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# Teaching Ethics with Sports: Recent Developments

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## ARTICLES

# TEACHING ETHICS WITH SPORTS: RECENT DEVELOPMENTS

ADAM EPSTEIN\* & BARBARA OSBORNE\*\*

### I. INTRODUCTION

Recent incidents and situations at various levels of sport provide a ripe landscape for examination and discussion of law and ethics.<sup>1</sup> As sport is

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\*\* Barbara Osborne is a Professor with a joint appointment in Exercise and Sport Science and the School of Law at the University of North Carolina at Chapel Hill. She advises the Sport and Entertainment Law Student Association, and directs the graduate program in Sport Administration – the first in the United States to focus solely on college sport. Professor Osborne has been honored with two university teaching awards. Her academic research focuses on legal issues intercollegiate athletics, gender equity, and medical issues in sport. Professor Osborne has degrees in Communications from the University of Wisconsin-Parkside, Sport Management from Boston University, and her law degree from Boston College Law School. Professor Osborne's experience in the sport industry includes college athletics administration, coaching, public relations, television sports commentator, publisher, and sports information director. She is licensed to practice law in both North Carolina and Massachusetts. Professor Osborne served as the General Counsel for the National Association for Collegiate Women Athletics Administrators (NACWAA), worked for Ice Miller LLP in the collegiate sports practice group, served as the Chair of the Sport and Entertainment Law section

widely popular in the United States, using sport examples is an engaging way to teach ethics in the context of a business or sports law course.<sup>2</sup> The purpose of this article is to provide examples of ethical and legal issues to be used in the classroom, primarily for pedagogical purposes. However, the incidents discussed can also be used as a springboard for further research and exploration. Issues are presented by the level of sport competition. Part II addresses youth and interscholastic sport, including issues related to recreational and amateur sport generally. Part III explores intercollegiate (college) sport. Part IV covers Olympic-related sport, and Part IV dives into professional sport. Indeed, the question of whether or not one may, must, or should act in a particular manner is often unclear for the decision-maker. Issues related to how one must act might also vary from state to state, given a particular law, rule, code of ethics, or a policy within an organization or jurisdiction.

As we show, particularly at the youth and interscholastic sport level, current ethical issues often focus on the principle of sportsmanship rather than a clear violation of a law, rule, or policy. However, decisions by participants, coaches, and administrators sometimes have legal issues and ramifications, along with consequences, and this article attempts to address the intersection between the two. A few questions are posed after each subsection, intended to foster further consideration of our blueprint by professor and student alike and to reinforce the subjects covered in each subsection.

## II. YOUTH, RECREATIONAL, AND INTERSCHOLASTIC SPORT

This section explores more ethical than legal issues. Given the large, though somewhat declining number of youth sport participants in the United States,<sup>3</sup> it is no surprise situations present themselves in which there does not appear to be a clear right or wrong answer with regard to a rule or policy. For example, if something is not a succinct violation of the rules, does that then outright excuse

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of the North Carolina Bar Association, and is a member of the Sport Lawyers Association, North American Society for Sport Management, and the Sport and Recreation Law Association. As a life-long athlete, she was inducted into the Kenosha (WI) Sports Hall of Fame and the University of Wisconsin-Parkside's Athletics Hall of Game. Additionally, Professor Osborne received the Jeanne Rowlands Award for Outstanding Achievement in Women's Sports from the Massachusetts Association of Intercollegiate Athletics for women.

1. This article includes only incidents occurring since 2011 to 2017, as a similar article has already addressed previous examples. See Adam Epstein & Bridget Niland, *Exploring Ethical Issues and Examples by Using Sport*, 13 ATLANTIC L.J. 19 (2011).

2. *Id.* at 23 ("Using sport-related examples allows students to research and explore ethical dilemmas via the internet immediately after class available with just a few clicks.").

3. See Michael S. Rosenwald, *Are Parents Ruining Youth Sports? Fewer Kids Play Amid Pressure*, WASH. POST, Oct. 4, 2015, [https://www.washingtonpost.com/local/are-parents-ruining-youth-sports-fewer-kids-play-amid-pressure/2015/10/04/eb1460dc-686e-11e5-9ef3-fde182507eac\\_story.html?utm\\_term=.33bb35b5d7b4](https://www.washingtonpost.com/local/are-parents-ruining-youth-sports-fewer-kids-play-amid-pressure/2015/10/04/eb1460dc-686e-11e5-9ef3-fde182507eac_story.html?utm_term=.33bb35b5d7b4).

a coach or provide immunity for their decisions? Some examples in this section focus on decisions made where there were no clear rules to follow. Consider how social media, such as Facebook and Twitter, and video platforms, such as YouTube, have exposed the degree of unethical conduct more than ever before.

#### *A. Sportsmanship: Working Definitions*

Before addressing recent issues, we must have a working definition or baseline of what constitutes sportsmanship. One working definition includes, “an aspiration or ethos that a sport or activity will be enjoyed for its own sake, with proper consideration for fairness, ethics, respect, and a sense of fellowship with one’s competitors.”<sup>4</sup> Another example, used by the Wisconsin Interscholastic Athletic Association (WIAA) in conjunction with the National Federation of State High School Associations (NFHS) Sportsmanship Guidelines, state:

Good sportsmanship is viewed by the WIAA in conjunction with the National Federation as a commitment to fair play, ethical behavior and integrity. In perception and practice, sportsmanship is defined as those qualities which are characterized by generosity and genuine concern for others. The ideals of sportsmanship apply equally to all activity disciplines. Individuals, regardless of their role in activities, are expected to be aware of their influence on the behavior of others and model good sportsmanship.<sup>5</sup>

Similarly, the WIAA offers the *Fundamentals of Sportsmanship* to include:

1. Show respect for self and others at all times.
2. Show respect for the officials. Good sportsmanship implies the willingness to accept and abide by the decisions of the officials.
3. Know, understand and appreciate the rules of the contest. Good sportsmanship suggests the importance of conforming to the spirit as well as the letter of the rules.
4. Maintain self-control at all times.

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4. See *Sportsmanship*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Sportsmanship> (last visited July 30, 2018).

5. See *Sportsmanship Definitions and Fundamentals*, WIS. INTERSCHOLASTIC ATHLETIC ASS’N, <https://www.wiaawi.org/Schools/Sportsmanship.aspx> (last visited July 30, 2018).

5. Recognize and appreciate skill in performance regardless of team affiliation.<sup>6</sup>

Thus, it appears consistent that the definition of sportsmanship is aspirational in nature to serve as a model for others. Still, it should come as no surprise that parents and coaches at the youth and intercollegiate sport level often lack sportsmanship, sometimes demonstrated by violations of codes of conduct.<sup>7</sup> In fact, there are many examples where the decisions made and actions taken cross the line from ethical issues to legal issues, particularly when parents and coaches engage in physical confrontations, many of which are caught on camera and posted to the Internet.<sup>8</sup>

Questions:

1. Is it realistic to establish and enforce codes of conduct involving sportsmanship ideals?
2. What purpose is served by emphasizing sportsmanship in youth sport to participants and parents?

*B. Wisconsin Cheer Ban*

In December 2015, a reminder memorandum was sent to WIAA member schools via email seeking to reinforce the state-wide ban on common—yet inappropriate—chants at basketball games.<sup>9</sup> The WIAA's "Sportsmanship Reference Guide" says that chants such as "air ball," "scoreboard," and many, many others, are "inappropriate" and should be discouraged.<sup>10</sup>

6. *Id.*

7. See *Coaches Code of Conduct*, WIS. INTERSCHOLASTIC ATHLETIC ASS'N, <https://www.wiaawi.org/Schools/Sportsmanship/CodeofConduct.aspx> (last visited July 30, 2018).

8. See Epstein & Niland, *supra* note 1, at 40 (offering that "University of Kentucky head basketball coach John Calipari launched into filthy-mouthed dress-down of his player, Terrence Jones, when his team lost to the University of Alabama which, of course, was uploaded to the internet causing considerable criticism for the outrage.").

9. See Howard Sinker, 'You Can't Do That!' Wisconsin Bans Common Cheers at Prep Games, STARTRIB., Jan. 12, 2016, <http://www.startribune.com/wisconsin-bans-common-cheers-at-high-school-games-student-suspended-from-team-for-critical-tweet/365046921/>.

10. See Juliet Spies-Gans, *A Complete List of Things Wisconsin HS Students Have Been Told Not to Do at Games*, HUFFINGTON POST, Jan. 14, 2016, [http://www.huffingtonpost.com/entry/wisconsin-high-school-chant-ban\\_us\\_56965df3e4b09dbb4bad5923](http://www.huffingtonpost.com/entry/wisconsin-high-school-chant-ban_us_56965df3e4b09dbb4bad5923).

Booing of any kind; "Over-rated" chant; "Scoreboard" cheer; "Air ball" chant; "Nuts n' Bolts . . ." chant; "You, You, You" chant; "You can't do that," "fund-a-mentals," "We can't hear you," "Warm up the bus" chants; "Sieve, sieve, sieve" chant; "Nah, nah, hah, nah . . . hey-eyy goodbye" song; "Season's Over" chant; "Push it, push it, push it" chant; "U-S-A, U-S-A, U-S-A" or any acronym of derogatory language or innuendo; Any chants/comments that are disrespectful to an opponent or official, including school mascot, school nickname, school population, opponent's town or community or that is derogatory to an

Soon thereafter, Hilbert High School student-athlete April Gehl, a three-sport star and one of the top scorers for the Wolves' girls' basketball team, was informed by Hilbert's athletic director that she was suspended for five games due to a tweet that Gehl posted on Twitter concerning the WIAA.<sup>11</sup> The tweet expressed extreme frustration on her part that the WIAA's policies were so restrictive.<sup>12</sup> Gehl's three-word tweet used profanity directed at the WIAA for its sportsmanship policy, and she was accordingly punished for a violation of her school policy related to inappropriate language.<sup>13</sup>

Questions:

1. To what degree is it appropriate for a high school or its state interscholastic athletic association to regulate speech, if at all?
2. Is it appropriate to punish student-athletes in youth or interscholastic sport for expressing their opinions via social media if profanity is used?

### *C. Violence Against Sports Officials*

Referees at this sport level are increasingly becoming objects of violent, physical displays of discontent.<sup>14</sup> For example, in a Taylorsville, Utah criminal

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individual because of race, gender, creed, body type or ability; Holding up papers or props during opponent introductions; Turning backs to court/field during opponent introductions; Dressing in attire that is not associated with school spirit or is inappropriate; Waving arms or making movements or sudden noises in an attempt to distract an opponent; Fan participation activities while the game is actually being played (i.e. the roller coaster, the wave, etc.); Competitors not shaking hands after a contest; Competitors "trash-talking" before, during or after a contest; Competitors celebrating a play excessively by beating on chest; pointing to the crowd; dancing; or a movement perceived to be drawing attention to one's self; Competitors celebrating a play by prolonged staring at an opponent, or standing over an opponent; Criticizing or diminishing the efforts or abilities of an opponent or official in the media before during or after a contest; Criticizing teammates or coaches; Not standing at attention during the National Anthem or excessive talking, chanting, yelling or movement during the playing/singing of the anthem; Throwing of any object by fans or competitors throwing/hitting equipment (pucks, balls, bats, helmets, etc.); Body passing; Damaging any property (bleachers, hotel rooms, locker rooms, etc.) associated with a sporting event; Attending an event inebriated or under the influence of mood altering substances; Bare-chested fans and body paint at indoor events.

*Id.*

11. See Richard Arguello, *Tweet About WIAA Earns Suspension for Athlete*, POST-CRESCENT, Jan. 12, 2016, <http://www.postcrescent.com/story/sports/2016/01/08/prep-athlete-suspended-tweet/78525606/>.

12. *Id.*; see also Tobias Salinger, *Wisconsin High School Athlete Suspended for Her Tweet Protesting Sportsmanship Policy That Sparked National Debate*, N.Y. DAILY NEWS, Jan. 13, 2016, <http://www.nydailynews.com/news/national/wisc-hs-athlete-suspended-tweet-protesting-chant-policy-article-1.2494894>.

13. See Arguello, *supra* note 11.

14. See Adam Epstein, *Utah and Sports Law*, 28 MARQ. SPORTS L. REV. 107 (2017); see also, Emiley Morgan, *'I Was Frustrated,' Says Teen Who Admits Killing Referee*, DESERET NEWS, Aug. 5, 2013,

case, Jose Domingo Teran, a seventeen-year-old soccer player, pleaded guilty in 2013 to homicide by assault in the death of forty-six-year-old referee, Ricardo Portillo, during a game on April 27, 2013.<sup>15</sup> Referee Portillo issued a yellow card to Teran, a goalkeeper, who pushed an opposing player in a seventeen-and-under league. Teran responded by punching Portillo in the head, causing serious damage.<sup>16</sup> Portillo was in critical condition in the hospital for seven days before he died.<sup>17</sup>

As a result, Third District Juvenile Judge, Kimberly Hornak, recommended a three-year sentence and ordered Teran to keep a picture of Portillo in his cell for his time in juvenile jail.<sup>18</sup> Additionally, Teran was required to “write weekly letters to Portillo’s family members [outlining] [the] steps he [was] taking to return to normal life.”<sup>19</sup>

Similarly, on June 29, 2014, during a recreational adult league soccer game in Livonia, Michigan, player, Bassel Saad, punched referee, John Bienewicz, in the head as he was about to eject him from the game.<sup>20</sup> Bienewicz died as a result of the punch, and Saad pleaded guilty to involuntary manslaughter. He was sentenced to serve eight to fifteen years in prison,<sup>21</sup> and instructed to pay \$9,265 in restitution to Bienewicz’s family.<sup>22</sup> A wrongful death lawsuit was

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<http://www.deseretnews.com/article/865584129/I-was-frustrated-says-teen-who-admits-killing-referee.html?pg=all> (discussing how Jose Domingo Teran, a seventeen-year-old, pleaded guilty to punching soccer referee, Ricardo Portillo, in the face, which resulted in Portillo’s death, in the Salt Lake City area after Portillo called a foul on Domingo Teran).

15. See Emiley Morgan & Peter Samore, *Family of Teen Charged with Referee’s Death Feels ‘Horrible’*, KSL, June 14, 2013, <https://www.ksl.com/?sid=25600822>; see also CNN Staff, *Teen Pleads Guilty in Referee’s Death*, CNN (Aug. 6, 2013), <http://www.cnn.com/2013/08/05/us/utah-soccer-death/>.

16. CNN Staff, *supra* note 15.

17. *Id.*

18. *Id.*

19. *Id.*; see Morgan, *supra* note 14.

The judge said that while Teran’s good grades and clean history were factors in her sentence, she could not ignore the facts of the case. “What the court is (most) concerned by is that your one act of violence was without any cause or excuse or any justification,” Hornak said, adding that Portillo was serving the community when he was killed. “In one moment of rage you took away his life, you changed the life of all of his daughters and you changed your life and your family’s life forever.”

Morgan, *supra* note 14.

20. See Adam Epstein, *Michigan and Sports Law*, 24 J.L. BUS. & ETHICS 1 (2018); see also Brian Thompson, *Deadly Punch to Soccer Ref Gets Man 8–12 Years in Prison*, MI HEADLINES, Mar. 13, 2015, <http://www.miheadlines.com/2015/03/13/deadly-punch-to-soccer-ref-gets-man-8-12-years-in-prison/>.

21. Jeff Seidel, *Man Takes Plea, Will Serve 8–15 Years in Soccer Ref Death*, DETROIT FREE PRESS, Feb. 20, 2015, <http://www.freep.com/story/news/local/michigan/wayne/2015/02/20/soccer-referee-punch/23728687/> (discussing the 911 call and noting that Saad was involved in another assault on a soccer field in 2005 in which he hit another player repeatedly in the head).

22. Thompson, *supra* note 20.

subsequently filed and settled in August 2015.<sup>23</sup> As a result of the Saad incident, the Michigan legislature considered whether attacking a sports official should lead to extra jail time as a felony, punishable by up to three years in prison and a \$10,000 fine, which would make it the twenty-fourth state to have such referee-specific crimes.<sup>24</sup> However, the bill stalled in the legislature and has not yet become a law in Michigan.<sup>25</sup>

Questions:

1. What is an appropriate punishment for attacking a sport official? Were Judge Hornak's additional orders in sentencing fitting?
2. What are the pros and cons of specific legislation designed to protect sport officials?

#### *D. Coach-led Misconduct*

##### 1. Physical Violence

Two recent examples demonstrate egregious acts by high school student-athletes who followed their coach's direction to hurt others. For example, on September 4, 2015, John Jay High School football players said their assistant coach told them to tackle a referee during a play, stating: "You need to hit him."<sup>26</sup> The students, Victor Rojas and Michael Moreno, obliged and became infamous Internet sensations after the assistant coach, Mack Breed, told them that the referee "needs to pay the price" for racial slurs and making unjustified calls after a safety got injured.<sup>27</sup> The referee, Robert Watts, was speared from behind during the last minute of the game. Moreno and Rojas

23. See Elisha Anderson, *Settlement Reached in Lawsuit Over Soccer Referee Death*, DETROIT FREE PRESS, Aug. 7, 2015, <http://www.freep.com/story/news/local/michigan/wayne/2015/08/07/settlement-law-suit-soccer-referee/31293293/>.

24. See Kathleen Gray & Elisha Anderson, *Bill Aims to Make It a Felony to Assault Sports Officials*, DETROIT FREE PRESS, Jan. 28, 2015, <http://www.freep.com/story/news/politics/2015/01/28/referee-assault-become-felony/22493487/>; see also Mike Householder, *Michigan Referee's Death Prompts Calls for Tougher Laws*, FOX SPORTS, Mar. 12, 2015, <http://www.foxsports.com/other/story/michigan-referees-death-prompts-calls-for-tougher-laws-031215> (noting that there could be resistance in the state legislature against such a bill because some believe that attacks on referees should be treated no differently than attacks on anyone, regardless of their job or profession).

25. See Householder, *supra* note 24; see also Kathleen Gray, *Slain Referee's Family Seeks Tougher Assault Penalty in Michigan*, DETROIT FREE PRESS, Mar. 7, 2017, <http://www.freep.com/story/news/politics/2017/03/07/michigan-senate-panel-increases-penalties-assault-referees/98872232/>.

26. See John Barr & Michael Sciallo, *Texas HS Players Say Coach Told Them to Hit Referee*, ESPN (Sept. 18, 2015), [http://espn.go.com/moresports/story/\\_/id/13682526/texas-hs-players-say-coach-told-hit-referee](http://espn.go.com/moresports/story/_/id/13682526/texas-hs-players-say-coach-told-hit-referee).

27. *Id.*



were suspended by the Northside Independent School District and ordered to complete the semester in an alternative school, though they were eligible to return to John Jay High School on January 15, 2016.<sup>28</sup>

Nonetheless, Head Coach Gary Gutierrez was placed on two years' probation.<sup>29</sup> Assistant Coach Mack Breed, now resigned, was suspended through the 2016–17 school year, and given an additional two years' probation.<sup>30</sup> Texas law provides, “if a person aids, encourages or directs an individual to commit a crime, that person can also be criminally charged.”<sup>31</sup> Breed also pleaded guilty to misdemeanor assault charges and was sentenced to one year in jail with a \$3,500 fine. The plea agreement suspended his incarceration and he instead served eighteen months' probation.<sup>32</sup> In his “guilty plea, . . . Breed did not admit he ordered the players to strike the official.”<sup>33</sup>

Cache High School (Oklahoma) girls' basketball coach, Kenny White, allegedly told his players to intentionally injure an opponent during a game. Subsequently, Elgin High School star, Jentry Holt, was hit in the face, breaking her nose, during an in-bounds play on February 10, 2015.<sup>34</sup> Two affidavits from players stated the play was designed to hurt Holt, and Coach White was suspended for three games as a result of several investigations by the Oklahoma Secondary Schools Activities Association (OSSAA).<sup>35</sup> Still, White and several administrators were later sued for the incident, and the school board ultimately voted to retain the interim coach rather than reinstate White in April 2016.<sup>36</sup>

## 2. Sexual Misconduct

There are numerous allegations of sexual misconduct against others considered authority figures in the context of youth and amateur sport at the

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28. *Id.*

29. See Austin Guerrero, *UIL Hands Down Punishment for John Jay Football Players and Coaches*, SAN ANTONIO CURRENT, Oct. 15, 2015, <http://www.sacurrent.com/the-daily/archives/2015/10/15/uil-hands-down-punishment-for-john-jay-football-players-and-coaches>.

30. See John Barr, *Former John Jay HS Assistant Coach Mack Breed Gets 18 Months Probation*, ESPN (Dec. 14, 2015), [http://espn.go.com/moresports/story/\\_/id/14368663/former-john-jay-hs-assistant-coach-mack-breed-gets-18-months-probation](http://espn.go.com/moresports/story/_/id/14368663/former-john-jay-hs-assistant-coach-mack-breed-gets-18-months-probation).

