards*

The NCAA’s divergence from governance models widely tested and understood in the business world is empowered by the association’s lack of scrutiny in the courts, as well as the decisions it has made regarding how to handle disagreements among and between stakeholders. Unlike in the corporate setting, where shareholders are empowered to challenge fiduciary failings by corporate boards<sup>370</sup> and boards are empowered to mount enthusiastic defenses, in the NCAA process the association deprives stakeholders of the opportunity to advocate vigorously for their own positions.<sup>371</sup> In the NCAA enforcement process, there is no nimble, neutral arbiter<sup>372</sup> interested in the evolution of the standards governing

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369. Steele, *supra* note 30302, at 4.

370. See Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball*, 77 MINN. L. REV. 1339, 1340 & 1344 (1993) (explaining that shareholder suits are “remarkable” and “afford a truly extraordinary form of relief”).

371. See Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545, 570 (discussing how stakeholders have little right to participate in NCAA regulatory decisions).

372. See Broyles, *supra* note 108, at 517 (“The biggest problem with the NCAA’s enforcement program is the lack of an independent decision-making body.”).

organizations that can perform the role played by the Delaware judiciary in business disputes.<sup>373</sup>

One possible broader lesson that can be drawn has to do with the potential of private actors to construct governance regimes on their own. In response to a widening array of federal laws speaking to corporate governance issues, there has been a predictable call for a modified approach to regulating business and financial entities.<sup>374</sup> The notion that organizations can adopt “[s]elf-regulatory strategies” to achieve compliance has “taken hold in many areas of corporate regulation” and a “growing mass” of scholarly support.<sup>375</sup> Organizations can be trusted, it is argued, to manage themselves in ways that would redound to the benefit of shareholders. This “New Governance” school favors a move “toward problem-solving and away from either the punishment of perceived wrongs (corrective justice) and/or the enforcement of personal rights.”<sup>376</sup> Entities would be given “a fair amount of discretion to devise processes necessary to achieve . . . broad goals.”<sup>377</sup>

In fact, the NCAA’s failure to facilitate self-regulation in intercollegiate athletics compliance provides some evidence that organizational self-regulation is “ineffective at reducing organizational misconduct.”<sup>378</sup> And as this article has demonstrated, the NCAA has nearly complete freedom to structure its own rule enforcement, yet it has failed to do so in a way that gives clear guidance to member organizations on their oversight responsibilities.

## 2. Behavioral perspectives on wrongdoing and cover-ups

*a. Clearly established standards on oversight responsibilities are the best way to address the prospect of organizational misconduct.* In spite

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373. See generally Baer, *supra* note 200, at 974–75 (discussing how the lack of a “neutral, third-party arbiter that mediates the competing claims of two adversaries and their counsel” can cause “accountability problems” in the “regulation and implementation” of compliance regimes).

374. See John W. Cioffi, *State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research*, 48 AM. J. COMP. L. 501, 510 (2000).

375. Timothy P. Glynn, *Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations*, 32 BERKELEY J. EMP. & LAB. L. 279, 310 (2011).

376. Baer, *supra* note 200, at 1001.

377. *Id.* at 1002.

378. Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 596 (2005).

of perceived similarity between the NCAA's contractual imposition of an institutional control obligation on member schools and the Delaware fiduciary obligation on the part of corporate boards to exercise meaningful oversight, there are of course differences between the goals of NCAA compliance and corporate governance. The NCAA demands adherence to the principle of institutional control for instrumental reasons—to ensure that its other rules are respected. By comparison, fiduciary duties exist to protect shareholders from the agency costs arising from the separation of ownership and control.<sup>379</sup> Institutional control operates to deter rule violations, in particular when they provide a competitive advantage to a violating school, to help maintain a “level playing field” in intercollegiate athletics. The obligation to exercise oversight in the corporate setting operates to deter lower-level corporate actors from committing abuses that redound to the disadvantage of shareholders.

