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## NCAA Rules Enforcement: Missouri, Alternative Resolution, and Imposing Penalties in an Age of "Reform"

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**NCAA RULES ENFORCEMENT: MISSOURI,  
ALTERNATIVE RESOLUTION, AND IMPOSING  
PENALTIES IN AN AGE OF “REFORM”**

**Jerry R. Parkinson\***

*NCAA infractions committees recently decided a case involving academic misconduct at the University of Missouri. Critics have contended that penalties imposed on the university in that case were harsh, unfair, and inconsistent with penalties imposed in other infractions cases. The author examines the decisions in the Missouri case and compares those decisions to other recent cases involving academic misconduct. He concludes that the penalties imposed on Missouri are easily defensible under current NCAA bylaws, but also contends that the NCAA’s use of alternative methods of resolving major infractions cases opens the door to potential penalty inconsistency.*

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## I. INTRODUCTION

I've been covering the NCAA a long time. I started as an investigative reporter dealing with NCAA issues. I say that to say this — in all the years that I've watched, studied and reported on the NCAA, I think that this is the most outrageous penalty I've ever seen. There's no justification for it. There's no rhyme or reason. The longer I've thought about this and the more I've read about it and spoken to people at Mizzou and elsewhere, the more sickened I am by it . . . . To penalize this football team for that, it's not only reprehensible, but it shows why people genuinely hate the NCAA.<sup>1</sup>

The quotation above is from Paul Finebaum, a sports journalist and media personality now working for the SEC (Southeastern Conference) Network.<sup>2</sup> His remarks in the summer of 2019 came on the heels of a major infractions case involving the University of Missouri, Columbia (Mizzou).<sup>3</sup> Finebaum's connections with the SEC, whose membership includes the University of Missouri,<sup>4</sup> may have influenced his opinion, along with his conversations with "people at Mizzou," who naturally would be opposed to harsh NCAA sanctions on themselves. Nonetheless, Finebaum is a highly respected commentator, and his words are extraordinary, so they bear further examination. What is the "that" for which the University of Missouri football team was so unfairly penalized?

## II. THE MISSOURI INFRACTIONS CASE

The facts of the Missouri infractions case are straightforward. In 2015-2016, an academic tutor working for the University of Missouri athletics department completed and submitted academic work for twelve student-athletes.<sup>5</sup> "Simply stated," in the words of the NCAA Division I Committee on Infractions (COI), "she did their work."<sup>6</sup> For some student-athletes, she completed individual homework assignments, quizzes,

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1. SDS Staff, *Paul Finebaum on Mizzou bowl ban: 'The most outrageous penalty I've ever seen,'* SATURDAY DOWN SOUTH, <https://www.saturdaydownsouth.com/mizzou-football/paul-finebaum-on-mizzou-bowl-ban-the-most-outrageous-penalty-ive-ever-seen/> (last visited Aug. 23, 2020).

2. *Id.*

3. *See id.*; *see also* GASN Sports, *Paul Finebaum sounds off on NCAA sanctions*, YOUTUBE (July 18, 2019), <https://www.youtube.com/watch?v=1SsXtD8bu5U> (discussing Mizzou and its postseason ban in an interview with GASN Sports).

4. *See University of Missouri*, SEC NETWORK, <https://www.secsports.com/school/missouri-tigers> (last visited Aug. 23, 2020).

5. NCAA DIVISION I COMMITTEE ON INFRACTIONS, UNIVERSITY OF MISSOURI, COLUMBIA PUBLIC INFRACTIONS DECISION 1 (2019), <https://web3.ncaa.org/lstdbi/search/mi-CaseView/report?id=102744> [hereinafter NCAA MISSOURI INFRACTIONS DECISION].

6. *Id.*

or exams.<sup>7</sup> For one student-athlete, she essentially completed the entire course.<sup>8</sup> For two others, the tutor helped to complete a math placement exam so the student-athletes would not be forced into a remedial math course.<sup>9</sup> In all instances, the tutor engaged in academic misconduct;<sup>10</sup> tutors may assist students in completing their own work, but tutors may not do the work themselves.

I served on the NCAA's Division I COI from 2000-2010. In those days, we referred to such conduct as academic fraud, and academic fraud was "considered by the committee to be among the most egregious of NCAA violations."<sup>11</sup> Academic fraud goes directly to the heart of institutional integrity, consequently the NCAA leadership had made it abundantly clear that schools whose employees committed academic fraud on behalf of student-athletes would receive harsh penalties.<sup>12</sup>

The membership still believes that. Since 2013, NCAA violations have been classified according to level of severity, from "Level I" violations that are the most serious to "Level IV" violations that are relatively minor.<sup>13</sup> Under NCAA bylaws, Level I violations are "severe breach[es] of conduct . . . that seriously undermine or threaten the integrity of the NCAA Collegiate Model."<sup>14</sup> The bylaws specifically list academic misconduct, similar to the kind committed by the tutor at the University of Missouri, as an example of a Level I violation.<sup>15</sup>

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. NCAA DIVISION I COMMITTEE ON INFRACTIONS, FLORIDA STATE UNIVERSITY PUBLIC INFRACTIONS REPORT 1, 14 (2009), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102310>. Public COI decisions used to be called "reports," but in 2013 they were officially relabeled as "decisions."

12. *See, e.g.*, Press Release, Dr. Myles Brand, Leadership and Challenges: The Roles of Interscholastic Athletics in the University (Jan. 12, 2008), <http://fs.ncaa.org/Docs/PressArchive/2008/Announcements/Myles%2BBrands%2B2008%2BState%2Bof%2Bthe%2BAS-sociation%2BSpeech.html> ("Academic fraud violates the fundamental bond that links intercollegiate athletics to higher education and should be dealt with aggressively and harshly."); NCAA DIVISION I COMMITTEE ON INFRACTIONS, UNIVERSITY OF MINNESOTA, TWIN CITIES PUBLIC INFRACTIONS REPORT 3 (2000), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102169> ("[A]cademic fraud . . . undermined the bedrock foundation of a university and . . . damaged the academic integrity of the institution.") [hereinafter NCAA MINNESOTA INFRACTIONS REPORT].

13. NAT'L COLLEGIATE ATHLETIC ASS'N, 2019-2020 DIVISION I MANUAL, § 19.1 (2019) [hereinafter NCAA MANUAL]; *New Violation Structure Introduced*, NCAA (Aug. 1, 2013, 12:00 AM), <https://www.ncaa.org/about/resources/media-center/news/new-violation-structure-introduced> (The NCAA defines Level IV violations as those that are "inadvertent and isolated, technical in nature and result in a negligible, if any, competitive advantage.").

14. NCAA MANUAL, *supra* note 13, § 19.1.

15. *Id.* § 19.1.1. Prior to the 2013 bylaw changes, the infractions committee typically used the phrase "academic fraud" to describe cheating in an academic setting. *See, e.g.*, NCAA MINNESOTA INFRACTIONS REPORT, *supra* note 12, at 3 (referring to "academic fraud"). The

When University of Missouri representatives appeared before a panel of the infractions committee to address the violations, they surely knew that serious penalties were a possibility. The facts were not in dispute—relatively extensive academic misconduct had occurred.<sup>16</sup> Nor could the University of Missouri contest the fact that this was a Level I case, which carried with it the most significant penalties.

However, the level of penalties the University of Missouri faced depended on a wide range of aggravating and mitigating circumstances enumerated in the NCAA bylaws which the COI must consider.<sup>17</sup> In weighing all of the circumstances, the committee categorizes each case as an “Aggravated” case (in which aggravating circumstances outweigh mitigating circumstances), a “Standard” case (in which the aggravating and mitigating circumstances are in relative balance—“generally of equal weight”), or a “Mitigated” case (in which mitigating circumstances outweigh aggravating circumstances).<sup>18</sup>

The bylaw directives were introduced in 2013 as part of a broader effort by the NCAA membership to limit the COI’s discretion in assessing penalties. Once a case is labeled—for example, a “Level I-Standard” case—it is plugged into a “penalty matrix” that prescribes a relatively narrow range of penalties for each label.<sup>19</sup> For example, one of the so-called “core” penalties prescribed in the matrix for a Level I-Standard case is a postseason ban of one to two years.<sup>20</sup> By contrast, a

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bylaws since 2013 have used the term “misconduct” rather than “fraud.” NCAA MANUAL, *supra* note 13, § 14.02.1. In this article, I use “academic fraud” to describe cheating prior to the 2013 bylaw revisions and “academic misconduct” for cases decided after the revisions.

16. Twelve student-athletes is actually quite a few. I argued a case on appeal in the early 2000s in which academic fraud on behalf of two student-athletes resulted in a ban on postseason competition. See NCAA DIVISION I COMMITTEE ON INFRACTIONS, UNIVERSITY OF CALIFORNIA, BERKELEY PUBLIC INFRACTIONS REPORT 3-4, 16-18 (2002), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102235> [hereinafter NCAA CAL-BERKELEY INFRACTIONS REPORT]. Other aggravating factors, including a lack of institutional control and repeat-violator status, also played a role in the penalties. See *id.*

17. NCAA MANUAL, *supra* note 13, §§ 19.9.3, 19.9.4.

18. *Id.* § 19.9.2.

19. *Id.* § 19.9.5, fig.19-1.

