Institutional Control And Corporate Governance

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INSTITUTIONAL CONTROL AND CORPORATE GOVERNANCE

Geoffrey Christopher Rapp

ABSTRACT

In January, 2015, the NCAA agreed to restore Penn State’s football wins, vacated as part of sanctions imposed for the University’s handling of the Sandusky sex abuse scandal. This represented a curious end to one of the most attention-grabbing and unusual NCAA enforcement actions in history. In the summer of 2012, the NCAA had strong-armed Penn State into accepting draconian sanctions based on the conclusion that the University failed to exert proper “institutional control” over its athletics program as required by NCAA rules. The foundation for that conclusion was the Freeh Report, which faulted Penn State’s senior leaders and Board members for their role in failing to stop Sandusky’s abuse.

This paper steps back to consider an unexplored aspect of the Freeh Report. In describing the University Board’s obligations, and failings, the Freeh Report relied upon two Delaware business law cases on the fiduciary duties of corporate directors. The connection between corporate oversight and NCAA “institutional control” is intriguing, since fiduciary duties typically arise in absence of contract and the NCAA is a voluntary association arising from contract.

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By exploring the parallels and divergence between Delaware fiduciary oversight obligations and the NCAA “institutional control” rule, important insights regarding the development of compliance and enforcement regimes can be gained. Delaware fiduciary law arises through vigorously contested, adversarial litigation. This gives clarity and nuance to its rules and standards, and provides direct implementation guidance on best practices to business firms. By comparison, the NCAA’s institutional control rule is rarely subject to clarity and the process for enforcement used by the Association is far from adversarial. Important lessons about the potential of private associations to engage in self-governance and the value of an adversarial approach to deriving oversight obligations can be gleaned.

When they write obituaries on the National Collegiate Athletics Association (NCAA), the demise of which would have been unthinkable a decade ago but today seems increasingly plausible, they may describe the beginning of the end of college sports as we know it as having originated, like so many college sports stories, in State College, Pennsylvania. Jerry Sandusky, once heir apparent to college football’s most heralded coach, is a soulless pedophile now safely behind bars. The conduct causing harm to his victims amounts to his greatest sin, but may also go down as the first straw in a pile that broke the NCAA’s back.

1 In 2001, the NCAA had a $325 million revenue budget. Julia T. Higgs & John T. Reisch, Testing NCAA Compliance at Southeastern State University: A Case Study, 17 ISSUES IN ACCOUNTING EDUC. 95, 95 (2002).
2 In a recent presentation, I described the “Four Horsemen of the NCAA’s Apocalypse” as the Sandusky affair, unionization at Northwestern, antitrust and Name/Image/Likeness litigation, and the potential workers’ compensation and/or tort exposure connected with traumatic brain injuries and concussions. For a discussion of some of these fundamental challenges to the NCAA, see Nicolas A. Novy, “The Emperor has no clothes”: The NCAA’s Last Chance as the Middle Man in College Athletics, 21 SPORTS LAW. J. 227 (2014).
4 Maureen Dowd commented that Joe Paterno sold his soul, but Jerry Sandusky was a man without a soul to sell. Maureen Dowd, JoP added his soul, As for Jerry Sandusky, he didn’t have one to sell, PITTSBURGH POST-GAZETTE, July 23, 2012, available at http://www.post-gazette.com/opinion/Op-Ed/2012/07/23/Maureen-Dowd-JoePa-sold-his-soul-As-for-Jerry-Sandusky-he-didn’t-have-one-to-sell/stories/201207230127.
The Sandusky affair was shocking and, to the NCAA’s leaders, disgusting.6 It was something they wanted to move past and quickly.7 But it was also, in a sense, a “rope-a-dope.”8 It lured the NCAA’s top leaders into mounting a moral high horse, condemning Sandusky and his protectors, and acting without the usual process9 to administer a punishment that seemed quick and decisive and, no doubt, was hoped would put this story into the history books.

But once the NCAA jumped onto the moralism podium, it found itself in a curious position.10 If the NCAA could impose draconian sanctions on Penn State – even though there was considerable question even among NCAA staff11 as to whether the institution violated NCAA rules – because of moral outrage associated with Sandusky’s crimes, how could the NCAA also deny the fundamental immorality of its seeming exploitation of “amateur athletes”?12 Forced to defend itself against antitrust litigation13 and watching a growing push towards unionization by student athletes14, the NCAA had now accepted that moral arguments15 were legitimate in what otherwise could have been defined as the “business” of college sports.

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


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


Unfortunately for the NCAA, its moral position regarding athlete unionization and student-athlete pay was even more obviously defective than its legal one. The use of morality to drive punishment in spite of a lack of clarity regarding authority in the Penn State matter also invites a skeptical view of the NCAA’s inaction in subsequent cases involving alleged sexual crimes by star athletes at big-time schools. If Penn State broke the rules and deserved punishment for not stopping Sandusky, could Florida State University be held responsible for its lackadaisical and dilatory response regarding the rape accusations against Jameis Winston?  

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

In this paper, I step back to examine an as-yet unexplored aspect of the Sandusky affair. The NCAA’s quick and precipitous sanction of Penn State – without the usual time-consuming (and perhaps feared to be embarrassing) investigation – was grounded in the so-called “Freh Report,” commissioned by the Penn State Board of Trustees. Based on the Freh Report, the NCAA concluded that Penn State’s reaction, or failure to react, to Sandusky’s crimes, amounted to a lack of “institutional control,” as required by the NCAA’s rules.  

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17 See Complaint and Demand for Jury Trial, Jane Doe v. the Florida State University (D. Fl. 2015), at *4, available at http://www.al.com/sports/index.ssf/2015/01/jameis_winstons_accuser_files.html (alleging that “FSU did nothing to investigate Plaintiff’s report of rape while the FSU Athletics Department continued to keep the incident a secret.”).
19 Id.
20 Professor Mitten describes the sanctions imposed on Penn State as “unprecedented.” Mitten, supra note 9, at 321 (2014).
To reach that conclusion, the report quoted several Delaware decisions on the fiduciary obligations of for-profit company boards to engage in oversight as part of their duties to corporate shareholders. 24 What’s striking about the Freeh Report (upon which the NCAA relied) turning to Delaware fiduciary duty decisions is that an institution’s obligations to exert institutional control are contractual in nature. 25 The NCAA is a voluntary association 26, and, in consideration for participation and the benefits it is believed to offer to schools, colleges agree to abide by the NCAA’s rules, including the one requiring “control” over athletics. 27 In essence, when imposing a sanction, the NCAA finds that an institution failed to adhere to its side of the bargain. Yet the Freeh report turned to Delaware cases dealing with fiduciary obligations – which arise in the absence of formal contract (and sometimes even in contradiction of a formal contract) – in order to understand the meaning of an institution’s obligations to the NCAA. Fiduciary law fills gaps where contracts either do not exist or where, due to transactions costs, they would be inefficient to develop. 28 Here, though, a contract existed; the use of gap-filling rules to understand an obligation that did not arise in the absence of contract is striking. 29

I. Introduction

This paper explores the parallels and divergence between the Freeh Report on the Penn State child sex abuse scandal and a body of case law emerging out of Delaware since the mid-1990s. The important contribution is to highlight the differences produced by governance regimes created by

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24 Freeh Report, supra note 20, at 100.
26 National Collegiate Athletic Association v. Lasege, 54 S.W.3d 77, 82 (Ky. 2001).
27 Miller v. NCAA, 10 F.3d 639 (9th Cir. 1993) (“As a condition of membership, each institution is obligated to apply and enforce all NCAA legislation related to its own athletic programs.”).

While the NCAA’s legislative apparatus is hardly efficient, according to the conventional sense of the word, it does not on its face present an instance of bargain-impeding transactions costs. Rule changes can be implemented largely without creating obligations for member institutions to breach existing contracts. It may be that a true and frank consensus on appropriate institutional oversight would be difficult to spell out due to failed internal political processes at member institutions, but that does not constitute something that would ordinarily be considered a bargain-impeding transaction cost.
29 Fiduciary duties “are untailored defaults that strike the hypothetical bargain to decide what most parties would have wanted,” id. at 1353, but where parties have struck a contract, as is the case in the relationship between schools and the NCAA, one would expect the transactions costs associated with greater specification of member obligations to be surmountable.
private associations (in the Sandusky case, by the NCAA), and those produced for corporations through the development of Delaware’s common law of corporate fiduciary duties.

The basics of the Sandusky affair are probably known to all. A coach for decades at Penn State University, and at one time the heir apparent to Joe Paterno, Sandusky committed heinous acts of child sex abuse from at least 1998 (and likely long before). Many of these were committed on Penn State’s campus, in university facilities, and even though some of the university employees witnessing the abuse came forward, no actions were taken to stop Sandusky’s crimes for almost two decades.

Penn State’s Board retained the law firm of former FBI Director Louis Freeh to investigate the failure of university employees to take appropriate action in the Sandusky matter and to recommend changes to university policies and governance structures based on that the Sandusky affair. That report was published on July 12, 2012.

In a sudden and, in what appeared, to many observers, to be an unexpected turn, the NCAA used the Freeh Report, rather than an independent compliance investigation, to strong-arm the university into accepting a major punishment – tens of millions in fines, bowl bans, the vacating of wins and records, and scholarship reductions.

The NCAA found sufficient evidence in the Freeh Report to conclude that the university lacked adequate “institutional control” over its athletic programs. The Principle of Institutional Control – Article 2.1 of the NCAA Constitution – requires the university to “control its intercollegiate athletics program in compliance” with NCAA rules and regulations. Institutional Control violations have been at the core of most major recent major NCAA actions against universities.

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32 The firm is known as Freeh Sporkin and Sullivan, LLP. Among other notable partners in the firm is Judge Thomas Sporkin, a former chief of the SEC’s enforcement division. See Our People, http://www.freehsorkinsullivan.com/leaders?leader=10#leader.
33 FREEH REPORT, supra note 20, at 1.
34 Andy Staples, Justice in Penn State case should come from courts, not NCAA, SPORTS ILLUSTRATED, May 2, 2012, available at http://www.si.com/more-sports/2012/07/02/penn-state-jerry-sandusky-ncaa. Professor Mitten argues that Penn State’s “egregious” conduct “arguably does not violate any then-existing NCAA rules, whose primary objectives are to maintain and promote academic integrity, amateurism, and competitive balance as well as the health, safety and welfare of student-athletes.” Mitten, supra note 9, at 334.
36 Crowe, supra note 28, at 80-81.
37 CONSENT DEGREE, supra note 21, at 2.
The Freeth Report was used to support a finding of lack of institutional control, but, interestingly, its authors were not trained in NCAA compliance nor did they make violation of NCAA rules part of their investigation. Instead, they were lawyers, and, with this in mind, it is not surprising that they turned for inspiration to Delaware fiduciary duty law in outlining the responsibility of Penn State’s board and leadership with regard to criminal activity by university employees and affiliated persons.