31. *Id.*

32. *Id.*

33. *Id.*

34. See Jacob Unruh, *Cache Girls Basketball Coach Kenny White Will Not Return*, NEWS OK, Apr. 12, 2016, <http://newsok.com/article/5491184>.

35. *Id.*

36. *Id.*; see also Jacob Unruh, *Former Cache Coach Kenny White Now Coaching in Texas*, NEWS OK, July 29, 2016, <http://newsok.com/article/5511675> (stating that the coach took a position in Vernon, Texas, and “White will coach girls basketball and volleyball, the same positions he held at Cache.”).

local and national levels.<sup>37</sup> A former youth and middle school football and wrestling coach, Kenneth Carroll, was sentenced to over eighteen years in prison for four counts of child sex abuse and two counts of sodomy.<sup>38</sup> Carroll pleaded guilty to the acts that occurred between 1998 and 2002, but additional evidence indicated he may have engaged in child sex abuse in two different states (Oregon and Washington) for a significant number of years.<sup>39</sup> Carroll apparently recorded some of the abuse, as law enforcement found more than 1,000 videos and over 100,000 images of child pornography on his computer.<sup>40</sup> Another example involves a twenty-three-year-old lifeguard and high school water polo coach who was arrested for sexually assaulting fourteen to sixteen-year-old female athletes on his team.<sup>41</sup>

A particularly egregious example extends throughout youth, collegiate, and Olympic sport. Former University of Utah Head Coach Greg Winslow was accused of physically and psychologically abusing his swimmers and divers, suspended during the 2013 Pac-12 championships, and later fired.<sup>42</sup> Other allegations against Winslow included various acts of inappropriate and

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37. See, e.g., Benjamin Raven, *13 to Sue MSU Over Former USA Gymnastics Doctor's Sexual Abuse Scandal*, MLIVE, Nov. 30, 2016, [http://www.mlive.com/news/detroit/index.ssf/2016/11/13\\_women\\_to\\_sue\\_msu\\_over\\_forme.html](http://www.mlive.com/news/detroit/index.ssf/2016/11/13_women_to_sue_msu_over_forme.html) (discussing the plans to sue Michigan State University over the school not properly investigating sexual abuse complaints); see also Nancy Armour & Rachel Axon, *USA Gymnastics: Sexual Assault Investigation Urges Cultural Change*, USA TODAY, June 27, 2017, <https://www.usatoday.com/story/sports/olympics/2017/06/27/sexual-assault-usa-gymnastics-olympics-usoc-larry-nassar-deborah-daniels-usa-gymnastics/431358001/> (referencing a 100-page report authored by Deborah Daniels, a former federal prosecutor, "USA Gymnastics needs a 'complete cultural change' after not doing enough to educate its staff, members and athletes about protecting children from sexual abuse and failing to ensure that safeguards were being followed . . ."). Additionally, "[t]he safety and well-being of the governing body's athletes, not world and Olympic medals, must be the focus . . ."; Matt Mencarini, *23 More Women, Girls File Lawsuit against MSU, Nassar*, LANSING ST. J., June 30, 2017, <http://www.lansingstatejournal.com/story/news/local/2017/06/30/23-more-women-girls-file-lawsuit-against-msu-nassar/443945001/> (offering that the federal lawsuit against the former Michigan State University doctor and USA Gymnastics doctor Larry Nassar by women and girls had increased to 119 claimants).

38. See Q13 Fox News Staff, *Ex-Puyallup Youth Sports Coach Accused of Child Sex Abuse in Washington, Oregon, Sentenced to Prison*, Q13 FOX, Feb. 22, 2016, <http://q13fox.com/2016/02/22/ex-puyallup-youth-sports-coach-accused-of-child-sex-abuse-in-washington-oregon-sentenced-to-prison/>.

39. *Id.*

40. *Id.*

41. See ABC7 Staff, *Water Polo Coach Accused of Sexually Assaulting La Palma High School Student-Athletes*, ABC7 (Nov. 23, 2016), <http://abc7.com/news/coach-accused-of-sexually-assaulting-la-palma-students/1622713/>.

42. See Epstein, *supra* note 14; see also Braden Keith, *ESPN to Feature Story of Fired Utah Swim Coach Greg Winslow on Outside the Lines*, SWIMSWAM (Dec. 19, 2013), <https://swimswam.com/espn-feature-story-fired-utah-swim-coach-greg-winslow-outside-lines/>.

unprofessional conduct.<sup>43</sup> Though no criminal charges were ever filed, USA Swimming banned Winslow for life in 2014.<sup>44</sup>

Misconduct claims were also made, and a police report was filed, reaching back to Winslow's prior coaching tenure at Sun Devil Aquatics, a swim club team in Arizona. In 2015, Arizona passed a law criminalizing sexual abuse misconduct with a minor by an authority figure in a "position of trust."<sup>45</sup> The University of Utah's investigation only covered the six years he was coach at the university, while an independent investigation demonstrated that the university could have fired Winslow in 2012, for alcohol-related problems that "were corrosive to the entire team."<sup>46</sup>

Questions:

1. Why do you think coaches encourage their players to injure sport officials or opponents?
2. Should student-athletes be responsible for their actions if they were "just doing what they were told to do?"
3. What can be done to eliminate sexual misconduct in youth sport?

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43. Keith, *supra* note 42.

[A]ccusations of verbally and physically abusing his assistants, abusing alcohol while on team trips, using racial slurs against a black swimmer, and even a charge that a swimmer was caught dealing drugs on a school-sponsored trip, but wasn't disciplined until after taking advantage of that swimmer represented the Utes at the Olympic Trials.

*Id.* For an interesting employment law and constitutional analysis of whether coaches may be terminated only "for cause," see *Kingsford v. Salt Lake City Sch. Dist.*, 247 F.3d 1123 (10th Cir. 2001) (offering that because "conflicting evidence [existed] on the factual question of whether . . . implied-in-fact promise [was] [made] to plaintiff that he would be removed as football coach only for cause, the issue could not be decided at the summary judgment stage.").

44. See Morgan Priestley, *Greg Winslow Added to USA Swimming Banned for Life List*, SWIMSWAM (Feb. 14, 2014), <https://swimswam.com/greg-winslow-added-usa-swimming-banned-life-list/>.

45. See KPNX Staff, *Bill Closes Sexual Abuse Loophole in Arizona*, 12NEWS, Apr. 1, 2015, <https://www.12news.com/article/news/local/bill-closes-sexual-abuse-loophole-in-arizona/184865339>; see also ARIZ. REV. STAT. § 13-1404 (2018) (reflecting the 2015 amendment to include "position of trust"); Michael Kiefer, *Ex-Utah Swim Coach Won't Face Sex Assault Charges*, USA TODAY, June 13, 2013, <http://www.usatoday.com/story/sports/college/2013/06/13/utah-swimming-coach-greg-winslow-sex-assault-charges-in-arizona/2418911/>.

46. See Ceci Christy, *Christy: Utah Admits Winslow Should Have Been Fired in 2012*, SWIMSWAM (July 2, 2013), <https://swimswam.com/christy-utah-admits-winslow-should-have-been-fired-in-2012/>.

The investigators concluded that no physical abuse or sexual activity occurred with any of Mr. Winslow's swimmers while he coached at the University. Additionally, he was cleared of any alleged racial discrimination. The investigators did not issue a position on the allegations of psychological abuse during training sessions as "training methods are subjective."

*Id.*

*E. Embezzlement*

A common problem at the youth sport level involves theft of funds by parents who are entrusted to collect, guard, and monitor fees and money on behalf of a volunteer, nonprofit, or local club. For example, Brian Farley, a Tri-Boro Youth Soccer Club treasurer, in eastern Pennsylvania, stole \$120,000 from the organization.<sup>47</sup> A Lehigh County Court judge ordered Farley to repent publicly to club members as part of his guilty plea, and the event was so controversial that the club hired security to maintain order at the public event.<sup>48</sup> As a result of his plea, Farley received five years of probation and was ordered to make repayment of approximately \$225 per month to the club to make it whole.<sup>49</sup>

Tri-Boro's situation is not unique. Similar acts of misconduct appeared at little league and youth sport clubs involving \$220,000 in Washington, \$300,000 in Michigan, \$431,000 in Minnesota, and \$560,000 in New Jersey.<sup>50</sup> There is no national agency that oversees fiduciary conduct of the approximately 14,000 youth sports organizations in the United States, generating annual revenue of about \$59 billion.<sup>51</sup> Investigators and prosecutors in several states say embezzlement investigations involving youth sports often involve volunteers who are highly regarded in their local communities.<sup>52</sup> In the last five years, there have been hundreds of arrests and convictions in forty-three states involving fifteen sports.<sup>53</sup>

Questions:

1. Could there be a justifiable excuse to steal money from a youth sport bank account?
2. Could the local or national youth sport organization be liable for not providing a system of checks and balances, best practices, or quality control?
3. Should youth sport organizations purchase crime or fraud insurance designed for this specific situation as a condition of

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47. See Bill Pennington, *The Trusted Grown-Ups Who Steal Millions from Youth Sports*, N.Y. TIMES, July 7, 2016, [http://www.nytimes.com/2016/07/10/sports/youth-sports-embezzlement-by-adults.html?smid=tw-share&\\_r=0](http://www.nytimes.com/2016/07/10/sports/youth-sports-embezzlement-by-adults.html?smid=tw-share&_r=0).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Pennington, *supra* note 47.

53. *Id.*

participation or affiliation with a national youth sport organization?

### *F. Participation Fraud*

#### 1. Individuals

Using ineligible participants in any sport violates fundamental principles of sportsmanship and is often characterized as *participation fraud*. Having an adult participate in a youth sport competition is obviously regarded as unfair.<sup>54</sup> Recent incidents demonstrate the lengths to which some will go to cheat.

High school player, “Javier Jones,” enrolled at Mount Pleasant High School (Michigan) during the first week of the 2012–13 school year and played on the varsity football team.<sup>55</sup> Jones played four games for the team until it was discovered that he had falsified his name and documents, his birth certificate was forged, and his high school transcripts were altered.<sup>56</sup> Jones was actually James Nash, a twenty-one-year-old, who violated Michigan’s “age 19 rule” which disallows participation if the student turns nineteen before September 1.<sup>57</sup> An anonymous parent from the Lansing area, an hour south of the high school, blew the whistle on Nash who had previously attended high school there.<sup>58</sup>

Nash was arraigned in December 2012, on one count of forging or altering a vital record, a misdemeanor punishable by up to one year in jail and a \$1,000 fine.<sup>59</sup> Mount Pleasant High School finished the season with a 4–5 record, but changed its 2012 record to 2–7, forfeiting the games Nash played.<sup>60</sup>

Similarly, a Permian High School (Texas) player turned out to be an impersonator.<sup>61</sup> Guerdwich Montimere, who competed in Texas as “Jerry

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54. See Associated Press, *Youth Football Team Kicked Out of League After Sneaking Adult Man into Game*, USA TODAY HIGH SCH. SPORTS, Oct. 25, 2016, <http://usatodayhss.com/2016/youth-football-team-kicked-out-of-league-after-sneaking-adult-man-into-game#sthash.a9jR63Pp.z1hDrYqo.uxfs>.

55. See Epstein, *supra* note 20; see also Jim Lahde, *Mt. Pleasant Student Turns Out to Be 21; Football Team May Have to Forfeit Games*, MORNING SUN, Nov. 2, 2012, <http://www.themorningsun.com/article/MS/20121102/SPORTS/121109948>.

56. *Id.*

57. *Id.*

58. *Id.*

59. See Rick Mills, *Mt. Pleasant Police: 21-Year-Old Man Said He Fraudulently Attended High School in Order to Get into College*, NEW HAVEN REG., Dec. 17, 2012, <http://www.nhregister.com/article/NH/20121217/NEWS/312179724>.

60. *Id.*; see also Lahde, *supra* note 55.

61. See Wright Thompson, *OTL – Guerdwich Montimere Poses as High School Student, Cons Texas Family*, ESPN (May 3, 2012), [http://www.espn.com/espn/otl/story/\\_/id/7879165/otl-guerdwich-montimere-poses-high-school-student-cons-texas-family-espn-magazine](http://www.espn.com/espn/otl/story/_/id/7879165/otl-guerdwich-montimere-poses-high-school-student-cons-texas-family-espn-magazine).

Joseph” was actually a twenty-two-year-old basketball player posing as a sixteen-year-old Haitian orphan. He had attended a high school in Fort Lauderdale, Florida, but received a three-year prison sentence in 2011 after pleading guilty to two counts of sexual assault of a child and three counts of tampering with government records.<sup>62</sup>

## 2. Teams

Coined as “America’s team,” Jackie Robinson West (JRW) Little League Baseball players made their way through postseason play in August 2014.<sup>63</sup> Representing the South Side League (Chicago),<sup>64</sup> JRW was composed of all African-American youths, and won the U.S. Little League World Series bracket in Williamsport, Pennsylvania. JRW then fell to South Korea in the Little League International title game in which the best U.S. team plays the winner of the international (world) bracket.<sup>65</sup>

Unfortunately, only five of the thirteen JRW players who played in the 2014 tournament were actually eligible, having used fake boundary maps and player address forms.<sup>66</sup> Little League International ultimately, albeit delayed, stripped JRW of the championship in February 2015, and Team Manager Darold Butler was suspended.<sup>67</sup> JRW parents sued the team’s director, Little League Baseball, and Chris Janes, the man who alerted authorities to the boundary issues.<sup>68</sup> The lawsuit claimed Janes violated their privacy by tracing license plates to home addresses and reporting the residency issue to Little League.<sup>69</sup> In turn, Janes

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62. See Eamonn Brennan, *Guerdwich Montimer Sentenced to Prison*, ESPN (July 28, 2011), [http://www.espn.com/blog/collegebasketballnation/post/\\_id/33377/guerdwich-montimer-sentenced-to-prison](http://www.espn.com/blog/collegebasketballnation/post/_id/33377/guerdwich-montimer-sentenced-to-prison); see also Cameron Smith, *Texas Imposter Hoops Star Receives 3-Year Prison Sentence*, YAHOO! SPORTS (July 28, 2011), <http://sports.yahoo.com/blogs/highschool-prep-rally/texas-imposter-hoops-star-receives-3-prison-sentence-181357819.html> (offering that Montimere, who played as “Jerry Joseph” and who is a naturalized United States citizen, faced up to twenty years in prison, and the charges not only focused on identity theft, but also included charges of sexual assault).

63. See David Mendell, *Little League, Big Trouble*, SB NATION (June 24, 2015), <http://www.sbnation.com/2015/6/24/8831551/little-league-big-trouble>.

64. *Id.*

65. *Id.*; see also Scott Holland, *Jackie Robinson West Parents Sue Little League*, ESPN, *Say Wrongly Accused Them of Cheating to Win 2014 Title*, COOK COUNTY REC., Feb. 11, 2016, <http://cookcountyrecord.com/stories/510663111-jackie-robinson-west-parents-sue-little-league-espn-say-wrongly-accused-them-of-cheating-to-win-2014-title>.

66. *Id.*

67. *Id.*

68. See William Lee, *Jackie Robinson West Parents File Suit Against League*, ESPN, *Whistleblower*, CHI. TRIB., Feb. 12, 2016, <http://www.chicagotribune.com/news/local/breaking/ct-jackie-robinson-west-defamation-suit-0212-20160212-story.html>.

69. *Id.*

sued Little League Baseball International due to the extreme emotional distress he suffered as a result of the revelation of the impropriety involving boundary rules violations and the delay by the organization to immediately investigate and take action.<sup>70</sup>

Questions:

1. Can you provide other examples of fraudulent participation in youth or interscholastic sport over the years?
2. Why do some student-athletes (or parents) go to such extremes to misrepresent their identity?
3. Should Chris Janes be protected from prosecution as a whistleblower? How should questionable practices used to obtain information be addressed relative to organizational investigations?

### *G. Intentionally Losing (“Tanking”)*

It seems contrary to athletic competition to intentionally lose a game, also known as *tanking*. However, in 2015, a South Snohomish, Washington softball team intentionally lost a game against a team from Salisbury, North Carolina so they would force a three-way tie and thereby eliminate the Polk City, Iowa team.<sup>71</sup> Washington was already in, so it benched starters and had every batter try to bunt. Iowa was then out after Washington lost 8–0.<sup>72</sup>

An unsuccessful appeal was made to Little League Softball World Series, but an appeal to Little League International overturned the qualification result.<sup>73</sup> The final decision was to force a one-game playoff (i.e., a “play-in” game)

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70. See Zak Koeske, *Whistleblower in Jackie Robinson West Scandal Sues Little League Baseball*, CHI. TRIB.: DAILY SOUTHTOWN, Sept. 20, 2016, <http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-little-league-lawsuit-st-0921-20160920-story.html> (“alleg[ing] intentional and negligent infliction of emotional distress, [and] that Little League Baseball International’s two-month ‘cover-up’ — from Dec. 16, 2014 to Feb. 11, 2015 — caused him ‘severe emotional distress that resulted in depression, anxiety, humiliation, loss of sleep, weight loss, and loss of consortium.’”).

71. See John Naughton, *Little League Says Iowa’s Allegations of Another Team Cheating Were ‘Credible’*, DES MOINES REG., Aug. 18, 2015, <http://www.desmoinesregister.com/story/sports/2015/08/18/little-league-softball-world-series-scandal-iowa-washington-playoff/31894837/>; see also Victor Mather, *Little League Softball Scandal Ends in Elimination for the Accused*, N.Y. TIMES, Aug. 18, 2015, <http://www.nytimes.com/2015/08/19/sports/team-accused-of-throwing-little-league-softball-game-is-eliminated.html>; Greg Rajan, *Scandal Erupts at Little League Softball World Series*, HOUS. CHRON., Aug. 18, 2015, <http://www.chron.com/sports/headlines/article/Scandal-erupts-at-Little-League-Softball-World-6450561.php>.

72. Naughton, *supra* note 71.

73. *Id.*

between Iowa and Washington.<sup>74</sup> Iowa beat Washington 3–2 and joined North Carolina in the semi-finals.<sup>75</sup> With Washington out, the team from Salisbury, North Carolina (Rowan County) won the 2015 Little League World Series over Warwick, Rhode Island, 4–2.<sup>76</sup>

Similarly, in Rutherford County, Tennessee, both Riverdale High School and Smyrna High School girls' basketball teams tried to lose the consolation game on February 23, 2015.<sup>77</sup> Smyrna defeated Riverdale 55–29, but the loser of the consolation game would be placed on the opposite side of the regional tournament bracket from Blackman High School, the highest ranked team in the state.<sup>78</sup> Both Riverdale and Smyrna had already lost to Blackman earlier in the season.<sup>79</sup>

The consolation game became so bad that the referees stopped the game, pulled both coaches aside and told Riverdale coach, Cory Barrett, and Smyrna coach, Shawn Middleton, that they were not going to make a mockery of the game.<sup>80</sup> The school district's code of ethics states in part, "[t]he coach must be aware that he or she occupies a position of great influence on the education of a student-athlete and therefore should never place the value of winning above the value of instilling the highest ideals of character."<sup>81</sup> Further, "[c]oaches must uphold the honor and dignity of their position. In all contacts with student-athletes, officials, school administrators, competitors and the public, coaches shall set an example of the highest ethical and moral conduct."<sup>82</sup> The coaches were suspended for the rest of the season for intentionally trying to lose.<sup>83</sup>

Questions:

1. If tanking puts a team in a better position in a tournament, is this simply keen strategy by a coach? Should the rules of the tournament be changed to prevent this?

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74. *Id.*

75. *Id.*

76. See Associated Press, *Rowan County Team Takes Little League Softball World Series Title*, CHARLOTTE OBSERVER, Aug. 21, 2015, <http://www.charlotteobserver.com/sports/other-sports/article31596194.html>.

77. See Tom Kreager & Mealand Ragland-Hudgins, *Riverdale, Smyrna Coaches Suspended for 2015-16 Season, District Says*, DAILY NEWS J., Feb. 25, 2015, <http://www.dnj.com/story/sports/high-school/2015/02/25/odom-suspends-smyrna-riverdale-coaches/24000277/>.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*



2. Could you argue that intentionally losing should not be a violation of a code of conduct or sportsmanship generally if in the long run, it benefits the team?

