

ASSESSING THE NCAA AS A COMPLIANCE ORGANIZATION

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The National Collegiate Athletic Association is in essence a compliance organization. This is evidenced by the NCAA’s stated and functional mission—one supported by a considerable and growing administrative apparatus—that is aimed at ensuring its member schools abide by the Association’s rules. While a significant body of academic literature analyzes the NCAA and its bylaws, surprisingly none of these prior works evaluates the effectiveness of the NCAA as a compliance organization. This omission is glaring considering the past decade has seen a rich body of work emerge regarding the field of corporate governance and organizational compliance. And it is all the more surprising given the sustained and withering critiques of the NCAA centered on the Association’s inability to adequately and fairly police the integrity of college athletics.

This Article seeks to fill this conspicuous gap in the literature by analyzing the NCAA through the lens of corporate compliance. What it finds, after applying theories based in behavioral ethics, criminology, and procedural justice, is that the Association’s legislative and enforcement apparatus has become so overwrought, so “overcriminalized,” that it is eroding the legitimacy of the NCAA as a whole. Critically, this delegitimization not only decreases compliance effectiveness, but also fosters future wrongdoing by allowing players, coaches, staff, and third parties to rationalize rule-breaking behavior. In its misguided attempts to increase the integrity of college sports, the NCAA has damaged its own legitimacy, thereby creating conditions ripe for further rule violations. The origins, operation, and examples of this phenomenon are detailed, but so, too, are the implications for the NCAA, which must learn from corporate compliance if it is ever to effectuate its laudable, yet increasingly embattled, mission.

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INTRODUCTION

The United States’ first intercollegiate athletic competition was held in 1852, when two teams of rowers—one from Harvard and the other from Yale—met at Lake Winnepesaukee in New Hampshire.¹ Although no one could have predicted it at the time, that first contest foreshadowed several trends in intercollegiate athletics that remain in place up to the present day.

First, the race was heavily intertwined with commercial interests. Indeed, the regatta itself was coordinated by a railroad company to promote rail travel to Lake Winnepesaukee, with the competitors promised an all-expenses-paid, two-week vacation in exchange for participating in the race.² After the victorious Harvard rowers accepted their prize of a pair of silver-tipped oars, they thanked the organizers for providing such “sumptuous entertainment at the best of hotels.”³ Second, the competition was rife with cheating, as both teams allegedly employed non-student,

1. See Justin P. Sievert, *Coaching Changes and NCAA Transfer Rules: Is the Current System Leaving Athletes Abandoned?*, 9 WILLAMETTE SPORTS L.J. 49, 55–56 (2011) (“The first intercollegiate athletic contest took place in 1852 when crew teams from Harvard and Yale raced on Lake Winnepesaukee in New Hampshire.”); Christopher L. Tazzi, *To Tax, or Not to Tax, That Is the Question: Searching for a Solution to the Increasing Commercialization of Intercollegiate Athletics*, 38 J. COLL. & U.L. 381, 384 (2012) (“[T]he birth of American intercollegiate athletics [occurred] when on August 3, 1852, the crew teams of Harvard and Yale raced on Lake Winnepesaukee in New Hampshire.”).

2. See Richard Johnson, *Even the First College Sporting Event in the United States Involved Cheating*, SB NATION (Feb. 24, 2018, 8:28 AM), <https://www.sbnation.com/college-basketball/2018/2/24/17042498/first-ncaa-college-sporting-event-cheating> [<https://perma.cc/ES7C-Y98C>] (quoting Robert C. Kennedy, *On This Day*, N.Y. TIMES (2001), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/harp/0309.html> [<https://perma.cc/CVS4-BACK>]).

3. Thomas C. Mendenhall, *The First Boat Race*, YALE ALUMNI MAG. (Mar. 1993).

professional rowers in an attempt to secure a leg-up on the other squad.⁴ A water-soaked board even found its way into the path of the leading boat and slowed it down for a moment,⁵ an obstacle that may have been placed there by one of the many spectators wagering heavily on the competition.⁶

While there was no entity in place to ensure that Harvard and Yale competed on a level playing field in 1852, today the duty of regulating college sports falls upon the National Collegiate Athletics Association. The NCAA, a voluntary association made up of approximately 1,100 member universities and colleges, is charged with safeguarding collegiate sporting competition and ensuring the integrity of the student-athlete experience.⁷ Had the NCAA operated in the manner it does now, it would have been quite busy after the Harvard-Yale race.⁸ The Association would have been called upon to investigate a whole host of potential rule violations, everything from whether the student rowers had forfeited their amateur status by accepting payments and prizes⁹ to whether they had been involved in any gambling related to the competition,¹⁰ and possibly even whether they had been eligible to compete in the first place.¹¹ More broadly, NCAA officials would have had to determine if the athletes acted with honesty and sportsmanship “represent[ing] the honor and dignity of fair play . . . associated with wholesome competitive sports”—the Association’s standard for ethical conduct.¹²

What is known about the Winnepesaukee race suggests fairly straightforward answers, but the landscape of modern collegiate sports is much more complicated. Determining whether university and college athletes, coaches, and third parties (e.g., parents, boosters, sports agents, and shoe company executives) have violated an increasing number of NCAA rules and regulations requires not only investigation but also training, monitoring, and enforcement of more than a thousand member schools, tens of thousands of athletic department staff, and nearly 500,000

4. See Murray Sperber, *College Sports, Inc.: How Big-Time Athletic Departments Run Interference for College, Inc.*, in *BUYING IN OR SELLING OUT?: THE COMMERCIALIZATION OF THE AMERICAN RESEARCH UNIVERSITY* 17, 17 (Donald G. Stein ed., 2004).

5. Mendenhall, *supra* note 3, at 1 (One of the rowers “suddenly found [the board] sitting on his oar at the finish of a stroke.”).

6. See *id.* (reporting that “the betting ran quite high” among the crowd).

7. See *Overview*, NCAA, <https://www.ncaa.org/overview> [<https://perma.cc/M2RV-XN5F>] (last visited Sept. 10, 2021).

8. See, e.g., NCAA, 2020–21 NCAA DIVISION I MANUAL § 12.2.3.2 [hereinafter NCAA D-I MANUAL].

9. *Id.* § 12.1.2.

10. See, e.g., *id.* § 10.3(d).

11. See *id.* § 14 (detailing academic eligibility requirements).

12. *Id.* § 10.01.1.

student-athletes.¹³ This in turn requires a substantial administrative apparatus aimed at disseminating the Association's standards and making sure they are followed.

At root, then, the NCAA is a compliance organization—one established to ensure that its membership is not engaged in rule-violating behavior. While a significant body of academic literature analyzes the NCAA and its bylaws,¹⁴ somewhat surprisingly, none of these prior works evaluates the effectiveness of the NCAA in terms of compliance.¹⁵ This omission is all the more glaring considering that the past decade has seen a rich body of work emerge regarding the field of corporate and organizational compliance.¹⁶ This Article seeks to fill this gap in the existing literature by analyzing the NCAA through the lens of corporate compliance and governance. Indeed, the Association closely parallels the typical corporate compliance regime in terms of both its stated purpose and function.¹⁷ Identifying this similarity leads to a critical insight: just as in the corporate compliance sphere, the “overcompliance” embedded in the NCAA's rulemaking and enforcement apparatus is undermining the Association's own compliance efforts. Until that apparatus is changed, compliance by NCAA member schools will be irregular and fleeting—an unfortunate state of affairs for the body charged with ensuring the integrity of college sports.

Accordingly, this Article will make several contributions to its respective fields of corporate compliance and governance, as well as sports law. The Article begins by examining the extent to which the body of NCAA rules and regulations has expanded over time, considering the ways in which such increased complexity has likely proven to be

13. See Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551, 559–61 (2011).

14. See, e.g., Timothy Davis & Christopher T. Hairston, *Majoring in Infractions: The Evolution of the National Collegiate Athletic Association's Enforcement Structure*, 92 OR. L. REV. 979 (2014) [hereinafter Davis & Hairston, *Majoring in Infractions*]; Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9 (2000); Weston, *supra* note 13, at 559.

15. See Geoffrey C. Rapp, *Institutional Control and Corporate Governance*, 2015 BYU L. REV. 985, 987–88 (2015) (critiquing the NCAA's handling of the Penn State Sandusky abuse scandal from an institutional control and corporate governance standpoint).

16. See, e.g., Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009); Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285 (2017); Sean J. Griffith, *Corporate Compliance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016); Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215 (2017) [hereinafter Haugh, *Criminalization*]; Veronica Root, *The Compliance Process*, 94 IND. L.J. 203 (2019).

17. See *infra* Section III.A.

counterproductive to the Association's compliance goals. Indeed, this regulatory bloat has significant implications for the NCAA's compliance efforts. The literature regarding corporate compliance has observed that one of the most important aspects of compliance success is the internal legitimacy of the compliance program within the organization.¹⁸ But overregulation and overcompliance breed illegitimacy, especially when—as is the case with the NCAA—many of these rules are not perceived as advancing the core interests of the organization but instead are focused on tertiary issues (such as the plethora of NCAA rules seeking to maintain competitive balance between the Association's member institutions rather than address the wellbeing of student-athletes). As rules proliferate, they are inevitably enforced more arbitrarily, which delegitimizes the entire compliance endeavor.¹⁹ This delegitimization not only decreases compliance effectiveness, but it also actually fosters future wrongdoing by allowing coaches, players, compliance staff, and third parties to rationalize rule-breaking behavior.²⁰ The recent NCAA men's basketball bribery scandal offers an example of this phenomenon, whereby rationalizations among the wrongdoers were rife and a common source of those rationalizations was the overwrought NCAA rules structure itself.²¹

18. See, e.g., Tom Tyler, John Dienhart & Terry Thomas, *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 CAL. MGMT. REV. 31, 33 (2008); Gary R. Weaver & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 BUS. ETHICS Q. 315, 317, 333 (1999); Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106, 110–11.

19. Cf. Paine, *supra* note 18, at 111 (noting punitive systems may produce less compliance); see also *infra* Section III.B.

20. See Haugh, *Criminalization*, *supra* note 16, at 1261. See, e.g., John Daniel Davidson, *The Suspension of Ohio State's Chase Young Is Everything That's Wrong with the NCAA*, FEDERALIST (Nov. 13, 2019), <https://thefederalist.com/2019/11/13/the-suspension-of-ohio-states-chase-young-is-everything-thats-wrong-with-the-ncaa/> [<https://perma.cc/XB2J-JJ48>] (describing four-game suspension of Ohio State's defensive end Chase Young for borrowing and paying back money for girlfriend's plane ticket to game); Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/92N8-Y8BP>] (“NCAA officials . . . [are like] traffic cops in a speed trap, who could flag down almost any passing motorist for prosecution in kangaroo court under a ‘maze of picayune rules.’”).

21. See Brenton M. Smith, Note, *Flagrant Foul or Flagrant Fraud? The Implications of Honest Services Fraud Prosecutions of College Basketball Coaches on Student-Athletes*, 70 ALA. L. REV. 813, 814 (2019) (discussing the fact that several college men's basketball coaches and representatives from the Adidas shoe company were charged with a variety of fraud, conspiracy, and bribery claims in 2017); Will Hobson, *Basketball Corruption Trials Conclude, Leaving NCAA to Sort Through Aftermath*, WASH. POST (May 8, 2019), https://www.washingtonpost.com/sports/colleges/basketball-corruption-trials-conclude-leaving-ncaa-to-sort-through-aftermath/2019/05/08/41100eea-71b3-11e9-9f06-5fc2ee80027a_story.html [<https://perma.cc/Z5YQ-ZEWM>] (reporting a defendant in one trial testified that his team was “definitely paying players” because “[e]veryone was paying

After exploring these dynamics, this Article makes several normative contributions. First, it contends that the NCAA should make a more serious effort to streamline its rules and regulations. While the Association has undertaken a series of deregulatory efforts over the years,²² these efforts have failed to meaningfully simplify the Association's rules. By streamlining the Association's rulebook, the NCAA will allow itself and its member institutions to reallocate resources away from ensuring compliance with a host of relatively inconsequential rules to instead focus on the Association's most pressing issues impacting its core mission. Fewer rules more consistently enforced is the key to building the legitimacy both of the NCAA and its member schools.

Second, in addition to undertaking a sustained deregulatory effort, the NCAA should also boost its legitimacy among its many stakeholders by working to improve the perceived fairness of its enforcement mechanisms. As management and corporate governance scholars have recognized, organizational legitimacy is created—and thus the opportunity for stakeholders to rationalize future bad acts is reduced—by providing those subject to compliance programs with procedural justice.²³ This includes ensuring the transparency and fairness of decisions made by the organization throughout the compliance process.²⁴ Ultimately, the idea is that member schools and their constituents will adopt the NCAA's stated values as their own, choosing compliance not because it conforms to a rule but because “they believe it to be the best way to act” in furtherance of their shared mission.²⁵

These observations are particularly timely given the critical juncture at which the NCAA presently finds itself. In June 2021, the NCAA suffered a decisive, unanimous loss at the U.S. Supreme Court in the case of *NCAA v. Alston*,²⁶ where the Court found that NCAA rules restricting schools from competing with one another by offering prospective student-athletes education-related benefits (such as computers or graduate-study stipends) violated the Sherman Antitrust Act.²⁷ Following *Alston*, many

players,” indicating the claim of relative normality rationalization). For additional information, see *infra* notes 319–20 and accompanying text.

22. See *infra* Section II.A.

23. See, e.g., Tyler, Dienhart & Thomas, *supra* note 18, at 33; (demonstrating that procedural fairness is critical in promoting employee commitment and compliance); Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143, 1153–54 (2005) (same); see also Weaver & Treviño, *supra* note 18, at 333 (same).

24. Tyler, Dienhart & Thomas, *supra* note 18, at 33.

25. *Id.* at 32; see, e.g., NCAA Mission Statement, CITADEL (Mar. 6, 2007), http://www.citadel.edu/root/ncaa_mission [https://perma.cc/S2P2-74SR] (linking member school's athletic department's mission to NCAA's stated core purpose).

26. 141 S. Ct. 2141 (2021).

27. *Id.* at 2166.

commentators have predicted that it is only a matter of time before the courts require schools to compete by paying their athletes above and beyond the cost of their college attendance, effectively introducing a system of “pay-for-play” to college sports.²⁸ At the same time, the NCAA also was forced to allow its players to receive endorsement income from third parties for the use of their so-called name, image, and likeness (“NIL”) rights after at least twenty-six different states had passed laws expressly granting student-athletes within their jurisdictions this right.²⁹ In response to these events, leaders throughout the college sports industry recently have begun to advocate for changes to the current administrative structure of U.S. intercollegiate athletics.³⁰ As a result, one way or the other, it appears likely that the NCAA soon will be forced to substantially overhaul its current bylaws, offering the Association a prime opportunity to streamline its regulatory apparatus to better effectuate the Association’s goals.

This Article proceeds in four parts. Part I describes how the NCAA operates, explaining the Association’s history, legislative framework, and enforcement apparatus. What becomes clear is twofold: the NCAA is fundamentally a compliance organization, and its effectiveness as such is lessening over time. Part II examines the many frequent criticisms of the NCAA, as well as the Association’s largely unsuccessful attempts to address these critiques to date. Part III explores the mechanisms by which these shortcomings have occurred. Drawing from the corporate compliance and governance literature, which in turn incorporates behavioral ethics, criminological, and organizational legitimacy research, the Article explains an often-overlooked aspect of rulemaking and

28. See, e.g., Ian Millhiser, *The Supreme Court’s Unanimous Decision on Paying NCAA Student-Athletes, Explained*, VOX (June 21, 2021, 12:56 PM), <https://www.vox.com/2021/6/21/22543598/supreme-court-ncaa-alston-student-athletes-football-basketball-sports-antitrust> [https://perma.cc/R8MQ-8PCU] (“The NCAA may suffer an even more significant loss in a future case.”).

29. See Alan Blinder, *College Athletes May Earn Money from Their Fame*, N.C.A.A. Rules, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html> [https://perma.cc/F4JF-DJ4T] (reporting same); Meghan Roos, *26 States Now Allow College Athletes to Be Compensated for Image, Likeness*, NEWSWEEK (July 14, 2021, 1:11 PM), <https://www.newsweek.com/26-states-now-allow-college-athletes-compensated-image-likeness-1609744> [https://perma.cc/HN2B-A6N4].

30. See, e.g., Ross Dellenger, *The SEC, NCAA and a Fight to Change College Sports*, SPORTS ILLUSTRATED (July 19, 2021), <https://www.si.com/college/2021/07/19/ncaa-restructuring-greg-sankey-sec-mark-emmert> [https://perma.cc/XRM2-5B4D] (reporting that Southeastern Conference commissioner Greg Sankey “has suggested the need for a new governance model” for college sports following *Alston*); Ralph D. Russo, *NCAA’s Emmert: It Is Time to Decentralize College Sports*, AP NEWS (July 15, 2021), <https://apnews.com/article/sports-business-college-sports-63d1739ab77795561b705a8fec31dcae> [https://perma.cc/FF2L-L5R2].

enforcement—that overregulation and overcompliance not only divert resources away from properly targeted violations, but also increase wrongdoing by fostering criminogenic rationalizations. This is one explanation for why the NCAA’s proliferating rules seem to have little effect on curbing actual wrongdoing in college sports. Once this phenomenon is understood, Part IV concludes by offering suggestions for how the NCAA can remake its rules to better achieve its laudable goals as a compliance organization, one that is rightly dedicated to the success of college athletes.

I. THE NCAA AS A COMPLIANCE ORGANIZATION

To say that the NCAA is a compliance organization has an initially odd ring to it. Most of the public knows the NCAA simply as the body overseeing college sports but with little understanding beyond that.³¹ If the public associates the Association with anything more specific, it likely relates to administering season-concluding national championship tournaments, primarily in men’s basketball. In fact, public perceptions of the NCAA’s core purpose run the gamut; most respondents do not know, and those who offer an opinion are roughly split between integrating athletics into higher education, preparing college athletes for professional sports careers, and financially benefiting universities.³² None of these is the Association’s explicit purpose,³³ and none is its functional purpose—that is, to ensure member institutions and their constituents comply with the rules of intercollegiate athletics.³⁴ Thus, as a starting point, this Part provides an overview of the NCAA, as well as its rulemaking and enforcement procedures and practices.

31. Bo Bothe & Chris Wilks, *Brand Analysis: The NCAA*, SOLVING FOR B°, <https://www.brandextract.com/Insights/Podcast-Episodes/Brand-Analysis-The-NCAA/> [https://perma.cc/5PRT-KN3F] (last visited Sept. 11, 2021) (“I bet you 90% of the big college fans don’t really understand the core purpose of the NCAA.”).

32. MORNING CONSULT, PUBLIC OPINION ON THE PURPOSE OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA) IN THE UNITED STATES AS OF FEBRUARY 2019 (June 21, 2019), <https://www.statista.com/statistics/985756/ncaa-purpose-us/>.

33. *See id.* The NCAA’s purpose is to “cultivate[] an environment that emphasizes academics, fairness and well-being across college sports.” *Mission and Priorities*, NCAA, <https://www.ncaa.org/mission-and-priorities> [https://perma.cc/9FLJ-6U9G] (last visited Sept. 10, 2021) [hereinafter NCAA Mission Statement]. However, internal polling by the NCAA finds that the public believes otherwise; almost eighty percent think that universities put money before their athletes, and over fifty percent believe the NCAA is “part of the problem.” Jeremy Bauer-Wolf, *Lost Trust in College Sports*, INSIDE HIGHER ED (Oct. 31, 2017), <https://www.insidehighered.com/news/2017/10/31/ncaa-president-public-losing-trust-big-time-sports> [https://perma.cc/C6HB-YUGS].

34. *See infra* Section I.C.

A. The Basics of the NCAA

The origin of the NCAA dates back to the early 1900s.³⁵ Following a spate of fatalities on the college football playing field—with eighteen players dying in 1905 alone³⁶—President Theodore Roosevelt convened a group of college officials to discuss ways to curb the rash of injuries in the hopes of saving the sport.³⁷ This initiative eventually resulted in the formation of the Intercollegiate Athletic Association of the United States (IAAUS) in 1905,³⁸ an organization tasked with creating a series of rules and regulations to govern the sport of college football.³⁹ By 1910, the IAAUS had changed its name to the NCAA⁴⁰ and thereafter “began to formulate and implement rules in other areas, slowly expanding to cover every area of college athletics.”⁴¹

Today, the modern NCAA is an unincorporated association of over 1,100 athletics-sponsoring colleges and universities that have vested the Association with the power to regulate nearly every aspect of intercollegiate athletic competition.⁴² NCAA member institutions are subdivided into three levels of sporting competition, from Division I (the

35. See Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 490 (1995) (discussing the founding of the NCAA).

36. See Ray Yasser, *The Case for Reviving the Four-Year Deal*, 86 TUL. L. REV. 987, 990–91 (2012) (“With brutal formations that encouraged high-impact collisions and common practices like gang tackling, the 1905 football season alone saw 18 deaths and 149 serious injuries.”).