20. *Id.* In essence, “core” penalties are presumptive. The bylaws state that once the COI hearing panel classifies a case as aggravated, standard, or mitigated, it “shall prescribe” the corresponding core penalties set forth in Figure 19-1. *Id.* § 19.9.5. The panel may depart from the core penalties if “extenuating circumstances are found” and the panel explains in its decision the basis for the departure. NCAA MANUAL, *supra* note 13, § 19.9.6. The COI panel also may prescribe additional penalties not included among the core. *Id.* § 19.9.7. The 2013 bylaw changes were based on recommendations of an NCAA “enforcement working group.” NCAA WORKING GROUP ON COLLEGIATE MODEL - ENFORCEMENT, FINAL REPORT (2012), [https://www.ncaa.org/sites/default/files/Report\\_Final\\_101112.pdf](https://www.ncaa.org/sites/default/files/Report_Final_101112.pdf). That group’s final report in 2012 suggested that core penalties were “those (1) identified by the membership as most effectively deterring serious rules violations, and/or (2) identified by the [working] group as

Level-I Mitigated case calls for either no postseason ban or a ban of one year.<sup>21</sup> Thus, a school like Missouri, which seeks to avoid a postseason ban, has a strong incentive to try to convince the COI that its case is a “mitigated” case rather than a “standard” case.

That was precisely the scenario that played out in the Missouri case. The university contended that its academic misconduct case was a Level I-Mitigated rather than a Level I-Standard.<sup>22</sup> Unfortunately for Missouri, the classification on which the COI panel that heard the case ultimately landed was the latter.<sup>23</sup> One point of contention in the Missouri case was the number of mitigating factors that applied.<sup>24</sup> Missouri asserted that it should get the benefit of two factors enumerated in the bylaws: (1) “prompt self-detection and self-disclosure of the violations,” and (2) “implementation of a system of compliance methods designed to ensure rules compliance and satisfaction of institutional/coaches’ control standards.”<sup>25</sup>

The COI panel disagreed. With respect to the first factor, the tutor essentially turned herself in; the *university* did not “self-detect” the violations, even though it did “self-disclose” to the NCAA after the violations became known.<sup>26</sup> The COI panel also concluded that the second factor did not apply.<sup>27</sup> The second factor only applies when the compliance system in place at the time of the violations led to detection of the violations.<sup>28</sup> Again, the university did not detect the violations through its compliance system; the violations continued for a year and may never have been discovered had the tutor not come forward to report her wrongdoing.<sup>29</sup>

In an interesting twist, the University of Missouri initially tried to resolve its infractions case through the NCAA’s “summary disposition” process.<sup>30</sup> This process, which has been available for many years, can be used when the offending school and the NCAA enforcement staff agree on the facts.<sup>31</sup> They can then present their case to the infractions

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those that historically have best addressed the gravity of the violations involved in infractions cases.” *Id.*

21. NCAA MANUAL, *supra* note 13, § 19, fig.19-1. There are no partial-year bans; the penalty would be either no ban at all or a one-year ban.

22. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 13.

23. *Id.*

24. *Id.* at 12.

25. *Id.*; NCAA MANUAL, *supra* note 13, §§ 19.9.4(a), 19.9.4(e).

26. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 12.

27. *Id.* at 12-13.

28. *Id.*

29. *Id.*

30. *Id.* at 2.

31. NCAA MANUAL, *supra* note 13, § 19.6.

committee for disposition without a hearing.<sup>32</sup> The committee may reject this “summary” disposition on a variety of grounds, and even if it accepts the case for disposition without a hearing, it still decides the penalties, which are appealable if the university disagrees with them.<sup>33</sup>

In the Missouri case, the COI panel rejected the proposed summary disposition in part because the tutor was not included as a party to the proceedings.<sup>34</sup> The NCAA enforcement staff did not include the tutor because she threatened to breach the confidentiality of the proceedings.<sup>35</sup> The COI panel responded that “[t]hreats . . . should not serve as a shield from accountability,”<sup>36</sup> and determined that she was an indispensable party to the proceedings in light of her central role in the academic misconduct.<sup>37</sup>

Perhaps even more interesting in the summary disposition process was the University of Missouri’s concession that the case was either a “low-end (tending toward mitigated) standard” case or an “upper-end mitigated” case despite insisting later that it was only a Level I-Mitigated case.<sup>38</sup> In its ultimate decision, following its rejection of the summary disposition and its conduct of a formal hearing, the COI panel “agree[d] with Missouri’s original analysis.”<sup>39</sup> In other words, the panel held the University to its word that it was either a “low-end Level I-Standard” case or an “upper-end Level I-Mitigated” case.<sup>40</sup> Why does it matter? Because classification as either a “low-end standard” or an “upper-end mitigated” case puts one squarely within that part of the penalty matrix that includes as a “core” penalty a one-year postseason ban.<sup>41</sup>

If all of this sounds formulaic, that’s because it is. The classification of cases, enumeration of specific aggravating and mitigating factors, and a prescribed penalty matrix represent a significant departure from a more flexible approach the COI employed prior to 2013.<sup>42</sup> While the committee still considered aggravating and mitigating circumstances

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32. *What is a Summary Disposition?*, NCAA, <http://www.ncaa.org/enforcement/what-summary-disposition> (last visited Aug. 29, 2020); NCAA MANUAL, *supra* note 13, § 19.6.

33. NCAA MANUAL, *supra* note 13, § 19.6.4.

34. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 2.

35. *Id.* at 10.

36. *Id.*

37. *Id.* at 2, 10.

38. *Id.* at 13.

39. *Id.*

40. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 13.

41. See NCAA MANUAL, *supra* note 13, § 19, fig.19-1.

42. Compare NAT’L COLLEGIATE ATHLETIC ASS’N, 2012-2013 DIVISION I MANUAL ART. 19 [hereinafter 2012-13 NCAA MANUAL] (including none of these provisions), with NCAA MANUAL, *supra* note 13, § 19.

prior to 2013, it was not tethered to the bylaws as the committee is now.<sup>43</sup> Indeed, in defending its decisions on appeal, the pre-2013 COI regularly argued that its penalty determinations could not be formulaic due to the unique nature of each case.<sup>44</sup>

In the end, the COI in the Missouri case leveled serious sanctions on the University, including significant scholarship reductions in three sports—football, baseball, and softball (the student-athletes involved in the academic misconduct were spread among those three sports)—and the penalty that really mattered the most to the university, a one-year postseason ban in all three sports.<sup>45</sup> That is, in none of the three sports could student-athletes compete in postseason competitions, such as bowl games in football or the College World Series in baseball or softball.

Missouri officials predictably reacted with outrage. After pronouncing himself “shocked and dismayed” by the decision,<sup>46</sup> the university’s athletics director, Jim Sterk, launched a “Make It Right” campaign, which included billboards and a website encouraging alumni and friends to voice their own outrage, even urging Missouri fans to “call and e-mail state and federal legislators as they help us take a stand against these penalties.”<sup>47</sup> University of Missouri officials appealed the

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43. NCAA DIVISION I INFRACTIONS APPEALS COMMITTEE, UNIVERSITY OF MISSISSIPPI PUBLIC INFRACTIONS APPEALS REPORT 19 (1995), <https://web3.ncaa.org/lstdbi/search/mi-CaseView/report?id=102462> [hereinafter NCAA MISSISSIPPI APPEALS REPORT].

44. I prepared twenty-eight appellate responses on behalf of the COI during my tenure on the committee from 2000-2010, and this was a standard argument I made in those responses. In part that position was based on guidance provided by the Infractions Appeals Committee, a five-member body that reviews decisions of the COI. *See id.* at 15 (“Because each case presents its own facts and circumstances, this comparison [to other cases] cannot be made by mechanically applying a formula.”).

45. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 14-18. One of the reasons the postseason ban received so much attention is because of the financial hit on the university that resulted from the sanction. Pursuant to an SEC rule, the postseason ban precluded Mizzou from sharing in the conference’s bowl revenue, a loss in the millions of dollars. *See* Dennis Dodd & Ben Kercheval, *Missouri incensed as bowl ban upheld, lawyer insists cooperating with NCAA not worthwhile*, CBS SPORTS (Nov. 27, 2019, 12:31 PM), <https://www.cbssports.com/college-football/news/missouri-incensed-as-bowl-ban-upheld-lawyer-insists-cooperating-with-ncaa-not-worthwhile/> (estimating a loss of \$8-10 million); Liam Quinn, *Costly decision: Missouri’s bottom line takes hit from NCAA sanctions*, MISSOURIAN (Nov. 26, 2019), [https://www.columbiaindependant.com/sports/mizzou\\_football/costly-decision-missouri-s-bottom-line-takes-hit-from-ncaa/article\\_ffaa1c44-100d-11ea-a6ea-1fd1d45dcf6d.html](https://www.columbiaindependant.com/sports/mizzou_football/costly-decision-missouri-s-bottom-line-takes-hit-from-ncaa/article_ffaa1c44-100d-11ea-a6ea-1fd1d45dcf6d.html).

46. Dave Matter, *Mizzou ‘shocked and dismayed’ by NCAA punishment, will appeal severe sanctions*, ST. LOUIS POST-DISPATCH (Feb. 1, 2019), [https://www.stltoday.com/sports/college/mizzou/mizzou-shocked-and-dismayed-by-ncaa-punishment-will-appeal-severe-sanctions/article\\_b8b12f21-6675-5d6a-89cf-3a05848ba6bd.html](https://www.stltoday.com/sports/college/mizzou/mizzou-shocked-and-dismayed-by-ncaa-punishment-will-appeal-severe-sanctions/article_b8b12f21-6675-5d6a-89cf-3a05848ba6bd.html).