#### *H. Blowouts and the Mercy Rule*

Many states have procedures in place to deal with a blowout score during a sports contest, often known as a *mercy rule*.<sup>84</sup> In Colorado, for example, all varsity sports, except basketball, either terminate a game or proceed with a running clock when the score margin reaches a certain point.<sup>85</sup>

On December 12, 2012, a lopsided final score in a high school girls' basketball game sparked debate over sportsmanship and the need for a mercy rule in Indiana as Bloomington South High School defeated Arlington High 107–2.<sup>86</sup> Though the coach insisted that it would have been more embarrassing if they stopped shooting, he also maintained that his team was not trying to run up the score.<sup>87</sup> Still, with no mercy rule in place in Indiana, there was no clear-cut guidance for the coach on the proper course of action.<sup>88</sup>

In 2015, in California, a coach was suspended for two games for poor sportsmanship after Arroyo Valley (San Bernardino) beat Bloomington High, 161–2.<sup>89</sup> The score was 104–1 at the half.<sup>90</sup> Bloomington had already lost one game that season by ninety-one points and Arroyo Valley had already won four games by seventy or more.<sup>91</sup>

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84. See Rick Anderson, *A High School Football Team So Good That Nobody Wants to Play Them Anymore*, L.A. TIMES, Oct. 11, 2016, <http://www.latimes.com/nation/la-na-lopsided-football-season-20161010-snap-story.html>. See generally *Running Up the Score*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Running\\_up\\_the\\_score](https://en.wikipedia.org/wiki/Running_up_the_score) (last visited July 30, 2018).

85. See Kevin Lytle, *700 Basketball Blowouts: Does High School Hoops Need a Mercy Rule?*, USA TODAY HIGH SCH. SPORTS, Jan. 22, 2016, <http://usatodayhss.com/2016/does-high-school-basketball-need-a-mercy-rule> (“Four states that border Colorado have a version of a running clock in high school basketball, instituting a second-half running clock in games with 30 to 40 point differences.”).

86. ESPN News Services, *107-2 – Bloomington South Girls' Basketball Team Beats Arlington*, ESPN (Dec. 12, 2012), [http://espn.go.com/espn/story/\\_/id/8738942/107-2-bloomington-south-girls-basketball-team-beats-arlington](http://espn.go.com/espn/story/_/id/8738942/107-2-bloomington-south-girls-basketball-team-beats-arlington).

87. *Id.*

88. See, e.g., Alison Moran, *107-2? Should There Be a 'Slaughter Rule' in Indiana HS Basketball?*, CHI.NOW: TOKEN FEMALE (Dec. 13, 2012), <http://www.chicagonow.com/token-female/2012/12/107-2-should-there-be-a-slaughter-rule-in-indiana-hs-basketball/>.

89. See ESPN News Services, *California Girls High School Basketball Coach Suspended Two Games After 161-2 Win*, ESPN (Jan. 17, 2015), [http://espn.go.com/los-angeles/story/\\_/id/12182194/california-girls-high-school-basketball-coach-suspended-two-games-161-2-win](http://espn.go.com/los-angeles/story/_/id/12182194/california-girls-high-school-basketball-coach-suspended-two-games-161-2-win).

90. *Id.*

91. See Tara Fowler, *High School Basketball Coach Suspended After His Team Crushes Another 161-2*, PEOPLE, Jan. 19, 2015, <http://www.people.com/article/high-school-basketball-coach-suspended-161-2>.

In a 2011 high school baseball game in Texas, Dallas Lake Highlands High beat Samuell 54–0.<sup>92</sup> The teams' district changed its mercy rule so games did not have to go five innings to be an official game that according to the coach essentially had forced the team to continue its slaughter into the fifth inning.<sup>93</sup>

In a high school football game in Texas in 2013, Aledo beat Fort Worth Western Hills High 91–0.<sup>94</sup> In response to the blowout, a Western Hills parent filed a bullying complaint against Aledo football coach Tim Buchanan.<sup>95</sup> The principal and the school investigated, as mandated by the state.<sup>96</sup> Texas did not have a mercy rule for eleven-person football games, and the coach was cleared in the end, as it was demonstrated that he put in the second-and third-team offensive line, the offense only had thirty-two snaps, and the starters started coming out in the third quarter.<sup>97</sup> Texas still does not have a mercy rule for eleven-person public school football games.<sup>98</sup>

Questions:

1. Do you feel it is unethical to run up the score, or should players “fight” until the end of a game?
2. Does winning by 100 points serve any educational purpose?
3. Does your state high school athletics association have a mercy rule? What key provisions should a mercy rule include?
4. Should schools or sport organizations be liable for intentional infliction of emotional distress for scheduling mismatches?

92. See Corbett Smith, *No Misprint: Lake Highlands Defeats Samuell Baseball by 50-plus Runs*, DALL. NEWS: SPORTSDAY HS, Mar. 9, 2011, <http://sportsday.dallasnews.com/high-school/highschool-headlines/2011/03/09/no-misprint-lake-highlands-defeats-samuell-baseball-by-50-plus-runs>.

93. *Id.* (quoting Highland High Coach, Jay Higgins, “The National Federation, which is the rule book we go by, says you have to play five innings before the game is considered official.”); see also Bob Cook, *53–0: A High School Baseball Score, a Lesson in Rich and Poor*, FORBES, Apr. 11, 2011, <http://www.forbes.com/sites/bobcook/2011/04/11/53-0-a-high-school-baseball-score-a-lesson-in-rich-and-poor/#1bca4e3454f0>.

94. See Richard Durrett, *Aledo Football Coach Tim Buchanan Accused of Bullying After 91–0 Win*, ESPN (Oct. 22, 2013), [http://espn.go.com/dallas/story/\\_/id/9863505/aledo-football-coach-tim-buchanan-accused-bullying-91-0-win](http://espn.go.com/dallas/story/_/id/9863505/aledo-football-coach-tim-buchanan-accused-bullying-91-0-win).

95. *Id.*

96. *Id.*

97. See Associated Press, *Texas School Officials Reject Bullying Charge Over 91-0 Football Beatdown*, CBS NEWS, Oct. 23, 2013, <http://www.cbsnews.com/news/texas-school-officials-reject-bullying-charge-over-91-0-football-beatdown/>.

98. See Corbett Smith, *No ‘Aledo rule’: the UIL Rejects Proposals to Create Mercy Rule in 11-Man Football*, DALL. NEWS: SPORTSDAY HS, June 11, 2014, <https://sportsday.dallasnews.com/high-school/high-school-headlines/2014/06/11/no-aledo-rule-the-uil-rejects-proposals-to-create-mercy-rule-in-11-man-football>.

### *I. Handshakes*

Finally, one might think that shaking hands before or after a sports contest is the ultimate example of sportsmanship. In October 2013, however, the Kentucky High School Athletic Association (KHSAA) issued a “directive” that there be no more organized postgame handshakes.<sup>99</sup> Citing more than two dozen incidents over the past three years, the KHSAA essentially banned handshakes after games and meets in baseball, basketball, football, soccer, softball, volleyball, and wrestling.<sup>100</sup> Still, if Kentucky teams decide to shake hands and there are no altercations, no action will be taken.<sup>101</sup>

Questions:

1. Does it violate principles of sportsmanship in the first place to regulate post-contest handshakes?
2. Is there a better way to avoid post-game brawls than issuing a directive to prevent organized high school handshakes?

### III. INTERCOLLEGIATE SPORT

Areas for exploration of ethical and legal issues in college sports are abundant. Colleges and universities—including athletic conferences—around the country often represent some of the most diverse and inclusive areas of American society, and have policies reflecting diversity as well.<sup>102</sup> Sometimes errors in judgment by coaches and student-athletes become a national embarrassment.<sup>103</sup> Allegations,<sup>104</sup> and in many instances, revelations of

99. See Evan Hilbert, *Kentucky High Schools Put an End to Postgame Handshakes*, CBS SPORTS (Oct. 8, 2013), <http://www.cbssports.com/general/news/kentucky-high-schools-put-an-end-to-postgame-handshakes/> (“Citing more than 20 fights and other altercations over the past three years, the KHSAA has banned handshakes after games and meets in baseball, basketball, football, soccer, softball, volleyball and wrestling.” *Id.* The article continues, however, stating, “[t]here is a bit of a loophole, though it requires everyone acting appropriately after games. If teams decide to shake hands and there are no altercations, no action will be taken.”).

100. *Id.*

101. *Id.* (offering that if there is an altercation, however, that the athletic departments will be punished).

102. See McKenzie Sanderson, *MAC Announces New Diversity, Inclusion Program for Fall 2017*, CM-LIFE (Nov. 2, 2016), [http://www.cm-life.com/article/2016/11/mac-diversity-and-inclusion-11-2-16?\\_h=7387b48d-0d60-4051-8451-4e83f7325917](http://www.cm-life.com/article/2016/11/mac-diversity-and-inclusion-11-2-16?_h=7387b48d-0d60-4051-8451-4e83f7325917).

103. See USA Today Sports, *Texas A&M President Weighs in on Chalk Talk Debacle*, USA TODAY, Aug. 2, 2016, <http://www.usatoday.com/story/sports/ncaaf/sec/2016/08/02/texas-am-president-chalk-talk-football-coach-sex/87943688/> (reporting that two assistant football coaches “used crude sexual innuendo during the football program’s ‘Chalk Talk for Women’ event” and “were suspended for two weeks without pay.”).

104. See Adam Himmelsbach, *Louisville: ‘No Next Step Planned’ for Kellie Young*, USA TODAY, Oct. 8, 2013, <http://www.usatoday.com/story/sports/college/lacrosse/2013/10/08/kellie-young-louisville-cardinals-lacrosse-coach-plans/2948629/> (reporting allegations of misconduct by women’s lacrosse coach Kellie Young using abusive language and tactics with student-athletes).

coaching-related impropriety, have been met with wrongful discharge and retaliation claims by coaches.<sup>105</sup> There has been a call for greater accountability and change.<sup>106</sup>

Moving from the last section to collegiate athletics, many of the following situations focus on ethical considerations specifically related to the National Collegiate Athletic Association (NCAA) and its rules known formally as *bylaws*.<sup>107</sup> As the largest and most influential intercollegiate organization, the NCAA has had to evolve over decades of changing times and perceptions related to the relationship between the amateur student-athlete and his or her institution.<sup>108</sup> We first explore some specific provisions in the Division I NCAA Manual.

### A. NCAA and Sportsmanship

The term sportsmanship is mentioned twenty-nine times in the 2017–2018 NCAA Manual.<sup>109</sup> The principles of sportsmanship and ethical conduct appear in several NCAA bylaws, including:

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105. See ESPN News Services, *Judge in Former San Diego State Coach Beth Burns' Case Files Tentative Ruling to Deny California State University System's Motion to Abandon \$3.35 Million Verdict*, ESPN (Dec. 2, 2016), [http://www.espn.com/college-sports/story/\\_/id/18185535](http://www.espn.com/college-sports/story/_/id/18185535) (“Burns, the winningest women’s basketball coach in the school’s history, was fired in April 2013 with four years left on a contract that paid her \$220,000 plus bonuses and benefits. She sued for wrongful termination and whistleblower retaliation for complaining about potential Title IX violations.”).

106. See Press Release, Drake Group, *Drake Group Calls for Strong Actions to Address Collegiate Coaching Misconduct* (Dec. 1, 2016) (on file with the University of New Haven College of Business), [http://myemail.constantcontact.com/The-Drake-Group-Press-Announcement.html?soid=1121233932461&aid=at5\\_8Gk83c4](http://myemail.constantcontact.com/The-Drake-Group-Press-Announcement.html?soid=1121233932461&aid=at5_8Gk83c4) (“[A]dequate evidence shows that the coaching profession is without clear and consistent standards and that absent such guidelines, too many coaches, albeit a minority, are crossing the line that separates good practice from harm to athletes.”).

107. See NCAA, 2017–18 NCAA DIVISION I MANUAL art. 1, 1.3.1, at 1 (August 1, 2017) (“A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”).

108. See, e.g., Adam Epstein & Kathryn Kisska-Schulze, *Northwestern University, The University of Missouri, and the “Student-Athlete”: Mobilization Efforts and the Future*, 26 J. LEGAL ASPECTS OF SPORT 71 (2016).

109. A search of the NCAA Manual yielded the number of times the following words are used: Student-athlete: 3,530; Violation: 343; Amateur: 197 (including amateurism); Compliance: 121; Responsibility: 82; Penalty: 77; Commitment: 63 (to rules compliance, fair competition, integrity, sound academic standards . . . ); Positive: 31 (but mostly “positive” in relation to a drug test); Sportsmanship: 29; Integrity: 21; Misconduct: 19; Ethic: mentioned 25 (ethical, unethical); Protect: 15 (e.g., protect the health of, protect the integrity of) (includes “protected”); Respect: 14 (excluded “respectively”); Duty: 12; Honest: 11 (honesty, dishonesty); Law: 10 (excluding bylaw, however); Fairness: 9; Good-faith: 8; Fraud: 8 (fraudulent, fraudulence); Cooperation: 7; Guilty: 7; Fair Play: 5; Dignity: 4; Criminal: 3 (not crime); Police: 3 (but two of the three are misuse/misspellings of “policies” such as “certain fundamental policies, practices and principles . . .”).

## 2.4 The Principle of Sportsmanship and Ethical Conduct.

For intercollegiate athletics to promote the character development of participants, to enhance the integrity of higher education and to promote civility in society, student-athletes, coaches, and all others associated with these athletics programs and events should adhere to such fundamental values as respect, fairness, civility, honesty and responsibility. These values should be manifest not only in athletics participation, but also in the broad spectrum of activities affecting the athletics program. It is the responsibility of each institution to:

- (a) Establish policies for sportsmanship and ethical conduct in intercollegiate athletics consistent with the educational mission and goals of the institution; and
- (b) Educate, on a continuing basis, all constituencies about the policies in Constitution 2.4-(a).<sup>110</sup>

### 10.01.1 Honesty and Sportsmanship.

Individuals employed by (or associated with) a member institution to administer, conduct or coach intercollegiate athletics and all participating student-athletes shall act with honesty and sportsmanship at all times so that intercollegiate athletics as a whole, their institutions and they, as individuals, shall represent the honor and dignity of fair play and the generally recognized high standards associated with wholesome competitive sports.<sup>111</sup>

### 20.9.1.4 The Commitment to Integrity and Sportsmanship.

It is the responsibility of each member institution to conduct its athletics programs and manage its staff members, representatives and student-athletes in a manner that promotes the ideals of higher education and the integrity of intercollegiate athletics. Member institutions are committed to encouraging behavior that advances the interests of the Association, its membership and the Collegiate Model of athletics. All individuals associated with intercollegiate athletics programs and events should adhere to such fundamental values as respect, fairness, civility, honesty, responsibility, academic integrity and

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110. NCAA, *supra* note 107, art. 2, 2.4, at 3-4.

111. *Id.* art. 10, 10.01.1, at 45.

ethical conduct. These values should be manifest not only in athletics participation, but also in the broad spectrum of activities affecting the athletics programs.<sup>112</sup>

Unfortunately for the NCAA and its member institutions, such lofty goals and aspirations do not prevent its member institutions or individuals at those schools from engaging in misconduct in a variety of ways. Still, it is noteworthy that NCAA bylaws and policies evolve and change to meet the needs of its members.<sup>113</sup> This included the elimination of a short-lived rule in basketball that prohibited dunking during pre-game warm-ups and assessed a technical foul as the violation because dunking was considered a violation of sportsmanship.<sup>114</sup>

Questions:

1. Is it important for the NCAA to promote and publish its principles of sportsmanship and ethical conduct in writing?
2. Can you provide examples of misconduct by student-athletes or coaches at the intercollegiate level?
3. To what degree do you think that student-athletes and coaches are aware of the NCAA's principles of sportsmanship?

#### *B. Sexual Misconduct by Coaches and Student-Athletes*

Just as in Part II, sexual misconduct occurs at the next level of athletic competition as well. In 2012, former Penn State University (PSU) assistant football coach Jerry Sandusky was found guilty of forty-five charges of sexual abuse involving child-molestation.<sup>115</sup> PSU was fined \$2.4 million by the Department of Education for mishandling the case and ignoring its duties under the Clery Act.<sup>116</sup> However, the man who blew the whistle on Sandusky, former

112. *Id.* art. 20, 20.9.1.4, at 360.

113. *See, e.g.*, Cyd Zeigler, *A College Football Official Explains the NCAA's 5 New Rules to Know for 2016*, SB NATION (July 13, 2016), <http://www.sbnation.com/college-football/2016/7/13/12113306/college-football-rules-changes-2016> (discussing Rule 9-2-6 which states that college football coaches can be ejected for their on-field unsportsmanlike misbehavior starting in 2016, if the coach receives two unsportsmanlike conduct penalties within the same game).

114. *See* Rodger Sherman, *College Basketball Got Rid of One of Its Dumbest, Least Fun Rules. Dunk Away!*, SB NATION (June 9, 2015), <http://www.sbnation.com/2015/6/9/8752983/ncaa-college-basketball-dunk-warmups-technical-foul>.

115. Associated Press, *Penn State Fined Record \$2.4 Million for Handling of Jerry Sandusky Case*, ESPN (Nov. 4, 2016), [http://www.espn.com/college-football/story/\\_/id/17963936](http://www.espn.com/college-football/story/_/id/17963936).

116. *Id.*; *see* Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f) (2018) (Named after Jeanne Clery, a nineteen-year-old Lehigh Univ. student who was raped and murdered in 1986 in her residence hall. The Clery Act requires all colleges and universities

assistant Mike McQueary, paid a heavy price for revealing the wrongdoing.<sup>117</sup> After a decade of suffering, in 2016 a judge ruled that PSU had to pay McQueary \$4.974 million<sup>118</sup> in addition to a jury which awarded him \$7.3 million for his defamation, misrepresentation and retaliation claims.<sup>119</sup>

Then, two high profile administrators, former PSU athletics director Tim Curley, and university vice president Gary Schultz, pled guilty to misdemeanor child endangerment.<sup>120</sup> Both were sentenced to serve between six and twenty-three months in prison, a \$5,000 fine, and two hundred hours of community service.<sup>121</sup> Former university president, Graham Spanier, was charged with conspiracy and felony child endangerment, but chose to stand trial; a jury convicted him for a single misdemeanor for endangering the welfare of a child.<sup>122</sup> He was ordered to serve a mandatory two months in prison and two months of probation in a four-to-twelve month sentence, fined \$7,500, and perform two hundred hours of community service.<sup>123</sup>

The PSU situation represented only one of many high-profile examples of sex-related misconduct at many prominent universities in recent years. For example, in September 2013, Occidental College (Los Angeles) agreed to a confidential settlement with 37 students and alumni over allegations the school

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that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses and compliance is monitored by the United States Department of Education).

117. Associated Press, *Jury Rules in Favor of Ex-Penn State Assistant Mike McQueary in Defamation Case*, ESPN (Oct. 28, 2016), [http://www.espn.com/college-football/story/\\_/id/17905245/jury-rules-favor-ex-penn-state-assistant-mike-mcqueary-defamation-case](http://www.espn.com/college-football/story/_/id/17905245/jury-rules-favor-ex-penn-state-assistant-mike-mcqueary-defamation-case).

118. See Dan Wetzel (@DanWetzel), TWITTER, (Nov. 30, 2016, 1:25 PM), <https://twitter.com/DanWetzel/status/804074015950249984> (displaying a copy of the damages form filled in manually by the jury).

119. See Marc Tracy, *Mike McQueary Is Awarded \$7.3 Million in Penn State Defamation Case*, N.Y. TIMES, Oct. 27, 2016, <http://www.nytimes.com/2016/10/28/sports/ncaafootball/mike-mcqueary-penn-state-verdict.html?smid=tw-nytsports&smtyp=cur>; see also Angela Couloumbis, *Judge Orders Penn State to Pay McQueary Another \$5 Million*, PHILLY, Dec. 1, 2016, [http://www.philly.com/philly/news/20161201\\_Judge\\_orders\\_Penn\\_State\\_to\\_pay\\_McQueary\\_another\\_5\\_million.html](http://www.philly.com/philly/news/20161201_Judge_orders_Penn_State_to_pay_McQueary_another_5_million.html).

120. Mark Scolforo & Marc Levy, *2 Penn St. Ex-Administrators Plead Guilty in Sex Abuse Case*, YAHOO! NEWS (Mar. 13, 2017), <https://www.yahoo.com/news/penn-st-ex-athletic-director-pleads-guilty-abuse-153826713.html>.

121. See Suhauna Hussain, *Graham Spanier, 2 Other Ex-Penn State Officials Get Jail Time in Sandusky Case*, CHRON. OF HIGHER EDUC.: TICKER (June 2, 2017), [http://www.chronicle.com/blogs/ticker/graham-spanier-2-other-ex-penn-state-officials-get-jail-time-in-sandusky-case/118771?cid=at&utm\\_source=at&utm\\_medium=en&elqTrackId=5a43e0dc742e4662ab887837077ee310&elq=21fa81ba68c64f479833e3ab7cb70e86&elqaid=14184&elqat=1&elqCampaignId=5951](http://www.chronicle.com/blogs/ticker/graham-spanier-2-other-ex-penn-state-officials-get-jail-time-in-sandusky-case/118771?cid=at&utm_source=at&utm_medium=en&elqTrackId=5a43e0dc742e4662ab887837077ee310&elq=21fa81ba68c64f479833e3ab7cb70e86&elqaid=14184&elqat=1&elqCampaignId=5951).

122. See Sara Ganim & Evan Simko-Bednarski, *Former Penn State President Spanier Convicted in Sandusky Case*, CNN (Mar. 24, 2017), <http://www.cnn.com/2017/03/24/us/former-penn-state-president-convicted/>.

