Article-The NCAA and Whistleblowers 30-40 Years of Wrongdoing and College Sport and Possible Solutions

Adam Epstein
THE NCAA AND WHISTLEBLOWERS:  
30-40 YEARS OF WRONGDOING AND COLLEGE SPORT AND POSSIBLE SOLUTIONS

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I. INTRODUCTION

The purpose of this article is to explore specific examples of individuals on college campuses who took the step of blowing the whistle by exposing wrongdoing over the last thirty to forty years in the context of college sport.1 The article briefly discusses a history of whistleblowing in the United States, reaching back to the False Claims Act (FCA), the first federal law adopted specifically to protect whistleblowers enacted post-Civil War.2 The relevancy to today is demonstrated in the various federal and state laws and programs now designed to protect (and possibly reward) those who reveal wrongdoing.3

Then, article offers prominent, modern examples of whistleblowers in the context of intercollegiate athletics, particularly-but not exclusively-to instances of academic fraud, including those emanating from the 1980s, 1990s, and post-2000. As the article demonstrates, there could be a heavy price to be paid for revealing wrongdoing in college sports which includes a broad spectrum of unsavory revelations and allegations including academic fraud,4 physical violence,5 sexual abuse,6 and the reporting of Title IX

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*J.D./M.B.A., Professor, Department of Finance and Law, Central Michigan University, Mount Pleasant, Michigan. This article generally follows an invited-now updated-presentation given at Marquette University Law School for the symposium in conjunction with the Wisconsin Bar Association’s Current Ethical Issues in Sports Law on July 10, 2015. Sincere thanks to Professor Paul Anderson, Marquette University Law School for the invitation.

1 See Sara Ganim, Women Who Blew Whistle in Student-athlete Cases and What Happened Next, CNN.COM (Jan. 9, 2014), http://www.cnn.com/2014/01/09/us/ncaa-athlete-literacy-whistle-blowers/ (offering various examples of women on college campuses who reported wrongdoing many of whom are discussed in this article).


violations.7 Indeed, the list of examples of revelation of wrongdoing runs deep. Beyond exploration of a few examples among these decades, the article demonstrates that reporting allegations of wrongdoing impacts the organization and often results in civil claims, criminal charges, a social stigma to the whistleblower, termination, intimidation, and often a severe blow to physical and mental health of the whistleblower.

As a basic solution, the article offers that NCAA or its member institutions should consider establishing whistleblower policies to protect those who report wrongdoing, thereby formalizing a structure and possibly minimizing the negative impact on the individual and the organization. Of course, given the advent of social media and its prevalence, the stakes have been raised for all college campuses regardless of whether it is related to athletics thereby exposing wrongdoing merely with the click of a button.

(SUNY-Binghamton) was pressured to change her grading policy for basketball players who were missing classes and was afraid to speak out against the basketball players and their absences and disruptions in class). She was subsequently terminated later in 2009 due to an “uncertain fiscal environment” and “strategic reprioritization of resources across the university.” See, e.g., Pete Thamel, Binghamton Lecturer Critical of Athletics Is Fired, N.Y. TIMES (Sept. 29, 2009).

5 See Lester Munson, Rutgers’ Tangled Legal Mess, 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 (summarizing the allegations by Eric Murdock who served as the director of basketball player development for Rutgers and the coaching abuses by former Rutgers basketball coach Mike Rice). Rice was eventually fired, athletic director Tim Pernetti resigned the next year, Murdock was fired from Rutgers and sued for wrongful termination. The lawsuit ended in August 2016, settling for $500,000. See Keith Sargeant, Eric Murdock Finally Settles with Rutgers over Mike Rice Scandal, NJ.COM (Aug. 29, 2016), http://www.nj.com/rutgersbasketball/index.ssf/2016/08/eric_murdock_vs_rutgers_feud_finally_over_after_6-.html.


7 For an exploration of how whistleblower protections were expanded and held to include falling under a Title IX analysis, see Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005). High school coach Roderick Jackson ultimately prevailed after he complained about inadequate and disparate treatment in facilities between boys’ and girls’ locker rooms and was terminated for blowing the whistle on the discrimination. The Supreme Court held he was an indirect victim of sex discrimination because he tried to rectify the gender discrimination that his athletes were experiencing. The Court’s reasoning was that Title IX mirrors Title VII even though it is not explicit in the Title IX statute. “Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action.” Id. at 173. For a quick summary, see Faces of Title IX, Coach Roderick Jackson’s Title IX Story, Title IX.INFO, http://www.titleix.info/Faces-of-Title-IX/Meet-the-Faces-of-Title-IX/Coach-Roderick-Jacksons-Title-IX-Story.aspx (last visited Jan. 6, 2018).
The article finally provides how a few schools have developed whistle-blower policies, and how the establishment of a formal policy might benefit all the players involved in intercollegiate sport by attempting to mitigate the immediate effects against the whistleblower and, possibly, viewing the whistleblower as a protected organizational asset rather than a villain.