37. See Cody J. McDavis, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 289 (2018) (“In 1905, alarmed by eighteen deaths and over one hundred injuries in intercollegiate football, President Theodore Roosevelt invited officials from major football programs to participate in a White House conference.”).

38. *History*, NCAA, <https://www.ncaa.org/history> [https://perma.cc/6EAA-AMK7] (last visited Sept. 10, 2021).

39. See Frank W. Carsonie, Comment, *Educational Values: A Necessity for Reform in Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 661, 667 (1991) (“The IAAUS was comprised of sixty-two schools and had the purpose of organizing a set of rules to remedy the maladies of college football.”).

40. See Christian Dennie, *White Out Full Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97, 99 (2007) (“In 1910, the IAAUS became known as the NCAA.”).

41. See Greg Heller, *Preparing for the Storm: The Representation of a University Accused of Violating NCAA Regulations*, 7 MARQ. SPORTS L.J. 295, 298 (1996).

42. See, e.g., Nathan Hunt, Note, *Cureton v. NCAA: Fumble! The Flawed Use of Proposition 16 by the NCAA*, 31 U. TOL. L. REV. 273, 277–78 (2000) (“The NCAA is the governing body of American intercollegiate sports. It is a voluntary, unincorporated organization, with a current membership of [approximately] 1,200 U.S. colleges, universities, conferences, and other bodies of higher education. The NCAA divides its membership into three separate classes: Division I, Division II, and Division III.”).

highest level of competition) to Division III (the lowest).⁴³ Schools across all three divisions have charged the NCAA with the mission of “cultivating an environment that emphasizes academics, fairness and well-being across college sports.”⁴⁴ While membership in the NCAA is strictly voluntary as a legal matter, in reality any four-year college or university that wishes to participate in major, intercollegiate athletic competition has no choice but to join the Association, as no feasible alternatives exist to provide a source of competition.⁴⁵ Therefore, all member schools, those schools’ athletic departments, and their student-athletes fall under the purview of the Association’s rules.

B. The NCAA’s Legislative Framework

The NCAA’s rulemaking power is vested in its membership,⁴⁶ with the Association’s member institutions having created a variety of committees, councils, and boards to help govern their affairs.⁴⁷ At the Division I level, new proposed bylaws are typically developed by one or more athletic conferences⁴⁸ in conjunction with one of the NCAA’s

43. See David A. Grenardo, *The Blue Devil’s in the Details: How a Free Market Approach to Compensating College Athletes Would Work*, 46 PEPP. L. REV. 203, 212 (2019) (quoting MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & N. JEREMI DURU, *SPORTS LAW AND REGULATION* 107 (4th ed. 2017)) (“Division I . . . involves ‘the highest level of competition in most sports.’ . . . Division III . . . serves as the lowest level of competition amongst the three divisions.”)

44. NCAA Mission Statement, *supra* note 33.

45. See Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1305 n.35 (1992) (“[C]ollege and university membership in the NCAA may not truly be voluntary If a university wishes to benefit from the national media exposure and revenues that participation in intercollegiate athletics provides, it must join the NCAA.”).

46. See Josephine (Jo) R. Potuto & Jerry R. Parkinson, *If It Ain’t Broke, Don’t Fix It: An Examination of the NCAA Division I Infractions Committee’s Composition and Decision-Making Process*, 89 NEB. L. REV. 437, 441 (2011) (“Through adoption of bylaws, NCAA member institutions set the boundaries and rules by which the [enforcement committee] operates.”).

47. For instance, the NCAA’s Executive Committee, consisting of “sixteen member-institution presidents and chancellors,” is charged with overseeing the Association’s budget and setting its policy agenda. Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749, 753 (2007). Meanwhile, the NCAA’s Division I Board of Directors “has final authority over all aspects of Division I,” while “the Division I Leadership and Legislative Councils . . . review national policy and have prime responsibility for the legislative agenda.” Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws that Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 260 (2010).

48. *Division I Legislative Committee*, NCAA, <https://www.ncaa.org/governance/committees/ncaa-division-i-legislative-committee> [<https://perma.cc/A846-LTAL>] (last visited Sept. 10, 2021). Conferences are collections of

relevant committees (such as the Men’s Basketball Oversight Committee or the Competition Oversight Committee).⁴⁹ These proposals are then advanced to the Division I Legislative Committee for consideration before ultimately being presented to the Division I Council for approval.⁵⁰ The Division I Council is an entity “comprised of 40 members, including a representative from each of the 32 Division I conferences, four [conference] commissioners, two student-athletes and two faculty athletics representatives.”⁵¹ Any proposal approved by the Division I Council must then be adopted by the NCAA’s Division I Board of Directors,⁵² a twenty-four member body made up of twenty university presidents, one director of athletics, one senior woman administrator,⁵³ one faculty athletics representative,⁵⁴ and one student-athlete.⁵⁵ However, any legislation enacted by the Division I Board of Directors can be overturned based on a vote of two-thirds of the Division I membership.⁵⁶

athletic-sponsoring colleges or universities that work together to facilitate competition, set rules, etc. See Marc Edelman, *The NCAA’s “Death Penalty” Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise?*, 18 LEWIS & CLARK L. REV. 385, 389 (2014) (discussing the origin and purpose of college athletic conferences).

49. See *Division I Legislative Committee*, *supra* note 48 (“The Legislative Committee’s primary responsibility will be to review and make recommendations to the [Division I] Council regarding the merits of proposals developed through the shared governance process (conferences and Council committees).”).

50. See *id.*

51. *Division I Council*, NCAA, https://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1COUNCIL [<https://perma.cc/4WSM-295E>] (last visited Sept. 10, 2021).

52. See Damon Moore, *Proposals for Reform to Agent Regulations*, 59 DRAKE L. REV. 517, 526 (2011) (“Legislation proposed by the Legislative Council must ultimately be approved by the NCAA’s Board of Directors, which consists of school presidents and chancellors.”).

53. Under NCAA rules, each member institution must appoint a “Senior Woman Administrator, who is generally responsible for advancing the interests of female student-athletes and ensuring the institution is complying with the spirit of Title IX.” Glenn M. Wong, Christopher R. Deubert & Justin Hayek, *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, 22 JEFFREY S. MOORAD SPORTS L.J. 1, 46 (2015).

54. “Each NCAA member institution must have a faculty athletics representative . . . [The representative is] typically a full professor with tenure” and is responsible for “campus oversight or direct responsibility for NCAA rules compliance, academic standards related to student-athlete performance, athletics academic integrity, and student-athlete well-being.” Potuto & Parkinson, *supra* note 46, at 444 n.30 (citations omitted).

55. *Division I Board of Directors*, NCAA, https://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=BOARD [<https://perma.cc/5X36-94Q5>] (last visited Sept. 10, 2021).

56. NCAA D-I MANUAL, *supra* note 8, § 5.3.2.2.7.3 (“An amendment shall be rescinded upon submission of rescission requests from at least two-thirds of all active Division I institutions that are eligible to submit a request.”).

It has been estimated that as many as 150 new bylaws are proposed annually, with more than half of those typically being enacted by the membership.⁵⁷ As a result, the NCAA rulebook has grown substantially over time.⁵⁸ Indeed, the Association's bylaws now touch upon nearly every aspect of sporting competition and the student-athlete experience, regulating student-athlete eligibility, recruitment, financial aid, and practice limits, among other things, often in "excruciating detail."⁵⁹ And because many of these proposals are initiated at the conference level, it has been observed that the NCAA legislative process is often focused on discrete issues championed by a small group of schools.⁶⁰ Consequently, as one commentator observed nearly thirty years ago, the NCAA rules have "taken on the prolixity of a collective bargaining agreement" of the sort that one might expect to find in one of the major U.S. team sports leagues.⁶¹ Figure 1 shows how the NCAA rules have grown over the past four decades.

57. See Dan Dutcher, *NCAA Regulation of College Athletics*, 22 J. COLL. & U.L. 33, 34 (1995) ("In January of 1995, the membership considered 150 proposals, and over 90 of them were adopted. From that standpoint, it was not an unusual convention. In fact, over the last eight conventions, an average of 160 proposals have appeared in the convention program, and the adoption rates have remained significantly high.").

58. "The quality and quantity of [NCAA] rules have 'immensely grown and expanded since 1906.'" Devon Stauffer, Comment, *Will Athletes Ever Learn?: Examining Ways the NCAA Has Tried To and Can Deter Student-Athletes From Accepting Extra Benefits*, 24 JEFFREY S. MOORAD SPORTS L.J. 111, 115 (2017) (quoting Mary Elizabeth Kane, Comment, *When The NCAA Strikes, Who is Called Out?*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBLEMS 119, 122 (2011)).

59. Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551, 561 (2011).

60. See Timothy Davis & Christopher T. Hairston, *NCAA Deregulation and Reform: A Radical Shift of Governance Philosophy?*, 92 OR. L. REV. 77, 83 (2013) ("The legislative process also was imbued with proposals that focused on discrete issues often only championed by a single athletic conference.").

61. See Ray Yasser, *A Comprehensive Blueprint for the Reform of Intercollegiate Athletics*, 3 MARQ. SPORTS L.J. 123, 143 (1993).

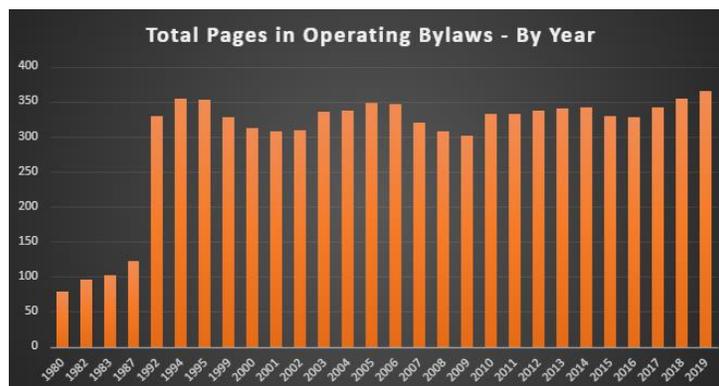


Figure 1: Growth of NCAA Rules

Beyond the primary bylaws themselves, the NCAA also has released a “panoply of manuals, documents, [and] interpretive releases,” ostensibly to provide additional clarity regarding the expectations imposed on NCAA member institutions.⁶² In reality, however, this additional guidance all too often merely provides an additional layer of complexity to the regulatory framework. For example, manuals exist for each of the three divisions of college sports.⁶³ The Division I manual runs close to 500 pages.⁶⁴ In addition, each Division I sport has its own separate rulebook, and some have supporting case books that explain everything from the rules of competition to how names must be worn on a jersey.⁶⁵ There are also dozens of ancillary guidebooks and manuals, from one styled as a comprehensive how-to guide to managing a basketball program to another focused on the rules regarding transferring athletes.⁶⁶

Some of this growth has been attributed to the competitive dynamics between the diverse set of universities operating within Division I that face vastly different budgetary pressures. For instance, Division I schools such as the University of Texas and Ohio State University annually spend

62. See Rapp, *supra* note 15, at 1001.

63. NCAA D-I MANUAL, *supra* note 8; 2020–21 NCAA DIVISION II MANUAL; 2020–21 NCAA DIVISION III MANUAL.

64. NCAA D-I MANUAL, *supra* note 8.

65. NCAA, 2020–21 NCAA MEN’S BASKETBALL RULES r. 2, § 22, art. 7 (146 pages); See NCAA, 2020–21 NCAA MEN’S CASEBOOK r. 1 (111 pages).

66. *E.g.*, NCAA DIVISION I MEN’S BASKETBALL ETHICS COALITION, MANAGING YOUR PROGRAM: A GUIDE FROM ONE COACH TO ANOTHER, <https://www.ncaapublications.com/productdownloads/D1MBBECG.pdf> [<https://perma.cc/NY6H-PS7H>]; NCAA ELIGIBILITY CENTER, 2020–21 GUIDE FOR FOUR-YEAR TRANSFERS, <https://www.ncaapublications.com/productdownloads/TGONLINE42020.pdf> [<https://perma.cc/Z3C9-DX8Z>].

upwards of \$200 million on their intercollegiate athletics departments, while smaller Division I institutions like Mississippi Valley State and Coppin State are forced to get by on fewer than \$5 million per year.⁶⁷ As a result, schools operating their athletic programs with smaller budgets have used the NCAA's legislative process to enact a variety of rules intended to keep higher-spending universities in check in the hopes of fostering greater competitive balance.⁶⁸

At the same time, other bylaws have been enacted to address specific loopholes that have arisen over time. Indeed, the ultra-competitive nature of intercollegiate athletics often results in coaches pushing the boundaries of the rules in order to seize any competitive advantage they might be able to permissibly exploit.⁶⁹ In one particularly notorious example of NCAA rulemaking taken to absurd lengths, a former bylaw specified that while institutions could provide their student-athletes with bagels, supplying them with complimentary cream cheese to spread on them would amount to an NCAA infraction.⁷⁰ Consequently, over the years various NCAA rules along these lines have been “promulgated to govern specific situations deemed to be unfair” by a majority of the Association's membership.⁷¹

The resulting intricacy and overbreadth of the rules makes perfect compliance with NCAA rules nearly impossible even for the most well-intentioned universities and athletics department personnel.⁷² It has been estimated, for instance, that most large, Division I institutions self-report more than ten NCAA rules infractions each year, mostly of a minor

67. See *NCAA Finances*, USA TODAY, <https://sports.usatoday.com/ncaa/finances/> [https://perma.cc/QYT8-H7C4] (last visited Sept. 11, 2021) (detailing various Division I athletic department budgets). See also Josephine (Jo) R. Potuto, *The Once and Future NCAA and Collegiate Sports*, 6 ARIZ. STATE U. SPORTS & ENT. L.J. 85, 89 (2016).

68. See Broyles, *supra* note 35, at 509 (“Most [NCAA] rules are created by smaller member institutions to level the playing field that larger, more economically powerful member institutions enjoy.”).

69. See Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667, 698 (2003) (“[R]ules are often adopted to end practices developed and implemented by coaches over time that, while technically within existing rules, still create a real or perceived competitive or recruiting advantage.”).

70. See Davis & Hairston, *supra* note 60, at 84 (quoting NCAA, 2012–13 NCAA DIVISION I MANUAL § 16.5.2(h) (2012)) (discussing the NCAA's former “Fruit, Nuts and Bagels” bylaw).

71. Broyles, *supra* note 35, at 509.

72. See Broyles, *supra* note 35, at 509 (quoting college basketball coaches discussing the fact that it “is almost impossible” for a coach to know all of the NCAA rules he or she is obligated to follow); see also Heller, *supra* note 41, at 311 (observing that “[u]nder the current rules structure, one could potentially find some type of violation at nearly every institution”).

variety.⁷³ Moreover, statistics show that the NCAA annually processes more than 4,000 infractions involving low-level, secondary rule violations.⁷⁴ All too often, these lower-level infractions relate to what can only be described as insignificant matters. Indeed, the NCAA's bylaws historically have regulated a variety of seemingly trivial matters, such as rules restricting when schools can supply a recruit with a soft drink while he or she is on campus to those regulating when student-athletes can be provided a ride to the airport.⁷⁵

By the early 2010s, the universities belonging to the five largest and most powerful Division I conferences—the Atlantic Coast, Big 10, Big XII, Pacific 12, and Southeastern Conferences⁷⁶—had come to believe that the rules enacted by the broader NCAA membership were unduly restrictive and, at times, at odds with their own institutional interests.⁷⁷ This belief was compounded by the fact that the members of these so-called “Power 5” conferences were facing a series of lawsuits seeking to force the nation's richest athletics departments to share a greater proportion of their ever-growing revenues with their student-athletes.⁷⁸ As

73. Marsh & Robbins, *supra* note 69, at 675 (“Most large institutions self-report ten or more secondary violations a year, and most do not become public knowledge.”).

74. See Josephine (Jo) R. Potuto, *The NCAA Student-Athlete Reinstatement Process: Say What?*, 63 BUFF. L. REV. 297, 307–08 (2015) (stating that “[a]pproximately four thousand Level III violations are processed [by the NCAA] annually” involving infractions that “are isolated or limited in nature and provide no more than a minimal recruiting or competitive advantage”).

75. See Kenneth E. James, Note, *College Sports and NCAA Enforcement Procedures: Does the NCAA Play Fairly?* National Collegiate Athletic Association v. Miller, 29 CAL. W. L. REV. 429, 435 (1993) (observing that “colleges and universities must guard against such seemingly trivial events as meeting a recruit off-campus or giving the recruit a soft drink or a ride to the train station”). Similarly, in the 1980s, then-Indiana University basketball star Steve Alford was suspended by the NCAA for one game because he allowed his picture to appear in a charitable calendar produced by a campus sorority, a then-impermissible use of his name and likeness under NCAA rules. See Yasser, *supra* note 61, at 131 (recounting that “University of Indiana [sic] basketball player Steve Alford was suspended for one game because he appeared on a sorority calendar, the proceeds from which went to charity”).

76. See Paul Myerberg, *Analysis: What's Next for the Power 5 Conferences After SEC Expansion?*, USA TODAY (July 28, 2021, 1:20 PM), <https://www.usatoday.com/story/sports/ncaaf/2021/07/28/sec-expansion-force-power-5-conferences-make-moves-but-what/8072873002/> [https://perma.cc/PS9H-N5LR] (detailing the effects of the SEC's expansion on the Power 5).

77. See GERALD GURNEY, DONNA A. LOPIANO & ANDREW ZIMBALIST, UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 19 (2017) (“the NCAA formally adopted super-conference autonomy in governance [as the] [p]residents from the five wealthiest conferences, known as the Power Five ... reasoned that modern big-time sport was its own ecosystem, and its issues and the ability to resolve them were unique to their institutions”).

78. See, e.g., Marc Edelman, *A Prelude to Jenkins v. NCAA: Amateurism, Antitrust Law, and the Role of Consumer Demand in a Proper Rule of Reason Analysis*, 78

a result, the Power 5 schools began advocating for change.⁷⁹ Specifically, in 2014, the five conferences threatened to leave the NCAA if they were not granted more freedom to formulate the rules governing their athletic programs.⁸⁰ Eventually, the rest of the NCAA's Division I schools agreed to give the Power 5 an additional degree of autonomy, permitting them to adopt their own bylaws relating to matters such as recruiting, financial aid, student academic support, and nutrition.⁸¹ Even then, however, the broader NCAA membership continues to impose limitations on the Power 5, requiring the NCAA's presidential review group to approve any new bylaws proposed via this "autonomy" process.⁸²

C. The NCAA's Enforcement Framework

In its early days, the NCAA had no formal system for enforcing its bylaws, hoping instead that its membership would police itself by refusing to schedule games with any university that did not adhere to the rules.⁸³ Over time, as the competitive pressures on schools grew, this voluntary system of enforcement became insufficient.⁸⁴ As a result, the NCAA adopted a more formal enforcement apparatus in the 1950s, a system that—*notwithstanding* various modifications—remains largely intact today.⁸⁵

LA. L. REV. 227, 228–29 (2017) (discussing the *Jenkins* and *O'Bannon* antitrust lawsuits filed against the NCAA on behalf of current and former student-athletes).

79. See Anthony G. Weaver, *New Policies, New Structure, New Problems? Reviewing the NCAA's Autonomy Model*, 7 ELON L. REV. 551, 558 (2015) ("The most recent round of NCAA policies creating autonomy for the Power Five . . . started after a 2011 proposal to provide stipends to student-athletes was rejected.")

80. See Donna A. Lopiano, *Fixing Enforcement and Due Process Will Not Fix What Is Wrong with the NCAA*, 20 ROGER WILLIAMS U. L. REV. 250, 265 (2015) ("[T]he Big Five conference institutions[] threatened to leave the NCAA if the other divisions or subdivisions did not give them what they wanted.")

81. See Potuto, *supra* note 67, at 89, 96–98 (reporting that the Power 5 conferences have autonomy in several areas, such as "recruiting restrictions, pre-enrollment support, financial aid, awards and benefits, academic support, student-athlete health and wellness, meals and nutrition, time demands, student-athlete career transition, and athletics personnel").

82. See *id.* at 97–98 (summarizing limitations on Power 5 autonomy).

83. See Heller, *supra* note 41, at 298 ("In 1919, facing the problem of member institutions not adhering to the rules, the NCAA implemented a policy encouraging other schools not to schedule those members for competition.")

84. See Christian Dennie, *The Benefits of Arbitration: Arbitration in NCAA Student-Athlete Participation and Infractions Matters Provides for Fundamental Fairness*, 46 U. MEM. L. REV. 135, 138 (2015) ("It quickly became clear that [a voluntary system of compliance] was not feasible and also lacked strength.")