123. See Hussain, *supra* note 121.

deliberately discouraged women from reporting sexual assaults.<sup>124</sup> In July 2014, the University of Connecticut agreed to pay \$1.28 million to settle a lawsuit filed by five students who alleged the school treated their claims of sexual assault and harassment with indifference.<sup>125</sup> In 2015, the University of Oregon settled a lawsuit brought by a female student who said she was gang-raped by three basketball players for \$800,000.<sup>126</sup> That same year, strippers were utilized at the University of Louisville during the basketball recruiting process.<sup>127</sup>

Sex-related misconduct and sexual abuse scandals continued to dominate sports headlines in 2016. Florida State University agreed to pay \$950,000 to settle a Title IX lawsuit filed by a former student who accused former Seminoles football star Jameis Winston of raping her in 2012.<sup>128</sup> That settlement also commits Florida State to five years of sexual assault awareness programs and to publish annual reports on those programs, although the university did not admit liability.<sup>129</sup> While Winston was never criminally charged, it is important to note the difference between the civil law “preponderance of the evidence standard” used in Title IX civil suits and the “beyond a reasonable doubt” standard applied in criminal cases.<sup>130</sup>

124. See Jason Felch & Jason Song, *Occidental College Settles in Sexual Assault Cases*, L.A. TIMES, Sept. 18, 2013, <http://articles.latimes.com/2013/sep/18/local/la-me-occidental-settlement-20130919>.

125. See Jake New, *U. of Connecticut to Pay \$1.3 Million to Settle Sexual Assault Lawsuit*, INSIDE HIGHER ED (July 21, 2014), <https://www.insidehighered.com/news/2014/07/21/u-connecticut-pay-13-million-settle-sexual-assault-lawsuit>.

126. See Richard Read, *Student Who Sued UO, Claiming She Was Gang-Raped by Basketball Players, Settles Suit for \$800,000*, OREGONLIVE, Aug. 5, 2015, [http://www.oregonlive.com/education/index.ssf/2015/08/student\\_receives\\_800000\\_settle.html](http://www.oregonlive.com/education/index.ssf/2015/08/student_receives_800000_settle.html).

127. See Kevin Trahan, *The NCAA's Handling of Louisville's Sex Scandal Proves Its Sanctions Hypocrisy*, VICE SPORTS (Oct. 21, 2016), [https://sports.vice.com/en\\_us/article/the-ncaas-handling-of-louisvilles-sex-scandal-proves-its-sanctions-hypocrisy](https://sports.vice.com/en_us/article/the-ncaas-handling-of-louisvilles-sex-scandal-proves-its-sanctions-hypocrisy); see also Mark Schlabach, *Louisville Cardinals Rick Pitino Fail Once Again in Response to NCAA Punishment for Sex Scandal*, ESPN (June 15, 2017), [http://www.espn.com/mens-college-basketball/story/\\_/id/19645627/louisville-cardinals-rick-pitino-fail-once-again-response-ncaa-punishment-sex-scandal](http://www.espn.com/mens-college-basketball/story/_/id/19645627/louisville-cardinals-rick-pitino-fail-once-again-response-ncaa-punishment-sex-scandal).

For hiring strippers and prostitutes to attend more than a dozen sex parties with recruits and players at an on-campus dormitory over a five-year period, Louisville was placed on four years' probation by the NCAA, and Pitino was suspended from coaching in the first five ACC games this coming season. In addition to other penalties, the Cardinals were ordered to forfeit four scholarships (overall during the four-year probation) and may have to vacate as many as 108 regular-season victories and 15 NCAA tournament wins – including their 2013 national championship.

Schlabach, *supra*.

128. See Rachel Axon, *Florida State Agrees to Pay Winston Accuser \$950,000 to Settle Suit*, USA TODAY, Jan. 25, 2016, <http://www.usatoday.com/story/sports/ncaaf/2016/01/25/florida-state-settles-title-ix-lawsuit-erica-kinsman-jameis-winston/79299304/>.

129. *Id.*

130. See OCR, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, BACKGROUND, SUMMARY, AND FAST FACTS (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf>.



Similarly, the University of Tennessee settled a multimillion-dollar lawsuit, alleging that coaches and university officials created a culture of sexual violence at on-campus and off-campus parties and in athlete dorms, including underage drinking, drug use, and alleged assaults.<sup>131</sup> Further, Baylor University terminated its relationship with head football coach Art Briles after it was revealed the program engaged in repeated cover-ups of sexual assault.<sup>132</sup> Harvard University canceled its men's soccer season after it discovered the players continued to rank female players based upon their sex appeal and appearance, even after the 2012 team did the same thing, resulting in an investigation by the Office of General Counsel.<sup>133</sup> Incidents were discovered and punishment followed accordingly at Princeton in swimming and diving,<sup>134</sup> Columbia wrestling,<sup>135</sup> Amherst cross-country,<sup>136</sup> and within men's soccer at Washington University of St. Louis as well.<sup>137</sup>

Questions:

1. Why are sexism, sexual assault and sexual misconduct so prevalent on college campuses, and among university athletic programs?

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131. See Mark Schlabach, *University of Tennessee Reaches Financial Settlement in Lawsuit Regarding School's Handling of Sexual Assault Cases*, ESPN (July 6, 2016), [http://www.espn.com/college-sports/story/\\_/id/16809872/university-tennessee-reaches-financial-settlement-lawsuit-regarding-school-handling-sexual-assault-cases](http://www.espn.com/college-sports/story/_/id/16809872/university-tennessee-reaches-financial-settlement-lawsuit-regarding-school-handling-sexual-assault-cases).

132. See Marc Tracy, *Baylor Sexual Assault Report Produces Punishment, But No Paper Trail*, N.Y. TIMES, July 15, 2016, [http://www.nytimes.com/2016/07/16/sports/ncaafootball/baylor-sexual-assault-report-no-paper-trail.html?\\_r=0](http://www.nytimes.com/2016/07/16/sports/ncaafootball/baylor-sexual-assault-report-no-paper-trail.html?_r=0). But see Associated Press, *Art Briles Suing Baylor Officials for Libel and Conspiracy*, SPORTS ILLUSTRATED, Dec. 8, 2016, <http://www.si.com/college-football/2016/12/08/art-briles-suing-baylor-officials-libel-and-conspiracy>.

133. See Andrew M. Duehren, C. Ramsey Fahs, & Daphne C. Thompson, *Harvard Cancels Men's Soccer Season After Finding Sexually Explicit 'Reports' Continued Through 2016*, HARV. CRIMSON, Nov. 4, 2016, <http://www.thecrimson.com/article/2016/11/4/soccer-suspended-scouting-report-harvard/>.

134. See Christopher Mele, *Princeton Is Latest Ivy League School to Suspend Team Over Vulgar Material*, N.Y. TIMES, Dec. 15, 2016, [https://www.nytimes.com/2016/12/15/sports/princeton-mens-swimming-suspended.html?\\_r=0](https://www.nytimes.com/2016/12/15/sports/princeton-mens-swimming-suspended.html?_r=0).

135. See Seth Berkman, *Columbia Disciplines Wrestlers and Clears Team to Return to Competition*, N.Y. TIMES, Nov. 18, 2016, [https://www.nytimes.com/2016/11/19/sports/columbia-wrestlers-apologize-for-texts-in-open-letter.html?\\_r=0](https://www.nytimes.com/2016/11/19/sports/columbia-wrestlers-apologize-for-texts-in-open-letter.html?_r=0).

136. See Felicia Gans, *Amherst Men's Cross-Country Team on Probation for Four Semesters, College Officials*, BOS. GLOBE, Jan. 10, 2017, <https://www.bostonglobe.com/metro/2017/01/09/amherst-men-cross-country-team-probation-for-four-semesters-college-officials-say/JJEwJqVgl4UG6rCM76WyEP/story.html>.

137. See Lori S. White, *University Concludes Investigation of Complaint Submitted by Women's Soccer Team*, SOURCE, Feb. 6, 2017, <https://source.wustl.edu/2017/02/statement-from-lori-s-white-soccer-investigation>.

2. Should head coaches be responsible for the sexual misconduct of their student-athletes when incidents occur off-campus?
3. What can be done to curb sexist or misogynistic behavior in sport?

### *C. Academic Misconduct or Fraud*

In recent years, as in years past, NCAA member schools have committed egregious violations of NCAA rules including various instances of academic fraud or other academic-related misconduct.<sup>138</sup> However, the role of the NCAA in academic fraud investigations is not entirely clear.<sup>139</sup> Prominent institutions such as the University of North Carolina, the University of Notre Dame,<sup>140</sup> and the University of Missouri offer examples of “shenanigans” with regard to the *student* part of the student-athlete.<sup>141</sup> In 2016, the NCAA’s Division I Council adopted new rules designed to update its academic integrity policies for the first time since 1983 in which member colleges must now “maintain and adhere to written academic integrity policies that apply to the entire student body.”<sup>142</sup>

In 2014, Weber State University (WSU) in Ogden, Utah paid the price for violations of NCAA rules related to academic fraud.<sup>143</sup> A former developmental

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138. See B. David Ridpath, *Irish, Tigers and Tar Heels—Oh My! More Academic Shenanigans in College Sports!*, FORBES, Nov. 23, 2016, <http://www.forbes.com/sites/bdavidridpath/2016/11/23/irish-tigers-and-tar-heels-oh-my-more-academic-shenanigans-in-college-sports/#31b39b9b692a> (“[T]here seems to be no shortage of these stories . . .”).

139. See Sean Dotson, *The NCAA’s Ill-Defined Role in Academic Fraud Cases*, SPORTS ESQUIRES (Apr. 16, 2015), <http://thesportsesquires.com/the-ncaas-ill-defined-role-in-academic-fraud-cases>.

140. See NCAA, *University of Notre Dame Public Infractions Decision*, NCAA (Nov. 22, 2016), [https://www.ncaa.org/sites/default/files/2016INF\\_PublicInfractionsDecisionNotreDame\\_20161122.pdf](https://www.ncaa.org/sites/default/files/2016INF_PublicInfractionsDecisionNotreDame_20161122.pdf) (summarizing that NCAA rules Notre Dame must vacate 2012 & 2013 football victories due to academic misconduct); Emily James, *Former Notre Dame Athletic Training Student Acted Unethically, Committed Academic Misconduct*, NCAA (Nov. 22, 2016), <http://www.ncaa.org/about/resources/media-center/news/former-notre-dame-athletic-training-student-acted-unethically-committed-academic-misconduct>.

141. See Ridpath, *supra* note 138; see also Dave Matter & Ashley Jost, *Former Mizzou Athletics Tutor Said Her Superiors Groomed Her for ‘Academic Dishonesty’*, ST. LOUIS POST-DISPATCH, Nov. 23, 2016, [http://www.stltoday.com/news/local/education/former-mizzou-athletics-tutor-said-her-superiors-groomed-her-for/article\\_c72e9a21-9776-5835-9120-d659f27fe469.html?utm\\_medium=social&utm\\_source=twitter&utm\\_campaign=user-share](http://www.stltoday.com/news/local/education/former-mizzou-athletics-tutor-said-her-superiors-groomed-her-for/article_c72e9a21-9776-5835-9120-d659f27fe469.html?utm_medium=social&utm_source=twitter&utm_campaign=user-share) (reporting by tutor of academic dishonesty involving online tests and entrance exams, and characterizing the tutor as a whistleblower).

142. See Michelle Brutlag Hosick, *DI Council Adopts Academic Integrity Proposal*, NCAA (Apr. 8, 2016), <http://www.ncaa.org/about/resources/media-center/news/di-council-adopts-academic-integrity-proposal>.

143. See Epstein, *supra* note 14; see also Steve Luhm, *Weber State Football Put on NCAA Probation, Loses Scholarships*, SALT LAKE TRIB., Nov. 19, 2014, <http://www.sltrib.com/sports/1845841-155/academic-ncaa-state-weber-football-fraud>.

math instructor committed violations in the spring of 2013, in which the instructor completed online quizzes, tests, and exams for five student-athletes who gave her their usernames and passwords.<sup>144</sup> The NCAA Committee on Infractions (Committee) found that WSU committed violations of NCAA rules constituting academic fraud resulting in penalties including three years of probation and the loss of nine scholarships.<sup>145</sup> The Level I<sup>146</sup> violations included NCAA bylaws 10.1 and 10.1 (b)<sup>147</sup> dealing with unethical conduct by the university because the student-athletes received fraudulent academic credit.<sup>148</sup> Bylaw 10.1 and 10.1(b) stated, at that time:

10.1 Unethical Conduct. Unethical conduct by a prospective or enrolled student-athlete or a current or former institutional staff member, which includes any individual who performs work for the institution or the athletics department even if he or she does not receive compensation for such work, may include, but is not limited to, the following: . . . (b) Knowing involvement in arranging for fraudulent academic credit or false transcripts for a prospective or an enrolled student-athlete.<sup>149</sup>

The Committee did not agree with the NCAA enforcement staff's original assertion that WSU failed to monitor the academic coursework of student-athletes because WSU did have a compliance system in place and WSU took "swift, decisive action" after discovering the violations, including self-reporting to the NCAA.<sup>150</sup> Therefore, the Committee concluded WSU did not violate NCAA bylaw 2.8.1 (Responsibility of Institution).<sup>151</sup> After looking

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144. *Id.*

145. *Id.* (noting that Weber State did self-report the "academic irregularities" and quoting Weber State president Charles A. Wright, "We take full responsibility for the incident," and "While we regret that it occurred, it is reassuring to know the systems we have in place quickly detected these unethical activities. We must remain vigilant going forward.").

146. In 2013, the NCAA modified its violation of rules structure to move from two levels of misconduct to four levels of misconduct, with Level I being the most serious and characterized as "Severe breach of conduct." See NCAA, *New Violation Structure*, NCAA (Aug. 1, 2013), <http://www.ncaa.org/about/resources/media-center/news/new-violation-structure>.

147. See NCAA, *Weber State University Public Infractions Decision*, NCAA (Nov. 19, 2014), <https://www.ncaa.org/sites/default/files/Weber%20State%20University%20Infractions%20Decision%20PUBLIC.PDF> ("Level I violations seriously undermine or threaten the integrity of the NCAA Collegiate Model and include any violation that provides or is intended to provide a substantial or extensive advantage.").

148. *Id.*

149. *Id.* at 6.

150. *Id.* at 7.

151. *Id.* Note that NCAA Manual bylaw 2.8.1 states:

Each institution shall comply with all applicable rules and regulations of the Association in the conduct of its intercollegiate athletics programs. It shall monitor its programs to assure

at both aggravating and mitigating factors<sup>152</sup> (bylaws 19.9.3 and 19.9.4 respectively), the Committee penalized WSU under its Level I structure.<sup>153</sup>

In 2016, the NCAA found two staff members at Georgia Southern provided “impermissible academic assistance” by completing assignments for three football players.<sup>154</sup> The same year, the University of Mississippi punished itself for twenty-eight NCAA infractions, including academic fraud.<sup>155</sup> It received a Notice of Allegations (NOA) from the NCAA and decided to forfeit 11 football scholarships in addition to its already established postseason ban for its women’s basketball team.<sup>156</sup>

Also in 2016, former head basketball coach Donnie Tyndall was penalized for cheating at the University of Southern Mississippi (USM) from 2012-2014.<sup>157</sup> The NCAA handed Tyndall a ten-year show-cause order, which prohibits any school from hiring him during that period.<sup>158</sup> Additionally, three former Tyndall USM assistants were penalized.<sup>159</sup> The NCAA found that under Tyndall’s watch, assistant or graduate-assistant coaches traveled across the

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compliance and to identify and report to the Association instances in which compliance has not been achieved. In any such instance, the institution shall cooperate fully with the Association and shall take appropriate corrective actions. Members of an institution’s staff, student-athletes, and other individuals and groups representing the institution’s athletics interests shall comply with the applicable Association rules, and the member institution shall be responsible for such compliance.

NCAA, *supra* note 107, art. 2, 2.8.1.

152. NCAA, *supra* note 147, at 8-9.

153. *Id.* at 10. Regarding the show-cause order:

If she is [sic] secures a position with a member institution with responsibilities in the institution’s athletics department during the time period of her show-cause order, upon employment she must inform that institution’s athletics department that she is under a five-year show-cause order. In this circumstance, the involved institution shall be required to appear before a panel to consider whether the member institution shall be subject to the show-cause order set forth in NCAA Bylaw 19, which could limit the individual’s ability to perform responsibilities in the institution’s athletics department for the designated period of time.

*Id.*

154. See Emily James, *Former Georgia Southern Staff Members Provided Impermissible Academic Assistance*, NCAA (July 7, 2016), <http://www.ncaa.com/news/ncaa/article/2016-07-07/former-georgia-southern-staff-members-provided-impermissible-academic>.

155. See Jake New, *U of Mississippi Announces Penalties for NCAA Violations*, INSIDE HIGHER ED (May 31, 2016), <https://www.insidehighered.com/news/2016/05/31/u-mississippi-announces-penalties-ncaa-violations>.

156. *Id.*

157. See Dan Wolken, *How Donnie Tyndall’s NCAA Case May Be Warning to All Head Coaches*, USA TODAY, Sept. 7, 2016, <http://www.usatoday.com/story/sports/ncaab/2016/09/07/donnie-tyndalls-ncaa-infractions-case-show-cause-morehead-state-southern-miss-tennessee-basketball/89963638>.

158. *Id.*

159. *Id.*

country to physically complete academic work for seven junior-college prospects to become eligible, facilitated cash and pre-paid credit card payments to prospects, and also deleted emails related to the investigation and lied to NCAA investigators.<sup>160</sup>

For eighteen years, employees at the University of North Carolina at Chapel Hill (UNC) knowingly steered thousands of students, including 1,500 student-athletes, toward “paper courses”, independent studies that never met and required a research paper to receive a high grade.<sup>161</sup> An internal investigation into UNC’s Department of African and Afro-American Studies showed that while the majority of students enrolled in these courses were not student-athletes, UNC men’s basketball players accounted for more than twelve percent of all student-athletes taking the courses. Many of the suspect classes were taught in the summer by former department chairman Julius Nyang’oro, who subsequently resigned.<sup>162</sup>

Upon discovery of the academic impropriety, UNC launched several investigations,<sup>163</sup> including an independent report authored by Kenneth Wainstein who conducted an eight-month investigation into the scandal, which led to four employees being fired, five others disciplined, and one former employee having an honorary status removed.<sup>164</sup> The university also enacted over seventy new policies and procedures to prevent academic impropriety in the future.<sup>165</sup> While the NCAA accused UNC of lacking institutional control over athletics,<sup>166</sup> UNC’s response to the NCAA allegations accuses the NCAA

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160. See Emily James, *Former Southern Mississippi Men’s Basketball Coach Acted Unethically*, NCAA (Apr. 8, 2016), <http://www.ncaa.org/about/resources/media-center/news/former-southern-mississippi-men-s-basketball-coach-acted-unethically>.

161. See, e.g., Jake New, *More Than a Dozen Athletic Programs Have Committed Academic Fraud in Last Decade, with More Likely to Come*, INSIDE HIGHER ED (July 8, 2016), <https://www.insidehighered.com/news/2016/07/08/more-dozen-athletic-programs-have-committed-academic-fraud-last-decade-more-likely>.

162. *Id.*

163. See, e.g., *Our Commitment: Taking Action and Moving Forward Together*, UNIV. OF N.C. AT CHAPEL HILL, <http://carolinacommitment.unc.edu> (last visited July 30, 2018).

164. See KENNETH L. WAINSTEIN ET AL., 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), <http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/UNC-FINAL-REPORT.pdf>; see also Sara Ganim & Devon Sayers, *UNC Athletics Report Finds 18 Years of Academic Fraud*, CNN (Oct. 23, 2014), <http://www.cnn.com/2014/10/22/us/unc-report-academic-fraud>.

165. See *Our Commitment: Taking Action and Moving Forward Together*, *supra* note 163.

166. *Id.*

of reaching beyond the scope of its regulatory authority in an internal, institutional-specific academic issue.<sup>167</sup>

As a result of these incidents and others, the NCAA recently adopted the expression “impermissible academic assistance” into its bylaws, broadening the scope of “academic fraud.”<sup>168</sup> The most recent relevant bylaw provision states,

16.01.1.1.1 Application to Impermissible Academic Assistance. [A] The restitution provisions of Bylaw 16 do not apply to an extra benefit violation in which a student-athlete receives an impermissible academic arrangement or assistance from an institutional staff member or representative of an institution’s athletics interests. In such a situation, reinstatement of the involved student-athlete’s eligibility for competition is required.<sup>169</sup>

One wonders why NCAA member institutions have been involved in so many cases of academic fraud in recent years and whether the role of the NCAA with regard to academic fraud investigations might change in the future.