Since the mid-1990s, Delaware law has seen a noticeable shift in the treatment of corporate boards accused of failure to monitor or engage in proper oversight. The 1963 Graham v. Allis-Chalmers decision of the Delaware Supreme Court – which declined to impose on obligation on board members to engage in “corporate espionage” – was effectively overruled in 1996 by Chancellor Allen in In re Caremark Derivative Litigation.

Although he found that the directors of Caremark did in fact have in place adequate information and reporting systems, the Chancellor took the opportunity to sketch the proper structure of a fiduciary duty claim based on the failure to engage in oversight. The Delaware Supreme Court accepted the Caremark theory a few years later in Stone v. Ritter.

In its description of the failures of the Penn State Board, the Freeth Report uses language that echoes the vision of board responsibility in Caremark and Stone. And in fact, the report quotes both cases to show why the Penn State board failed in its duties to demand information about major

[39] However, there was some interaction between Freeth’s team and NCAA staff during the course of the former’s investigation into Penn State. See Don Van Natta Jr., NCAA, Freeth worked together, ESPN, Nov. 12, 2014, available at http://espn.go.com/espn/otl/story/_/id/11863293/court-documents-indicate-ncaa-freeth-investigators-worked-together-penn-state-nittany-lions-investigation.

[40] Notably, the Freeth Report does not mention the words “institutional control.”

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


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

[44] Id.

[45] Id.

risks to the university from the school’s president. The influence of Caremark on the Freeh report is by no means surprising, but it is nonetheless striking.

A critical difference between the NCAA’s treatment of “institutional control” and the Delaware courts’ treatment of “corporate oversight” has to do with the manner in which the obligations of governed entities are described and articulated. NCAA compliance decisions relating to institutional control take one of two forms. First, the NCAA may find a lack of institutional control and impose punishment. Second, the NCAA may find that NCAA rules other than institutional control were violated but that no institutional control violation occurred, perhaps concluding that the institution violated only the lesser standard imposing an obligation to “monitor.” In these cases, the NCAA will not impose its more draconian sanctions even though some rules are violated (and typically self-reported) but no institutional control failure occurred. There are essentially no instances in which the NCAA will issue an opinion where no rules were violated. The result is that the NCAA’s published opinions give us a list of “don’ts” – things that universities cannot do if they want to avoid a finding of lack of institutional control – but don’t really give us a sense of the best practices in terms of institutional control.

48 FREEH REPORT, supra note 20, at 15.
50 Typically, an institution would already have imposed some self-sanctions by this point, and the NCAA might accept as sufficient the institution’s own self-sanction.
51 The NCAA’s database of infractions decisions often contains nothing more than a summary entry for cases in which no major violations were found – with reference to the legislation at issue but no narrative description of why the Committee found no violations.
52 Professor Jo Potuto describes as an “unusual aspect” of the NCAA’s practices that the Committee on Infractions, which resolves grievances, does not have the power to “render authoritative interpretations” – instead, that function rests with the NCAA’s Board of Directors and Legislative Council. Potuto, supra note 23, at 273. Acknowledging that this is a “topsy-turvy” approach, she argues that it is nonetheless “integral to NCAA governance.” Id. She argues that this is so because most decisions in an athletic department are made not by a university employee reading and interpreting published infractions decisions, but instead by consulting with various NCAA committee staffers. Major violations are “by no means the bread and butter of the compliance job.” Id. While I find this argument for the practical benefits of devolved, non-adjudicative guidance persuasive regarding run-of-the mill rules compliance, when we turn to the question of what constitutes that most serious violation (lack of institutional control) the NCAA’s structure does not facilitate clarity, since no university compliance officer is ever likely to call the NCAA and offer a description of years of violations and leadership failings and ask, “Is this an institutional control issue?” In other words, the NCAA’s staff-driven interpretation process provides clarity on technical rule violations but a level of opacity not found in the Delaware decisions on corporate governance when it comes to the larger issue of institutional control.

Another advantage of adversarial decision-making is clarity. Each side presents an argument and the decision-maker crafts a solution to the disagreement. Administrative
But Delaware case law – often in dicta53 in cases finding no fiduciary breach for oversight failures – does something different. Delaware’s judges have gone to great length to give readers a sense of what kinds of things one must do to avoid liability under these theories. The resulting body of jurisprudence has provided direction and incentive for a rapid modernization of corporate reporting and compliance regimes.54 Although the NCAA has issued various kinds of policy guidance relating to institutional control, its process of writing lengthy opinions only where violations are found leaves many questions unanswered. Perhaps most notably, the NCAA requires institutional control but does not provide much guidance for the proper reporting chains within universities.55 For instance, Penn State is faulted in the Freeh Report for having its Athletics Compliance Officer report via channels other than to the overall University compliance officer.56 Is a centralized compliance regime now required to exercise proper institutional control? We have no clear guidance, even though providing such guidance would be relatively simple for the NCAA. By comparison, Delaware’s post-Caremark jurisprudence has generated specific, tangible insights that corporations have put into place as part of their internal compliance regimes.

“interpretation” tends to be mired in bureaucrat-speak and, divorced from the facts of specific cases, lacks a tie to real world scenarios. This makes reduces the value of administrative interpretations from a planning perspective.

Moreover, the question of whether or not NCAA Infractions decisions have precedential value is one on which the NCAA itself is not entirely clear. The Committee on Infractions “cannot be strictly bound to decisions made years earlier.” NCAA Committee on Infractions, Supplemental Report of Infractions Report No. 355 – Boise State University, Oct. 12, 2012, at 5. available at https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=appeal&seqnumber=126&publication=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED. The COI views its role as follows: “past cases do provide some guidance, but each case stands on its own.” NCAA Committee on Infractions, University of Arkansas at Pine Bluff Public Infractions Report, November 5, 2014, at 12, available at https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=850&publication=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED. Other times, the NCAA COI justifies its approach by reference to specific past practices: “In adhering to case precedent…” NCAA Committee on Infractions, University of Alaska, Anchorage Public Infractions Report, May 2, 2014, at 6, available at https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=840&publication=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED.

53 The fact that Delaware courts may offer a new clarification in dicta does not “seem to affect its importance as an additive to Delaware law.” Jill E. Fisch, The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters, 68 U. CIN. L. REV. 1061, 1080 (2000).

54 See infra at 40-44.

55 As a result, universities have “many different paths” for how athletics departments report to higher university officials,” and in practice interaction may “depend very much upon personalities.” JAMES J. DEURSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE 102 & 103 (2003). The lack of clarity in regard to best practices thus leaves governance of athletics to develop in an ad hoc, unpredictable way.

56 FREEH REPORT, supra note 20, at 139.
The relative lack of clarity in regard to the NCAA “institutional control” rule arises in part because of the lack of scrutiny and in part because of a lack of a truly contested, adversarial enforcement process. Associational governance rules (and decisions) are protected from scrutiny under the so-called “law of voluntary associations” – in essence, a principle of judicial abstention. In the NCAA’s case, further protection is provided by the apparent non-state-actor status of the Association. When institutions are accused of infractions, they tend to roll over and accept punishment (in the hope of avoiding a more draconian sanction).

While board decisions on corporate governance are protected from judicial review, to a degree, by the business judgment rule or state laws permitting the adoption of exculpatory provisions, the fact is that shareholder fiduciary claims are vigorously litigated – on both sides. The result is a much clearer and cleaner picture about corporate governance than about university “institutional control” over athletics. Moreover, the regular litigation of corporate governance disputes – and the rapid pace of Delaware resolution of those disputes – means that corporate governance rules can evolve and adapt over time. Caremark itself was triggered by changing Organizational Sentencing Guidelines from the federal government. Today, the implications of Caremark may be affected by statutes like Sarbanes-Oxley and Dodd-Frank. Delaware’s process for making a common law of fiduciary oversight is equipped to incorporate those developments in a way that the NCAA’s shielded, from-on-high method of outlining institutional control is not.

What this picture paints is a very different outcome for a governance regime created by private associational rulemaking versus governance rules that result from the evolution of the common law in fiduciary duty.

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57 The institutional control rule is the most “frequently misunderstood” of the NCAA’s rules. Deurstadt, supra note 53, at 231.
58 See infra at nn. 334-335 & accompanying text.
59 See infra at nn. 336-341 & accompanying text.
60 See infra at nn. 313-317 & accompanying text.
62 See, e.g., Del. G. Corp. L. § 102(b)(7).
64 Caremark, 698 A.2d at 968-969.
68 See infra at 40-44.
claims asserted in shareholder derivative lawsuits. The implications of this exploration are quite significant. Calls for the deregulation of corporations—such as calls to roll back Sarbanes-Oxley or to reduce the reach of Dodd-Frank—are based on a notion that corporations should be permitted to voluntarily decide what kinds of compliance regimes to embrace. But a more sensible and coherent vision may result from our current process of litigating shareholder derivative claims.

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

II. Institutional Control before Penn State

A. NCAA Rules and Sanctions

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

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71 For a discussion of the role of the NCAA compliance officer, see MARC EDELMAN & GEOFFREY CHRISTOPHER RAPP, CAREERS IN SPORTS LAW 73-84 (2014).
72 Though I refer, for the sake of shorthand, to “NCAA Rules,” in fact there are several different “Rulebooks” for varying levels of competition, and other associated legislative documents and interpretations that are of relevance.
73 Whether Tarkanian was good law at the time, or remains good law in light of Brentwood Academy, is open to debate. See infra at nn. 336-341 & accompanying text.
74 NCAA DIVISION I MANUAL, supra note 36, at 156.
Other rules, however, are written in more open-ended, “muddier” terms. Such is the case with the “Principle of Institutional Control and Responsibility” (as it is referred to in Article 2) or “Principle of Institutional Control” (as it is referred to in Article 6). Article 2.1 provides:

2.1.1 Responsibility for Control. It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association. The institution’s president or chancellor is responsible for the administration of all aspects of the athletics program.

2.1.2 Scope of Responsibility. The institution’s responsibility for the conduct of its intercollegiate athletics program includes responsibility for the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interests of the institution.

Article 6 provides:

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

The remaining portions of Article 6 lay out the responsibilities of particular athletics department components and higher education entities.

The penalties for violating the institutional control rule can be severe. A violation is perceived to be the “most damming” NCAA rule violation because “it represents a failure within the institution, rather than an act — although major and important — which may have been committed by a distant booster, renegade coach, or some other variety of 'independent contractor' who has little or no connection to the program.”

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75 The use of muddy terms in setting standards for conduct is also the subject of extensive scholarly commentary. See, e.g., Carol M. Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577 (1988).
76 NCAA MANUAL, supra note 36, at 3.
77 Id. at 3.
78 Id.
79 Id.
80 Higgs & Reisch, supra note 1, at 96.
institutional control “sometimes suggests a climate of noncompliance or a lackadaisical approach to NCAA rules compliance – akin to a climate within a corporation where there was contempt for rules, negligent disregard of rules, or ignorance of rules due to a failure in rules education.”  

