

**Do You Really Wanna Love Me Forever?  
Oh, Oh, or Am I Caught in a Hit and Run?  
The Problem of College Coaches Switching Schools in Order to  
Avoid NCAA Penalties**

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**I. Introduction**

On November 6, 1996, Jim Harrick, the men’s basketball coach at the University of California, Los Angeles (UCLA), was fired after he falsified an expense report so as to conceal that two UCLA men’s basketball players had attended a recruiting dinner in violation of NCAA rules, persuaded an assistant coach to corroborate the false expense report, and repeatedly lied to UCLA’s National Collegiate Athletic Association (NCAA) faculty representative about the dinner.<sup>1</sup> The NCAA investigated and issued a letter of reprimand to UCLA but did not punish Harrick personally.<sup>2</sup> In 1998, the NCAA uncovered further violations by Harrick during his time at UCLA and correspondingly placed UCLA’s men’s basketball team on probation for three years, reduced the number of permissible on-campus visits for UCLA men’s basketball recruits from twelve to six for a period of two years, and extended the probationary period for UCLA’s softball team.<sup>3</sup> Once again, the NCAA did not punish Harrick personally, although it did ask the University of Rhode Island (URI), where Harrick was then the men’s basketball coach, to submit a review of his recruiting efforts the following spring.<sup>4</sup>

Due to Harrick’s great success at UCLA, where he averaged twenty-four victories a season and won a national championship, he landed a job as the URI’s men’s basketball coach just one season after

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<sup>1</sup> Alexander Wolff, *Out to Dinner, out of a Job: UCLA F[ir]ed Coach Jim Harrick for Lying About an Expense Account Meal. Was That the Only Reason?* SPORTS ILLUSTRATED, Nov. 18, 1996, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1009062/index.htm>.

<sup>2</sup> Michael Rosenberg, *UCLA Hit with Probation: Ex-coach’s Violations Earn 3-Year Punishment*, CHICAGO TRIBUNE, May 1, 1998, available at [http://articles.chicagotribune.com/1998-05-01/sports/9805010114\\_1\\_ucla-steve-lavin-ncaa-violation](http://articles.chicagotribune.com/1998-05-01/sports/9805010114_1_ucla-steve-lavin-ncaa-violation).

<sup>3</sup> *Id.*

<sup>4</sup> *See Id.*

being fired.<sup>5</sup> Harrick's two years at URI were also a great success on the court as he amassed a record of forty-five wins and twenty-two losses and led the team to the elite eight and its first ever Atlantic 10 league title.<sup>6</sup> Harrick's brief tenure at URI was not so successful off the court, however, as he was a defendant in a sexual harassment lawsuit (the suit was later dropped), his players were alleged to have received money from his staff and URI boosters, his staff was accused of arranging for players' grades to be changed, and his son, who was an assistant coach, was accused of submitting false expense reports.<sup>7</sup> URI investigated Harrick and his successor and, in 2004, reduced its men's basketball scholarships from thirteen to twelve for a period of three years.<sup>8</sup> The NCAA accepted URI's investigation and self-imposed punishment and imposed no further penalties.<sup>9</sup> For a third time, Harrick was not disciplined personally.<sup>10</sup>

After two winning seasons at URI, Harrick left to become the men's basketball coach at the University of Georgia (UGA).<sup>11</sup> Following a familiar pattern, Harrick achieved great success on the basketball court at UGA but then resigned under pressure after just four years.<sup>12</sup> The events leading up to Harrick's resignation were set in motion when a former UGA men's basketball player who had been kicked off the team for rules violations alleged that Harrick gave him a credit card to purchase a television and that he also received cash from a booster.<sup>13</sup> It was later uncovered that Harrick's son, who had followed Harrick from URI to UGA, gave A's to basketball players in his basketball strategy course even though they never came to class.<sup>14</sup> In somewhat of an ironic twist, UGA was placed on probation for four years for conduct that occurred while Harrick was UGA's men's basketball coach in the same year that URI reduced the number of its men's basketball scholarship for conduct that occurred while Harrick was URI's men's basketball coach.<sup>15</sup>

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<sup>5</sup> Billy Witz, *Harrick in Deep Trouble: Coach Suspended, Georgia Sanctions Itself amid Scandal*, DAILY NEWS, Mar. 11, 2003, available at <http://www.thefreelibrary.com/HARRICK+IN+DEEP+TROUBLE+COACH+SUSPENDED,+GEORGIA+SANCTIONS+ITSELF...-a098690559> (discussing Harrick's success at UCLA).

<sup>6</sup> Paul Kenyon, *The Carothers Years: URI Pays a High Price for Basketball Success*, PROVIDENCE JOURNAL, June 14, 2009, available at [http://www.projo.com/uri/content/carothers\\_uri\\_series\\_0613.7abc8330.html](http://www.projo.com/uri/content/carothers_uri_series_0613.7abc8330.html).

<sup>7</sup> Jeff Zillgitt, *Alleged Wrongdoing Puts the "Oops" in College Hoops*, USA TODAY, Mar. 5, 2003, available at [http://www.usatoday.com/sports/columnist/zillgitt/2003-03-05-zillgitt\\_x.htm](http://www.usatoday.com/sports/columnist/zillgitt/2003-03-05-zillgitt_x.htm).