Yet there is a common target, as well. Both institutional control and corporate oversight seek to minimize the incidence and effects of misconduct within an organization. The NCAA's approach does a far less meaningful job than the corporate law's in creating clear and flexible standards that can enhance an organization's compliance activities.<sup>380</sup>

*b. Optimism-commitment whipsaw.* Another similarity between the Sandusky scandal and corporate oversight failings in the corporate world may be found in the behavioral factors that lead to compliance breakdowns. Professor Donald Langevoort coined the term “optimism-commitment whipsaw” to answer the question, “[W]hy would public companies ever deliberately lie to investors?”<sup>381</sup> He asserts that business fraud arises because managers become committed to an overly optimistic narrative after passing the point at

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379. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 66 (McMillan Company rev. ed. 1933).

380. See generally Michael Faure et al., *The Regulator's Dilemma: Caught Between the Need for Flexibility & the Demands of Foreseeability. Reassessing the Lex Certa Principle*, 24 ALB. L.J. SCI. & TECH. 283, 364 (2014) (“[L]egal certainty plays an important role in ensuring efficient regulation by enabling and incentivizing individuals to modify their behavior in compliance with the legal norm.”).

381. Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 106 (1997).

which project failure threatens careers, even though that point precedes the true realization of dangers associated with a product.<sup>382</sup>

Langevoort's explanation begins in the initial period in which a decision is made to launch a project—something that occurs in an atmosphere of extreme ambiguity.<sup>383</sup> Natural optimism leads to presentations to senior officials that are overly optimistic about the potential upside of a project and which downplay the project's risks.<sup>384</sup>

Once the project is underway, those closest to it, with the best access to information, try to preserve an aura of optimism to prevent the project from being cancelled.<sup>385</sup> “[R]isks are not reported at all, or they are communicated upward in a way that dulls [the message being transmitted].”<sup>386</sup> As more serious danger signs emerge, the project's managers become even more committed—at this point they are both emotionally and economically wedded to a project and its failure would threaten negative implications for their careers.<sup>387</sup> “At that point, an active cover-up might begin.”<sup>388</sup> Professor Langevoort explains, “The important point . . . is that the final awareness of the risk or harm occurs . . . after the point in time at which . . . the responsible actors are likely to be held accountable.”<sup>389</sup> Now committed to a rosy version, even if that does not match reality, business leaders lie.

The whipsaw provides an explanation of what happened at Penn State after initial indications suggested Sandusky had engaged in criminal activity. *Overoptimism* about Sandusky involved administrators who heard initial reports that he had been showering with children in the Penn State locker room as indicating that he was just weird, not an abuser.<sup>390</sup> Furthermore, administrators may have been optimistic about their own ability to

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382. *Id.* at 146–47.

383. *Id.* at 147.

384. *Id.*

385. *Id.* at 166.

386. *Id.*

387. *Id.* at 167.

388. *Id.*

389. *Id.*

390. “Pillars of the community are given much more of a benefit of the doubt.” See Patrick Hruby, *Could the Penn State Abuse Scandal Happen Somewhere Else? Definitely*, ATLANTIC (July 16, 2012), <http://www.theatlantic.com/entertainment/archive/2012/07/could-the-penn-state-abuse-scandal-happen-somewhere-else-definitely/259907/>.

keep these allegations secret. As time passed, and as it became clear that the optimistic view of Sandusky was wrong—that is, it became clear that he was an abuser—Penn State had reached the point where the senior leadership of the university would now suffer personal career harm if Sandusky’s conduct was to be made public. Their optimism proven off base, they were now committed to keeping the information confidential.

*c. Effective information systems and the whipsaw.* There is no simple solution to the optimism-commitment whipsaw, since it represents organizational failures that are rooted in basic human nature.<sup>391</sup> But information and reporting systems like those called for by Delaware’s fiduciary law represent the best hope. Implementing an “adequate reporting system[.]” makes it easier for directors to spot fraud at the early stages. Compliance systems bring information to the board rather than forcing the board to seek it out. Without compliance systems, the burden falls “on individual directors to inquire proactively,” whereas with compliance systems, “better information flows about both the company’s ongoing operations and new projects.” Both the business’s bottom line and fraud-avoidance are served by the free flow of information becoming “an institutionalized part of corporate decisionmaking.”<sup>392</sup> Information and reporting systems can also help “slow” the thinking of organizational leaders, allowing them to overcome biases and make better decisions.<sup>393</sup> At a minimum, an information system forces decision-makers to slow down long enough to acknowledge the presence of new information.

