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The Propriety of Incorporating Enforcement Staff Declination Statements into the NCAA Infractions Process Following Bylaw 11.1.1.1 Head Coach Responsibilities Investigations

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Josh Lens*

The Propriety of Incorporating Enforcement Staff Declination Statements into the NCAA Infractions Process Following Bylaw 11.1.1.1 Head Coach Responsibilities Investigations

ABSTRACT

When a significant NCAA violation occurs within a sports program, NCAA legislation presumes that the head coach is responsible for it, even if the head coach had no knowledge of, or involvement in, the rule breaking conduct. Under its relevant process, and as part of its investigation of the underlying violation(s), the NCAA automatically examines whether the head coach: (1) promoted a compliant atmosphere within the sports program and (2) monitored staff. If the NCAA deems the head coach's actions in these two areas satisfactory, the head coach rebuts the presumption of responsibility for the violation(s) in the head coach's program. If the head coach's actions fall short of the NCAA's expectations, the NCAA holds the head coach responsible for the violation(s) and will charge the head coach individually with another violation—that the head coach violated NCAA Bylaw 11.1.1.1 head coach responsibilities legislation.

While the NCAA has suggested some activities that head coaches can undertake to help them rebut the presumption of responsibility for violations in their programs, it has stated there is no safe harbor or checklist for head coaches. Thus, head coaches seeking more information are left to try to learn from written decisions from the committee on infractions (COI) adjudicating violation cases involving head coaches at other universities. The COI adjudicates most cases involving significant NCAA violations. In doing so, it drafts and releases

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a written decision for the public. However, the COI's written decisions only include analysis of situations where the NCAA charges a head coach with a violation of head coach responsibilities legislation.

What about situations where a violation occurs within a sports program, the NCAA investigates to determine whether to charge the head coach individually as responsible for the violation, and the head coach's conduct satisfies the NCAA such that it does not charge the head coach individually? In these instances, even though its process dictates that it automatically analyzes the head coach's conduct, the NCAA typically does not release any information about what the head coach did—or did not do—that satisfied its expectations. Thus, head coaches—and other college athletics constituents—are left in the dark about the NCAA's expectations in actual cases where head coaches successfully rebutted the presumption of responsibility for their staff members' violations. This information could be extremely beneficial to other head coaches who seek insight into NCAA expectations.

Prosecutors occasionally release statements explaining why criminal charges will not follow an investigation. Scholars have argued that, in certain situations, these prosecutorial declination statements are appropriate and beneficial. The benefits include signaling an end to an investigation, clearing an individual's name, and educating the public regarding laws and prosecutors' roles. This Article contends that, for many of the reasons prosecutorial declination statements are beneficial in certain situations, the NCAA should release information about situations in which it investigates a head coach for violations in the coach's program and concludes that it will not hold the head coach responsible for them because the coach's actions rebutted the presumption of responsibility. Head coaches—and other college athletics constituents—could learn so much from these situations involving their peers.

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I. INTRODUCTION

Numerous cases stemming from a federal investigation into corruption in men's college basketball currently are at various stages in the NCAA's infractions process.¹ As a result of their alleged association with the scandal, the NCAA has charged several high-profile universities and head men's basketball coaches with significant violations of NCAA rules.² Universities and head coaches facing allegations of NCAA violations include the University of Kansas and Bill Self, the

1. See Dennis Dodd, *NCAA Head of Enforcement Is "Frustrated and Disappointed" Most Bribery and Corruption Cases Are Still Ongoing*, CBS SPORTS (Jan. 15, 2021, 8:10 PM), <http://cbssports.com/college-basketball/news/ncaa-head-of-enforcement-is-frustrated-and-disappointed-most-bribery-and-corruption-cases-are-still-ongoing/> [https://perma.cc/J32Z-AH9E] (describing status of NCAA infractions cases stemming from a federal investigation into a scandal in men's college basketball that impacted a dozen schools).

2. See *id.* (describing NCAA scrutiny of men's college basketball "bluebloods" including the University of Kansas, the University of Louisville, and the University of Arizona).

University of Louisville and its now-former head coach Rick Pitino, and the University of Arizona and its now-former head coach Sean Miller.³

Oklahoma State University, the University of South Carolina, and the University of Southern California already received their day in the NCAA's court for their association with the exact same scheme as the aforementioned universities and head coaches.⁴ However, the NCAA did not charge the head coach at any of those three universities individually with NCAA violations,⁵ despite the fact that NCAA legisla-

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3. See Tim Sullivan, *Justice Delayed Is Justice NCAA-Style: Wheels Turning Slowly in Solving DI Infractions*, LOUISVILLE COURIER J. (Dec. 15, 2020, 5:46 PM), <https://www.courier-journal.com/story/sports/college/louisville/2020/12/15/ncaa-infractions-cases-slow-way-organization-operates/6542680002/> [<https://perma.cc/84XA-TK67>] (quoting Southeastern Conference commissioner Greg Sankey as describing “numerous high-profile infractions matters”). Louisville and Pitino are especially at risk of potentially significant NCAA penalties because as a result of a 2015 scandal involving escorts, they were on NCAA probation and serving a show-cause penalty, respectively, at the time of the most recent investigation. See Ben Kercheval, *Louisville Basketball Receives NCAA Notice of Allegations in Connection with FBI Investigation*, CBS SPORTS (May 4, 2020, 2:29 PM), <http://cbssports.com/college-basketball/news/Louisville-basketball-receives-ncaa-notice-of-allegations-in-connection-with-fbi-investigation/> [<https://perma.cc/BV54-QWFFQ>] (describing the NCAA's allegations of rules violations against Louisville).
 4. See Doug Lederman, *USC Spared from Major Penalties in Basketball Bribery Case*, INSIDE HIGHER ED (Apr. 16, 2021), <http://insidehighered.com/news/2021/04/16/ncaa-spares-usc-major-penalties-college-basketball-bribery-case> [<https://perma.cc/9MP7-525W>] (describing University of Southern California infractions case and resulting penalties). In fact, the same assistant coach's actions resulted in both Oklahoma State's and South Carolina's NCAA troubles. Lamont Evans was an assistant coach at South Carolina prior to his tenure at Oklahoma State and, at both universities, accepted bribes from someone associated with an agent in exchange for providing access to student athletes. See Kyle Boone, *NCAA Hits South Carolina with Probation, Recruiting Restrictions for Assistant Coach Tied to Bribery Scandal*, CBS SPORTS (Feb. 25, 2021, 12:49 PM), <http://cbssports.com/college-basketball/news/ncaa-hits-south-carolina-with-probation-recruiting-restrictions-for-assistant-coach-tied-to-bribery-scandal/> [<https://perma.cc/3QY3-QSCH>] (detailing South Carolina infractions case and resulting penalties). However, the penalties in the two cases differ, as Oklahoma State's penalties included a postseason ban but South Carolina escaped without that hefty penalty. See *id.* But that analysis is more appropriate for a different manuscript.
 5. Oklahoma State released the NCAA enforcement staff's notice of allegations against it. The notice is void of an allegation that the head coach violated NCAA head coach responsibilities legislation. See Notice of Allegations from the Nat'l Collegiate Athletic Ass'n to the President of Oklahoma State Univ. (Nov. 1, 2019), <http://okstate.com/documents/2019/11/22/NOA.pdf?id=23187> [<https://perma.cc/7PGC-4ZME>]. Likewise, the NCAA did not allege any violations against South Carolina's head men's basketball coach. See Pete Iacobelli, *NCAA Hands South Carolina 2-Year Probation for Ex-Assistant*, ABC NEWS (Feb. 25, 2021), <https://abcnews4.com/sports/basketball/ncaa-hands-south-carolina-2-year-probation-for-ex-assistant> [<https://perma.cc/WA9H-FNDJ>] (describing outcome of South Carolina's NCAA infractions case). According to the University of Southern California, the notice of allegations related to a former coach. See Press Release,

tion presumes that head coaches are responsible for violations within their sports programs even if they are unaware of them.⁶ Therefore, these head coaches successfully rebutted the presumption of responsibility during the NCAA's investigation into whether they (1) promoted a compliant atmosphere and (2) monitored their staff members.⁷ While it is clear the coaches successfully rebutted the presumption of responsibility, it is not clear how they did so because the NCAA process leaves college athletics constituents in the dark on valuable details about the specific actions the head coaches undertook. Unlike written decisions adjudicating NCAA allegations of rules violations, NCAA investigations that do not result in adjudication rarely produce publicly available information.⁸ Since the NCAA did not charge Oklahoma State, South Carolina, and Southern California's head coaches with violations of NCAA head coach responsibilities legislation, there were no such allegations to adjudicate. Consequently, college athletics constituents will not learn details about the specific actions that the head coaches took that satisfied the NCAA's expecta-

Univ. S. California, USC Statement on NCAA Notice of Allegations (Dec. 13, 2019), <http://usctrojans.com/news/2019/12/13/mens-basketball-usc-statement-on-ncaa-notice-of-allegations.aspx> [<https://perma.cc/2M5R-9GS4>]; see also Ryan Kartje, *USC Basketball Program Receives Formal Notice of Allegations from NCAA*, L.A. TIMES (Dec. 13, 2019, 10:27 PM), <http://latimes.com/sports/usc/story/2019-12-13/usc-basketball-program-formal-notice-of-allegations-from-ncaa> [<https://perma.cc/DM6U-52QR>] (stating that the NCAA's allegations "presumably refer to former assistant coach Tony Bland").

6. *Division I Enforcement Charging Guidelines*, NCAA, <https://www.ncaa.org/enforcement/division-i-enforcement-charging-guidelines#HCR> [<https://perma.cc/8WVF-MAK2>] (last visited Sept. 10, 2021) (explaining head coach responsibilities legislation).
7. See *id.* (illustrating process through which head coaches rebut the presumption of responsibility for violations in their programs).
8. See Jerry R. Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 WYO. L.R. 215, 218 (2012) (explaining that infractions reports are "readily accessible to the public on the NCAA's website"); see also NCAA, *DIVISION I MANUAL 2020–21*, at 359 (2020), <http://ncaapublications.com/productdownloads/D121.pdf> [<https://perma.cc/Y3CS-W73T>] (prohibiting public disclosure regarding pending NCAA cases). The Legislative Services Database (LSDBi) is the NCAA's public online database that includes information on NCAA legislation, NCAA legislative proposals, and major infractions cases. *LSDBi*, NCAA, <https://web3.ncaa.org/lsdbi/> [<https://perma.cc/VL96-K44A>] (last visited June 30, 2021). Universities often release NCAA documents setting forth allegations of rules violations, referred to as notice of allegations, but these documents do not contain interview transcripts or other documents from the investigation. See Mark Schlabach, *Arizona Wildcats Men's Basketball Faces Allegations of Five Level I Rules Violations*, ESPN (Mar. 5, 2021), https://www.espn.com/mens-college-basketball/story/_/id/31013131/arizona-wildcats-men-basketball-faces-allegations-five-level-rules-violations [<https://perma.cc/3WNS-NV8F>] (explaining the process through which ESPN obtained notice of allegations from Arizona).

tions of head coaches and thereby avoid individual responsibility for violations in their own programs.

Instead, they only learn what not to do. Eventually, details regarding how the actions taken by Self, Pitino, Miller, and other head coaches failed to satisfy the NCAA's expectations, resulting in NCAA allegations against the head coaches will be published. However, the information to which the public will eventually be privy is likely to describe only actions that did *not* satisfy the NCAA's expectations of head coaches. The Committee on Infractions (COI) adjudicates most significant NCAA violations cases,⁹ affirming nearly all of the NCAA's allegations.¹⁰ Through the COI's written decisions, the public receives only information regarding head coaches' actions that *did not* meet the NCAA expectations and resulted in allegations against the head coaches. While this information is valuable for head coaches and others in college athletics, information regarding Oklahoma State, South Carolina, and the University of Southern California's head coaches' actions, for example, would be just as, if not more, valuable. Though they had violations within their sports programs, their activities regarding promoting a compliant atmosphere and monitoring staff satisfied the NCAA's expectations. Other coaches and college athletics constituents could benefit from information about these head coaches' activities and the NCAA's expectations of head coaches, information that does not become public through the NCAA's current investigation or infractions processes.

Comparatively, criminal prosecutors occasionally release statements explaining why criminal charges will not follow an investigation.¹¹ Scholars have argued that these prosecutorial declination statements are especially beneficial and appropriate in signaling an end to an investigation, clearing an individual's name, or educating the public regarding laws and prosecutors' roles.¹² This Article con-

9. See *Division I Infractions Process*, NCAA, <http://ncaa.org/enforcement/division-i-infractions-process> [<https://perma.cc/23ZH-VBNR>] (last visited Feb. 28, 2021) (illustrating there are four means by which an infractions case involving a Division I member university resolves, and three of them end with COI decisions).

10. Universities caught in the enforcement staff's crosshairs will be dismayed to learn that the COI affirms a whopping ninety-three percent of the enforcement staff's allegations. See JON DUNCAN, NCAA, *ENFORCEMENT SELF-STUDY: OPERATIONS AND COMPLIANCE 7* (2019), http://ncaaorg.s3.amazonaws.com/infractions/guides/2019ENF_SelfStudyOperComp.pdf [<https://perma.cc/KVH6-HYJT>] (contending that this data shows that the enforcement staff makes well-supported charges).

