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DOES THE CRIME JUSTIFY THE PUNISHMENT?
AN IN-DEPTH LOOK AT THE INDIANA UNIVERSITY PHONE CALL SCANDAL

T.J. Clifton*

I. INTRODUCTION

“We’ve been hit extremely hard by this, and I hope everybody is really paying attention to it, and the people making the decisions realize how much of a detriment this is.”1 That was current Indiana University basketball coach Tom Crean responding to questions about the possibility that his basketball team will face more punishment in the wake of the Kelvin Sampson telephone scandal. In October of 2007, Indiana announced that its basketball coach, Kelvin Sampson, and his assistants had made over 100 phone calls in violation of NCAA recruiting rules.2 In the aftermath, Indiana removed the entire coaching staff and only two players remained from the team that played under Sampson.3

At first, the NCAA charged that the Indiana program had committed four major NCAA rules violations resulting from the coaching staff’s excessive calls.4 A few months later, the NCAA shocked Indiana and charged them with a fifth major violation in the form of a failure to monitor charge.5 While the NCAA claims that the athletic department failed in its monitoring and supervision of Sampson and his assistants, the University fired back and claimed that it would “vigorously defend” the unjustified charges.6 Initially, Indiana argued that the impermissible calls were more an indication on the veracity of Sampson and his ability to hide the phone calls from the compliance

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2. Id.
4. Id.
5. Id.
6. Id.
department rather than an indictment on the strength of its compliance program.7

While this may seem like a simple “he said, she said” dispute, this conflict has highlighted the larger issue of whether the NCAA should hold institutions responsible for the individual acts of the coaches they hire. While the coach at fault will likely be dismissed and have a new job in months, these institutions are left with reeling programs and student-athletes who are punished for the acts of a select few. The issue becomes a balancing act, weighing the detriment on the current student-athletes and the program’s themselves against the desire to punish the program and deter others from undertaking similar unethical acts.

This article will attempt to justify the NCAA’s punishment as fair and legally defensible. First, it will examine in-depth the situation at Indiana University. Second, it will turn to past infractions punished by the NCAA in similar situations and look at the different ways the NCAA handed out the punishment and analyze the fairness of its decisions. Third, it will move outside of the NCAA and look at three different legal concepts and analyze how fair and effective those doctrines would be if applied to the NCAA’s punishment of institutions. Finally, this article will evaluate the fairness of the Infraction Committee’s decision against Indiana in light of its precedent and other legal doctrines evaluated in the paper.

II. Background

A. Leading Up to the Hiring of Sampson

The Indiana University athletic department has had an excellent record in its compliance with NCAA rules. The University has had no major violations since 1960 and the men’s basketball program has never been found to have committed a major violation.8 That squeaky clean image began to change as the 2005-2006 season came to a close.

On March 29th, 2006, Indiana University announced the hiring of a new men’s basketball coach, Kelvin Sampson.9 Sampson previously coached at the University of Oklahoma and left amid an NCAA investigation into a supposed 550 impermissible calls to recruits by

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7. Id.
Sampson and his assistant coaches. At his introductory news conference, Sampson stated, “you also have to realize we’re human and we make mistakes, I made a mistake but we’ve corrected it and moved forward.” Indiana President, Adam Herbert, was aware of the issues at Oklahoma and stated that it was the University’s number one concern, but that school officials had reviewed the violations and were satisfied with Sampson’s ability to run a clean program. Indiana was confident that it had found its man to return the basketball program to prominence and fame. Little did it know what type of fame lie ahead.

B. Sampson’s Violations

In October of 2007, Indiana University reported to the NCAA what it called secondary violations for over 100 impermissible calls by Sampson and his staff to potential recruits. These were the same impermissible calls that Sampson and his staff had been making at Oklahoma. In February of 2008, the NCAA accused the men’s basketball program of four major violations stemming from the over 100 impermissible calls. In the coming months the NCAA would add an additional charge, this time against Indiana University itself, in the form of a failure to monitor charge. Shocked and upset with the charge against the Institution, Indiana President Michael McRobbie said the school would “vigorously defend” itself. While the University would not know its fate until the NCAA made a ruling, Sampson and his basketball program quickly experienced the fallout from their actions.

