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## Punishing Penn State

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## Punishing Penn State

### Abstract

The NCAA has imposed upon Penn State's football program a series of punitive sanctions some deem worse than the (so-called) death penalty. The sanctions respond to Penn State's failure to report and prevent Jerry Sandusky's sex abuse crimes. We believe that Penn State deserves to be sanctioned, and we agree with the corrective sanctions the NCAA has imposed. But we fear that at least some of the punitive sanctions Penn State has received may be inappropriate.

### Disciplines

Business Organizations Law | Civil Law | Law | Nonprofit Organizations Law | Sexuality and the Law

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# Punishing Penn State

By Amy Sepinwall and Scott Rosner

The NCAA has imposed upon Penn State's football program a series of punitive sanctions some deem worse than the (so-called) death penalty. The sanctions respond to Penn State's failure to report and prevent Jerry Sandusky's sex abuse crimes. We believe that Penn State deserves to be sanctioned, and we agree with the corrective sanctions the NCAA has imposed. But we fear that at least some of the punitive sanctions Penn State has received may be inappropriate.

The NCAA acted in light of the Freeh Report, prepared at the university's request by a team led by former FBI director, Louis Freeh, detailing the school's role in enabling Sandusky's crimes. Among the report's most damning findings is a decision made in 1998 by four key members of the inner-circle of Penn State's leadership at the time — President Graham Spanier, Senior Vice President Gary Schultz, Athletic Director Tim Curley, and Head Football Coach Joe Paterno — to suppress information about an act of sex abuse on campus. Though the officials in question had at one point contemplated reporting the incident to the Department of Welfare, they subsequently decided that it would be more “humane” not to do so. That decision afforded Sandusky an additional 13 years to prey upon and molest young boys.

On any decent ethical theory, it is clear that the officials who sought to bury the information would deserve reprobation and punishment. But there are many critics who believe that the NCAA's sanctions — which include a reduction in the number of available scholarships, a \$60 million fine, a ban on post-season play, and a stripping of all of the team's wins from 1998 to 2011 — hurt primarily current and potential future team members, the team, the school as a whole, and the surrounding community. Many observers have criticized the NCAA for levying sanctions at all, claiming that this was a matter beyond their purview and one better left to the civil and criminal processes. The essence of this argument is, ‘by what right can the NCAA claim this reach?’

The Freeh Report provides us with two avenues for connecting the university officials' failures to report to the institution itself, its formal members, alumni, and football fans. First,

the Report describes at length the school's failure to comply with the Clery Act, which requires that universities collect and publicize crime statistics annually, and report suspected sex abuse crimes to the police. Between 1991 and 2011, the school did little to implement the Clery Act's requirements and, as a result, the football officials who heard reports about Sandusky's on-campus sex acts with young boys either did not know that they were legally required to report these to campus police or else exploited the university's laxity in enforcing the requirement. The failure to implement and enforce the Clery Act reflects a defect in the school's organizational structure and policy.

Second, the Report also highlights a flawed institutional culture, characterized by a "reverence for the football program that is ingrained at all levels of the campus community." This culture insulated university officials from accountability, as they were permitted to proceed in the 'Penn State Way,' i.e., with an excessive focus on athletics, and without outside input or oversight. Thus the highest-ranking athletic officials could 'live by their own rules,' with the President's blessing and the community's acquiescence. (Indeed, it may be that much change is still needed on this front, as Penn State's new President apparently negotiated potential sanctions — which the NCAA initially proposed would involve a four-year death penalty and a fine far larger than the eventual \$60 million — with the NCAA without informing or consulting with the University's Board of Trustees, ESPN reports.)

In light of these structural and cultural flaws, it is not unfair if some part of the NCAA's sanctions extend beyond individual offenders to the team, to the school as a whole, and even to its extended community. The nature of corrective and punitive sanctions imposed by governing bodies ranging from the SEC to the NCAA often punish those in the organization who are 'left behind.' This is inherent to the sanctions, and without this occurring the governing bodies would be rendered largely impotent. But do the sanctions levied by the NCAA do so in the most appropriate and fair way?

According to its bylaws, the NCAA can impose one or more of the following penalties in response to a major rules violation: public reprimand and censure; probation for up to five years; suspension of institutional staff members from their duties for a specified period (*note that this was inapplicable here as the major protagonists are no longer employed by the university*); reduction in the number of scholarships; reduction in the number of expense-paid recruiting visits to the institution in the involved sport; prohibition against, or limits on, recruiting activities by some or all coaching staff members in an

involved sport; prohibition against specified competition in the sport (*e.g., a postseason ban*); vacation of records; financial penalty; prohibition against television appearances of the institution in the sport in which the violation occurred; a show-cause provision requiring institutions that fail to discipline individuals involved in rules violations in an appropriate manner to prove that they should not be subject to additional sanctions (*note that this too was inapplicable here as the major protagonists are no longer employed by the university*); and a catch-all provision allowing for other penalties as appropriate (*note that this includes a prohibition on outside competition, a.k.a. the 'death penalty', which is designed to punish repeat violators of NCAA rules but was considered by the NCAA as a viable option in this situation*).