The institutional control rule is the subject of many “truisms and other ‘isms’”, including the notion that it is a “shared” or “campus-wide” responsibility. While some suggest that the rules themselves are both brief and “easy to understand,” in real world cases that level of clarity is hard to discern. Athletics compliance “does not lend itself to easy, clear, direct, and irrefutable answers.”

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

**B. Infractions Releases**

The NCAA released a short guide entitled in 1998 (updated since), entitled _The Principles of Institutional Control_, which appears to be an attempt to describe the substance of its institutional control rule.

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

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82 Id. at 671.
83 Id. at 672.
84 Id. at 704. Professor Potuto writes that “Institutional control requires and institution to self-policing and then to self-report if violations are uncovered.” Potuto, _supra_ note 23, at 282.
85 David A. Pierce et al., _Creating Synergy Between Athletics Compliance and Academic Programs: Students in the Compliance Office_, 5 J. CONTEMP. ATHLETICS 183, 184 (2011).
86 DEURSTADT, _supra_ note 53, at 7.
87 Id.
89 Kenneth J. Martin, _The NCAA Infractions Appeals Committee: Procedure, Precedent and Penalties_, 9 SETON HALL J. SPORT, L. 123, 136 (1999) (“Just because the NCAA has distributed a document clarifying the principles of institutional control, that did not mean there is … a definite definition of adequate monitoring.”).
90 _Principles of Institutional Control_, _supra_ note 84, at 1.
To decide if there is a “lack” of institutional control, “it is necessary to ascertain what formal institutional policies and procedures were in place” and “whether those policies and procedures, if adequate, were being monitored and enforced.” The document, therefore, begins by defining the probative inquiry in the negative, rather than positive sense – not telling us what schools ought to do to exercise institutional control but instead how to decide if they have failed. A lack of control could be shown, under the document’s articulation, by one four things: (1) a lack of policies and procedures; (2) inadequacy of policies and procedures, (3) failure to monitor policies and procedures (sic) – more accurately, failure to monitor conduct potentially violating policies and procedures; or (4) failure to enforce policies and procedures.

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

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

The document concludes with the cumbersome and entirely capitalized statement, “COMPLIANCE MEASURES IN PLACE AT THE TIME OF VIOLATION AS A FACTOR IN DETERMINING WHETHER OR NOT THERE HAS BEEN A LACK OF INSTITUTIONAL CONTROL.” No, apparently “BEST PRACTICES” isn’t a clearer,

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91 Id. at 1.
92 The NCAA is not sanctioning schools for failing to update the policies themselves.
93 Id. at 1-2.
95 Principles of Institutional Control at 1-2.
96 Id. at 4.
cleaner approach. Ever coy, the NCAA states, “Institutions are eager to learn what measures can be taken to reduce the likelihood that in the event a violation does occur, it will result in a finding of a lack of institutional control.” Of course they are! This would seem to be a wonderful opportunity to tell them what those measures are. Not so – instead, here are “some of the steps” that can be taken but institutions should not assume that taking these enumerated steps would be enough – “the presence of such measures are not a guarantee against” a finding of a lack of institutional control.

The actual pseudo-list of pseudo-best practices is then bizarre and strange. First, the “NCAA rules” must be readily available. Since there is no actual document or set of documents called “rules,” that is a bit opaque. Even if we presume athletes and coaches can make the inference that we’re talking about the panoply of manuals, documents, interpretive releases, etc., published by the NCAA, merely making those rules available is not a best practice if the rules themselves are presented in ways difficult to understand. Second, the Principles document advises, “appropriate forms” must be made available. The question of what appropriate means is left open, and the bureaucratic belief that forms can solve problems seems especially prominent here.

Rather than evaluate the defects of each of the measures on this list, consider the final item, #10, which states that “the institution and its staff members have a long history of self-detecting, self-reporting and self-investigating all potential violations.” Evidently, the best way to demonstrate control over athletics is to have a history of having control over athletics.

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

C. Infractions “Case”-law

97 Id.
98 Id.
99 Geoffrey Christopher Rapp, The Brain of the College Athlete, 6 DEPAUL J. OF SPORTS & CONTEMP. PROBS. 151, 154 (2012).
100 Principles of Institutional Control at 6.
101 Id.
The NCAA’s process for investigating and punishing rules violations has evolved by fits and starts, in large part due to public criticism of its handling of particular investigations.102

Most investigations are launched after institutions self-report violations to the NCAA – only rarely do investigations begin due to a whistleblower tip or referral from a government agency. After the NCAA either receives a referral from an institution or has some other basis to believe a violation occurred, it will issue a Letter of Preliminary Inquiry to the member institution.103 If initial exploration of an athletics scandal suggests a violation of the institutional control rule, the NCAA’s investigators will issue an official letter of inquiry.104 This letter will encourage the institution to conduct its own internal investigation.105

At a prehearing conference, the NCAA staff members inform the institution of witnesses and evidence in the NCAA’s possession and consider any evidence the institution has developed through its internal investigation.106

There are essentially no published infractions reports in which “no violation” is found. “The result of the Infractions Committee’s official investigation is always the finding of some violation of NCAA rules.”107 The critical question is whether the Infractions Committee finds a violation of the “control” rule or only of some set of less significant rules.

Those decisions which are published provide the core of what might be deemed the infractions case law.108 In spite of the availability of prior cases and interpretations, however, the NCAA investigates each case de novo and this creates a “glaring problem” regarding inconsistent rule interpretation.109 This is particularly the case in regard to decisions on institutional control. Although it may be the most important rule violated by a college or university, “institutional control” is typically the last thing addressed in a Public Infractions Report. Nor do the decisions of the

104 Id. at 568.
105 Id.
106 Broyles, supra note 98, at 495.
107 This kind of terminology, as my co-author Marc Edelman has argued, may improperly and undeservedly confer to the NCAA a governmental imprimatur, when in fact it is little more than a private cartel.
NCAA’s Infractions Appeals Committee provide greater clarification. Typical is one case reducing a finding of lack of institutional control to the lesser included offense of “failure to monitor,” in which the Infractions Appeals committee offered only a “brief statement” and “little additional discussion.”

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

1. Boise State University

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

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

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110 Glenn Wong Et al., The NCAA’s Infractions Appeals Committee: Recent Case History, Analysis, and the Beginning of a new chapter, 9 VA. SPORTS & ENT. L.J. 47, 60 (2009)
112 Id. at 1.
113 Id.
114 Id. at 8.
115 Id.
116 Id. at 12.
pay for housing during orientation sessions, but that, according to the
NCAA, is not the same as arranging rent-free off-campus housing.\footnote{Boise State PIR, supra note 106, at 54.}

In its report on athletic violations at Boise State University, the
NCAA began its discussion of institutional control only on page 54. And
the discussion is somewhat perfunctory. The Report reads, “The scope and
nature of the violations set forth in this report demonstrated that the
institution lacked institutional control.”\footnote{Id. at 54.}

Boise State’s failure to exercise control is supported primarily by the
fact that its compliance regime failed to detect and avert violations of other
NCAA rules regarding participation and recruiting. The NCAA states,
“[F]ailures over an extended time period demonstrate that the system
that the institution had in place was inadequate.”\footnote{Id. at 58.}

The system’s inadequacy, to the NCAA, is proven by the fact that
rules were broken – there was an “ongoing ineffectiveness…to detect and
deter potential violations.”\footnote{Id. at 58.} This sort of language is repeated in a number of other Published Infractions Reports.\footnote{See e.g., NCAA Committee on Infractions, Kean University Public Infractions Report, April 19, 2012, available at https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=809&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED [hereinafter, “Kean University PIR”]; California State Polytechnic University, Pomona, Public Infractions Report, Dec. 16, 2011, available at https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=725&publicTerms=(%20pomona).}

2. \textit{Kean University}

Kean University is a Division III institution located in Union, NJ.\footnote{Quick Facts, http://www.keanathletics.com/information/quick%20facts/index.} The NCAA’s investigation focused primarily on three kinds of “extra benefits” provided to women’s basketball players and a broader problem in the university’s administration of financial aid to athletes.\footnote{Kean University PIR at 2.} First, a special summer class was created to coincide with a basketball team trip to Spain – since only athletes could take the class, it constituted a prohibited extra benefit available only to student-athletes.\footnote{Id. at 1.} Second, the basketball team’s head coach provided cash to players during a Florida tournament, and, unsurprisingly given the obvious nature of this violation, did not report doing so to any higher university officials.\footnote{Id.} Third, the coach intervened

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on behalf of a student whose grades had rendered her academically ineligible by contacting the university’s vice president for academic affair, who altered an “F” grade to an “incomplete” so as to preserve the student’s eligibility for competition.\textsuperscript{128}

In addition, the university, for a four year period, awarded financial aid to athletes more generously than to non-athletes and factored athletic \textit{performance} in to its financial aid considerations.\textsuperscript{129}

When it turned to why these failures amounted to a lack of institutional control, however, the NCAA’s Public Infractions Report is confusing. The failures were “consistent” and undermined “an atmosphere for rules compliance,” according to the NCAA.\textsuperscript{130} The cash payments did not raise institutional control concerns – instead, the university’s financial aid practices, the Spain course, and the grade change demonstrated “lack of control over its athletics program.”\textsuperscript{131}

The general criticism of the special course in Spain offered by the NCAA is that the coach sponsoring the course failed to make “appropriate athletics personnel” aware of the planned course.\textsuperscript{132}

Among the findings in the PIR was that the institution’s Vice President of Academic Affairs failed to consult with the Athletic Department before modifying a student-athlete’s grade: “the former vice president for academic affairs sought no input from athletics personnel before he unilaterally changed student-athlete 1’s grade . . . . To take such an action without considering the possible NCAA rules ramifications constituted a lack of institutional control.”\textsuperscript{133} However, modifying a student grade seems squarely within a VP for Academic Affairs’ scope of responsibility – one could imagine the NCAA having problems with a decision to consult with Athletics personnel under these circumstances because it might raise questions surrounding whether Athletics influenced this inherently academic decision. That someone \textit{outside} of the Athletics Department made a mistake concerning an athlete does not, on its face, reveal that the institution failed to \textit{control} its athletics program. Moreover, although the University’s formal grade change policy was not followed, the NCAA found no indication that the vice president who initiated the change was aware of the connection between the failing grade and the athlete’s continued eligibility.\textsuperscript{134}

\textsuperscript{128} \textit{Id.} at 1-2.
\textsuperscript{129} \textit{Id.} at 2.
\textsuperscript{130} \textit{Id.} at 2.
\textsuperscript{131} \textit{Id.} at 2.
\textsuperscript{132} \textit{Id.} at 4.
\textsuperscript{133} \textit{Id.} at 17.
\textsuperscript{134} \textit{Id.} at 8-9.
institution did not detect the violations in question, on other occasions it had warned students about selling memorabilia to individuals who might contact them on-line.\textsuperscript{144}

The NCAA cited Ohio State for “failure to monitor” in connection with the no-show jobs.\textsuperscript{145} Although the University distanced itself from certain boosters, it failed to take “any monitoring actions” even after it became aware of the booster’s efforts to extend unpermitted generosity to student-athletes.\textsuperscript{146}

However, the PIR contains \textit{no discussion} of why these violations failed to rise to the level of a lack of institutional control. Distinguishing the OSU case from the Boise State case is difficult.\textsuperscript{147} In both instances, a head coach had knowledge of rule violations, and violations occurred over a multi-year period. At a minimum, some discussion of why the NCAA felt institutional control was not the appropriate violation would have been illuminating.