II. “WHISTLEBLOWING”

The definition of “whistleblowing” and a “whistleblower” can vary, but for the purposes of this article, it is defined broadly as “calling attention to wrongdoing that is occurring within an organization.”\(^8\) Indeed, the Government Accountability Project\(^9\) lists four ways to blow the whistle on wrongdoing from a general perspective to include:

1. Reporting wrongdoing or a violation of the law to the proper authorities such as a supervisor, a hotline or an Inspector General;
2. Refusing to participate in workplace wrongdoing;
3. Testifying in a legal proceeding;
4. Leaking evidence of wrongdoing to the media.\(^{10}\)

Prominent whistle-blowers in the context of modern American business law have included Karen Silkwood (Kerr-McGee), Jeffrey Wigand (Brown & Williamson), Sherron Watkins (Enron), Cynthia Cooper (WorldCom) and Coleen Rowley (Federal Bureau of Investigation).\(^{11}\) Indeed, Harry Markopolos tried to blow the whistle on Bernard Madoff’s infamous modern day Ponzi scheme, but at first no one would listen to his concerns.\(^{12}\) More

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\(^9\) Id.

\(^{10}\) Id. According to its website, “The Government Accountability Project is the nation’s leading whistleblower protection and advocacy organization. A non-partisan public-interest group, GAP litigates whistleblower cases, helps expose wrongdoing to the public, and actively promotes government and corporate accountability. Since 1977, GAP has helped over 6,000 whistleblowers.” See GOV’T ACCOUNTABILITY PROJECT, About, WHISTLEBLOWER.ORG (2017), https://www.whistleblower.org/truth-be-told-it-isn’t-tagline-it’s-our-driving-purpose.


recently, the high-pressure culture at the financial services company Wells Fargo reinforces the concept that those who blow the whistle on wrongdoing within an organization often suffer severely and are retaliated against for revealing misdeeds within the organization.\[^{13}\]

A. Federal and State Whistleblowing Protection Fundamentals

In the U.S., the first law adopted specifically to protect whistleblowers was the 1863 False Claims Act (FCA) (revised in 1986), which tried to combat fraud by suppliers of the U.S. government during the Civil War.\[^{14}\] The FCA encourages whistleblowers to reveal violations and wrongdoing against the government by promising a percentage of the money recovered by the government (anywhere between 10-30%), and by offering to protect them from employment retaliation.\[^{15}\]

In recent years, awards to whistleblowers who provide timely and credible information about federal securities laws violations have been awarded tens of millions of dollars.\[^{16}\] In the employment context, a claim would be investigated by the Equal Employment Opportunity Commission

\[^{13}\]See Matt Egan, More Wells Fargo Workers Allege Retaliation for Whistleblowing, CNN MONEY (Nov. 7, 2017), http://money.cnn.com/2017/11/06/investing/wells-fargo-retaliation-whistleblower/index.html?sr=twmoney110617hln1005PMN/AN/A&linkId=44396390 (mentioning the “fake accounts scandal and that “Wells Fargo was ordered by the Labor Department to pay $5.4 million and rehire a whistleblower who was fired after calling the ethics hotline to report suspected fraud”); see also Stacy Cowley, At Wells Fargo, Complaints About Fraudulent Accounts Since 2005, N.Y. TIMES (Oct. 12, 2016), http://www.nytimes.com/2016/10/12/business/dealbook/at-wells-fargo-complaints-about-fraudulent-accounts-since-2005.html?smid=tw-share (detailing the ethics scandal and retaliation and in some cases demotion or termination against employees who reported the opening of sham accounts, forging customer signatures and sending out unsolicited credit cards).


\[^{15}\]Id.; see also Press Release, SEC Awards Whistleblower More Than $700,000 for Detailed Analysis, SEC.GOV (Jan. 15, 2016), https://www.sec.gov/news/pressrelease/2016-10.html (noting also that “...the SEC protects the confidentiality of whistleblowers and does not disclose information that might directly or indirectly reveal a whistleblower’s identity.”).

\[^{16}\]See Whistleblower Awards over $150 Million, U.S. SECS. & EXCH. COMM’N, https://www.sec.gov/page/whistleblower-100million (last visited Jan. 6, 2018) (offering an interactive chart on how the process works and listing the top 10 awards since 2013).
(EEOC), the agency responsible for enforcing federal laws against employment discrimination.\textsuperscript{17}

Reporting violations to the government are referred to as \textit{qui tam} lawsuits and special procedures to keep the claim from becoming public until the federal government makes its decision on whether to prosecute the claim.\textsuperscript{18} In sum, the FCA allows private citizen whistleblower (i.e., a “relator”) to file a qui tam action on behalf of the federal government to recover funds paid due to fraud.\textsuperscript{19}

Today, the Internal Revenue Service (IRS)\textsuperscript{20} and the Securities and Exchange Commission (SEC) have formal whistleblower programs.\textsuperscript{21} Additionally, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) strengthens the whistleblower protection provisions of the FCA.\textsuperscript{22} With respect to whistleblowing, the legislative history of Dodd-Frank explains that “whistleblowers often face the difficult choice between telling the truth and the risk of committing ‘career

\textsuperscript{17} See Press Release, \textit{EEOC Issues Final Enforcement Guidance on Retaliation and Related Issues after Public Input Process}, \textit{EEOC.Gov} (Aug. 29, 2016), https://www.eeoc.gov/eeoc/newsroom/release/8-29-16.cfm (offering, “Since EEOC’s 1998 Compliance Manual section on retaliation, the U.S. Supreme Court has issued seven decisions addressing retaliation under EEOC-enforced laws, and the filing of EEO claims that include a retaliation allegation has continued to grow.” Additionally, “Charges of retaliation surpassed race discrimination in 2009 as the most frequently alleged basis of discrimination” and “In the federal sector, retaliation has been the most frequently alleged basis since 2008, and retaliation findings comprised between 42 percent and 53 percent of all findings of EEO violations from 2009 to 2015.”).