85. See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 334 (2007) ("The contemporary

At the center of the NCAA's current enforcement framework lies the concept of "institutional control."⁸⁶ The NCAA bylaws impose an obligation on member institutions to self-monitor and report any rules violations.⁸⁷ Each college or university's "chief executive officer"—usually its president or chancellor—is ultimately responsible for ensuring that his or her institution is in compliance with all NCAA regulations.⁸⁸ At the same time, all university athletic department personnel are required to certify every year that they have no knowledge of any infractions at their institution.⁸⁹

This obligation to self-detect and self-report any violation of the multitude of NCAA rules has led to a significant expansion of athletic department staff members specifically responsible for leading their institution's NCAA-compliance efforts.⁹⁰ These institutional compliance officers are tasked with monitoring a variety of athletic department functions, including recruiting, the award of financial aid, and student-athlete academic eligibility, while also helping to educate the department's coaching staffs on these matters.⁹¹ Universities with major sports programs now employ as many as eleven full-time staff members to serve as NCAA compliance officers within their athletic departments.⁹² Many

array of NCAA rules and regulations . . . finds its genesis in the . . . developments of the 1950s.”).

86. See Jordan Kobritz & Jeffrey Levine, *The Show-Cause Penalty and the NCAA Scope of Power*, 3 ARIZ. ST. SPORTS & ENT. L.J. 29, 33 (2013) (“The centerpiece of the NCAA’s rulebook and bylaws is the principle of institutional control and responsibility.”); Rapp, *supra* note 15, at 998–1002 (describing institutional control provisions and related guidance by the NCAA).

87. See NCAA D-I MANUAL, *supra* note 8, § 6.

88. See Gene A. Marsh, *A Call for Dissent and Further Independence in the NCAA Infractions Process*, 26 CARDOZO ARTS & ENT. L.J. 695, 712 n.37 (2009) (“Under the NCAA rule book, an institution’s chief executive officer is assigned the ultimate responsibility and final authority for the conduct of its intercollegiate athletics program.”).

89. See Chris Hanna, Jeffrey Levine & Anita M. Moorman, *College Athletics Whistle-Blower Protection*, 27 J. LEGAL ASPECTS SPORT 209, 211 (2017) (“[A]ll intercollegiate athletic department staff members [must] certify that the institution is in compliance with all NCAA bylaws.”).

90. See Marsh & Robbins, *supra* note 69, at 695 (observing that while these compliance responsibilities used to be assigned “to a coach who no longer wanted to coach, or to an individual who also carried additional job responsibilities,” today NCAA compliance is governed by one or more compliance directors within the athletic department).

91. See Heller, *supra* note 41, at 318 (discussing “[t]he functions that compliance coordinates perform”).

92. See, e.g., *Staff Directory*, UNIV. GA. ATHLETICS, GEORGIA DOGS.COM, <https://georgiadogs.com/staff-directory> [<https://perma.cc/84XY-YWBN>] (last visited Sept. 11, 2021) (listing eleven employees in the Compliance department).

of these individuals hold law degrees, training that enables them to better interpret the complexity of the NCAA rulebooks and their supplements.⁹³

In addition to these university-based compliance efforts, the NCAA itself also maintains its own compliance staff at its Indianapolis, Indiana, headquarters. NCAA compliance staff are charged with independently investigating alleged rule infractions by the Association's member institutions.⁹⁴ Investigations are conducted through a formal process. First, if the NCAA staff believes that "reasonably reliable information" suggests that an institution has committed an infraction, the staff will issue a Notice of Inquiry.⁹⁵ This notice triggers a formal investigation with which the institution has an affirmative obligation to cooperate.⁹⁶ The obligation to cooperate is particularly important to the NCAA given its lack of subpoena power; indeed, the Association often is unable to force individuals no longer affiliated with a member institution to comply with an investigation.⁹⁷

If the NCAA's investigation yields sufficient evidence to establish that a violation has occurred, the Association will then issue a Notice of Allegations to the offending institution outlining the alleged infractions that the university has committed.⁹⁸ Beginning in 2013, the NCAA adopted a new, four-tier classification system for infractions of its bylaws.⁹⁹ Under the new system, the most serious breaches of NCAA rules are categorized as Level I violations.¹⁰⁰ A Level I violation is reserved for a "severe breach of conduct," one that "seriously undermine[s] the integrity of an NCAA enduring value."¹⁰¹ Examples of a Level I violation might include the failure of an institution to comply with an NCAA

93. See Heller, *supra* note 41, at 318 ("Some of these individuals have law degrees, while several institutions list a legal background as a requirement for employment, due to the complexity of NCAA legislation.")

94. See Rogers & Ryan, *supra* note 47, at 754–55 (describing the investigators within the NCAA's enforcement staff as one body within the NCAA).

95. *Id.* at 764 (quoting NCAA, 2006–07 NCAA DIVISION I MANUAL § 32.5.1.).

96. *Id.* at 758, 765 ("[T]he Bylaws impose an affirmative obligation to cooperate with an [NCAA] investigation and to assist in developing full information, whether exculpatory or against the institution's interest.")

97. See Marsh, *supra* note 88, at 697 ("[T]he NCAA enforcement process may be weaker than other compliance programs run by administrative agencies because the NCAA lacks subpoena power.")

98. Brandon Leibsohn, *Road to Recovery: The NCAA's New Enforcement Process Creates More Legal Headaches*, 21 SPORTS L.J. 123, 126 (2014) ("The NCAA will investigate potential rule violations and issue a notice of allegations if violations are found.")

99. See Davis & Hairston, *Majoring in Infractions*, *supra* note 14, at 1002 (describing the new enforcement structure adopted in August 2013).

100. *Id.* at 1003 (describing a Level I violation).

101. *Id.*

investigation, offering “cash inducements to prospective student-athletes,” or academic fraud.¹⁰² Notably, these types of violations are “most damning” because they indicate a significant lack of institutional control and a “climate of noncompliance” at the member school.¹⁰³

Level II violations encompass infractions that are less significant than a Level I violation but still “result in more than a minimal . . . recruiting, competitive, or other advantage.”¹⁰⁴ In other words, “Level II violations are milder forms of Level I violations.”¹⁰⁵ Meanwhile, Level III and IV violations constitute infractions that are more secondary or incidental in nature.¹⁰⁶ A Level III might involve communications with a prospective student-athlete during an unauthorized time period or the provision of impermissible school paraphernalia to recruits.¹⁰⁷ Alternatively, sending out an unauthorized camp brochure might constitute a Level IV violation under the new framework.¹⁰⁸

The resolution of less significant Level III and IV violations is typically negotiated between the institution and a member of the NCAA’s enforcement staff.¹⁰⁹ However, for alleged infractions of a more serious nature—namely those rising to the stature of Level I or II—the ultimate responsibility for punishing the institution falls on the NCAA’s Committee on Infractions (CoI).¹¹⁰ As currently constituted, the CoI is comprised of twenty-four members drawn from a pool consisting of university faculty, athletic directors, conference administrators, former coaches, and former university presidents.¹¹¹ These individuals are assigned to panels to decide cases involving alleged infractions by NCAA member institutions.¹¹² Depending on the severity of the case, the CoI can

102. *Id.*

103. Marsh & Robbins, *supra* note 69, at 671.

104. Davis & Hairston, *Majoring in Infractions*, *supra* note 14, at 1003.

105. Ryan Appel, *Breaking Bad: An Examination of the NCAA’s Investigation Practices over the Last Forty Years*, 22 U. MIA. BUS. L. REV. 83, 88 (2014).

106. See Potuto, *supra* note 74, at 306–07 (describing Level III infractions as those “isolated or limited in nature and provid[ing] no more than a minimal recruiting or competitive advantage” and Level IV as “minor, technical violations that were committed inadvertently”).

107. Davis & Hairston, *Majoring in Infractions*, *supra* note 14, at 1005.

108. See Leibsohn, *supra* note 98, at 136.

109. See Potuto, *supra* note 74, at 306–08 (“Level III violations . . . are handled by an enforcement director specifically designated for that purpose (Level III Director).”).

110. See Potuto & Parkinson, *supra* note 46, at 438 (explaining that the NCAA’s “Division I Committee on Infractions . . . hears and resolves cases involving institutional culpability for major violations of NCAA rules”); Potuto, *supra* note 74, at 307.

111. See *NCAA Division I Committee on Infractions Roster*, NCAA, <https://www.ncaa.org/ncaa-division-i-committee-infractions-roster> [<https://perma.cc/83AV-65XW>] (last visited Sept. 1, 2021).

112. Davis & Hairston, *Majoring in Infractions*, *supra* note 14, at 990–91 (observing same).

hold a hearing in person or via teleconference or, alternatively, decide the matter based entirely on the written record.¹¹³ If a hearing is held, the CoI directly interviews witnesses and can consider any evidence it deems to be relevant.¹¹⁴

Although schools have a right to contest any allegations made by the NCAA's enforcement staff, historically, few universities have dared to seriously challenge their alleged impropriety before the committee.¹¹⁵ Instead, schools typically will concede that a violation has occurred and elect to focus their arguments on the appropriate level of punishment in the case.¹¹⁶ Some of this anti-adversarial posture is because NCAA member institutions are obligated to fully cooperate with any NCAA enforcement action and therefore run the risk of getting cited for another infraction if they fail to attend the proceedings.¹¹⁷ At the same time, however, this deferential approach can at least partially be attributed to the widespread belief that the CoI will be more lenient in cases in which it believes the university has cooperated fully with the investigatory process. Indeed, schools often fear that the CoI will impose a more draconian punishment in cases in which the offending institution was deemed not to be sufficiently contrite.¹¹⁸

The CoI has broad discretion to levy a variety of potential penalties against an institution found to have violated the NCAA's rules. Depending on the nature of the infraction, potential punishments might include imposing limitations on coaches' recruiting activities, vacating victories in prior contests in which an ineligible student-athlete participated, reducing the number of scholarships a university can award in a particular

113. See Dennie, *supra* note 84, at 142–43 (explaining potential CoI processes).

114. See Rogers & Ryan, *supra* note 47, at 790–92 (discussing evidentiary requirements in CoI hearings). The CoI hearing process has been criticized for failing to provide sufficient due process to the institution and its personnel alleged to have committed the infraction. See, e.g., *id.* at 756, 792 (stating that “COI proceedings . . . lack . . . formal due process protection”). That said, NCAA rules do require the CoI to provide parties with fair notice of any alleged infractions and an opportunity to defend themselves. See *id.* at 757 (reporting that the NCAA bylaws “provide[] due-process-like protection, granting member institutions accused of major violations the right to fair notice and a meaningful opportunity to appear and defend. The difference is that the COI—not the courts—determines whether the notice was fair and the opportunity meaningful.”).

115. Cf. Rapp, *supra* note 15, at 1035–37. But see Rogers & Ryan, *supra* note 47, at 760.

116. Cf. Rogers & Ryan, *supra* note 47, at 760 (noting that “institutions frequently challenge a violation’s classification as major rather than secondary . . . [o]r perhaps . . . that the sentence imposed by the COI does not fit the violation”).

117. See *id.* at 758–59 (explaining that the “duty to cooperate repeatedly surfaces and must shape the lawyer’s view of the entire [NCAA] enforcement process”).

118. See Rapp, *supra* note 15, at 1035 (asserting that the threat of significant penalties—such as the so-called “death penalty” discussed *infra*—has left schools unwilling to vigorously defend themselves before the CoI).

sport for a period of time, restricting television appearances by the institution, assessing financial penalties, banning the school from post-season competition, or even imposing the so-called “death penalty,” in which the NCAA orders a university to suspend its participation in a particular sport for a period of one or more seasons.¹¹⁹

Universities that are ultimately dissatisfied with the CoI’s resolution of the case have an opportunity to appeal the CoI’s decision to the Infractions Appeals Committee, which can overturn the CoI’s determination on any one of three grounds: (1) the CoI’s finding was clearly contrary to the evidence, (2) the facts found by the CoI did not constitute a violation of NCAA bylaws, or (3) a procedural error rendered the CoI’s evidence unreliable.¹²⁰ Not surprisingly given the relatively narrow grounds for review, a comprehensive academic analysis of appeals to the Appeals Committee concluded that “the likelihood of success on appeal is minimal and may continue to be for the foreseeable future.”¹²¹

Recently, the NCAA has sought to strengthen its enforcement apparatus.¹²² Given the potential competitive and financial incentives for breaking the rules, commentators believed that under the old penalty framework, a school conducting a risk-reward analysis could conclude that “the benefits derived from violating NCAA regulations outweighed the potential penalties that the NCAA would likely impose.”¹²³ In order to combat this perception, the NCAA adopted a series of new, stricter

119. See Kobritz & Levine, *supra* note 86, at 35–36 (outlining potential punishments in NCAA infractions cases). The CoI has only prescribed the “death penalty” one time, in 1985, against Southern Methodist University (SMU) and its football team. See Edelman, *supra* note 48, at 387 (reporting same). The effects of this punishment on SMU were so severe that many have speculated the NCAA will never again issue such a sanction. See Andrew Solomon, *Preventing Recurrences of the Cover-Ups at Penn State & Baylor (and Now Michigan State): Where Does It End?*, 28 MARQ. SPORTS L. REV. 379, 418 (2018) (quoting Tim Layden, *The Loneliest Losers*, SPORTS ILLUSTRATED VAULT (Nov. 18, 2002), <https://vault.si.com/vault/2002/11/18/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-y> [<https://perma.cc/KZ55-AETV>]) (observing same).

120. See generally Glenn Wong, Kyle Skillman & Chris Deubert, *The NCAA’s Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of a New Chapter*, 9 VA. SPORTS & ENT. L.J. 47, 57 (2009) (outlining the standard of review at the Infraction Appeals Committee).

121. *Id.* at 152.

122. See, e.g., Weston, *supra* note 59, at 576 (“Current regulations are an insufficient mechanism to hold coaches responsible for the integrity of the program or actions of their subordinates.”); See Dennie, *supra* note 84, at 140 (discussing calls for reform).

123. Davis & Hairston, *Majoring in Infractions*, *supra* note 14, at 985.

guidelines for punishment beginning in 2013.¹²⁴ In particular, the NCAA implemented a system akin to the sentencing guidelines found in criminal law, mandating certain penalties—such as post-season bans, scholarship reductions of up to twenty-five percent, and a fine of one to three percent of the total budget for the relevant team—in most Level I and II cases.¹²⁵ As a result, the CoI is now permitted to deviate from these punishments only in cases in which the circumstances are either sufficiently mitigating or so extraordinary that they rise to the level of aggravating.¹²⁶

In addition, the NCAA also took steps in 2013 to further incentivize coaches to ensure that their programs were operating in compliance with the Association's bylaws.¹²⁷ Specifically, the Association enacted new bylaws holding head coaches accountable for any violations committed by their assistant coaches or other subordinates.¹²⁸ Previously, head coaches defended themselves from alleged infractions by arguing that they were unaware that their assistant coach or supporting staff member had broken the rules.¹²⁹ Now, head coaches must ensure that their subordinates have been appropriately trained and monitored for compliance with NCAA bylaws.¹³⁰

However, because no formal contractual relationship exists between the NCAA and any individual university employee—only the NCAA and its member-institutions are affiliated by privity of contract—the Association lacks standing to directly punish any individual wrongdoers,

124. See Dennie, *supra* note 84, at 140 (reporting that revisions to the NCAA's penalty structure became effective on August 1, 2013).

125. See Davis & Hairston, *Majoring in Infractions*, *supra* note 14, at 1011–12 (analogizing the required penalties as being “similar to criminal law sentencing guidelines”).

126. See *id.* at 1012 (noting that aggravating factors may include “multiple Level I violations . . . a history of Level I and II violations . . . by the institution . . . [or] a lack of institutional control”).

127. See Dennie, *supra* note 84, at 143–44 (reporting that the NCAA altered its enforcement structure to, among other things, “hold individuals in positions of power and authority accountable for failing to appropriately oversee compliance matters”).

128. See Leibsohn, *supra* note 98, at 135 (stating that the NCAA now “requires head coaches to take an active role in ensuring compliance with NCAA rules on behalf of their entire programs”).

129. See Brian L. Porto, *New Rules for an Old Game: Recent Changes to the NCAA Enforcement Process and Some Suggestions for the Future*, 92 OR. L. REV. 1057, 1083 (2014) (“Previously, penalties were based on whether the head coach knew of the violations or could be presumed to have known of them.”).

130. See *id.* (quoting NCAA, *Q&A with Oregon State President Ed Ray* (Oct. 30, 2012), <https://www.ncaa.org/about/resources/media-center/news/qa-oregon-state-president-ed-ray> [<https://perma.cc/S2Y9-HDLK>]) (explaining that coaches must “put practices and training and written materials in place that instruct their assistant coaches how to act”).

including coaches.¹³¹ Instead, the Association has historically been forced to penalize offending individuals indirectly via the so-called “show-cause” penalty.¹³² When the CoI determines that a coach or other athletic department personnel has committed one or more serious infractions, the CoI will order any member institution that employs the offending individual to establish—or show cause—that they have properly penalized the employee for the violation.¹³³ Such potential punishments may include “termination, suspension or reassignment.”¹³⁴ If the CoI determines that the institution’s punishment of the employee was not sufficient, then it can further penalize the university for the individual’s offense.¹³⁵ This is true even if a coach subjected to a show-cause penalty has left to work for a different university, with the new hiring institution potentially subject to penalties for infractions committed by its employee at his or her prior school.¹³⁶ As a result, being subjected to a show-cause penalty usually disrupts the coach’s career—if not effectively ending it entirely—for the duration of the penalty period.¹³⁷

Most recently, and in addition to the existing enforcement apparatus outlined above, the NCAA launched a new, independent decision-making framework for particularly complex cases. This new adjudication option, adopted in 2019, is known as the Independent Accountability Resolution Process (IARP).¹³⁸ The IARP creates a series of independent groups to

131. See Weston, *supra* note 59, at 564 (“NCAA sanction powers extend only to member institutions, not to individual coaches, players, agents, boosters, or involved individuals who are not direct members of the NCAA” because “[t]echnically the NCAA does not contract with coaches or players.”). That said, universities typically include a provision in their contracts with coaches requiring the coaches to abide by NCAA rules. See *id.* (“[T]hose individuals generally must agree to comply with NCAA regulations through contractual arrangements with the member school.”).

132. See C. Peter Goplerud III, *NCAA Enforcement Process: A Call for Procedural Fairness*, 20 CAP. U. L. REV. 543, 544 (1991) (“The bylaws also authorize the [CoI] to order a member institution to show cause why that member should not suffer further penalties, unless the institution imposes a prescribed discipline on an employee.”).

133. See James Hopkins, *NCAA Penalties: Corporate Accountability for Coaches and Presidents*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 179, 181 (2003) (“The NCAA places a burden on the institutions to show that they have properly penalized their personnel.”).

134. *Id.*

135. See *id.* (“The NCAA . . . reserves the right to determine if a penalty is suitable in each situation.”).

136. See Kobritz & Levine, *supra* note 86, at 36 (reporting that when “an athletics department staff member . . . has been found in violation[] of the provisions of NCAA legislation while representing another institution,” the hiring institution must still “show cause why a penalty or additional penalty should not be imposed”).

137. See *id.* at 42 (noting that some believe a show-cause penalty effectively renders a coach “unemployable at any NCAA institution”).

138. See Gregg Doyel, *NCAA’s New Independent Infractions Structure Is Complicated and Terrifying*, INDIANAPOLIS STAR (May 2, 2020, 11:43 AM),

handle complex infractions cases in the hopes of minimizing the appearance of any conflict of interest that may have existed under the NCAA's primary enforcement model discussed above (insofar as the existing model calls upon representatives of NCAA member schools to hold their peer institutions accountable).¹³⁹ The NCAA hopes that this new mechanism will dispel the perception that the Association has not traditionally meted out punishment in an equitable manner in past cases.¹⁴⁰

Specifically, the IARP creates a series of new committees responsible for overseeing and administering the new process.¹⁴¹ In order to enter the IARP, the accused institution, the NCAA's Vice President of Enforcement, or the chair of the CoI must file a referral request.¹⁴² From there, the request for referral to the IARP goes to the newly created Infractions Referral Committee—made up of a group of NCAA enforcement personnel, other intercollegiate athletics officials, and an independent arbitrator—which determines whether the case is sufficiently complex and adequately implicates core NCAA values to warrant adjudication under the IARP framework.¹⁴³ If the Referral Committee approves the request, the case then goes to the Complex Case Unit, a body of independent investigators and advocates who determine whether any additional inquiry into the institution's alleged infractions is necessary and, if so, conduct a subsequent investigation.¹⁴⁴ Once the Complex Case Unit is satisfied that an adequate investigation has been completed, the case then moves to the Independent Resolution Panel, where a hearing is held before a panel of five of the Resolution Panel's fifteen independent "members with legal, higher education and/or sports backgrounds."¹⁴⁵

<https://www.indystar.com/story/sports/2020/05/02/scary-new-ncaa-independent-enforcement-model-eyes-memphis-n-c-state/3047915001/> [<https://perma.cc/YD7F-EJZU>] (describing creation and operation of the IARP).

139. See *Independent Accountability Resolution Process*, IARPC, <https://iarpc.org/> [<https://perma.cc/9YWG-J4MV>] (explaining that "[t]he creation of independent groups to handle select complex infractions cases and minimize perceived conflicts of interest was the intended purpose of the independent structure").

140. See Doyel, *supra* note 138 (quoting the NCAA's Vice President of Hearing Operations, Naima Stevenson Starks, as stating that the IARP was created to combat "the perception . . . that some schools weren't being held as accountable as others" under the NCAA's prior enforcement model).