47. MAKE IT RIGHT, <https://mutigers.com/feature/MakeItRight> (last visited Aug. 22, 2020); Eli Lederman, *From the ashes of ‘Make It Right,’ a larger conversation rises*, MISSOURIAN (Dec. 2, 2019), <https://www.columbiaindependant.com/sports/from-the-ashes->



COI decision,<sup>48</sup> and throughout a frustratingly long appeal process<sup>49</sup> continued to voice their optimism that at least some of the sanctions, including the postseason bans, would be overturned by the Infractions Appeals Committee.<sup>50</sup>

However, the infractions committee's penalties are not shocking to anyone with a familiarity of the NCAA process. Again, this is a formulaic process and classification of an infractions case is critical in determining penalties because classification will place the case in the appropriate position in the penalty matrix. In the Missouri case, everyone, including University of Missouri representatives, agreed that the case was at the most serious level—Level I—because academic misconduct was involved.<sup>51</sup> At the initial summary judgment stage, Missouri characterized the case as either “low-end Level I-Standard” or “upper-end Level I-Mitigated.”<sup>52</sup> Even though Missouri later backed away from Level I-Standard classification, the COI retains latitude in its own classification.<sup>53</sup> As the appeals committee later noted, “the panel does have the discretion and authority to disagree with the parties’ position on level and classification and thus can make its own determination of such.”<sup>54</sup> The COI panel exercised that discretion and authority, and stuck with its own view that the case was a Level I-Standard.<sup>55</sup>

What is lost in most commentary on the Missouri case is that the COI panel met the university at least halfway on the classification issue. After noting a “significant overlap” in penalty ranges in the matrix for low-end standard and upper-end mitigated cases, “the panel intentionally

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of-make-it-right-a-larger-conversation-rises/article\_8e013006-1160-11ea-ba83-b37a63bbde82.html.

48. Dave Matter, *Mizzou files NCAA appeal, argues sanctions could have ‘chilling effect,’* ST. LOUIS POST-DISPATCH (Mar. 26, 2019), [https://www.stltoday.com/sports/college/mizzou/mizzou-files-ncaa-appeal-argues-sanctions-could-have-chilling-effect/article\\_f4d5c242-3e28-5d9e-b4aa-3ab8bfff153df.html](https://www.stltoday.com/sports/college/mizzou/mizzou-files-ncaa-appeal-argues-sanctions-could-have-chilling-effect/article_f4d5c242-3e28-5d9e-b4aa-3ab8bfff153df.html).

49. See Dodd & Kercheval, *supra* note 45 (noting Mizzou’s increasing frustration as the appeal took more than twice the time for ultimate resolution as typical appeals).

50. Eric Blum, *Mizzou AD remains confident about NCAA appeal*, COLUMBIA DAILY TRIB. (June 22, 2019, 12:01 AM), <https://www.columbiatribune.com/sports/20190622/mizzou-ad-remains-confident-about-ncaa-appeal>. Experts interviewed by the campus newspaper, however, were not so optimistic about success on appeal. Bennett Durando, *Experts: ‘Tough road ahead’ if MU wants to overturn NCAA sanctions in appeal*, MISSOURIAN (Feb. 2, 2019), [https://www.columbiamissourian.com/sports/mizzou\\_football/experts-tough-road-ahead-if-mu-wants-to-overturn-ncaa/article\\_99fbc1c2-2751-11e9-b230-6fb430e98cdc.html](https://www.columbiamissourian.com/sports/mizzou_football/experts-tough-road-ahead-if-mu-wants-to-overturn-ncaa/article_99fbc1c2-2751-11e9-b230-6fb430e98cdc.html).

51. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 13.

52. *Id.*

53. See NCAA DIVISION I INFRACTIONS APPEALS COMMITTEE, UNIVERSITY OF MISSOURI, COLUMBIA PUBLIC INFRACTIONS APPEALS DECISION 7 (2019), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102806> [hereinafter NCAA MISSOURI APPEALS DECISION].

54. *Id.*

55. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 13-14.

looked to prescribing the lowest penalties associated with Level I-Standard ranges.”<sup>56</sup> Moreover, it explicitly chose not to ascribe the *tutor*’s aggravating factors to the university, despite the tutor in the Missouri case operating within the scope of her employment when she committed the academic misconduct violations.<sup>57</sup> The COI acknowledged that infractions cases “historically have had symmetry between aggravating and mitigating factors for institutions and involved individuals when involved individuals are operating as institutional employees—particularly when involved individuals are operating within the scope of their employment.”<sup>58</sup> However, despite the fact the tutor’s aggravating factors were more numerous than the university’s, the panel, with an ambiguous remark about “the nature of the record in this case,” chose not to tag the university with her aggravators.<sup>59</sup>

A close reading of the COI decision, then, indicates that the panel took considerable care in fashioning its classification of the Missouri case and, at least in some respects, gave the institution the benefit of the doubt. The one-year postseason ban and other penalties were within the range dictated by the penalty matrix even if the case were classified as Level I-Mitigated as Missouri wanted.<sup>60</sup> The Infractions Appeals Committee (IAC) noted this fact twice in its written decision.<sup>61</sup>

The COI is not strictly bound by the penalty matrix prescribed in the bylaws, but there certainly is a strong presumption that it follows the guidelines: “the hearing panel *shall* prescribe core penalties from the ranges set forth . . . . The panel may depart from the core penalties only as set forth in Bylaw 19.9.6.”<sup>62</sup> Bylaw 19.9.6 allows departure from the matrix only if the COI panel finds “extenuating circumstances” and explains the basis for its departure in its written decision.<sup>63</sup>

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56. *Id.* at 13.

57. *Id.* at 11-12.

58. *Id.* at 11.

59. *Id.* at 11-12. The panel recognized that this was a departure from historical practice and added the following: “Because this case is unique, it should not be cited as precedent in this limited regard.” *Id.* at 12.

60. NCAA MANUAL, *supra* note 13, § 19, fig.19-1.

61. NCAA MISSOURI APPEALS DECISION, *supra* note 53, at 7, 9 n.10.

62. NCAA MANUAL, *supra* note 13, § 19.9.5 (emphasis added).

63. *Id.* § 19.9.6. Extenuating circumstances can run the gamut. *See, e.g.*, NCAA DIVISION I COMMITTEE ON INFRACTIONS, UNIVERSITY OF ALABAMA PUBLIC INFRACTIONS DECISION 10-11 (2017), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102608> (departing downward from penalty matrix because underlying recruiting violation was Level II, not Level I, and because the university’s swift action prompted coach’s resignation); NCAA DIVISION I COMMITTEE ON INFRACTIONS, UNIVERSITY OF NOTRE DAME PUBLIC INFRACTIONS DECISION 16 (2016), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102580> (departing upward from penalty matrix because of significant academic misconduct and a period of probation would provide NCAA “additional time for oversight and monitoring”).

It likewise should have been no surprise that the IAC upheld the Missouri penalties on appeal. When application of the penalty matrix is coupled with the IAC's "abuse of discretion" standard of review,<sup>64</sup> it would be a tall order for an appeals committee—even one as active as the IAC<sup>65</sup>—to conclude that the COI panel *abused its discretion* when applying the penalty guidelines set forth in the bylaws.<sup>66</sup> And the IAC said as much: it would decline "to delineate any penalty within the appropriate matrix options as an abuse of discretion absent a *clearly arbitrary*" panel decision.<sup>67</sup>

Nonetheless, University of Missouri officials reacted to the IAC decision in much the same way as they reacted to the COI decision—with anger and indignation. Athletics director Jim Sterk, after expressing disappointment and shock, said, "Now I am just angry . . . . The NCAA has proven again it cannot effectively serve its membership and the student-athletes it is supposed to protect. The decision today is just wrong."<sup>68</sup> University chancellor Alexander Cartwright added that it is debatable whether the IAC decision "is currently encouraging or discouraging compliance and integrity."<sup>69</sup> Mun Choi, the president of the University of Missouri System, also felt compelled to chime in: "I could not be more upset with this decision. Mizzou supporters across the state and nation have every reason to be outraged, and college sports fans across the country should be concerned about this decision."<sup>70</sup>

Even though both the COI and IAC decisions—and the penalties—are eminently supportable both by the bylaws and by comparison with

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64. NCAA MANUAL, *supra* note 13, § 19.10.1.1 (stating IAC may set aside penalties only on abuse of discretion).

65. See JERRY PARKINSON, *INFRACTIONS: RULE VIOLATIONS, UNETHICAL CONDUCT, AND ENFORCEMENT IN THE NCAA* 149-52 (2019) (describing how often the IAC granted appellants penalty relief during the 2000's, including one several-year period in which appellants received relief in half of appealed cases). A look at the NCAA's major-case database shows that the IAC has continued to be quite active in overturning penalties during the last decade. *Major Infractions Search Results*, NCAA LSDBI, <https://web3.ncaa.org/lstdbi/search?types=major&q=> (last visited Nov. 4, 2020).

66. NCAA MANUAL, *supra* note 13, § 19.10.1.1.

67. NCAA MISSOURI APPEALS DECISION, *supra* note 53, at 9 (emphasis added) (quoting NCAA DIVISION I INFRACTIONS APPEALS COMMITTEE, SOUTHERN METHODIST UNIVERSITY PUBLIC INFRACTIONS APPEALS DECISION 4 (2016), <https://web3.ncaa.org/lstdbi/search/mi-CaseView/report?id=102545>).

68. Nick Kelly, *No relief: NCAA denies Missouri's appeal, upholds all sanctions*, MISSOURIAN (Nov. 26, 2019), [https://www.columbiamissourian.com/sports/mizzou\\_football/no-relief-ncaa-denies-missouri-s-appeal-upholds-all-sanctions/article\\_37e74a00-1072-11ea-b0bf-0b08757dda07.html](https://www.columbiamissourian.com/sports/mizzou_football/no-relief-ncaa-denies-missouri-s-appeal-upholds-all-sanctions/article_37e74a00-1072-11ea-b0bf-0b08757dda07.html).