By adding clarity in regards to the board’s oversight obligations, Delaware courts have helped to foster an atmosphere that mitigates the whipsaw in practice.<sup>394</sup> A “highly indeterminate” standard is likely to have a less “direct impact on firm behavior than we would like to think.”<sup>395</sup> The NCAA’s institutional control

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391. Glynn, *supra* note 375, at 314 (noting “how difficult it is for firms to design and maintain genuinely effective compliance systems”).

392. Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 752–53 (2005).

393. Ann Morales Olazabal, *Behavioral Science and Scierter in Class Action Securities Fraud Litigation*, 44 LOY. U. CHI. L.J. 1423, 1445 (2013).

394. Paredes, *supra* note 392, at 754.

395. Langevoort, *supra* note 382, at 169 (italics omitted).

standard, without the elaboration provided by dicta or dissent, is one such indeterminate standard.

## VI. CONCLUSION

The Freeh Report's inclusion of corporate law principles in an analysis of higher education athletics administration provides an interesting opportunity to compare the respective systems of corporate oversight and college sports compliance. In that comparison, the NCAA's approach leads to less clarity in regard to the meanings of the obligations the association imposes upon its members. It is no surprise that no one knew if Penn State would even be the target of an NCAA investigation in connection with the Sandusky scandal, given the lack of clarity in regard to the NCAA's rules.

Fortunately, it is possible to view the Penn State scandal as a "one off," the kind of thing one may never have to see again—a perfect storm<sup>396</sup> of a powerful football program and a deviant criminal sheltered in its midst arose in State College, Pennsylvania. But while the precise circumstances of the scandal may never arise again,<sup>397</sup> the broader problems the Penn State story reveals for America's universities cannot be ignored.<sup>398</sup> While the NCAA's requirement of institutional control appears at face value to impose oversight responsibilities on university leaders, the process by which the NCAA investigates and adjudicates rule violations leaves much to be desired.

The key standards in the NCAA's rules at issue in the Penn State scandal—institutional control, as well as ethical conduct—are ones about which colleges and universities need greater clarity. An obvious first step would be for the NCAA, on its own, to modify its approach to rendering infractions decisions and offer more meaningful dicta and guidance. Where there is a finding of a failure to monitor but *not* a failure to exercise institutional control, the NCAA Committee

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396. Stephanie A. Shields, *The Perfect Storm: Power, Privilege, and Silence*, AM. PSYCHOL. ASS'N (Nov. 19, 2011), <http://www.apadivisions.org/division-35/news-events/news/2011/perfect-storm.aspx>.

397. *But see* Frederick E. Allen, *Why the Penn State Scandal Happened—and How to Keep Other Scandals from Happening*, FORBES (July 20, 2012, 11:07 AM), <http://www.forbes.com/sites/frederickallen/2012/07/20/why-the-penn-state-scandal-happened-and-how-to-keep-scandals-from-happening/>.

398. *Id.*

on Infractions should issue an explanation of why not. Explaining why, for instance, Ohio State's "tattoo-gate" scandal was not a violation of the institutional control rule would have helped other universities calibrate their own compliance and detection regimes. Relatedly, the NCAA could permit dissenting Infractions Committee members to file separate opinions that identified points on which they disagree—under current practices, NCAA written opinions "never reflect . . . differences" in view by committee members.<sup>399</sup> The current NCAA enforcement process simply "fails in recognizing and valuing the importance of dissenting opinions."<sup>400</sup> Although dissenting opinions may not affect the outcome of a particular case, their value arises from giving the public increased confidence in the organization's decision-making and facilitating reform should membership agree with a dissenting rather than dominant view.<sup>401</sup>

More aggressive reform could involve organizational changes rather than unilateral action. For instance, the actual decision-making process could be divorced from the NCAA itself and handed to a neutral party such as an arbitrator<sup>402</sup> or an independent tribunal.<sup>403</sup> The NCAA would no longer be both prosecutor and adjudicator, and some other entity would be created to determine when rules were violated.<sup>404</sup> Targeted universities would thus be free to mount more vigorous defenses and the decision-maker would produce careful, nuanced decisions that offered clarity schools could use to improve their internal oversight and compliance regimes. While this option has been considered by the NCAA in the past, it has not been embraced.<sup>405</sup>

Improvements in how information is marshaled regarding potential rule violations are also warranted. States could permit the NCAA or targeted institutions to "request subpoena power on a

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399. Gene A. Marsh, *A Call for Dissent and Further Independence in the NCAA Infractions Process*, 26 CARDOZO ARTS & ENT. L.J. 695, 711 (2009).