<sup>8</sup> Paul Kenyon and Kevin McNamara, *Former Walk-on Is Suing URI and Baron: Basketball Player Tom Behrens Claims the School and Head Coach Jim Baron Breached a Contract, and Also Charges That the Rams Violated NCAA Rules by Playing Him When He Was Ineligible*, PROVIDENCE JOURNAL, Mar. 31, 2006, available at [http://www.projo.com/uri/content/projo\\_20060331\\_31uri.6fa8ec8.html](http://www.projo.com/uri/content/projo_20060331_31uri.6fa8ec8.html).

<sup>9</sup> *Id.*

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

<sup>11</sup> *See Witz, supra* note 5.

<sup>12</sup> Ray Glier, *Georgia's Harrick Resigns After Ethics Accusations*, NEW YORK TIMES, Mar. 28, 2003, available at <http://www.nytimes.com/2003/03/28/sports/georgia-s-harrick-resigns-after-ethics-accusations.html>; THE NEW GEORGIA ENCYCLOPEDIA, *UGA Men's Basketball*, <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-1973> (noting Harrick led the UGA to a school-record two consecutive NCAA tournaments and its first back-to-back seasons of double-digit wins in the Southeastern Conference).

<sup>13</sup> Glier, *supra* note 12.

<sup>14</sup> *Id.*; *See also* ESPN, *Final Exam: Harrick's Basketball 101*, available at [http://espn.go.com/sportsnation/quiz/\\_id/600](http://espn.go.com/sportsnation/quiz/_id/600), (questions on the final exam for this course include, "[h]ow many halves are in a college basketball game?" and "[i]n your opinion, who is the best Division I assistant coach in the country?" (hint: it's Jim Harrick, Jr.)).

<sup>15</sup> *See* Rome News-Tribune, *Harrick's Dawg Days En[d]*, 2003, available at [http://www.romenews-tribune.com/view/full\\_story/3389466/article-Harrick%E2%80%99s-Dawg-days-en---Sport](http://www.romenews-tribune.com/view/full_story/3389466/article-Harrick%E2%80%99s-Dawg-days-en---Sport).

## II. Part I: The Problem

As Jim Harrick's story demonstrates, coaches can leave schools that face sanctions as a result of their behavior and coach at a new school ("violate and run") without facing any discipline personally. While the NCAA does have rules in place to deal with coaches who violate and run, these rules are not applied uniformly or quickly enough and have not been effective at deterring coaches from violating and running. In order to deter coaches from violating and running, the NCAA must make it harder for them to do so without facing penalties. If the NCAA does this, the personal risk of committing rules-violations will be higher for coaches and they will accordingly be less likely to do so.

### A. Available Penalties for Rules-Violations

There are both secondary and major violations of NCAA Division I rules.<sup>16</sup> A secondary violation is "a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage[,] and does not include any significant recruiting inducement or extra benefit."<sup>17</sup> Major violations are "all violations other than secondary violations[,] . . . specifically including those that provide an extensive recruiting or competitive advantage."<sup>18</sup> Multiple secondary violations can also constitute a major violation.<sup>19</sup>

The NCAA has a wide range of available options when punishing Division I coaches and schools for coaches' secondary and major violations. However, the vast majority of the penalties that can, and are, imposed are directed only towards schools, not towards coaches. When a coach commits a secondary violation, among the available penalties the NCAA can impose are: 1) no penalty; 2) a prohibition on the coach and/or other staff members participating in off-campus recruiting activities; 3) an up to 20% reduction in the total financial aid available for the sport in which the violation occurred; 4) a suspension of the coach and/or other staff members for one or more competitions; and 5) a requirement that the coach's institution show cause as to why an additional penalty should not be imposed if it does not take appropriate internal disciplinary action.<sup>20</sup>

When a Division I coach commits a major violation, the presumptive penalty will be one or more of the following: 1) a two-year probationary period for the coach's school, which includes periodic, in-person monitoring and required written reports; 2) a reduction in the number of expenses-paid recruiting trips to the coach's school for one year for the sport in which the violation occurred; 3) a prohibition on off-campus recruiting, applicable to all members of the coaching staff for the sport in which the violation occurred, for up to one year; 4) a requirement that all staff members determined to have knowingly engaged in, or condoned, the major violation be a) terminated; b) suspended for at least a year without pay; c) reassigned for at least a year to another position that does not include contact with current or prospective student-athletes or representatives of the school's athletic interests; or d) subjected to other specified discipline; 5) a reduction in the number of available scholarships; 6) a prohibition on participation in NCAA postseason competition in the sport in which the violation occurred; and 7) a requirement that the school recertify that its athletic policies and practices conform to NCAA rules.<sup>21</sup>

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<sup>16</sup> Since most violating and running is done by NCAA Division I coaches, this paper focuses on solving the problem of violating and running in NCAA Division I athletics.

<sup>17</sup> NCAA Division I Bylaw 19.02.2.1, available at <http://www.ncaapublications.com/productdownloads/D110.pdf>.

<sup>18</sup> NCAA Division I Bylaw 19.02.2.2, available at <http://www.ncaapublications.com/productdownloads/D110.pdf>.

<sup>19</sup> NCAA Division I Bylaw 19.02.2.1, *supra* note 17.

<sup>20</sup> NCAA Division I Bylaw 19.5.1, available at <http://www.ncaapublications.com/productdownloads/D110.pdf>.

<sup>21</sup> NCAA Division I Bylaw 19.5.2.1, available at <http://www.ncaapublications.com/productdownloads/D110.pdf>.