141. See IARPC, *supra* note 139.

142. *Infractions Referral Committee Procedures*, IARP § 6-1, https://iarpc.org/wp-content/uploads/2020/11/IRC_Procedure.pdf [<https://perma.cc/7DSD-JA7T>].

143. *Id.* §§ 2-3, 5-1 (specifying the factors pertinent to the IRC's determination of whether to grant the referral request).

144. See *Complex Case Unit (CCU)*, IARP, <https://iarpc.org/complex-case-unit/> [<https://perma.cc/9S8P-QY5B>].

145. *Independent Resolution Panel (IRP)*, IARP, <https://iarpc.org/independent-resolution-panel/> [<https://perma.cc/83XJ-SJCP>].

The Resolution Panel is ultimately charged with deciding whether a violation occurred, and, if so, prescribing an appropriate penalty under the NCAA's stricter punishment guidelines discussed above.¹⁴⁶ The panel's decision is considered to be final, with no appeals permitted.¹⁴⁷ This IARP structure is further overseen and administered by another committee, the Independent Accountability Oversight Committee.¹⁴⁸ To date, a total of six cases have been approved for resolution under the IARP.¹⁴⁹ Four of these cases stem from the FBI's investigation into corruption in men's college basketball.¹⁵⁰ So far, the Resolution Panel has not reached a final decision in any of these cases.

II. CRITICISMS OF THE NCAA: OVERREGULATION AND UNFAIRNESS

The NCAA has been harshly criticized over the years on a variety of grounds.¹⁵¹ Indeed, the Association has become such a frequent punching bag that sports columnist Andy Staples has noted, "one of the few things Republicans and Democrats can agree on is their hatred of the NCAA."¹⁵² This criticism of the Association has most commonly centered on two main areas: (1) the NCAA's overregulation of college sports and (2) its ineffective and unfair enforcement mechanisms.¹⁵³ Unfortunately, as this

146. *See id.* (stating that the IRP "decides whether violations occurred and prescribes penalties").

147. *Id.* ("Decisions issued by the IRP are final and are not subject to appeal.").

148. *Independent Accountability Oversight Committee (IAOC)*, IARP, <https://iarpc.org/independent-accountability-oversight-committee-iaoc/> [<https://perma.cc/78ZD-XCUA>].

149. *Referred Cases*, IARP, <https://iarpc.org/referred-cases/> [<https://perma.cc/CP4V-TX8Z>].

150. *See id.* (noting that infractions cases involving the University of Arizona, Louisiana State University, the University of Kansas, and North Carolina State University have all been approved for resolution under the IARP); *see also* Dennis Dodd, *At Least Six College Basketball Programs Will Be Notified of Major NCAA Violations by This Summer*, CBS SPORTS (June 12, 2019), <https://www.cbssports.com/college-basketball/news/at-least-six-college-basketball-programs-will-be-notified-of-major-ncaa-violations-by-this-summer/> [<https://perma.cc/9NBD-QSC4>]. The fifth case involves the University of Memphis's men's basketball team and alleged improper benefits provided to its star player, James Weisman. *See Memphis' NCAA Case Goes to Independent Investigation Arm*, AP NEWS (Mar. 4, 2020), <https://apnews.com/article/ddb7223bc1dc457018a0de30cb152a59>.

151. *See* Courtney Tibbetts, Note, *The FEMALE Act: Bringing Title IX into the Twenty-First Century*, 22 VAND. J. ENT. & TECH. L. 697, 705 (2020) (observing that "the NCAA receives frequent harsh criticism for its practices").

152. Andy Staples, *Why the NCAA Is Taking a Massive Step Just by Discussing Athletes' Path to Profit*, SPORTS ILLUSTRATED (May 14, 2019), <https://www.si.com/college/2019/05/14/ncaa-working-group-schools-compensation-options-for-athletes> [<https://perma.cc/P7P3-Q2TW>].

153. In addition to the two criticisms discussed herein, the NCAA also faced considerable scrutiny in recent years for its failure to allow student-athletes—especially

Part will reveal, although the NCAA at times has acknowledged the apparent legitimacy of these criticisms, the Association to date has been unable to effect meaningful reform in either area.

A. Overregulation by the NCAA

First, as noted above,¹⁵⁴ one common criticism of the NCAA is that it has excessively legislated college sports, resulting in an unworkably large and complex body of rules.¹⁵⁵ Indeed, as one university official has contended, the NCAA schools are “the most over-regulated body known to man. We’ve got to rival the IRS.”¹⁵⁶ This overregulation, in turn, has made it practically impossible for schools to avoid running afoul of NCAA bylaws¹⁵⁷ while at the same time dramatically increasing the compliance costs imposed on universities.¹⁵⁸ Consequently, critics of the NCAA—and even the Association itself—have frequently argued that a significant deregulatory campaign is needed in order to streamline the Association’s rulebook.¹⁵⁹

Recognizing that the complexity of its bylaws could be counterproductive to its overall mission, the NCAA has sporadically

those participating in the revenue-generating sports of football and men’s basketball—from receiving any monetary compensation above their total cost of attendance. *See, e.g.*, Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA’s Myth That Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 662–65 (2018); Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 177, 179–80 (2020). The ultimate merits of these criticisms, as well as the proper resolution of this so-called “pay for play” issue, are beyond the scope of this Article. However, it is worth noting that the perceived unfairness of these restrictions on student-athlete compensation likely fuels additional rationalizations allowing various NCAA stakeholders to justify their rule-breaking behavior, as further discussed below. *See infra* notes 330–31 and accompanying text.

154. *See supra* notes 57–66 and accompanying text (discussing the growth of NCAA regulations over time).

155. *See, e.g.*, Weston, *supra* note 59, at 560 (contending that “[t]he NCAA is often criticized as a behemoth bureaucracy that over-regulates college athletics in the name of amateurism”).

156. T. Matthew Lockhart, Comment, *The NCAA Should Adopt a Uniform Student-Athlete Discipline Policy*, 16 UCLA ENT. L. REV. 119, 127 (2009) (quoting Steve Wieberg, *More Schools Laying Down the Law*, USA TODAY, Sept. 18, 1998, at 17C).

157. *See supra* notes 72–75 and accompanying text (noting that schools find avoiding infractions of NCAA rules increasingly difficult).

158. *See supra* notes 90–93 and accompanying text (considering the growth of universities’ NCAA compliance programs over time).

159. *See* Wong, Skillman & Deubert, *supra* note 120, at 52 (“By the early 1980s, the NCAA members became concerned that even relatively minor violations were being processed in a manner that slowed the system and gave the impression that the enforcement program was nitpicking . . .”).

embraced the goal of deregulation at various times over the years.¹⁶⁰ Indeed, as early as the 1980s, the NCAA acknowledged that overregulation of relatively minor violations had the potential to overwhelm its enforcement apparatus.¹⁶¹ Unfortunately, however, any attempts to significantly streamline the NCAA's rulebook inevitably have run into pushback from the Association's membership, with schools objecting to any deregulatory effort on several grounds.

One persistent source of opposition has been by smaller-budget schools that have feared that the elimination of regulations would make competing with wealthier programs even more difficult.¹⁶² At the same time, college coaches also have been a somewhat surprising, albeit frequent, source of pushback against any deregulation efforts. Indeed, coaches historically have objected to attempts to streamline the rules on quality-of-life grounds, fearing that any loosening of regulations could result in increased pressure to work even harder to keep up with their rivals given the competitive nature of the industry.¹⁶³ Back in the 1990s, for instance, the NCAA convened a panel of fifty college coaches to help identify recruiting bylaws that could be eliminated.¹⁶⁴ Rather than identify any such rules to abolish, however, the coaches instead recommended that the Association add even more regulations to limit their activities during the recruiting process.¹⁶⁵

Despite this historic inability to streamline its bylaws, the NCAA nevertheless launched a new effort to deregulate in 2013.¹⁶⁶ In particular, the Association appointed a Rules Working Group charged with identifying and eliminating unnecessary regulations.¹⁶⁷ In doing so, the

160. See Dutcher, *supra* note 57, at 34 (“[D]eregulation of NCAA legislation has been a topic of interest for many years.”).

161. See Wong, Skillman & Deubert, *supra* note 120, at 52.

162. Cf. Davis & Hairston, *supra* note 60, at 91–92 (noting that “smaller, lesser-staffed programs” have objected to easing restrictions on the recruiting activities of non-coaching staff members for fear that it “would result in further widening the gap between the ‘haves’ and the ‘have-nots’ within college athletics”).

163. See *id.* at 89 (noting the fear that such “measures would increase the work pressure on coaches and thus disrupt any effort by them to lead balanced lives”).

164. See Dutcher, *supra* note 57, at 34 (“[M]ore than fifty Division I coaches from all sports [were convened] in an attempt to reach agreements on reducing and simplifying recruiting rules.”).

165. See *id.* (“The results of that meeting were somewhat surprising. Rather than identifying regulations to be eliminated, football and basketball coaches suggested even more regulations . . .”).

166. See Davis & Hairston, *supra* note 60, at 78 (noting that the NCAA considered twenty-six proposals in 2013 attempting to “streamline NCAA rules governing recruiting, coaches and other athletics personnel, and awards and benefits”).

167. See *Rules Working Group*, NCAA, <http://www.ncaa.org/governance/working-groups/rules-working-group> [<https://perma.cc/5QFT-ZW7Q>] (last visited Sept. 11, 2021) (describing the Rules

Working Group was asked to help shift the NCAA bylaws from a system attempting to achieve competitive equity amongst all of the Association's member institutions to one focused on ensuring fair competition between schools.¹⁶⁸ In other words, rather than use its rulemaking power to attempt to eliminate any competitive advantage that richer, more historically successful athletic departments may have over smaller-budget programs, the NCAA's new emphasis on fair competition sought to focus the Association on ensuring compliance in core areas of interest to all member institutions, such as student-athlete eligibility and regulating the length of the recruiting and playing seasons.¹⁶⁹

The Working Group ultimately made a series of twenty-six proposals for reform, focusing on three main areas: recruiting, the duties of athletic department personnel, and scholarship awards and benefits.¹⁷⁰ For instance, the Working Group proposed eliminating restrictions regarding the types of printed recruiting materials that schools can send to prospective student-athletes—such as rules limiting the size of mailings—and deregulating the extent to which coaches can call, text, or tweet their recruits.¹⁷¹ Meanwhile, other proposals would have expanded the degree to which noncoaching staff athletic-department personnel could engage in recruiting functions and would have permitted universities to purchase and convey computers to their student-athletes as part of their scholarship grant.¹⁷²

These proposals were adopted via a special process approved by the NCAA in 2011, in which any rule change proposed by the Working Group would be submitted directly to the Division I Board of Directors for approval.¹⁷³ Although the Board approved twenty-five of twenty-six

Working Group's charge as being to "[r]eview and amend the Division I Manual to reduce the volume of the unenforceable and inconsequential rules that fail to support our enduring values and place emphasis on the most strategically important").

168. See Davis & Hairston, *supra* note 60, at 78 ("More than attempting to achieve simplification, the deregulation legislation submitted [by the Rules Working Group] also ushers in a new model of governance that reflects a controversial transformation in the NCAA's governance philosophy—from an emphasis on maintaining competitive equity to achieving fairness of competition.").

169. See *id.* at 85 ("[A] fair competition model . . . focuses rulemaking on issues of association or nationwide concern—such as student-athlete eligibility, scholarships, the length of recruiting and playing seasons, and coach limitations.").

170. See *id.* at 78 (reporting that the Rules Working Group made "twenty-six proposals" to "streamline NCAA rules governing recruiting, coaches and other athletics personnel, and awards and benefits").

171. See *id.* at 87–90 (summarizing proposals).

172. See *id.* at 91–92, 94–95.

173. See *id.* at 83 (explaining that the Rules Working Group would "propose legislation for Board of Directors' consideration").

proposals,¹⁷⁴ the implementation of many of these proposals ultimately was suspended after they generated significant pushback from the NCAA's broader membership.¹⁷⁵ In particular, critics of the proposals feared that they would further exacerbate the competitive gap between large- and small-budget schools.¹⁷⁶ As a result, any attempt at streamlining the NCAA bylaws was effectively put on hold.

Consequently, despite widespread acknowledgement that the NCAA bylaws are overly complex, the Association historically has been unable to meaningfully implement any deregulatory efforts. Indeed, the NCAA's former Director of Legislative Service once opined that the quest for "significant legislative deregulation is akin to the quest for the Holy Grail—a noble, and maybe even a romantic, quest that may not be achieved, at least in this lifetime, given the inherently competitive nature of intercollegiate athletics."¹⁷⁷

B. Perceived Ineffectiveness and Unfairness of NCAA Enforcement

Second, despite the multitude of rules and regulations promulgated by the NCAA—as well as the extensive enforcement apparatus the Association has built¹⁷⁸—another frequent criticism of the Association is that it has nevertheless proven itself to be ineffective at actually preventing its member institutions from breaking its rules.¹⁷⁹ Indeed, there is widespread public perception—shared by a number of college coaches themselves¹⁸⁰—that rule-breaking is rampant among NCAA schools.¹⁸¹

174. See *id.* at 79 (“[T]he Board of Directors approved twenty-five of the [Rules Working Group’s] twenty-six legislative proposals.”).

175. See *id.* at 80 (“[T]his legislation was adopted but has been suspended in light of strong opposition by Division I member institutions.”).

176. See *id.* at 92 (noting, for instance, that “smaller, lesser-staffed programs” objected to easing restrictions on the recruiting activities of non-coaching staff members for fear that it “would result in further widening the gap between the ‘haves’ and the ‘have-nots’ within college athletics”).

177. Dutcher, *supra* note 57, at 33, 35.

178. See *supra* Section I.C.

179. Cf. Kevin M. McKenna, *A Proposition with a Powerful Punch: The Legality and Constitutionality of NCAA Proposition 48*, 26 DUQ. L. REV. 43, 76 (1987) (bemoaning “the rampant cheating and exploitation throughout our universities and colleges” despite the NCAA’s regulatory efforts).

180. See Dennis Dodd, *Candid Coaches: Revealing How Many Teams Cheat, Commit Major Violations*, CBS SPORTS (Aug. 7, 2017, 10:00 AM), <https://www.cbssports.com/college-football/news/candid-coaches-revealing-how-many-teams-cheat-commit-major-violations/> [<https://perma.cc/K8PS-W2YL>] (reporting that “just under half of all coaches surveyed believe there is rampant cheating going on”).

181. See Scott McKay, *Here’s to the Cheaters*, AM. SPECTATOR (Mar. 19, 2019, 1:00 PM), <https://spectator.org/heres-to-the-cheaters/> [<https://perma.cc/44SE-EHFB>] (asserting, “[h]ere’s a quick bit of reality for those who don’t get it — in college basketball,

To some extent, the apparent underenforcement of NCAA rules is simply a function of basic math. The Association is responsible for monitoring the compliance of its more than 1,100 member institutions, schools that collectively sponsor over 500,000 student-athletes every year.¹⁸² To perform this task, the Association employs approximately sixty enforcement staff members, or roughly one enforcement staff member per 8,333 student-athletes.¹⁸³ While the Association traditionally has attempted to remedy this imbalance by imposing an obligation on its member institutions to self-report any infractions they have committed through the institutional control provisions,¹⁸⁴ some degree of underenforcement is all but inevitable.

Meanwhile, the NCAA's enforcement difficulties have been compounded in recent years by the fact that the incentives to break the Association's rules arguably have never been greater, while cheating has simultaneously become harder to detect. The revenue college sports programs generated has grown dramatically over the last two decades, increasing by 250 percent over the last fifteen years alone (rising from \$4 billion in 2003 to \$14 billion in 2018).¹⁸⁵ However, schools are unable to divert any of this additional revenue directly to the players who are largely responsible for generating it, as the NCAA forbids its member institutions from compensating their student-athletes beyond the cost of their education.¹⁸⁶

This state of affairs has led to the formation of a black market in which various interested third parties—whether they be a college's fans and boosters or the athletic apparel company that sponsors the school—attempt to funnel money to players in order to entice them to enroll at a

and college football too, everybody cheats"). *See also* J. Adam Ribock, *The NCAA: Enabling Cheating Since 1910 by Inadequately Punishing Cheating Coaches*, 1 MISS. SPORTS L. REV. 389, 392 (2012) (noting "the problem of widespread cheating among college coaches").

182. *Overview*, NCAA, *supra* note 7.

183. *See* Jeff Eisenberg, *Toughest Jobs in Sports: NCAA Enforcement Staff Member*, YAHOO! SPORTS: THE DAGGER (July 27, 2014), <https://sports.yahoo.com/blogs/ncaab-the-dagger/toughest-jobs-in-sports--ncaa-enforcement-staff-member-163826437.html> [<https://perma.cc/LX3L-3CY9>] (noting that the size of the NCAA's enforcement staff was recently increased by fifty percent, from forty to sixty staff members).

184. *See* NCAA D-I MANUAL, *supra* note 8, §§ 19.2.1, .2.

185. *See* Patrick Hruby, *How Fighting the NCAA Became a Bipartisan Sport*, WASH. POST (Mar. 17, 2020), <https://www.washingtonpost.com/magazine/2020/03/17/how-fighting-ncaa-became-bipartisan-sport/> [<https://perma.cc/5LF3-6EMT>].

186. *See, e.g.*, Cody J. McDavis, Comment, *The Value of Amateuism*, 29 MARQ. SPORTS L. REV. 275, 277–78 (2018) (noting that "[t]he NCAA caps student-athlete financial aid at cost of attendance").

particular university.¹⁸⁷ Indeed, media reports are replete with salacious stories of college athletes being provided under-the-table compensation from university boosters in a variety of hard-to-detect forms, including everything from gift cards to casino chips and farm equipment to Bitcoin.¹⁸⁸ Consequently, in light of the apparent regularity of such surreptitious compensation, as well as the ease with which it frequently can be concealed, the NCAA itself has estimated that the Association fails to catch over half of the cheating that is actually occurring at its member institutions.¹⁸⁹

At the same time, however, cynics contend that the underenforcement of NCAA rules is also—at least to some extent—by the Association’s own design.¹⁹⁰ Sports fans have long believed that the NCAA is disinclined to punish the most popular athletics programs too strictly, as the Association depends on the revenues generated by these schools to fund itself.¹⁹¹ Specifically, because a substantial portion of the NCAA’s annual operating budget is generated from media-rights contracts for the television coverage of its various national tournaments,¹⁹² it is often

187. See James Landry & Thomas A. Baker III, *Change or Be Changed: A Proposal for the NCAA to Combat Corruption and Unfairness by Proactively Reforming Its Regulation of Athlete Publicity Rights*, 9 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 4 (2019) (asserting that “a black market for athlete services developed in which NCAA member institutions and their business partners seduce college athletes to their schools with payments and other benefits that are exchanged in violation of NCAA rules”). Indeed, as economist David Berri has observed, “[a]s long as athletes generate more revenue than they receive in compensation, there will be an incentive for schools to increase the compensation to athletes beyond what the rules allow.” David Berri, *Who is Cheating in College Sports?*, FORBES (Apr. 27, 2018, 11:07 AM), <https://www.forbes.com/sites/davidberri/2018/04/27/who-is-cheating-who-in-college-sports/?sh=4262689e7080> [<https://perma.cc/56X3-YQAJ>].

188. See, e.g., Dennis Dodd, *Newton Rewrote Rules but Here’s How Cheating Is Still Rampant in College*, CBS SPORTS (Jan. 30, 2016, 1:17 PM), <https://www.cbssports.com/college-football/news/newton-rewrote-rules-but-heres-how-cheating-is-still-rampant-in-college/> [<https://perma.cc/F8K6-SRXJ>] (recounting alleged forms of unauthorized compensation provided to student-athletes in violation of NCAA rules).

189. See Sean Sheridan, Comment, *Bite the Hand That Feeds: Holding Athletics Boosters Accountable for Violations of NCAA Bylaws*, 41 CAP. U. L. REV. 1065, 1094 (2013) (stating that “the NCAA even admits that it is common for *major investigations* to uncover less than fifty percent of the actual cheating occurring at a given institution”).

190. See Christopher L. Chin, *Illegal Procedures: The NCAA’s Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1243 (1993) (asserting that “when the NCAA enforces its regulations, its commercial motives are clear” after providing relevant examples).