4. \textit{University of North Carolina}

The University of North Carolina came under investigation after a tutor committed academic fraud involving football players, writing significant portions of papers handed in by the students for academic credit.\textsuperscript{148} That tutor, sports agents and “runners” also provided tens of thousands of dollars in benefits to student athletes.\textsuperscript{149}

The NCAA found that the tutor engaged in unethical conduct, rendering the athletes ineligible for competition.\textsuperscript{150} Impermissible benefits were provided by agents and “runners”.\textsuperscript{151}

The institution was cited for failing to monitor in connection with agent involvement with one student athlete\textsuperscript{152}, but again, not for a failure to exercise institutional control regarding impermissible services provided by the tutor.

\textsuperscript{144} Id. at 6.
\textsuperscript{145} Id. at 16.
\textsuperscript{146} Id.
\textsuperscript{149} Id. at 2.
\textsuperscript{150} Id. at 3.
\textsuperscript{151} Id. at 8-9.
\textsuperscript{152} Id. at 10.
Distinguishing the academic improprieties at issue in the UNC case from those at issue in Kean University is difficult. In both cases, the fraud did not come to the attention of athletics personnel in a timely fashion. The NCAA evidently decided that the UNC “scandal was not an athletic one,” but was forced to reopen its investigation several years later after a public outcry.

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

5. The University of Southern California

USC was targeted after revelations emerged involving relationship with professional sports agents concerning star football player Reggie Bush and basketball player OJ Mayo. The Committee on Infractions was “troubled” by the “general campus environment,” which involved “relatively little effective monitoring” of locker rooms and sidelines. Violations included impermissible benefits provided to the athletes and their family members including cash payments and travel expenses.

In finding a lack of institutional control, the NCAA noted deficiencies concerning institutional “monitoring of” student athlete “automobile registration”, and employment at “the office of a sports marketing agent.” The institution “failed to heed warning signs”

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154 Brett Friedlander, UNC allegations are bad, but they could have been worse, ACC INSIDER, June 21, 2011, available at http://accblogs.starnesonline.com/23165/unc-allegations-are-bad-but-they-could-have-been-worse/.
155 Wong et al., supra note 103, at 60.
157 Id. at 1.
158 Id. at 14-15.
159 Id. at 31.
160 Id. at 46.
regarding elite athletes in high profile sports. Inadequate resources were dedicated to compliance.

The USC PIR offers some of the most useful instructive language available in NCAA Infractions Committee reports regarding the obligations imposed by institutional control, but by its terms is somewhat limited to the “special” case of super-star, likely-to-go-pro athletes. The Committee opined that the “clandestine nature of intentional rules violations” requires institutions put in place “well-conceived processes” to “assist in uncovering potential violations.” The failure to monitor automobile possession and use is noted, although that, of course, was also a problem in the Ohio State case, in which the university escaped a finding of a lack of institutional control.

Although USC became aware that Reggie Bush was employed by a “sports marketing agency,” and failed to adhere to its “heightened obligation” to monitor that relationship, Various “red flags” were present yet no follow up occurred.

D. Conclusion

Professor Potuto describes institutional control as follows:

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

It is in practice where things get complicated. The NCAA rules themselves, releases by the Infractions Committee, and the “case law” leave important questions unanswered. Some of these are relatively simple, and

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161 Id. at 46.
162 Id. at 47.
163 Id. at note 133, at 3. The Ohio State PIR contains no information on whether the university had in place a system to monitor student athlete vehicle transactions or registrations.
164 USC PIR, supra note 151, at 47.
165 Id. at 48-49.
are ones that any university consciously seeking to design a compliance regime to avoid misconduct would want to answer. Yet, because of the “roll over and play dead” approach universities take in the face of an NCAA investigation, and the lack of helpful “dicta” in the NCAA’s fact-specific public releases, no guidance from the Association has been offered on these questions.

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

III. Delaware Fiduciary Duty on Corporate Oversight

Corporate governance is typically and traditionally the province of state, rather than federal law. However, one state matters more than any other for reasons that have been widely discussed in legal scholarship. That state is Delaware. Long the choice for incorporation of publicly held entities, Delaware has developed a nuanced body of law concerning the fiduciary duties of corporate directors, in which the duty of oversight has played a prominent recent role.

A. Graham v. Allis-Chalmers

The classic case on corporate oversight from Delaware involved the Allis-Chalmers Corporation, a manufacturer of electrical equipment. After having been found to have engaged in conduct prohibited by the

168 Having the auditor submit her report to the AD or President “raises the question of the internal auditor’s reporting independence. To enhance the independence of the internal audit function, these reports need to be distributed to those individuals (Boards/Trustees) that have an oversight responsibility. Michael D. Akers & Gregory Naples, Internal Audit, Sarbanes-Oxley and Athletic Departments: An Examination and Recommendations for Reform, 9 THE REVIEW OF BUSINESS INFORMATION SYSTEMS 45, 51 (2005). A clear “best practice” in accounting is for the internal audit department to report directly to the Board, id.; there is no similar clarity in the athletics context.
169 Id. at 51. The authors refer to this as an “[U]nfortunate” and “particularly alarming.”
171 Wells M. Engledow, Handicapping the Corporate Law Race, 28 J. CORP. L. 143, 146-147 (2002).
172 Id.
174 188 A.2d at 128.
federal antitrust laws, the company entered two consent decrees in 1937 with the federal government to avoid sanction.\textsuperscript{175} Years later, lower level employees engaged in further price fixing and bid rigging.\textsuperscript{176} The Board, at the time, had put in place no system to detect violations of antitrust law.\textsuperscript{177} The violations were not detected, renewed federal action including indictments of managers followed, and share price fell.\textsuperscript{178}

A shareholder suit was filed, and subsequently rejected by the Delaware Supreme Court (the jurisdiction’s highest court). The Court wrote that “absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists.”\textsuperscript{179} The Court opined that the Board simply couldn’t be expected to “know personally all of the company’s employees”\textsuperscript{180} and that the “very magnitude of the enterprise required them to confine their control to the broad policy decisions.”\textsuperscript{181}

B. \textit{Caremark}

Thirty-three years after \textit{Allis-Chalmers}, another Delaware court faced the issue of whether the failure to exercise oversight would amount to an actionable breach of a Board’s fiduciary duties. This time, the statutes violated by lower level corporate employees were federal statutes prohibiting kickbacks in connection with government funded healthcare programs.\textsuperscript{182} Employees of pharmaceutical company Caremark had paid kickbacks, and a shareholder lawsuit sought damages for breach of fiduciary duty associated with “failing to adequately supervise” and take appropriate corrective measures.\textsuperscript{183} A proposed settlement – involving relatively modest concessions by the defendant\textsuperscript{184} – needed to be signed off on as fair by the Delaware courts. That, in turn, provided an opportunity to evaluate the underlying strength of the plaintiffs’ legal claims along with the appropriate legal standards for such suits.

Chancellor Allen of the Delaware Chancery Court was bound by the “no espionage” precedent of \textit{Allis-Chalmers}. However, he ended up crafting a duty that appears to most observers to have deviated from that

\textsuperscript{175} 188 A.2d at 129.
\textsuperscript{176} Id. at 128.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 130.
\textsuperscript{180} Id. at 130.
\textsuperscript{181} Id. at 130.
\textsuperscript{182} Brown, supra note 42, at 17-18.
\textsuperscript{183} Id. at 18-19
\textsuperscript{184} 698 A.2d at 968-969.
guiding precedent. His “provocative” opinion asks, “[W]hat is the board’s responsibility with respect to the organization and monitoring of the enterprise to assure that the corporation functions within the law to achieve its purposes?” Board members, he answered, have an obligation to be reasonably informed concerning the corporation . . . assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation’s compliance with law and its business performance.

While straining to avoid explicitly disregarding the binding precedent of a higher court, he advised that it is important that the board exercise a good faith judgment that the corporation’s information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility.

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

Prior to the Chancellor’s decision in Caremark, “Delaware courts expected little board involvement in the day-to-day work of the corporation, looking to the board only in the case of fundamental or self-dealing transactions.” Caremark represents a shift and “gave more substance to the duty to monitor.” Taking the decision to its “logical extension,”

185 Brown, supra note 42, at 14.
186 Id. at 24.
698 A.2d at 968-969.
188 Id. at 970.
189 Id. at 969.
192 Id.
Caremark imposed upon boards the duty “both to establish and evaluate the adequacy of its internal control and information-reporting systems and to consider the legal and economic environment of the corporation.”

Even though it took a decade for Delaware’s Supreme Court to adopt the Caremark holding, savvy corporate lawyers responded promptly. They began to market a new array of services to help corporate boards detect and prevent organizational misconduct.

C. Caremark’s Progeny

Although Caremark was produced by a lower court, it was subsequently validated by the Delaware Supreme Court. Stone v. Ritter arose after AmSouth bank employees broke federal money laundering regulations for accounts used in a Ponzi scheme. The Delaware Supreme Court’s 2006 decision adopted Caremark as articulating:

the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such as system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations.

Now endorsed by Delaware’s highest court, the Caremark decision has taken on “iconic status” and been cited “approvingly by courts in many other states.” Caremark represents perhaps the most important point in an “extensive judicial exploration” of the limits of statutory protection for director of corporations. In subsequent cases – mostly finding that plaintiffs failed to state proper Caremark claims – the Delaware courts identified the kinds of failings that could lead to a conclusion of lack of proper oversight.

194 Id. at 362 (Del. 2006).
195 Id. at 370.
198 See, e.g., Guttmann v. Huang, 823 A.2d 492, 507 (Del. Ch. 20013).
This body of law culminated in the Delaware Supreme Court’s decision in the nearly decade-long *Disney* litigation, in which, in spite of alleged “ostrich-like” neglect, Disney’s board escaped liability for the company’s ill-fated decision to hire former talent agent Michael Ovitz as its Chief Operating Officer.

D. Synthesis

Delaware’s evolving law has had “tremendous influence over prevailing corporate governance practices.” Through their decisions, opinion and commentary, the state’s judges have helped “develop and define norms and best practices that affect director behavior.”