If a Division I coach commits a major violation of NCAA rules and the NCAA does not impose one or more of the presumptive penalties, the NCAA can instead impose: 1) one or more of the penalties it can impose for secondary violations; or 2) or one or more of the following penalties, among others: a) a public reprimand and censure; b) a period of probation for the school for at least one year; c) a reduction in the number of scholarships for the school for a specified period; d) a prohibition on the recruitment of student-athletes in one or more sports for a specific period; e) a financial penalty against the school; f) a ban on the team's participation in invitational or postseason NCAA competitions or NCAA championship events; g) a restriction on the school's ability to vote in NCAA matters or serve on NCAA committees; and 9) a requirement that the school show cause why an additional penalty should not be imposed if the NCAA determines the school did not take appropriate disciplinary and corrective action against the coach and/or other representatives of its athletic interests.<sup>22</sup>

### **B. The Current Penalties That Can Be Imposed on Coaches who Violate and Run Are Inadequate**

While most penalties for violations of Division I rules apply to schools, not coaches, the NCAA does have sufficient authority to punish Division I coaches who violate and run. The NCAA's strongest weapon in this regard is the show cause order, which can be applied to Division I coaches personally.<sup>23</sup> A show cause order requires a school to:

“demonstrate to the satisfaction of the [NCAA] why it should not be subject to a penalty (or additional penalty) for not taking appropriate disciplinary or corrective action against an institutional staff member or representative of the institution's athletic interests identified by the [NCAA] as having been involved in a violation of NCAA regulations[.]”<sup>24</sup>

A show cause order that applies to a coach so worries Division I schools that the practical effect of such an order is to ban the coach who is the subject of the order from coaching at the NCAA Division I level for the duration of the order.<sup>25</sup> As a result, the NCAA may be hesitant to impose a show cause order even when a coach has committed one or more major violations of NCAA Division I rules.<sup>26</sup> Although a show cause order can be imposed for a secondary violation of NCAA Division I rules,<sup>27</sup> this will rarely, if ever, occur.

The NCAA has the authority to impose other, less-serious punishments on coaches who attempt to violate and run but rarely does so because applicable NCAA rules offer no guidance or structure on how to do so. The NCAA's authority to impose these other punishments comes solely from the fact that

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<sup>22</sup> NCAA Division I Bylaw 19.5.2.2, available at <http://www.ncaapublications.com/productdownloads/D110.pdf>.

<sup>23</sup> See, e.g. Glenn Wong, Kyle Skillman & Chris Deubert, *The NCAA's Infractions Appeal Committee: Recent Case History, Analysis and the Beginning of a New Chapter*, 9 Va. Sports & Ent. L.J. 47, 71-75 (Fall, 2009) (containing a number of examples of show cause orders being issued to coaches personally).

<sup>24</sup> NCAA Division I Bylaw 19.02.1, available at <http://www.ncaapublications.com/productdownloads/D110.pdf>.

<sup>25</sup> Charlie Zegers, *Show Cause*, ABOUT.COM GUIDE: BASKETBALL, available at <http://basketball.about.com/od/collegebasketballglossary/g/show-cause.htm>.

<sup>26</sup> See e.g. Wong, Skillman & Deubert, *supra* note 23 (discussing situations in which show cause orders were imposed on Division I coaches personally, all of which included, at a minimum, multiple secondary violations); NCAA Division I Bylaw 19.5.2.1, *supra* note 21 (listing the presumptive penalties for major violations and not including a show cause order); NCAA Division I Bylaw 19.5.2.2, *supra* note 22 (listing the alternative disciplinary measure for major violations and including a show cause order).

<sup>27</sup> NCAA Division I Bylaw 19.5.1(i), available at <http://www.ncaapublications.com/productdownloads/D110.pdf>.

the Division I Bylaw regarding punishments for secondary violations states that the listed penalties are only “among the [available] disciplinary measures[.]”<sup>28</sup> and the Division I Bylaws regarding punishments for major violations state that the listed penalties are “among the disciplinary measures . . . that may be adopted”<sup>29</sup> and that, in the event that a staff member is determined to have “knowingly . . . engaged in or condoned a major violation[.]” the NCAA can impose “[o]ther disciplinary action[.]”<sup>30</sup> Since the NCAA is reluctant to discipline Division I coaches who violate and run on the basis of this vague language and will only impose show cause orders on Division I coaches personally in cases involving egregious conduct, many Division I coaches are able to violate and run with impunity as long as their conduct is not sufficiently egregious, creating an “enforcement gap.”<sup>31</sup> As a consequence of this enforcement gap, many observers have become cynical about the NCAA’s commitment to preventing misconduct by Division I coaches, which has tarnished the image of NCAA Division I athletics in the eyes of the public.<sup>32</sup>

### C. The NCAA’s Imposition of Show Cause Orders on Division I Coaches Personally

In order to understand the nature of the enforcement gap, it is necessary to understand the situations in which the NCAA will impose show cause orders on Division I coaches personally. By examining three examples of such situations, it becomes clear that serious rules violations must be committed in order for such an order to be warranted. As a consequence, it also becomes clear that the enforcement gap is quite large and a Division I coach can often commit numerous rules-violations and then violate and run without facing any consequences.

Example 1: In 1999, Tim Cohane, the men’s basketball coach at the University of Buffalo, the State University of New York, received an approximately three-year show cause order for, among other rules-violations, repeatedly and impermissibly coaching and observing scrimmages and tryouts and allowing players to make seventy long-distance phone calls free of charge.<sup>33</sup> Example 2: In 2001, Fletcher Cockrell, former men’s basketball coach at the University of Central Arkansas and assistant men’s basketball coach at New Mexico State, received a ten-year show cause order for supplying a prospective student-athlete with \$2,000 in cash, housing, and meals, holding an impermissible tryout, and arranging for the fraudulent completion of coursework for two prospective student-athletes in order to

<sup>28</sup> NCAA Division I Bylaw 19.5.1, *supra* note 20.