Questions:

1. Why is academic fraud so common in college sports?
2. Should the NCAA punish the universities more harshly for academic fraud than other acts of impropriety, or is that best left to the universities themselves to monitor and control?
3. How might athletics administrators, coaches and faculty members discourage student-athletes from committing academic fraud?
4. What legal authority does the NCAA have to regulate academic affairs of its member institutions?

#### *D. Coaching Abuse*

College coaches, including assistant coaches, especially at the Division I level in football, can be very well paid, and such high pay has been the subject

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167. *Id.*; see also RICK EVRARD & BOB KIRCHNER, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL RESPONSE TO NCAA AMENDED NOTICE OF ALLEGATIONS, SCHOENECK & KING, PLLC (Aug. 1, 2016), <http://carolinacommithment.unc.edu/files/2016/08/UNC-Response-to-2016-ANOA.pdf>.

168. See Jon Solomon, *UNC Scandal Forces NCAA to Redefine its Academic Misconduct Policy*, CBS SPORTS (Apr. 8, 2016), <http://www.cbssports.com/college-football/news/unc-scandal-forces-ncaa-to-redefine-its-academic-misconduct-policy>.

169. NCAA, *supra* note 107.

of statistical analysis, debate, and scrutiny.<sup>170</sup> This does not mean, however, that certain types of behavior in college sports by coaches—or even athletic directors<sup>171</sup>—are excusable.<sup>172</sup> Decisions made by coaches might lead to suspensions,<sup>173</sup> lawsuits,<sup>174</sup> resignations and terminations of high-profile football coaches, particularly when forms of abuse involving student-athletes occur.<sup>175</sup>

170. See Steve Berkowitz et al., *Football | Assistant | Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/football/assistant?hootPostID=ace8d1ccfdaf852a1f8e890136ae615> (last visited July 30, 2018) (revealing that in 2016, at least 189 assistant football coaches are paid \$400,000 or more); see also Chad Leistikow & Steve Berkowitz, *Iowa Football Strength Coach Making Almost \$600,000 Per Year*, USA TODAY, Aug. 22, 2016, <http://www.usatoday.com/story/sports/ncaaf/bigten/2016/08/22/iowa-football-strength-coach-chris-doyle-salary/89115760>. The NCAA has three Divisions (I, II, III) and Division I is the most visible and influential as a whole.

171. See Patrick Redford, *Rutgers Student Tailgate Shut Down After AD Chugs a Beer on Stage*, DEADSPIN (Sept. 20, 2016), [http://deadspin.com/rutgers-student-tailgate-shut-down-after-ad-chugs-a-bee-1786876482?utm\\_campaign=socialflow\\_deadspin\\_twitter&utm\\_source=deadspin\\_twitter&utm\\_medium=socialflow](http://deadspin.com/rutgers-student-tailgate-shut-down-after-ad-chugs-a-bee-1786876482?utm_campaign=socialflow_deadspin_twitter&utm_source=deadspin_twitter&utm_medium=socialflow) (quoting the athletic director, “I regret that any action on my part can be interpreted as promoting the use of alcohol”).

172. See ESPN News Services, *Mike Lonergan Fired as George Washington Men’s Basketball Coach*, ESPN (Sept. 18, 2016), [http://www.espn.com/mens-college-basketball/story/\\_/id/17566497/mike-lonergan-fired-george-washington-men-basketball-coach](http://www.espn.com/mens-college-basketball/story/_/id/17566497/mike-lonergan-fired-george-washington-men-basketball-coach) (discussing termination due to allegations of verbal and emotional abuse against players); see also Brian Bennett, *Illinois Fires Tim Beckman One Week Before Season Amid External Review*, ESPN (Aug. 28, 2015), [http://www.espn.com/college-football/story/\\_/id/13533196/tim-beckman-fired-coach-illinois-fighting-illini](http://www.espn.com/college-football/story/_/id/13533196/tim-beckman-fired-coach-illinois-fighting-illini) (citing allegations against Beckman of influencing medical decisions and pressuring players to play hurt); Pete Thamel, *Video Shows Bowling Green Coach Chris Jans Slapping Woman’s Buttocks*, SPORTS ILLUSTRATED, Apr. 2, 2015, <http://www.si.com/college-basketball/2015/04/02/chris-jans-bowling-green-state-fired> (discussing video and subsequent termination).

173. See Jake New, *U. of Georgia Swimming Coach Suspended After Encouraging Professor to Enroll Student in Concluded Course*, INSIDE HIGHER ED (Dec. 17, 2014), <https://www.insidehighered.com/news/2014/12/17/u-georgia-swimming-coach-suspended-after-encouraging-professor-enroll-student> (discussing the suspension of University of Georgia head swimming coach, Jack Bauerle, having to sit out nine competitions and be restricted from recruiting for one year after he arranged for a swimmer to enroll in an independent study course run by a professor in the psychology department for the sole purpose of maintaining athletic eligibility by creating a “safety net”); see also Associated Press, *NCAA Extends Suspension for Georgia Bulldogs Swim Coach Jack Bauerle*, ESPN (Dec. 16, 2014), [http://www.espn.com/college-sports/story/\\_/id/12036950/ncaa-extends-suspension-georgia-bulldogs-swim-coach-jack-bauerle](http://www.espn.com/college-sports/story/_/id/12036950/ncaa-extends-suspension-georgia-bulldogs-swim-coach-jack-bauerle) (offering that “[t]he NCAA extended the suspension . . . through the 2014–15 season and imposed a \$5,000 fine for major rules violations involving star Chase Kalisz [and] . . . rul[ing] that Bauerle ‘did not promote an atmosphere for compliance.’”).

174. See Daniel Brown, *Suit: Former U of I Football Player Forced Back Early from Injury*, CHI. SUN TIMES, Nov. 5, 2016, <http://chicago.suntimes.com/news/suit-former-u-of-i-football-player-loses-scholarship> (stating that former University of Illinois at Urbana-Champaign football player filed suit against the university, former athletic director, and former head coach for allegedly forcing him to return early from an injury which led to loss of his scholarship).

175. See Mark Schlabach, *Kevin Wilson Resignation as Indiana Hoosiers Coach in Part Due to Investigations into Conduct Regarding Injured Players*, ESPN (Dec. 3, 2016), [http://www.espn.com/college-football/story/\\_/id/18196308](http://www.espn.com/college-football/story/_/id/18196308) (“Indiana University officials conducted two [separate] investigations [of] former football coach Kevin Wilson’s treatment of injured players . . .”).

For example, Eric Murdock filed a wrongful termination suit against Rutgers University over his dismissal from the men's basketball program in 2012, though the school claimed that his contract was simply not renewed.<sup>176</sup> Murdock, the team's former director of player development who blew the whistle on fired coach Mike Rice, said in the complaint that athletic director Tim Perneti disregarded video evidence showing Coach Rice abusing the players, calling them names, kicking, shoving and throwing basketballs at them.<sup>177</sup>

Indeed, Perneti stepped down in 2013 after protests over his handling of the situation.<sup>178</sup> Jimmy Martelli, a Rutgers assistant men's basketball coach,<sup>179</sup> and John B. Wolf, Rutgers University's former interim senior vice president and general counsel, also resigned.<sup>180</sup> Former player Derrick Randall received \$300,000 in a settlement with the university in a separate 2013 lawsuit in which he claimed he was "chronically and heinously targeted and abused, both physically and psychologically."<sup>181</sup>

Former gymnasts at Penn State accused husband and wife coaches, Jeff and Rachelle Thompson, of abusive behavior including demeaning comments, body shaming, and forcing female student-athletes to train while injured.<sup>182</sup> Though a review of the gymnastics program by the university's Office of Ethics and Compliance found no evidence of abuse,<sup>183</sup> exposés in the Penn State student newspaper,<sup>184</sup> and *People* magazine,<sup>185</sup> described an environment that drove

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176. See Lester Munson, *Rutgers Whistleblower Eric Murdock Has Tough Road for Wrongful-Termination Lawsuit But Also Won't Likely Face Extortion Charges*, ESPN (Apr. 8, 2013), [http://www.espn.com/espn/otl/story/\\_/id/9148105/rutgers-whistleblower-eric-murdock-tough-road-wrongful-termination-lawsuit-likely-face-extortion-charges](http://www.espn.com/espn/otl/story/_/id/9148105/rutgers-whistleblower-eric-murdock-tough-road-wrongful-termination-lawsuit-likely-face-extortion-charges).

177. See Michael Pearson & Brittany Brady, *Rutgers Coach Fired After Abusive Video Broadcast*, CNN (Apr. 4, 2013), <http://www.cnn.com/2013/04/03/sport/rutgers-video-attack>.

178. See ESPN News Services, *Tim Perneti Out as Rutgers Scarlet Knights Athletic Director*, ESPN (Apr. 9, 2013), [http://www.espn.com/new-york/mens-college-basketball/story/\\_/id/9137089/tim-pernetti-rutgers-scarlet-knights-athletic-director](http://www.espn.com/new-york/mens-college-basketball/story/_/id/9137089/tim-pernetti-rutgers-scarlet-knights-athletic-director).

179. *Id.*

180. *Id.*

181. See Charlie Kratovil & Richard Rabinowitz, *Rutgers Quietly Settles Lawsuit with Ex-Basketball Player for \$300K*, NEW BRUNSWICK TODAY, June 20, 2016, <http://newbrunswicktoday.com/article/rutgers-quietly-settles-lawsuit-ex-basketball-player-300k>.

182. Rennie Dyball, *Penn State Women's Gymnastics Coaches Accused of Emotional Abuse, Body-Shaming*, PEOPLE, May 31, 2016, <http://people.com/sports/penn-state-womens-gymnastics-coaches-accused-of-emotional-abuse-body-shaming>.

183. *Id.*

184. Morganne Mallon & Erin McCarthy, *Former Penn State Women's Gymnasts Speak Out Against Coaches Jeff, Rachelle Thompson*, DAILY COLLEGIAN, Apr. 18, 2016, [http://www.collegian.psu.edu/features/article\\_d0ae8e90-051f-11e6-aa96-0b85cc3a2ad0.html](http://www.collegian.psu.edu/features/article_d0ae8e90-051f-11e6-aa96-0b85cc3a2ad0.html).

185. Dyball, *supra* note 182.



many gymnasts to quit the team, experience depression, and even thoughts of suicide. Rachele Thompson resigned in 2016, claiming she had lost her passion,<sup>186</sup> and Jeff Thompson was fired in 2017 by PSU after his annual post-season evaluation; a process that included exit interviews with graduating gymnasts, team survey results, and discussions with support personnel.<sup>187</sup> These behaviors continued despite the appointment in 2013 of an athletics integrity officer, whose role was to “monitor compliance with University standards, including those related to issues of integrity, ethics and institutional standards.”<sup>188</sup>

Questions:

1. Is it ever appropriate for any coach to throw anything at his or her players?
2. But for smart phones and social media, how many acts of misconduct have gone unreported out of fear of retaliation or lack of evidence?
3. What policies and procedures can be put in place to assure proper physical and emotional treatment of student-athletes?

#### *E. Social Media Policies and Misconduct*

Many colleges and universities actively monitor their student-athletes' social media accounts, both to discover potential NCAA rules violations and to thwart potential program embarrassment. In response, Utah passed legislation in 2013 banning schools from requiring students to verify their social media

186. Morganne Mallon, *Penn State Women's Gymnastics Associate Head Coach Rachele Thompson to Resign Following Abuse Allegations*, DAILY COLLEGIAN, May 20, 2016, [http://www.collegian.psu.edu/sports/division\\_one\\_sports/article\\_222e286a-1ea8-11e6-9e4e-c394ecd10129.html](http://www.collegian.psu.edu/sports/division_one_sports/article_222e286a-1ea8-11e6-9e4e-c394ecd10129.html).

187. See Collegian Staff, *Penn State Women's Gymnastics Fires Head Coach Jeff Thompson Effective Immediately*, DAILY COLLEGIAN, Feb. 23, 2017, [http://www.collegian.psu.edu/sports/division\\_one\\_sports/article\\_1fb1da9c-fa0c-11e6-807d-cf42bcd22a1.html](http://www.collegian.psu.edu/sports/division_one_sports/article_1fb1da9c-fa0c-11e6-807d-cf42bcd22a1.html); see also Morganne Mallon & Erin McCarthy, *Penn State Athletics Responds to Allegations of Coaching Misconduct in Women's Gymnastics and Women's Ice Hockey Programs*, DAILY COLLEGIAN, Apr. 29, 2016, [http://www.collegian.psu.edu/features/article\\_c5643610-0dc2-11e6-9f17-cffb9c472cb.html](http://www.collegian.psu.edu/features/article_c5643610-0dc2-11e6-9f17-cffb9c472cb.html) (offering that women's ice hockey coach Josh Brandwene was also accused of impropriety involving “mind games.”). Brandwene retired from college hockey in 2017 after five seasons as the head coach at PSU. See Andrew Rubin, *Penn State Women's Hockey Head Coach Josh Brandwene Retires from Coaching College Hockey*, DAILY COLLEGIAN (Apr. 19, 2017), [http://www.collegian.psu.edu/sports/women\\_hockey/article\\_f1c4e3e6-24fd-11e7-b2f7-7bca06b08fbd.html](http://www.collegian.psu.edu/sports/women_hockey/article_f1c4e3e6-24fd-11e7-b2f7-7bca06b08fbd.html). It appears that trouble loomed all around PSU in recent years involving instances and allegations of coaching abuse.

188. See Press Release, Penn State, University Appoints New Athletics Integrity Officer (June 29, 2017) (on file with Pennsylvania State University), <http://news.psu.edu/story/473535/2017/06/29/university-appoints-new-athletics-integrity-officer> (reporting that newly hired Robert Boland would fill the position previously held by Julie Del Giorno who “served as the University's first athletics integrity officer since 2013.” The article additionally offers that, “Del Giorno will be fulfilling a broader compliance role for Penn State and providing investigative support.”).

usernames and passwords.<sup>189</sup> For example, student-athletes at Utah State University formerly were required to sign a social media policy release stating: “To the extent that any federal, state, or local law prohibits the Athletic Department from accessing my social networking accounts, I hereby waive any and all such rights and protections.”<sup>190</sup>

Utah’s *Internet Postsecondary Institution Privacy Act* now prohibits postsecondary institutions from asking for personal, non-institution-provided student social media account information<sup>191</sup> or punishing them for failing to do so.<sup>192</sup> However, this Act does not prevent schools from accessing an electronic account or service provided by the institution, or viewing, accessing or using social media posts found in the public domain.<sup>193</sup>

On the other hand, in recent times several schools have had to take punitive action against their student-athletes for misconduct related to text messages, tweets or Facebook postings. For example, Columbia University’s wrestling team was suspended as the university investigated text messages sent by

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189. See Bradley Shear, *Utah Bans Student-Athlete Social Media Monitoring Firms*, SHEAR LAW (Apr. 10, 2013), <http://www.shearlaw.com/utah-bans-student-athlete-social-media-monitoring-firms> (offering that Utah joined Delaware, California, Michigan, and New Jersey).

190. *Id.*; see also Sean Gregory, *Jock Police*, TIME, Oct. 22, 2012, <http://content.time.com/time/subscriber/article/0,33009,2126662-1,00.html>.

191. See Epstein, *supra* note 14; see also UTAH CODE ANN. § 53B-25-201 (2018). The Utah statute took effect on May 14, 2013, and states:

A postsecondary institution may not do any of the following: (1) request a student or prospective student to disclose a username and password, or a password that allows access to the student’s or prospective student’s personal Internet account; or (2) expel, discipline, fail to admit, or otherwise penalize a student or prospective student for failure to disclose information specified in Subsection (1).

§ 53B-25-201.

192. *Id.*

193. *Id.* § 53B-25-202.

(1) This chapter does not prohibit a postsecondary institution from requesting or requiring a student to disclose a username or password to gain access to or operate the following: (a) an electronic communications device supplied by or paid for in whole or in part by the postsecondary institution; or (b) an account or service provided by the postsecondary institution that is either obtained by virtue of the student’s admission to the postsecondary institution or used by the student for educational purposes. (2) This chapter does not prohibit or restrict a postsecondary institution from viewing, accessing, or using information about a student or prospective student that can be obtained without the information described in Subsection 53B-25-201(1) or that is available in the public domain.

§ 53B-25-202.

wrestlers that included the “frequent use of racist, misogynistic and homophobic terms.”<sup>194</sup>

Questions:

1. Does the NCAA go too far in expecting member institutions to monitor social media to discover potential rules violations?
2. Some schools have attempted to ban student-athletes from using social media outright. Is this appropriate or legitimate?
3. Does the privilege of participation in college athletics justify abdication of students’ free speech rights?

#### *F. Indiana University Bill of Rights*

Whether cutting-edge or just a matter of positive public relations, Indiana University (IU) announced its own Student-Athlete Bill of Rights in 2014, a 10-point document that outlines new and current reforms, such as a lifetime degree guarantee and the use of the career placement center after graduation.<sup>195</sup> The lifetime degree guarantee allows former student-athletes to finish their degrees if they leave school early, so long as they were eligible for two seasons.<sup>196</sup>

Comprehensive medical examinations that were once freely available to only incoming scholarship athletes are now also open to walk-ons, and every student-athlete will receive an iPad and a blazer.<sup>197</sup> IU’s written policy comes at an important time in the national discourse related to student-athlete rights, including whether student-athletes should be characterized as employees though the answer to that has been met with consistent resistance and a resounding “no” in the courts.<sup>198</sup>

Questions:

1. What do you think is the primary purpose of IU’s Student-Athlete Bill of Rights?

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194. See Seth Berkman, *Columbia Suspends Wrestling Season Over Lewd and Racist Text Messages*, N.Y. TIMES, Nov. 14, 2016, [http://www.nytimes.com/2016/11/15/sports/columbia-suspends-wrestling-season-lewd-text-messages.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&\\_r=2](http://www.nytimes.com/2016/11/15/sports/columbia-suspends-wrestling-season-lewd-text-messages.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&_r=2).

195. See *Bill of Rights*, IND. U. STUDENT-ATHLETE (June 2014), <http://sidearm.sites.s3.amazonaws.com/iuhoosiers.com/documents/2015/3/20/Bill-of-Rights.pdf>.

196. *Id.*

197. *Id.*

198. See Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287, 297 (2016) (“Although litigation over the issue has continued, the courts have been consistent finding that student-athletes are not recognized as employees under any legal standard, whether bringing claims under workers’ compensation laws, the NLRA or FLSA.”); see generally Epstein & Kisska-Schulze, *supra* note 108.

2. Does the Student-Athlete Bill of Rights create additional legal rights?
3. How does the policy relate to the national discussion over student-athlete rights?

### *G. Handshakes*

Similar to the handshake incidents at the youth sport level, there have been some curious and ignominious examples at the intercollegiate level. While team captains are often chosen for their character, consider the 2014 incident in which the University of Maryland's three captains refuse to shake hands with Penn State's football captains after a pre-game shoving match among players.<sup>199</sup> Similarly, a football game between Fresno City College and College of the Sequoias turned ugly when the two teams exchanged handshakes after the game in Visalia, California and a brawl ensued.<sup>200</sup>

Questions:

1. How should a college or university respond when team captains refuse to shake hands?
2. Do post-game handshakes serve an educational purpose at the collegiate level?

## IV. OLYMPIC-RELATED SPORT

At the 2016 Rio Olympics, an act of sportsmanship demonstrated by distance runners Abbey D'Agostino (USA) and Nikki Hamblin (New Zealand), during the second heat for the women's 5,000-meter, garnered international praise after each attended to the other on the track when they collided during the race in which neither advanced to the final.<sup>201</sup> A few weeks later, both were awarded the International Fair Play Committee Award by the International Olympic Committee (IOC) for epitomizing the Olympic values of fair play and

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199. See Josh Moyer, *Maryland Terrapins Coach Randy Edsall Apologizes for His Captains Refusing to Shake Hands*, ESPN (Nov. 2, 2014), [http://espn.go.com/college-football/story/\\_/id/11803938/maryland-terrapins-coach-randy-edsall-apologizes-captains-refusing-shake-hands](http://espn.go.com/college-football/story/_/id/11803938/maryland-terrapins-coach-randy-edsall-apologizes-captains-refusing-shake-hands) (discussing the incident in which Maryland's three football captains refused to shake hands with Penn State's captains before the coin toss at the middle of the field in State College, Pennsylvania).

200. See *Brawl Breaks Out Between Fresno City College and College of the Sequoias Football Teams*, ABC 30 (Nov. 13, 2016), <http://abc30.com/news/brawl-breaks-out-between-fresno-city-college-and-college-of-the-sequoias-football-teams/1604586>.

201. See Helene Elliott, *Runners Abbey D'Agostino, Nikki Hamblin Are the Real Winners in Rio*, L.A. TIMES, Aug. 16, 2016, <http://www.latimes.com/sports/olympics/la-sp-oly-rio-2016-runners-abbey-d-agostino-nikki-hamblin-1471369602-htmstory.html> (providing video of the incident and injury yet tremendous display of sportsmanship).

sportsmanship.<sup>202</sup> Unfortunately, the Olympic Games, known as the *Olympic Movement*, has been riddled with demonstrations of unethical behavior for decades.