\textsuperscript{18} See \textit{AM. BAR ASS’N, False Claims Act}, http://apps.americanbar.org/abastore/products/books/abstracts/5150321chapter1_abs.pdf (providing a link to Chapter 1 and offering that “qui tam” is an abbreviation of the Latin phrase \textit{qui tam pro domino rege quam pro se ipso in hac parte sequitur}, meaning [he] “who brings the action for the king as well as himself.”).

\textsuperscript{19} \textit{Id}. at 2.

\textsuperscript{20} See \textit{Whistleblower - Informant Award}, \textit{IRS.GOV}, https://www.irs.gov/compliance/whistleblower-informant-award (“The IRS Whistleblower Office pays money to people who blow the whistle on persons who fail to pay the tax that they owe. If the IRS uses information provided by the whistleblower, it can award the whistleblower up to 30 percent of the additional tax, penalty and other amounts it collects.”).

\textsuperscript{21} See Press Release, \textit{supra} note 15.

\textsuperscript{22} Pub. L. No. 111-203, 124 Stat. 1376-2223 (codified in scattered sections of 12 U.S.C. (2017)); see also Sipe et al., \textit{supra} note 14, at 5-7. Since Congress established the program under the Dodd-Frank Act, the SEC has paid $107 million to 33 whistle-blowers, and recovered more than $500 million in sanctions from enforcement actions prompted by tips from the public; see also N. Peter Rasmussen, \textit{SEC Whistle-Blower Awards Top $100 Million}, \textit{Corporate Transactions Blog}, \textit{BLOOMBERG} (Sept. 1, 2016), http://www.bna.com/sec-whistleblower-awards-b73014447088/?promocode=LIPP101AA&utm_source=Twitter&utm_medium=compcontent &utm_campaign=BloombergLaw.
Numerous other federal laws, including the Sarbanes-Oxley Act of 2002 (SOX), provide whistleblower protections today. At the state level, laws are comprehensive yet often vary by jurisdiction. Wisconsin has developed whistleblower protections via both common law and statutory law. In California, whistleblower protections protect workers who disclose violations even if doing so is not part of their official job duties.

B. Whistleblowing in the Context of Sport

Blowing the whistle on wrongdoing in sport comes in various forms including, but not limited to, the reporting allegations of Title IX violations.

24 Pub. L. 107–204, 116 Stat. 745 (2002); see also Sipe et al., supra note 14, at 3-5 (offering, “SOX created protective anti-retaliation provisions for corporate whistleblowers by empowering courts and administrative agencies to provide monetary and non-monetary remedies to make the whistleblower whole.”);
25 See Chris Hanna et al., College Athletics Whistle-Blower Protection, 27 J. LEG. ASPECTS OF SPORT 209, 214 (2017) (“Generally speaking, each state provides some level of protection, but the requirements necessary to receive protection are not uniform.”).
26 State of Wisconsin, Protection from Retaliation for Wisconsin Workers-the Whistleblower Law, WISCONSIN.GOV, https://dwd.wisconsin.gov/er/discrimination_civil_rights/whistleblower_law.htm (last visited June 7, 2015) (offering that an employee may not be discharged for a reason that violates a fundamental and well-defined public policy and employers may not discharge employees who fulfill a statutory obligation to prevent wrongdoing by reporting the wrongdoing to appropriate authorities).
27 Workplace Fairness, Filing a Whistleblower or Retaliation Claim-Wisconsin, WORKPLACEFAIRNESS.ORG, http://www.workplacefairness.org/whistleblower-retaliation-claim-WI (last visited June 2, 2017) (offering that an employee may not be discharged (or discriminated against) in retaliation for opposing an unlawful discriminatory practice. Nor may an employee be discharged (or discriminated against) in retaliation for filing a complaint, testifying, or assisting in a proceeding, under the Wisconsin Fair Employment Act (WFEA)).
28 See CAL. WHISTLEBLOWER PROTECTION ACT §§8547–8547.15, http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?division=1.&chapter=6.5.&lawCode=GOV&title=2.&article=3 (Listing the Act which in 8541.1 states, “The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.”).
29 See Mark Zeigler, USC Assistant Beth Burns Wins Wrongful-termination Lawsuit against San Diego State, L.A. TIMES (Sept. 28, 2016), http://www.latimes.com/sports/sportsnow/la-sp-beth-burns-lawsuit-20160928-snap-story.html (discussing former San Diego State women’s basketball coach Beth Burns’ legal victory over her wrongful-termination trial against the university, receiving a $3.35-million judgment from a San Diego jury for whistle-blower retaliation after complaining about potential Title IX violations, though SDSU was not on trial for Title IX violations per se. “Burns was fired in April 2013, a month after her team won a
revelations of fraudulent participation, and the exposure of the use of performance-enhancing drugs (PEDs). The plight of the whistleblowers involved in the revelation of state-sponsored Russian Olympic participant doping has forced those whistle-blowers to fear for their lives. At least one whistleblower has been placed in the U.S. government’s witness protection program as a result. Additionally, the World-Anti-Doping Agency (WADA), the organization responsible for administering world-wide sport drug-testing for the Olympic Movement and other sport organizations, has recently established a formal whistleblower policy and procedures to protect those who reveal wrongdoing.