191. See *id.*

192. See Trisha Ananiades, *Penalty on the Field: Creating a NCAA Sexual Assault Policy*, 19 VILL. SPORTS & ENT. L.J. 463, 472 (2012) (explaining that “[t]he NCAA holds media rights contracts with various networks for the coverage of championships, including football, basketball, and baseball . . . revenue streams [that] comprise over 90%

speculated that the NCAA is less inclined to punish high-profile programs such as the University of Alabama, Duke University, or the University of Kentucky for fear of damaging the potential value of its championship tournaments during future negotiations of media rights.¹⁹³

As but one recent example of this apparent phenomenon, despite the fact that the FBI launched a series of high-profile prosecutions in 2017 against assistant college men's basketball coaches affiliated with leading athletic programs like the University of Arizona, University of Southern California, Oklahoma State University, and Auburn University—on the basis of their alleged involvement in a scheme with shoe company Adidas to provide under-the-table financial compensation to top recruits¹⁹⁴—to date the NCAA has officially punished only one of these schools for its apparent infractions.¹⁹⁵ During this same time period, however, the Association placed Cal Poly San Luis Obispo on two years' probation and forced it to vacate its only NCAA men's basketball tournament berth for providing impermissible textbook stipends to some of its student-athletes (including, in one case, a stipend just five dollars over the allowed limit).¹⁹⁶

Meanwhile, in other instances, the NCAA has been perceived as having failed to sufficiently punish high-profile wrongdoing when—

of the NCAA's operating budget"); Tazzi, *supra* note 1, at 405 (observing that roughly ninety percent of the NCAA's annual operating "budget is comprised of the revenues generated from the NCAA men's basketball tournament").

193. See, e.g., Bradley David Ridpath, Gerald Gurney & Eric Snyder, *NCAA Academic Fraud Cases and Historical Consistency: A Comparative Content Analysis*, 25 J. LEGAL ASPECTS SPORT 75, 98 (2015) (arguing that the recent academic fraud scandal at the University of North Carolina suggests that "the NCAA again appears to be demonstrating situational ethics with regard to potential punishment, or lack thereof, for North Carolina. Candidly, UNC is much more of a valuable property to the NCAA mechanism and revenue generation than Marshall University and it seems to be clear by the NCAA thus far dodging any significant punishment for unethical conduct and academic fraud for UNC.").

194. See Anne Ryman, *College Basketball FBI Trial: What You Need to Know*, AZCENTRAL (Apr. 19, 2019, 11:12 AM), <https://www.azcentral.com/story/sports/2019/04/18/ncaa-fbi-investigation-college-basketball-trial-arizona-wildcats-sean-miller-adidas-nike-bribery/3468288002/> [<https://perma.cc/T6WV-QP5E>] (discussing the FBI's case). For an additional discussion of the FBI investigation, see *infra* notes 319–27 and accompanying text.

195. See Matt Norlander, *Oklahoma State Hit with One Year Postseason Ban for NCAA Violations Uncovered in FBI Investigation*, CBS SPORTS (June 5, 2020, 5:15 PM), <https://www.cbssports.com/college-basketball/news/oklahoma-state-hit-with-one-year-postseason-ban-for-ncaa-violations-uncovered-in-fbi-investigation/> [<https://perma.cc/DPP7-SMD7>] (reporting that the NCAA banned Oklahoma State University's men's basketball team from participating in the 2021 NCAA Men's National Tournament, in addition to other penalties such as a reduction of scholarships).

196. See Billy Witz, *Who's on Trial in the College Basketball Scandal? Not the Big Names*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/sports/college-basketball-trial-arizona-lsu.html> [<https://perma.cc/9JPJ-72E9>] (observing same).

despite its multitude of rules—the Association’s bylaws failed to address the specific conduct at issue in the scandal. For example, the NCAA failed to take action against the University of North Carolina, despite the school admitting to having allowed significant academic fraud to occur, because the wrongdoing extended beyond just student-athletes to the school’s general student population and thus was ostensibly outside the scope of the Association’s rules.¹⁹⁷ Similarly, Michigan State University evaded any NCAA punishment following the revelation that the school’s former medical doctor, Larry Nassar, had sexually abused hundreds of young women, including a number of the school’s own student-athletes, after the Association concluded that the conduct did not implicate any existing NCAA bylaw.¹⁹⁸ Indeed, somewhat remarkably, nowhere in the NCAA’s vast, “440-page rule book [had the Association promulgated any] penalties for sexual violence,” even when committed by student-athletes.¹⁹⁹

Taken together, these various factors have led to the widespread perception that the NCAA is no longer able to meaningfully police its members. Instead, it is commonly assumed that many, if not most, of the highest-profile NCAA schools are frequently breaking the Association’s rules. It should come as no surprise, then, that even high-profile figures in college athletics—among them the Big 12’s commissioner, Bob

197. See Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html> [<https://perma.cc/L2ZB-YBMZ>] (explaining that “[i]n a ruling that caused head-scratching everywhere except Chapel Hill, the N.C.A.A. announced on Friday that it could not punish the university or its athletics program because the ‘paper’ classes were not available exclusively to athletes. Other students at North Carolina had access to the fraudulent classes, too.”).

198. See Cheyna Roth, *The NCAA Tells Michigan State No Rules Violated in Larry Nassar Scandal*, NPR (Aug. 30, 2018, 5:37 PM), <https://www.npr.org/2018/08/30/643465851/the-ncaa-tells-michigan-state-no-rules-violated-in-larry-nassar-scandal> [<https://perma.cc/8R89-85US>] (reporting that “[t]he National Collegiate Athletic Association (NCAA) has cleared Michigan State University of any violations stemming from how it has handled sexual assault allegations”). For more on the Nassar scandal, see Marc Edelman & Jennifer M. Pacella, *Vaulted into Victims: Preventing Further Sexual Abuse in U.S. Olympic Sports Through Unionization and Improved Governance*, 61 ARIZ. L. REV. 463, 468–82 (2019).

199. Kendall Baker, *The NCAA’s “Predator Pipeline,”* AXIOS (Jan. 23, 2020), <https://www.axios.com/ncaa-athletes-sexual-assault-rules-e0d53060-384c-4d76-8fff-77b05b3702d0.html> [<https://perma.cc/NL6P-5TQ3>]. See also Dan Greene, *Worth Fighting for: An Ex-athlete Is Advocating for Colleges to Take a Stronger Stance Against Sexual Assault*, SPORTS ILLUSTRATED, Mar. 11, 2019, at 15, 16 (noting that an online petition urging NCAA schools to “adopt rules banning athletes with histories of violence . . . from competing” had been signed by more than 214,000 people).

Bowlsby—have concluded that the NCAA’s “enforcement [process] is broken.”²⁰⁰

One final criticism of the NCAA’s enforcement apparatus is focused not on the effectiveness or arbitrariness of its outcomes, but rather on the lack of due process afforded to individuals caught up in an NCAA investigation. Such concerns date at least as far back as 1978, when the U.S. House of Representatives Subcommittee on Oversight and Investigations convened hearings to examine allegations of unfairness in the NCAA enforcement process.²⁰¹ Specifically, because the NCAA is not considered to be a state actor following the U.S. Supreme Court’s seminal 1988 decision in *NCAA v. Tarkanian*,²⁰² the Association is not legally required to provide constitutional due process to individuals (or institutions) subject to its enforcement process.²⁰³ As a result, although NCAA member schools are afforded various rights under the Association’s bylaws, all too often this same level of protection is not afforded to individuals subject to an NCAA investigation on a personal level. For instance, student-athletes do not necessarily have the right to be notified of the allegations against them when being questioned by NCAA or university-level compliance staff, nor do they have the right to a hearing or appeal prior to being declared ineligible for competition.²⁰⁴ Although some states—including Florida, Nevada, and Kansas—attempted to redress this shortcoming by pursuing legislation in the early 1990s that would have subjected the NCAA’s enforcement process to state due process protections, in 1993 the Ninth Circuit Court of Appeals ultimately ruled that these efforts were unconstitutional.²⁰⁵ As a result, the NCAA today continues to possess considerable discretion to decide for itself what procedural protections to afford to those subject to its investigatory powers.

200. Jake Trotter, *Bob Bowlsby Sees Bleak Landscape*, ESPN (July 22, 2014, 6:52 PM), https://www.espn.com/college-sports/story/_/id/11243234/bob-bowlsby-big-12-commissioner-says-cheating-pays-ncaa-enforcement-broken [<https://perma.cc/7ELF-MGAU>].

201. See Wong, Skillman & Deubert, *supra* note 120, at 51–52 (discussing hearings).

202. 488 U.S. 179 (1988).

203. *Id.* at 195–98.

204. See Emmett Gill, *The UNC Football Investigation and Student-Athlete Due Process*, ENT. & SPORTS LAW., Fall 2015, at 45, 56 (discussing the due-process shortcomings in the NCAA’s treatment of University of North Carolina football players Devon Ramsay and Michael McAdoo).

205. *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993) (holding these state-level due process laws unconstitutional based on commerce-clause grounds). See also Wong, Skillman & Deubert, *supra* note 120, at 51–53 (recounting the history of state attempts to subject the NCAA to state-level due process protections).

III. LESSONS FOR THE NCAA FROM CORPORATE COMPLIANCE

It should be clear from the foregoing that ensuring compliance with its own rules is fundamental to the NCAA's mission. The NCAA is therefore a compliance organization. Yet this prompts an obvious question: If the main purpose of the NCAA is compliance, why does it seem so unable to curb wrongdoing, both large and small, among its member institutions? Whether it is bribes paid to college basketball players or too much cream cheese on an athlete's bagel, the NCAA rulemaking and enforcement apparatus appears to be operating in fits and starts, catching only a fraction of the "real" wrongdoing while over-punishing the mundane. Indeed, a recent survey of leaders across the college athletics landscape revealed that "[f]ew believe the NCAA enforcement system works well."²⁰⁶ If the NCAA's rulemaking and enforcement process is indeed as broken as so many believe, what exactly needs mending in order to effectuate the Association's compliance goals?

This Part suggests that while the unique rulemaking structure of the NCAA—a structure that incentivizes small schools to adopt rules in an effort to limit large school dominance²⁰⁷—plays an important role, there is an overlooked harm stemming from this dynamic that deserves equal attention. When compliance efforts become bloated and overwrought, they actually create more rule-breaking behavior. The process by which this occurs requires a theoretical analysis that has been lacking among existing legal scholarship focused on the NCAA. Fortunately, emerging work of corporate compliance scholars, particularly those focused on the behavioral aspects of law and ethics, offers a compelling literature upon which to draw.

A. Parallels Between Corporate and NCAA Compliance

The NCAA's mission is centered around compliance; that much is certain.²⁰⁸ But before drawing insights from another area of compliance that, at first glance, could arguably be viewed as unrelated to athletics—corporate compliance and organizational governance—it is important to demonstrate the parallels between the two.

206. SHUGOLL RSCH., NCAA DIVISION I GOVERNANCE AND ORGANIZATIONAL/COMPETITIVE STRUCTURE SURVEY: QUANTITATIVE RESEARCH FINDINGS 13 (2020), <https://www.knightcommission.org/wp-content/uploads/2020/10/kcia-ncaa-governance-organizational-competitive-structure-survey-1020-01.pdf> [<https://perma.cc/M652-FXN7>].

207. See *supra* notes 67–68 and accompanying text (discussing the wide variance in athletic budgets across Division I schools and the resulting dynamics that this imbalance has for the NCAA legislative process).

208. See Kobritz & Levine, *supra* note 86, at 33.

Although the term “corporate compliance” can be amorphous, it is generally defined as “a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter violations of law.”²⁰⁹ Others define corporate compliance more directly as a set of processes used to ensure employees “do not violate applicable rules, regulations or norms.”²¹⁰ And still others take a more behavioral-oriented approach, saying “compliance is the set of internal processes used by firms to adapt behavior to applicable norms.”²¹¹

Regardless of the definition adopted, parallels to the NCAA’s mission are striking. The Association’s stated purpose is to “cultivat[e] an environment that emphasizes academics, fairness and well-being across college sports.”²¹² This broad notion is effectuated through NCAA Bylaw 2.4(a), which requires each member school to “[e]stablish policies for sportsmanship and ethical conduct.”²¹³ According to the NCAA’s definition of sportsmanship, the focus should be on the behaviors of student-athletes, coaches, officials, administrators, and fans, as guided by a set of principles akin to the law, albeit imposed at “a higher standard.”²¹⁴ In other words, as in corporate compliance, the functional definition of the NCAA’s mission is the implementation of a set of policies aimed at facilitating rule-following behavior among members.

The parallels continue beyond the definitional. Corporate compliance is generally considered to have two main areas of focus: deterring violations of law and generating positive norms.²¹⁵ On the legal front, compliance programs are aimed at reducing criminal and civil law-breaking by corporate employees that create vicarious legal liability for the firm.²¹⁶ For example, compliance officers build and administer

209. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 958 (2009).

210. Geoffrey P. Miller, *The Compliance Function: An Overview 1* (N.Y.U. Ctr. L. Econ. & Org., Working Paper No. 14-36, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527621 [<https://perma.cc/4L5V-VLJJ>].

211. Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2082 (2016).

212. NCAA Mission Statement, *supra* note 33.

213. NCAA D-I MANUAL, *supra* note 8, § 2.4(a).

214. *Committee on Sportsmanship and Ethical Conduct*, NCAA, <https://www.ncaa.org/governance/committees/committee-sportsmanship-and-ethical-conduct> [<https://perma.cc/NU2P-GR8Z>] (last visited Aug. 29, 2021).

215. Haugh, *Criminalization*, *supra* note 16, at 1220–21.

216. See Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1573–74 (1990). Vicarious liability is expansive, particularly for criminal violations: “The bottom line is that a corporation is criminally, strictly, and vicariously liable for whatever

programs to prevent violations of state and federal criminal laws such as money laundering, bribery, antitrust, and fraud,²¹⁷ as well as regulatory violations that often form the basis of concurrent criminal and civil liability.²¹⁸ Compliance officers also attempt to guard against violations of purely civil tort-based statutes and regulations that may be raised by private litigants against the company, including workplace harassment and discrimination, occupational health, privacy, environmental protection, and health care.²¹⁹ As to norm generation, compliance programs hope to generate intracompany “social norms that champion law-abiding behavior.”²²⁰ This is important because “norms fill the gaps left by more formal [statutory and regulatory enforcement] mechanisms.”²²¹ Further, many in compliance consider norm generation as the way to build an ethical corporate culture, which helps reduce wrongdoing without employing more formal and costly legal mechanisms.²²²

The NCAA has essentially the same two aims. Although it does not explicitly speak in terms of legal violations, its compliance efforts are highly legalistic.²²³ Much like any self-regulatory organization operating in a heavily regulated industry, the NCAA imposes significant mandates

crimes corporate personnel commit on company time unless they are on a frolic and detour for their own exclusive, personal benefit.” Paul J. Larkin, Jr. & John-Michael Seibler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 STETSON L. REV. 7, 8 (2016). See also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) (explaining the scope of tort liability for employer based on employee’s actions).

217. See Griffith, *supra* note 211, at 2082, 2084 n.19.

218. See J. KELLEY STRADER, UNDERSTANDING WHITE COLLAR CRIME 9–10 (4th ed., 2017) (explaining that concurrent civil and criminal proceedings are common in white collar and corporate cases). There are at least 10,000—but possibly upwards of 300,000—regulatory provisions that expose companies to criminal liability. See Ellen S. Podgor, *Introduction: Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 531 n.10 (2012) (quoting *Reining in Overcriminalization: Assessing the Problems and Proposing Sols. Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 3 (2010) (statement of Jim E. Lavine, President, National Association of Criminal Defense Lawyers)).

219. See Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 467 (2008); Miller, *supra* note 210, at 11 (discussing the effect that private litigation has on compliance programs).

220. Baer, *supra* note 16, at 960. Norm-based compliance is “the process[] by which an organization seeks to ensure that employees and other constituents conform to applicable norms.” GEOFFREY PARSONS MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 3 (2014).

221. Baer, *supra* note 16, at 960. Social norms are often more powerful than legal proscriptions. See Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417, 438–39 (2003) (describing how norms expressed by Enron’s culture overrode internal rules and external laws).

222. Griffith, *supra* note 211, at 2093–94.

223. Scholars have commented that although the NCAA rules are not law, they are “most often written and read by lawyers.” Rapp, *supra* note 15, at 997.

on its independent members through rules—its bylaws.²²⁴ While membership in the Association is voluntary, that is true only in theory—membership provides access to benefits that are necessary for an athletic program’s survival. Therefore, running afoul of NCAA rules is akin to violating a serious law. This means member programs must self-police through compliance efforts, just as companies must self-police their employees or face sanctions.²²⁵ Whether company or athletic program, both are attempting to avoid the same thing: violations of the rules that lead to costly penalties or even the “death penalty” of being excluded from competition.²²⁶ It is no surprise, then, that NCAA rulebooks and athletic program compliance departments have grown so as to guard against this risk.²²⁷ At the same time, the NCAA is also attempting to foster norms against rule-breaking behavior. Just as companies understand that rule-based compliance cannot foresee and prevent every transgression and that positive culture can help fill the gaps,²²⁸ member schools know that

224. Self-regulatory organizations such as the Financial Industry Regulatory Authority (FINRA) or the Chicago Mercantile Exchange act as the “private police officers of [the] financial system.” William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 5 (2013) (explaining that self-regulatory organizations investigate and sanction members and their companies for rules violations).

225. See, e.g., Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113, 1113–14 (1997) (describing the “advent of self-policing efforts by corporate organizations—spurred by rising public expectations”).

226. Rapp, *supra* note 15, at 1035. For companies, the “death penalty” is exclusion from being able to sell their products or services. The best example is when a business involves selling or providing services to the government; violating a serious enough rule could result in a bar to future government contracting, which would effectively put the company out of business. See Marc R. Greenberg, *Beware: Debarment Can Prove to Be More Damaging than the Criminal Penalty* (Jan. 28, 2014) (unpublished manuscript), http://www.musickeeler.com/images/ps_attachment/attachment1183.pdf (outlining the collateral consequences of debarment for convicted companies, particularly those subject to EPA jurisdiction).

227. See Heller, *supra* note 41, at 318. Interestingly, however, the NCAA seems to lack an understanding of how to best effectuate compliance despite its expanding mandates, as it provides scant specific guidance on how athletic departments can *do* compliance. One of the main guidance documents published by the NCAA, *Principles of Institutional Control*, speaks mostly in generalities and provides little best practices. See NCAA COMMITTEE ON INFRACTIONS, PRINCIPLES OF INSTITUTIONAL CONTROL (2012–13). See also Rapp, *supra* note 15, at 1002 (stating the document “offers essentially no guidance on key oversight questions, such as proper reporting chains and lines of communication”). That said, the NCAA does provide examples of some member schools’ compliance manuals; unfortunately, this may do more to add to the complexity of rules compliance than streamline it. See NCAA, *Institutional Control*, <https://www.ncaa.org/governance/institutional-control> [<https://perma.cc/5FQS-9RL8>] (last visited Sept. 5, 2021) (linking to sample manuals).

228. Susannah Hammond & Mike Cowan, *Cost of Compliance 2021: Shaping the Future* 5 (Thomson Reuters 2021),

fostering a culture of following the “letter and spirit of the [NCAA] rules” based around the “fundamental values that define sportsmanship” creates a more comprehensive compliance system.²²⁹

To achieve legal deterrence and positive norm-generation, corporate compliance programs have historically executed three main tasks. One is employee education.²³⁰ Most consider the starting point for all compliance to be educating employees on what the applicable laws and company policies are and how to comply.²³¹ This is usually accomplished through written codes of conduct and company procedures that employees are then trained on, the idea being that employees will be able to automatically apply the policies in their daily work.²³² The second task is monitoring, which is aimed at ensuring corporate policies are understood and followed and that any violations are quickly identified.²³³ Monitoring can be both direct and indirect—everything from screening new hires to formal performance reviews to auditing past financial transactions.²³⁴ The third task is enforcement.²³⁵ Often this involves additional training or minor sanctions for low-level compliance violations, but firing an employee is the most common penalty for significant violations.²³⁶ If the wrongdoing

m/documents/legal/en/pdf/reports/shaping-the-future.pdf [https://perma.cc/D9V5-RH7Z] (noting that financial services industry compliance officers “reported that instilling a culture of compliance remained high on the list of challenges that boards foresaw for 2021”).

229. NCAA, *Committee on Sportsmanship and Ethical Conduct*, <https://www.ncaa.org/governance/committees/committee-sportsmanship-and-ethical-conduct> [https://perma.cc/RJ4N-Q4PY] (last visited Sept. 5, 2021) (explaining the creation in 1997 of the Committee on Sportsmanship and Ethical Conduct and its subsequent focus on values and the principles of sportsmanship that “reflect[] a higher standard than law because it includes, among other principles, fundamental values that define sportsmanship”). See also Assoc. Press, *NCAA’s Enforcement Staff Will Go Back to School*, INDY STAR (Aug. 9, 2013, 6:48 PM), <https://www.indystar.com/story/sports/college/1/01/01/ncaas-enforcement-staff-will-go-back-to-school/2637557/> [https://perma.cc/8JUM-EHC9] (describing new NCAA rules that allow schools opportunity to demonstrate they “create[d] a culture of compliance on campus”).

230. Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with the Law*, 2002 COLUM. BUS. L. REV. 71, 81.

231. Baer, *supra* note 16, at 965; Griffith, *supra* note 211, at 2095–96; James A. Fanto, *Advising Compliance in Financial Firms: A New Mission for the Legal Academy*, 8 BROOK. J. CORP. FIN. & COM. L. 1, 9 (2013).