Still, the Olympic Movement stands by its code of ethics, which provides written guidelines for those who participate under its jurisdiction. Naturally, the IOC's Code of Ethics (Code) expects all Olympic-related participants to follow its rules.<sup>203</sup> This Code states, in *Fundamental Principles, Article I*, that "Respect for the universal fundamental ethical principles is the foundation of Olympism" and includes:

- 1.1 Respect for the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play;
- 1.2 Respect of the principle of the universality and political neutrality of the Olympic Movement;
- 1.3 Maintaining harmonious relations with state authorities, while respecting the principle of autonomy as set out in the Olympic Charter;
- 1.4 Respect for international conventions on protecting human rights insofar as they apply to the Olympic Games' activities and which ensure in particular: – respect for human dignity; – rejection of discrimination of any kind on whatever grounds, be it race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status; – rejection of all forms of harassment and abuse, be it physical, professional or sexual, and any physical or mental injuries;
- 1.5 Ensuring the participants' conditions of safety, well-being and medical care favourable to their physical and mental equilibrium.<sup>204</sup>

Unfortunately for the IOC, the Olympic Movement, during the Olympics itself and the years leading up to the biennial event, has had a long and recent

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202. See Guardian Staff, *New Zealand and US Runners Awarded for Sportsmanship*, GUARDIAN, Aug. 21, 2016, <https://www.theguardian.com/sport/2016/aug/21/new-zealand-and-us-runners-awarded-for-sportsmanship>.

203. See *IOC Code of Ethics*, INT'L OLYMPIC COMMITTEE, <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Leading-the-Olympic-Movement/Code-of-Ethics/EN-IOC-Code-of-Ethics-2016.pdf> (last visited July 30, 2018).

204. *Id.*

history of poor sportsmanship,<sup>205</sup> misconduct,<sup>206</sup> scandal,<sup>207</sup> impropriety,<sup>208</sup> retaliation,<sup>209</sup> and outright cheating,<sup>210</sup> sometimes causing the stripping of Olympic medals ex post facto.<sup>211</sup> If fundamental ethical principles are not enforced, do they really have any meaning to the coaches, countries and competitors? The following examples demonstrate misconduct at the Olympic sport level.

### *A. Systemic Russian Doping*

The use of performance-enhancing drugs in the Olympic Movement has created chaos within international sport and forced the IOC to address the

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205. See Karolos Grohmann, *Egyptian Judo Sent Home Over Handshake Refusal with Israeli*, REUTERS (Aug. 15, 2016), <http://uk.reuters.com/article/us-olympics-rio-judo-egypt-israel-idUK-KCN10Q1WC> (Egyptian Islam El Shehaby was sent home after refusing to shake the hand of Israeli Or Sasson following the end of their bout); see also Doug Williams, *A Short History of Long Tradition of Bad Sportsmanship at Summer Olympics*, ESPN (Aug. 19, 2016), [http://www.espn.com/olympics/story/\\_/id/17337637/a-short-history-long-tradition-bad-sportsmanship-summer-olympics](http://www.espn.com/olympics/story/_/id/17337637/a-short-history-long-tradition-bad-sportsmanship-summer-olympics) (providing examples through the years of violence, cheating, and sore losers who competed at the Olympics).

206. See Houston Mitchell, *Read Ryan Lochte's Apology for His Actions in Rio*, L.A. TIMES, Aug. 19, 2016, <http://www.latimes.com/sports/olympics/la-sp-oly-rio-2016-read-ryan-lochte-s-apology-for-his-1471616618-htmllstory.html> (providing American swimmer Lochte's apologetic tweet for his vandalism misconduct in Brazil).

207. See Tanner Walters, *Reports: Irish IOC Chief Patrick Hickey Arrested in Rio*, YAHOO! SPORTS (Aug. 17, 2016), <https://sports.yahoo.com/news/report-irish-ioc-chief-arrested-in-rio-111535599.html> (discussing that the head of the European Olympic Committee was illegally scalping Olympic tickets).

208. See Dan Rafael, *AIBA Removes Several Olympic Boxing Judges and Refs; Results Will Stand*, ESPN (Aug. 18, 2016), [http://www.espn.com/olympics/summer/boxing/story/\\_/id/17327993/aiba-removes-several-olympic-judges-refs-results-stand](http://www.espn.com/olympics/summer/boxing/story/_/id/17327993/aiba-removes-several-olympic-judges-refs-results-stand).

209. See Rachel Axon, *Russian Whistleblower's Anti-Doping Account is Hacked*, USA TODAY, Aug. 13, 2016, [http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/13/russian-whistleblower-accounts-hacked/88672168/?utm\\_source=dlvr.it&utm\\_medium=twitter](http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/13/russian-whistleblower-accounts-hacked/88672168/?utm_source=dlvr.it&utm_medium=twitter).

210. See Martin Rogers, *Russia is Kicked Out of Rio Paralympics Because of Widespread Doping*, USA TODAY, Aug. 7, 2016, <http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/07/russia-kicked-out-rio-paralympics-doping/88363526/>; see also Michael Pavitt, *Belgian Banned for Six Years by UCI Disciplinary Commission in First-Ever Technological Fraud Case*, INSIDE THE GAMES (Apr. 26, 2016), <http://www.insidethegames.biz/articles/1036869/belgian-banned-for-six-years-by-uci-disciplinary-commission-in-first-ever-technological-fraud-case> (providing that Belgian bicycle rider Femke Van den Driessche was given a six-year suspension by the International Cycling Union's (UCI) Disciplinary Commission after it was discovered that she participated in the under twenty-three event at the UCI Cyclocross World Championships with a bike that used a hidden motor. She claimed that the bike actually belonged to her friend, but that did not deter the UCI from suspending her retroactively from October 11, 2015 to October 10, 2021, and stating, "[a]ll competitive results achieved by Ms Femke Van den Driessche from and inclusive October 11, 2015, shall be disqualified.").

211. See Associated Press, *Russia Stripped of Women's 4x100m Relay Gold Medal from Beijing Olympics*, GUARDIAN, Aug. 16, 2016, <https://www.theguardian.com/sport/2016/aug/16/russia-stripped-of-2008-olympics-gold-medal-drugs>. But see Greg Wyshynski, *Why IOC's Olympic Doping Retesting Crusade is Pointless*, YAHOO! SPORTS (Aug. 17, 2016), <https://sports.yahoo.com/news/why-iocs-olympic-doping-retesting-crusade-is-pointless-165418025.html>.

concern, making the fight against illicit drug use a priority.<sup>212</sup> The use of illicit, performance-enhancing drugs in the Olympic Movement has created so much controversy that the record-books are being re-written years after events are over and medals have been awarded.<sup>213</sup>

In 2016, international tennis star Maria Sharapova was banned by the International Tennis Federation (ITF) for her use of the drug Meldonium, a prohibited substance, causing a stir among her sponsors.<sup>214</sup> However, Sharapova's positive test was only one example of a much larger problem with Russian athletes after Vitaly Stepanov, who along with his wife, Yulia Stepanova, blew the whistle and exposed systemic doping in Russia.<sup>215</sup> The two claimed that eighty percent of coaches in Russian track used doping to prepare athletes for London's Olympics in 2012, including the use of performance-enhancing drugs by four Russian gold-medalists at the 2014 Sochi Games.<sup>216</sup>

As a result of Russia's state-sponsored drug program, the governing body for track and field, the International Association of Athletic Federations (IAAF), suspended Russian track and field athletes from the 2016 Rio Olympics.<sup>217</sup> Grigory Rodchenkov, the director of Russia's anti-doping laboratory at the time, detailed how Russia's state-run program was able to swap out urine samples with clean ones at night—literally through a hole in the wall—to assure the eligibility of dozens of Russian athletes.<sup>218</sup> Not a single Russian athlete was

212. See IOC, *Declaration of the 5th Olympic Summit*, INT'L OLYMPIC COMMITTEE (Oct. 8, 2016), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/News/2016/10/2016-10-08-Declaration-Olympic-Summit.pdf> ("Protecting clean athletes is an absolute priority for the entire Olympic Movement.").

213. See Rebecca R. Ruiz, *Olympics History Rewritten: New Doping Tests Topple the Podium*, N.Y. TIMES, Nov. 21, 2016, [http://www.nytimes.com/2016/11/21/sports/olympics/olympics-doping-medals-stripped.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&\\_r=0](http://www.nytimes.com/2016/11/21/sports/olympics/olympics-doping-medals-stripped.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=0).

214. See Sophia Yan, *Nike Stands by Maria Sharapova Despite Two-Year Drug Ban*, CNN MONEY (June 9, 2016), <http://money.cnn.com/2016/06/08/news/nike-maria-sharapova-doping/>.

215. See Rachel Axon, *Russian Olympic Ban is Bittersweet for Whistleblower Who Provided Doping Evidence*, USA TODAY, June 17, 2016, <http://www.usatoday.com/story/sports/olympics/rio-2016/2016/06/17/iaaf-decision-opens-door-russian-whistleblower-compete/86070268/>.

216. See Associated Press, *Whistleblower: Changes in Russian System 'Just Fake' So Far*, DAILY MAIL, May 11, 2016, <http://www.dailymail.co.uk/wires/ap/article-3585513/Whistleblower-Changes-Russian-just-fake-far.html>.

217. See Rebecca R. Ruiz & Michael Schwartz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, N.Y. TIMES, May 12, 2016, <http://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html>.

218. *Id.*

caught doping in Sochi; Russia won the most medals, thirty-three, as well as the most gold medals with thirteen.<sup>219</sup>

The World Anti-Doping Agency (WADA) enacted on November 29, 2016, a formal whistle-blowing policy (effective in 2017) that formalizes the process for protecting and offering assurance of confidentiality to whistleblowers and will encourage athletes, administrators, and others to raise concerns and incentivize those individuals that come forward with valuable information.<sup>220</sup> On December 9, 2016 a comprehensive, independent report by Canadian Richard H. McLaren (for the second time) revealed over-the-top and systemic cheating by Russia at many summer and winter sport events for so many years that the drug testing cheating was characterized as a “carefully orchestrated conspiracy” whose forensic testing is based upon “immutable facts.”<sup>221</sup> Outrage over ineffective drug testing and institutional corruption by Russian officials has caused some to call for an end to Russian participation in any international competition until the IOC and WADA can assess what happened and prevent it from happening again.<sup>222</sup>

Questions:

1. Is it appropriate to punish the entire Russian Olympic team or just the athletes who used performance-enhancing drugs?
2. Does drug testing create a more level playing field for competitors? Why or why not?
3. What are the pros and cons of prohibition of and testing for performance-enhancing drugs in the Olympic Movement (and elsewhere)?

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219. *Id.*

220. See Sir Craig Reedie, President, World-Anti Doping Agency, Speech at the 14th Council of Europe Conference of Ministers Responsible for Sport: “The Role of Governments in Addressing Emerging Challenges in the Fight Against Doping in Sport” (Nov. 29, 2016), (transcript available at [https://wada-mailing-list.s3.amazonaws.com/holidays/img/2016-11-29-Sir%20Craig%20Reedie%20\\_Speech\\_14th%20Council%20of%20Europe\\_Ministers%20responsible%20for%20Sport.pdf](https://wada-mailing-list.s3.amazonaws.com/holidays/img/2016-11-29-Sir%20Craig%20Reedie%20_Speech_14th%20Council%20of%20Europe_Ministers%20responsible%20for%20Sport.pdf)).

221. See RICHARD H. MCLAREN, THE INDEPENDENT PERSON 2ND REPORT 102–03 (2016), [https://www.wada-ama.org/sites/default/files/resources/files/mclaren\\_report\\_part\\_ii\\_2.pdf](https://www.wada-ama.org/sites/default/files/resources/files/mclaren_report_part_ii_2.pdf) (“The entire system operated with the precision of a Swiss watch.”); see also Victor Mather & Rebecca R. Ruiz, *Here Are the Key Findings in the Russian Doping Report*, N.Y. TIMES, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/sports/olympics/mclaren-report-russian-doping.html?partner=rss&emc=rss> (implicating more than 1,000 athletes in at least thirty sports); Rebecca R. Ruiz, *Report Shows Vast Reach of Russian Doping: 1,000 Athletes, 30 Sports*, N.Y. TIMES, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/sports/russia-doping-mclaren-report.html?smid=tw-nytimes&smtyp=cur>.

222. See Bonnie D. Ford, *McLaren Report – Latest Unravels Even More Russian Doing Corruption*, ESPN (Dec. 9, 2016), [http://www.espn.com/olympics/story/\\_/id/18244371/mclaren-report-latest-unravels-even-more-russian-doping-corruption](http://www.espn.com/olympics/story/_/id/18244371/mclaren-report-latest-unravels-even-more-russian-doping-corruption).



*B. IOC "Rule 40" Social Media Policy and Social Media Misconduct*

The IOC modified Rule 40 in the Olympic Charter for the 2016 Rio Olympics, which protects "official" sponsors of the Olympic Games from ambush marketing attempts and also prohibits Olympic athletes, coaches and others from tweeting about non-official sponsors just prior to, during, and shortly after the Games themselves.<sup>223</sup> Rule 40.3 states, "Except as permitted by the IOC Executive Board, no competitor, [coach, trainer or official] who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games."<sup>224</sup>

In February 2015, the IOC announced small changes to Rule 40, allowing Olympic athletes to appear in generic advertising that does not explicitly mention the Games or use any other Olympic intellectual property under certain pre-approved conditions.<sup>225</sup> Olympic and non-sponsor brands had to submit waivers to the USOC by January 27, 2016, including plans for advertising and social media campaigns, and IOC-approved advertisements must have been published or broadcast in-market well in advance of the Games themselves.<sup>226</sup>

Although the IOC social media rules have somewhat loosened-up with regard to recognition of non-official sponsors, tweeting has gotten participants in trouble during the Olympics and the events leading up to the Games. For example, in 2012, Michel Morganella, a defender on the Swiss Olympic soccer squad, was kicked off the Swiss Olympic team for an offensive tweet about South Koreans hours after losing to the South Korean team 2-1.<sup>227</sup> "I want to beat up all South Koreans! Bunch of mentally handicapped retards!" ("Je les

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223. See *Olympic Charter*, INT'L OLYMPIC COMMITTEE (Aug. 2, 2015), [https://stillmed.olympic.org/Documents/olympic\\_charter\\_en.pdf](https://stillmed.olympic.org/Documents/olympic_charter_en.pdf) (stating, "Except as permitted by the IOC Executive Board, no competitor, team official or other team personnel who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games."). For a further and in-depth discussion of Rule 40 and the most recent changes, see Adam Epstein, *The Ambush at Rio*, 16 J. MARSHALL REV. INTELL. PROP. L. 351 (2017) (providing a critical analysis and offering ten alternative suggestions for addressing social media and its relationship to the Olympic Movement).

224. *Olympic Charter*, *supra* note 223, at 79 ("Participation in the Olympic Games").

225. See Christine Birkner, *How the Olympics' New Advertising Rules Will Impact Athletes and Brands in Rio*, ADWEEK (July 5, 2016), <http://www.adweek.com/news/advertising-branding/how-olympics-new-advertising-rules-will-impact-athletes-and-brands-rio-172372> (providing that for generic advertising, the sponsor and athlete still may not utilize the Olympic rings, and terms such as "Olympics," "2016," "Rio," "games," and "gold.").

226. *Id.*

227. *Id.*; see also Epstein, *supra* note 223.

tous Defonce Coréens, allez vous tous Bruler, bande de trisos!”).<sup>228</sup> Similarly, Voula Papachristou, Greece’s triple-jump champion, was kicked off her Olympic team for an offensive tweet, “With so many Africans in Greece, at least the mosquitoes of West Nile [sic] will eat homemade food!!!”<sup>229</sup>

Questions:

1. Is the IOC practical to expect total control over social media of Olympic athletes and other personnel?
2. While social media gives the world access to Olympic athletes, are there drawbacks to the use of social media by participants during the Games themselves?

### *C. Tanking in London*

Eight female badminton doubles players were disqualified from the 2012 London Olympics after intentionally trying to lose matches to receive a more favorable place in the tournament bracket.<sup>230</sup> The Badminton World Federation (BWF) ruled that two teams from South Korea and one each from China and Indonesia were punished for “not using one’s best efforts to win a match and conducting oneself in a manner that is clearly abusive or detrimental to the sport.”<sup>231</sup>

Also in London, Algerian middle-distance runner Taoufik Makhloufi was kicked out for not trying hard enough in an 800-meter preliminary heat.<sup>232</sup> Makhloufi stopped running in the first lap of the 800-meter, having already qualified for the 1,500-meter final, and it appeared he was saving energy for that race.<sup>233</sup> The IAAF supported the referee who found the twenty-four-year-old African champion guilty of “failure to compete honestly with bona fide

228. See Benjamin Newman, “South Koreans Are Mentally Handicapped Retards!” *Michel Morganella (Swiss) Has a Twitter Meltdown After Losing at the Olympics*, 101 GREAT GOALS BLOG (July 30, 2012, 6:16 PM), <http://www.101greatgoals.com/blog/switzerlands-michel-morganella-has-a-meltdown-on-twitter-after-losing-to-south-korea-at-the-olympics/>.

229. See Alon Harish, *After Greek Olympic Jumper Expelled for Racist Tweet, Defenders Flock to Twitter*, ABC NEWS (July 25, 2012), <http://abcnews.go.com/International/greek-olympic-jumper-expelled-racist-tweet-defenders-flock/story?id=16856393>.

230. See Richard Allen Greene, *Olympic Badminton Players Disqualified for Trying to Lose*, CNN (Aug. 1, 2012), <http://www.cnn.com/2012/08/01/sport/olympics-badminton-scandal/>.

231. See Paul Kelso, *Badminton Pairs Expelled from London 2012 Olympics After ‘Match-Fixing’ Scandal*, TELEGRAPH, Aug. 1, 2012, <http://www.telegraph.co.uk/sport/olympics/badminton/9443922/Badminton-pairs-expelled-from-London-2012-Olympics-after-match-fixing-scandal.html>.

232. See, e.g., Eddie Pells, *London Olympics 2012: Algeria’s Taoufik Makhloufi Runs to Gold in 1,500m*, WASH. TIMES, Aug. 7, 2012, <http://www.washingtontimes.com/news/2012/aug/7/london-olympics-2012-algerias-taoufik-makhloufi-ru/>.

233. *Id.*

effort.”<sup>234</sup> However, he was later reinstated for the 1,500-meter final after the Algerian Olympic Federation provided evidence that he had a legitimate knee problem.<sup>235</sup> He won the gold medal in the 1,500-meter the next day, prompting additional controversy and claims he used performance-enhancing drugs.<sup>236</sup>

Questions:

1. What ethical issues are implicated when runner Makhloufi is injured one day, banned from the Games, almost immediately reinstated, and wins the Olympic gold medal the next day?
2. Are rules disqualifying an Olympic participant for not giving a “bona fide effort” necessary? If the goal is to win a medal, should athletes be allowed to make competitive decisions to further that end?

#### *D. Corrupt Judging*

At the 2016 Rio Olympic Games, the first time that professional boxers were eligible to compete,<sup>237</sup> the International Boxing Association (AIBA) removed several boxing judges during the competition for irregularities in outcomes of decisions.<sup>238</sup> In particular, the outcome of the victorious Russian Vladimir Nikitin over Ireland’s Michael John Conlan in the men’s bantamweight (fifty-six kilogram) quarterfinals brought individual outrage and worldwide scrutiny.<sup>239</sup> Similarly, Evgeny Tishchenko of Russia celebrated the gold medal in the men’s heavyweight competition over Vassiliy Levit of

234. *Id.*

235. *Id.*

236. See Simon Turnbull, *Makhloufi’s Miracle 1500m Win Met with Growing Skepticism*, INDEP., Aug. 8, 2012, <http://www.independent.co.uk/sport/olympics/athletics/makhloufis-miracle-1500m-win-met-with-growing-scepticism-8022817.html>.

237. See Press Ass’n, *Professional Boxers Will Be Allowed to Compete at Rio Olympics*, GUARDIAN, June 1, 2016, <https://www.theguardian.com/sport/2016/jun/01/professional-boxers-allowed-compete-at-rio-olympics>.

238. See A.J. Perez, *Boxing Judges Sent Home from Rio Olympics After Review of Decisions*, USA TODAY, Aug. 17, 2016, [http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/17/aiba-boxing-judges-sent-home-rio-olympics/88892072/?utm\\_source=feedblitz&utm\\_medium=FeedBlitzRss&utm\\_campaign=usatodaycomsports-topstories](http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/17/aiba-boxing-judges-sent-home-rio-olympics/88892072/?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=usatodaycomsports-topstories); see also Ken Belson & Scott Blumenthal, *Dismissal of Rio Boxing Judges Robed in Secrecy*, N.Y. TIMES, Aug. 20, 2016, [http://www.nytimes.com/2016/08/21/sports/olympics/boxing-judges-dismissal-robed-in-secrecy.html?smid=tw-nytsports&smtyp=cur&\\_r=0](http://www.nytimes.com/2016/08/21/sports/olympics/boxing-judges-dismissal-robed-in-secrecy.html?smid=tw-nytsports&smtyp=cur&_r=0).