school-record 27 games.” According to the article, SDSU claimed that Burns was terminated for other reasons including an alleged “history” of mistreating subordinates; see also Mark Zeigler, The Real Reason Beth Burns was Fired at SDSU, SAN DIEGO UNION-TRIB. (Sept. 30, 2016), http://www.sandiegouniontribune.com/sports/aztecs/sd-sp-burns-20160929-story.html.

30 See Zak Koeske, Whistleblower in Jackie Robinson West Scandal Sues Little League Baseball, CHI. TRIB. (Sept. 20, 2016), http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-little-league-lawsuit-st-0921-20160920-story.html (discussing the case of Chris Janes, the Chicagoland area resident and rival youth baseball coach who blew the whistle on Jackie Robinson West (JRW) by filing a formal complaint to Little League Baseball International (LLBI), which later stripped JRW of its 2014 national title for using ineligible players based upon their residency. Janes alleged intentional and negligent infliction of emotional distress, and that LLBI’s two-month “cover-up” of the wrongdoing caused him “severe emotional distress that resulted in depression, anxiety, humiliation, loss of sleep, weight loss and loss of consortium” and he received “death threats, suffered public humiliation and feared for his life.”).

31 See Rebecca R. Ruiz, Willing to Blow the Whistle on Doping? New Legal Aid Group Wants to Help, N.Y. TIMES (Mar. 12, 2017), https://www.nytimes.com/2017/03/12/sports/olympics/willing-to-blow-the-whistle-on-doping-new-legal-aid-group-wants-to-help.html?_r=2; but see United States ex rel. Landis v. Tailwind Sports Corp., 308 F.R.D. 1 (D.D.C. 2015) (holding that former professional cyclist Floyd Landis, who filed qui tam action against Lance Armstrong alleging that Armstrong had a duty to repay the team sponsor U.S. Postal Service (USPS), could not recover as a relator under the Act as there was no “reverse false claims provision” under § 3729(a)(7)).

32 Ruiz, supra note 31.


C. Whistleblowing in the Context of Intercollegiate Athletics

In college sport, blowing the whistle on wrongdoing has often centered on claims of academic misconduct.\(^{35}\) Often, those who have reported violations have paid a heavy emotional and reputational price for speaking out against wrongdoing within the organization.\(^{36}\) The following examples represent just a few of some of the most prominent examples of whistleblowing in the context of college sport in the last 30-40 years. Unfortunately, for many of them, the price paid may have been too much as the whistleblower often suffers and serves as the scapegoat for the institution.\(^{37}\)

1. Jan Kemp: 1980s

One of the earliest athletic-related whistle-blowers was Assistant Professor of English Jan Kemp, who in the early 1980s exposed preferential treatment of student-athletes at the University of Georgia (UGA) for allowing football players who failed a remedial English class to play in the Sugar Bowl against the University of Pittsburgh in 1982.\(^{38}\) Kemp was then demoted that same year and then fired in 1983, though she was later reinstated.\(^{39}\) She sued UGA officials, claiming unlawful termination based upon a violation of her freedom of speech.\(^{40}\)

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\(^{35}\) Scott James Preston, *Whistleblowing in Intercollegiate Athletics*, UNIV. BUS. (Apr. 2012), http://www.universitybusiness.com/article/whistleblowing-intercollegiate-athletics (mentioning the case involving Mike McQueary at Penn State and discussing Glenn Hedden’s case at Kean University, both discussed further infra).

\(^{36}\) See, e.g., Mike McIntire, *Football Favoritism at F.S.U.: The Price One Teacher Paid*, N.Y. TIMES (Sept. 1, 2017), https://www.nytimes.com/2017/09/01/sports/ncaafootball/florida-state-football.html (outlining the price paid by doctoral student Christina Suggs at Florida State University, “who said she felt pressured to give special breaks to athletes in online hospitality courses on coffee, tea and wine, where some handed in plagiarized work and disregarded assignments and quizzes.” Suggs thereafter “lost her job and left the school.”).

\(^{37}\) Patrick Hruby, *Code of Silence*, SPORTS ON EARTH (Apr. 5, 2013), http://www.sportsonearth.com/article/43883520/ (stating, “…college sports whistleblowers get blown up” and providing various examples from several university athletic programs).


\(^{39}\) *Id.* (“Although Dr. Kemp was ultimately vindicated, she said she suffered emotional turmoil from the dispute and twice attempted suicide in 1982.”).