232. Fanto, *supra* note 231, at 9.

233. Langevoort, *supra* note 230, at 81; Miller, *supra* note 210, at 4.

234. Langevoort, *supra* note 230, at 81–82; Miller, *supra* note 210, at 14; Griffith, *supra* note 211, at 2096–97.

235. Miller, *supra* note 210, at 14–15; Griffith, *supra* note 211, at 2097.

236. Many consultants urge companies to “fire quickly” if there are any compliance lapses. Bruce Weinstein, *Hiring and Firing Lessons from the Toshiba Scandal*, FORTUNE (July 24, 2015, 2:44 PM), <http://fortune.com/2015/07/24/toshiba-hiring-firing/>

involves illegality, the employee faces formal censure, fines, debarment, and even prison,²³⁷ while the company faces expensive and time-consuming investigations that could result in vicarious criminal and civil liability.²³⁸

The NCAA's compliance regime tracks these same three tasks. Particularly since the Association's enforcement structure was revamped in 2013, the NCAA has emphasized training, monitoring, and harsher enforcement.²³⁹ As an initial matter, the NCAA has made clear that each member institution is responsible for conducting its athletic program in compliance with the Association's rules.²⁴⁰ Each institution's compliance staff is expected, for example, to hold meetings to provide rules education.²⁴¹ In fact, the main responsibility of a school's NCAA compliance director is to draft program guidelines and ensure that coaches and staff understand the rules and properly interpret them day to day.²⁴² This obligation has heightened over the years such that "mere rules education will not suffice"—education efforts must be "supported by systematic, vigilant monitoring" of coaches, players, and third-parties.²⁴³ Such a monitoring system covers recruiting, financial aid, eligibility, and academic fraud and makes use of self-reported violations, hotline or other outside reporting systems, and investigations by compliance staff.²⁴⁴

[<https://perma.cc/S3YT-AXTE>]. Such "zero-tolerance policies" increased during the post-Enron era. See Landon Thomas, Jr., *On Wall Street, a Rise in Dismissals over Ethics*, N.Y. TIMES (Mar. 29, 2005), <http://www.nytimes.com/2005/03/29/business/on-wall-street-arise-in-dismissals-over-ethics.html> [<https://perma.cc/WHQ2-4ZQL>].

237. See, e.g., Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 155–59 (2015) (recounting liability for Wall Street banker for offenses tied to the financial crisis).

238. See Larkin, Jr. & Seibler, *supra* note 216, at 23 (discussing corporate liability for acts of agents and the six factors federal prosecutors are to consider when investigating and charging corporate wrongdoing). Companies are trying to avoid three things that come from employee misdeeds and the ensuing governmental investigation: legal liability, increased costs, and disruption of business practices. See Haugh, *Criminalization*, *supra* note 16, at 1240–43 (explaining three aspects of intervention and providing BP, Bank of America, and Volkswagen scandals as examples).

239. See Davis & Hairston, *Majoring in Infractions*, *supra* note 14, at 1002–06 (explaining four-tier classification system for infractions of NCAA's bylaws).

240. *Id.* at 1015.

241. *Id.* at 1016.

242. Megan Fuller, Note, *Where's the Penalty Flag? The Unauthorized Practice of Law, the NCAA, and Athletic Compliance Directors*, 54 N.Y.L. SCH. L. REV. 495, 505 (2009).

243. Davis & Hairston, *Majoring in Infractions*, *supra* note 14, at 1016; NCAA D-I MANUAL, *supra* note 8, § 19.2.1 ("Each institution has an affirmative obligation to monitor and control its athletics programs, its representatives and its student-athletes to ensure compliance with the constitution and bylaws of the Association.").

244. Fuller, *supra* note 242, at 505–06; Heller, *supra* note 41, at 318–19.

Although the subject matter of potential violations is different, these are the same tools and mechanisms used by corporate compliance officers.²⁴⁵

The NCAA's 2013 enhancements to its enforcement process also highlight the similarities between corporate and NCAA compliance. In both spheres there is an expectation of cooperation. While this is an affirmative duty for NCAA member schools²⁴⁶ and only a preference for companies,²⁴⁷ the penalty structures under both incentivize broad cooperation. In fact, the potential penalties have increased concomitantly over the years, and possible penalties for significant rule-breaking by NCAA member schools now follow a structure that some compare to the "criminal law sentencing guidelines" that drive enforcement in corporate compliance.²⁴⁸ For example, NCAA Level I violations, absent mitigating circumstances, require the imposition of post-season bans, scholarship reductions, and fines based on the total budget of the sports team in question; departure from these guidelines is allowed only under rare circumstances.²⁴⁹ The launching of the new IARP adds an additional layer of strict enforcement for complex cases. While the IARP may have been created to minimize conflicts of interest, it was also formulated with the goal of increasing punishments for large-budget schools that had been deemed to have received soft treatment in the past.²⁵⁰ For cases that are sufficiently complex and implicate core NCAA values, the end result undoubtedly will be more severe punishment with no right to appeal.²⁵¹

This is precisely how criminal penalties for individual white-collar offenders operate, with high penalties based on severity of the offense and

245. See Haugh, *Criminalization*, *supra* note 16, at 1222–24 (describing education and monitoring functions of most large corporate compliance programs).

246. NCAA D-I MANUAL, *supra* note 8, §19.2.3 (stating that "[c]urrent and former institutional staff members, and prospective and enrolled student-athletes of member institutions have an affirmative obligation to cooperate fully with and assist the NCAA enforcement staff").

247. See, e.g., Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 86–91 (2013) (describing internal investigations and the pressures on employees to cooperate). Indeed, it is commonplace for a company in the course of its investigation to read its employees' emails, listen to phone calls, monitor Internet activity, videotape them, confiscate their work, and interview them without providing counsel and at the end of the investigation, turn all the information over to the government to demonstrate cooperation. Haugh, *Criminalization*, *supra* note 16, at 1223.

248. Davis & Hairston, *Majoring in Infractions*, *supra* note 14, at 1012, 1017.

249. *Id.* at 1011–13.

250. See Doyel, *supra* note 138.

251. *Id.*; *Independent Resolution Panel (IRP)*, *supra* note 145 (stating that the IRP "decides whether violations occurred and prescribes penalties" and "[d]ecisions issued by the IRP are final and are not subject to appeal").

advisory sentencing ranges.²⁵² Companies found liable for their employee's misdeeds also face high monetary penalties that can only be lessened if the employee committed a crime despite the company having an "effective" compliance program.²⁵³ The NCAA's institutional control structure acts similarly, deterring violations by requiring schools to exercise oversight of their respective programs.²⁵⁴ In addition, because almost all sentences of individuals, and virtually every corporate punishment, are pursuant to an agreement with the government, there is very little opportunity for oversight and appeal.²⁵⁵

There is one final similarity between NCAA and corporate compliance: how the proliferation of rules creating compliance obligations

252. See generally KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 38–77 (1998) (providing a comprehensive history of federal sentencing); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 24 (2003).

253. See Philip A. Wellner, Note, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 497–500 (2005). A company with an effective compliance program that meets the specified criteria of the Organizational Guidelines can receive a reduction of up to ninety-five percent of its "base fine." ETHICS RES. CTR., *THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS AT TWENTY YEARS* 16, 22 (2012), <https://www.theagc.org/docs/f12.10.pdf> [<https://perma.cc/NKD8-RASU>]. Effective compliance is judged on the following criteria:

- (1) standards and procedures to prevent and detect criminal conduct;
- (2) responsibility at all levels of the program, together with adequate program resources and authority for its managers;
- (3) due diligence in hiring and assigning personnel to positions with substantial authority;
- (4) communicating standards and procedures, including a specific requirement for training at all levels;
- (5) monitoring, auditing, and non-retaliatory internal guidance/reporting systems, including periodic evaluation of program effectiveness;
- (6) promotion and enforcement of compliance and ethical conduct; and
- (7) taking reasonable steps to respond appropriately and prevent further misconduct upon detecting a violation.

See *id.* at 23–24; see also U.S. SENT'G GUIDELINES MANUAL § 8B2.1(a)–(b) (U.S. SENT'G COMM'N 2018). This story is complicated by the rise of deferred and non-prosecution agreements, which formally take a company out of the Guidelines' purview yet still follow many of the Guidelines' dictates. See BRANDON L. GARRETT, *TOO BIG TO JAIL* 6–7 (2014) (describing the rise of deferred and non-prosecution agreements and its ramifications); Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIA. L. REV. 321, 325 (2012).

254. Rapp, *supra* note 15, at 1043. But unlike in the corporate context, the standards by which proper oversight is judged are far from clear.

255. See GARRETT, *supra* note 253, at 162 (comparing corporate deferred and non-prosecution agreements with plea agreements for individuals charged with federal crimes).

has occurred. While legislation affecting corporate compliance efforts does not suffer from the small-versus-large school dynamic, it does share a similar pattern of enactment, one that is largely driven by scandal. The last sixty years of corporate compliance—what is considered the modern era—indicates that compliance morphed from a regime of self-regulation²⁵⁶ to one of formal compliance as a once-a-decade cycle occurred.²⁵⁷ Under this cycle, corporate scandal happens, followed by public outcry, followed by criminal investigation and prosecution, followed by sweeping criminal and quasi-criminal legislative response, all culminating in increased compliance efforts within companies.²⁵⁸

The result has been almost exponential growth in compliance, as evidenced by companies hiring thousands of compliance personnel at a time, costing millions of dollars per year.²⁵⁹ But more important than raw numbers are those on whom companies spend their compliance budgets. The most “sought-after hires tend to be attorneys,” especially “those with regulatory backgrounds,” which “makes sense given that compliance officers [must keep up] with increasingly strict and complex regulatory systems” in order to train on, monitor, and enforce those systems.²⁶⁰ For senior compliance positions, hires are not only lawyers but also former high-ranking prosecutors and regulatory agency heads.²⁶¹ These folks, not surprisingly, tend to shape their companies’ compliance programs toward a focus on preventing unlawful conduct, “primarily by increasing surveillance and control and by imposing penalties for wrongdoers”²⁶² — just as they would have done in their prior professional roles. Critically,

256. Haugh, *Criminalization*, *supra* note 16, at 1224.

257. *Id.* at 1224–33.

258. Haugh, *Criminalization*, *supra* note 16, at 1233.

259. See Anthony Effinger, *The Rise of the Compliance Guru—and Banker Ire*, BLOOMBERG (June 25, 2015, 5:06 AM), <http://www.bloomberg.com/news/features/2015-06-25/compliance-is-now-calling-the-shots-and-bankers-are-bridling> (reporting that JPMorgan hired 8,000 compliance personnel after the financial crisis); Robert Bird & Stephen Park, *An Efficient Investment-Risk Model of Compliance*, CLS BLUE SKY BLOG (Nov. 30, 2016), <http://clsbluesky.law.columbia.edu/2016/11/30/an-efficient-investment-risk-model-of-corporate-compliance/> (finding that compliance costs may be as high as \$10,000 per employee at some firms). Although things have leveled out since the financial crisis, the compliance industry is expected to reach \$97.3 billion by 2028. *Enterprise Governance, Risk & Compliance Market Worth \$97.3 Billion By 2028*, GRAND VIEW RSCH. (Apr. 2021), <https://www.grandviewresearch.com/press-release/global-enterprise-governance-risk-compliance-egrc-market> [<https://perma.cc/Q6LP-PYAH>].

260. Haugh, *Criminalization*, *supra* note 16, at 1245; Effinger, *supra* note 259; Aruna Viswanatha, *Wall Street’s Hot Trade: Compliance Officers*, REUTERS (Oct. 9, 2013, 6:07 AM), <https://www.reuters.com/article/us-usa-banks-compliance/wall-streets-hot-trade-compliance-officers-idUSBRE9980EE20131009> [<https://perma.cc/7SHZ-9JF3>].

261. Haugh, *Criminalization*, *supra* note 16, at 1245–46.

262. See Lynn S. Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106, 109.

the result is often “over-compliance,”²⁶³ a scenario in which often-needless rules and procedures are created in an attempt to minimize all “downside risk” associated with any employee misconduct.²⁶⁴

The same thing has happened with NCAA compliance. Each new cheating or payment scandal—usually occurring at large-budget men’s basketball or football programs—is followed by calls for new rules, which are implemented by member schools thereafter.²⁶⁵ This results in a larger and more complex compliance apparatus within the NCAA itself and within member institutions—one that grows with each new scandal.²⁶⁶ That is why the compliance staff at many large athletic programs looks much like the compliance staff at large companies. There is often a compliance director, who likely has a law degree, overseeing a host of employees focused just on NCAA compliance.²⁶⁷ All this is necessary to provide training, monitoring, and enforcement of the ever-growing NCAA rulebook and its interpretive documents, as well as to keep abreast of the 150 new bylaws proposed each year.²⁶⁸ In sum, exasperation over the

263. Ashlee Vance, *Over-Compliance is the New Compliance, Says Former SEC Chairman*, REG. (May 18, 2005, 8:20 PM), http://www.theregister.co.uk/2005/05/18/pitt_sec_kalorama/ [https://perma.cc/7AAU-X6XA] (reporting that Harvey Pitt, former SEC Chairman and now CEO of a compliance provider, approaches compliance program design from the standpoint of a proactive, “[m]inimal muster is for losers,” approach).

264. Griffith, *supra* note 211, at 2083.

265. See Branch, *supra* note 20, at 82, 94 (cataloging recent scandals in Division I programs and discussing resulting rule changes and attempted changes). In a compelling example, after the DOJ criminally charged a number of shoe executives and agents for paying top basketball prospects to attend certain schools, the NCAA responded by forming a commission to set new rules. Marc Tracy, *N.C.A.A. Alters Rules for Agents and Draft in Wake of Basketball Corruption Scandal*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/sports/ncaa-basketball-agents.html> [https://perma.cc/65L9-29UW]. Yet the actual imposition of those new rules and the disposition of high-profile cases seems to be taking longer than ever. Pat Forde, *Three Years Ago, the College Basketball Corruption Scandal Promised a Reckoning. Where Is It?*, SPORTS ILLUSTRATED (Oct. 21, 2020), <https://www.si.com/college/2020/10/21/college-basketball-scandal-sec-recruiting-daily-cover> [https://perma.cc/8EUC-37KQ] (describing how only one school to date has been punished by the NCAA after widespread scandal and criminal charges by DOJ).

266. See, e.g., Austin Malinowski, Comment, *The Adidas College Basketball Scandal and Its Aftermath*, 30 MARQ. SPORTS L. REV. 243, 243 (2019) (contending that “[m]any scandals and eligibility issues that have arisen in college athletics have led to . . . changes in the NCAA bylaws”).

267. Fuller, *supra* note 242, at 505–06; Davis & Hairston, *Majoring in Infractions*, *supra* note 14, at 1016.

268. Dutcher, *supra* note 57, at 34; Stauffer, *supra* note 58, at 115.

“unmistakable growth curve of compliance” can be found equally in a Fortune 500 company or almost any Division I athletic program.²⁶⁹

B. What Corporate Compliance Reveals about the Effects of NCAA Overcompliance

At first glance, the growth of NCAA compliance would appear to be an annoyance—more rules, more staff, and more cost that no program wants to incur—yet a justified one given the Association’s admission that much rule-breaking is going unpunished. But that ignores a misunderstood consequence of overcompliance, one that only recently has been explored in the corporate compliance literature. Specifically, the danger exists that when an organization’s compliance practices become overwrought, that itself imposes negative behavioral consequences on its members. Put differently, overcompliance can actually create an environment that unwittingly fosters future wrongdoing because overcompliance allows those subject to it the opportunity to justify and rationalize their unethical or illegal conduct. Although these sorts of rationalizations lie at the heart of white-collar crime and unethical decision-making, the processes by which they are created is seldom understood. This Section draws from recent corporate compliance scholarship, aided by criminological and behavioral ethics research, to demonstrate how overcompliance and rationalizations work together to thwart the goals of NCAA compliance.

To better understand why overcompliance—“overcriminalization,” as it is referred to in some literature—fosters additional rule-breaking, one can turn to several insights from criminology and behavioral ethics.²⁷⁰ One such insight is the rationalization process. Dating back to the pathbreaking work of criminologist Donald Cressey in the 1960s, scholars have come to appreciate that the commission of white-collar crime and unethical behavior within organizations typically follows a three-step process.²⁷¹ First, in order for an individual to engage in wrongdoing, she must experience some sort of pressure, what Cressey called an “unsharable

269. Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1197–1201 (2015) (providing overview of overcriminalization and its common definitions).

270. *Id.* 1197–201 (providing overview of overcriminalization and its common definitions).

271. See Donald R. Cressey, *The Respectable Criminal: Why Some of Our Best Friends Are Crooks*, CRIMINOLOGICA, May 1965, at 13 (laying out his three-part theory of white-collar offending that eventually became known as the fraud triangle) [hereinafter Cressey, *Respectable Criminal*]. See also Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664, 666–70 (1957) (applying similar ideas to juvenile wrongdoing but focusing only on neutralizations).

financial problem.”²⁷² Next, she must have an opportunity or, in other words, be in a position in which she can solve that non-sharable problem by violating a trust conferred upon her by the organization.²⁷³ Third, she must engage in a rationalization, the process through which she vindicates the trust violation in her own mind in order to make the behavior appear acceptable.²⁷⁴ Because many employees will find themselves in a situation triggering the first two steps—after all, many individuals will face periodic personal or professional financial pressures at some point in their careers, while all employees hold positions of trust to some degree as agents of the firm—the “crux of the problem” of white-collar crime and unethical acts in business lies in the final rationalization step.²⁷⁵

This rationalization process allows individuals to reach surprising contradictions, essentially enabling a wrongdoer to hold two incongruent ideas constant in their mind at the same time—that they are good people operating in normative society, while at the same time engaging in conduct that violates the norms or laws of their organization or society at large.²⁷⁶ In this way, by “pacify[ing] the morality of the situation and dissuad[ing] the feelings of guilt that may occur,”²⁷⁷ rationalizations allow the offender to engage in behavior that they would otherwise find to be psychologically unavailable.²⁷⁸ Cressey believed that these “conversations”—the ones the offender was holding with herself—were the most important aspects of offending.²⁷⁹ They were what “gets [her] into trouble, or keeps [her] out of trouble” by serving as the bridge allowing unethical thoughts to cross over to unethical action.²⁸⁰

This insight suggests one of the most important aspects of rationalizations: they do not function simply as excuses that offenders create ex post to justify their wrongdoing. Rationalizations are, instead, “‘vocabularies of motive,’ words and phrases that exist as group definitions labeling their deviant behavior as appropriate.”²⁸¹ Put

272. Cressey, *Respectable Criminal*, *supra* note 271, at 14.

273. *Id.*

274. *Id.*

275. *Id.* at 15.

276. *Id.*

277. Paul M. Klenowski, “*Learning the Good with the Bad*”: *Are Occupational White-Collar Offenders Taught How to Neutralize Their Crimes?*, 37 CRIM. JUST. REV. 461, 471 (2012).

278. DONALD R. CRESSEY, *OTHER PEOPLE’S MONEY: A STUDY IN THE SOCIAL PSYCHOLOGY OF EMBEZZLEMENT* 153 (1973) [hereinafter CRESSEY, *OTHER PEOPLE’S MONEY*]. *See also* Sykes & Matza, *supra* note 271, at 666.

279. Cressey, *Respectable Criminal*, *supra* note 271, at 15.

280. *Id.*

281. Todd Haugh, *Criminalized Compliance*, in *THE CAMBRIDGE HANDBOOK OF COMPLIANCE* 141 (Benjamin van Rooij & D. Daniel Sokol, eds. 2021) (quoting Cressey,

differently, violators do not formulate rationalizations moment by moment when they are acting unethically, but rather they have internalized these justifications before any such improper action has been taken.²⁸² Thus, rationalizations are best understood as a form of motivation—they not only justify the unethical behavior to others, but they also allow that behavior to become intelligible to the wrongdoer herself, thereby making it actionable.²⁸³

Rationalizations are critical to compliance because they help explain through a behavioral lens why an otherwise rule-abiding employee might nevertheless engage in unethical or illegal activity. This has both a theoretical and relational aspect. From a theoretical perspective, a rationalization is particularly pertinent to corporate and organizational wrongdoing because “almost by definition white-collar offenders are more strongly committed to the central normative structure”; thus, they need to rationalize their behavior through “elaborate . . . processes prior to their offenses.”²⁸⁴ Because these wrongdoers have not only been able to successfully traverse normative society but also have actually benefited from its structure and hierarchy, they have a greater need to preserve their status in it and therefore rely on the use of a rationalizing mechanism to “psychologically operate outside of it.”²⁸⁵

Respectable Criminal, *supra* note 271, at 15) [hereinafter Haugh, *Criminalized Compliance*, CAMBRIDGE HANDBOOK].

282. *Id.*

283. Haugh, *Criminalized Compliance*, CAMBRIDGE HANDBOOK, *supra* note 281, at 141; CRESSEY, OTHER PEOPLE’S MONEY, *supra* note 278, at 94–95.

284. Michael L. Benson, *Denying the Guilty Mind: Accounting for Involvement in a White-Collar Crime*, 23 CRIMINOLOGY 583, 587 (1985).