239. See Kevin Iole, *Irish Boxer Robbed Against Russian, Tweets Vladimir Putin: ‘How Much Did They Charge You Bro?’*, YAHOO! SPORTS (Aug. 16, 2016), <http://sports.yahoo.com/news/irish-boxer-tweets-vladimir-putin-000000944.html> (discussing Conlon’s outrage and referencing Olympic judging outrageousness involving U.S. boxer Roy Jones, Jr., stating, with regard to Conlon, “That verdict might have been the worst of the tournament, though even that couldn’t match the debacle involving Jones at the 1988 Games in Seoul, South Korea . . . . The call was so bad, the organizers went to a computerized scoring system in the next Olympics.”).

Kazakhstan in what many, including the majority of the spectators, regarded as a clear-cut decision for Levit.<sup>240</sup> The judging irregularities at Rio called into question the integrity of the sport as a whole once again as it did back in 1988 at the Seoul, South Korea, Olympic Games.<sup>241</sup>

As demonstrated in this section, ethical issues are prevalent involving the Olympic Movement. Of course, at the international level, one could also explore the host of recent controversies involving professional soccer and the various accusations, scandals, kickbacks and improprieties involved with Fédération Internationale de Football Association (FIFA), the international soccer federation, alone.<sup>242</sup>

Questions:

1. What can be done to prevent subjective sports such as boxing, diving, gymnastics or figure skating from bribery and corruption of judges?
2. Why do you think the AIBA allowed professional boxers to compete at the Olympic Games in Rio for the first time?

#### V. PROFESSIONAL SPORT

Professional sport in the United States exerts a profound influence on individuals and our culture. These athletes are worshipped and idolized as role models, and teams inspire rabid, cult-like loyalty in their fans. In this final section, we explore some recent ethical and legal issues for professors and students to consider involving professional athletes and sport. Issues related to

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240. See Ryan Bailey, *Rio Report: Boxing Threatens the Integrity of the Olympic Games Once Again*, BLEACHER REPORT (Aug. 17, 2016), <http://bleacherreport.com/articles/2658325-rio-report-boxing-threatens-the-integrity-of-the-olympic-games-once-again> (discussing the Conlon and Levit decisions and comparing them to the 1988 Seoul Olympics stating, “In 1988, Roy Jones Jr famously lost the gold-medal fight to South Korea’s Park Si-Hun. Jones dominated the match—landing 86 punches compared to Park’s 32—and appeared to be a shoe-in for gold. However, the judges somehow ruled in Park’s favour . . .”).

241. *Id.*

242. See, e.g., Press Release, Dep’t of Justice: Office of Public Affairs, Sixteen Additional FIFA Officials Indicted for Racketeering Conspiracy and Corruption (Dec. 3 2015) (on file with author), <https://www.justice.gov/opa/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption> (listing all the defendants by name, age and nationality, and stating, “A 92-count superseding indictment was unsealed earlier today in federal court in Brooklyn, New York, charging an additional 16 defendants with racketeering, wire fraud and money laundering conspiracies, among other offenses, in connection with their participation in a 24-year scheme to enrich themselves through the corruption of international soccer.”); see also Matt Apuzzo, Stephanie Clifford, & William K. Rashbaum, *FIFA Officials Arrested on Corruption Charges; Blatter Isn’t Among Them*, N.Y. TIMES, May 26, 2015, <https://www.nytimes.com/2015/05/27/sports/soccer/fifa-officials-face-corruption-charges-in-us.html> (discussing the FBI-backed operation in Zurich to arrest several FIFA leaders and senior officials for their role in widespread corruption over the past two decades involving bids for World Cups, marketing and broadcast deals, and specific charges to include racketeering, wire fraud and money laundering conspiracy).

professional sport can be quite serious and far exceed whether the mere hugging of an official should be considered unsportsmanlike.<sup>243</sup>

### *A. Domestic Violence and Abuse*

Incidents of domestic violence involving women and children have plagued the National Football League (NFL) in recent years. In February 2014, a video surfaced of Baltimore Ravens running back Ray Rice dragging his unconscious fiancé, Janay Palmer, from a hotel elevator in Atlantic City.<sup>244</sup> On March 27, 2014, Rice was indicted on aggravated assault charges; he married the alleged victim the next day.<sup>245</sup> During the summer, Rice had a disciplinary hearing with NFL Commissioner Roger Goodell that resulted in a two-game suspension, and in August, the NFL announced a new domestic violence policy to address mounting public concerns.<sup>246</sup>

Goodwill was short-lived as TMZ released an extended version of the video in September 2014 showing Rice punching Palmer in the face.<sup>247</sup> Rice was then suspended indefinitely from the NFL, with statements from the Ravens management and the NFL leadership denying knowledge of the full video.<sup>248</sup> Rice ultimately won his appeal of the indefinite suspension and was reinstated by the NFL in November 2014.<sup>249</sup> During the suspension, Rice filed a lawsuit against the Ravens for \$3.529 million in lost wages for the fifteen weeks after his initial two-game suspension.<sup>250</sup> The parties ultimately settled for an undisclosed amount.<sup>251</sup>

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243. See Jay Busbee, *Hugging Is Now Unsportsmanlike, as Earl Thomas Learned Sunday*, YAHOO! SPORTS (Oct. 30, 2016), <http://sports.yahoo.com/news/hugging-is-now-unsportsmanlike-as-earl-thomas-learned-sunday-202004959.html>.

Seattle Seahawks defensive back Earl Thomas picked up a Mark Ingram fumble and scampered in for a touchdown, just the second touchdown he's ever scored in his NFL career. So overcome with emotion was Thomas that he embraced the referee . . . and immediately drew an unsportsmanlike conduct flag.

*Id.*

244. See Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SB NATION (Nov. 28, 2014), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens>.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. Aaron Wilson, *Ravens, Former Running Back Ray Rice Settle Grievance, Sources Say*, BALT. SUN, Jan. 15, 2015, <http://www.baltimoresun.com/sports/bal-ravens-ray-rice-settle-grievance-sources-say-20150115-story.html>.

251. *Id.*

In May 2014, Minnesota Vikings running back Adrian Peterson was indicted for reckless or negligent injury to a child for whipping his four-year-old son with a switch, causing lacerations on the boy's back, legs, arms, and buttocks.<sup>252</sup> The Vikings initially suspended Peterson for one game, then reinstated him justifying Peterson's behavior as disciplining his child.<sup>253</sup> Corporate sponsors were not so forgiving as Radisson suspended its limited sponsorship of the Vikings, and Nike and Castrol suspended their sponsorships of Peterson.<sup>254</sup> Peterson ultimately pleaded no contest to a reduced charge of misdemeanor reckless assault and was ordered to pay a \$4,000 fine, court costs, and perform eighty hours of community service.<sup>255</sup> He missed fifteen games in the 2014 season and was fully reinstated.<sup>256</sup>

Also in 2014, apparently a landmark year for domestic violence and abuse related to NFL players, Arizona Cardinals running back Jonathan Dwyer was charged with aggravated assault causing a fracture, aggravated assault of a minor, two counts of criminal damage, assault, and preventing the use of a phone in an emergency.<sup>257</sup> Dwyer had allegedly head butted his wife, breaking her nose, when she refused his sexual advances.<sup>258</sup> He was also accused of punching her the next day, and hitting his son with a shoe.<sup>259</sup> Although he was the Cardinals second-leading rusher at the time of the arrest, the Cardinals deactivated him immediately.<sup>260</sup> Dwyer ultimately pleaded guilty to a charge of

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252. See Steve DiMatteo, *A Timeline of the Adrian Peterson Child Abuse Case*, SB NATION (Sept. 17, 2014), <http://www.sbnation.com/2014/9/17/6334793/adrian-peterson-child-abuse-statement-vikings-timeline>.

253. *Id.*

254. *Id.*

255. Eric Prisbell & Brent Schrottenboer, *Adrian Peterson Avoids Jail Time in Child Abuse Case*, USA TODAY, Nov. 4, 2014, <https://www.usatoday.com/story/sports/nfl/vikings/2014/11/04/adrian-peterson-minnesota-vikings-child-abuse-plea-deal-misdemeanor/18466197/>.

256. Chris Wesseling, *Minnesota Vikings' Adrian Peterson Reinstated by NFL*, NFL (Apr. 16, 2015), <http://www.nfl.com/news/story/0ap3000000485756/article/minnesota-vikings-adrian-peterson-reinstated-by-nfl>.

257. See Josh Weinfuss, *Jonathan Dwyer of Arizona Cardinals Arrested on Two Counts of Suspicion of Aggravated Assault*, ESPN (Sept. 18, 2014), [http://www.espn.com/nfl/story/\\_/id/11544985/jonathan-dwyer-arizona-cardinals-arrested-two-counts-suspicion-aggravated-assault](http://www.espn.com/nfl/story/_/id/11544985/jonathan-dwyer-arizona-cardinals-arrested-two-counts-suspicion-aggravated-assault).

258. ESPN News Services, *Police Report Says Jonathan Dwyer of Arizona Cardinals Head-Butted, Punched Wife and Struck Young Son with Shoe*, ESPN (Sept. 18, 2014), [http://www.espn.com/nfl/story/\\_/id/11547511/police-report-says-jonathan-dwyer-arizona-cardinals-head-butted-punched-wife-struck-young-son-shoe](http://www.espn.com/nfl/story/_/id/11547511/police-report-says-jonathan-dwyer-arizona-cardinals-head-butted-punched-wife-struck-young-son-shoe).

259. *Id.*

260. Weinfuss, *supra* note 257.

disorderly conduct and was sentenced to eighteen months of probation and community service.<sup>261</sup>

While the NFL instituted a new personal conduct policy on domestic violence issues after the Ray Rice incident, allowing the league to discipline players on a case-by-case basis even if criminal charges are not filed, subsequent incidents and lax league punishments have prompted some to question whether the NFL is serious about reining in abusive, off-the-field player behavior.<sup>262</sup> The policy requires a baseline six-game suspension, but former 49ers and Bears defensive tackle Ray McDonald was allowed to play throughout the allegations,<sup>263</sup> and New York Giants kicker Josh Brown was suspended for only one game after being arrested for alleged physical violence against his wife.<sup>264</sup> Invoking déjà vu of the Rice incident, a year later, Brown was released by the Giants when authorities released letters and journal entries in which the kicker admitted to abusing his wife.<sup>265</sup> Meanwhile, the NFL continues to support domestic violence education programs, and has committed \$25 million over five years to the National Domestic Violence Hotline.<sup>266</sup>

Of course, domestic violence is not limited to the NFL<sup>267</sup> or men's professional sport and athletes. Former U.S. Women's National Soccer Team (USWNT) goalkeeper Hope Solo was arrested in June 2014 for physically attacking her sister and seventeen-year-old nephew.<sup>268</sup> According to police

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261. See Associated Press, *Jonathan Dwyer Pleads Guilty to Disorderly Conduct*, USA TODAY, Jan. 29, 2015, <https://www.usatoday.com/story/sports/nfl/2015/01/29/jonathan-dwyer-pleads-guilty-to-disorderly-conduct/22529951/>.

262. See Cindy Boren, *Why the NFL Responded Differently to Josh Brown's Domestic Violence Report*, CHI. TRIB., Aug. 24, 2016, <http://www.chicagotribune.com/sports/football/ct-nfl-domestic-violence-josh-brown-20160824-story.html>.

263. Michael David Smith, *NFL Clears Ray McDonald in Domestic Violence Case*, NBC SPORTS (Apr. 26, 2015), <http://profootballtalk.nbcsports.com/2015/04/26/nfl-clears-ray-mcdonald-in-domestic-violence-case/>.

264. Boren, *supra* note 262.

265. Steve Almasy, *NFL Kicker Josh Brown Released by Giants After Admitting Abuse*, CNN (Oct. 25, 2016), <http://www.cnn.com/2016/10/25/us/nfl-josh-brown-released/index.html>.

266. See Karen Grigsby Bates, *A Year On, Did NFL Anti-Domestic Violence Efforts Work?*, NPR (Feb. 7, 2016), <http://www.npr.org/sections/codeswitch/2016/02/07/465841229/a-year-on-did-nfl-anti-domestic-violence-efforts-work>.

267. See Nina Mandell, *Why So Many Professional Athletes Accused of Domestic Violence Are Still Allowed to Take the Field*, USA TODAY: FOR THE WIN, Sept. 16, 2014, <http://ftw.usatoday.com/2014/09/nfl-players-domestic-violence-policy> (offering that there has been a lack of consistency among the leagues with regard to allegations of crimes and that “[S]ports leagues use a combination of factors in determining how to treat accused and convicted players, including Collective Bargaining Agreements that are shaped by years of negotiations between union leaders, commissioners and ownership as well as arbitration rulings.”).

268. See, e.g., Scott Gleeson, *Hope Solo Arrested on Domestic Violence Charge*, USA TODAY, Jun. 22, 2014, <https://www.usatoday.com/story/sports/soccer/2014/06/21/hope-solo-arrested-on-domestic-violence-probe/11207907/>.

reports, Solo was intoxicated, the victims had visible injuries, and she verbally berated the arresting officers.<sup>269</sup> As of the time of this writing, Solo's case is still pending trial, but the alleged victims and witnesses have refused to cooperate or provide depositions.<sup>270</sup> Despite the considerable negative publicity, U.S. Soccer kept Solo on the roster throughout the ordeal.<sup>271</sup> She was eventually suspended from the team and her contract with U.S. Soccer terminated for calling the Swedish team "cowards" after USA's defeat in the quarterfinals of the 2016 Olympic Games.<sup>272</sup>

Questions:

1. Why have professional leagues and national governing bodies been reluctant to punish athletes for violent domestic incidents?
2. What legal recourse do association, league, team, or individual sponsors have when athletes behave badly off-the-field?
3. Why has domestic violence and abuse come to the forefront of discussion in recent years?

#### *B. Lance Armstrong's Performance-Enhancing Drugs Legal Saga*

American cyclist Lance Armstrong continues to be involved in litigation resulting from his prior use of performance-enhancing substances. In October 2012, the U.S. Anti-Doping Agency (USADA) released its report detailing the extent of doping allegations made against Armstrong when he won the Tour de France seven years in a row from 1999 to 2005.<sup>273</sup> More than 1,000 pages, including sworn testimony from twenty-six people (fifteen of those riders), financial statements, emails, scientific data, and laboratory results provided evidence that the U.S. Postal Service Pro Cycling Team operated the most

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269. *Id.*

270. Lynsi Burton, *Court Rejects Hope Solo's Appeal in Domestic Violence Case*, SEATTLEPI, Jun. 8, 2016, <http://www.seattlepi.com/local/crime/article/Court-rejects-Hope-Solo-s-appeal-in-domestic-7971276.php#photo-8322305>.

271. Anna Chan, *Hope Solo Suspended for Calling Swedish Players 'Cowards'*, US WEEKLY, Aug. 25, 2016, <http://www.usmagazine.com/celebrity-news/news/hope-solo-suspended-for-calling-swedish-players-cowards-w436112>.

272. *Id.*

273. Press Release, USADA Media Relations, Statement from USADA CEO Travis T. Tygart Regarding the U.S. Postal Service Pro Cycling Team Conspiracy, (Oct. 10, 2012) (on file with author), <http://cyclinginvestigation.usada.org>.



sophisticated, professionalized, and successful doping program in the history of cycling.<sup>274</sup>

USADA banned Armstrong from cycling for life and stripped him of the titles he earned since August 1, 1998.<sup>275</sup> Armstrong's biggest sponsor, Nike, Inc., terminated his contract, and other sponsors that terminated his contract included: Anheuser-Busch, Trek, RadioShack, FRS (energy drink maker), Honey Stinger (energy foods maker), Easton-Bell (Giro helmet maker), and Oakley.<sup>276</sup>

In 2010, Floyd Landis, Armstrong's former teammate, filed a complaint against Armstrong as a government whistleblower.<sup>277</sup> The Department of Justice joined the case in April 2013, claiming Armstrong violated his contract with the U.S. Postal Service and was "unjustly enriched" while cheating to win the Tour de France.<sup>278</sup> By conspiring to use performance-enhancing drugs (i.e. "dope") with the team riders, the plaintiffs alleged Armstrong and the other parties who ran the U.S. Postal Service team violated their contract and defrauded the government.<sup>279</sup>

A federal judge dismissed Landis's claims against Armstrong and his partners, but the government's case continues under the False Claims Act (FCA)

274. *Id.*

275. Press Release, USADA Media Relations, Lance Armstrong Receives Lifetime Ban and Disqualification of Competitive Results for Doping Violations Stemming from His Involvement in the United States Postal Service Pro-Cycling Team Doping Conspiracy (Aug. 24, 2012) (on file with author), <https://www.usada.org/lance-armstrong-receives-lifetime-ban-and-disqualification-of-competitive-results-for-doping-violations-stemming-from-his-involvement-in-the-united-states-postal-service-pro-cycling-team-doping-conspi/>.

Mr. Armstrong has received a lifetime period of ineligibility for his numerous anti-doping rule violations, including his involvement in trafficking and administering doping products to others . . . . In addition to the lifetime ban, Mr. Armstrong will be disqualified from any and all competitive results obtained on and subsequent to August 1, 1998, including forfeiture of any medals, titles, winnings, finishes, points and prizes.

*Id.*

276. See Henry Blodget, *RadioShack, Nike Dump Lance Armstrong*, BUS. INSIDER, Oct. 18, 2012, <http://www.businessinsider.com/radioshack-nike-dump-lance-armstrong-2012-10>; see also Andrew Tredinnick, *Lance Armstrong Has Lost His Last Sponsor*, BUS. INSIDER, Oct 22, 2012, <http://www.businessinsider.com/lance-armstrong-has-lost-his-last-sponsor-2012-10>.

277. See Brent Schrotenboer, *Feds Call Lance Armstrong 'a Doper, Dealer and Liar' in Scathing New Rebuke*, USA TODAY, July 13, 2016, <https://www.usatoday.com/story/sports/cycling/2016/07/12/feds-lance-armstrong-rebuke-doper-dealer-liar/86978852/>.

278. See Associated Press, *Lance Armstrong Slapped with Lawsuit Claiming He Was 'Unjustly Enriched' by Tour de France Wins*, DAILY MAIL, Apr. 24, 2013, <http://www.dailymail.co.uk/news/article-2313858/Lance-Armstrong-slapped-lawsuit-claiming-unjustly-enriched-Tour-France-wins.html>.

279. *Id.*

in which the government could win treble damages worth \$100 million.<sup>280</sup> In fact, as a whistleblower under the statute, Landis could recover twenty-five percent if any damages are awarded.<sup>281</sup> In February 2017, a federal district court judge ruled against Armstrong's motion for summary judgment and the case is scheduled to proceed to trial.<sup>282</sup>

Questions:

1. Should Lance Armstrong or his team be punished if many others who competed in the same events were doping as well?
2. What are the costs and benefits for sponsors when they discontinue a sponsorship arrangement?

### *C. Hackgate*

In January 2017, Major League Baseball (MLB) entered a new era by having to address an act of cybercrime: computer hacking involving two teams and the subsequent banning of the perpetrator-hacker from baseball for life.<sup>283</sup> Chris Correa, the former St. Louis Cardinals scouting director, is serving a forty-six month prison sentence for hacking into the computer network of the Houston Astros.<sup>284</sup> Correa, who was employed with the Cardinals from 2009-2015, pleaded guilty in a Houston federal court to five of the twelve counts of unauthorized access to a protected computer.<sup>285</sup> He also was ordered to pay \$279,000.<sup>286</sup>

Rob Manfred, MLB Commissioner, also punished the Cardinals organization with a \$2 million fine, as well as taking the Cardinals' first two

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280. See Cycling News, *Armstrong Wins Partial Victory in Landis Whistleblower Suit*, CYCLING NEWS, Jan. 15, 2016, <http://www.cyclingnews.com/news/armstrong-wins-partial-victory-in-landis-whistleblower-suit/>; see also Spencer S. Hsu, *Lance Armstrong's Latest Race: Outrunning a \$100M U.S. Fraud Claim in U.S. Court*, WASH. POST, Nov. 2, 2016, [https://www.washingtonpost.com/local/public-safety/lance-armstrongs-latest-race-outrunning-a-100m-us-fraud-claim-in-us-court/2016/11/02/b5df632c-a11f-11e6-8d63-3e0a660f1f04\\_story.html?utm\\_term=.225ecb3149e](https://www.washingtonpost.com/local/public-safety/lance-armstrongs-latest-race-outrunning-a-100m-us-fraud-claim-in-us-court/2016/11/02/b5df632c-a11f-11e6-8d63-3e0a660f1f04_story.html?utm_term=.225ecb3149e); see generally False Claims Act, 31 U.S.C. §§ 3729–3733 (2018).