\(^{40}\) See Kemp v. Ervin, 651 F. Supp. 495 (N.D. Ga. 1986) (overruling UGA administrators’ motion for a new trial and attempt to vacate, or alternatively reduce, liability for jury’s award of compensatory damages. Kemp successfully claimed that the termination, “…deprived of her employment and other employment benefits because of the exercise of the freedom of speech rights” under the First and Fourteenth Amendments”). *Id.* at 498.
UGA defended its actions saying that Kemp was dismissed for being a poor professor overall and “...did not participate in research, was insubordinate and had difficulty in getting along with her peers and others.”  

UGA also attempted “to show that there was no reasonable likelihood that she would be tenured and that the fair thing to do, from an academic point of view, was to nonrenew [sic] her contract” since she might not have eventually earned tenure at UGA based upon her scholarly output, though “…it was conceded by the defendants that she was an excellent English teacher.” The jury awarded $2.57 million, which was later reduced.

University President Fred C. Davison announced his resignation a month after the jury’s verdict. Kemp retired from teaching in 1990 and was named “a hero of the 80s” by People Magazine. Kemp died in 2008 at only 59 years old from complications related to Alzheimer’s disease. She was the Drake Group’s first honoree of the Hutchins Award in 2004, an organization devoted to academic integrity and how to end corruption in college sport.

2. Jan Gangelhoff: 1990s

The next decade, Jan Gangelhoff was involved in a scandal at the University of Minnesota (UM) involving its men’s basketball team and NCAA rules violations over academic dishonesty. The St. Paul Pioneer Press published an article on the day before the 1999 NCAA March Madness...
Basketball Tournament with revelations by former UM academic counseling office manager Gangelhoff herself that she had voluntarily written over 400 papers for 20 UM basketball players from 1994-1998. She resigned from UM from stress.\(^51\)

The fraud led to resignations of head coach Clem Haskins, men’s athletic director Mark Dienhart, and university vice president McKinley Boston.\(^52\) Four student-athletes were immediately suspended.\(^53\) The NCAA placed UM’s basketball program on four years’ probation and reduced scholarships.\(^54\) Jan suffered from bouts of depression, underwent quadruple bypass heart surgery, and lost 80 pounds.\(^55\) She died in 2005 at only 56 years young.\(^56\)


Norma McGill was a graduate teaching assistant in the African-American and Africa Studies Department at Ohio State University (OSU).\(^57\) When McGill witnessed star running back Maurice Clarett walk out of his midterm exam in 2002 and then retake the test orally, she questioned the legitimacy of the process.\(^58\) When McGill called on OSU officials to investigate the matter, she claimed she suffered hostile treatment from the department chair.\(^59\) McGill left the university.\(^60\)

An internal investigation found no evidence to support allegations of academic misconduct made against the OSU football program or the athletics

department.\textsuperscript{61} OSU President Karen Holbrook and athletic director Andy Geiger revealed that the NCAA read the school’s report and would take no further action in the matter.\textsuperscript{62} Still, it is noteworthy that in 2006, OSU established a formal, university-wide whistleblower policy.\textsuperscript{63}

4. Mike McQueary: 2010s

A former quarterback for Penn State University (PSU) between 1994 and 1997, Mike McQueary joined head coach Joe Paterno’s staff as a graduate assistant in 2000 and later was named a full-time receivers coach at PSU.\textsuperscript{64} In 2011, when charges were first brought against assistant PSU football coach Jerry Sandusky for sexually assaulting and preying on children, McQueary was suspended with pay and placed on administrative leave on November 11, 2011, the final game of the season.\textsuperscript{65} McQueary witnessed Sandusky’s abuse in 2001.\textsuperscript{66}

After Sandusky was found guilty of abusing at least ten boys in 2012, PSU terminated McQueary’s job for which he claimed retaliation for assisting prosecutors.\textsuperscript{67} McQueary had testified before the grand jury that he witnessed Sandusky in the shower with a young boy, engaging in sex acts.\textsuperscript{68} McQueary testified that he reported the incident to Paterno and high-level administrators.\textsuperscript{69}

McQueary fought back after being placed on leave and filed a $4 million whistleblower lawsuit against PSU for lost wages and he claimed

\textsuperscript{61} See Mark Freeman, Misconduct on Clarett is Denied, N.Y. TIMES (Dec. 18, 2003), http://www.nytimes.com/2003/12/18/sports/football-misconduct-on-clarett-is-denied.html.
\textsuperscript{62} Id.
\textsuperscript{63} See OHIO STATE UNIV., Whistleblower Policy 1.40, https://hr.osu.edu/public/documents/policy/policy140.pdf (revealing that it has been edited or revised three times since its establishment in 2006 and currently reads, “The Ohio State University encourages all faculty, staff, students and volunteers, acting in good faith, to report suspected or actual wrongful conduct. The university is committed to protecting individuals from interference with making a protected disclosure and from retaliation for having made a protected disclosure or for having refused an illegal order as defined in this policy.”).
\textsuperscript{66} Id. (According to this report “On May 7, 2012, prosecutors file court documents to change the date of the assault to on or around February 9, 2001.”)
\textsuperscript{68} Id.
\textsuperscript{69} Id.
“irreparable harm to his ability to earn a living” because PSU discriminated against him for providing testimony in the Sandusky case. McQueary was awarded $7.3 million, including compensatory and punitive damages for defamation, on October 27, 2016. In the end, and after huge repercussions for the university’s reputation and its highest ranking administrators, another $5 million was ordered for retaliation for the whistleblowing thereby pushing McQueary’s award to $12 million.