285. Haugh, *Criminalized Compliance*, CAMBRIDGE HANDBOOK, *supra* note 281, at 141; Scott M. Kieffer & John J. Sloan, III, *Overcoming Moral Hurdles: Using Techniques of Neutralization by White-Collar Suspects as an Interrogation Tool*, 22 SEC. J. 317, 324 (2009). *See also* Vilhelm Aubert, *White-Collar Crime and Social Structure*, in DELINQUENCY, CRIME, AND SOCIAL PROCESS 89, 92 (Donald R. Cressey & David A. Ward eds., 1969) (“But what distinguishes the white-collar criminal in this respect is that his group often has an elaborate and widely accepted ideological rationalization for the offenses, and is a group of great social significance outside the sphere of criminal activity . . .”). It is sometimes questioned how researchers are sure that an offender’s rationalizations are occurring *prior* to the unethical act, thereby allowing the behavior to proceed, versus occurring *after* the act, rendering the rationalizations mere excuses. *See* Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 271 (2005) (calling this the “lingering ‘chicken-or-the-egg’ debate”). Yet this need not provide much pause. First, longitudinal studies demonstrate the presence of *ex ante* rationalizations. *See, e.g.*, Robert Agnew, *The Techniques of Neutralization and Violence*, 32 CRIMINOLOGY 555, 555–56, 573 (1994) (engaging in a longitudinal study supporting rationalization theory’s *ex ante* sequencing). Second, even if offenders commit an unethical act without using an explicit rationalization, they often “get applied retroactively to excuse or redefine the initial deviant acts. . . . [and therefore] become discriminative for repetition of the deviant acts and, hence, precede the

Regarding the relational aspect, one crucial aspect of rationalizations is the manner in which they develop. Cressey found that rationalizations come from “popular ideologies that sanction [wrongdoing] in our culture”²⁸⁶—in other words, they are swirling around in society “waiting to be assimilated and internalized by those considering violating a trust.”²⁸⁷ Recent research findings have not only confirmed this hypothesis but also actually identify a more specific delivery mechanism: rationalizations are largely channeled through one’s network of family and friends or coworkers.²⁸⁸

Criminologist Paul Klenowski built on Cressey’s work to find that the most common source of an offender’s justifications for their actions was the example set by “coworkers or others peers in their industry.”²⁸⁹ The offenders in Klenowski’s study identified common rationalizations that “taught [them] early in [their] career[s] that [they] should do whatever it takes” to succeed, including lying and cheating.²⁹⁰ As with the common justifications that Cressey had identified, rationalizations were used to suggest that certain types of wrongdoing were acceptable in particular situations (e.g., “[a]ll people steal when they get in a tight spot” and “[h]onesty is the best policy, but business is business”).²⁹¹ Klenowski found that similar rationalizations, such as “in order to level the playing field, some rules need to be bent,” were often embedded in the processes by which employees learned their roles and jobs in the organization.²⁹²

Table 1 lists the rationalizations that are most common among white collar offenders, a description of how they operate, and the manner in which they might be verbalized.

future commission of the acts.” Maruna & Copes, *supra* at 271. Put simply, a rationalization may start off as an after-the-fact excuse but necessarily becomes the rationale facilitating future offending. *Id.*

286. Cressey, *Respectable Criminal*, *supra* note 271, at 15.

287. Haugh, *Criminalized Compliance*, CAMBRIDGE HANDBOOK, *supra* note 281, at 141.

288. Klenowski, *supra* note 277, at 471.

289. *Id.*

290. *Id.*

291. Cressey, *Respectable Criminal*, *supra* note 271, at 15.

292. Klenowski, *supra* note 277, at 473.

Table 1: White-collar Rationalizations²⁹³

Rationalization	Description ²⁹⁴	Example of verbalization ²⁹⁵
Denial of responsibility	The actors engaging in corrupt behaviors perceive that they have no other choice than to participate in such activities.	<i>"I didn't do anything wrong; it was an accident" or "it was an emergency, I needed it"</i>
Denial of injury	The actors are convinced that no one is harmed by their actions; hence, the actions are not really corrupt.	<i>"Nobody got hurt" or "I didn't steal, I just borrowed"</i>
Denial of the victim	The actors counter any blame for their actions by arguing that the violated party deserved whatever happened.	<i>"I'm the real victim here" or "They got what they deserved"</i>
Condemning the condemners	The actors shift attention from away from their conduct onto the motives of other persons or groups that may be enforcing rules or standards applied to the actors.	<i>"This place is unfair or corrupt" or "The rules are unjust anyway"</i>
Appeal to higher loyalties	The actors argue that their violation of norms is due to their attempt to realize a higher-order value.	<i>"I did it for the company" or "I had to put my family first"</i>
Metaphor of the ledger	The actors contend that they are entitled to indulge in deviant behaviors because of their accrued credits (time and effort) in their jobs.	<i>"I've done way more good than bad in my life" or "For all I've done for this place, this is nothing"</i>

293. Haugh, *Criminalized Compliance*, CAMBRIDGE HANDBOOK, *supra* note 281, at 142.

294. Descriptions adapted from Vikas Anand, Blake E. Ashforth & Mahendra Joshi, *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 18 ACAD. MGMT. EXEC. 39, 40–43 (2004).

295. Verbalizations drawn from PAUL MICHAEL KLENOWSKI, "OTHER PEOPLE'S MONEY": AN EMPIRICAL EXAMINATION OF THE MOTIVATIONAL DIFFERENCES BETWEEN MALE AND FEMALE WHITE COLLAR OFFENDERS 56, 67 (May 2008) (Ph.D. dissertation, Indiana University of Pennsylvania) (ProQuest).

Claim of entitlement	The actors justify their conduct on the grounds that they deserve the fruits of their wrongful behavior.	<i>"I deserve this" or "I've earned the right to have this"</i>
Claim of relative acceptability/normality	The actors justify their conduct by comparing it to others, whom they believe are committing actions that are worse.	<i>"There are people way worse than me" or "Everybody does it"</i>

Understanding these common rationalizations and the way in which they enable a corporate wrongdoer to engage in unethical or illegal behavior is essential to crafting an effective corporate compliance regime. It is also critical to understanding the connection between rationalizations and overcompliance. Indeed, it is important to remember the setting in which rationalizations originate—if rationalizations are drawn from an offender's work environment, that would include the compliance regime under which that individual operates. Thus, in some cases, a compliance program itself can serve as a source of rationalizations, especially in cases in which the organization's own compliance regime is overwrought or overcriminalized.²⁹⁶

Because overcriminalization as a term and concept may be unfamiliar to those focused on compliance, especially NCAA compliance, a brief discussion is warranted. The most succinct definition of the idea comes from Paul Larkin and is stated as "the overuse and misuse of the criminal law to punish conduct traditionally deemed morally blameless."²⁹⁷ Stephen Smith adds important context to this definition by identifying the phenomenon not only as encompassing the proliferation of criminal law, but also the degradation of its quality.²⁹⁸ Smith sees overcriminalization's defining characteristic as an undermining of the effort "to provide just and proportional punishments for offenses."²⁹⁹ This second definition gets closer to the heart of what overcriminalization is by focusing on its effects, i.e., what "vices" it creates.³⁰⁰ But ultimately what both definitions

296. *Id.*

297. Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 745 (2014).

298. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 539–40 (2012).

299. *Id.* at 540.

300. Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005) (defining overcriminalization as a series of "vices," finding its common features to include things like "excessive unchecked" enforcement discretion, disparity among offenders, "potential for abuse by enforcement authorities," "potential to undermine other significant" criminal law "values and . . . procedural protections," and "misdirection of scarce resources").

establish is that when attempting to define the concept of overcriminalization, a precise encapsulation of the idea is less important than conveying an understanding of the harms that it inflicts.

On this latter point, perhaps no one has been more influential than legal scholar William Stuntz. Nearly two decades ago, Stuntz observed that overcriminalization had created a “world in which the law on the books makes everyone a felon, and in which prosecutors and the police both define the law on the street and decide who has violated it.”³⁰¹ In Stuntz’s view, the sheer number of state and federal laws created a set of “overlapping circles” such that a single act of wrongdoing could run afoul of a variety of different criminal statutes.³⁰² Importantly, Stuntz believed that this feature of modern criminal law—its “breadth and depth”—has several negative ramifications for society.³⁰³

First, overcriminalization has had the effect of shifting the lawmaking process to a considerable extent from legislatures and courts to “law enforcers.”³⁰⁴ Because criminal law has become so broad, it can no longer be enforced strictly as it is written; there are simply too many potential violators to prosecute.³⁰⁵ Under such a system, decisions about how to enforce the law, and whom to prosecute, fall to the executive and, more specifically, to prosecutors and law enforcement officers, with the result that actual criminal enforcement on the street can differ markedly from the “law on the books.”³⁰⁶ Accordingly, the “criminal justice system’s real lawmak[ing]” increasingly takes the form of government lawyers and police making law through their enforcement choices, with legislatures—and their more traditional democratic governance processes—gradually becoming something of an afterthought.³⁰⁷

A second, related implication of overcriminalization is that it ultimately empowers prosecutors, and not the courts, to adjudicate crime. Because prosecutors now have so many overlapping criminal statutes and regulations to choose from, they are in a position to charge a defendant with a range of different crimes all arising from the same conduct.³⁰⁸ This gives them the option to charge a defendant with the easiest crime to prove, the crime that carries with it the highest penalty, or in many cases—by

301. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001).

302. *Id.* at 518–19.

303. *Id.* at 519–21. Stuntz believed there was a third consequence, what he thought “may be the most important of all”—that is, overcriminalization disrupts the criminal law’s expressive message. *Id.* at 520–21.

304. *Id.* at 519.

305. *Id.*

306. *Id.*

307. *Id.* at 506, 519.

308. *Id.* at 519.

asserting multiple charges—both.³⁰⁹ This dynamic increases the pressure on defendants to resolve their case through a plea agreement rather than a full-blown jury trial, thereby lowering the cost of convicting defendants and allowing prosecutors to enforce the law “more cheaply.”³¹⁰ Today’s prosecutors are thus “not so much redefining criminal law . . . as deciding whether its requirements are met, case by case.”³¹¹ Regardless of the individual decisions prosecutors make, they are de facto adjudicating outcomes.

The practical effect of these two consequences of overcriminalization should be obvious. If prosecutors and law enforcers have, in effect, become the criminal justice system, they are generally free to personify and use that system in whatever manner they see fit.³¹² This inevitably results in the “selective enforcement and unequal treatment of similarly situated defendants.”³¹³ This is not to suggest that such unequal outcomes are necessarily the result of intentional bias or vindictiveness; rather, a law enforcer may simply be applying his or her own sincerely held view of morality.³¹⁴ Regardless of the motivation, however, the end result is the same: inconsistent and arbitrary enforcement of the law.³¹⁵

As troubling as inconsistency and arbitrariness may be in their own rights, they give rise to a potentially more pernicious harm. A society faced with an enforcement regime it perceives to be arbitrary or unjust will question the regime’s legitimacy as a whole. Such an erosion of legitimacy encourages the formation of rationalizations by creating a space for the verbalizations outlined above to develop. In essence, would-be offenders are better able to justify their unethical and lawbreaking behavior as something other than illegal because of the illegitimacy of the system in which they find themselves.³¹⁶

This same phenomenon can be seen in companies and organizations with overcriminalized compliance programs.³¹⁷ Employees and staff

309. *Id.* at 519–20.

310. *Id.*

311. *Id.* at 519.

312. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712 (2005). Some suggest that “what tends to characterize many of us who have evaded punishment is not our compliance with law but the good fortune not to have been caught, [or] the discretion of authorities in failing to make arrests or bring charges.” DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 25 (2008).

313. Beale, *supra* note 300, at 757.

314. *Id.* at 758.

315. *Id.* at 758–59.

316. Sykes & Matza, *supra* note 271, at 666 (finding that much anti-normative behavior is based on “what is essentially an unrecognized extension of [legal] defenses to crimes, in the form of justifications for deviance that are seen as valid by the delinquent but not by the legal system or society at large”).

317. Haugh, *Criminalization*, *supra* note 16, at 1218–19.

subject to overcompliance are more easily able to rationalize behavior that otherwise runs contrary to the internal and external norms and rules that are fundamental to the compliance function. Once this thought process has occurred, there is nothing in the way to prevent these employees or staff members from engaging in future unethical or rule-breaking conduct, regardless of the compliance regime in place. There simply is no normative “check” available to those subject to the compliance regime because it has been rationalized away.³¹⁸

The recent scandal surrounding the FBI’s investigation into NCAA men’s college basketball offers a classic example of this phenomenon. Following an extensive investigation into alleged corruption in the sport, the FBI ultimately charged ten individuals with federal crimes arising from its probe: four assistant men’s basketball coaches—from Auburn University, the University of Arizona, the University of Southern California, and Oklahoma State University—as well as a director of an Amateur Athletic Union (AAU) Program, a marketing director and an advisor from the Adidas shoe company, an AAU basketball coach, a financial adviser, and the owner of a clothing line.³¹⁹ While the precise theory under which each defendant was implicated varied, the FBI contended that all ten defendants were guilty of illicit fraud and bribery insofar as they knowingly funneled money to or through the four assistant coaches in order to curry favor with high school and college basketball prospects.³²⁰ Most notably, the Adidas representatives were alleged to have provided sums of upwards of \$100,000 to promising, five-star high school basketball prospects in order to entice those players to attend

318. Importantly, an individual’s acceptance of a rationalization does not automatically lead to unethical or illegal behavior, as rationalizations “merely permit delinquency” rather than require it. Agnew, *supra* note 285, at 560.

319. See Matthew VanTryon & Jenny Green, *FBI Arrests Former Pacer Chuck Person and Other NCAA Assistants in Corruption Scheme*, INDIANAPOLIS STAR (Sept. 26, 2017), <https://www.indystar.com/story/sports/2017/09/26/fbi-arrests-former-pacer-chuck-person-and-other-ncaa-assistants-corruption-scheme/703301001/> [<https://perma.cc/2QUW-3UQ3>] (reporting that “four NCAA assistant basketball coaches and 10 people total arrested in a corruption scheme that allegedly involves both recruiting athletes to universities and directing athletes with NBA potential to specific agents, advisers and an apparel company”).

320. Dan Greene, *Stories of Corrupt Coaches, Advisors Underscore How the NCAA Model Exploits Players*, SPORTS ILLUSTRATED (Sept. 26, 2017), <https://www.si.com/college/2017/09/26/assistant-coaches-recruiting-fbi-arrests-player-advisors> [<https://perma.cc/U2XU-7YB2>] (explaining that the FBI charges centered on allegations that “[a] sportswear company and various advisors or managers had paid college basketball coaches for access to players and their families, or paid players and their families for the players’ commitment to attend affiliated schools, violating federal bribery and fraud law in the process”).

Adidas-affiliated universities.³²¹ Because the assistant coaches were involved in facilitating these payments and knew they were doing so in violation of NCAA rules but nevertheless had certified to their universities that they were not aware of any issues that might endanger their players' eligibility, the coaches were alleged to have defrauded their universities.³²² Meanwhile, the defendant agent, financial advisor, and clothing line owner were alleged to have paid the four assistant coaches bribes in exchange for the coaches agreeing to steer their players to the defendants' respective agency, investment firm, and clothing store.³²³

While a number of these defendants ultimately agreed to plea deals, several elected to go to trial to contest the charges.³²⁴ The testimony provided at trial by the accused agent, Christian Dawkins, is particularly illuminating. Far from denying that he had facilitated any payments to college players in violation of NCAA rules, Dawkins readily admitted it: "We were definitely paying players, yes."³²⁵ Indeed, Dawkins then justified his behavior, contending that "[e]veryone was paying players."³²⁶ He continued by explaining that, "personally, [he didn't] think there [wa]s anything wrong with paying players" because they "are the only people in college basketball who can't get paid."³²⁷ "The idea that it's an amateur [sport] is not real," he maintained.³²⁸

Although he may not have realized it, Dawkins identified at least three rationalizations he committed—denial of responsibility, claim of

321. Charlotte Carroll, *Report: Top Recruit Allegedly Took \$100K Bribe To Attend Louisville*, SPORTS ILLUSTRATED (Sept. 26, 2017), <https://www.si.com/college/2017/09/26/louisville-bribery-fbi-coaches-corruption-fraud-scheme> [<https://perma.cc/XRG3-F3HM>] (noting that an Adidas representative was alleged to have made a cash payment of \$100,000 to the family of highly regarded basketball recruit Brian Bowen to entice the player to attend the University of Louisville).

322. See Michael McCann, *Breaking Down the Prosecution's Wire Fraud Case in College Basketball's Corruption Trial*, SPORTS ILLUSTRATED (Oct. 12, 2018), <https://www.si.com/college/2018/10/12/ncaa-corruption-bribery-trial-brian-bowen-christian-dawkins> [<https://perma.cc/8VEP-EF3D>] (reporting that "the Justice Department contends that payoffs to recruits defraud the universities that enroll those recruits").

323. See VanTryon & Greene, *supra* note 319.

324. Andy Staples, *What Has the NCAA—or Anyone—Learned From the College Basketball Black Market's Time on Trial?*, SPORTS ILLUSTRATED (May 9, 2019), <https://www.si.com/college/2019/05/09/ncaa-trial-fbi-bribery-corruption-mark-emmert> [<https://perma.cc/TWP9-9LDP>] (reporting that all four assistant basketball coaches, a financial advisor, and an owner of a clothing line accepted plea deals; a basketball agent, Adidas marketing director, and Adidas consultant were found guilty at trial; and the charges against an AAU basketball coach were dropped).

325. Michael Powell, *The Most Honest Man in College Basketball Is Going to Prison*, N.Y. TIMES (May 3, 2019), <https://www.nytimes.com/2019/05/03/sports/college-basketball-trial.html> [<https://perma.cc/YM64-8WVC>].

326. *Id.*

327. *Id.*

328. *Id.*

relative acceptability, and condemning the condemners—that led to his lawbreaking behavior.³²⁹ By verbalizing these justifications to himself, he was able to hold the incongruent ideas in his mind that he was a moral agent acting on behalf of young basketball players while at the same time clearly violating NCAA rules and the law. And the main source of these rationalizations was the NCAA's rule structure itself, one that he and others perceived to be inconsistent and unfair to schools and players alike.³³⁰ Indeed, setting aside the relative merits of the question of whether student-athletes should be compensated above their cost of attendance, it appears likely that dissatisfaction with the NCAA's current policy in this area is fueling such rationalizations by any number of players, coaches, and other third parties.³³¹

While the college basketball corruption scandal and Dawkins's public testimony provide a high-profile example of how overcompliance's embedded arbitrariness can create rationalized wrongdoing, there are many more commonplace examples. In the 2010–11 and 2011–12 men's basketball seasons, players Josh Selby from the University of Kansas and Ryan Boatright from the University of Connecticut each were forced to sit out nine games and donate the funds to charity they received as high school players from potential business managers.³³² Yet the University of Kentucky's Enes Kanter was ruled permanently ineligible to play basketball in 2010 for receiving tuition credits from a club team so Kanter could attend a more academically rigorous high school in his home country of Turkey.³³³

Likewise, when Marcus Camby of the University of Massachusetts and Derrick Rose of the University of Memphis were found to have violated NCAA rules (accepting \$40,000 from a sports agent and cheating on the SAT, respectively), the Association stripped the schools' basketball programs of their wins involving the two players.³³⁴ The NCAA said the

329. See Haugh, *Criminalization*, *supra* note 16, at 1255–58 (providing detailed explanations of each rationalization and how each operates).

330. This feeling has only increased apparently. A recent *Sports Illustrated* article about the college basketball corruption scandal lamented the NCAA's lack of action and inconsistent enforcement, suggesting that “[t]hings may be worse now than they were before the FBI stuff.” Forde, *supra* note 265.

331. Notably, however, in this case the rationalizations are not coming from the overcomplexity of the NCAA's rules regarding student-athlete compensation but from dissatisfaction with a much simpler and straightforward prohibition. *See id.*

332. Stephen A. Miller, *The NCAA Needs to Let Someone Else Enforce Its Rules*, ATLANTIC (Oct. 23, 2012), <https://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012/> [<https://perma.cc/C6AF-Y94S>].

333. *Id.*

334. *Id.* The schools also had to forfeit the revenue received at part of their NCAA tournament appearances. *Id.*

schools were strictly liable despite their being “innocent victims” of the players’ conduct.³³⁵ However, when Duke University’s Corey Maggette took money from a sports agent, Duke was not required to forfeit any games and “[t]here was no mention of ‘strict liability.’”³³⁶ Recently, due to an administrative error, the University of Massachusetts overdistributed financial aid payments to men’s basketball players and women’s tennis players, resulting in the victories of both programs being forfeited, including the women’s Atlantic 10 championship.³³⁷ This second flip-flop on enforcement was all the more noticeable because it took place under the revised NCAA enforcement provisions that are supposedly more formal and consistent.³³⁸

All of this would be merely unfortunate until one understands how these instances of overcompliance-driven arbitrariness cause the more specific problem of rationalized wrongdoing. Each instance of perceived illegitimacy creates more space for violation-inducing rationalizations among players, coaches, staff, and third parties. This can be seen in how these stakeholders talk about the NCAA rules and their enforcement. For example, an SEC source likened the NCAA to a policeman who is “pulling over old ladies for going 40 in a 35 [when] [p]eople are robbing banks.”³³⁹ Others say the NCAA “majors in minors” while allowing hidden rule-breaking to occur.³⁴⁰ And still others more colorfully say that rule enforcement in certain conferences is a “s—fest . . . [but] coaches can’t be too hypocritical because everyone else is doing it, too.”³⁴¹ These sentiments are the building blocks for rationalizations, and they are swirling around in college athletics just waiting to be adopted.³⁴² Each time

335. *Id.*

336. *Id.*

337. See Forde, *supra* note 265 (quoting an Atlantic 10 commissioner stating the obvious: “The scope and depth of this minor administrative error does not compare with other institutions’ violations that truly jeopardize the collegiate model.”).