11. See Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 482 (2020) (explaining that prosecutors are increasingly likely to publicize their declinations).

12. See, e.g., *id.*; see also Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1442 (2004) ("A prosecutor's decision to proceed with, or to

tends that, for many of the reasons prosecutorial declination statements are appropriate in certain situations, the NCAA should release information when it investigates head coaches for violations in their programs and concludes that it will not hold them responsible for the violations. Head coaches (and other college athletics constituents) could learn a lot from these situations involving their peers. Further, it would protect the reputations of head coaches who met NCAA expectations for promoting a compliant atmosphere and monitoring of staff.

The organization of this Article is as follows. Part II details the NCAA's infractions process, focusing on the analysis and process through which head coaches may be held responsible for the actions of their staff members. Part III introduces prosecutorial declination statements and explains how they can be beneficial in certain cases and circumstances. Part IV suggests that, and how, the NCAA should issue declination statements on occasions where it concludes head coaches successfully rebut the presumption of responsibility for violations in their programs. Part V briefly concludes.

II. NCAA RULES ENFORCEMENT MECHANISMS AND PROCESSES AND HEAD COACH RESPONSIBILITIES LEGISLATION

This Part describes the processes and mechanisms that the NCAA employs to attempt to ensure its member universities and their staff members follow NCAA rules. One particularly powerful mechanism is legislation that gives the NCAA the ability to impute liability on head coaches for their staff members' rule-breaking activity. Given the numerous recent instances where the NCAA has alleged that high-profile sports programs and coaches have violated NCAA rules, this legislation will feature prominently in college athletics as these cases go through the NCAA's infractions process.

forgo, a criminal prosecution is one of the more important decisions routinely made by government officials.”).

A. The NCAA Division I Infractions Process¹³

The NCAA describes itself as a member-led organization that consists of over 1,000 colleges and universities.¹⁴ Through the NCAA's legislative process, its member universities propose and adopt rules regarding college athletics and implement them on campus.¹⁵ The NCAA notoriously does not lack for rules. For example, one rule in the NCAA Division I Manual defines the term "business day," while others regulate when and how often coaches can call or write prospective student athletes and even whether coaches may answer incoming calls from them.¹⁶

NCAA member universities and staff members should not be disadvantaged for abiding by NCAA legislation.¹⁷ Thus, NCAA member universities created the infractions process to help ensure fair play and integrity among members.¹⁸ One group of NCAA employees in particular bears this responsibility: the NCAA's enforcement staff.¹⁹ The enforcement staff consists of a few dozen individuals²⁰ including former coaches, campus administrators, compliance staff members, student athletes, and attorneys.²¹ Many have described the enforcement staff as the NCAA's prosecutor,²² since it is the entity responsi-

13. The overall infractions process and structure is beyond the scope of this Article, and that topic is sufficiently critiqued by others. *See, e.g.*, Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749, 751 (2007) (referencing, for example, "the many procedural differences in NCAA enforcement proceedings" from the United States court system).

14. *What is the NCAA?*, NCAA, <http://ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [<https://perma.cc/YQ9J-FL4P>] (last visited Feb. 28, 2021) (providing basic information regarding the NCAA).

15. *Id.* (noting these rules cover "everything from recruiting and compliance to academics and championships").

16. NCAA, *supra* note 8, at 95, 103–06, 120–22.

17. *See* Elizabeth Lombard, Note, *Changes Are Not Enough: Problems Persist with NCAA's Adjudicative Policy*, 95 NOTRE DAME L. REV. 925, 928 (2019).

18. *Division I Infractions Process*, *supra* note 9.

19. *See* NCAA, DIVISION I INFRACTIONS: 2019–20 ANNUAL REPORT 9 (2020), https://ncaaorg.s3.amazonaws.com/infractions/d1/2019D1Inf_AnnualReport.pdf [<https://perma.cc/WFY5-EFX3>] (describing enforcement staff's role in the infractions process).

20. *Evaluations Show Infractions Process Improvements*, NCAA (Aug. 1, 2016), <http://ncaa.org/about/resources/media-center/news/evaluations-show-infractions-process-improvements> [<https://perma.cc/PH94-TV2P>] (describing efforts to improve infractions process and noting the enforcement staff consisted of fifty-seven individuals in 2016).

21. *Who's Who in the Infractions Process*, NCAA (June 2019), http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionWhoisWho.pdf [<https://perma.cc/LA8C-TBY5>] (describing staff roles in infractions process).

22. *See* Timothy Davis & Christopher T. Hairston, *Majoring in Infractions: The Evolution of the National Collegiate Athletic Association's Enforcement Structure*,

ble for reviewing information about potential violations.²³ The enforcement staff receives information regarding potential rule violations from many sources (e.g., self-reports or third-party sources).²⁴ If a situation warrants further investigation, the enforcement staff issues a notice of inquiry to, and works with, the involved member university to discover the facts.²⁵ By sending a notice of inquiry to the university, the enforcement staff signals the commencement of a formal joint investigation of and with the university.²⁶ Enforcement staff investigators must review information regarding potential violations in a fair, accurate, collaborative, and timely manner.²⁷

If the enforcement staff believes the information may substantiate violations, it alleges potential Level I or Level II violations (Level I is the more significant of the two).²⁸ The enforcement staff states its allegations in a formal document directed to the university called a notice of allegations.²⁹ The enforcement staff bears the burden of proving these violations.³⁰

There are four means by which an infractions case involving a Division I member university resolves, and three of them conclude with a decision by the COI.³¹ Former COI vice chair Gene Marsh has de-

92 OR. L. REV. 979, 988 (2014) (describing the enforcement staff's actions to include presenting information to support allegations of rules infractions to the COI); *see also* Rogers & Ryan, *supra* note 13, at 753–54 (noting that enforcement staff members are full-time NCAA employees).

23. *See Division I Infractions Process*, *supra* note 9.

24. *Paths for Handling Potential Violations*, NCAA (Jan. 2020) http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_ResolutionPathsForViolations.pdf [<https://perma.cc/29B8-CNZH>] (illustrating various resolution paths for potential violations).

25. *See Division I Infractions Process*, *supra* note 9.

26. *See* Parkinson, *supra* note 8, at 226 (explaining that the investigation begins on campus but will go “wherever else the evidence leads”). The notice of inquiry is not an allegation; rather, it informs the university of a formal investigation. *Id.*; Rogers & Ryan, *supra* note 13, at 765.

27. *See* NCAA, *supra* note 19, at 9 (characterizing trust and collaboration among the enforcement staff, universities, and conferences as “vital” to the process).

28. *See id.* at 6–7 (providing overview of infractions process). There are three levels of violations. *See id.* at 5. The COI will hear and determine cases involving alleged Level I and Level II violations, whereas, for the most part, the enforcement staff and universities handle Level III violations. *Id.* at 9. For context, the enforcement staff alleged an average of ninety-one Level I or Level II violations per year between 2017 and 2019. *See id.* at 11 (providing data regarding enforcement staff allegations). For further context, the COI hosted six hearings over disputed allegations in 2019. *See id.* at 12.

29. Parkinson, *supra* note 8, at 226 (explaining that the enforcement staff directs the notice to the university's president or chancellor).

30. *Id.* at 224 (noting that the COI has concluded that the enforcement staff has not met its burden “plenty” of times).

31. *See Division I Infractions Process*, *supra* note 9 (providing an illustration showing that three of the four means through which the process resolves allegations involve the COI).

scribed the COI as “the thousand-pound gorilla, with the final word in the case.”³² The COI is an independent administrative body that includes volunteers from NCAA member universities, conferences, and individuals from the general public.³³ More specifically, panelists’ professional profiles include current and former university presidents, chancellors and athletics directors, conference commissioners, former NCAA coaches, individuals with legal training, and professors.³⁴ Thus, the COI touts the infractions process as “peer-reviewed.”³⁵ There are up to twenty-four COI members at any given time, a smaller panel of which considers each case on the COI’s behalf.³⁶

If the university and any other parties (e.g., coaches) agree with the enforcement staff on the facts, violations, level(s) of violations, and penalties, the enforcement staff and parties may pursue a “negotiated resolution,”³⁷ where the parties submit a draft report to the COI.³⁸ The COI reviews the appropriateness of the parties’ agreed-upon penalties.³⁹

When the parties agree to the facts and violation level(s) but disagree on penalties, they may elect to forgo participating in a COI hearing and attempt to resolve their case via the “summary disposition” track.⁴⁰ When doing so, the enforcement staff, university, and any in-

32. See Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667, 677 (2003) (describing COI’s vast authority in cases where a party does not appeal).

33. *Division I Committee on Infractions*, NCAA, <http://ncaa.org/governance/committees/division-i-committee-infractions> [<https://perma.cc/S44D-FXQD>] (last visited Dec. 21, 2020) (describing COI).

34. See *Division I Committee on Infractions Composition*, NCAA, https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_COIComposition-FactSheet.pdf [<https://perma.cc/6BEG-3AH6>] (last visited Nov. 29, 2020) (noting that a panel’s size is between three and seven COI members for each case).

35. See NCAA, *supra* note 19, at 5 (describing framework of infractions process). For a discussion regarding the benefits of judgment by peers, see Gene A. Marsh, *A Call for Dissent and Further Independence in the NCAA Infractions Process*, 26 CARDOZO ARTS & ENT. L.J. 695, 709 (2009) (recommending, among other things, more independent members on COI).

36. See *Division I Committee on Infractions Composition*, *supra* note 34.

37. *Division I Infractions Process*, *supra* note 9 (describing means of resolving infractions cases).

38. *Id.* (noting there is no opportunity to appeal a negotiated resolution).

39. *Negotiated Resolution*, NCAA (Jan. 2019), http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionsProcessNegotiatedResolution-FactSheet.pdf [<https://perma.cc/QLZ5-3M9U>].

40. See *Infractions Process Overview*, NCAA (Jan. 2019), http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionsProcessOverview-FactSheet.pdf [<https://perma.cc/42ZW-XUDC>] (illustrating different paths to resolve infractions cases). The summary disposition process should be a more streamlined process than participating in a COI hearing. See *Summary Disposition*, NCAA (Jan. 2019), https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_

dividual subject to a violation charge submits a report to the COI.⁴¹ If the COI accepts the report, it issues penalties.⁴² However, the COI may reject the report and order a full hearing if it feels the enforcement staff failed to allege a pertinent violation, among other reasons.⁴³

In cases involving disputed allegations, a panel of COI members conducts a hearing and determines whether the enforcement staff's allegations are accurate, though the COI also has the authority to conclude that violations occurred even when the enforcement staff did not allege them.⁴⁴ A COI hearing combines elements of a legal trial, an administrative agency hearing, and an academic or non-academic misconduct hearing on a university campus.⁴⁵ If it is established during the hearing that violations took place, the COI imposes penalties on the involved university and any staff members accordingly.⁴⁶ In summary disposition or contested cases, the COI follows NCAA membership-legislated guidelines when issuing penalties.⁴⁷ The penalties range from financial penalties and vacation of records to athletics scholarship reductions and postseason bans.⁴⁸ When the COI finds that violations occurred, it ultimately produces a written decision detailing the facts, violations, and penalties.⁴⁹

Finally, the enforcement staff, member universities, and other parties to an infractions case may choose to resolve a disputed case through the Independent Accountability Resolution Process (IARP).⁵⁰ The IARP was created in August 2019 and seeks to draw on the expertise of independent experts—with no university affiliation—to review,

grphcs/D1INF_InfractionProcessSDRFactSheet.pdf [https://perma.cc/XBP5-NCWG].

41. See *Infractions Process Overview*, *supra* note 40.

42. See *id.*

43. See OFF. OF THE COMMS. ON INFRACTIONS, INTERNAL OPERATING PROCEDURES, chapters 4-10-2-3, 4-10-3 (May 20, 2021) http://ncaaorg.s3.amazonaws.com/committees/d1/infraction/D1COI_IOPs.pdf [https://perma.cc/795J-H4D2].

44. See *id.* at chapter 5-12.

45. See Marsh & Robbins, *supra* note 32, at 678 (2003) (describing a COI hearing as “a unique process”). For a comparison between NCAA infractions proceedings and legal proceedings, see Rogers & Ryan, *supra* note 13, at 754–61. The COI affirms a staggering ninety-three percent of the enforcement staff's allegations. DUNCAN, *supra* note 10. This has led some to question the COI's neutrality and describe the COI as an arm of the enforcement staff that will not deviate from the enforcement staff's recommendations. See Davis & Hairston, *supra* note 22, at 993 (pointing out that such accusations are difficult to substantiate).

46. See *Division I Infractions Process*, *supra* note 9.

47. See NCAA, *supra* note 19, at 15 (describing penalty guidelines as increasingly serious).

48. Nathaniel Richards, Note, *The Judge, Jury, and Executioner: A Comparative Analysis of the NCAA Committee on Infractions Decisions*, 70 ALA. L. REV. 1115, 1116 (2019) (citing relevant NCAA legislation).