<sup>29</sup> NCAA Division I Bylaw 19.5.2.2, *supra* note 22.

<sup>30</sup> NCAA Division I Bylaw 19.5.2.1, *supra* note 21.

<sup>31</sup> See, e.g. Gary Parrish, *Just like UMass, Calipari’s Accomplishments at Memphis Are Tainted*, CBS Sports, May 28, 2009, available at <http://www.cbssports.com/collegelbasketball/story/11793826> (discussing how, despite the fact that NCAA violations were committed by the men’s basketball programs at the University of Massachusetts and the University of Memphis while John Calipari was the men’s basketball coach at these schools, Calipari was able to leave both schools to coach at other Division I schools without facing any penalties); *Kiffin to Coach USC After 1 Vols Season*, ESPN Los Angeles, Jan. 13, 2010, available at <http://sports.espn.go.com/los-angeles/ncf/news/story?id=4820737> (noting that Lane Kiffin was able to become the football coach at the University of Southern California after being the head football coach at the University of Tennessee for one year, during which six secondary NCAA violations were committed by the football program).

<sup>32</sup> See, e.g. Brian Cook, *Want a Mid-Major Job? Try Massive NCAA Violations*, The Sporting Blog, Apr. 2, 2010, available at [http://www.sportingnews.com/blog/the\\_sporting\\_blog/entry/view/61547/want\\_a\\_mid-major\\_job?\\_try\\_massive\\_ncaa\\_violations](http://www.sportingnews.com/blog/the_sporting_blog/entry/view/61547/want_a_mid-major_job?_try_massive_ncaa_violations) (satirizing the fact that coaches from big-time Division I programs who resign or are fired in the face of massive NCAA violations manage to land jobs at mid-major programs and are then considered “feel-good redemption stor[ies]”); Lee Andrew Henderson, *Why the NCAA Should Punish Coaches for Recruiting Violations*, Associated Content, Sep. 19, 2007, available at [http://www.associatedcontent.com/article/379207/why\\_the\\_ncaa\\_should\\_punish\\_coaches.html?cat=9](http://www.associatedcontent.com/article/379207/why_the_ncaa_should_punish_coaches.html?cat=9) (bemoaning the fact that many times coaches commit NCAA recruiting violations and are able to get away “scotch free”).

<sup>33</sup> Wong, Skillman & Deubert, *supra* note 23, at 71-75.

facilitate their transfer to New Mexico State.<sup>34</sup> **Example 3:** In 2002, Aleks Mihailovic, men's soccer coach at Jacksonville University, received a three-year show cause order because representatives of the soccer program impermissibly provided recruits with transportation, lodging, free long-distance calling, meals, and athletic apparel.<sup>35</sup>

### III. Part II: The Solution

Since the NCAA has sufficient authority to punish Division I coaches who violate and run without issuing a show cause order,<sup>36</sup> it may seem as if all the NCAA needs to do is to create a policy for handing out lesser punishments to coaches who attempt to violate and run in order to close the enforcement gap. However, violating and running can have a huge negative impact on the image of NCAA Division I athletics,<sup>37</sup> which is a major component of their popularity.<sup>38</sup> Therefore, creating a new bylaw, which will be more permanent than a new policy, is a better approach to utilize in order to close the enforcement gap.

A proposed Division I bylaw to close the enforcement gap is the following:

“In the event that a school is penalized for violating NCAA Division I bylaws and the coach for the sport in which the violation(s) were committed becomes employed as a representative of any another Division I school's athletic interests, such other school shall face the same penalties, over the same time period, as the coach's former school, whether these sanctions are self-imposed or imposed by the NCAA, unless and until such other school ceases to employ the coach. This Bylaw shall only apply to an assistant coach to the extent that he or she was involved in the commission of the violation(s) at issue or was aware of the violation(s) and failed to report them in an appropriate manner and/or take appropriate corrective action. This Bylaw shall not apply to a coach if he or she is the subject of a show cause order.”

Before explaining in detail how this bylaw would be applied, it is important to discuss the logic behind it. The bylaw applies to a head coach whenever a violation is committed and only applies to an assistant coach if he or she has committed one or more specified bad acts, because head coaches are responsible for maintaining institutional control under the NCAA Constitution.<sup>39</sup> In addition, the bylaw does not apply to coaches who are the subject of a show cause order and does not impact the show cause order rule because: 1) a show cause order is such a serious penalty that further punishment is not necessary,<sup>40</sup> and 2) since the NCAA can punish a coach more harshly than it punishes an institution with a show cause order but not under the proposed bylaw, leaving the show cause order in place will give the NCAA the flexibility to punish a coach more harshly than it punishes an institution where appropriate.

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<sup>34</sup> *Id.* at 76-79.

<sup>35</sup> *Id.* at 80-82.

<sup>36</sup> *See supra* section IV.

<sup>37</sup> *See supra* note 32.

<sup>38</sup> *See e.g.* Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 Duke L.J. 555, 559 (2009) (discussing NCAA regulations relating to the amateur status of student-athletes and noting that one of the main reasons that people watch Division I sports is that “[a]mateurism is assumed to be good [and the n]otion of amateurism is characterized by nostalgia for a time when sport was played for pure love”).

<sup>39</sup> Matthew M. Keegan, *Due Process and the NCAA: Are Innocent Student-Athletes Afforded Adequate Protection from Improper Sanctions? A Call for a Change in the NCAA Enforcement Procedures*, 25 N. Ill. U. L. Rev. 297, 340 (2005).