400. *Id.* at 713.

401. *Id.* at 715–16.

402. Ross et al., *supra* note 354, at 79 (calling for arbitration of NCAA eligibility decisions by an outside entity).

403. Broyles, *supra* note 108, at 565.

404. One author called for a "voluntary transfer of enforcement responsibilities to an outside organization." See Miller, *supra* note 10.

405. Robin J. Green, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99, 133 (1992).

case-by-case basis.”<sup>406</sup> The lack of subpoena power makes the NCAA’s enforcement program less effective than “compliance programs run by administrative agencies.”<sup>407</sup> In reality, the NCAA may be reluctant to request subpoena power out of a fear it would trigger additional legislative oversight of the association.<sup>408</sup>

At the end of the day, something needs to be done to free colleges and universities to defend themselves without fear of the massive financial repercussions of the “death penalty.” In corporate litigation, that role may be served by director and officer (“D & O”) insurance, which would be responsible for any financial losses<sup>409</sup> and may pay for and direct the defense of corporate directors targeted in a shareholder derivative suit.<sup>410</sup> The directors targeted in a fiduciary lawsuit are not playing with their own money and not, in many cases, even directing their own defense.<sup>411</sup> The insurer—with an institutional incentive to achieve clarity in legal standards even if it means risking loss in a particular case<sup>412</sup>—plays that role. Perhaps some parallel could be developed for NCAA compliance investigations—with schools paying insurers who would then cover a financial penalty lodged against a school based on violations. This would of course require a complete rethinking of NCAA sanctions, which currently target the institutions themselves and are primarily visited not on the wrongdoers, but on those who remain affiliated with a university after postseason competition bans and scholarship reductions are imposed.

Other authors have proposed replacing the NCAA’s current regime of sanctions with larger fines against violating institutions.<sup>413</sup>

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406. Broyles, *supra* note 108, at 565.

407. Marsh, *supra* note 399, at 697.

408. Josephine R. Potuto, *NCAA as State Actor Controversy: Much Ado About Nothing*, 23 MARQ. SPORTS L. REV. 1, 37 (2012).

409. “Liability insurers bankroll shareholder litigation in the United States.” See Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors’ and Officers’ Liability Insurance Market*, 74 U. CHI. L. REV. 487, 487 (2007).

410. Lawrence J. Trautman & Kara Altenbaumer-Price, *D & O Insurance: A Primer*, 1 AM. U. BUS. L. REV. 337, 351 (2012).

411. Even without an insurance policy providing a defense, the company itself will often provide that defense for its directors.

412. The insurer is an “obvious example” of a “repeat player.” HERBERT M. KRITZER, *THE JUSTICE BROKER* 71 (1990).

413. 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, 457 (2012).

Increased fines “would punish the institution for infractions while limiting the impact on current student-athletes because the punishment is directed towards the institution and its administration rather than at the specific athletics programs in which the current student athletes are involved.”<sup>414</sup> Large fines could deter future violations “because university administrators would push the athletics department to comply with the NCAA rules, and in turn the athletics department would push the coaches to comply with the NCAA rules.”<sup>415</sup> A move from scholarship reductions and post-season bans to larger fines would also create a potential market for “infractions insurance,” in which institutions could contract for insurance policies calibrated to their own particular level of risk.<sup>416</sup> It would also allow an insurer to play the role of zealous defense, helping to create a more robust adversarial “jurisprudence” in compliance that would provide far greater clarity on the meaning of key NCAA standards like institutional control.

Corporate America has been driven by changes in both federal and state law to adopt meaningful compliance regimes to ensure effective oversight of operations across a range of industry. Delaware’s adversary litigation-generated fiduciary jurisprudence has played an important role in driving that change. In intercollegiate athletics, schools know that violations of the NCAA’s rules are serious but haven’t been given the tools to develop effective compliance regimes. The NCAA bears much of the blame.

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414. *Id.*

415. *Id.*

416. For instance, institutions like USC with “unique” athletes likely to face temptations could obtain more robust insurance coverage.