5. Others

The above examples represent only a small-but significant-sample of incidents where individuals blew the whistle in college sports over the last 30-40 years and suffered significantly as a result. Additional examples suitable for further research and exploration include claims of academic fraud exposed by professor Linda Bensel-Meyers at the University of Tennessee, women’s basketball coach Robin Potera-Haskins at Montana State University who claimed wrongful discharge and retaliation for reporting gender discrimination in violation of Title IX, though


72 Id.; see also CNN Library, supra note 65 (offering, “The Department of Education fines Penn State $2.4 million for violating the Clery Act, a law that requires universities to report crime on campuses” and “Penn State reports that the total amount of settlement awards paid to Sandusky’s victims is now over $100 million.” This CNN timeline reported additional fallout from the criminal case, “Former Penn State athletic director [Tim] Curley and former university vice president [Gary] Schultz plead guilty to a misdemeanor charge of endangering the welfare of children in exchange for the dismissal of felony charges. June 2, 2017-The former president of Penn State University, [Grant] Spanier, and two other former administrators are sentenced to jail terms for failing to report a 2001 allegation that assistant coach Sandusky was molesting young boys. Spanier, whose total sentence is four to 12 months incarceration, will be on probation for two years and must pay a $7,500 fine, according to Joe Grace, a spokesman for the Pennsylvania’s attorney general’s office. Former Athletic Director Curley is sentenced to seven to 23 months’ incarceration and two years’ probation...He will serve three months in jail followed by house arrest and pay a $5,000 fine. Former Senior Vice President for Finance and Business Schultz is sentenced to six to 23 months’ incarceration and two years’ probation. He will serve two months in jail, followed by house arrest and pay a $5,000 fine, according to Grace.”).

73 See Ganim, supra note 1 (“In 2003, after years of hate mail and verbal attacks, she decided to leave Tennessee because death threats mentioned her children. Bensel-Meyers said she was treated so badly she had symptoms of post-traumatic stress disorder, and when she resigned, she told the university in her resignation letter: “No faculty member should ever find her attempts to do her job met with institutional threats and public attacks on her character.”.”).
unsuccessfully, and David Ridpath who reported NCAA rules violations at Marshall University and was reassigned after reporting misconduct.

Similarly, consider price paid by Abar Rouse who revealed misconduct among the Baylor University basketball team involving drugs and a murder, and Tiffany Terrell Mayne who reported of grade-changing involving student-athletes at Louisiana State University. A more recent example includes the plight of Mary Willingham, a learning specialist, who settled in 2015 with the University of North Carolina which paid her $335,000 settlement after she continued to speak publicly about one the most egregious example of academic misconduct in the history of the NCAA. In sum, a common theme among these examples and others who have alleged wrongdoing in college sports at all levels is that retaliation by a superior is almost a certainty.

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74 See Amy Beth Hanson, Montana State University Prevails in Potera-Haskins Lawsuit, BOZEMAN DAILY CHRON. (Aug. 11, 2010), https://www.bozemandailychronicle.com/news/montana-state-university-prevails-in-potera-haskins-lawsuit/article_8be8e666-a567-11df-bbe9-001cc4c002e0.html (providing pdf of the Memorandum and Order in which after a four day bench trial, U.S. District Court Judge Sam Haddon stated, “I have concluded ... that the entirety of plaintiff's Title IX complaints were undertaken to draw attention from or to blunt the impact of the extremely serious and harmful consequences of her conduct as head women's basketball coach.”); see also Potera-Haskins v. Gamble, 519 F. Supp. 2d (D. Mont. 2007), aff’d 2011 U.S. App. LEXIS 17077 (9th Cir. Mont. 2011).


77 See Ganim, supra note 1 (offering that she settled the lawsuit in 2005 “after alleging she was told to change grades to keep football players eligible for a bowl game.” Ganim continues, “Then-Chancellor Mark Emmert-now the president of the NCAA-said at the time Terrell-Mayne and another whistle-blower were tying personal issues to NCAA violations.”).


79 See, e.g., Dave D’Alessandro, Former Athletic Director Glenn Hedden Settles CEPA Suit against Kean University for $1.8 million, NJ.COM (June 30, 2014), http://www.nj.com/ledger-
III. ESTABLISHING AN INSTITUTIONAL WHISTLEBLOWER POLICY

One way to address concerns over retaliation for the reporting of wrongdoing includes establishing a formal policy that includes an anonymous whistleblower hotline or online reporting system. Additionally, conducting whistle-blowing education and training on how to report wrongdoing without jeopardizing one’s employment could be an effective means to address concerns within an organization.