<sup>40</sup> *See supra* note 25.

The bylaw applies both self-imposed penalties and penalties imposed by the NCAA to a coach's new school because schools that hire or continue to employ coaches who have violated and run should be subject to all penalties faced by the coach's former school as a result of his or her behavior.<sup>41</sup> In addition, because self imposed penalties precede additional penalties from the NCAA, the bylaw is structured to eliminate the possibility that coaches who violate and run to escape early disciplinary action in these circumstances.<sup>42</sup>

Some hypothetical examples will help show how the proposed bylaw will operate. These examples illustrate that the bylaw will be effective in closing the enforcement gap and, at a minimum, reducing the number of Division I coaches who violate and run. Example 1: Coach X is fired from his position as men's basketball coach at Big-Time University (BTU) after an NCAA investigation determines that he committed several minor recruiting violations. Coach X is immediately hired as the men's basketball coach at Mid-Sized University (MSU). One year later, the NCAA takes away three men's basketball scholarships from BTU for three years but does not sanction Coach X individually. As a result of the bylaw, MSU also loses three men's basketball scholarships for three years or until it decides to no longer employ Coach X.

Without the bylaw, Coach X could have violated and ran to MSU without any repercussions. However, based on the severity of the sanctions MSU faces under the proposed bylaw for continuing to employ Coach X, it will likely terminate his employment.<sup>43</sup> In addition, Coach X will likely have a hard time finding a job in the athletics department of another Division I school until the three years of BTU's penalty have expired.

Example 2: Coach X is fired as men's basketball coach at BTU after two sub-par seasons and is immediately hired as the men's basketball coach at MSU. Two years into his tenure at MSU, the NCAA initiates an investigation into allegations that Coach X violated NCAA rules at BTU by giving his players free meals and rides around campus. BTU concludes its investigation of these allegations and imposes a ban on its own men's basketball team's participation in NCAA invitational tournaments for two years. As a result of the bylaw, MSU's men's basketball team is now also subject to this invitational tournament participation ban unless MSU ceases to employ Coach X at some point during these two years.

One year into the invitational tournament participation ban period, the NCAA finishes its investigation and prohibits BTU men's basketball program from engaging in off-campus recruiting for one year. As a consequence of the bylaw, MSU men's basketball program is also prohibited from engaging in off-campus recruiting for one year unless MSU ceases to employ Coach X before this one-year period concludes. In this scenario, the sanctions faced by BTU are less serious and it is more likely that MSU or some other Division I school, though probably not a school with a top-flight men's

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<sup>41</sup> In certain instances, the NCAA imposes penalties on institutions on the basis of conduct by multiple coaches over a period of time. *See e.g. supra* section I. If the proposed bylaw were instituted, the NCAA would not be able to continue to do this and would have to specify what sanctions were for what time periods so that a school that hires a coach who violated and ran will not be penalized for conduct that did not involve the coach in any way.

<sup>42</sup> *See infra* section VII.

<sup>43</sup> It is important to note that Coach X's contract could make it difficult or impossible for MSU to terminate him at this point. However, if the proposed bylaw were enacted, it is unlikely that coaches would be able to negotiate contracts with schools that prevented these schools from firing them in the event that the school faced sanctions for continuing to employ them. *See* ESPN.COM NEWS services, *NCAA Lists 5 Major Violations; IU AD "Profoundly Disappointed,"* Feb. 15, 2008, available at <http://sports.espn.go.com/ncb/news/story?id=3243793> (noting that Indiana University (IU) men's basketball coach Kelvin Sampson's contract with IU included termination clauses for violations of NCAA rules because he was previously sanctioned for violating NCAA rules while at the University of Oklahoma).

basketball program, will employ Coach X during the period BTU faces sanctions for his behavior. Yet, even if this occurs, Coach X will likely be supervised more closely and his behavior during and after the period BTU faces sanctions will be more likely to conform to NCAA rules.

Example 3: Coach X is fired as men's basketball coach at BTU after a BTU internal investigation concludes that he violated NCAA rules by having his players' grades changes. BTU punishes its men's basketball team by taking away two scholarships for the next four years. As a consequence of the bylaw, any Division I school that hires Coach X will now also lose two men's basketball scholarships for four years. If Coach X is hired by another Division I school when there is three years remaining on BTU's self-imposed punishment, this school will lose two men's basketball scholarships for the next three years.

Two years into BTU's self-imposed punishment, the NCAA concludes its investigation and punishes BTU by banning its men's basketball team from participating in NCAA postseason tournaments for two years. In addition, the NCAA imposes a six-year show cause order on Coach X. Once this happens, the bylaw is no longer applicable to Coach X and the regular NCAA Division I show cause rules apply to him.