The NCAA frequently uses these methods to punish those institutions that have violated rules regarding recruiting, amateurism, eligibility, financial assistance, special treatment, and extra benefits and, as a result, enjoy an illicit competitive advantage over other institutions. But clearly the nature of the violations here are so atypical that the usual matrix of available punitive sanctions seems like a somewhat poor fit for the egregious malfeasance engaged in at Penn State. The oft-criticized NCAA — a private, voluntary association with economic, not legal, power and with no authority to subpoena or otherwise compel testimony — was placed in an extremely difficult position in this instance. At opposite extremes were the untenable moral option of doing nothing and the equally unappealing option of acting in an unprecedented fashion surpassing anything previously contemplated by the organization, arguably beyond its own legal authority. It chose the latter, invoking all of the applicable sanctions save for two - those involving recruiting and television. So again, we ask the question: Do the sanctions levied by the NCAA do so in the most appropriate and fair way?

The reduction in scholarships, while intended to disadvantage the team, may also unduly deprive scores of disadvantaged teens from getting what would otherwise be a free college education. Though those future college football players who would have received scholarships to Penn State will doubtlessly receive similar offers from other institutions, there is a crowding out problem. This will at some level result in the net loss of at least 40 scholarships in college football. With 42.6 percent of Division I-A football players in 2009-10 representing racial and ethnic minorities (most of whom are African American), there is a racial component to the sanctions as well. Given other mechanisms for diminishing the team's chances of success, like a limitation on recruiting opportunities and a ban on

television appearances, it is not clear that the loss of scholarships is either necessary or desirable.

Also problematic is the NCAA's decision to vacate all of the school's football victories from 1998 to 2011, the years of the Sandusky cover-up. The impulse to shame Penn State and Paterno is perfectly understandable. Condemnation has as its natural corollary a debasement of the condemned. For this reason, it was entirely appropriate for the school to remove Joe Paterno's statue — the long-serving coach of the Nittany Lions ought not to be lionized after he participated in the cover-up. But the mechanism through which the NCAA has sought to undermine Penn State's glory — by stripping the school of 13 years worth of football wins — is ironic at best, and unfair at worst. If the school is to be sanctioned because it suppressed the truth, surely the sanction it receives should not also involve a suppression of the truth. And the victory-stripping inadvertently misconstrues the nature of the school's offense: The historical record will now remember Penn State football as having been less adept than it was. But its failures were not on the field so much as they were in the ether — the very reverence for the team and the game that created the conditions for its highest authorities' impunity.

At the same time, this culture of veneration is not unique to Penn State. A more honest accounting would acknowledge that, at many schools, football commands a reverence that entails worship of the team's top officials, and insulates them from adequate oversight. In idolizing its team, the Penn State community's actions were no worse than those of its counterparts at peer institutions though, tragically, the idolatry at Penn State had far worse effects. And vacating Penn State's wins does more than just unfairly single out for punishment one among many institutions plagued by a "too big to fail" or "too big to challenge" football culture; the change in rankings actually enhances the glory of the coaches at some of these other schools, along with the schools themselves — some of whom were embroiled in scandals, as well. Thus, with Paterno's "new" numbers, Bobby Bowden, who presided over the Florida State football team when it was found guilty of an academic cheating scandal and had 12 of his own wins vacated as a result, now holds the records for most wins by a major college football coach.

Perhaps a better solution would involve simply noting that all of Paterno's and Penn State's victories during this 13-year window came during a period in which it continued to grant access to the athletic facilities to a child molester despite the head coach having

knowledge of the situation.

If victory-stripping is not the appropriate way to have the school bear the taint of its association with Sandusky's crimes and the cover-up that facilitated them, what is? The NCAA's decision to forbid the school to play post-season games for the next four years is a move in the right direction. Better still would be to deny the team television coverage for a season or more. The television ban would deprive the team of the remote adulation of its fans, and thereby serve as an effective counter-measure to the over-glorification that contributed to the acts of abuse. Of course, one could argue that a decision not to televise the team's games punishes not just Penn State's teams but its opponents as well. Yet it is not clear that this is entirely undue, again given that these opponents may well operate in a culture not so very different from Penn State's, with a similar potential for immunizing their officials from oversight and discipline.

On the other hand, the NCAA-imposed \$60 million fine far better tracks the nature of the school's offense, as the fine money will be used to endow external programs targeting the prevention of child sexual abuse or assisting victims. (The money may not be used to fund any such programs at Penn State.) There remains however the question of how the school will raise the required money. The consent decree forbids the school from using funds earmarked for academics or other sports, and Pennsylvania's governor has insisted that the money not come from tax dollars. These restrictions make good sense. More importantly, they provide an opportunity for the community to take responsibility for its role. When the allegations first emerged in November 2011, alumni acted quickly and admirably to raise money for RAINN, the Rape, Abuse and Incest National Network. The reparative nature of the NCAA financial sanction allows Penn State's fans to do indirectly what these alumni had sought to do directly — they should band together to raise the money, as a way of expressing contrition for their role in sustaining the football-above-all culture. And insofar as this culture exists at other schools as well, fans and alumni from these other schools should be invited to contribute to the fund as well.

While Penn State has agreed to accept the NCAA's findings and sanctions (and, really, how could it not, given the PR backlash that would have accompanied a challenge?), the school would do well to go beyond these, to demonstrate its commitment to cultural change. In particular, the school could choose of its own accord to withdraw from football for a year. This self-imposed (temporary) death penalty would signal a clear break from the

past and give the school a chance to develop an identity that foregrounded more than its football prowess. And, in so doing, it just might reorient the place of football on campuses across the nation.



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