49. 2019–20 ANNUAL REPORT, *supra* note 19, at 21.

50. See *Division I Infractions Process*, *supra* note 9.

hear, and decide select “complex” Division I cases.⁵¹ Complex cases may include those involving core NCAA values such as academic prioritization or student-athlete well-being, the possible imposition of significant penalties, or conduct contrary to the NCAA’s cooperative principles.⁵² Universities, the COI chair, or the enforcement staff’s vice president may request independent review of a case.⁵³

B. Head Coach Responsibilities Legislation, Processes, and Analysis

NCAA Division I legislation places extra responsibility and accountability on head coaches. This section describes the legislation’s evolution and the process and analysis through which the enforcement staff and COI apply it.

1. Head Coach Responsibilities Legislation Background

Until August 1, 2013, NCAA legislation afforded head coaches plausible deniability of rule-violating conduct within their programs.⁵⁴ Implemented at the urging of the National Association of Basketball Coaches, the initial version of head coach responsibilities legislation was applicable from its inception in 2005 until the 2013 amendment.⁵⁵ Under it, the NCAA presumed head coaches were *knowledgeable* of actions of staff members who report to them.⁵⁶ Head coaches could rebut the presumption by showing they promoted a com-

51. *Independent Accountability Resolution Process*, IARP, <https://iarpc.org/> [<https://perma.cc/4CX6-SC6J>] (last visited Aug. 15, 2021) (describing IARP).

52. *Id.*

53. *Id.* (noting the Infractions Referral Committee reviews the request for referral). The University of Louisville, University of Arizona, Louisiana State University, University of Kansas, and North Carolina State University chose to resolve their recent cases involving their men’s basketball programs through the IARP. *See IARP*, NCAA, <http://naaa.org/themes-topics/iarp> [<https://perma.cc/V2TP-APDC>] (last visited Mar. 1, 2021) (providing links to IARP-related stories).

54. *See* Dennis Dodd, *Inside College Football: Hugh Freeze Faces an NCAA Issue Calipari, Carroll Avoided*, CBS SPORTS (Mar. 3, 2017, 4:12 PM), <https://www.cbssports.com/college-football/news/inside-college-football-hugh-freeze-faces-an-issue-calipari-carroll-avoided/> [<https://perma.cc/MG9W-8SJW>] (tracing amendment to head coach responsibilities legislation to incidents involving current University of Kentucky head men’s basketball coach John Calipari and now-former University of Southern California head football coach Pete Carroll).

55. *Meaningful Penalties Align with Significance of Wrongdoing*, NCAA (Aug. 1, 2013), <http://naaa.org/about/resources/media-center/news/meaningful-penalties-align-significance-wrongdoing> [<https://perma.cc/6GM6-MTMQ>]; *see also* Memorandum, NCAA, Head Coach Control: NCAA Bylaw 11.1.2.1 (Mar. 29, 2011), http://fs.ncaa.org/Docs/AMA/legislative_actions_issues/LSDBi/HeadCoachControl.pdf [<https://perma.cc/55CZ-KT3C>] (describing original version of head coach responsibilities legislation).

56. *Id.* at 1.

pliant atmosphere and monitored their staff⁵⁷ and thus avoid: (1) having their staff members' violations imputed to them; (2) facing an allegation of violating head coach responsibilities legislation; and (3) receiving penalties accompanying any head coach responsibilities legislation violation.⁵⁸

According to Tom Yeager, who served on the COI for nine years and as the commissioner of the Colonial Athletic Association for over three decades, "these [coaches] generally know every time somebody sneezes on their team."⁵⁹ College athletics constituents registered this level of ownership and control head coaches exercised, particularly in prestigious (and lucrative) athletic programs, and grew tired of hearing head coaches, in a position that the COI has described as one of "authority and trust," express shock and dismay that their suddenly rogue, rule-breaking assistant coach surprisingly committed a recruiting violation.⁶⁰ For example, national championship-winning head coaches such as John Calipari (current University of Kentucky men's basketball head coach) and Pete Carroll (former University of Southern California head football coach) are two examples of head coaches who claimed to be unaware of significant NCAA violations within their programs and thus escaped vicarious liability.⁶¹ Further, Lane Kiffin, head football coach at USC at the time, recognized that people considered responsibility for the ethics and culture of the program as part of the head coach job and "were tired of an assistant coach doing something (wrong) and the assistant coach being the one punished."⁶² What's more, the increasing commercialization of big-money college

57. *Id.*

58. *See id.*; *see also* *Athletics Personnel—Conduct of Athletics Personnel—Responsibility of Head Coach*, NCAA (Oct. 30, 2012) [hereinafter *Conduct of Athletics Personnel*], https://www.ncaa.org/sites/default/files/Att3_EWGProposalBylaw%2B11%2B1%2B2%2B1_071112.pdf (explaining rationale for revision to head coach responsibilities legislation in amending Bylaw 11.1.2.1).

59. Dodd, *supra* note 54.

60. *See* Public Infractions Decision from the NCAA Comm. on Infractions Panel to Lamar Univ. 8 (Sept. 22, 2016), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102560> [<https://perma.cc/HVL3-7R9L>] (noting requirement that head coaches must set the "proper tone" for their programs).

61. *See* Dodd, *supra*, note 54 (naming former University of Oklahoma head football coach Barry Switzer and former Penn State University head football coach Joe Paterno as head coaches who also were able to escape individual penalties by denying knowledge of rule-breaking conduct within their programs).

62. Rich Hammond, *NCAA Tightens Screws on Head Coaches*, ORANGE CNTY. REG. (Oct. 30, 2012, 3:00 PM), <https://www.oregister.com/2012/10/30/ncaa-tightens-screws-on-head-coaches/> [<https://perma.cc/AK3W-ABDZ>]; *see also* Pedro Moura, *Kiffin on New NCAA Enforcement Plans*, ESPN (Oct. 30, 2012), https://www.espn.com/blog/los-angeles/usc/post/_id/15380/kiffin-chimes-in-on-new-ncaa-enforcement-plans [<https://perma.cc/24NY-M3MS>] (noting that Kiffin acknowledged the difficulty of knowing the activities of everyone associated with his program).

athletics has exacerbated both a win-at-all-costs mentality and temptations to act unethically.⁶³ NCAA President Mark Emmert became concerned that financial pressures increased the temptation to break rules, especially if coaches believed they would not get caught or the consequences would not be harsh if they did.⁶⁴ Emmert feared that, for some head coaches, financial gains skewed the risk-reward analysis toward gaining a competitive or recruiting advantage by violating NCAA rules.⁶⁵ These realizations spurred movement to increase both accountability and penalties for head coaches with rules violations in their programs.⁶⁶ Thus, under NCAA legislation adopted by NCAA member universities that became effective August 1, 2013, head coaches at Division I universities are now presumed *responsible*—no longer merely knowledgeable—for the actions of those who report to them.⁶⁷ Under the revised legislation, NCAA Bylaw 11.1.1.1, whether the head coach knew of their assistant coach's actions is irrelevant.⁶⁸ Even when a head coach is unaware—or claims lack of awareness—of an assistant coach's actions, the COI presumes the head coach should have been aware.⁶⁹

The rationale for strengthening the legislation was to mitigate the ability of head coaches to ignore impermissible conduct and avoid punishment.⁷⁰ The revision from presumption of knowledge to presumption of responsibility means plausible deniability is no longer a viable defense for a head coach of a rule-breaking program.⁷¹ The current

63. Gregg Clifton, Paul Kelly & Bethany Swaton Wagner, *New NCAA Rule Puts Premium on Head Coaches' Accountability*, SPORTS BUS. J. (Jan. 7, 2013), <https://www.sportsbusinessdaily.com/Journal/Issues/2013/01/07/Opinion/Clifton-Kelly-Wagner.aspx> [<https://perma.cc/B3GA-SWTW>].

64. *NCAA Approves Tougher Sanctions for Rule Breakers*, KOMU (Oct. 30, 2012), http://komu.com/news/ncaa-approves-tougher-sanctions-for-rule-breakers/article_e7d42c03-426b-53cd-b8c6-f7e96d38534d.html [<https://perma.cc/2WVK-HNGM>] (noting that 2011 was “one of the most scandalous years in college sports history”).

65. *See id.*

66. *See id.*

67. NCAA, *supra* note 8, at 49.

68. Nicole Auerbach, *Coaches Recognize NCAA Demand To Be More Accountable*, USA TODAY (July 11, 2013, 5:52 PM), <https://www.usatoday.com/story/sports/ncaab/2013/07/11/college-basketball-coaches-rule-monitoring/2510215/> [<https://perma.cc/AFC8-9RLM>] (describing “new world of NCAA enforcement and greater responsibility” for head coaches).

69. Dodd, *supra* note 54 (explaining how the amended legislation holds head coaches more accountable for what happens within their programs).

70. Clifton, Kelly, & Swaton Wagner, *supra* note 63.

71. Gregg E. Clifton & John G. Long, *NCAA Head Coaches Beware: You Are 'Presumptively' Responsible for Acts of Assistant Coaches, Administrators*, JACKSON LEWIS COLLEGIATE & PRO. SPORTS L. BLOG, (Mar. 1, 2018), <https://www.collegeandprosportslaw.com/collegiate-sports/ncaa-head-coaches-beware-you-are-presumptively-responsible-for-acts-of-assistant-coaches-administrators/> [<https://>

version of head coach responsibilities legislation places head coaches under a guilty-until-proven-innocent standard.⁷²

Head coaches' reactions to the amended legislation varied. Now-former Ohio State University head football coach Urban Meyer appreciated the amended legislation's deterrent effect, believing that for the first time, there was real fear of the NCAA's bylaws and penalties.⁷³ Other coaches commented on the increased clarity. For example, Baylor University head men's basketball coach, Scott Drew, appreciated knowing the penalties because "[i]t makes things fairer, easier to understand and follow."⁷⁴ Others focused on the fact that they could be held responsible for their staff members' actions. Kiffin expressed concern regarding the difficulty of knowing what his staff members and players are doing but acknowledged that the application of NCAA rules comes with the job.⁷⁵ Michigan State University head men's basketball coach Tom Izzo agreed with the premise "that if an assistant does something wrong, it should be on the head coach."⁷⁶ Izzo's perspective aligns with the COI's, which has stated in its written case decisions that Bylaw 11.1.1.1 sets the standard of conduct for head coaches.⁷⁷

In addition to imposing a presumption of responsibility on the head coach for violations in the sports program, Bylaw 11.1.1.1 requires head coaches to promote an atmosphere of compliance and monitor

perma.cc/W4TU-MCU3] (explaining the "I didn't know it was going on" excuse will not rebut the presumption of responsibility).

72. *Bylaw 11.1.1.1 and What It Means for Head Coaches*, TUCSON (Oct. 10, 2017), https://tucson.com/bylaw-and-what-it-means-for-head-coaches/article_7e727314-ae04-11e7-9a59-d32e84ef0752.html [<https://perma.cc/WT7V-GVYZ>] (analyzing Bylaw section 11.1.1.1's application to the allegations in the case involving the University of Arizona men's basketball program).
73. John Infante, *Head Coach Responsibility a Potential Gamechanger*, ATHNET: THE BYLAW BLOG, <https://www.athleticscholarships.net/2013/06/13/head-coach-responsibility-a-potential-gamechanger.htm> [<https://perma.cc/3QDS-B3PN>] (last visited Nov. 5, 2021) (describing Meyer and other coaches' response to the new rule as "eye-opening").
74. Auerbach, *supra* note 68 (reporting Drew explained that because most head coaches try to do the right thing, the amendments to the legislation would not lead to any big changes).
75. Moura, *supra* note 62 (quoting Kiffin as stating, "It is what it is").
76. Auerbach, *supra* note 68 (quoting Izzo as stating that he struggled with the "absolutes" of the amended legislation, apparently misunderstanding that the presumption is rebuttable and there is no strict liability for actions of staff members).
77. Email from Joel D. McGormley, Managing Dir., NCAA Off. of the Comms. on Infractions to William Bynum, Jr., President, Mississippi Valley State Univ. 1, 3, 7 (Mar. 24, 2017), https://s3.amazonaws.com/shortcode/sites/mvsusports.com/documents/2017/5/29/MVSU_Infractions_Release_Packet.pdf [<https://perma.cc/RRR9-WEFB>] (providing COI decision in case in which a now-former head cross country coach directed student athletes to compete under assumed names).

the activities of those who report to them.⁷⁸ As the following subsection shows, these requirements become increasingly important when significant NCAA rules violations occur in a head coach's program.