### **A. Why the Proposed Bylaw Will Be More Effective Than Current NCAA Rules**

The proposed bylaw closes the enforcement gap and should make Division I coaches more leery of violating NCAA rules. In addition, the bylaw gives the NCAA a straightforward mechanism to punish Division I coaches who violate and run and ensures that all coaches who violate and run will be treated similarly.<sup>44</sup> Moreover, since the NCAA does not have the authority to sanction individual coaches - it can only sanction schools for taking a particular action with respect to a coach - a bylaw like the proposed bylaw is the only way the NCAA can effectively deal with Division I coaches who violate and run.<sup>45</sup>

Another advantage of the proposed bylaw is that, as with a show cause order, it makes it much more likely that the penalties for violations of Division I rules are not borne completely by innocent parties.<sup>46</sup> This is especially important because many times it is the case that, by the time NCAA and

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<sup>44</sup> The assumption that coaches who violate and run will be treated similarly rests on the assumption that the NCAA will punish schools whose employees commit similar NCAA violations similarly, which may not necessarily be a safe assumption. See e.g. Richard A. Di Lisi, *NCAA v. Tarkanian: A Delegation of Unfettered Discretion*, 39 Case W. Res. 1423 (1989) (discussing the NCAA's handling of supposed NCAA rules-violations committed by Jerry Tarkanian, then the men's basketball coach at the University of Nevada, Las Vegas (UNLV), and how many observers felt Tarkanian was treated unfairly). Nevertheless, it is much more likely that the NCAA will punish schools whose employees commit similar NCAA violations similarly than it is that they will treat individuals who commit similar NCAA violations similarly because if the NCAA treated one school differently from other schools it would be much more likely to face a backlash among its members than it would if it treated a single individual differently from other individuals.

<sup>45</sup> *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 197 (1988) (noting that the NCAA cannot "assert sovereign authority over any individual" and can only directly impose disciplinary measures on its members).

<sup>46</sup> It is important to point out that, in certain circumstances, the proposed bylaw would not punish an offending coach at all. For example, if a coach leaves his or her institution to coach professional sports or retires from coaching, the bylaw will not have any impact. See, e.g. Lynn Zinser, *U.S.C. Sports Receive Harsh Penalties*, NEW YORK TIMES, June 10, 2010, available at <http://www.nytimes.com/2010/06/11/sports/ncaafotball/11usc.html> (discussing sanctions faced by the University of Southern California's men's football team based on incidents occurring while Pete Carroll - now the head coach of the Seattle Seahawks in the National football League - was head coach and that Pete Carroll is not facing any sanctions personally). In such situations, a monetary fine or other penalty would be more appropriate but is unavailable as a potential form of discipline. *Tarkanian*, *supra* note 45. Thus, while there will still be an enforcement gap if the proposed bylaw is enacted, it will be closed to the extent possible. It is also important to point out that the proposed bylaw and show cause orders imposed on coaches punish innocent parties to



internal investigations are concluded and sanctions are imposed, the players, coaches, and other employees involved in the violations have moved on.<sup>47</sup> Furthermore, since respondeat superior does not apply in NCAA disciplinary actions, institutions are often penalized for conduct by coaches acting completely on their own initiative in a manner that could not have been prevented and it is unfair to let coaches escape discipline in these scenarios.<sup>48</sup>

An additional advantage of the proposed bylaw is that it will cause NCAA Division I coaches who violate and run to be disciplined more quickly. When the NCAA finishes a preliminary investigation and has developed “reasonably reliable information” that a school has violated NCAA rules, it will issue the school a Notice of Inquiry.<sup>49</sup> A Notice of Inquiry will inform a school that a formal investigation is forthcoming and will also contain, among other things, the following information to the extent possible: 1) the sport involved; 2) the approximate time period during which the violations are alleged to have occurred; 3) the identity of any individuals thought to be involved; 4) the approximate time period during which the NCAA’s formal investigation will take place; and 5) a statement discussing the school’s obligation to cooperate with the NCAA investigation.<sup>50</sup>

At some point after a school receives a Notice of Inquiry, its athletic director may receive a Notice of Allegations.<sup>51</sup> A Notice of Allegations lists the NCAA Bylaws that are alleged to have been violated and contains detailed descriptions of all such allegations.<sup>52</sup> Although not specified as a formal procedure under NCAA Bylaws, a school can, and often will, file a self-report with the NCAA after it receives a Notice of Inquiry and before it receives a Notice of Allegations.<sup>53</sup> Traditionally, schools only filed self-reports in cases of alleged secondary violations.<sup>54</sup> More recently, self-reports have become commonplace in cases involving allegations of major violations as well.<sup>55</sup> More schools are filing self-reports because they recognize that the NCAA looks favorably on, and may impose less punishment towards, schools that file self-reports, admit guilt, and/or impose sanctions on themselves when appropriate.<sup>56</sup>

Since self-reports and self-imposed sanctions are now common, it is also now common for self-imposed penalties to be levied prior to NCAA penalties. As a result, it is important that the proposed bylaw applies self-imposed sanctions to a coach’s new school so that coaches receive quicker discipline in many cases. In addition, if coaches were only punished when the NCAA made its decision on whether to impose penalties, they would have more time to plan an exit strategy from their schools if necessary. Although it might seem as if applying self-imposed punishments to a coach’s new school will enable the coach’s former school to enact its revenge in any manner it sees fit, it is highly unlikely that a school will punish itself more than necessary simply to spite a former coach.

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some extent, including student-athletes who go to school solely to play for a coach who is disciplined and a coach’s new school, which may have conduct another coaching search.

<sup>47</sup> Keegan, *supra* note 39.

<sup>48</sup> Mike Rogers and Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 Seton H. L. Rev. 749, 761 (2007) (stating respondeat superior does not apply in NCAA disciplinary proceedings).

<sup>49</sup> *Id.* at 764-765.

<sup>50</sup> *Id.* at 765.

<sup>51</sup> *Id.* at 767.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 772.

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

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

<sup>56</sup> *Id.* at 773.