For example, at DePauw University, an NCAA Division III member in Greencastle, Indiana, has a formal Whistleblower Policy: Protection for Those Reporting Fraudulent, Dishonest, or Unlawful Behavior that proscribes certain types of conduct violations falling within its purview including, but not limited to:

- A violation of a federal, state, or local law;
- Fraud or financial irregularities;
- Violation of any University policy;
- Fraudulent financial reporting;
- Forgery or alteration of any documents;
- Unauthorized alteration or manipulation of computer files;
- The use of University, property, resources or authority for personal gain or for non-University-related purpose except as authorized or provided under University policy;
- Authorizing or receiving compensation for services not received or services not performed;
- Requesting reimbursement for expenses not incurred;
- Authorizing or receiving compensation for hours not worked;
- Activities endangering the health and safety of others.

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dalessandro/index.ssf/2014/06/former_athletic_director_glenn_hedden_settles_cepa_suit_against_kean_university_for_18_million.html (announcing the settlement of Division III school Kean Univ. with Hedden, athletic director there for 22 years and who “was fired after informing his superiors and the NCAA that the coach of the women’s basketball team had committed academic fraud and violated a number of other regulations in conspiracy with two University vice presidents.”).

80 DEPAUW UNIV., Whistleblower Reporting, https://www.depauw.edu/offices/finance-administration/policies-and-procedures/governance-policies/whistleblower-policy/ (offering the policy that became effective Jan. 1, 2007 and stating, “Anonymous reporting of violations of this policy can be made by calling Campus Conduct Hotline at (866) 943-5787. Campus Conduct Hotline is a confidential, independent call-in service for Whistleblower reporting.”).

81 Id.
It further states,

“This policy prohibits retaliation in any form against an employee or student who in good faith reasonably believes and reports such alleged violations to the University’s attention. However, any employee or student who knowingly makes false accusations of misconduct shall be subject to disciplinary action. This policy also prohibits retaliation in any form against an employee or student who participates in or otherwise assists with an administrative proceeding, judicial proceeding, or investigation under this policy by the University, the Audit and Risk Management Committee of the Board of Trustees, or government agencies. Any employee or student who takes any actions whatsoever in retaliation against an employee or student of the University who has in good faith and with reasonable belief of a violation raised any question or concern or made a report under this policy shall be subject to discipline, up to and including termination of employment. Any employee or student who encourages others to retaliate also violates this policy and will be subject to such disciplinary action.”

The policy continues:

“The University will investigate any reported violation of laws, regulations, policies, or procedures by a University official or employee. Anyone found to have engaged in such violations is subject to disciplinary action, up to and including termination of employment, subject to applicable University procedures. All members of the University community are expected and encouraged to report possible violations through appropriate University procedures published elsewhere or by contacting the Vice President supervising the university official or employee whose conduct is in question; however, anyone concerned about possible retaliation may use the special reporting mechanisms of this policy (“whistleblower reporting”). Regardless of how the report of possible violations is filed, any concern about apparent retaliation for reporting a possible violation should be reported through the procedures outlined in this policy.”

82 Id.
83 Id.
DePauw’s formal, written policy could be a model for others NCAA member institutions to follow.

Similarly, at Montana State University (MSU), a Division I program, a hotline was set up to make it easier for whistleblowers to submit anonymous tips if they suspect someone is committing fraud, harassment or other violations of laws, regulations or policies. The hotline is open to students, staff, faculty and the public all four campuses (Bozeman, Billings, Great Falls and Havre). In fact, at MSU, the hotline and the associated website is regarded as a “best practice.” MSU includes similar examples of wrongdoing as DePauw but goes further and includes, “NCAA rules violations” within the scope of its policy. Individuals making false reports or with “reckless disregard for the truth” would be subject to disciplinary action.

IV. SUGGESTIONS

While establishing whistleblower policies on-campus can be effective, it might be more significant if NCAA Bylaws were amended to require the establishment of whistleblower protection policy among member institutions. At present, there is not such bylaw found within the 2017-2018 NCAA Division I Manual, though today the NCAA and its members have included “academic fraud” within its jurisdiction.

85 Id.
86 Id.; see also MSU Compliance Hotline, MONTANA STATE UNIV. https://secure.ethicspoint.com/domain/media/en/gui/38620/index.html (last visited Jan. 6, 2018).
87 See Whitney D. Hermandorfer, Note: Blown Coverage: Tackling the Law’s Failure to Protect Athlete-Whistleblowers, 14 VA. SPORTS & ENT. L.J. 250 (2015). Hermandorfer continues that student-athlete whistleblower protections would likely fail under an employment law analysis since “the law has overwhelmingly refused to recognize scholarship athletes as “employees” of the universities they attend.” Id. at 261; see also Edmund Donnelly, What Happens When Student-Athletes are the Ones Who Blow the Whistle?: How Lowery v. Euverard Exposes a Deficiency in the First Amendment Rights of Student-Athletes, 43 NEW ENG. L. REV. 943, 964 (2009) (proposing an additional layer of analysis to the Tinker student speech rule in athlete-whistleblower situations to remedy courts’ abridgment of student-athlete speech rights).
Further, Division I head coaches now bear the ultimate responsibility of wrongdoing under their supervision. However, unless a new federal or state law or NCAA bylaw was added or amended to include protection for student-athletes, it is very likely that any employment-related protection would protect student-athletes who report wrongdoing since student-athletes are not (yet) considered employees.