69. *Id.*

70. Dave Matter, *NCAA denies Mizzou's appeal, upholds postseason ban and other sanctions*, ST. LOUIS POST-DISPATCH (Nov. 26, 2019), [https://www.stltoday.com/sports/college/mizzou/ncaa-denies-mizzous-appeal-upholds-postseason-ban-and-other-sanctions/article\\_10ff0a157-a2e3-5c4f-af2c-655cabc4f9f3.html](https://www.stltoday.com/sports/college/mizzou/ncaa-denies-mizzous-appeal-upholds-postseason-ban-and-other-sanctions/article_10ff0a157-a2e3-5c4f-af2c-655cabc4f9f3.html).

other cases involving academic misconduct,<sup>71</sup> *some* prior case law makes these officials' visceral reaction understandable at some level. In particular, the University of North Carolina (UNC) decision of 2017<sup>72</sup> is the case by which every school with academic misconduct wants to be measured. For Missouri it's reasonable for officials to say, "UNC got nothing and *we* get a postseason ban?!"

### III. ACADEMIC MISCONDUCT AND A COMPARISON TO UNC

The NCAA opened itself to legitimate criticism when the University of North Carolina at Chapel Hill received no penalties at the end of a years-long process involving rampant academic fraud at the school.<sup>73</sup> A university-commissioned investigation into the matter (one of many investigations) found that over 3,000 students received fraudulent academic credit in a scheme that spanned nearly two decades.<sup>74</sup> The scheme involved over a thousand bogus independent studies and scores of make-believe lecture courses.<sup>75</sup> Roughly half of the students who "benefitted" from the scheme were student-athletes, even though student-athletes comprised only about four percent of the UNC undergraduate student body.<sup>76</sup>

It is not an exaggeration to say that the UNC case was the biggest academic fraud case in NCAA history. Yet as the case was being decided, the NCAA was in the process of changing its academic fraud by-laws, for the first time in over thirty years.<sup>77</sup> At the risk of oversimplification, the principal goal of the changes was to shift responsibility for academic misconduct to individual NCAA member *institutions*, which had for years asserted that academic matters were within *their* control,

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71. See, e.g., NCAA MANUAL, *supra* note 13, §§ 10.1, 10.01.1, 16.11.2.1; NCAA DIVISION I INFRACTIONS APPEALS COMMITTEE, FORMER DIRECTOR OF MEN'S BASKETBALL OPERATIONS, CALIFORNIA STATE UNIVERSITY, NORTHRIDGE PUBLIC INFRACTIONS APPEALS DECISION (2018), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102665>.

72. NCAA DIVISION I COMMITTEE ON INFRACTIONS, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL PUBLIC INFRACTIONS DECISION (2017), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102636>.

73. See PARKINSON, *supra* note 65, at 263-64.

74. *Id.* at 244 (citing KENNETH L. WAINSTEIN, A. JOSEPH JAY III & COLLEEN DEPMAN KUKOWSKI, INVESTIGATION OF IRREGULAR CLASSES IN THE DEPARTMENT OF AFRICAN AND AFRO-AMERICAN STUDIES AT THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, CADWALADER, WICKERSHAM & TAFT LLP (Oct. 16, 2014)). The Wainstein report is available at *Our Commitment: Taking Action and Moving Forward Together*, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, <https://carolinacommittment.unc.edu/reports-resources/> (last visited Nov. 3, 2020).

75. PARKINSON, *supra* note 65, at 244.

76. *Id.* at 244, 265.

77. *Id.* at 248, 255-56.

not the NCAA's.<sup>78</sup> It was now up to the individual school to determine whether academic misconduct had occurred, according to institutional academic policies.<sup>79</sup> And if a school determined that its own academic policies were not violated, there was little the NCAA could do about it.<sup>80</sup>

In the UNC case, institutional representatives stood by the sham courses that resulted in fraudulent academic credit, asserting that the university's academic policies *at the time* did not prohibit what occurred.<sup>81</sup> In contrast, the University of Missouri, upon learning of its tutor's misconduct, promptly determined that it violated school policies on academic integrity.<sup>82</sup> So for Missouri, which arguably acted more honestly and honorably than UNC, this meant it was slapped with serious sanctions, including postseason bans, while UNC went merrily on its way.

Common sense suggests that the violations in the Missouri case, as serious as they are, pale in comparison to the violations at UNC. When viewed in that context, then, Missouri officials have every right to feel aggrieved. But they also know the ground rules (the NCAA bylaws), and if they are offended by the seemingly inconsistent results, their beef should be with the NCAA legislation, which the NCAA *membership* (including the University of Missouri) approved, not with the COI or IAC, which decided the case reasonably pursuant to applicable bylaws.

#### IV. MISSISSIPPI STATE AND NEGOTIATED RESOLUTION

Missouri got a double whammy when the COI decided another major infractions case while the Missouri case was on appeal. In August 2019, a COI panel reviewed an academic misconduct case at Mississippi State University with facts remarkably similar to those in the Missouri case—an athletics academic tutor did work in an online chemistry course for eleven student-athletes.<sup>83</sup> The tutor completed homework assignments and exams (in some cases, nearly the entire course) for student-athletes who did not do their own work.<sup>84</sup>

At first glance, the two cases—both involving roughly the same level of academic misconduct—would seem headed toward similar

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78. *Id.* at 255-56.

79. *Id.* at 256-57.

80. *See id.* at 262-63.

81. PARKINSON, *supra* note 65, at 262.

82. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 10.

83. NCAA DIVISION I COMMITTEE ON INFRACTIONS, MISSISSIPPI STATE UNIVERSITY NEGOTIATED RESOLUTION (2019), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102786> [hereinafter NCAA MISSISSIPPI STATE NEGOTIATED RESOLUTION]. In the Mississippi State case, the tutor completed assignments “in exchange for cash payments” from the student-athletes. *Id.* at 2.

84. *Id.* at 3-4.

penalties. Yet Mississippi State received significantly lighter penalties, including fewer scholarship and recruiting restrictions.<sup>85</sup> Most importantly, at least from Missouri's perspective, Mississippi State received no postseason ban.<sup>86</sup> It did not take long for Missouri officials to seize upon the decision and cry foul.<sup>87</sup>

However, three factors distinguish the two cases. First, the COI credited Mississippi State with two additional mitigating factors.<sup>88</sup> Indeed, the two factors that Missouri argued the COI should apply to its case, but which the COI panel rejected, were applied to Mississippi State: (1) prompt self-detection and self-disclosure, and (2) a compliance system designed to ensure rules compliance.<sup>89</sup> Recall that in the Missouri case the tutor came forward to report her own misconduct; the university did not "self-detect" the violation.<sup>90</sup> In contrast, in the Mississippi State case, an academic advisor overheard an incriminating conversation and reported it to a superior, who then reported the matter to compliance officials.<sup>91</sup> Thus, the misconduct was detected through the school's compliance system and promptly reported.<sup>92</sup>

However, it seems unlikely that these mitigators made the difference. Based on my experience with the COI, I can say with some confidence that the cases, in light of the nature and extent of the academic fraud, would have been decided similarly, at least prior to 2010 and absent any of the distinguishing factors mentioned above. But in the Mississippi State case, a far more important factor was in play: the Mississippi State infractions case was decided pursuant to a new "negotiated resolution" process in which the university and the NCAA enforcement

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85. Compare *id.* at 7 (proposing penalties in the form of a reduction of two scholarships and restricting official football recruiting visits to four), with NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 15 (proposing the following penalties: reduction of four scholarships—five percent of eighty-five allowable, NCAA MANUAL, *supra* note 13, § 15.5.6.1 (limit of eighty-five scholarships)—and seven official recruiting visits in football).

86. See Dave Matter, *Sterk: NCAA ruling on Mississippi State shows Mizzou penalties were 'excessive, inconsistent,'* ST. LOUIS POST-DISPATCH (Aug. 25, 2019), [https://www.stltoday.com/sports/college/mizzou/sterk-ncaa-ruling-on-mississippi-state-shows-mizzou-penalties-were/article\\_3897875d-dd10-5bff-984d-30c829446707.html](https://www.stltoday.com/sports/college/mizzou/sterk-ncaa-ruling-on-mississippi-state-shows-mizzou-penalties-were/article_3897875d-dd10-5bff-984d-30c829446707.html) (no postseason ban on Mississippi State).

87. See *id.*

88. NCAA MISSISSIPPI STATE NEGOTIATED RESOLUTION, *supra* note 83.

89. *Id.* at 6.

90. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 2.

91. NCAA MISSISSIPPI STATE NEGOTIATED RESOLUTION, *supra* note 83, at 1. As of mid-September 2020, the public report included in the NCAA major case database contains an error, stating that "the tutor" reported the conversation. The report should read "the academic advisor." An author of the report verified that the original negotiated resolution signed by the parties included the correct designation. Telephone Interview with Larry Parkinson, Member, Comm. on Infractions (Sept. 14, 2020).