#### IV. Part III: Why It's So Important to Close the Enforcement Gap

Despite great efforts by the NCAA to appeal to fans by branding its athletics as pure, amateur competitions played for the love of the game,<sup>57</sup> it has become harder and harder to maintain this image. Many observers are now referring to Division I athletics as simply an enormously successful, profit-making enterprise.<sup>58</sup> The handsome salaries earned by Division I coaches only further contribute to the NCAA's difficulties in preserving its brand. For example, Nick Saban received \$32 million over eight years to coach football at the University of Alabama while John Calipari received a similar sum of money to coach basketball at the University of Kentucky.<sup>59</sup> In addition to high salaries, Division I coaches also receive other perks and benefits, including performance-based incentives and buyouts in the event they are fired.<sup>60</sup>

One cause of these high salaries is the fact that Division I coaches are often lured from one school to another, even in spite of the fact that they are under long-term contracts with their current schools, by offers of a higher salary.<sup>61</sup> As a result, this causes schools whose coaches leave for a higher salary to use similar tactics to acquire their own new coaches, further contributing to the high salaries of Division I coaches.<sup>62</sup> In fact, the frequency of the movement of Division I coaches from one school to another following the conclusion of a particular Division I sport's season has led observers to coin the term "college coaching carousel."<sup>63</sup> The college coaching carousel has now spun out of control to the point where schools are willing to pay damages owed by a new coach to the coach's former school as a result of that coach's breach of contract when leaving.<sup>64</sup> Moreover, schools have begun to take a proactive approach by giving their coaches higher salaries in order to ensure that they are not lured away by other schools after successful seasons.<sup>65</sup>

For better or worse, the NCAA has accepted the coaching carousel as a fact of life, asserting it is powerless to act even in the face of complaints from smaller Division I schools that coaching costs are spiraling out of control.<sup>66</sup> In accepting the coaching carousel, the NCAA has done damage to its brand.<sup>67</sup> With Division I coaching salaries continuing to rise,<sup>68</sup> the NCAA's brand will only deteriorate further, which makes it critical for the NCAA to stop Division I coaches from violating and running.<sup>69</sup>

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<sup>57</sup> See Fitt, *supra* note 38.

<sup>58</sup> See, e.g. Lee J. Rosen, *Proposition 16 and the NCAA Initial-Eligibility Standards: Putting the Student Back in Student-Athlete*, 50 Cath. U.L. Rev. 175, 193 (Fall, 2000) ("[t]he rapid development of college athletics into a multimillion dollar business has challenged the NCAA in its effort to preserve academic standards").

<sup>59</sup> John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. Ill. L. Rev. 109, 111 (2010).

<sup>60</sup> Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 Fordham Intell. Prop. Media & Ent. L.J. 1, 12 (2009).

<sup>61</sup> *Id.* at 2.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 12, 51-52 (noting that the University of Michigan paid \$1.5 million in liquidated damages to the University of West Virginia (UWV) after hiring UWV's football coach, Rich Rodriguez).

<sup>65</sup> *Id.* at 2.

<sup>66</sup> *Id.* at 3.

<sup>67</sup> See e.g. Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism As an Antitrust Defense in NCAA Compensation Challenges*, 24 Hamline L. Rev. 24, 52-53 (2000) (discussing the high salaries paid to college coaches and stating that, "[f]or a university with a major athletics program to argue that athletics is not part of its regular business is ridiculous [because a]n athletic department is business as usual").

<sup>68</sup> Karcher, *supra* note 60, at 4-6.

<sup>69</sup> See e.g. Keegan *supra* note 39, at 340 (noting with disdain the fact that "[t]he NCAA is replete with former head coaches whose improprieties caused them to be fired from a previous coaching job, but have been hired at another member institution by virtue of their coaching prowess").

The risk to the NCAA's brand from allowing Division I coaches to violate and run becomes even more apparent when one examines the NCAA's treatment of student-athletes. While the current enforcement gap allows many Division I coaches to violate and run with impunity, if an NCAA Division I athlete transfers from one Division I school to another he or she cannot participate in intercollegiate athletics at his or her new school for a full academic year without a waiver or exemption, regardless of the reasons for the transfer.<sup>70</sup> Furthermore, at the same time the NCAA has been turning a blind eye to Division I coaches who violate and run, there have been numerous high-profile in which many observers have felt the NCAA has been unduly harsh on student-athletes.<sup>71</sup>

#### V. Part IV: The Proposed Bylaw Will Hold Up in Court

Although many of the NCAA's members are state schools, which are state actors for constitutional law purposes, the NCAA is not a state actor and is not constrained by the U.S. Constitution when disciplining members.<sup>72</sup> Therefore, if a coach were to argue that the proposed bylaw violates his or her liberty or property interest, the claim would fail because the NCAA is not required to afford coaches any form of due process.<sup>73</sup> A coach could also claim that compliance with the proposed bylaw by school that is also a state actor would turn the NCAA into a state actor for constitutional law purposes, but such a claim would also fail.<sup>74</sup>

The only reasonable remaining challenge to the proposed bylaw is grounded in the Sherman Anti-Trust Act ("Sherman Act"). Even though the NCAA is a single entity, all of its bylaws must be able to withstand scrutiny under the Sherman Act because such bylaws can be characterized as agreements and concerted action among NCAA members.<sup>75</sup> If a plaintiff challenged the proposed bylaw under the Sherman Act, he or she would likely argue that it is an unlawful restraint of trade, in which case its validity would depend on whether it satisfied the "rule of reason" test.<sup>76</sup> The proposed bylaw would pass the rule of reason test and be upheld against such a claim because: 1) it does not have a substantial effect on the employment of Division I coaches - it only impacts coaches who violates NCAA rules and, even then, Division I schools can employ these coaches so long as they submit to sanctions - 2) it has a

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<sup>70</sup> T. Matthew Lockhart, *The NCAA Should Adopt a Uniform Student-Athlete Discipline Policy*, 16 UCLA Ent. L. Rev. 119, 135-136 (2009).