The Board’s information and reporting system must be reasonable and tailored to the firm’s operational and regulatory context. The greater the risk of violations of applicable laws and regulations, the more onerous and intrusive an information and reporting system must be. The more a firm is on notice of red flags, the more its Board should regularly visit the quality of its information and reporting system.

Ann Tucker identifies five factors as relevant to identifying and classifying “red flags”: (1) potential harm to the firm; (2) time available to react; (3) source of red flag; (4) frequency of detected violation or misconduct; (5) information available to the directors.

At its foundation, *Caremark* stands for the same proposition as many of the other cases in the corporate law pantheon concerning the fiduciary duty of care – board members need to ask questions. Even if they may not always come upon the right answer, board members have an obligation not to coast along assuming lower level corporate employees – or even top executives – will behave in a manner consistent with sound business ethics and the protection of shareholder interests.

IV. Penn State Scandal

A. The basics of the scandal

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200 In re Walt Disney Corporation Derivative Litigation, 906 A.2d 27 (Del. 2006).
201 825 A.2d 275, 288 (Del. Ch. 2003).
202 906 A.2d at 27.
203 Pan, *supra* note 186, at 740.
204 *Id.*
206 E. Norman Veasey, *Separate and Continuing Counsel for Independent Directors: An Idea Whose Time has not come as a General Practice*, 59 Bus. Law. 1413, 1417 (“Counsel should continually exhort the board to ask questions until the directors have a complete understanding of the matter to be decided and its ramifications.”).
The events are, as noted above, known to all. Timelines of how they unfolded are available. Jerry Sandusky played at Penn State during the 1960s and joined the University’s football coaching staff in 1969. At one point, he was the heir apparent to coaching legend Joe Paterno.

He engaged in multiple acts of child abuse beginning at least as early as 1994, both on and off the Penn State campus. Penn State officials knew of the allegations against Sandusky by 1998 but did not report them as required by federal law.

B. The Freeh Report

The Freeh Report was commissioned by the Penn State Board of Trustees to investigate the role of University employees in failing to report and respond to Sandusky’s abuse. Freeh’s firm was specifically asked to make recommendations on changes to University governance. Investigators from the firm conducted 430 interviews and had access to internal e-mails and files.

Though the facts motivating Penn State to launch an internal investigation were highly unusual, the tool of an internal investigation (conducted by outside counsel) has become a common one. The retention of outside counsel can help make the findings of an investigation “more credible” and the utilization of a law firm to conduct such an investigation can shield some aspects of the investigation from “involuntary disclosure” to third parties. Moreover, law firms like Freeh’s “have developed an expertise in the process of internal investigation itself and the resources to do so, to incluJnnETkstilla
a. No subpoena power

Because Freeh’s firm was retained by Penn State to conduct an external self-investigation, it did not have subpoena power in connection with the parties involved in the Sandusky affair. Individuals providing information to Freeh’s investigators were not testifying under oath – they might have lied intentionally and there is nothing that could be done to them criminally. Of course, this criticism of the Free Report has strength only when the Report is compared to judicial processes, since NCAA investigators and enforcement staff also lack subpoena power and “access to court-supervised discovery.” This has, in the past, led NCAA investigators to be unable to obtain cooperation from individuals with knowledge relating to an athletics investigation.

b. Evidence pursued without regard to admissibility

As an internal report, the Freeh Report was not drafted with the idea of developing evidence that could be introduced in a legal proceeding. As a result, considerations regarding the admissibility of evidence – such as the validity of uncorroborated hearsay or whether witnesses received appropriate “Miranda” warnings – did not play a role in the authors’ efforts to unpack the Sandusky affair.

c. Did not talk to key witnesses

Notably, Freeh’s investigators did not interview whistleblower Mike McQueary, Sandusky himself, and other key parties involved in the

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Id. at 6.


Penn State employees who lied to investigators might, however, have been subject to disciplinary action by the University. Though that might favor truth-telling, it would do so far less effectively than the threat of a perjury or obstruction of justice charge. Potuto, supra note 23, at 288.


Thomas R. Mulroy & Eric J. Munoz, The Internal Corporate Investigation, 1DePAUL BUSINESS & COMM. L.J. 49, 71-72 (2002) (“Fact-finding is a primary goal of any investigation, therefore an employee with relevant information is important to that effort. Thus, any corporate-type Miranda warning given to an employee must not be overstated, such that the employee refuses to offer any information.”).

FREEH REPORT, supra note 20, at 12.
affair, such as the University’s head of public safety, who would have had responsibility for reporting criminal activity on campus under the federal Clery Act. In most cases, the decision not to speak to a particular witness was made in response to a request of the Pennsylvania state Attorney General’s office, responsible for pursuing criminal prosecutions in connection with the Sandusky affair.

**d. Protections against disclosure**

The Freeh Report’s authors were employed by a law firm and their work would be shielded by rules restricting forced disclosure to the extent it was connected with anticipated litigation. This means that interview notes and other “work product” might never be released and could not be compelled to be released in a legal proceeding. The University waived privilege to release the report itself but much of the background information may forever remain outside of the public’s eye.

**e. Profit Motive**

Some might wonder whether the Freeh Report should be viewed with suspicion since its authors were employed by Penn State. Perhaps the Freeh Report could not come down either too weak or too hard on Penn State or it would lose credibility or dissuade other schools and companies from hiring the firm for internal investigations in the future.

Because of simple profit motives, Freeh’s firm may thus have been destined to reach the kind of middle ground conclusion about Penn State’s responsibility that it did – to find serious fault and problems but to decline to attribute them to fundamental choices about, say, the proper allocation of resources between University academic and athletic enterprises. The “middle ground” result of an independent investigation is not unique to the case of the Freeh Report.

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220 Id.
222 Id. In advising lawyers on how to conduct internal investigations, the Mulroy & Munoz advise that attorneys should “strive to include mental impressions, legal theories or potential strategies in all notes or memoranda of interviews with others, in order to afford those documents the extensive protection of opinion work product.” Id. at 72.
223 Consider, for instance, another former FBI Director’s report commissioned by the NFL to determine if the League had access to the graphic video of Ray Rice striking his then-girlfriend in an Atlantic City Casino. That report identified failings by the NFL but found no evidence the video had been received. This “middle ground” gave the report credibility
Had the firm recommended, for instance, the elimination of PSU’s football program, it would likely not have been hired by another university. Similarly, had the firm found no areas of concern, its report would not have deflected an NCAA infractions investigation, and again, the firm would not be hired for other similar projects in the future.

2. Basic governance findings

At its core, the Freeh report offers a “convincing[] demonstration” of the need for “presidential control of intercollegiate athletics.” The report did not identify a particular NCAA bylaw violated by Penn State, but instead targeted Penn State under “the general guise of unethical conduct.”

The unethical conduct in question was not simply that of Sandusky himself – instead, it was on the part of “[f]our of the most powerful people at The Pennsylvania State University” who “failed to protect against a child sexual predator harming children for over a decade.” These four were its President, Graham Spanier, its Senior Vice President, Gary Shultz, Athletic Director Timothy Curley and Head Football Coach Joe Paterno. “These individuals empowered Sandusky to attract potential victims.” Motivated by a desire to “avoid the consequences of bad publicity,” these “most powerful leaders at the University . . . repeatedly concealed critical facts relating to Sandusky’s child abuse from the authorities, the University’s Board of Trustees, the Penn State community, and the public at large.”

Much of the report’s ire is directed toward Penn State’s former President. Spanier “failed in his duties as President” by “not promptly and fully advising the Board of Trustees.” But the failures went further – the University’s Board “did not perform its oversight duties.”

a. Senior leader duties

but also let the NFL off the hook on the most serious charges. See ROBERT S. MUELLER III, REPORT TO THE NATIONAL FOOTBALL LEAGUE OF AN INDEPENDENT INVESTIGATION INTO THE RAY RICE INCIDENT, Jan. 8, 2015, available at http://robertmuellerreport.com/muellerfinalreport.pdf

227 Mitten, supra note 9, at 322.
229 Id., at 15.
230 Id. at 15.
231 Id. at 15.
232 Id. at 15.
233 Id. at 15.
234 Id.
i. Report information about major risks to the board

Senior leaders – most notably a College’s President but also its other senior administrative employees – should bring major risks to the attention of the board. To do so, such leaders must both investigate and probe potential risks and develop and support effective compliance systems to detect potential risks.

ii. Encourage discussion and dissent and welcome a diversity of opinions

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

Penn State’s leaders operated under an “ingrained sense of secrecy” that was “hard to shred.”

iii. Penn State’s failures

The University’s senior leaders failed to structure its compliance function to ensure success, having created “no centralized office, officer or committee to oversee institutional compliance with laws, regulations, policies and procedures.” Instead, individual departments, including athletics, “monitor their own compliance issues, some with very limited resources.”

b. Board duties

\[235\] Id.
\[238\] Id.
i. Demand and create systems to facilitate reporting of major risks

The Board’s duties, according to the Freeh Report, are to “oversee the President and senior University officials.” The Board must put in place an information and reporting system to ensure that senior leaders provide the board information allowing it to exercise its governance role.

The role of a university board is “simple, at least in theory.” It is the “final authority for key policy decisions” and accepts “both financial and legal responsibility for the welfare of the institution.” But in reality, the Board’s ability to manage the details of athletics is limited: “the level of understanding, experience, and accountability of most board members is rather limited and not well aligned with the needs of college sports.”

ii. Penn State’s failures

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

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

To the extent the NCAA’s “institutional control” punishment of Penn State was due to the Board’s failings, this may be the first time a governing board’s failures were the basis for an institutional control sanction. In part, the Freeh Report blames the Board’s oversight failures for

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239 Id. at 15.
240 DouERSTADT, supra note 53, at 97.
241 Id. at 106.
242 FreEh REPORT, supra note 20, at 15.
243 Brenda C. Liss, Lessons from Penn State and Rutgers, NEW JERSEY LAWYER, Dec. 2013, at 43, 45.
creating an environment in which top university executives failed in their roles: “Because the Board did not demand regular reporting of such risks, the president and senior University officials in this period did not bring major risks facing the University to the Board.”²⁴⁶

iii. Citation to Caremark/Stone

In describing its vision of the duties of the Penn State Board – duties the Board failed to fulfill – the Freeh Report cites two Delaware corporate law cases ²⁴⁷ – Caremark and its confirmatory progeny Stone v. Ritter. The Report provides:

A board can breach it duty when it “utterly fails to implement any reporting or information systems or controls” or having implemented such system or controls “consciously fails to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.” The board breaches its duty not because a mistake occurs but because the board fails to provide reasonable oversight in a sustained or systematic fashion.²⁴⁸

Against this measure of its duty, Penn State’s Board “fail[ed] to exercise its oversight functions . . . by not having regular reporting procedures or committee structures in place to ensure disclosure to the Board of major risks to the University.”²⁴⁹

The Freeh Report was not the first effort to draw a connection between corporate governance principles and the oversight of collegiate athletics. For instance, Michael Akers and Gregory Naples, Marquette Business School professors, wrote a 2005 article suggesting that the Sarbanes-Oxley Act of 2002 and emerging financial reporting concepts designed for publically traded companies “could be used by not-for-profit institutions such as colleges and universities.”²⁵⁰ Two other authors constructed a fictional parable involving the NCAA adopting key mandates of the Dodd-Frank Act,²⁵¹ including a requirement that the relationship

²⁴⁶ FREEH REPORT, supra note 20, at 15.
²⁴⁷ Id. at nn. 563-64 and accompanying text.
²⁴⁸ Id. at nn. 563 & 564 and accompanying text.
²⁴⁹ Id. at 16.
²⁵⁰ Akers & Naples, supra note 163, at 52 (“[I]t might be more reasonably effective to take notice of some of the Sarbanes principles to demand that governing boards establish sufficient internal controls to more effectively manage intercollegiate athletics programs.”).
between Board members and university athletics programs be disclosed. Michigan’s former President explains that the NCAA institutional control rule is “a process, a system, and a set of values and expectations” that “is very similar to the system of audit controls governing a major corporation.”

c. Institutional Culture

i. Athletics vs. academics

The most damning dimension of the Freeh Report may very well be an indictment of big-time college athletics generally. Criticism of the role of athletics in American higher education – in particular, the place of football – is nothing new. One commentator stated that the “culture of football in American Universities is completely out of control.”