2. *Head Coach Responsibilities Legislation Process*

As part of a larger overhaul to its enforcement processes effective August 2013, the NCAA introduced a four-tier hierarchy under which rules violations range from severe breaches of conduct (Level I) to incidental infractions (Level IV).⁷⁹ Levels I and II are considered major infractions and consist of conduct breaches that seriously undermine or compromise the integrity of the NCAA Constitution or collegiate model (e.g., academic fraud or recruiting inducements).⁸⁰

The head coach responsibilities analysis and process follows a step-by-step progression. When the enforcement staff suspects that a Level I or Level II violation occurred within a sports program, it conducts an investigation.⁸¹ If the enforcement staff concludes that the investigation substantiated the underlying Level I or Level II violation (e.g., impermissible recruitment of a prospective student athlete) and involved a member of the sports program's staff, the enforcement staff *must* determine whether to also allege a Bylaw 11.1.1.1 violation against the head coach.⁸² That analysis begins with a presumption that the head coach is responsible for the violations⁸³ committed by individuals who report, directly or indirectly, to them.⁸⁴ A head coach's lack of knowledge regarding violations within their program is irrelevant—the presumption of responsibility applies to all situations

78. NCAA, *supra* note 8, at 49.

79. *New Violation Structure Introduced*, NCAA (Aug. 1, 2013), <http://ncaa.org/about/resources/media-center/news/new-violation-structure-introduced> [<https://perma.cc/C5D7-87E5>] (describing four-tiered violation structure). Note the NCAA has since eliminated the Level IV classification of rules violations. See *Division I Proposal-2017-7*, NCAA, <http://web3.ncaa.org/lstdbi/search/proposalView?id=100647> [<https://perma.cc/DR69-UH4H>] (last visited Mar. 3, 2021) (identifying efficiency as the rationale for elimination since many member universities inappropriately treated and processed Level IV violations as Level III violations).

80. See *New Violation Structure Introduced*, *supra* note 79 (quoting former chair of the NCAA Executive Committee Ed Ray as explaining that the four levels of violations helped the NCAA distinguish between severe and significant, as opposed to simply major and secondary under the prior model).

81. *Division I Enforcement Charging Guidelines*, *supra* note 6, at 2.

82. *Id.* (emphasis added) (outlining process whereby the enforcement staff and COI determine whether a head coach violated Bylaw section 11.1.1.1 due to their staff member's actions).

83. See *id.*

84. See *id.*; see also NCAA, *supra* note 8, at 49 (stating that an institution's head coach is presumed responsible for the actions of those staff member who directly or indirectly report to the head coach).

where the enforcement staff believes a staff member committed a Level I or Level II violation.⁸⁵

The presumption of responsibility is rebuttable, which means head coaches may escape liability for a staff member's violation.⁸⁶ To that end, during the investigation of a Level I or Level II violation involving a sports program staff member, the enforcement staff gathers information regarding whether the head coach: (1) promoted a compliant atmosphere and (2) monitored their staff.⁸⁷ If the head coach's actions satisfy the enforcement staff's expectations in those two areas, the head coach has successfully rebutted the presumption that they are responsible for the staff member's violation, the enforcement staff will not allege a Bylaw 11.1.1.1 violation against the head coach,⁸⁸ and the head coach likely will not be punished for their staff member's violation. If, however, the head coach's actions fail to satisfy the enforcement staff's expectations, the head coach fails to rebut the presumption of responsibility for their staff member's violation, and the enforcement staff will charge the head coach with a Bylaw 11.1.1.1 violation.⁸⁹

The COI has ultimate authority in determining the merit of the enforcement staff's Bylaw 11.1.1.1 violation allegation.⁹⁰ It is the head coach's responsibility to present to a COI hearing panel information demonstrating that they promoted a compliant atmosphere and monitored staff.⁹¹ In effect, when a head coach fails to rebut the presumption of responsibility in the eyes of the enforcement staff, the COI will conduct its own Bylaw 11.1.1.1 analysis to independently determine whether the head coach rebutted the presumption. However, a review

85. See *Conduct of Athletics Personnel*, *supra* note 58 (explaining that “the bylaw is amended to presume only responsibility” rather than knowledge); see also Memorandum from NCAA Comm. on Infractions Panel to DePaul Univ., 1, 9 (July 23, 2019), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102782> [<https://perma.cc/RM5N-Q3XT>] (explaining that head coaches must verify—not just trust—that staff members comply with NCAA legislation).

86. *Division I Proposal–2012-15 Athletics Personnel–Conduct of Athletics Personnel–Responsibility of Head Coach*, NCAA, <http://web3.ncaa.org/lstdbi/search/proposalView?id=3007> [<https://perma.cc/ZT6Z-38CC>] (last visited Aug. 16, 2021).

87. *Division I Enforcement Charging Guidelines*, *supra* note 6 (providing guidelines for enforcement staff considering a Bylaw section 11.1.1.1 violation charges).

88. See *id.* (outlining steps the enforcement staff takes when analyzing a potential Bylaw section 11.1.1.1 allegation).

89. See *id.* Note that Bylaw section 11.1.1.1 requires head coaches to promote a compliant atmosphere and monitor staff members. NCAA, *supra* note 8, at 49. Thus, they should have been doing these things already.

90. *Id.*

91. *Division I Enforcement Charging Guidelines*, *supra* note 6; see also OFF. OF THE COMMS. ON INFRACTIONS, *supra* note 43, at chapter 2-4-2 (explaining the head coach is presumed responsible for a violation of Bylaw section 11.1.1.1 while the enforcement staff gathers information regarding whether the head coach promoted an atmosphere of compliance and monitoring).

and analysis of the NCAA's searchable database reveals that it is extremely rare for the COI to conclude that a head coach charged with a Bylaw 11.1.1.1 violation rebutted the presumption of responsibility.⁹² In fact, out of the dozens of occasions the enforcement staff has charged a head coach with a Bylaw 11.1.1.1 violation, the COI has disagreed with the enforcement staff's allegation only three times.⁹³

If the COI ultimately concludes a head coach failed to rebut the presumption of responsibility and thus violated Bylaw 11.1.1.1, the head coach is vicariously responsible for the staff member's violation and faces significant penalties. The COI presumes the level of the Bylaw 11.1.1.1 violation corresponds to the level of the underlying violation (e.g., a violation of Bylaw 11.1.1.1 resulting from underlying Level II violations is presumed to be a Level II violation for the head coach).⁹⁴ The COI may suspend the head coach, pursuant to a show-cause order, for up to an entire season for a Level I violation and up to half of a season for a Level II violation.⁹⁵

3. *Rebuttable Presumption Analysis*⁹⁶

As stated above, head coaches rebut the presumption of responsibility for violations within their programs when they satisfy enforce-

92. See generally *LSDBi*, *supra* note 8 (providing additional information on the NCAA's searchable database).

93. Cases involving the baseball programs at Wichita State University, *see infra* notes 120–23 and accompanying text, and the University of the Pacific, along with a case involving Baylor University are the three cases in which the COI disagreed with an enforcement staff Bylaw section 11.1.1.1 allegation, Memorandum from NCAA Comm. on Infractions Panel to Univ. of the Pacific 1, 26 (Sept. 20, 2017), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102630> [<https://perma.cc/UA4Z-VZ9P>]; Memorandum from NCAA Comm. on Infractions Panel to Baylor Univ. 3 (Aug. 11, 2021), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102928> [<https://perma.cc/2BU3-LC89>].

94. Memorandum from NCAA Comm. on Infractions Panel to Jackson State Univ. 1, 6 (July 1, 2016), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102674> [<https://perma.cc/2QMU-375K>] (describing case wherein the now-former head men's tennis coach knowingly permitted an ineligible student athlete to practice, receive travel expenses, and compete under another student athlete's name).

95. *Division I Enforcement Charging Guidelines*, *supra* note 6 (explaining that the COI determines the suspension's length based on factors including the severity of the underlying violations and level of the head coach's involvement). Head coaches may also receive suspensions for certain Level III (breach of conduct) violations their staff members commit (e.g., exceeding the permissible number of recruiting contacts with a prospective student athlete, providing team gear, or other inducements to prospective student athletes). *19.1 Violation Structure*, NCAA, <https://web3.ncaa.org/lstdbi/search/bylawView?id=31596> [<https://perma.cc/5MBQ-PN47>]. The assistant coach or staff member who committed the violation would also face suspension. *Id.*

96. This section briefly highlights the NCAA's suggested action items for head coaches to undertake in order to successfully rebut the presumption of

ment staff or COI expectations regarding promotion of a compliant atmosphere and monitoring their staff members.⁹⁷ But it is difficult for head coaches to prove these expectations are met, and “[t]he exact standard of ‘promoting and monitoring’ is also somewhat unclear.”⁹⁸ The NCAA has stated there is no safe harbor or checklist of actions that head coaches may undertake that will always prevent a Bylaw 11.1.1.1 allegation or finding.⁹⁹ However, the NCAA has provided memos, documents, and guidelines that provide suggested action items for head coaches: communication, monitoring, and documentation.¹⁰⁰ If these action items are undertaken to the enforcement staff’s or the COI’s satisfaction, they could mitigate the likelihood of a head coach responsibilities violation allegation or finding. Further, the COI has provided hints or outright suggestions for head coaches in published case decisions regarding these three action items.¹⁰¹

With respect to a head coach’s communication, the enforcement staff and the COI will consider the head coach’s communications that, overall, demonstrate their commitment to compliance.¹⁰² Saint Francis University’s 2014 case involving its football program is illustrative. There, the head coach and three assistant coaches provided or arranged for the provision of impermissible inducements and extra benefits (e.g., impermissible transportation, meals, and lodging) to four prospective or current football student athletes and a parent of one of the current student athletes.¹⁰³ The COI processed the case as a Level

responsibility for violations within their programs. For a more detailed discussion of these suggestions, including analysis of additional and relevant cases, see Joshua Lens, *NCAA Head Coach Responsibilities Legislation*, 14 DEPAUL J. SPORTS L. 33 (2018) (considering application of strict liability standard on head coaches for violations within their programs).

97. NCAA, *supra* note 8, at 49.

98. *Bylaw 11.1.1.1 and What It Means for Head Coaches*, *supra* note 72 (quoting Stuart Brown, an attorney who works with universities regarding NCAA matters).

99. *Division I Enforcement Charging Guidelines*, *supra* note 6 (stating recommended monitoring activities are merely examples, not a checklist or safe harbor).

100. *See, e.g., id.*; *see also* OFF. OF THE COMMS. ON INFRACTIONS, *supra* note 43, at chapter 2-4-2 (explaining that the enforcement staff will consider the head coach’s overall communications, monitoring efforts, and activities demonstrating their commitment to compliance as well as the specific circumstances surrounding the alleged underlying violation).

101. *See, e.g.*, Memorandum from NCAA Comm. on Infractions Panel to Southern Methodist Univ. 38 (Sept. 29, 2015), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102554> [<https://perma.cc/BV7U-LTDC>] (stating that head coaches must recognize potential problems, address them, and report them to athletics administration).

102. *Division I Enforcement Charging Guidelines*, *supra* note 6.

103. Memorandum from NCAA Comm. on Infractions Panel to Saint Francis Univ. 1 (Aug. 28, 2014), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102446> [<https://perma.cc/SE6D-3SNF>] (noting the value of the inducements and benefits totaled \$1,450).

II violation.¹⁰⁴ Thus, though he was not solely responsible for the violations, NCAA legislation presumed the head coach was responsible for them. The COI concluded the head coach failed to promote a compliant atmosphere by, among other things, failing to require his entire staff to participate in monthly meetings with the university's compliance staff regarding NCAA rules.¹⁰⁵ Consequently, the head coach failed to rebut the presumption that he was responsible for the violations within his program.¹⁰⁶

The NCAA also recommends that coaches monitor their staff in order to mitigate the likelihood of a Bylaw 11.1.1.1 charge or finding,¹⁰⁷ an obligation that now-former University of Southern California athletic director, Pat Haden described as a requirement to be “constantly vigilant.”¹⁰⁸ Substandard monitoring has loomed large in two separate COI decisions that held two prominent head coaches responsible for their staff members' violations. First, in 2017, the COI processed an infamous case involving the University of Louisville's men's basketball program after a staff member arranged and paid for current and prospective student athletes on campus visits to engage in illicit activities with strippers and prostitutes.¹⁰⁹ Though he pled ignorance of the illicit activities, the COI held head coach Rick Pitino responsible for the violations because he placed the staff member in an authority position, assumed they would follow NCAA rules, and failed to monitor or follow up about late night activities with the staff member.¹¹⁰

104. *Id.* at 2.

105. *Id.* at 4 (stating that the head coach failed to promote an atmosphere of compliance by not requiring his staff to participate in compliance education meetings); see Josh Lens, *supra* note 96, at 42 (2018).

106. Memorandum from NCAA Comm. on Infractions Panel to Saint Francis Univ., *supra* note 103, at 9. Note the COI applied both the prior and current version of head coach responsibilities legislation in its analysis, as the revision occurred during the period of the relevant violations. *Id.*

107. *Division I Enforcement Charging Guidelines*, *supra* note 6. Note the redundancy here as Bylaw 11.1.1.1 explicitly requires head coaches to monitor staff members. See NCAA, *supra* note 8, at 49.

108. Moura, *supra* note 62 (noting Haden was part of a group of college athletics officials who drafted the amended legislation prior to its adoption).

109. Memorandum from NCAA Comm. on Infractions Panel to the Univ. of Louisville 1 (June 15, 2017), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102682> [<https://perma.cc/EE5W-EBCK>] (noting it had “not previously encountered a case like this”).