<sup>71</sup> Perhaps the best example is the case of Jeremy Bloom, who was a member of the University of Colorado's (CU) football team and the world's number one-ranked professional, freestyle mogul skier. Alain Lapter, *Bloom v. NCAA: A Procedural Due Process Analysis and the Need for Reform*, 12 Sports Law. J. 255, 256 (2005). Bloom was able to pay his skiing expenses only through endorsement deals he received from companies that sold skiing-related products. *Id.* at 256-257. Unfortunately for Bloom, the NCAA's "no endorsement" rule prohibited him from receiving any endorsement money for a sport without losing his amateur status, meaning he could not play college football if he continued to ski. *Id.* at 257. Bloom and CU petitioned the NCAA for a waiver and, after the NCAA rejected this petition, Bloom filed a lawsuit, which was unsuccessful. *Id.* at 257, 259-260. Interestingly, the NCAA refused to grant Bloom's petition even though under NCAA rules Bloom could have been a paid professional athlete in another sport and retained his eligibility as a college football player so long as he did not violate the no endorsement rule. *Id.* at 257, 267.

<sup>72</sup> *Tarkanian*, *supra* note 39 at 196-199 (holding that the NCAA was not a state actor when it issued a show cause order to UNLV regarding UNLV's employment of men's basketball coach Jerry Tarkanian).

<sup>73</sup> Keegan *supra* note 39 at 341.

<sup>74</sup> *Id.* at 341-342.

<sup>75</sup> *Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136, 1147 (5th Cir. 1977).

<sup>76</sup> *Id.* at 1151. A plaintiff might also challenge the proposed bylaw as per se invalid under the Sherman Act, but such a claim would fail. See *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1344 (5th Cir. 1988) (discussing how NCAA rules should be analyzed using the rule of reason test and not a per se test) (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984)).

compelling justification - to protect the NCAA's brand, to punish coaches for violating NCAA rules, and to deter coaches from violating NCAA rules - and 3) it is necessary to close the enforcement gap.<sup>77</sup>

## VI. Conclusion

Individual Division I schools are, for all intents and purposes, helpless to prevent coaches from violating and running.<sup>78</sup> Thus, it is up to the NCAA to put a stop to violating and running at the Division I level. As of the date of this article, the NCAA has failed to do so, and this failure is putting the NCAA's brand at risk. With the current state of the U.S. media, which is characterized by a twenty-four-hour news cycle,<sup>79</sup> stories of violating and running are circulated over and over, making it even more critical for the NCAA to institute the proposed bylaw.

Returning to the case of Jim Harrick, the need for the proposed bylaw becomes crystallized even further. It is true that Harrick was coaching at URI in 1997, before any sanctions were imposed on UCLA in 1998. Nevertheless, his subsequent behavior would likely have been altered, and URI and UGA might have been able to avoid their unfortunate fates, had URI faced sanctions for continuing to employ Harrick once UCLA had been penalized for the NCAA rules-violations that occurred while he was at UCLA. Had URI faced such sanctions, it might have decided not to employ Harrick, causing him to alter his behavior to conform to NCAA rules at his next Division I coaching job.<sup>80</sup> Alternatively, URI could have continued to employ Harrick while supervising him more rigorously, which also would likely have caused him to alter his behavior to conform to NCAA rules. Thus, regardless of the actions URI would have taken had it faced sanctions for continuing to employ Harrick once UCLA was penalized as a result of Harrick's behavior, it is hard to believe that Harrick would not have improved his behavior had the proposed bylaw been in effect. Accordingly, the proposed bylaw could have enabled Harrick to avoid the infamous reputation now attached to his name, and the NCAA to avoid yet another blow to its diminishing brand and reputation.

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<sup>77</sup> See *Hennessey*, *supra* note 75 (holding that a rule limiting the number of assistant basketball and football coaches of Division I schools did not violate the rule of reason, was not an unreasonable restraint on trade, and was not in violation of the Sherman Act); *Bd. of Regents*, *supra* note 76, at 92-93 (discussing why an NCAA plan was invalid under the Sherman Act and stating that the plan was not "necessary to enable the NCAA to penetrate the market through an attractive package sale" and, "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics").

<sup>78</sup> Although Division I institutions can collect damages, including liquidated damages, from coaches who breach contracts to coach at other schools while violating and running, these damages cannot be excessive or they will constitute penalties and be unenforceable on public policy grounds. See, e.g. *Contractual Provisions for Per Diem Payments for Delay in Performance As One for Liquidated Damages or Penalty*, 12 A.L.R. 4th 891, 899 (2009) (discussing how excessive liquidated damage clauses can be construed as unenforceable penalties). Moreover, even to the extent that a damage or liquidated damage provision is enforceable, a coach's new school may be willing to pay some or all the applicable damages for the coach in order to be able to hire him or her. See *supra* note 64.

<sup>79</sup> Liane Hansen and David Folkenflik, *The Power of the 24-Hour News Cycle*, NPR, May 29, 2005, available at <http://www.npr.org/templates/story/story.php?storyId=4671485>.

<sup>80</sup> It is possible that if URI decided to terminate Harrick's employment in order to avoid facing sanctions he would not have ever obtained another Division I coaching job. However, based on Harrick's track record of success as a basketball coach, such an outcome would have been unlikely.