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

The question is not whether athletics have a place in higher education, or are of benefit to individual schools, but instead whether they are given their proper place. Critics continue to decry the prominence of athletics in educational institutions. Particular criticism is levied against the

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252 Critics charge that university “governing boards are all too often influenced by athletics boosters, sports media, or perhaps the personal interest and inappropriate involvement of some board members with intercollegiate athletics.” DEURSTADT, supra note 53, at xi.
253 Larcker & Tayan, supra note 244, at 2.
254 DEURSTADT, supra note 53, at 231.
259 DEURSTADT, supra note 53, at ix.
260 Id.
so-called “revenue sports” of men’s basketball and football: “They now threaten not only the academic welfare of their participants but the integrity and reputation of the very institutions that conduct them, our colleges and universities.”

ii. Penn State’s failings

The University operated under a “culture of reverence for the football program that was ingrained at all levels of the campus community.” The report called for the University to “undertake a thorough and honest review of its culture.”

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

d. Additional observations

i. Fixation on soft landings and “golden parachutes”

Penn State’s leaders fixated on “soft landings” – providing “Golden Parachutes” to departing staff rather than making what might seem to be painful personnel decisions. Sandusky retired one year after the first report of an incident of child abuse on campus. While the Freeh Report found no evidence that he retired because of the report, the timing is highly suggestive of a connection. Let’s say, however, for the sake of argument, that he was retiring because he was told he would not succeed Paterno, and further suppose that that decision had nothing to do with reports of abuse.

Even if these things were true, the circumstances of his retirement were highly unusual. He received an unheard of $168,000 lump sum

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261 Id. at x.
262 FREEH REPORT, supra note 20, at 17.
263 Id. at 18.
265 Id.
266 It’s hard to envision firing a child abuser to be painful, but it evidently was for Penn State’s leaders.
267 FREEH REPORT, supra note 20, at 59.
payment to “make him whole” for reduced retirement benefits due to the timing of his retirement.\textsuperscript{268} 

ii. Leaders failed to ask “why” in the face of unusual decisions

Moreover, Sandusky was awarded an emeritus rank even though he did not meet the stated requirements.\textsuperscript{269} The provost approving that rank – Rodney Erickson, who took over as interim president after Spanier’s downfall – admitted unease with the decision to award that rank.\textsuperscript{270} He told a staff member that he hoped “not too many other people make careful note of the decision.”\textsuperscript{271} Yet Erickson – who emerged from the Penn State scandal relatively unscathed – failed to ask his boss, Spanier, why he was being asked to make such an unusual decision.

Even after he retired, Sandusky continued to be the beneficiary of Penn State largesse. In 2001, the board of trustees of PSU approved a favorable land deal involving Sandusky’s charity, Second Mile – selling a parcel of university owned property to the charity for the same price the school had paid sometime prior.\textsuperscript{272} This unusual deal – with the university apparently not getting market value for the property\textsuperscript{273} – along with the unusual terms of Sandusky’s retirement should have prompted questions, but didn’t.

iv. Two brutal facts of life for potential whistleblowers in small-town state universities

The question of why Sandusky was able to get away with his crimes, even as evidence presented itself to various athletics and university employees over the years\textsuperscript{274}, is one we may never be able to answer. But the reality is that, given his power and prominence in the University’s cherished football program, Sandusky was a fearsome figure on whom to blow the whistle.\textsuperscript{275} Whistleblowers in all settings face severe disincentives

\textsuperscript{268} Id. at 79.
\textsuperscript{269} Id. at 60.
\textsuperscript{270} Id. at 61.
\textsuperscript{271} Id. at 61.
\textsuperscript{272} Id. at 64.
\textsuperscript{273} Id. at 79.
\textsuperscript{274} Notably, two janitors separately witnessed an incident of abuse in 2000 and did not report it, out of fear that “they would be fired for disclosing what they saw.” Id. at 62.
when considering raising concerns outside the chain of command—
including financial losses stemming from termination, social ostracism,
psychological suffering, “blacklisting” in an industry, and even legal exposure. But for employees at a state university in a small town, the downsides of whistleblowing are particularly pronounced.

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

C. NCAA Response

The NCAA acted promptly after the publication of the Freeh Report. It “coerced Penn State into accepting draconian institutional sanctions, including a $60 million fine, a four-year ban on any postseason football games, a significant reduction in football scholarships over a four-year period, and vacation of 112 football wins from 1998 to 2011.”

D. Aftermath: Legal challenges continue

Though the NCAA’s sanctions following the completion of the Freeh Report were intended to close the door on this messy scandal, they were hardly successful. A variety of legal disputes broke out in the months after Penn State accepted its punishment. For instance, Joe Paterno’s estate and family “filed a lawsuit in Pennsylvania state court against the NCAA . . . on May 30, 2013.” But because none of the plaintiffs “have a direct

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277 Id. at 119-120.
278 Id. at 120-122.
279 Id. at 122-124.
280 Id. at 124-125.
281 Id. at 125-126.
283 Mitten, supra note 9, at 322.
284 Id. at 338.
contractual relationship with the NCAA,” they may have lacked standing to bring these claims.\footnote{\textit{Id}, at 339.}

The Commonwealth of Pennsylvania brought an antitrust claim against the NCAA, which was dismissed by the federal district court.\footnote{Mitten, \textit{supra} note 9, at 341, citing Commonwealth v. NCAA, 2013 WL 2450291, at *15 (M.D. Pa. June 6, 2013).} Because the antitrust claims were “bootstrap[ped]”\footnote{Mitten, \textit{supra} note 9, at 340.} on contractual and process-oriented claims, they were doomed to failure. The lawsuit was widely perceived “to be a plainly political move for [Pennsylvania governor Tom] Corbett,” under fire for his handling of the Sandusky investigation during his tenure as state Attorney General.\footnote{Kropp, \textit{supra} note 221, at 192.} Like most “Hail Mary” passes, this one did not connect with a receiver in the end zone.


V. Contrasting governance with institutional control

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

A. The contested nature of fiduciary litigation

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

Even when a court sides with a defendant, as Chancellor Allen did in Caremark, it may choose to articulate standards of liability that create new theories that plaintiffs can advance in future cases. The courts demonstrate “self-conscious attention to influencing the conduct of future transactions, independent of the case before the court,” and thus “give[] special meaning to the phrase ‘mere dicta.’” Their decisions provide “guidance on how to conduct future transactions” even when such guidance is offered as a “lecture” (dicta) rather than by deciding the outcome of the case one way or the other.

More importantly, the evolving articulation of fiduciary duty standards in Delaware case law helps perform a “moral education” role, providing guidance and insight to corporate leaders regarding the scope of their obligations. The “ready-made vocabulary” flowing from judicial decisions provides the tools for rejuvenated “moral discourse.” The language used by the courts matters not just because it shapes “the advice counsel provide to their clients” but because “what people say influences what they do.” The courts’ rhetorical choices play an important role in constituting our moral and social worlds. Specifically, the way we talk about fiduciary obligation is crucial.

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296 Id. at 28.
297 Id. at 916.
299 Id. at 916.
300 Duggin & Goldman, supra note 193, at 271-272.
302 Duggin & Goldman, supra note 193, at 271.
303 Id.
because the most distinguishing characteristic of fiduciary law is its operation as a system of moral education that promotes and reinforces trust and honesty in commercial transactions. The sermon-like style of fiduciary rhetoric captivates our moral consciousness and contributes to an understanding of fiduciary obligation in ways that reason alone cannot. In its true essence, fiduciary duty seeks to embody a complex value system that penetrates everyday life by appealing to our ears and hearts. This moral appeal offers an experience, an invitation for reflection. In this way, fiduciary rhetoric seeks to intrude into the psyches of fiduciaries to create feelings of guilt for violation of duty and feelings of honor for upholding the tradition. This language encourages readers to internalize the message, to change their ways of thinking and being. In this way, fiduciary discourse has a complex psychological appeal that speaks to our better side to desire noble aspirations, while simultaneously reprimanding our other side by instilling fear of fiduciary breach.\(^{304}\)

The language of fiduciary duty opinions creates a “legal lore that influences actors in a positive way.”\(^{305}\)

The language of these opinions, crafting robust and moralistic fiduciary obligations, including obligations to engage in monitoring and oversight, would not have arisen absent the contested battles between plaintiff shareholders and defendant boards. Vigorous litigation produces published decisions (even when reviewing proposed settlements\(^{306}\)), which offer greater clarity on rules and standards.\(^{307}\) Without plaintiffs and defendants willing to contest important aspects of the application of law to the facts of a case, as well as to contest the law itself, Delaware courts would not be able to “aggressively adopt and modify corporate law doctrine, exhibiting a degree of activism that more closely resembles the

\(^{305}\) Dugan & Goldman, *supra* note 193, at 271.
\(^{306}\) Interestingly, in the usual scholarly account of the benefits of adversarial litigation settlements are criticized for undermining the ability of courts to clarify the law by offering an interpretation of its application to the facts of a particular case. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984). In Delaware shareholder derivative litigation, settlements must be approved by a court which must conclude the settlement is “fair.” Geoffrey Miller, *Political Structure and Corporate Governance: Some Points of Contrast Between the Unriveted States and England*, 1998 COLUM. BUS. L. REV. 52, 68 (1998). This consideration typically requires the court to assess the strength of the underlying claims advanced by the plaintiffs.
The “nature of litigation provides courts with information” that allows “tailoring of the legal structure to the particular factual context presented.” Because the development of Delaware law is “litigant driven,” it allows parties to in effect “force the court” to evaluate the legality of a particular transaction or business practice.