110. *Id.* at 20–21. One of the many penalties the COI imposed in the case was vacating the university's 2013 national title, the first time this occurred in modern Division I men's basketball history. Jeff Greer, *Louisville Forced To Vacate 2013 Men's Basketball Title After NCAA Denies Appeal*, USA TODAY (Feb. 20, 2018, 5:39 PM), <https://www.usatoday.com/story/sports/ncaab/2018/02/20/louisville-forced-vacate-2013-mens-basketball-title-after-ncaa-denies-appeal/355189002/> [<https://perma.cc/G4XV-ZP7S>]. It was unclear whether the COI was going to require Pitino to remove the celebratory tattoo he received after winning the championship as a bargain with his student athletes. Kyle Boone, *LOOK: With*

Along with the fact that Pitino failed to ask questions that would have uncovered the illicit activities, Pitino claimed he delegated monitoring of the staff member to assistant coaches who were unaware of this responsibility.¹¹¹ Among other penalties, the COI handed down a five-game suspension for Pitino.¹¹²

Another NCAA infractions case involving the University of Mississippi's football program also sheds light on the NCAA's monitoring expectations. The enforcement staff alleged twenty-one violations in the case.¹¹³ Among them, now-former head football coach Hugh Freeze achieved the distinction of being the first Division I Football Bowl Subdivision head football coach charged with violating modern head coach responsibilities legislation.¹¹⁴ Freeze did not engage in the underlying violations and claimed to be unaware of them, yet his lack of knowledge was of little consequence for the enforcement staff or the COI.¹¹⁵ The COI ultimately concluded Freeze committed a Level I violation of Bylaw 11.1.1.1 by failing to monitor his staff and its interactions with football program boosters.¹¹⁶ The COI emphasized that some of the violations happened in Freeze's plain sight, yet he failed to identify them.¹¹⁷ Among the penalties imposed, the COI issued a two-game suspension for Freeze.¹¹⁸

Louisville Vacating Its 2013 Title, Rick Pitino May Regret This Tattoo, CBS SPORTS (Feb. 20, 2018, 1:41 PM), <https://www.cbssports.com/college-basketball/news/look-with-louisville-vacating-its-2013-title-rick-pitino-may-regret-this-tattoo/> [<https://perma.cc/A7U3-JWS7>].

111. See Memorandum from NCAA Comm. on Infractions Panel to the Univ. of Louisville, *supra* note 109, at 21.
112. *Id.* at 24 (suspending Pitino for five conference games the following season).
113. See Jeff Vitter, Ole Miss Chancellor, Ross Bjork, Ole Miss Vice Chancellor for Intercollegiate Athletics & Hugh Freeze, Ole Miss head football coach, *University's Update on NCAA Case*, YOUTUBE (Feb. 22, 2017), <https://www.youtube.com/watch?v=VYWyz3cwSPE> [<https://perma.cc/6V9H-4767>] (transcript available at *Information About NCAA Case*, U. Miss., <http://athleticsworking.wp2.olemiss.edu/transcript/> [<https://perma.cc/XR9U-HRWU>] (last visited July 13, 2021)).
114. Dodd, *supra* note 54 (maintaining that Freeze's reputation was on the line as a result of the allegations).
115. See *id.* (explaining that Freeze's actual knowledge of the violations was of little consequence).
116. See Memorandum from NCAA Comm. on Infractions Panel to the Univ. of Mississippi 48 (Dec. 1, 2017), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102650> [<https://perma.cc/77VE-W2F9>] (describing Freeze's actions promoting a compliant atmosphere as "admirable" yet concluding his monitoring was substandard, illustrating that head coaches need to satisfy both prongs in order to rebut the presumption of responsibility for staff members' actions).
117. *Id.* at 46 (emphasizing the extraordinarily high number of violations, as well as their nature—they included a wide range of staff members, high-profile recruits, and boosters).
118. *Id.* at 57 (suspending Freeze for two conference games the following season). Note, however, that Freeze never served the suspension because he was not a head coach for the 2018 season; the University of Mississippi fired him for reasons unrelated to the NCAA violations and he did not start his new head coaching

In addition to communication and monitoring, the NCAA recommends that head coaches document communications and other demonstrations of their commitment to compliance.¹¹⁹ In a 2015 case, documented efforts to promote a compliant atmosphere and monitor staff helped a now-former Wichita State University head baseball coach rebut the presumption of responsibility for his administrative assistant's violations. This case is noteworthy because it was the first one (of only three) in which the COI concluded a head coach successfully rebutted the presumption of responsibility after the enforcement staff charged a violation of the current version of Bylaw 11.1.1.1. The underlying violation was that the baseball program's administrative assistant permitted twenty-one student athletes to purchase personal items at a discount through a VIP account with the program's apparel provider.¹²⁰ Access to the VIP account and discounted apparel conferred impermissible extra benefits on the student athletes under NCAA legislation.¹²¹ While the enforcement staff charged the head coach with a head coach responsibilities violation, the COI concluded the head coach successfully rebutted the presumption of responsibility for the administrative assistant's violations.¹²² In concluding that the head coach promoted a compliant atmosphere and monitored the administrative assistant, it emphasized actions like the rules education components of the head coach's weekly staff meetings.¹²³

4. *The Prevalence of Head Coach Responsibilities Violations*

Recall that the current version of Bylaw 11.1.1.1 has been effective since August 1, 2013.¹²⁴ Since 2014, the enforcement staff has alleged

job at Liberty University until the 2019 season. See Matt Bonesteel & Tramel Raggs, *Liberty Turns to Hugh Freeze, Despite Football Coach's Checkered Past*, WASH. POST (Dec. 7, 2018), <http://washingtonpost.com/sports/2018/12/07/liberty-reportedly-will-hire-hugh-freeze-its-football-coach-despite-his-checkered-past/> [<https://perma.cc/58JA-VY5P>].

119. *Division I Enforcement Charging Guidelines*, *supra* note 6 (explaining that it is "helpful" if head coaches produce documentation illustrating compliance efforts, procedures for monitoring, and specific examples of communications about NCAA rules).
120. See Memorandum from NCAA Comm. on Infractions Panel to Wichita State Univ. 5 (Jan. 29, 2015), https://s3.amazonaws.com/sidearm.sites/wichita.sidearm.sports.com/documents/2015/11/5/Wichita_State_Infractions_DecisionPUB-LIC.pdf [<https://perma.cc/J7ME-F72W>] (explaining the apparel provider representative who serviced the account allowed the former administrative assistant to order personal items at a fifty percent discount through a VIP account).
121. *Id.* at 11 (explaining the administrative assistant believed there was no NCAA violation because the student athletes paid for the items they ordered; however, she did not verify her mistaken belief with the compliance staff).
122. *Id.* at 15.
123. *Id.* at 8, 14 (describing written rules education the administrative assistant received, including compliance staff e-mails, newsletters, and memos).
124. NCAA, *supra* note 8, at 49.

more Level I or Level II violations of Bylaw 11.1.1.1 than any other of the hundreds of bylaws in the NCAA manual.¹²⁵ Further, between 2014 and 2018, head coaches committed twenty-seven percent of Level I and Level II violations, the most of any position in college athletics.¹²⁶ In 2019, head coaches committed a whopping fifty-two percent of all violations (assistant coaches were the next highest group at fifteen percent).¹²⁷

This data suggests that despite the strengthening of Bylaw 11.1.1.1, head coaches engage in activity that both the enforcement staff and the COI believe violates NCAA legislation. The allegations against high-profile head coaches such as Self, Miller, and Pitino (and their universities) only increase the legislation's prominence. Self and the University of Kansas vehemently dispute the enforcement staff's head coach responsibilities allegation against Self in a case that will receive a lot of publicity.¹²⁸ Arizona already took the extreme measure of self-imposing a postseason ban for the 2021 postseason.¹²⁹ Additional "massive" sanctions against the university's athletics department could follow.¹³⁰

One option to try to curb significant NCAA violations would be to increase the deterrent effect of head coach responsibilities legislation

125. See NCAA, DIVISION I INFRACTIONS: 2018–19 ANNUAL REPORT 17 (2019), http://s3.amazonaws.com/ncaa.org/documents/2021/1/18/2018_infractions_annual_report_0.pdf [<https://perma.cc/FDL2-EMHY>] (stating that the enforcement staff alleged fifty-five Level I or Level II violations of head coach responsibilities legislation over the previous five years); NCAA, *supra* note 19, at 11 (showing that the enforcement staff alleged eighteen Level I and Level II head coach responsibilities violations in 2019, which was the most of any bylaw).

126. NCAA, *supra* note 125, at 17.

127. See NCAA, *supra* note 19, at 8.

128. OFF. OF PUB. AFF. UNIV. OF KANSAS, RESPONSE TO NCAA AMENDED NOTICE OF ALLEGATIONS 6 (Mar. 5, 2020), <http://publicaffairs.ku.edu/sites/publicaffairs.ku.edu/files/docs/KU%20FINAL%20RESPONSE%20Full.pdf> [<https://perma.cc/BS7F-JAUU>] (disputing, among other things, that the alleged underlying violations occurred in the first place); see also Mark Schlabach, *KU Charged with Lack of Institutional Control, More*, ESPN (Sept. 23, 2019), https://www.espn.com/mens-college-basketball/story/_/id/27687051/ku-charged-lack-institutional-control-more [<https://perma.cc/8UTB-LJK3>] ("[I]t's no secret that there is tremendous pressure on the NCAA to respond to the federal court proceedings involving college basketball. . . . In its haste and attempt to regain control, the enforcement staff has created a false narrative regarding me and our basketball program." (quoting Self)). Under Self, a former president of the National Association of Basketball Coaches, Kansas won the national championship in 2008 and appeared in the Final Four three times. *Id.*

129. Schlabach, *supra* note 8 (reporting that Miller understood and supported the postseason ban).

130. Pat Forde, *Arizona Charged with 9 Violations in Notice of Allegations*, SPORTS ILLUSTRATED (Oct. 25, 2020), <http://si.com/college/2020/10/25/arizona-sean-miller-violations-ncca-notice-of-allegations> [<https://perma.cc/E4AM-84NH>] ("Penalties could include multi-year postseason bans and a full-season suspension for Miller.").

and apply a strict liability standard on head coaches for violations in their programs. Such a standard would be akin to *respondeat superior*'s imposition of strict liability on employers.¹³¹ This would require the NCAA or its membership to eliminate head coaches' ability to rebut the presumption of responsibility through the complicated and slow NCAA legislative process.¹³² A more practical and easier fix would be to publicize information about enforcement staff investigations that *do not* result in a Bylaw 11.1.1.1 allegation. This would provide a valuable resource for head coaches seeking information regarding enforcement staff expectations. The following Part explains how criminal prosecutors sometimes make similar statements when they elect to not pursue criminal charges following an investigation, which can be appropriate and beneficial in certain situations.

III. PROSECUTORIAL DECLINATION STATEMENTS

As stated earlier, many describe the enforcement staff as the NCAA's prosecutors.¹³³ This Part describes prosecutorial declination statements in the more traditional context of criminal law prosecution and other enforcement areas (e.g., corporate corruption). It also analyzes the interests that publicized prosecutorial declinations serve, many of which are relevant to this Article's proposal.

A. Defining Prosecutorial Declination Statements

Prosecutors serve as gatekeepers of the United States criminal justice system.¹³⁴ When Philip Heymann was an Assistant Attorney General for the Department of Justice, he explained to the United States Senate Committee on the Judiciary that “[w]inning convictions is only half of a prosecutor’s job. Equally vital is to sort out which

131. For a discussion of this option, see Lens, *supra* note 96.

132. For information on the NCAA legislative process, see *NCAA Division I Council-Governance Legislative Process*, NCAA, https://ncaaorg.s3.amazonaws.com/governance/d1/legislation/2020-21/2020-21D1Gov_ConfLegislativeProcessInfoGr.pdf [https://perma.cc/VXZ9-MM22] (last visited Mar. 9, 2021).

133. Davis & Hairston, *supra* note 22; see also Rogers & Ryan, *supra* note 13, at 753–54 (“[E]nforcement staff members act as investigators and prosecutors when adversarial proceedings reach the COI.” (citing Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 494 (1995))).

134. Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declination*, 79 NOTRE DAME L. REV. 221, 249–50 (2003) (noting that prosecutors’ decisions to prosecute are made in the light of day while their decisions to forgo prosecution are seldom subject to oversight); Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not To Prosecute*, 103 MINN. L. REV. 843, 852 (2018) (“Public prosecutors are the gatekeepers of the criminal law enforcement . . .”).

cases to prosecute and which to decline.”¹³⁵ Thus, prosecutors sometimes accept the charges that police recommend to them, while at other times they file different charges or decline to file any at all.¹³⁶ This decision is one of the more important decisions government officials make.¹³⁷ A prosecutor’s decision to decline a prosecution is a momentous one; it affects the lives of victims, the accused, and other individuals who commit similar crimes.¹³⁸ A working definition of declinations may be decisions by law enforcement to conclude investigations without bringing enforcement actions.¹³⁹ Thus, declinations are perhaps better defined by what they are not: enforcement actions.¹⁴⁰ Regardless of their choice, prosecutors have their reasons for making them.¹⁴¹ Generally, prosecutors consider three sets of reasons to decline or pursue charges: legal reasons, administrative reasons, and equitable reasons.¹⁴² An example of an administrative reason is resource scarcity, whereas equitable reasons center on whether prosecutors normatively should file a charge in any given case.¹⁴³ According to Heymann, the “more important reason” is the legal reason, such as lack of merit in the prosecution.¹⁴⁴ Conventional wisdom maintains that prosecutors are in the best position to evaluate these reasons.¹⁴⁵

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135. *Privacy Protection Act: Hearing on S. 115, S. 1790, and S. 1816 Before the S. Comm. on the Judiciary*, 96th Cong. 50 (1980) [hereinafter *Privacy Protection Act*] (prepared statement of Philip B. Heymann, Assistant Att’y Gen. of the United States).
136. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 133 (2008). Federal prosecutors decline around a quarter of all criminal matters referred to them. O’Neill, *supra* note 134, at 271. Understanding why prosecutors select certain cases for prosecution while disregarding others is an enigma of the criminal justice system. O’Neill, *supra* note 12, at 1439.
137. See O’Neill, *supra* note 12 (describing consequences for the individual defendant and others).
138. *Id.* at 1491 (characterizing the decision to decline prosecution as “less visible—and arguably more important” than the effort to combat sentencing disparities).
139. Beverly Earle & Anita Cava, *The Mystery of Declinations Under the Foreign Corrupt Practices Act: A Proposal To Incentivize Compliance*, 49 U.C. DAVIS L. REV. 567, 598–99 (2015) (defining declinations in the context of the Federal Corrupt Practices Act and admitting there is “no obvious answer” to defining declinations).
140. *Id.* at 599.
141. Miller & Wright, *supra* note 136.
142. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not To Prosecute*, 110 COLUM. L. REV. 1655, 1655–56 (2010) (characterizing charging discretion as “no monolith”).
143. See *id.* at 1658–59.
144. See *Privacy Protection Act*, *supra* note 135.
145. Bowers, *supra* note 142, at 1657–58 (questioning whether prosecutors are the appropriate individuals to determine whether to decline or pursue charges based on equitable reasons).

Prosecutors can do much of their daily work without explaining their decisions to the public.¹⁴⁶ Unlike when they file charges, prosecutors generally have no legal duty to publicize their declinations.¹⁴⁷ Thus, prosecutors' declinations, and reasons for them, often remain private.¹⁴⁸ Further, there are few formal means by which a court or other entity or system may review declinations.¹⁴⁹ In common law countries, oversight of officials' failures to enforce resides almost entirely with the political process.¹⁵⁰ This may be why many view declination as the height of prosecutorial discretion.¹⁵¹

There are often reasons it is appropriate for prosecutors keep declinations confidential, including protecting the privacy of those who were under investigation, as well as witnesses and victims.¹⁵² However, because prosecutors are not required to disclose reasons for a declination and their discretion operates virtually without oversight, the decision not to prosecute frequently may appear capricious and

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146. Miller & Wright, *supra* note 136, at 129 (arguing that internal regulation of prosecutorial offices is sufficient and effective). Some legal scholars feel that prosecutors generally earn low grades for their transparency. *See id.* at 194.
 147. Roth, *supra* note 11, at 480–81 (pointing out the consistency between the lack of duty to publicize declinations and an overall lack of prosecutorial accountability and transparency).
 148. Miller & Wright, *supra* note 136, at 130 (“Declinations epitomize the black box: they remain hidden from all traditional legal review and test the capacity of our preferred strategy of internal regulation.”). One legal expert describes a prosecutor’s determination to pursue, or to forgo, a criminal matter as difficult to penetrate as a juror’s decision to convict or to acquit. O’Neill, *supra* note 12, at 1439. One explanation for the lack of oversight is that “the interests at stake are not as high—no individual faces prosecution and possible punishment.” Brown, *supra* note 134.
 149. O’Neill, *supra* note 134, at 224 (explaining that declinations are at least as unreviewable as decisions to pursue charges).
 150. Brown, *supra* note 134, at 845–46 (noting that decisions *not* to charge are virtually immune from judicial review or other nonpolitical oversight).
 151. Miller & Wright, *supra* note 136 (explaining that prosecutors do not have to state their reasons in open court or other settings outside of their offices); O’Neill, *supra* note 134, at 223 (“Deciding whether to prosecute an individual criminally is one of the most momentous tasks the government undertakes.”). Though the U.S. Attorneys’ Manual describes declination as “an exercise of prosecutorial discretion,” the Department of Justice and Securities and Exchange Commission have not “presented a clear definition of what declinations are nor have they presented clear guidance on the contours of declination decisions.” Earle & Cava, *supra* note 139, at 599–600 (quoting U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.110(A) (2015)). Nevertheless, the exercise of negative discretion is a crucial component of the criminal justice system. Roth, *supra* note 11, at 479 (“The exercise of negative discretion . . . is a necessary feature of our system and a reason why good judgment and common sense are so valuable as prosecutorial traits.”).
 152. Roth, *supra* note 11, at 481 (citing reasons for keeping reasons for a declination confidential, including “prosecutors’ prospective ability to exercise mercy without fear of political reprisal”). For an analysis of the risks that declination statements can pose, see *id.* at 513.

standardless.¹⁵³ Allegations of criminal conduct often surface in highly charged settings, and people may form strong opinions about matters of moral conduct or public policy to which criminal law does not give full expression.¹⁵⁴ So even though there is no legal reason to prosecute, when the public learns of the declination, it may perceive that prosecutors closed an investigation of an obvious scoundrel.¹⁵⁵ Without information on the reasoning behind a declination, the public may suspect political motivations.¹⁵⁶ Undoubtedly, the particular facts and circumstances of a case may mean confidentiality is proper, but the following section discusses situations in which public declinations can be appropriate and beneficial, combating many of these concerns.

B. Interests Served by Public Prosecutorial Declination Statements

Occasionally, prosecutors deviate from the norm and make their declinations public.¹⁵⁷ When prosecutors issue public declination statements or when an individual obtains access to private declination statements, such statements can shed meaningful light on prosecutors' work and can provide patterns of reasons across cases.¹⁵⁸ Analysis of the reasons behind declinations reveals the influence of substantive and procedural legal doctrines, supervisors' policy priorities (e.g., a high priority on pursuing intimate partner violence charges), and evidentiary hurdles of proving charges.¹⁵⁹ Overall, legal norms, not personal whims of prosecutors, shape many declination choices.¹⁶⁰ For example, the government's good-faith decision not to prosecute for more serious crimes is often informed by a combination of legal reasoning and predictions about juries' likely views.¹⁶¹ In other instances, prosecutors decline to pursue criminal charges because of limited resources, despite their belief that they have legally

153. O'Neill, *supra* note 134, at 234.

154. *Privacy Protection Act*, *supra* note 135 (explaining that a declination does not equate to condoning the behavior).

155. *Id.*

156. *Id.*

157. Roth, *supra* note 11 (reporting anecdotal evidence of increased transparency) (citing Benjamin Weiser, *Should Prosecutors Chastise Those They Don't Charge?* N.Y. TIMES (Mar. 24, 2017), <https://www.nytimes.com/2017/03/24/myregion/bill-de-blasio-campaign-finance.html> [<https://perma.cc/V53W-D2XQ>]).

158. Miller & Wright, *supra* note 136 at 130. Declination data can be difficult to unearth. O'Neill, *supra* note 134, at 250.

159. Miller & Wright, *supra* note 136 at 131 (describing review and analysis of prosecutorial declinations in New Orleans, Milwaukee, Charlotte, and San Diego); *see, e.g., id.* at 149 (stating the high priority on pursuing intimate partner violence charges as an example of supervisor policy priorities).

160. *See id.* at 141.

161. *Id.* at 145 (examining declination reasons in possible homicide and theft charges).

sufficient evidence to support those charges.¹⁶² The insights that prosecutors' reasoning provides make clear that given the right circumstances, publicly providing explanations and data regarding declinations produces significant benefits.¹⁶³ Professor Jessica Roth has identified "three categories of interests that declination statements can serve: signaling, accountability, and history-keeping."¹⁶⁴

1. *Signaling*

Forms of signaling can include "closure to those immediately affected by a declination decision[,] . . . nudges about the need for reforms[,] . . . [and] educational signals to the public about the criminal law."¹⁶⁵ "[D]eclination statements convey closure to the two most important parties in potential criminal prosecutions: victims and potential targets of prosecution."¹⁶⁶ Even when a decision goes against either a victim or an individual under investigation, there is value to both parties in the decision's certainty.¹⁶⁷ Victims may elect to pursue civil liability or other "avenues of redress."¹⁶⁸ Individuals publicly identified during an investigation may seek a declination statement to help resuscitate their reputation and otherwise mitigate the "practical negative consequences that flow from the investigation which can be ameliorated only when a declination is made public."¹⁶⁹

Declination statements can also be pedagogical tools for prosecutors.¹⁷⁰ Prosecutors can use them to emphasize the need for law enforcement agencies' procedural compliance or to draw legislators' attention to the ways existing law limits prosecution, for example.¹⁷¹ Declination information thus may provide insight into the circumstances under which substantive criminal law is un- or under-enforced

162. *See id.* at 153. Prosecutorial resources, even at the national level, are scarce. *See* O'Neill, *supra* note 134, at 222 (citing as an example federal prosecutors focusing more on terrorism in the aftermath of the September 11, 2001 terrorist attacks at the expense of devoting resources to other crimes).

163. *See* Miller & Wright, *supra* note 136, at 196. Publicizing declination reasons can create certain difficulties. O'Neill, *supra* note 12, at 1490 (citing example that some office guidelines may preclude prosecution of minor drug offenses, which, if made public, could harm deterrence efforts).

164. Roth, *supra* note 11, at 490 ("These interests sometimes overlap, and a single declination statement may serve all three.").

165. *Id.* (identifying "respect to prosecutors' fellow institutional actors . . . [and] signals about the prosecutorial role" as other forms of signaling).

166. *Id.* at 491.

167. *Id.* at 491–92 (noting that this closure may permit victims to pursue civil liability or other measures).

168. *Id.* at 491.

169. *Id.* at 492 (explaining that a declination statement may reduce stigma).

170. *Id.* at 493–94 (indicating statements that identify, for example, lack of evidence or an unlawful search as a way to "signal the need for corrective action").

171. *Id.*

and may highlight necessary reforms.¹⁷² “For example, a prosecutor might cite the narrow definition of bribery . . . in explaining a decision not to file charges in cases involving alleged public corruption.”¹⁷³ Legislators can use these statements to decide whether to pursue legislative reform.¹⁷⁴ Declination information can also shape lawmakers’ allocation of appropriate resources to support enforcement.¹⁷⁵

The pedagogical benefit of declination statements may also be useful to inform the public.¹⁷⁶ It can be difficult to keep in clear view the difference between scandalous behavior and criminal behavior, and the difference between suspecting criminal behavior and proving it.¹⁷⁷ Often, even scoundrels who behave poorly do not actually break the law.¹⁷⁸ Thus, prosecutors also use declination statements to educate the public about criminal law’s content and procedure, for example “when a prosecutor explains in a declination statement that the evidence does not establish a necessary element of a crime.”¹⁷⁹ Beyond quelling outcry stemming from a lack of understanding, declination statements educate the public about the laws to which they are subject. This may keep a prosecutor’s declination from undermining the law’s deterrent effect. What’s more, when law enforcement determines that it will not pursue an enforcement mechanism without offering reasoning for the declination, it can be difficult for other potential targets to determine what steps can be taken to achieve a similar outcome.¹⁸⁰ In 2016, for example, the Department of Justice (DOJ) Criminal Division instituted a pilot program “designed to provide transparency and accountability” regarding charging decisions under the Foreign Corrupt Practices Act (FCPA).¹⁸¹ The program publicized information about the factors considered when evaluating corporate

172. See O’Neill, *supra* note 12, at 1493; Roth, *supra* note 11, at 493–94.

173. Roth, *supra* note 11, at 494 (providing another example of a prosecutor citing the statute of limitations in a declination statement regarding sexual assault charges).

174. See *id.* at 494–95.

175. See O’Neill, *supra* note 12, at 1493.

176. Roth, *supra* note 11, at 496 (noting that declination statements are likely more readily available to the public than court opinions, charging documents, and statutes).

177. *Privacy Protection Act*, *supra* note 135 (explaining that this difficulty in discerning actual criminal behavior increases in a non-technical discussion of a suspected criminal’s behavior in a newspaper or journal).