338. See Matthew McGavic, *Your Guide to the Independent Accountability Resolution Process*, SPORTS ILLUSTRATED (Feb. 24, 2021), <https://www.si.com/college/louisville/basketball/guide-to-the-iarp> [https://perma.cc/3SVS-6NVQ] (explaining the NCAA’s Independent Accountability Resolution Process adopted in 2018). This same dynamic appears to be occurring in college football. See Rodger Sherman, *The NCAA’s Rulings on James Wiseman and Chase Young Remind Us Why It Should Not Exist*, RINGER (Nov. 8, 2019, 9:19 PM), <https://www.theringer.com/2019/11/8/20956104/james-wiseman-memphis-chase-young-ohio-state-ncaa> [https://perma.cc/2WDX-T9LD] (describing inconsistent penalties for Division I college football and calling into question rules against players being paid).

339. Forde, *supra* note 265.

340. *Id.*

341. *Id.*

342. See Cressey, *Respectable Criminal*, *supra* note 271, at 15.

that happens, wrongdoing occurs and the NCAA is weakened as an association.

Perhaps the direness of the situation was summed up best by sportswriter Rodger Sherman:

The NCAA seems weaker than ever. [Entities] are eroding its authority, and in fighting for its survival, it's using the only tactic it has ever known: arbitrarily enforced, completely unnecessary justice. But the players it seeks to punish . . . and the schools it seeks to punish apparently don't care.³⁴³

This apathy—for the rules and the mission they are intended to support—is the true harm of the NCAA's overregulation and overcompliance. Unless remedied, this lack of concern will continue to erode the NCAA as a compliance organization, rendering the Association's lauded mission to "cultivat[e] an environment that emphasizes academics, fairness and well-being across college sports" meaningless.³⁴⁴

IV. IMPLICATIONS FOR THE GOVERNANCE OF INTERCOLLEGIATE ATHLETICS

As the foregoing analysis has established, the NCAA's legislative and enforcement processes historically have been the subject of withering criticism on the grounds that the Association has simultaneously overregulated intercollegiate athletics and failed to adequately and equitably police violations of its expansive rules by member institutions.³⁴⁵ Although the NCAA has—to its credit—appeared to acknowledge and internalize these criticisms to some extent over the years, the Association unfortunately has yet to enact meaningful reform in either area. The ramifications of the NCAA's failure to act are likely greater than it currently recognizes, as its overregulation and inconsistent enforcement are themselves likely to foster additional rule-breaking by student-athletes, coaches, and affiliated third parties through the rationalization process outlined above.³⁴⁶ Consequently, this analysis suggests several potential areas in which the NCAA should act in order to increase its own legitimacy in the eyes of its many stakeholders and thereby help to deter future rule violations and strengthen itself in the process.

First, and perhaps most obviously, the NCAA should fully commit to pursuing and implementing meaningful deregulation of its rulebook.

343. Sherman, *supra* note 338.

344. NCAA Mission Statement, *supra* note 33.

345. *See supra* Part II.

346. *See supra* Part III.

While such a recommendation has been made elsewhere on a number of occasions over the years,³⁴⁷ this suggestion typically has been premised simply on the recognition that a reduction in the number of the Association's rules will improve the efficiency of the NCAA's enforcement monitoring process.³⁴⁸ However, as this Article has established, not only would meaningful deregulation benefit the NCAA's efficiency, but it would also help to foster greater legitimacy for the Association and its bylaws, thereby resulting in greater voluntary compliance by the Association's stakeholders. In this respect, this Article's observation that the NCAA shares many similarities with corporate compliance organizations as to its stated purpose and function becomes particularly relevant. Indeed, concerns regarding overregulation are not unique to the NCAA but instead are prevalent throughout the corporate compliance industry.³⁴⁹

That said, it is important to acknowledge that recent history suggests such a reform is likely to prove difficult for the NCAA to achieve. Despite vowing to deregulate its rulebook on several different occasions over the years, the Association has failed to succeed on these initiatives.³⁵⁰ Part of the reason for this inability to streamline its bylaws appears to relate to the unusual competitive dynamics at play within the Association, insofar as smaller-budget schools have historically viewed the NCAA's legislative process as a way to keep pace with their wealthier peers on the playing field by restraining these larger-budget schools' ability to leverage their financial advantage to perpetuate superiority.³⁵¹ In this respect, the NCAA faces a unique challenge. In other industries, smaller competitors typically would be the most likely to welcome deregulatory efforts since smaller firms are disproportionately harmed by the costs that overregulation imposes.³⁵² Nevertheless, considering the previously unrecognized extent

347. See *supra* notes 154–60 and accompanying text (citing prior calls for the NCAA to deregulate).

348. See, e.g., Wong, Skillman & Deubert, *supra* note 120, at 52 (“By the early 1980s, the NCAA members became concerned that even relatively minor violations were being processed in a manner that slowed the system . . .”).

349. See *supra* Part III.

350. See *supra* Section II.A.

351. See *supra* notes 67–68 and accompanying text (observing that smaller-budget NCAA schools will propose legislation intended to reduce competitive disparities with wealthier athletic programs).

352. See, e.g., NICOLE V. CRAIN & W. MARK CRAIN, SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS iv (2010) (reporting that “small businesses face an annual regulatory cost of \$10,585 per employee, which is 36 percent higher than the regulatory cost facing large firms (defined as firms with 500 or more employees)”). *But see* Robb Mandelbaum, *The \$83,000 Question: How Much Do Regulations Really Cost Small Businesses?*, FORBES (Jan. 24, 2017), <https://www.forbes.com/sites/robbmandelbaum/2017/01/24/the-83000-question->

to which NCAA overregulation is likely to be fostering additional rule-breaking behavior, achieving a meaningful streamlining of its rules ought to be a greater imperative for the NCAA than it currently appears to be for the Association.

Fortunately for the NCAA, it currently finds itself at a potentially opportune juncture to implement such reform. As noted above, the Association committed itself in early 2020 to substantially overhauling its student-eligibility guidelines to permit student-athletes to receive compensation from third parties for the use of the students' NIL rights (by, for instance, offering product endorsements).³⁵³ Meanwhile, should the NCAA's restrictions preventing member schools from themselves directly providing monetary compensation to student-athletes be struck down by the courts in a future decision—as many believe is all but inevitable following the Supreme Court's recent decision in *Alston*³⁵⁴—then the Association will be forced to undertake an even more dramatic revision of its underlying bylaws.

Either way, it appears likely that the NCAA will be forced to reconsider many of its bedrock regulations in the near future. This offers the Association a prime opportunity to engage in meaningful deregulation. When conducting such a reevaluation of its bylaws, the NCAA would be well served to remember its 2013 pledge to shift its rulemaking focus away from a system attempting to maintain competitive balance amongst all of its member institutions to one dedicated to advancing the Association's core purpose and values of “govern[ing] competition in a fair, safe, equitable and sportsmanlike manner, and . . . integrat[ing] . . . athletics into higher education so that the educational experience of the student-athlete is paramount.”³⁵⁵ By overhauling its bylaws to focus exclusively on rules that are clearly directed toward the advancement of these interests, the NCAA not only would help to reduce the amount of regulation to which its members are subject, but also enhance the perceived legitimacy of its

how-much-do-regulations-really-cost-small-business/?sh=499ddda31b25
[<https://perma.cc/48RX-TGUP>] (explaining that some very small businesses are exempted from certain regulation and compliance expenses).

353. See *supra* note 29 and accompanying text (discussing the NIL issue).

354. See Millhiser, *supra* note 28 (contending that after *Alston* “[t]he NCAA may suffer an even more significant loss in a future case”).

355. NCAA *Mission Statement 2021*, <https://mission-statement.com/ncaa/#:~:text=NCAA%20core%20values%20comprise%20%E2%80%9Cwell,NCAA%20requires%20a%20supportive%20environment>. See also Davis & Hairston, *supra* note 60, at 78 (noting the NCAA's 2013 commitment to transform its “governance philosophy[—]from an emphasis on maintaining competitive equity to achieving fairness of competition”).

remaining bylaws. Indeed, as noted above,³⁵⁶ dissatisfaction with the NCAA's current regulations relating to the compensation of student-athletes is likely serving as a significant basis for rationalizing rule violations by a number of its stakeholders. Therefore, should the NCAA undertake a comprehensive reexamination of its student-athlete eligibility bylaws, it should endeavor to make sure that any restrictions in this regard are clearly justified under, and grounded upon, the Association's core values.³⁵⁷

Alternatively, even if a substantial deregulation of its bylaws should ultimately prove unachievable, the NCAA should, at a minimum, commit itself to making any new future regulations as streamlined as possible. With respect to the NIL issue, for instance, many industry insiders are already anticipating that the Association will concoct an overly complex series of rules regulating when and how a player may accept endorsement income.³⁵⁸ Indeed, the NCAA ultimately is expected to enact bylaws in this area that seek to address what fair market value for a particular endorsement opportunity would be (in order to prevent boosters from promising over-market endorsement opportunities to woo star players to their schools), as well as the types of endorsement opportunities that student-athletes are prohibited from accepting (whether because they run afoul of a school's values or directly conflict with a school's own endorsement contract with a competing company).³⁵⁹ Such bylaws will raise difficult issues for student-athletes, potential endorsers, and school compliance officers, providing added complexity that could itself fuel further delegitimization of the NCAA's rulemaking and enforcement apparatus. The NCAA would be wise to consider whether a "less-is-more" approach to the NIL issue might pay dividends in the long run despite any objections it may evoke in the short term.

Second, in addition to effectuating meaningful deregulation, the NCAA also should consider ways by which it can increase the perceived legitimacy of its enforcement mechanisms. As discussed above, the NCAA's enforcement apparatus has been heavily criticized over the years

356. See *supra* note 331 and accompanying text (observing how displeasure with the NCAA's current student-athlete compensation rules is likely to be leading to rationalization of rule-breaking).

357. See *infra* note 377 and accompanying text (noting the importance of being able to explain the justification for a certain rule when training employees on compliance-related matters).

358. See Michael McCann, *College Endorsement Deals Sow Landmines for NCAA Compliance*, SPORTICO (July 24, 2020, 9:20 AM), <https://www.sportico.com/law/analysis/2020/college-athletes-endorsement-deals-1234609869/> [<https://perma.cc/J752-92K4>] (reporting that "many [school] compliance officers are already fretting" the Association's forthcoming NIL regulations).

359. *Id.* (offering three hypothetical endorsement scenarios that the NCAA bylaws will likely seek to address).

on several grounds, including the perception that it has failed to enforce its rules in an efficient and equitable manner, as well as for failing to provide sufficient due process protections to schools and individuals subject to an NCAA investigation.³⁶⁰ Unfortunately, as scholars in the corporate compliance and management fields have come to appreciate, the perception that a compliance organization's adjudicatory and enforcement processes are run in an unfair or inequitable manner can itself fuel the perceived delegitimacy of the compliance effort itself, thereby providing fertile ground for the formation of additional rationalizations by wrongdoers.³⁶¹

Luckily, the ways in which a company can increase the internal legitimacy of its compliance efforts in this regard have been studied extensively. Tom Tyler, the leading scholar in the area, has conducted decades of research demonstrating that organizational legitimacy is created primarily by providing employees with procedural justice, i.e., fairness in the processes that resolve disputes and allocate resources.³⁶² This includes ensuring the fairness of decisions made by the organization as embodied by its leader, supporting managers, and lower-level employees tasked with implementing these processes (the law enforcers discussed above).³⁶³ It also includes ensuring the fairness of interpersonal treatment of employees at all of these levels.³⁶⁴ As Tyler explains, “[t]he ideal is to have a result . . . where procedural aspects of decision making and interpersonal fairness dominate the organization and its workgroups.”³⁶⁵

Not surprisingly, crucial to cultivating a procedurally just organization are the values by which the compliance program operates. Lynn Paine's research that combines concern for the operation of law and rules with an emphasis on managerial responsibility for ethical behavior

360. See *supra* Section II.B.

361. See, e.g., Haugh, *Criminalization*, *supra* note 16, at 1218.

362. See, e.g., Tyler, Dienhart & Thomas, *supra* note 18, at 33 (demonstrating that procedural fairness is critical in promoting employee commitment and compliance).

363. *Id.* at 37.

364. *Id.*

365. *Id.* While there are many ways to achieve this ideal (and likely many more ways to miss the mark), a procedurally just compliance program should ask whether employees have an opportunity to provide input before decisions are made; decisions are made following clear and transparent rules; decision-making bodies act without biases; rules are applied consistently across “people and over time”; employees' rights are respected; employees' needs are considered; supervisors follow the same rules as required by employees; and decision makers provide honest explanations about their conclusions. *Id.* at 38.

and compliance is especially salient here.³⁶⁶ Although Paine acknowledges that strategies will vary among companies, her findings suggest that all successful companies “strive to define . . . guiding values, aspirations, and patterns of thought and conduct.”³⁶⁷ Like Tyler, Paine argues that procedurally just governance and compliance should be aimed at the goal of creating a space in which employees adopt the values of the company as their own, choosing compliant behavior not because it conforms to a rule but “because they believe it to be the best way to act.”³⁶⁸ Companies that make these ideas a reality will go a long way toward compliance effectiveness.

What this suggests is that the NCAA aligns its legislative and enforcement procedures with its overarching mission of ensuring fairness and integrity in collegiate athletics. The Association must holistically integrate its professed values into its own procedures, not just push its values onto member schools.³⁶⁹ In this sense, the NCAA’s recent decision to transition some of its enforcement activity to a neutral, third-party arbitration process—the IARP discussed above³⁷⁰—is a step in the right direction. The NCAA was essentially acknowledging that its prior model, under which representatives of NCAA-member schools served as judge and jury for their peers, raised the perception of any number of conflicts of interest inconsistent with the Association’s values. Unfortunately, the IARP process is itself likely to fuel additional claims of unfairness insofar as schools can potentially find themselves forced to adjudicate their cases through the process with no right of appeal.³⁷¹ Moreover, the perceived legitimacy of the NCAA is likely to be further harmed by the complex—and, some might say, convoluted—structure of the IARP, and the extent to which it has further slowed enforcement-related decision-making. The fact that none of the five major infraction cases moved into the IARP process has yet been fully adjudicated seems to strengthen this argument.³⁷²

366. Paine, *supra* note 18, at 106. *See generally* Weaver & Treviño, *supra* note 23 (first large-scale study testing and finding support for Paine’s hypothesis). Certainly, the Tyler’s work and Paine’s work overlap considerably.

367. Paine, *supra* note 18, at 107.

368. Tyler, Dienhart & Thomas, *supra* note 18, at 32.

369. *See* TIMOTHY L. FORT, *THE VISION OF THE FIRM: ITS GOVERNANCE, OBLIGATIONS & ASPIRATIONS* 229 (2014) (discussing the ethical and psychological foundations that underlie legal and compliance norms and the benefits of “Real Trust,” which occurs when organizations practice virtues such as honesty, truth-telling, and promise-keeping, integrating them into the production of quality goods and service).

370. *See supra* notes 138–50 and accompanying text (discussing the formation and operation of the IARP).

371. *See Independent Resolution Panel (IRP)*, *supra* note 145 and accompanying text (observing that schools engaged in the IARP have no right of appeal).

372. *See supra* notes 149–50 and accompanying text.

Given the obstacles inherent to large-scale deregulation and streamlining of enforcement, the NCAA also should consider focusing in parallel on something it can more easily implement and that is consistent with its existing compliance structure: training on rationalizations. If rationalizations are indeed the crux of the problem of unethical behavior and NCAA rule-breaking, it makes sense to target them.³⁷³ However, care should be taken lest such training be seen as just another set of needless rules, only implemented to be arbitrarily enforced later. Again, here is where best practices from corporate compliance can provide useful lessons.

For one, NCAA compliance personnel need to understand the role of rationalizations in wrongdoing, especially in the context of institutions like its member schools, and how individual stakeholders will use them to minimize moral guilt. A review of the more accessible literature on rationalizations is a good start.³⁷⁴ Second, NCAA personnel should affirmatively train the staff of member schools in ways to eliminate the adoption of rationalizations by players, coaches, and third parties. As sociologist Joseph Heath puts it, “[t]he best way to get people to behave ethically is to put them in a situation in which ethical conduct is expected of them and self-serving excuses are not tolerated.”³⁷⁵ Thus, in order to combat rationalizations, companies must create an environment in which the rationalizations used to excuse rule-breaking behavior are not accepted.³⁷⁶

The best way to do this without layering on more rules that destroy legitimacy is to educate stakeholders and then facilitate discussions among them about rationalizations. Although this approach seems simplistic, especially when compared to the NCAA’s current byzantine approach, it is the best way to demonstrate the inadequacy of rationalizations. For example, the NCAA could provide guidance to member schools on how to conduct periodic staff meetings wherein the participants trace out commonplace rule violations, articulate the logic of why the impacted regulation exists, and then explain how violations create real harm to players and their athletic departments (outside of NCAA sanctions for the

373. Cressey, *Respectable Criminal*, *supra* note 271, at 15.

374. See Joseph Heath, *Business Ethics and Moral Motivation: A Criminological Perspective*, 83 J. BUS. ETHICS 595, 605 (2008) (suggesting that bureaucratic organizations “might constitute peculiarly criminogenic environments” and discussing how that fosters rationalizations); Anand, Ashforth & Joshi, *supra* note 294; Cressey, *Respectable Criminal*, *supra* note 271, at 15–16. See also Todd Haugh, *Sentencing the Why of White Collar Crime*, 82 FORDHAM L. REV. 3143, 3185 (2014) (discussing role of rationalizations in sentencing and how judges can best be educated about them).

375. Heath, *supra* note 374, at 611.

376. *Id.*

violation).³⁷⁷ When rationalizations arise, they should be drawn out and explored. The goal is to raise “conscious awareness of certain patterns of self-exculpatory reasoning, and to flag them as suspicious,” so that everyone will be less likely to internalize that reasoning when presented with an opportunity to engage in rationalized wrongdoing.³⁷⁸ While this strategy is modest, that is a strength, not a weakness—it allows the compliance regime to combat the psychological mechanisms at the heart of unethical behavior and at the same time builds genuine legitimacy with those subject to that regime. As more organizations are understanding the role rationalizations play in individual wrongdoing, they are taking a more central place in compliance efforts.³⁷⁹

CONCLUSION

The NCAA fundamentally exists to ensure that its member schools are complying with the Association’s bylaws. Unfortunately, as has become obvious to sports fans everywhere, the NCAA is failing to adequately perform this central task. By applying lessons from the realm of corporate governance and organizational compliance, this Article has identified the reasons why—despite its voluminous rulebook and extensive enforcement apparatus—the NCAA is failing to meet its basic objective. Fortunately, the steps necessary to foster better compliance by its member institutions—most specifically, meaningful deregulation and a

377. Heath, *supra* note 374, at 611. The size of the discussion groups is important. “If [organizations] want to develop cultures of trust where people are habitually being honest and habitually keeping promises, they need to put employees into small ‘mediating structures’ within the [organization] that matches with their neurobiology.” FORT, *supra* note 369, at 233 (discussing research suggesting we are hardwired to tell ethical stories and build trust in small groups of four to six).

378. Heath, *supra* note 374, at 611. This approach, of course, presupposes that the rules can be objectively justified, which may not be the case for all NCAA regulations.

379. See, e.g., EUGENE SOLTES, *WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL* 83–85 (2016) (explaining rationalizations and their role in white-collar crime and compliance). Two current examples are helpful here. One is Parsons Corp., an international engineering and construction company based in Pasadena, that hosts an internal website where it posts hypothetical ethical problems and asks employees to vote on how they should be resolved. The company then publishes the narrative comments anonymously, followed up with a detailed analysis by the company’s ethics committee. Through the narratives, employees themselves identify common ethical traps and rationalizations. See Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 *GEO. J. LEGAL ETHICS* 961, 984 (2012). The other is a large multinational company that shows its employees a professionally-filmed video describing how the company pleaded guilty to a crime and became subject to a corporate monitoring agreement. In the course of the video, the employees explain what rationalizations were used to justify the illegal behavior, where they originated, and why they were wrong. The video sends a powerful message of a company not afraid to admit its past faults and determine their root causes.

renewed commitment to true procedural justice—are well within its grasp. The proverbial ball is now in the NCAA's court.