92. NCAA MISSISSIPPI STATE NEGOTIATED RESOLUTION, *supra* note 83, at 1.

staff (the tutor did not cooperate) agreed on the facts, level of violations, aggravating and mitigating factors, *and penalties*.<sup>93</sup>

The negotiated resolution process was added to the NCAA bylaws in 2018.<sup>94</sup> Mississippi State was one of the NCAA's early tests of the new process,<sup>95</sup> and perhaps it was unfortunate that the case appeared to be so similar to Missouri's. The legislation permits streamlining of the infractions process when the parties are in such agreement that a formal hearing—or even a summary disposition—seems unnecessary.<sup>96</sup> But there is one *substantial* new element injected into the negotiated resolution that was not present before—the NCAA enforcement staff's role in the determination of penalties.<sup>97</sup> Indeed, that is the major difference between the negotiated resolution and the summary disposition. In the latter process, the parties agree to the facts and the overall level of the case, then present the case to the COI for review.<sup>98</sup> The COI can accept or reject the summary disposition, but in any event, the COI determines penalties.<sup>99</sup> In the new negotiated resolution process, the parties must agree on the violations, level of those violations, *and penalties* before the case is presented to the COI.<sup>100</sup>

In years past, determination of penalties was within the exclusive jurisdiction of the Committee on Infractions (subject to review by the IAC). The enforcement staff steered clear of penalties, expressing no view on the penalties to be imposed. At appeal hearings, which nearly always focus on penalties and rarely on fact findings, enforcement staff representatives act essentially as observers, without an active role in the proceedings.<sup>101</sup>

I fear that giving the enforcement staff this new penalty responsibility in negotiated resolutions is a recipe for inconsistency in penalties. At first glance, this may seem not to be the case since the COI still

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93. *Id.* at 3-11.

94. NCAA MANUAL, *supra* note 13, § 19.5.12.

95. The Mississippi State case was resolved on August 23, 2019. NCAA MISSISSIPPI STATE NEGOTIATED RESOLUTION, *supra* note 83, at 1.

96. *See* NCAA MANUAL, *supra* note 13, § 19.5.12.

97. *Id.*

98. *See id.* § 19.6. An institution or individual charged with a violation, but not the enforcement staff, can propose penalties to the COI. *See id.* § 19.6.3.

99. *Id.* § 19.6.4.

100. *Id.* § 19.5.12.1; 2018 Enforcement Year in Review, NCAA, [www.ncaa.org/about/who-we-are/membership/2018-enforcement-year-review](http://www.ncaa.org/about/who-we-are/membership/2018-enforcement-year-review) (last visited Aug. 28, 2020) (explaining distinction between negotiated resolution and summary disposition).

101. *See generally* NCAA MANUAL, *supra* note 13, § 19.10.5(d) (“Representatives from the enforcement staff may participate during the appeal oral argument but such participation shall be limited to the opportunity to provide information regarding perceived new information, errors, misstatements and omissions.”).

reviews each agreement. In fact, in its explanation of the negotiated resolution process, the NCAA website says, “[t]he Division I Committee on Infractions reviews the case to determine whether the resolution is in the best interest of the NCAA and *whether the agreed-upon penalties are appropriate.*”<sup>102</sup> But this glosses over what the new bylaws really state. In defining the COI’s scope of review, the relevant bylaw states that a COI panel reviewing a case “shall only reject a negotiated resolution if it is not in the best interests of the Association or the agreed-upon penalties are *manifestly unreasonable* pursuant to Bylaw 19.9 and Figure 19-1.”<sup>103</sup> Bylaw 19.9 delineates aggravating and mitigating factors, and Figure 19-1 is the penalty matrix.<sup>104</sup>

We know how this process played out in the Mississippi State case. Despite being confronted with an academic misconduct case eerily similar to that of Missouri’s (whose postseason ban was currently on appeal), the COI panel was constrained by the resolution negotiated and agreed upon by the enforcement staff and Mississippi State University. Those parties had agreed that the case against the University was Level I-*Mitigated*, and the agreed-upon penalties, which did *not* include a postseason ban, were within the range of “core penalties for Level I-Mitigated” cases.<sup>105</sup> The penalty matrix for such cases prescribes either no postseason ban or a ban of one year.<sup>106</sup> Thus, the agreed-upon penalties could hardly be “manifestly unreasonable.”<sup>107</sup> So even if the COI believed that the Missouri and Mississippi State cases were identical, it was constrained seriously by the contours of the negotiated resolution process.

In announcing negotiated resolution as a new means of resolving major infractions cases, the NCAA media office said the process “uses fewer resources and expedites review by the Division I Committee on Infractions.”<sup>108</sup> These are admirable goals, to be sure, but if the use of alternative means of resolution results in inconsistent penalties for similar cases, the practice deserves reexamination. The new bylaws do state that negotiated resolutions approved by the COI “have no precedential value,”<sup>109</sup> but I’m sure that provision is of little consolation to Missouri.

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102. *2018 Enforcement Year in Review*, *supra* note 100 (emphasis added).

103. NCAA MANUAL, *supra* note 13, § 19.5.12.2 (emphasis added).

104. *See id.* § 19.9, fig.19-1.

105. NCAA MISSISSIPPI STATE NEGOTIATED RESOLUTION, *supra* note 83, at 3, 7-8, 12.

106. NCAA MANUAL, *supra* note 13, § 19.9, fig.19-1.

107. *See id.* § 19.5.12.2.

108. *2018 Enforcement Year in Review*, *supra* note 100.

109. NCAA MANUAL, *supra* note 13, § 19.5.12.4.



## V. HISTORY OF VIOLATIONS AND REPEAT VIOLATORS

To be clear, I am *not* contending that the Missouri and Mississippi State cases were identical. While I do not believe the addition of two modest mitigating factors in favor of Mississippi State should have tipped the balance, there is a *third* distinguishing factor between the two cases that may have caused the disparate outcomes. In addition to the mitigating factors and the different resolution processes, one common aggravating factor stands out in my mind. Both institutions have “a history of Level I, Level II or major violations.”<sup>110</sup> That sounds relatively innocuous, but a deeper examination may be in order.

In the “old days,” a postseason ban for Missouri would have been a slam dunk. Not only did the case involve relatively extensive academic misconduct, but Missouri was a *repeat violator*. Even a cursory look at the NCAA’s major-case database reveals the effect of repeat-violator status in the past.<sup>111</sup> In its day, repeat-violator status carried enormous weight, and every major infractions report ended with an admonition relating to the repeat-violator window.<sup>112</sup>

A repeat violator was an institution that had a major violation (now classified as a Level I or Level II violation) within five years of a finding of a major violation in a previous case.<sup>113</sup> Any school that came before the COI as a repeat violator knew that its penalties likely would be enhanced simply because of this status. The basic idea was that violators who did not learn from recent past mistakes should receive an extra dose of specific deterrence.

However, several years ago, “reforms” by NCAA leadership led to the deletion of a specific repeat-violator bylaw; repeat-violator status is

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110. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 11; NCAA MISSISSIPPI STATE NEGOTIATED RESOLUTION, *supra* note 83, at 5.

111. *See, e.g.*, NCAA CAL-BERKELEY INFRACTIONS REPORT, *supra* note 16, at 16-17 (explaining that repeat-violator status played significant role in penalties); NCAA DIVISION I COMMITTEE ON INFRACTIONS, UNIVERSITY OF ALABAMA, TUSCALOOSA PUBLIC INFRACTIONS REPORT 29 (2002), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102231> (explaining that repeat-violator status played significant role in penalties).

112. *See, e.g., infra* text accompanying notes 120-21.

113. 2012-13 NCAA MANUAL, *supra* note 42. Because dated manuals are not easily accessible, one might more readily refer to COI cases decided when a repeat-violator bylaw still existed. *E.g.*, NCAA DIVISION I COMMITTEE ON INFRACTIONS, UNIVERSITY OF NEVADA, LAS VEGAS PUBLIC INFRACTIONS REPORT 2 (2000), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102192> (“Due to the fact that the violations found in this case occurred within five years of the starting date of penalties associated with the 1993 case, the institution is considered a repeat violator and potentially subject to the penalties specified in Bylaw 19.6.2.3.2.”). Bylaw 19.6.2.3.2 included as a penalty “[t]he prohibition of some or all outside competition in the sport involved in the latest major violation for one or two sports seasons”—essentially the NCAA’s “death penalty.” *Id.* at 31; *see also* 2012-13 NCAA MANUAL, *supra* note 42, § 19.5.2.1.2(a).

now subsumed within the “history of violations” aggravator (which is itself easy to get lost in a list of thirty-one enumerated aggravating and mitigating factors).<sup>114</sup> I fear that these legislative changes have led to the death of the repeat violator, but that is a topic for another article. Perhaps there is still life left in the repeat violator, which may help to distinguish the Missouri and Mississippi State cases. Without mentioning the five-year window explicitly, the COI panel in the Missouri case did include this one sentence in its decision: “the panel makes specific note that Missouri now has had two Level I cases in less than three years.”<sup>115</sup> Missouri had a major case in men’s basketball in 2016—a case that also resulted in a one-year postseason ban, in addition to other substantial penalties.<sup>116</sup> Indeed, in 2016 Missouri *self-imposed* a postseason ban, even though the COI ultimately determined that the principal violations resulted in a Level I-*Mitigated* case!<sup>117</sup>

If one considers the schools’ overall “history of infractions,” though, neither Missouri nor Mississippi State has much to brag about. Missouri has had six major cases.<sup>118</sup> Mississippi State has had seven<sup>119</sup> and Mississippi State *barely* escaped repeat-violator status itself. Prior to its 2019 case, Mississippi State’s last major case occurred in 2013,<sup>120</sup> and the infractions report at that time included the usual repeat-violator admonition: “Mississippi State shall be subject to the provisions of NCAA Bylaw 19.5.2.3, concerning repeat violators, for a five-year period beginning on the effective date of the penalties in this case, June 7, 2013.”<sup>121</sup> The academic misconduct in the school’s most recent case began during the fall semester of 2018,<sup>122</sup> just outside the five-year window. So perhaps the two schools were essentially on the same level with

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114. See NCAA MANUAL, *supra* note 13, § 19.9. I use quotation marks around the word “reforms” because I believe that many of the enforcement process changes NCAA President Emmert has spearheaded in the last decade have been ill-advised, even if well-intended. In addition to some of the changes addressed in this article, such as the creation of a new “independent” resolution track for “complex” infractions cases, *see infra* text accompanying notes 123-45, I have addressed in my book other changes that I view with skepticism. *See, e.g.*, PARKINSON, *supra* note 65, at 106-10 (case levels and penalty structure), 221-25 (expansion of COI), 248-64 (academic misconduct legislation).

115. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 13.

116. NCAA DIVISION I COMMITTEE ON INFRACTIONS, UNIVERSITY OF MISSOURI, COLUMBIA PUBLIC INFRACTIONS DECISION (2016), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102548>.

117. *Id.* at 11-12.

118. See NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 1 n.2.

119. See NCAA DIVISION I COMMITTEE ON INFRACTIONS, MISSISSIPPI STATE UNIVERSITY PUBLIC INFRACTIONS REPORT 1 n.1 (2013), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102413>.

120. *Id.* at 1.

121. *Id.* at 16-17.

122. NCAA MISSISSIPPI STATE NEGOTIATED RESOLUTION, *supra* note 83, at 1 n.2.

respect to their history of infractions, and the only true distinguishing factor was the method of resolution—a negotiated resolution for Mississippi State and a regular COI hearing process for Missouri.

#### VI. INDEPENDENT ACCOUNTABILITY RESOLUTION PROCESS

If one reads Mississippi State’s negotiated resolution carefully, another interesting provision presents itself: “Additionally, the parties acknowledge that this negotiated resolution will not be binding if the case is referred to the independent accountability resolution process (By-law 19.11).”<sup>123</sup> The “Independent Accountability Resolution Process” (IARP) took effect on August 1, 2019.<sup>124</sup> It is an entirely new enforcement scheme that utilizes “independent investigators, advocates, and decision-makers” in the processing of a major infractions case.<sup>125</sup> In other words, the key players in this new process are “independent” of the usual participants. The NCAA enforcement staff’s typical roles in investigating an infractions case and presenting evidence before the COI are largely supplanted by “external investigators and advocates with no school or conference affiliations.”<sup>126</sup> Similarly, the COI is left out of the process. A new “Independent Resolution Panel” of five members, drawn from a larger group of fifteen members “with legal, higher education and/or sports backgrounds,” will hear the case, determine whether rule violations have occurred, and impose penalties.<sup>127</sup>

The IARP is another of the NCAA leadership’s “reforms” that may result in more headaches than improvements. The process was created, relatively hastily, following recommendations by the Commission on College Basketball.<sup>128</sup> NCAA President Mark Emmert appointed the commission in 2017 in response to a series of federal criminal indictments alleging, in part, illegal cash payments to high school basketball prospects and their families to steer the prospects to particular NCAA institutions.<sup>129</sup> After about a six-month review of the matter, the

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123. *Id.* at 11.

124. *New independent infractions process launches*, NCAA (Aug. 1, 2019, 1:41 PM), <http://www.ncaa.org/about/resources/media-center/news/new-independent-infractions-process-launches>.

125. *Id.*

126. *Independent Accountability Resolution Process*, IARPC (2020), <https://iarpc.org/>. The “complex case unit” assigned to investigation and advocacy under the IARP process will include “one member of the enforcement staff,” so the enforcement staff will continue to have at least a modest role. *Id.*

127. *Id.*

128. *Id.*

129. Marc Tracy, *N.C.A.A. Coaches, Adidas Executive Face Charges; Pitino’s Program Implicated*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/sports/ncaa-adidas-bribery.html>; NCAA Media Center, *Statement From President Mark Emmert on the*

commission, chaired by former U.S. Secretary of State Condoleezza Rice, recommended an “independent” process for “complex” infractions cases.<sup>130</sup> As a result, the IARP was created and designed “to minimize perceived conflicts of interest and to add different perspectives to the review of infractions matters.”<sup>131</sup>

The addition of yet another means of resolving major infractions cases invites inconsistency in penalties. Few of the individuals appointed to any of the IARP groups—including the “complex case unit” of investigators and advocates, and the fifteen-member group from which Independent Resolution Panels will be drawn—have experience in infractions matters.<sup>132</sup> Some NCAA-watchers wondered if the process ever would be used because institutions seemingly would be unwilling to risk being guinea pigs for an untested enforcement regime.<sup>133</sup> Use of the new process may be particularly unappealing when one of the significant components of the IARP is to deny an institutional participant the right to an appeal if it disagrees with findings or penalties: “Decisions issued by the Independent Resolution Panel are final and not subject to appeal or further review.”<sup>134</sup>

However, in March 2020, the NCAA announced that an infractions case involving the University of Memphis will be resolved through the IARP.<sup>135</sup> This will be the first test of the process, and it promises to be interesting, though we apparently will know few details until the case is finally resolved. In making its announcement, the NCAA said:

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*Formation of a Commission on College Basketball*, NCAA (Oct. 11, 2017, 1:55 PM), <http://www.ncaa.org/about/resources/media-center/news/statement-president-mark-emmert-formation-commission-college-basketball>.

130. COMMISSION ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL 9-10 (2018), [https://www.ncaa.org/sites/default/files/2018CCBReportFinal\\_web\\_20180501.pdf](https://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf); *Independent Accountability Resolution Process*, *supra* note 126.

131. *New independent infractions process launches*, *supra* note 124.

132. *Independent Accountability Resolution Process*, *supra* note 126 (“View the Committee Roster”); *Infractions Referral Committee*, IARPC (2020), <https://iarpc.org> (“View the Committee Roster”); *Complex Case Unit*, IARPC (2020), <https://iarpc.org>; *Independent Resolution Panel*, IARPC (2020), <https://iarpc.org> (“View the Panel Roster”).

133. See, e.g., Pat Forde, *NCAA, Memphis Enter Uncharted Territory as Tigers’ James Wiseman Decision Comes Home to Roost*, SPORTS ILLUSTRATED (Mar. 4, 2020), <https://www.si.com/college/2020/03/04/memphis-james-wiseman-investigation-ncaa> (“The general belief within the NCAA membership is that schools would be reluctant to request this resolution because of the unknown—nobody has ever been down this road before.”).

134. *Independent Accountability Resolution Process*, *supra* note 126; see also NCAA MANUAL, *supra* note 13, § 19.11.6.2 (“Any decision by a hearing panel shall be final, binding and conclusive, and shall not be subject to further review by any governance body.”).

135. *Memphis’ infractions case will be resolved through the Independent Accountability Resolution Process*, NCAA (Mar. 4, 2020, 12:15 PM), <http://www.ncaa.org/about/resources/media-center/news/memphis-infractions-case-will-be-resolved-through-independent-accountability-resolution-process>.

“Consistent with rules and procedures governing the process, details about the matter will remain confidential until the Independent Resolution Panel releases its decision.”<sup>136</sup>

The veil of secrecy is puzzling. If the NCAA wishes to have IARP buy-in, one might think a policy of transparency would serve its purposes more readily. We don’t know, for example, if the University of Memphis requested IARP resolution, and if so, why. The process can be initiated by a request from the school, the NCAA’s Vice President of Enforcement, or the chair of the Division I COI.<sup>137</sup> If the University of Memphis didn’t make the request, why would it be made by the enforcement VP, whose investigative and advocacy roles are supplanted by “independent” investigators and advocates? Similarly, what incentive would the COI have to request the IARP when the process takes it completely out of the picture?

Moreover, we don’t know why the Infractions Referral Committee, a newly constituted body that votes to approve or reject requests for referral of cases to the IARP,<sup>138</sup> decided that the University of Memphis case was suitable for resolution by this new process. Indeed, we don’t even know the nature of the Memphis case, although numerous commentators have speculated on it.<sup>139</sup> The process is designed to resolve “complex” cases,<sup>140</sup> but what is it about Memphis that makes the case complex? In my ten-year experience on the COI, I’m not sure I ever saw a complex case. Some cases involved egregious or extensive violations, but little is complex, for example, about institutional representatives making cash payments to recruits. Yet in its announcement of the IARP,

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136. *Id.*

137. NCAA MANUAL, *supra* note 13, § 19.11.3.2.1.

138. *Id.* §§ 19.11.2.2.5, 19.11.3.

139. *See, e.g.,* Forde, *supra* note 133; Dana O’Neil, *What it means that Memphis’ NCAA case is headed to the IARP*, ATHLETIC (Mar. 4, 2020), <https://theathletic.com/1653997/2020/03/04/what-it-means-that-memphis-ncaa-case-is-headed-to-the-iarp/>. Both Forde and O’Neil assume the case revolves around the University of Memphis’ decision to allow student-athlete James Wiseman to compete in three men’s basketball games during the fall of 2019, despite a pending NCAA investigation into whether Wiseman and his family had received improper recruiting inducements from Memphis head coach Penny Hardaway. Both Forde and O’Neil are superb sportswriters, but their columns also show how confusing the new IARP process can be. Both writers, in attempting to explain how the process will work, assert that independent advocates from the complex case unit will present the case to the Independent Resolution Panel on behalf of the University of Memphis. (“[A]n independent defense team . . . will advocate for the school in place of outside counsel hired by the university.” Forde, *supra* note 133. The independent “advocate” of the complex case unit “acts . . . as the defense.” O’Neil, *supra* note 139.) Surely the process does not allow the NCAA to deny an institution its right to have counsel of its own choosing, particularly if the school did not request referral of its case to the IARP.