178. See *id.* (emphasizing that declinations do not amount to an approval of investigated behavior).

179. Roth, *supra* note 11, at 496.

180. Earle & Cava, *supra* note 139, at 603.

181. Madeline DeGeorges, *Indecent Disclosure: Has the Department of Justice Provided Sufficient Clarity To Incentivize Corporations To Admit Wrongdoing?*, 5 ADMIN. L. REV. ACCORD 53, 68–69 (2019) (citing Press Release, Leslie Caldwell, Assistant Att’y Gen., Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016) (describing pilot program)).

conduct in the hope that increased transparency “would encourage voluntary corporate self-disclosure.”¹⁸² While the DOJ’s pilot program served as a means of educating potential targets, the DOJ designed it to provide accountability and transparency, the subjects of the next subsection.¹⁸³

2. *Accountability*

“Accountability among prosecutors has emerged as an important, albeit controversial, issue within the criminal justice system.”¹⁸⁴ “Declination statements [can] also promote prosecutors’ accountability to the public they serve.”¹⁸⁵ Such statements can also improve openness and consistency.¹⁸⁶ “Absent a declination statement, the public can eventually surmise that a prosecutor has declined to press charges with respect to a given matter,” but that process could take too long for there to be meaningful accountability.¹⁸⁷ Conversely, declination statements could offer “political cover” for district attorneys and illuminate “the tensions between police arrests and prosecutorial charging decisions, and might sort out how different applicable legal standards, office values, or resources affect declination choices.”¹⁸⁸ “The obligation to explain and the aspiration to make consistent and principled decisions can both thrive” in a transparent prosecutorial environment.¹⁸⁹

Further, according to one legal scholar, the primary reasons for unjustified decisions not to prosecute are “failing to investigate and charge due to biases against certain victims or harms, or favoritism toward certain kinds of suspects.”¹⁹⁰ The act of drafting declination statements can help combat such failures in several ways.¹⁹¹ First, constructing a declination statement forces a prosecutor to ground the

182. *Id.*

183. *See id.* (noting that the DOJ expanded the program into the FCPA Corporate Enforcement Policy in 2017).

184. O’Neill, *supra* note 12, at 1441 (citing Congress’s passage of the PROTECT Act, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003), as an example of increased accountability among prosecutors).

185. Roth, *supra* note 11, at 502.

186. *See* O’Neill, *supra* note 12, at 1488 (noting this is true of declination statements regardless of whether they are available to complainants or potential defendants).

187. *See* Roth, *supra* note 11, at 502 (explaining that accountability to the public is extremely important in jurisdictions where the public elects government attorneys).

188. *See* Miller & Wright, *supra* note 136, at 196 (noting, however, that added political cover may be superfluous, given distract attorney reelection rates).

189. *Id.*

190. Brown, *supra* note 134, at 853.

191. Roth, *supra* note 11, at 500.

decision in relevant facts and acceptable reasons, adding a layer of internal accountability.¹⁹² Further, “[w]riting for potential public consumption provides an additional level of discipline and constraint” that can help mitigate the likelihood of bias affecting the decision whether to prosecute.¹⁹³ Requiring articulation of declination reasons can increase consistency, as prosecutors can review past declination statements to determine whether certain identifiable reasons frequently emerge as the basis for declination.¹⁹⁴ For example, if review of the statements reveals that cases are frequently declined because law enforcement performed an illegal search, it may trigger the prosecutor to work with the policing authority’s supervisors to provide better oversight or training.¹⁹⁵

3. *History-Keeping*

In particularly complex or high-profile cases, declination statements “also can serve history-keeping interests.”¹⁹⁶ The history-keeping interest is “distinct from signaling and accountability [interests] in that it focuses on the documentation of historical facts for its own sake.”¹⁹⁷ Absent a declination statement, “the criminal justice system generally does not provide a means for the public to learn the facts that the prosecutor uncovered during the investigation;” a true loss since prosecutors likely “have the best access” to the fresh evidence.¹⁹⁸

IV. INCORPORATING DECLINATION STATEMENTS REGARDING THE ENFORCEMENT STAFF’S HEAD COACH RESPONSIBILITIES ANALYSIS INTO THE NCAA INFRACTIONS PROCESS

The previous Part illustrated that prosecutorial declination statements can be beneficial and appropriate under certain circumstances. Similar circumstances exist in the NCAA infractions cases described in the Introduction, where the enforcement staff investigates a head coach for a potential Bylaw 11.1.1.1 violation but declines to bring the charge. Thus, this Part argues that publicizing an enforcement staff

192. *Id.* at 501 (noting this helps ensure a prosecutor’s decision is not arbitrary).

193. *Id.* (explaining that a prosecutor writing a declination statement must consider, predict, and account for potential reactions).

194. *See* O’Neill, *supra* note 12, at 1488, 1490–91 (emphasizing importance of detail in declination statements).

195. *See id.* at 1489.

196. Roth, *supra* note 11, at 508.

197. *Id.* at 509 (citing as examples the Mueller Report and the Department of Justice’s report regarding the “2014 shooting death of Michael Brown in Ferguson, Missouri”).

198. *Id.* at 510–11 (noting that a small number of jurisdictions permit publication of investigative grand jury reports to make investigation findings public when there are no criminal charges).

declination statement is appropriate and beneficial in those situations.

A. Reasons Publicized Enforcement Staff Declinations for Head Coach Responsibilities Charges Are Appropriate and Would Be Beneficial

Roth has suggested a framework to determine whether a public declination statement is appropriate within the criminal law context. Generally, the framework indicates that “prosecutors should issue declination statements when they significantly further one or more of the interests [described above], where the risks posed by such statements are minimized, and where their value cannot be realized through other means.”¹⁹⁹ In other words, public, “detailed statements are warranted only when their value (i.e., the extent to which they further signaling, accountability, or history-keeping interests) in the context of the individual case is unusually high.”²⁰⁰ These “circumstances may provide unique ‘teachable moments’ in which prosecutors can” take advantage of the pedagogical value of declination statements and “convey important information about the law and its limits.”²⁰¹ Notably, Roth points to cases involving public figures engaged in official misconduct as those most likely to serve signaling, accountability, and history-keeping interests.²⁰² There are many ways this logic readily translates and applies to situations where the enforcement staff investigates a head coach due to a Level I or Level II violation in the coach’s sports program but concludes that it will not bring a Bylaw 11.1.1.1 allegation. For the reasons stated below, the enforcement staff should publicize a detailed declination statement in those situations.

1. Neither the Enforcement Staff’s Analysis nor Evidence It Uncovers Is Otherwise Readily Available

When the enforcement staff investigates a head coach for a potential Bylaw 11.1.1.1 violation and uncovers evidence of a head coach’s actions promoting a compliant atmosphere and staff monitoring, it

199. *Id.* at 537. Though Roth suggests that prosecutorial declination statements should be kept private when they identify the subject or target of an investigation, *id.* at 539, due to Bylaw 11.1.1.1, head coaches are automatically investigation targets when there is a Level I or Level II violation in their program. Thus, Roth’s reasoning for keeping statements private in the context of criminal prosecutions does not apply, and it would be appropriate for the enforcement staff to publicize its declination statement. *Id.* at 540. In fact, the target of an investigation may seek a public statement from the prosecutor in order to repair reputational harm. *Id.*

200. *Id.* at 541 (noting this threshold is difficult to define).

201. *Id.* at 542.

202. *Id.*

will not charge the head coach individually. The relevant process does not make this evidence public. Further, quality information regarding details of the head coach's promotion of a compliant atmosphere and monitoring is not otherwise readily available. A university may elect to publicly disclose receipt of a notice of allegations and when doing so, point out a lack of individual allegations against a head coach.²⁰³ However, this information comes from the university itself, and thus would not provide much insight into the reasoning behind the enforcement staff's decision to forego a Bylaw 11.1.1.1 allegation.²⁰⁴ In cases where the background facts and investigation are already public, it would be extremely helpful to gain insight into the resolution from the perspective of the entity responsible for weighing the mitigating factors.²⁰⁵

2. *Public Enforcement Staff Declinations Would Significantly Further Signaling and Pedagogical Interests*

A publicized enforcement staff declination would significantly further numerous signaling interests. These signaling interests include official notification to the target head coach that the enforcement staff will not pursue a Bylaw 11.1.1.1 allegation. Also, note there are no privacy concerns with making the declination public. One reason that prosecutors often keep their declinations confidential is to protect the privacy of those who were under investigation.²⁰⁶ However, this is a non-issue in enforcement staff head coach responsibilities investigations. Under the process through which the enforcement staff investigates a head coach, the sports program is already under investigation and the enforcement staff believes its investigation substantiates an underlying Level I or Level II violation.²⁰⁷ Thus, the enforcement staff will bring allegations as part of a case that will eventually become public through the NCAA infractions process.²⁰⁸ Because the process dictates that the enforcement staff automatically investigates the head coach as part of the case, there is no reason to fear that the head coach's privacy is compromised—the investigation is obligatory.²⁰⁹ In fact, head coaches would likely prefer a public declination statement in these circumstances. When a prosecutor declines to bring charges, a target often requests a public declination statement to help protect the

203. See Iacobelli, *supra* note 5 (describing South Carolina's public statement).

204. See Earle & Cava, *supra* note 139, at 618 (describing lack of insight stemming from instances where companies investigated by the DOJ or Securities and Exchange Commission describe those entities' declinations).

205. *Id.*

206. Roth, *supra* note 11, at 481.

207. *Division I Enforcement Charging Guidelines*, *supra* note 6.

208. Parkinson, *supra* note 8, at 218.

209. *Division I Enforcement Charging Guidelines*, *supra* note 6.

target's reputation and clear their name.²¹⁰ The same is likely true of head coaches, as they would likely appreciate a publicized enforcement staff declination detailing the favorable results of its investigation.

A publicized enforcement staff declination would serve significant pedagogical functions as well. Other head coaches and college athletics constituents could learn so much from an enforcement staff declination describing the head coach's actions that satisfied its expectations regarding promotion of a compliant atmosphere and monitoring. Likewise, the enforcement staff could use public declinations to signal their expectations of head coaches. This would help other head coaches who are seeking information to help them run their programs in a compliant manner.²¹¹

3. *Public Enforcement Staff Declination Statements Would Further Accountability Interests*

A publicized enforcement staff declination would also significantly further accountability interests. Not only would preparing a declination statement for public consumption require the enforcement staff to perform due diligence and carefully consider its decision, but it would also help improve consistency.²¹² An increase in transparency and consistency could help improve both insider and public perception of and confidence in the enforcement staff.²¹³ Concerns regarding the NCAA selectively punishing less visible sports programs or, conversely, seeking to make examples out of embattled coaches have been around for decades. These concerns even predate legendary former University of Nevada, Las Vegas, head men's basketball coach Jerry Tarkanian's statement that "[t]he NCAA is so mad at Kentucky, it's going to give Cleveland State two more years' probation,"²¹⁴ implying

210. Roth, *supra* note 11, at 492.

211. Further, additional transparency regarding enforcement staff declinations could increase the likelihood of self-disclosure of potential and actual NCAA rules violations, which is a hallmark of the NCAA enforcement and infractions processes. See Earle & Cava, *supra* note 139, at 620 (stating that a robust self-disclosure pipeline is a lynchpin of enforcement success in enforcement systems that require self-reporting such as under the Foreign Corrupt Practices Act).

212. See Roth, *supra* note 11, at 500–01; O'Neill, *supra* note 12, at 1490–91.

213. For an example of waning confidence in the NCAA's handling of infractions matters, see Pat Forde, *SEC Commissioner Warns NCAA It's Headed Toward 'Crisis of Confidence' over Infractions Case Delays*, SPORTS ILLUSTRATED (Dec. 10, 2020), <http://si.com/college/2020/12/10/ncaa-basketball-investigations-greg-sankey-letter> [<https://perma.cc/4LFC-3KL2>] (describing Southeastern Conference commissioner Greg Sankey's letter to NCAA asserting that member universities and the public are verging on a "crisis of confidence" with the NCAA's handling of infractions matters).

214. Pat Forde, *Is NCAA Selective Enforcement Real?*, ESPN (June 2, 2010), http://espn.com/mens-college-basketball/columns/story?columnist=forde_

the enforcement staff takes it easy on more visible programs and coaches and saves harsh justice for the more rank-and-file sports programs and coaches.²¹⁵ As Heymann pointed out, when the public does not receive information on the reason for a declination in a public case involving a visible individual, it simply learns that the investigation closed.²¹⁶ This may contribute to suspicion that the real reason for declination is political.²¹⁷ Just as with prosecutorial declination statements, a publicized enforcement staff declination could alleviate these suspicions and provide cover for those who suspect the enforcement staff was selective with its rules enforcement.

Interestingly, a recent case hints that the COI may also appreciate information on the enforcement staff's analysis of potential Bylaw 11.1.1.1 charges. In its 2016 written decision in a case involving California State University, Northridge, the COI disclosed that in light of some of the head coach's answers during the infractions hearing, the COI had formally inquired into the enforcement staff's "intentions regarding head coach responsibility."²¹⁸ The underlying violation centered on academic misconduct and provision of impermissible academic benefits by a men's basketball director of operations.²¹⁹ The COI made the inquiry because though the enforcement staff had not alleged head coach individual responsibility, the COI "was concerned about the head coach's potential responsibility in the case because he knew that the former director of basketball operations had access to the student-athletes' online portal accounts."²²⁰ After receiving the COI's formal inquiry, the enforcement staff re-interviewed the head coach and "could not identify any more steps he could have taken to further rebut the presumption of head coach responsibility."²²¹ But what were the "steps" the head coach engaged in that satisfied the enforcement staff? Again, it would be beneficial for head coaches and other college athletics constituents to have more detailed information on the actions the head coach took to promote a compliant atmosphere and monitor staff. Additionally, publicizing a description of these presumption-rebutting actions would have saved the enforcement staff and head coach from the COI's inquiry and thus would have saved all

pat&id=5242104 [https://perma.cc/B7NR-SUZZ] (pointing out that Tarkanian was on the enforcement staff's "speed dial at the time").