281. See Austin Murphy, *Floyd Landis: Former Cyclist Trying to Remake Image*, SPORTS ILLUSTRATED, July 7, 2016, <https://www.si.com/more-sports/2016/07/07/floyd-landis-cycling-tour-de-france-doping>.

282. See Brent Schrotenboer, *Lance Armstrong Handed Defeat by Federal Judge*, USA TODAY, Feb. 14, 2017, <https://www.usatoday.com/story/sports/cycling/2017/02/13/lance-armstrong-lawsuit-federal-judge-denies-request/97860084/>.

283. See Associated Press, *St Louis Cardinals Docked Two Draft Picks and Fined \$2m for Hacking Astros*, GUARDIAN, Jan. 30, 2017, <https://www.theguardian.com/sport/2017/jan/30/st-louis-cardinals-hacking-scandal-punishment-houston-astros-mlb>.

284. *Id.*

285. *Id.*

286. *Id.*

draft picks in 2017.<sup>287</sup> Correa used the saved passwords from former Cardinal's executive Jeff Luhnow, who became the general manager of the Houston Astros in order to gain access to the network.<sup>288</sup> This was the first known case of cyber-espionage involving a professional sports team hacking into another team's database.<sup>289</sup> Indeed, so serious was that the FBI got involved in this situation under the Computer Fraud and Abuse Act (CFAA).<sup>290</sup>

Questions:

1. What benefits are gained by hacking another team's scouting reports?
2. Is a \$2 million fine an appropriate punishment for the organization?
3. What can be done by an organization, especially when an employee leaves, to prevent hacking of their computer systems and databases?

#### *D. Deflategate*

An example of the crossroads between litigation and alternative dispute resolution (ADR), such as arbitration, involved the NFL, its Commissioner Roger Goodell, and one of the greatest players in NFL history, quarterback Tom Brady of the New England Patriots.<sup>291</sup> On September 3, 2015, Judge Richard M. Berman of the United States District Court for the Southern District of New York ruled in favor of Brady and his union, the NFLPA, in its case against the NFL; thereby, overturning Brady's four-game suspension for his alleged role in what has been termed *Deflategate*, as footballs were deflated to give Brady an unfair advantage.<sup>292</sup>

287. *Id.* (quoting Manfred, "Although Mr Correa's conduct was not authorized by the Cardinals, as a matter of MLB policy, I am holding the Cardinals responsible for his conduct.").

288. See Steve Fritz, *One, Two, Sixty Hacks You're Out: Lessons Learned from the Hack of the Houston Astros*, HEXAGON CYBER L. BLOG (Mar. 23, 2017), <https://www.hexagoncyberlaw.com/one-two-sixty-hacks-youre-lessons-learned-hack-houston-astros/> (offering a summary of the incident and eight lessons learned from the debacle).

289. See Max Cohen, *Ex-St. Louis Cardinals Scout Gets 46 Months in Prison for Hacking Rival's Database*, WALL ST. J.: MARKETWATCH (July 18, 2016), <http://www.marketwatch.com/story/ex-st-louis-cardinals-scout-gets-46-months-in-prison-for-hacking-rivals-database-2016-07-18>.

290. See Cindy Boren & Barry Svrluga, *St. Louis Cardinals Under Investigation by FBI in Hack of Houston Astros*, WASH. POST, June 16, 2015, [https://www.washingtonpost.com/news/early-lead/wp/2015/06/16/st-louis-cardinals-under-investigation-by-fbi-for-hacking-houston-astros/?utm\\_term=.ea0f82e82275](https://www.washingtonpost.com/news/early-lead/wp/2015/06/16/st-louis-cardinals-under-investigation-by-fbi-for-hacking-houston-astros/?utm_term=.ea0f82e82275); see also Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2018).

291. See Ben Volin, *Did Judge Berman Rule Correctly in Tom Brady Case?*, BOS. GLOBE, Feb. 29, 2016, <https://www.bostonglobe.com/sports/2016/02/29/brady/79Q2nxXPwzxJL3SUMJURdI/story.html>.

292. *Id.*

Berman's decision vacated the previous July 28, 2015 arbitration decision, and the NFL appealed that same day to the Second Circuit Court of Appeals.<sup>293</sup> The NFL investigation was conducted by Ted Wells after it was alleged that the Patriots intentionally deflated footballs during the January 2015 AFC Championship game against the Indianapolis Colts.<sup>294</sup> Wells found that "it is more probable than not" that Brady was involved with locker room attendant Jim McNally and equipment assistant John Jastremski.<sup>295</sup> However, Berman stated in his decision, "The Court is fully aware of the deference afforded to arbitral decisions, but, nevertheless, concludes that the Award should be vacated."<sup>296</sup> In other words, Berman did not give deference to the arbitration decision and felt there were "several significant legal deficiencies" in Commissioner Goodell's investigation related to accusations that the footballs were below league-mandated minimum pressure levels during the game.<sup>297</sup>

Following the conclusion of the season, the U.S. Second Circuit Court of Appeals reversed and remanded Berman's decision, reinstating Brady's four-game suspension effective for the beginning of the 2016 regular season.<sup>298</sup> In the decision, the majority of the panel opined that Goodell "properly exercised his broad discretion under the collective bargaining agreement and that his procedural rulings were properly grounded in that agreement and did not deprive Brady of fundamental fairness."<sup>299</sup> In July 2016, Brady decided to no longer appeal his decision to the Supreme Court and agreed to serve the suspension accordingly.<sup>300</sup> Whether Brady was involved in deflating footballs is still the subject of debate, but *Deflategate* provides an example to explore the legal process, the role and power of the Commissioner, the importance of

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293. *Id.*

294. See Sean Gregory, *Deflategate: NFL Investigation Says New England Patriots Deflated Balls*, TIME, May 6, 2015, <http://time.com/3849039/deflategate-new-england-patriots-tom-brady/>.

295. *Id.*

296. NFL Mgmt. Council v. NFL Players Ass'n, 2015 U.S. Dist. LEXIS 117662, at \*34 (S.D.N.Y. Sep. 3, 2015).

The Award is premised upon several significant legal deficiencies, including (A) inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct; (B) denial of the opportunity for Brady to examine one of two lead investigators, namely NFL Executive Vice President and General Counsel Jeff Pash; and (C) denial of equal access to investigative files, including witness interview notes.

*Id.*

297. *Id.*

298. NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527 (2d Cir. 2016) (holding in a 2–1 decision).

299. *Id.* at \*1.

300. See ESPN News Services, *Tom Brady of New England Patriots Won't Appeal Suspension to Supreme Court*, ESPN (July 15, 2016), [http://www.espn.com/nfl/story/\\_/id/17083595/tom-brady-new-england-patriots-appeal-suspension-supreme-court](http://www.espn.com/nfl/story/_/id/17083595/tom-brady-new-england-patriots-appeal-suspension-supreme-court).

collective bargaining agreements, and the fundamental differences between litigation and alternative dispute resolution.

Questions:

1. Do you believe that Brady's suspension was illegitimate or that Commissioner Roger Goodell exercised the authority granted to him under the collective bargaining agreement?
2. How might alternative dispute resolution, such as arbitration, be better or worse to resolve legal disputes in American sport-related jurisprudence?

*E. Equal Pay for U.S. Women's National Soccer and Hockey Teams*

Much has been written about the plight of professional team cheerleaders being under-paid, or not paid at all, for their training, meet-and-greets, and game day performances resulting in lawsuits with decisions and settlements related to the Fair Labor Standards Act (FLSA), also known as the federal minimum wage.<sup>301</sup> Similarly, the plight of suppressed minor league baseball player wages has led to various unsuccessful lawsuits claiming violations of the FLSA or antitrust law.<sup>302</sup>

The fight for equitable pay—and treatment—continued as female soccer players, who were members of the USWNT, sued for inequitable pay to the men's team and for inequitable treatment with regard to playing surfaces,<sup>303</sup> traveling in “coach class,” and for unequal per diem payments.<sup>304</sup> Tensions

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301. See generally Adam Epstein, *Attack of the Cheerleaders! Allegations of Violations of the FLSA on an Uncertain Landscape*, 21 J. L., BUS. & ETHICS, 23 (2015).

302. See Associated Press, *MLB Wages Lawsuit: Minor League Case Dismissed by Court*, SPORTS ILLUSTRATED, June 26, 2017, <https://www.si.com/mlb/2017/06/26/minor-league-baseball-players-salary-lawsuit-dismissed> (offering that the Ninth Circuit Court of Appeals affirmed a District Court decision that held that both MLB and MiLB are exempt from federal antitrust laws); see *Miranda v. Selig*, 860 F.3d 1237 (9th Cir. 2017).

Minor league baseball players are employed and paid by MLB, and MLB employs minor league players with the hope that some of them will develop into major league players. Therefore, the employment of minor league players is precisely the type of activity that falls within the antitrust exemption for the business of baseball.

*Miranda*, 860 F.3d at 1242.

303. See Andrew Das, *U.S. Soccer Sues Union Representing the Women's National Team*, N.Y. TIMES, Feb. 3, 2016, <https://www.nytimes.com/2016/02/04/sports/soccer/us-soccer-sues-womens-national-team-in-federal-court.html?smid=pl-share>.

304. *Id.*; see also Andrew Das, *Long Days, Google Docs and Anonymous Surveys: How the U.S. Soccer Team Forged a Deal*, N.Y. TIMES, Apr. 5, 2017, <https://www.nytimes.com/2017/04/05/sports/soccer/uswnt-us-soccer-labor-deal-contract.html>.

mounted as the players union and U.S. Soccer held differing opinions as to the effect of the validity of a 2013 memorandum of understanding (MOU) as a valid collective bargaining agreement (CBA) or a temporary, stand-alone solution until a new CBA would be agreed upon.<sup>305</sup> On February 3, 2016, U.S. Soccer went on the offensive, filing a lawsuit in an effort to define exactly what collective bargaining agreement existed between the two parties.<sup>306</sup>

Then, in March 2016, members of the USWNT filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming unequal compensation as compared to the men's national team in violation of Title VII and the Equal Pay Act.<sup>307</sup> The players claimed U.S. Soccer was paying them less than half of what they pay the men's team for doing the same job, in the same environment, with the same, if not higher, expectations.<sup>308</sup> Players' attorney Jeffrey Kessler stated, "Discrimination has happened forever, but in terms of legal actions, this is the first time I think that there's been an EEOC complaint on this [issue]."<sup>309</sup> On May 26, 2016, the U.S. Senate unanimously passed a non-binding resolution calling for the United States Soccer Federation to "immediately eliminate gender pay inequity and to treat all athletes with the same respect and dignity."<sup>310</sup>

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305. Das, *supra* note 303.

306. *Id.*

307. See Andrew Washburn, *USWNT EEOC Wage Discrimination Complaint Archives*, FORDHAM SPORTS L.F. (May 1, 2016) [http://fordhamsportslawforum.com/tag/uswnt-eeoc-wage-discrimination-complaint/#\\_ftn1](http://fordhamsportslawforum.com/tag/uswnt-eeoc-wage-discrimination-complaint/#_ftn1) (referencing the Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2012); Equal Pay Act of 1963, 29 U.S.C. § 206 (d)).

308. See Andrew Das, *Pay Disparity in U.S. Soccer? It's Complicated*, N.Y. TIMES, Apr. 21, 2016, <https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html>.

According to figures provided by U.S. Soccer, since 2008 it has paid 12 players at least \$1 million. Six of those players were men, and six were women. And the women hold their own near the top of the pay scale; the best-paid woman made about \$1.2 million from 2008 to 2015, while the top man made \$1.4 million in the same period. Some women in the top 10 even made more than their male counterparts over those years. But the numbers diverge down the list. At No. 25, the female player made just under \$341,000, and the corresponding male player supplemented his salary by about \$580,000. At No. 50, the male player made 10 times as much as his female counterpart.

*Id.*

309. Laura Santhanam, *Data: How Does the U.S. Women's Soccer Team Pay Compare to the Men?*, PBS (Mar. 31, 2016), <http://www.pbs.org/newshour/rundown/data-how-does-the-u-s-womens-soccer-team-pay-compare-to-the-men/#>.

310. See S. Res. 462, 114th Cong. (2015–16), available at <https://www.congress.gov/bill/114th-congress/senate-resolution/462> (*A Resolution Urging the United States Soccer Federation to Immediately Eliminate Gender Pay Inequity and Treat All Athletes with the Same Respect and Dignity*, introduced by Sen. Patty Murray [D-WA]). In her statement on the Senate floor before the resolution was adopted, Senator Patty Murray (D-Wash.) stated:

U.S. Soccer and the USWSNT finally agreed to a new CBA on April 5, 2017.<sup>311</sup> The new agreement includes a significant pay increase, improved match bonuses, and some licensing and marketing rights, but does not guarantee equal pay with the men's national team.<sup>312</sup>

At the same time, the U.S. Women's National Ice Hockey team threatened to boycott the 2017 World Championships, frustrated with their year-long discussions with USA Hockey about pay and equitable support.<sup>313</sup> The issues echoed those of the women's national soccer team from 2000—investing in girls development, more marketing, and better compensation.<sup>314</sup> Even though USA Hockey responded by threatening to use replacement players, the two sides were able to craft a new four-year contract with the women's national team in just a week.<sup>315</sup> While the terms of the agreement were not released, a salary of \$68,000, childcare and maternity benefits, disability insurance, and a group to oversee the advancement of girls and women's ice hockey were among the items sought by the players.<sup>316</sup>

Battles for equal or equitable pay are likely to continue in professional sport as long as players believe they are being treated unfairly. Whether the plight of professional cheerleaders, minor league baseball players, or the women's national teams in soccer or hockey, battles will continue to be debated and discussed in the court of public opinion and the judicial system, if necessary. In fact, with regard to the women's national hockey team, all four major professional sports league players associations (MLB, NBA, NFL and NHL) released statements of support, and fourteen U.S. Senators encouraged USA Hockey to treat the women's team fairly.<sup>317</sup>

Questions:

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[T]his isn't just about the money. It's also about the message it sends to women and girls across our country and the world. The pay gap between the men and women's national soccer teams is emblematic of what is happening all across our country. On average, women get paid just 79 cents for every dollar a man makes. This is at a time when women, more than ever, are likely to be the primary breadwinner for their family. The wage gap isn't just unfair to women. It hurts families. And it hurts our economy.

*Id.*

311. Das, *supra* note 304.

312. *Id.*

313. Juliet Macur, *U.S. Women's Hockey Team Boycott Echoes a Fight That Isn't Over*, N.Y. TIMES, Mar. 15, 2017, <https://www.nytimes.com/2017/03/15/sports/hockey/us-women-world-championship-boycott-contract.html>.

314. *Id.*

315. Ahiza Garcia, *Women's National Team Agrees to 4-year Deal with USA Hockey*, CNNMONEY (Mar. 29, 2017), <http://money.cnn.com/2017/03/28/news/usa-hockey-womens-pay/index.html>.

316. *Id.*

317. *Id.*

1. Should men's and women's national team players be compensated and treated equally for representing the United States in international competition?
2. Both the women's soccer and ice hockey national teams received support from elected government officials – what is the appropriate role for US Senators in the sport industry?

*F. Concussion Discussion, Concerns and Litigation*

Finally, the concern over participation in sport and concussions encompasses all levels of competition, from youth sport to professional sport. As Michael Rosenberg states, “In sports today, the word concussion is often followed by the word lawsuit.”<sup>318</sup> In fact, 2015 may have been the hallmark year for concussion discussion after the movie *Concussion* appeared in theaters and demonstrated the history of how a forensic pathologist, Dr. Bennet Omalu, successfully fought against the NFL and proved that constant blows to the head resulted in what he characterized as chronic traumatic encephalopathy (C.T.E.), or brain degeneration.<sup>319</sup> At all levels, how to deal with concussions has changed considerably over time and in recent years.<sup>320</sup>

Today, the concussion discussion is driven largely by prominent lawsuits and settlements including claims that thousands of retired football players have suffered from football-related brain diseases directly associated with concussions. Many of the lawsuits have been filed against professional leagues, such as the NFL, for failing to take reasonable precautions to protect players from the risks associated with concussions and traumatic brain injuries.<sup>321</sup> In 2016, the United States Court of Appeals for the Third Circuit upheld a settlement approval by the District Court, upwards of \$1 billion.<sup>322</sup> The settlement resolved the legal claims of two of the subclasses of the estimated 21,000 former players who either have, or may in the future develop brain disease.<sup>323</sup> Former players who develop the most severe brain diseases can seek

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318. See Michael Rosenberg, *Eric Lindros: Hall of Famer Makes Concussions Part of Legacy*, SPORTS ILLUSTRATED, June 29, 2017, <https://www.si.com/nhl/2017/06/29/eric-lindros-concussions-flyers-where-are-they-now>.

319. CONCUSSION (Columbia Pictures 2015); see *Concussion*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Concussion\\_](https://en.wikipedia.org/wiki/Concussion_) (last visited July 30, 2018).

320. See Rosenberg, *supra* note 318.

321. *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016).

322. *Id.* at 447–48.

323. *Id.* at 425.



up to \$5 million each from an open-ended NFL fund.<sup>324</sup> In December 2016, the Supreme Court of the United States declined to hear an appeal of the settlement,<sup>325</sup> and payouts to former players commenced in 2017, overseen by the District Court for the Eastern District of Pennsylvania.<sup>326</sup>

Questions:

1. Given the known risks associated with playing contact sports, should well-compensated professional athletes be expected to assume the risks inherent in their sport?
2. Why do parents still allow their children to play football given the known risks?
3. President Theodore Roosevelt once threatened to cancel college football because of disabling injuries and deaths – should football be banned?
4. What can be done from a regulatory or legal perspective to improve player safety and reduce the risk of brain injury?

## VI. CONCLUSION

The purpose of this article was to explore ethical and legal issues among four levels of sport since 2011. Primarily pedagogical in nature, the issues we have included provide a variety of ethical situations from which the instructor can present to the class for animated discussion and debate. Questions were provided at the end of each subsection accordingly.

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324. See Ken Belson, *Appeals Court Affirms Landmark N.F.L. Concussion Settlement*, N.Y. TIMES, Apr. 19, 2016, <https://www.nytimes.com/2016/04/19/sports/football/nfl-concussion-lawsuit.html> (providing a link to the sixty-nine page ruling and offering, inter alia, that “Only the 150 or so players who opted out of the settlement can continue to sue the league in the matter.”).

325. See Ken Belson, *N.F.L. Concussion Settlement Payments Can Begin After Supreme Court Defers*, N.Y. TIMES, Dec. 12, 2016, <https://www.nytimes.com/2016/12/12/sports/football/nfl-concussion-settlement-payments-supreme-court.html> (“The settlement, worth perhaps as much as \$1 billion, covers nearly every former player for the next 65 years.”).

326. See Associated Press, *First Claims Are Approved in N.F.L. Concussion Settlement*, N.Y. TIMES, June 16, 2017, <https://www.nytimes.com/2017/06/16/sports/football/nfl-concussion-settlement.html>.

The payouts were for \$5 million for a qualifying diagnosis of amyotrophic lateral sclerosis and \$4 million for a qualifying diagnosis of chronic traumatic encephalopathy. Those amounts mean that each individual played a minimum of five N.F.L. seasons and received a diagnosis before his 45th birthday. Players who have received a diagnosis of A.L.S., Parkinson’s, Alzheimer’s or dementia are eligible for payments. The league has estimated that 6,000 former players—or nearly three in 10—could develop Alzheimer’s disease or moderate dementia. More than 14,500 class members out of a potential well above 20,000 have registered for benefits ahead of the Aug. 7 deadline.

*Id.*

From the impact that social media has had with attempts to control and monitor postings and tweets by athletes and others, to “mercy rules,” to many examples of fraud, to the game of cat-and-mouse involving using and testing for performance-enhancing drugs, this article demonstrates that ethical issues never cease to reveal themselves in the context of sport even at the youth, amateur, interscholastic, intercollegiate, and Olympic levels of competition.

Recent examples abound in professional sport as well. For example, concerns related to computer fraud and *Hackgate*, manipulation of footballs in *Deflategate*, pay inequities among the men’s and women’s national soccer and hockey teams, to the vital legal issues, claims, settlements, and discussion of concussions, the relationship between ethics and law continues to present challenges for those involved in sport at any level. This article could serve as a springboard for further examples, but we believe it is important to engage in diverse viewpoints on the struggle between what is “right-or-wrong” especially when the rules of the game, so to speak, are unclear and ambiguous.

In the years to come, there will be further examples of misdeeds, which present challenges to coaches, parents, participants, and others in sport. We strongly encourage professors to share timely examples as society continues to evolve, technology advances, and laws and the legal system continuously attempt to play catch-up with changing times and a new generation. Indeed, staying current enhances the active-learning environment and challenges students and professors alike.