140. *See supra* text accompanying note 130; *New independent infractions process launches*, *supra* note 124.

the NCAA media center suggested that even “the possibility of major penalties” could render a case complex.<sup>141</sup> When will that not be the case? Every Level I and Level II case carries with it the possibility of major penalties.<sup>142</sup>

Regardless of how the Memphis case, or any other IARP-resolved case, turns out, inconsistency in penalties remains a potential problem.<sup>143</sup> Anytime the determination of penalties is left to alternative decisionmakers—including the enforcement staff now determining penalties in a negotiated resolution—consistency is jeopardized.

In its written decision in the Missouri case, the Infractions Appeals Committee made special note of the potential for inconsistency and confusion “given the varying processes and approaches for resolving infractions issues.”<sup>144</sup> As the IAC noted, there are now four different methods of resolving major infractions cases—negotiated resolution, summary disposition, COI hearings, and the IARP process.<sup>145</sup> Each of these methods employs a different approach to fact-finding and penalty determination.

## VII. PRECEDENTIAL VALUE OF PRIOR DECISIONS

The NCAA membership seemingly has recognized the potential for inconsistency, and it has adopted an odd approach to addressing the problem—vary the precedential value of the decisions rendered based on the process.<sup>146</sup> As noted previously in the discussion of the Mississippi State case, negotiated resolutions (in which penalties are determined by the parties to the case, subject to approval by the COI) have no

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141. *New independent infractions process launches*, *supra* note 124. The bylaws are similarly expansive in outlining a partial list of factors for the Infractions Referral Committee to take into account in making its referral decision. Those factors include “[a]ctual or perceived misconduct by the involved parties” and “[i]ncreased stakes, including potential penalties, or other pressures driving institutional decision-making.” NCAA MANUAL, *supra* note 13, § 19.11.3.1.1. Commentators have seized on another factor— “[l]ack of acceptance of the core principles of self-governance, such as adversarial posturing or refusal to cooperate,” *id.*—as a possible explanation for the referral decision in the Memphis case. *See Forde*, *supra* note 133; O’Neil, *supra* note 139. If the University of Memphis truly was thumbing its nose at the NCAA by seeking an injunction to allow Wiseman to play, perhaps the IARP is a retaliatory move by the NCAA. *See Forde*, *supra* note 133; O’Neil, *supra* note 139.

142. NCAA MANUAL, *supra* note 13, § 19.1.

143. The IARP bylaws do require the Independent Resolution Panel to “[c]oordinate with the Committee on Infractions, which will monitor compliance with prescribed penalties,” *id.* § 19.11.2.3.5(f), so that may serve as a check to ensure penalty consistency. But the bylaws also state that “[p]enalties prescribed by the Committee on Infractions . . . in prior infractions cases shall have no precedential value,” *id.* § 19.11.5.8.4.1, which suggests the Independent Resolution Panel has ample latitude to depart from COI precedent.

144. NCAA MISSOURI APPEALS DECISION, *supra* note 53, at 8.

145. *Id.* at n.9.

146. *See, e.g.*, NCAA MANUAL, *supra* note 13, § 19.11.5.8.4.1.

precedential value.<sup>147</sup> Similarly, the legislation governing the IARP process (in which penalties are determined by an “Independent Resolution Panel”) specifically states that IARP decisions have no precedential value.<sup>148</sup> Indeed, the IARP scheme even invites Independent Resolution Panels to ignore prior COI case law: “Penalties prescribed by the Committee on Infractions . . . in prior infractions cases shall have no precedential value.”<sup>149</sup>

Penalty determinations in summary judgments and following COI hearings at least are made by the same decisionmaker—the COI—but the committee may choose to accord little precedential value to a summary judgment. In the Missouri case, the University argued on appeal that the one-year postseason ban was out of step with prior summary judgment cases, but the COI responded in part that summary disposition reports “offer limited precedential value.”<sup>150</sup> As the IAC observed, that position was grounded on a COI “internal operating procedure” which states that COI panels may view summary judgment decisions “as less instructive than decisions through the contested hearing process because the violations through the summary disposition process constitute the parties’ agreement.”<sup>151</sup>

Indeed, the Missouri case indicates that the COI can even pick and choose which parts of a decision have precedential value.<sup>152</sup> Recall that the COI panel noted in its Missouri decision that historically aggravating factors of involved individuals have been attributed to the institutions at which those individuals were employed.<sup>153</sup> But the panel chose not to attribute the tutor’s aggravating factors to the University of Missouri “based on the nature of the record in this case.”<sup>154</sup> The panel then stated the following: “Because this case is unique, it should not be cited as precedent in this limited regard.”<sup>155</sup>

Limiting the precedential value of cases is no way to resolve penalty inconsistencies. The inconsistencies will remain and advocates in the enforcement process will continue to cite past cases that have facts similar to the case at hand, regardless of the method by which the past cases were resolved. Even the COI cites past summary disposition cases

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147. See *supra* accompanying note 109; NCAA MANUAL, *supra* note 13, § 19.5.12.4.

148. NCAA MANUAL, *supra* note 13, § 19.11.5.8.4.1.

149. *Id.*

150. NCAA MISSOURI APPEALS DECISION, *supra* note 53, at 7-8.

151. *Id.* at 8 n.7.

152. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5.

153. See *supra* text accompanying notes 58-59; NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 11.

154. NCAA MISSOURI INFRACTIONS DECISION, *supra* note 5, at 12.

155. *Id.*

when it serves the committee's purposes.<sup>156</sup> As the IAC noted in its Missouri decision, while the COI has argued summary judgments offer little precedential value, the committee "continues to cite summary disposition reports in its analysis and rationale in the infractions process."<sup>157</sup> Such a practice, employed as well by advocates for institutions and involved individuals, simply sows confusion.

Comparisons between cases, in an effort to achieve penalty consistency among similar cases, have always been a major factor in the determination of penalties and in the review of penalties on appeal.<sup>158</sup> Yet the new hodge-podge of case resolution processes, which not only employ different decisionmakers, but also vary in terms of precedential value, threatens to undermine penalty consistency—one of the fundamental goals of NCAA rules enforcement. It is no wonder that the IAC in its Missouri decision offered the following admonition:

This committee believes it is critical for the NCAA membership to discuss and evaluate . . . the appropriate precedential value and approach for cases in the entirety of the infractions processes. Doing so would better equip this committee and the Committee on Infractions in discharging its duties, and in turn improve the infractions process and yield better guidance for the membership as a whole.<sup>159</sup>

As the comparison between the Missouri and North Carolina cases reveals, it is difficult enough to achieve consistency when NCAA legislation changes to reflect current trends, such as an evolving approach to academic fraud. It becomes even more difficult when alternative means of resolution essentially invite inconsistency.

#### VIII. EXEMPLARY COOPERATION

Before concluding, let's return to the Missouri case for a brief examination of two final issues. I've contended that the penalties imposed are eminently reasonable under the current bylaws. In particular, the one-year postseason ban fits neatly within the penalty matrix, even if the case was classified "Level I-Mitigated," as the university desired.<sup>160</sup>

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156. NCAA MISSOURI APPEALS DECISION, *supra* note 53, at 8.

157. *Id.*

158. In perhaps its most instructive and most influential report, the IAC in a 1994-95 case involving the University of Mississippi set out the factors the IAC would consider in reviewing COI penalties. NCAA MISSISSIPPI APPEALS REPORT, *supra* note 43, at 15. Those seven factors, which guided both the COI and the IAC for nearly two decades, at least until the penalty matrix was added to the NCAA bylaws in 2013, included "Comparison of the Penalty or Penalties Imposed"—that is, how the penalty or penalties imposed in the current case "compared with the penalty or penalties imposed in other cases with similar characteristics." *Id.*

159. NCAA MISSOURI APPEALS DECISION, *supra* note 53, at 8.

160. See *supra* text accompanying notes 60-61.



But, as noted, the COI has discretion to depart from the matrix if there are “extenuating circumstances.”<sup>161</sup> Because the COI panel in Missouri chose not to depart from the matrix, we can conclude that the panel determined that the extenuating circumstances standard had not been met.

Most of the negative commentary regarding the NCAA decisions in the case, both from Missouri officials and the sports media, highlighted one factor—Missouri’s “exemplary cooperation” after it learned of the tutor’s misconduct. Critics have argued, at least implicitly, that exemplary cooperation should meet the extenuating circumstances standard, and that the COI and IAC decisions will encourage schools not to cooperate, or even encourage them to hide known violations.<sup>162</sup>

The extent to which schools should receive “credit” for cooperating with the NCAA after violations are discovered is such a prominent issue in infractions cases that I devoted an entire chapter to the issue in my recent book on NCAA rules enforcement.<sup>163</sup> As a membership organization, the NCAA relies upon the voluntary cooperation of its member institutions when rule violations occur.<sup>164</sup> This cooperation is particularly critical when the NCAA enforcement staff has no subpoena power to compel the cooperation of witnesses.<sup>165</sup> So NCAA bylaws impose an “affirmative obligation” on employees and student-athletes of member institutions “to cooperate fully with and assist the NCAA enforcement staff, the Complex Case Unit, the Committee on Infractions, the Independent Resolution Panel and the Infractions Appeals Committee to further the objectives of the Association and its infractions program, including the independent accountability resolution process.”<sup>166</sup>

In light of this affirmative obligation to cooperate in infractions matters, how important should it be that university officials fully cooperated after learning of major violations? Should exemplary cooperation result in reduced penalties, even in an egregious case? In 2007-2008, I chaired a penalty subcommittee of the COI. One of the subcommittee’s charges was to consider how cooperation, by both individual and institutional rule-violators, should factor into the resolution of major infractions cases. After hearing from many stakeholders, the subcommittee recommended a new bylaw stating that “full and complete cooperation

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161. See *supra* text accompanying notes 62-63; NCAA MANUAL, *supra* note 13, § 19.9.6.