Some have gone so far as to describe Delaware’s corporate law as a kind of narrative – the courts’ fiduciary jurisprudence is a “set of parables or folktales of good and bad managers, tales that collectively describe their normative role.” Delaware judges “transmit” the “most important and dramatic tales” in a “fairly” direct fashion, while others are “mediated by corporate lawyers who digest” legal opinions. Shareholder litigation thus offers far “greater benefits than the current skepticism recognizes.” Despite a judge resolving only the case before her at a particular time, and according to the facts it presents, the “narrative quality” of Delaware opinions “yield[s] reasonably determinate guidelines.” These judgments are communicated to business leaders by their corporate counsel, and thus “play an important role in the evolution of (nonlegal) norms of conduct.”

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

A more discrete benefit of litigated fiduciary duty doctrine manifests not in published decisions, but in discovery conducted in connection with suits that may, more often than not, end in negotiated settlement. The very “threat of discovery and the episodic legal demands for detailed corporate internal information have induced incremental improvements in corporate governance practices, including more exacting decision procedures, internal

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308 Fisch, supra note 51, at 1080.
309 Id. at 1084.
310 Id. at 1090.
312 Id.
313 Id. at 1017
314 Id. at 1017.
315 Id. at 1017.
316 Jessica M. Erickson, Overlitigating Corporate Fraud: An Empirical Examination, 97 IOWA L. REV. 49, 95 (2011).
317 Id. at 96.
monitoring, recordkeeping, and securities disclosure.” Corporate “responses to the demands of litigation discovery contribute to the effectiveness of internal monitoring.”

Delaware’s fiduciary duty law is also remarkably resilient and flexible, capable of evolving over time to adjust to new concerns and realities. Delaware’s fiduciary law is “the quintessential application of the common law process” and its “genius arises from its adaptability.” As “business norms and mores change over time,” Delaware fiduciary concepts “acquire more defined content” and doctrinal status reflecting “new business dynamics.”

B. The NCAA’s lack of adversarial infractions decision-making

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

The inability of schools to mount a vigorous defense when targeted is due not just to the severity of potential sanction but the uncertainty of the

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319 Id. at 1544.
321 Veasey & Di Gugliemo, supra note 193, at 270 n. 372.
322 Duggin & Goldman, supra note 193, at 270 n. 372.
323 Veasey & Di Gugliemo, supra note 311, at 1413.
324 Marsh & Robbins, supra note 78, at 703.
325 Alabama Girls for Battle with NCAA, 3 NO. 5 LEG. ISS. COLLEGIATE ATHLETICS 1 (March 2002).
326 Sean Sheridan, Bite the hand that feeds: holding athletics boosters accountable for violations of NCAA bylaws, 41 CAP. U. L. REV. 1065 (2013). The death penalty would also have a serious negative effect on “other members of the offending institution’s conference.” DeURSTADT, supra note 53, at 219.
NCAA’s investigative and enforcement process. Schools feel “vulnerable” in the face of the NCAA’s “unfair and haphazard enforcement of the rules governing college athletics programs.” The current system is simply “appalling” and its problems are the result of “structural deficiencies in the NCAA enforcement process.” A lack of clarity and “inconsistency in results from one infractions case to another reduce[] the deterrent effect of penalties and the entire enforcement process.” Attorneys with experience in civil litigation find the entire NCAA process – with its emphasis on cooperation – to be foreign. As Michigan’s former President explains, “[N]either the language nor the enforcement of [NCAA] rules are subject to the long-established principles of jurisprudence that cover civil and criminal violations in our society.”

The Penn State case provides perhaps the clearest example of a university capitulating rather than adopting an adversarial position. William Devine asks, “What if the Penn State trustees had challenged the bylaws instead of acquiescing?” After all, an “acceptable legal argument” existed regarding the “irrelevance” of NCAA rules to the unusual circumstances of the Sandusky sex abuse scandal. “Somehow” the Penn State Board members were persuaded to “submit to the Association’s authority,” even though, had they challenged the NCAA’s position, the saga may have played out differently.

The non-adversarial approach taken by target universities permeates the entire NCAA compliance apparatus in higher education. Compliance personnel do not view an infractions investigation as an adversarial process, but instead as a “cooperative enterprise” governed by NCAA rules and proceedings “which are in no way adversarial.” Attempts by an institution to “spin” the facts of an investigation in a way that minimizes the likelihood of sanction “are setting up the institution and the CEO for a fall.”

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330 Davis & Hairston, supra note 19, at 984.
331 Id. at 985-986.
333 Edurstadt, supra note 53, at 220.
334 Davis & Hairston, supra note 19, at 984.
335 Id. at 2-3.
336 Marsh & Robbins, supra note 78, at 703-704.
337 Id. at 704.
Institutions adopt a deferential approach because of the rewards for “cooperating” and the dangers of being found “uncooperative.” NCAA Rule 19.2.3 provides that “member institutions shall cooperate fully with the NCAA” and “require[s] full and complete disclosure by all institutional representatives of any relevant information . . . “340 All representatives of member institutions “have an affirmative obligation to report instances of noncompliance to the Association in a timely manner and assist in developing full information to determine whether a possible violation has occurred and the details thereof.”341

When challenges are made, they tend to be on ancillary issues (e.g., USC protesting connection between boosters and school, rather than disputing the underlying allegations).343 With regard to the core questions in an NCAA investigation, counsel are far more compliant. Consider, for instance, the way that Boise State’s outside attorney described that case in trying to argue that repeated violations associated with housing benefits for ineligible prospective students on a variety of teams did not amount to a lack of institutional control but instead were simply the “lesser” offense of failing to monitor: “You bring up an excellent point, and I don’t think the institution is shying away from saying this is absolutely without question not a lack of institutional control case. I think that is close.”344 This is from the “defense” lawyer, but it reflects a lack of willingness to directly engage the NCAA on the meaning and scope of its institutional control rule – an entirely rational reluctance, of course, because of the danger of appearing recalcitrant and thus inviting more severe sanctions.

The lack of a truly adversarial process is embedded in the NCAA’s rules and reinforced by the Association’s treatment in the courts. Courts apply a deferential “law of voluntary associations” approach to the NCAA, meaning that there is relatively little pressure on the NCAA arising from a fear of second-guessing. Three concerns motivate courts to avoid judicial review of NCAA decisions: “(1) individuals should have the freedom to choose their associations and their rules; (2) judicial review of private associations would impinge on the right to freedom of association;

340 NCAA DIVISION I MANUAL, supra note 36, at 312.
341 Id.
342 That representatives of target institutions don’t adopt an adversarial approach in a setting in which they lack the basic tools of a typical defense attorney is not meant to criticize such representatives. For instance, institutional representatives have no right in COI hearings to cross examine hostile witnesses, which is one of the basic tools of mounting a successful defense in a civil or criminal proceeding. Brian L. Porto, Can the NCAA Enforcement Process Protect Children from Abuse in the Wake of the Sandusky Scandal?, 22 WIDENER L.J. 555, 565-566 (2013).
343 USC PIR, supra note 151, at 46.
344 Boise State PIR, supra note 106, at 59.
and (3) rules and regulations of private associations are often unclear and are better evaluated by the association rather than by the courts.  

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

Coupled with this principle of judicial deference is the evident constitutional reality that the NCAA is not a “state actor” subject to an obligation to afford its targets due process of law. Private organizations are not subject to the due process provisions of the Fourteenth Amendment unless they are deemed state actors, which, in 1989, the Supreme Court declared the NCAA was not. While there may be some ambiguity on whether today’s Supreme Court would continue to adhere to the Tarkanian notion that the NCAA is not a state actor in light of its decision in Brentwood Academy, the fact is the Supreme Court has yet to consider a call offering an opportunity to revisit this holding.

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

We also miss out on published decisions identifying best practices that could avoid findings of a lack of institutional control in the future.

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349 Id.
350 Some have argued that “the facts leading to [the Tarkanian] holding can be sufficiently distinguished to warrant another review of the NCAA’s enforcement process requiring it to be held to the same constitutional scrutiny as the government.” Nolan McCready, Former Student-Athletes’ Property and Due Process Rights: The NCAA as State Actor in the Wake of the Penn State Sanctions, 19 NEXUS: CHAP. J., L & POL’Y 111, 112 (2013-2014).
352 Kadence A. Otto et al., Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later, 18 J. LEG. ASPECTS SPORT 243, 244-245
NCAA infractions process produces a list of “don’ts” but far less clear
guideposts than Delaware fiduciary law as to the best courses of conduct for
universities and their governing leaders. Without vigorously contested
disputes producing published decisions that must be internally consistent
and defensible, we also lack the kind of moral terminology and ethical
guidance which permeates fiduciary duty law. We lack the narrative and
parable of Delaware law. We miss the “generation and promulgation of
role-specific standards” that is “so critical,” with the vaguely defined idea of
“institutional control” representing at best a “‘kindergarten’ norm.”356 The
stories are not told in a way that becomes “part of the definition and
description of the ‘roles’” that various university and athletics leaders are
expected to play.357

“Institutional control” is principle-based regulation. But without an
adversarial process at the enforcement stage, this principle lacks
elucidation. The Caremark standard of corporate law is similarly
“principle-based,” in that it avoids detailed prescriptions in favor an ethical
or moral approach to the fiduciary duty of care.358 To be effective, such an
approach depends upon the existence of an “interpretive community” that
“collectively develops, on a rolling basis, the detailed content of statutory
principles.”359 Delaware’s judiciary and corporate counsel play that role
through the adversarial structure associated with litigation and settlement of
derivative claims. In the NCAA setting, there is no robust “interpretative
community” to create detailed content.

Ultimately, what the NCAA infractions process may be missing is
not guidance on the little things, but instead on the big picture. Because of
the lack of true adversarial engagement on the meaning of “institutional
control,” NCAA rules tend to operate in a vacuum divorced from moral
imperative. The broad fiduciary concepts crafted in Delaware cases and
then applied to particular facts are missing from NCAA “jurisprudence.”
Compliance officers, unlike lawyers counseling corporations, are simply not
equipped to offer advice in robust terms about affirmative responsibilities360
to manage the well-being of the organizations their “clients” lead.

The lack of clarity in the meaning of the norm-like standard of
institutional control is especially surprising given that university obligations
to act according to that rule are a product of contract.361 Typically, courts

356 Rock, supra note 302, at 1018.
357 Id. at 1019.
358 Chancellor Allen’s decision relied upon “moral suasion.” David A. Skeel, Shaming in
359 Cristie Ford, Governance in the Teeth of Human Fraility: Lessons from Financial
Regulation, 2010 Wis. L. Rev. 441, 458 (2010).
360 Johnson, supra note 292, at 966.
361 See supra nn. 24-27 & accompanying text.
would not “superimpose an overlay of common law fiduciary duties, or the judicial scrutiny associated with them, where the parties have not contracted for those governance mechanisms in the document forming their business entity.”