The NCAA and member institutions could also require mandatory training on state and federal laws that might apply to the institution including athletic departments on whistleblowing and retaliatory discharge (wrongful termination). The NCAA could engage institutions to encourage whistleblowing as a matter of policy and a form of self-policing with rewards for relators, possibly to include student-athletes themselves like *qui tam* actions. This might seem far-fetched, but on-campus compliance officers, academic misconduct includes any violation or breach of an institutional policy regarding academic honesty or integrity (e.g., academic offense, academic honor code violation, plagiarism, academic fraud.

90 NCAA MANUAL, art. 11.1.1.1 (“Responsibility of Head Coach. An institution’s head coach is presumed to be responsible for the actions of all institutional staff members who report, directly or indirectly, to the head coach. An institution’s head coach shall promote an atmosphere of compliance within his or her program and shall monitor the activities of all institutional staff members involved with the program who report, directly or indirectly, to the coach.”).

91 See Adam Epstein & Paul 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 also Hanna et al., *supra* note 25, *College Athletics Whistle-Blower Protection*, 27 J. LEGAL ASPECTS OF SPORT 209, 211 (2017) (acknowledging that whistleblowers are afforded “few safeguards from retaliation and potential threats to their career.” Hanna et al. also discuss the NCAA’s principle of institutional control and state, “Essential to the NCAA’s plan to provide effective oversight for the integrity of intercollegiate athletics is the requirement imposed on institutions and athletic department personnel to self-regulate and self-report violations. The NCAA requires all members of an intercollegiate athletics staff to annually sign Form 16–2 (or the “Form”). The Form requires all intercollegiate athletic department staff members to certify that the institution is in compliance with all NCAA bylaws (NCAA Form 16–2, 2016).” However, this NCAA policy appears to only apply to athletics department personnel and NCAA bylaws only. The authors do go on to state, however, “NCAA Form 16–2 essentially mandates that athletics personnel become active whistle-blowers.” Id. at 217).

92 See Hermandorfer, *supra* note 88 (proposing a *The Athlete-Whistleblower Protection Act* (AWPA), amending HIGHER EDUCATION ACT OF 1965 (20 U.S.C. § 1094(a)), for student-athletes establishing an anti-retaliation cause of action for athlete-whistleblowers who report abuse and misconduct by their coaches. As the author writes, “Without the law on their side, athlete-whistleblowers are often faced with a common choice: Stay silent, or risk exposure to “adverse athletic actions” including, most notably, non-renewal of their athletic-scholarships.” Id. at 252. It must be noted, however, that coaches no longer have “absolute discretion” to refuse to renew athletic scholarships and most athletic scholarships are no longer granted in one-year terms renewable solely at the discretion of the coach. Id. at 262-63; see also NCAA
coaches, faculty and even student-athletes could be partners rather than the be seen as villains.

Certainly, with the advent of social media and the ubiquitous smartphone with camera and video and audio recording capability, there is a possible level of transparency never before seen in college sports. Reporting or recording misdeeds and acts of wrongdoing are no longer constrained within the walls of athletic departments or the halls of the academic institution and are merely one Tweet or Snap away.

Though encouraging whistleblowing may be a lofty-and possibly unrealistic-goal for an organization, it is reasonable to propose that organizations establish formal, written policies which address such situations, and might include establishing a formal “amnesty clause” for reporting wrongdoing in which an institution posts on its own website that no formal action will be taken against those who report misconduct as some schools have with regard to sexual assault allegations. Until such policies are formal and written within an organization, it is also reasonable to assume that whistleblowing and protecting whistleblowers will not be taken seriously among NCAA institutions and elsewhere.

V. CONCLUSION

This article explored a few of the most prominent examples of whistleblowers in the last few decades on college campuses and the fallout from their decision to expose controversial matters involving intercollegiate athletics. As demonstrated, blowing the whistle on wrongdoing serves an important function and is as important today as it was post-Civil War. From classic business law examples including Silkwood, Wigand and Watkins, to
intercollegiate whistleblowers including Kemp, Gangelhoff and McQueary, reporting misconduct is an individual decision that comes with huge reputational risk.

Still, far too often, the decision to go public resulted in the instant status of pariah and employment termination. These examples and others have undoubtedly called into question the integrity of college athletic departments, universities and the overall intercollegiate athletic landscape. Regardless of the fallout, for some courageous individuals the price still may well be worth the cost.

The NCAA and its member institutions should consider alternatives to the status quo including encouraging the establishment of whistleblower protections through internal incentives rather than external legislation or governmental regulation. Athletic departments could include mandatory whistleblowing training so that compliance officers, coaches, faculty and others might better be related as partners rather than villains, especially when the integrity of higher education is tainted in the context of college sports. At the very least, this article recommends the establishment of a formal policy within an institution to protect whistleblowers including establishing an anonymous whistle-blower hotline.