162. Nicole Auerbach, *Auerbach: Missouri ruling shows cooperating with the NCAA doesn't pay*, ATHLETIC (Jan. 31, 2019), <https://theathletic.com/794463/2019/01/31/missouri-tigers-ncaa-infractions-cooperation-tutor-bowl-ban>; Dodd & Kercheval, *supra* note 45; Kelly, *supra* note 68; Matter, *supra* note 70.

163. PARKINSON, *supra* note 65, at 155-85.

164. NCAA MANUAL, *supra* note 13, § 19.2.3.

165. PARKINSON, *supra* note 65, at 157.

166. NCAA MANUAL, *supra* note 13, § 19.2.3.

in investigations and in disclosure of violations is an obligation of membership and does not mitigate sanctions imposed on either institutions or their staff members.”<sup>167</sup>

The full COI endorsed the proposed bylaw, concluding that because NCAA legislation already required full cooperation by parties under investigation, giving rule-violators “credit” for cooperation, in the form of penalty relief, was unfair to schools that complied with the rules.<sup>168</sup> The COI believed that *failure* to cooperate should result in increased penalties, but doing what one is obligated to do—cooperate—should not reduce penalties.<sup>169</sup>

Later, however, the COI reversed course. The NCAA enforcement staff persuaded the COI not to advance the new legislation, arguing that the committee’s proposal would hamper staff investigations.<sup>170</sup> Those investigations already were hamstrung by a lack of subpoena power and other investigative limitations.<sup>171</sup> So the COI revised its recommendation, and the NCAA leadership settled on a compromise. Schools and their employees are *expected* to cooperate and in the general run of cases, cooperation would not mitigate penalties.<sup>172</sup> But if the school’s level of cooperation rose to “extraordinary” cooperation, it would be a mitigating factor.<sup>173</sup>

This is essentially the regime that now exists under the bylaws. If a school has engaged in “exemplary” cooperation, the COI will recognize those efforts and give weight to them in the imposition of penalties.<sup>174</sup> That does not mean, however, that a school will escape harsh penalties if serious violations have occurred. Exemplary cooperation is simply one factor in a laundry list of aggravating and mitigating factors that the COI must consider in fashioning an appropriate set of penalties.<sup>175</sup> Yet schools in the dock, like Missouri, will continue to argue that harsh penalties are improper when schools cooperate fully. Consider Athletics Director Sterk’s comments following the IAC decision: “I think the appeals committee came to a point and they said, ‘We can’t overturn it because it is in this matrix.’ Why in the heck do you have an

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167. PARKINSON, *supra* note 65, at 182.

168. *Id.*

169. *Id.*

170. *Id.* at 182-83.

171. *Id.*

172. *Id.* at 183.

173. PARKINSON, *supra* note 65, at 183.

174. See NCAA MANUAL, *supra* note 13, § 19.9.4(f).

175. See *id.* §§ 19.9.3-19.9.4.

appeals process if they can't overturn a decision like that, where there is exemplary cooperation?"<sup>176</sup>

Yes, it's true, the IAC could not overturn the postseason ban because it was in the matrix.<sup>177</sup> But to allow Level I violations that "seriously undermine or threaten the integrity of the NCAA Collegiate Model,"<sup>178</sup> such as academic misconduct, to escape harsh punishment merely because a school cooperated in an exemplary fashion after violations were discovered would elevate cooperation to an exalted status rather than the substantial mitigating factor the membership intended it to be.

In the end, NCAA institutions are bound by the membership's collective judgment, and the NCAA's public response to Missouri officials' criticism of the COI and IAC decisions may seem insensitive, but it also seems to be on point: "While Missouri's disappointment is understandable, the rules and infractions processes are developed by NCAA members. If any member feels the rules and penalty structure are unfair, there is a clear path for them to suggest changes. The infractions process was collectively created and adopted by NCAA members, including Missouri."<sup>179</sup>

#### IX. POSTSEASON BANS AND HARM TO INNOCENT STUDENT-ATHLETES

Finally, the Missouri penalties raise the persistent concern that a postseason ban unfairly penalizes innocent student-athletes who had no involvement in violations. In fact, more often than not, by the time a major infractions case finally is resolved (particularly if there is an appeal), the violations are dated and occurred before many, if not all, of the institution's current student-athletes arrived on campus.<sup>180</sup> The impact of postseason sanctions on innocent student-athletes certainly is a consideration that the COI and the IAC must consider in determining whether penalties are fair and appropriate.<sup>181</sup> But the NCAA membership consistently considers the postseason ban to be one of the few tools in the COI's sanctions toolbox that has a chance to be an effective

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176. Kelly, *supra* note 68.

177. NCAA MANUAL, *supra* note 13, § 19.9.5 (COI panels "shall prescribe core penalties from the ranges set forth in Figure 19-1"), fig. 19-1.

178. *Id.* § 19.1.1.

179. Dodd & Kercheval, *supra* note 45.

180. *See, e.g.*, NCAA MISSOURI APPEALS DECISION, *supra* note 53, at 18-19.

181. In its prominent 1995 Mississippi report, the IAC listed "Impact of Penalties on Innocent Student-Athletes and Coaches" as a factor it would consider in reviewing COI penalties. NCAA MISSISSIPPI APPEALS REPORT, *supra* note 43, at 18.

deterrent.<sup>182</sup> The NCAA working group that revised the penalty structure—to include penalty classifications and the penalty matrix, among other revisions—relied on membership surveys that concluded that (1) penalties needed to be “more stringent,” and (2) postseason bans and scholarship restrictions were the most effective deterrents.<sup>183</sup>

The NCAA membership, then, has accepted the harm to innocent student-athletes as part of the tradeoff necessary to deter rule violations.<sup>184</sup> While that impact on innocents may be regrettable, schools like Missouri should direct their outrage toward the NCAA membership and its collectively developed legislation rather than toward the infractions committees that try to faithfully apply the bylaws handed to them.<sup>185</sup> Of course, where one stands always depends on where one sits. Schools on the hot seat invariably are opposed to harsh sanctions on themselves, even in the face of a clear directive from the membership that harsh sanctions must be imposed on the most serious rule violators. As one of the enforcement working group members stated, “People in general are going to say we need a strong enforcement process and coaches will say they are behind these changes, but when it comes down to specifics, everyone hates the outcome when it involves them. But the membership clearly wanted us to take this direction.”<sup>186</sup>

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182. See Gary Brown, *Violator Beware: Penalties in new enforcement structure pack a punch*, NCAA (Jan. 9, 2013, 12:00 AM), <http://www.ncaa.org/about/resources/media-center/news/violator-beware-penalties-new-enforcement-structure-pack-punch>.

183. *Id.*

184. Again, the 1995 Mississippi report from the IAC is instructive, summarizing the NCAA membership’s general approach to the concern:

The institution is correct in its assertion that the penalties imposed in this case will have an effect on innocent students and coaches. However, it would be impossible for the Committee on Infractions to carry out its functions and responsibilities under Bylaw 19.01.1 without having some effect on innocent students and coaches. That bylaw directs the committee, in imposing penalties, to provide fairness to uninjured parties. However, the bylaw also makes it clear that the primary mission of the committee is “to eliminate violations of NCAA rules and impose appropriate penalties should violations occur.”

NCAA MISSISSIPPI APPEALS REPORT, *supra* note 43, at 19 (finding the COI achieved the correct balance in imposing a two-year ban on postseason competition and television appearances).

185. In the spirit of full disclosure, my brother, Larry Parkinson, is currently a member of the NCAA Division I Committee on Infractions. He served as a member of the hearing panels for both the Missouri and the Mississippi State cases. We discussed neither case before they were fully resolved. My views in this article are strictly my own and do not necessarily reflect the views of my brother or any other member of the COI or IAC.

186. Brown, *supra* note 182 (quoting working group member Eleanor Myers).

## X. CONCLUSION

The recent University of Missouri infractions case has generated considerable heat for its purportedly unfair sanctions on the university's athletics program, in particular the one-year postseason ban imposed by the COI and upheld by the IAC. Even a glance at the NCAA's current penalty structure, however, suggests that the penalty was appropriate under legislative guidelines. Nonetheless, the case has highlighted significant issues that threaten to further undermine public confidence in the NCAA's enforcement processes.

Changes to academic misconduct legislation have left NCAA-watchers flummoxed, as the University of North Carolina skates away from a massive, two-decade academic fraud scheme while schools like Missouri receive substantial penalties for much milder misconduct. Strict penalty guidelines, in the form of a penalty matrix, have rendered the COI and IAC box-checkers. The NCAA's addition of negotiated resolution and the Independent Accountability Resolution Process as alternative means of resolving major infractions cases has introduced multiple actors into the penalty determination process, which invites inconsistency. Further, manipulation of the precedential value of past infractions decisions adds yet another layer of confusion to the process.

Let's hope that the NCAA leadership uses the Missouri case as a springboard for thoughtful reexamination and takes to heart the IAC's recommendation in that case to evaluate the appropriate approach to resolving major infractions cases "in the entirety of the infractions processes."<sup>187</sup>

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187. NCAA MISSOURI APPEALS DECISION, *supra* note 53, at 8.