215. *Id.* (describing cynics' belief that the NCAA "allowed the pressures of profitability and prestige to affect its system of justice").

216. *See Privacy Protection Act*, *supra* note 135.

217. *See id.*

218. *See* Remand Memorandum from NCAA Comm. on Infractions Panel to California State Univ., Northridge 3 (Dec. 7, 2016), <https://web3.ncaa.org/lstdbi/search/mi-CaseView/report?id=102690> [https://perma.cc/8LQ8-SQL3].

219. *Id.* at 1.

220. *Id.* at 12.

221. *Id.* at 3.

parties the resources (e.g., time and expense) associated with another interview of the head coach.

B. Logistics of a Proposed Enforcement Staff Declination Statement

This section makes logistical suggestions regarding proposed enforcement staff declination statements in cases where it declines to bring a Bylaw 11.1.1.1 allegation. More specifically, these suggestions pertain to the proposed statements' location and content.

1. Notices of Allegations for Violations in a Sports Program That Do Not Include a Bylaw 11.1.1.1 Allegation Should Include an Enforcement Staff Declination Statement

In every case involving a sports program facing a Level I or Level II violation, the enforcement staff automatically undertakes a Bylaw 11.1.1.1 analysis.²²² Because of the benefits that would result from an enforcement staff declination statement identified in the previous section, it should include a static section in every notice of allegations that alleges violations in sports programs that do not include a Bylaw 11.1.1.1 allegation. This section should include information regarding the enforcement staff's Bylaw 11.1.1.1 analysis that the next section details. Generally, a notice of allegations only becomes public in high profile cases or where the media requests it from a public university.²²³ Thus, to further systematize and increase transparency, the COI could include the enforcement staff's Bylaw 11.1.1.1 analysis section from a notice of allegations in its written case decision, all of which are publicly available.²²⁴ This would ensure public disclosure and availability in every case and provide another outlet through which universities and head coaches could learn about enforcement staff expectations.

2. The Enforcement Staff Declination Should Be Neutral and Include Detailed Information Regarding the Head Coach's Activities Promoting a Compliant Atmosphere and Monitoring Staff

One legal expert has explained that in widely publicized criminal cases involving public figures or allegations of official misconduct, a vague declination statement may not sufficiently serve accountability

222. *Division I Enforcement Charging Guidelines*, *supra* note 6, at 2.

223. See Schlabach, *supra* note 8 (explaining process through which ESPN obtained notice of allegations from Arizona).

224. See Parkinson, *supra* note 8 (explaining that infractions reports are "readily accessible" to the public on the NCAA's website).

interests.²²⁵ While this statement's suggestion pertains to declinations following criminal investigations, enforcement staff investigations of head coaches likewise involve public figures and will result in public cases if the enforcement staff alleges violations. Thus, the enforcement staff's declination statements should be detailed yet strive for a neutral tone that lets the facts speak for themselves.²²⁶

Interestingly, a few recent negotiated resolution case reports included or made reference to Bylaw 11.1.1.1 analysis, even though there was no corresponding allegation or finding.²²⁷ This is a great step toward furthering signaling, pedagogical, and accountability interests. However, the reports' analyses is lacking, the case decision format is inconsistent, and not every subsequent negotiated resolution—let alone every relevant infractions case—includes the Bylaw 11.1.1.1 analysis.

The 2019 University of Maryland, College Park (Maryland), and 2021 University of Dayton (Dayton) negotiated resolution reports contain the most complete Bylaw 11.1.1.1 analyses among cases without Bylaw 11.1.1.1 charges. In the Maryland case, which involved violations in both its men's and women's basketball programs, the parties agreed within the body of the report that the programs' head coaches both rebutted the presumption of responsibility for their staff members' violations and listed specific and detailed "factors" relevant to this agreement.²²⁸ For example, the head men's basketball coach and his staff regularly communicated with the compliance staff regarding NCAA rules matters, and the head coach enforced NCAA rules within his staff.²²⁹ The head women's basketball coach and her staff met regularly with the compliance staff, and the head coach's violations were "honest mistakes that were not indicative of the head coach failing to promote an atmosphere of compliance or monitoring her staff."²³⁰

225. See Roth, *supra* note 11, at 492.

226. *Id.* at 543 (providing suggested framework for prosecutorial declination statements).

227. Recall that a negotiated resolution is one of four ways an infractions case may resolve. Negotiated resolution is appropriate when the university and any other parties (e.g., coaches) agree with the enforcement staff on the facts, violations, levels of violations, and penalties. *Division I Infractions Process*, *supra* note 9. The enforcement staff and parties draft a report and submit it to the COI for review. *Id.* The COI reviews the appropriateness of the parties' agreed-upon penalties. *Negotiated Resolution*, *supra* note 39.

228. See Negotiated Resolution between NCAA Comm. on Infractions Panel and Univ. of Maryland, College Park 2–3 (June 18, 2019), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102860> [<https://perma.cc/JD38-BGHS>] (describing case involving Maryland's men's and women's basketball programs).

229. See *id.* at 2.

230. See *id.* at 3.

The Dayton case involved recruiting violations in its women's volleyball program.²³¹ In a section of the report titled "Review of Other Issues," the parties acknowledged that the enforcement staff considered advancing a Bylaw 11.1.1.1 allegation.²³² Instead, the parties agreed that the head coach rebutted the presumption of responsibility by establishing the coach set clear expectations that staff members comply with NCAA rules.²³³ Further, the head coach "established a program of prompt and consistent review of documentation related to monitoring camp and clinic information, such as forms and questionnaires within the sports program."²³⁴ Thus, the parties concluded, "[T]he overall tone and tenor set by the head women's volleyball coach rebutted the presumption of responsibility."²³⁵

This information regarding the Maryland and Dayton head coaches' activities could be extremely beneficial to other head coaches and universities because it comes directly from a report co-written by the enforcement staff and is approved by the COI. Two other cases where the head coaches rebutted the presumption of responsibility for violations in their programs feature negotiated resolution reports that lack relevant or helpful details. The first such case is Ohio University's 2020 negotiated resolution. The written report includes the "Review of Other Issues" section, which states that the university and enforcement staff agreed the head volleyball coach rebutted the presumption of responsibility and that his mistaken understanding of NCAA recruiting legislation led to violations.²³⁶ The head coach provided this misinformation to an assistant coach, who acted on it and caused the violations.²³⁷ When compliance staff informed the head coach he was wrong, he was immediately remorseful and acknowledged the violations may have occurred over the past several years.²³⁸ The head coach took responsibility for both his and the assistant coach's actions.²³⁹ The parties agreed there was no intent to circum-

231. Negotiated Resolution between NCAA Comm. on Infractions Panel and Univ. of Dayton 1 (Apr. 22, 2021), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102900> [<https://perma.cc/2XCF-UFRL>].

232. *Id.* at 5 (explaining that the enforcement staff also considered a failure to monitor charge against the university).

233. *Id.*

234. *Id.*

235. *Id.*

236. Negotiated Resolution between NCAA Comm. on Infractions Panel and Ohio Univ. 4–5 (June 16, 2020), https://ncaaorg.s3.amazonaws.com/infractions/decisions/Jun2020INF_OhioPUBLICNRAgreement.pdf [<https://perma.cc/PZM9-XSFJ>].

237. *Id.* at 4 (explaining that the head coach mistakenly believed NCAA rules permitted the university to finance air travel for prospective student athletes' parents on official visits).

238. *Id.*

239. *Id.* (noting that the head coach had misinformed the assistant coach).

vent NCAA rules or conceal violations and that the head coach “otherwise promoted an atmosphere of compliance and monitored his staff, resulting in him rebutting the presumption of responsibility.”²⁴⁰

The negotiated resolution case report involving Jackson State University and its football program also included the “Review of Other Issues” section explaining the university and enforcement staff were in agreement that the head football coach rebutted the presumption of responsibility for violations in his program.²⁴¹ The report explained the violations occurred during a time period when the current head coach was the interim head coach.²⁴² Further, the head coach fully cooperated with the ensuing investigations and agreed to suspend the staff member who committed the violations.²⁴³ The parties also credited the head coach for demonstrating “through his actions and during his interview that he promoted an atmosphere of compliance and monitored his staff, resulting in rebutting the presumption of responsibility.”²⁴⁴

While the information from the Maryland and Dayton cases is somewhat detailed and helpful, the Ohio and Jackson State case reports lack the specifics regarding the head coaches’ actions to make them valuable. In fact, conclusory statements like the head coach “otherwise promoted an atmosphere of compliance and monitored his staff” sufficiently to rebut the presumption of responsibility, without accompanying details regarding specific actions, are completely unnecessary. We already know from the reports that the enforcement staff did not bring a Bylaw 11.1.1.1 allegation, so it goes without saying that the head coaches rebutted the presumption of responsibility. The Ohio and Jackson State cases would more effectively advance signaling, pedagogical, and accountability interests if their reports contained detailed information like the Maryland report.

Despite these negotiated resolution case reports including Bylaw 11.1.1.1 analysis or acknowledgment, more recent negotiated resolution reports involving sports program violations curiously lack any Bylaw 11.1.1.1 rebuttable presumption analysis. For example, a 2021 University of Notre Dame negotiated resolution case report describes recruiting violations committed by a now-former assistant football coach.²⁴⁵ Even though the head coach was presumed responsible for

240. *Id.*

241. Negotiated Resolution between NCAA Comm. on Infractions Panel and Jackson State Univ. 4 (Oct. 23, 2020), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102876> [https://perma.cc/JA4G-GB2A].

242. *Id.* at 4 (describing case involving a football operations staff member’s violations).

243. *Id.* (noting the head coach also agreed to leave the staff member’s position vacant for the remainder of the 2019 season).

244. *Id.*

245. Negotiated Resolution between NCAA Comm. on Infractions Panel and Univ. of Notre Dame 1 (Jan. 21, 2021), <http://web3.ncaa.org/lstdbi/search/miCaseView/re->

the violations, and other recent negotiated resolution case reports reference or provide rebuttable presumption analysis, the Notre Dame case report is void of any such analysis or reference to head coach responsibilities legislation. Other head coaches and college athletics constituents would have greatly appreciated and could have learned a lot from the actions of the head coach of such a visible sports program. Instead, they are left to wonder how the head coach satisfied the enforcement staff's expectations.²⁴⁶ Likewise, a 2021 negotiated resolution case report regarding recruiting violations in Youngstown State's football program lacks any mention of Bylaw 11.1.1.1, let alone a detailed analysis.²⁴⁷ This, despite the head coach's involvement in some of the violations.²⁴⁸ Also baffling is the fact that the COI released the Youngstown State and Dayton cases two days apart, and only Dayton's report included Bylaw 11.1.1.1 analysis despite direct involvement of Youngstown State's head coach in the underlying violations.

A simple fix—including a static section with rebuttable presumption analysis in every relevant notice of allegations and COI case report—would address these shortcomings and inconsistencies. Of course, for it to be beneficial, the analysis must include specific details regarding head coaches' actions, like in the Maryland and Dayton negotiated resolution reports. Further, for maximum benefit, the enforcement staff and the COI should include this section in all types of case resolutions, including contested cases such as Oklahoma State, South Carolina, and Southern California's. Doing so would further signaling, pedagogical, and accountability interests.

V. CONCLUSION

Under certain circumstances, criminal prosecutors appropriately use declination statements to further important signaling, pedagogical, and accountability interests. Many of these circumstances exist in situations where the NCAA enforcement staff investigates a head coach for responsibility of violations within a sports program. Thus, the enforcement staff should publicize declination statements when it concludes it will not pursue a head coach responsibilities violation allegation against a head coach. Doing so would further those same sig-

port?id=102888 [https://perma.cc/M6CW-HUUF] (describing recruiting violations).

246. Although the author does not purport or believe himself to be one, NCAA cynics who follow Tarkanian's line of thinking may assume that due to the visibility of Notre Dame and its head football coach, other forces could be at play.

247. Negotiated Resolution between NCAA Comm. on Infractions Panel and Youngstown State Univ. (Apr. 20, 2021), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102899> [https://perma.cc/SJS2-ELBK] (describing recruiting violations).

248. Among the violations was the fact that the head coach recruited off campus despite not taking and passing the NCAA-mandated recruiting exam. *Id.* at 3.

naling, pedagogical, and accountability interests and could be done easily and with minimal resources. Considering both the significant number of cases in recent years involving head coach violations and the number of high-profile pending cases, the enforcement staff has an opportunity to provide valuable insight into its expectations of head coaches.