What’s amazing is that schools have not demanded greater clarity of contract in regard to the meaning of this powerful NCAA rule.

C. Broader implications

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

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

The NCAA’s divergence from governance models widely tested and understood in the business world is empowered by the Association’s lack of scrutiny in the courts as well as the decisions it has made regarding how to handle disagreements among and between stakeholders. Unlike in the corporate setting, where shareholders are empowered to challenge fiduciary failings by corporate boards\(^\text{363}\) and boards empowered to mount enthusiastic defenses, in the NCAA process the Association deprives stakeholders of the opportunity to advocate vigorously for their own positions.\(^\text{364}\) In the NCAA enforcement process, there is no nimble, neutral arbiter\(^\text{365}\) interested in the evolution of the standards governing organizations that can perform the role played by the Delaware judiciary in business disputes.\(^\text{366}\)

One possible broader lesson that can be drawn has to do with the potential of private actors to construct governance regimes on their own. In

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\(^{362}\) Steele, supra note 286, at 4.

\(^{363}\) Shareholder suits are “remarkable” and “afford a truly extraordinary form of relief.” Carol B. Swanson, Juggling Shareholder Rights and Strike Suits in Derivative Litigation: the All Drops the Ball, 77 MINN. L. REV. 1340 & 1345 (1993).


\(^{365}\) The “biggest problem with the NCAA’s enforcement program is the lack of an independent decision-making body.” Broyles, supra note 98, at 518.

\(^{366}\) The lack of a “neutral, third party arbiter that mediates the competing claims of two adversaries and their counsel” can cause “Accountability problems” in the “regulation and implementation” of compliance regimes. Baer, supra note 189, at 974-975.
response to a widening array of federal laws speaking to corporate governance issues, there has been a predictable call for a modified approach to regulating business and financial entities. The notion that organizations can adopt “[s]elf-regulatory strategies” to achieve compliance has “taken hold in many areas of corporate regulation” and a “growing mass” of scholarly support. Organizations can be trusted, it is argued, to manage themselves in ways that would redound to the benefit of shareholders. This “New Governance” school favors a move toward “problem-solving and away from either the punishment of perceived wrongs (corrective justice) and/or the enforcement of personal rights.”

Entities would be given “a fair amount of discretion to devise processes necessary to achieve…broad goals.”

In fact, the evidence suggests that organizational self-regulation is “ineffective at reducing organizational misconduct.” The NCAA has nearly complete freedom to structure its own rule-enforcement, yet it has failed to do so in a way that gives clear guidance to member organizations on their oversight responsibilities.

2. Behavioral perspectives on wrongdoing and cover-ups

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

In spite of perceived similarity between the NCAA’s contractual imposition of an “institutional control” obligation on member schools and the Delaware fiduciary obligation on the part of corporate boards to exercise meaningful oversight, there are of course differences between the goals of NCAA compliance and corporate governance. The NCAA demands adherence to the principle of institutional control for instrumental reasons – to ensure that its other rules are respected. By comparison, fiduciary duties exist to protect shareholders from the agency costs arising from the

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369 Baer, supra note 189, at 1001.
370 Id. at 1002.
371 Kimberly D. Krawiec, Organizational Misconduct: Beyond the Principal-Agent Model, 32 FLA. ST. U. L. REV. 571, 596 (2005)
separation of ownership and control. Institutional control operates to deter rule violations, in particular when they provide a competitive advantage to a violating school, to help maintain a “level playing field” in intercollegiate athletics. The obligation to exercise oversight in the corporate setting operates to deter lower-level corporate actors from committing abuses that redound to the disadvantage of shareholders.
emotionally and economically wedded to a project and its failure would threaten negative implications for their careers.\textsuperscript{380} “At that point, an active cover-up might begin.”\textsuperscript{381} Professor Langevoort explains, “The important point is that the final awareness of the risk of harm occurs…after the point in time at which the responsible actors are likely to be held accountable.”\textsuperscript{382} Now committed to a rosy version, even if that does not match reality, business leaders lie.

The whipsaw provides an explanation of what happened at Penn State after initial indications suggested Sandusky had engaged in criminal activity. Overoptimism about Sandusky involved administrators who heard initial reports that he had been showering with children in the Penn State locker room as indicating that he was just weird, not an abuser.\textsuperscript{383} Furthermore, administrators may have been optimistic about their own ability to keep these allegations secret. As time passed, and it became clear that the optimistic view of Sandusky was wrong – that he was clearly an abuser – Penn State had reached the point where the senior leadership of the university would now suffer personal career harm if Sandusky’s conduct was to be made public. Their optimism proven off base, they were now committed to keeping the information confidential.

c. Effective information systems and the whipsaw

There is no simple solution to the optimism-commitment whipsaw, since it represents organizational failures as rooted in basic human nature.\textsuperscript{384} But information and reporting systems like those called for by Delaware’s fiduciary law represent a best hope. The implementation of “adequate reporting systems” reduces the “burden on individual directors to inquire proactively, as better information flows about both the company’s ongoing operations and new projects” and that information becomes “an institutionalized part of corporate decisionmaking.”\textsuperscript{385} Information and reporting systems can also help “slow” the thinking of organizational

\begin{footnotes}
\footnotetext[380]{Id. at 167.}
\footnotetext[381]{Id.}
\footnotetext[382]{Id.}

\footnotetext[384]{Glynn, supra note 356, at 314 (noting “how difficult it is for firms to design and maintain genuinely effective compliance systems.”).

\footnotetext[385]{Troy A. Paredes, \textit{Too much pay, too much deference: behavioral corporate finance, CEOs, and corporate governance}, 32 FLA. ST. U. L. REV. 673, 752-753 (2005).}
\end{footnotes}
leaders, allowing them to overcome biases and make better decisions.\textsuperscript{386} At a minimum, an information system forces decision-makers to slow down long enough to acknowledge the presence of new information.

By adding clarity in regards to the board’s oversight obligations, Delaware courts have helped to foster an atmosphere which mitigates the whipsaw in practice.\textsuperscript{387} A “highly indeterminate standard” is likely to have a less positive “direct impact” on firm behavior “than we would like to think.”\textsuperscript{388} The NCAA’s “institutional control” standard, without the elaboration provided by dicta or dissent, is such a standard.

VI. Conclusion

Fortunately, it is possible to view the Penn State scandal as a “one off,” the kind of thing one may never have to see again. A perfect storm\textsuperscript{389} of a powerful football program and a deviant criminal sheltered in its midst arose in State College, Pennsylvania. But while the precise circumstances of the scandal may never arise again\textsuperscript{390}, the broader problems the Penn State story reveals for America’s universities cannot be ignored.\textsuperscript{391} While the NCAA’s requirement of “institutional control” appears at face value to impose oversight responsibilities on university leaders, the process by which the NCAA investigates and adjudicates rule violations leaves much to be desired.

The key “standards” in the NCAA’s rules at issue in the Penn State scandal – institutional control, as well as ethical conduct – are ones as to which colleges and universities need greater clarity. An obvious first step would be for the NCAA, on its own, to modify its approach to rendering infractions decisions and offer more meaningful dicta and guidance. Where there is a finding of a failure to monitor but not a failure to exercise institutional control, the NCAA Committee on Infractions should issue an explanation of why not. Explaining why, for instance, Ohio State’s “tattoo-gate” scandal was not a violation of the institutional control rule would have helped other universities calibrate their own compliance and detection


\textsuperscript{387} Paredes, \textit{supra} note 372, at 754.

\textsuperscript{388} Langevoort, \textit{supra} note 362, at 170.


\textsuperscript{391} \textit{Id.}
Relatedly, the NCAA could permit dissenting Infractions Committee members to file separate opinions that identified points on which they disagree—under current practices, NCAA written opinions “never reflect … differences” in view by committee members. The current NCAA enforcement process simply “fails in recognizing and valuing the importance of dissenting opinions.” Although dissenting opinions may not affect the outcome of a particular case, their value arises from giving the public increased confidence in the organization’s decision-making and facilitating reform should membership agree with a dissenting rather than dominant view.

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

Improvements in how information is marshaled regarding potential rule violations are also warranted. States could permit the NCAA or targeted institutions to “request subpoena power on a case-by-case basis.” The lack of subpoena power makes the NCAA’s enforcement program less effective than “compliance programs run by administrative agencies.” In reality, the NCAA may be reluctant to request subpoena power out of a fear it would trigger additional legislative oversight of the Association.

392 See supra at 20.
394 Id. at 713.
395 Id. at 715-716.
396 Ross et al., supra note 335, at 79 (calling for arbitration of NCAA eligibility decisions by an outside entity).
397 Broyles, supra note 98, at 565.
398 One author called for a “voluntary transfer of enforcement responsibilities to an outside organization.” Miller, supra note 10.
400 Broyles, supra note 98, at 565.
At the end of the day, something needs to be done to free colleges and universities to defend themselves without fear of the massive financial repercussions of the “Death Penalty.” In corporate litigation, that role may be served by Director and Officer (“D & O”) insurance, which would be responsible for any financial losses^{403} and may pay for and direct the defense of corporate directors targeted in a shareholder derivative suit.^{404} The directors targeted in a fiduciary lawsuit are not playing with their own money and not, in many cases, even directing their own defense.^{405} The insurer – with an institutional incentive to achieve clarity in legal standards even if it means risking loss in a particular case^{406} – plays that role. Perhaps some parallel could be developed for NCAA compliance investigations – with schools paying insurers who would then cover a financial penalty lodged against a school based on violations. This would of course require a complete rethinking of NCAA sanctions, which currently target the institutions themselves and are primarily visited not on the wrongdoers but on those who remain affiliated with a university after postseason competition bans and scholarship reductions are imposed.

Other authors have proposed replacing the NCAA’s current regime of sanctions with larger fines against violating institutions.^{407} Increased fines would “punish the institution for infractions while limiting the impact on current student-athletes because the punishment is directed towards the institution and its administration rather than at the specific athletics programs in which the current student athletes are involved.”^{408} Large fines could deter future violations “because university administrators would push the athletics department to comply with the NCAA rules, and in turn the athletics department would push the coaches to comply with the NCAA rules.”^{409} A move from scholarship reductions and post-season bans to larger fines would also create a potential market for “infractions insurance,” in which institutions could contract for insurance policies calibrated to their own particular level of risk.^{410} It would also allow an insurer to play the

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^{405}Even without an insurance policy providing a defense, the company itself will often provide that defense for its directors.

The insurer is an “obvious example” of a “repeat player.” Herbert M. Kritzer, The Justice Broker 71 (1990).


^{408}Id.

^{409}Id.

^{410}For instance, institutions like USC with “unique” athletes likely to face temptations could obtain more robust insurance coverage.
role of zealous defense, helping to create a more robust adversarial “jurisprudence” in compliance that would provide far greater clarity on the meaning of key NCAA standards like “institutional control.”