C. Indiana’s Reaction to the Scandal

In the aftermath of the alleged impermissible calls, Indiana underwent a massive house cleaning project within its basketball program. Sampson’s contract was bought out for $750,000 and all of his assistants were let go. By December of 2008, Rick Greenspan, the athletic director, who had hired Sampson, had resigned. Going into the 2008-2009 season, only two players remained from the 2007 team, as the

10. Id.
11. Id.
12. Id.
15. Id.
16. Id.
17. Id.
18. Marot, supra note 3.
rest had either transferred or been kicked off the team. The University eventually completely restructured the compliance office that failed to monitor Sampson. Marquette University’s Tom Crean was hired to be the new coach of the tarnished program. His contract included a provision giving Indiana permission to fire Crean if either he or anyone on his staff committed an NCAA violation. While Crean was now in charge of rebuilding the once proud basketball powerhouse, the University and its legal counsel had to come up with a defense to minimize the possible penalties from the NCAA.

In Indiana’s formal response to the NCAA Infractions Committee, the school pleaded with the Committee to be gentle. “Since the university now has a new coaching staff that was not involved in any way with these phone calls (or the other allegations) and since this staff already has to serve the remainder of the self-imposed penalties, the university continues to believe additional penalties are unnecessary.”

In its response, Indiana lays out a four prong defense with the hopes of diminishing the penalties that the NCAA will hand down. Initially, the University argues that its compliance system exceeded standard practices found at universities across the country and that no compliance system no matter how intensive could stop coaches who intend to cheat. In direct response to the failure to monitor charge, the school claimed this was not in fact a failure to monitor case, but rather an unethical conduct case on behalf of Sampson and his staff, not the institution. The University claimed it reviewed 100% of more than 70,000 calls made by the basketball staff and that its system was the best that technology would allow. The impermissible calls, which are cited in the violations, were undetectable because the coaching staff would falsely report about how many calls they were actually making.

The second prong of the University’s defense pertained to their self-imposed penalties. The University felt that the recruiting limitations

19. Id.
20. Id.
21. Id.
22. Id.
25. Id.
placed on Crean and his staff and forfeiting one scholarship for the basketball program were sufficient punishment alone and that no further penalties were necessary. On top of their own self-imposed penalties, schools officials felt that the negative publicity on not only the basketball program but the University itself was damage enough. The school believed that the intense media scrutiny around the country coupled with the negative public relations of the past year were the equivalent of a probationary period. The final prong of Indiana's defense looked at the Infractions Committee precedent in a case involving the Chicago State women's basketball program. In short, the NCAA found the school was not guilty of a lack of institutional control because the school's coach was acting on her own. The Chicago State situation is similar to the facts of Indiana's situation and will be discussed in depth below. In closing, Indiana cited to the Infractions Committee's own statements that the goal in these cases is to make the Universities better going forward and not to cripple the team currently in place at the school. With that, Indiana officials left their fate up to the NCAA Infractions Committee with the hope of avoiding significant punishment.

D. Ruling of Infractions Committee

On November 25th, 2008 the NCAA released the Infractions Committee report as Indiana school officials and fans braced for the worst. The Committee put the Institution on three years of probation, but abstained from imposing further penalties on the school for numerous reasons. The Committee accepted the self-imposed sanc-

29. Id.
30. Id.
31. Id.
32. Id.
33. Id.
34. The NCAA Committee on Infractions is a body composed of individuals from NCAA member institutions which has the authority to determine what findings should be made and what penalties should be assessed to member institutions. NCAA, Division I Committee on Infractions, http://www.ncaa.org/wps/ncaa?key=ncaa/ncaalegislation+and+governance/committees/division+if/infractions/index.html (last visited September 25, 2009) [hereinafter Committee].
tions as sufficient punishment for the violations. The Committee also looked at the decimation of the program as a result of these violations and fifty years of near perfect compliance by the University as mitigating factors. To the surprise of Indiana officials, the Committee did in fact find the University guilty of the failure to monitor charge despite their numerous efforts to refute liability. The Committee found that the monitoring of the basketball program and Sampson was not ready and operational at the time Sampson was hired. Specifically, the NCAA found that the compliance effort of the school was inadequate due to the heightened concern given Sampson's previous history of similar violations. In support of Indiana's compliance efforts, the Committee did acknowledge that Sampson's conduct was unprecedented in that he not only ignored signed compliance agreements with the University, but he also ignored telephone penalties imposed by the NCAA. A further ramification of this ruling by the Infractions Committee seems to be its adoption of a new standard. Big Ten Commissioner Jim Delany took the Committee's finding to imply that "when you hire someone who had serious problems at an institution, you're almost strictly liable for their actions going forward. The Committee is adopting a strict liability standard." While sparing Indiana University any further punishment, the infractions report handed down by the NCAA will have ongoing ramifications as Universities monitor their coaching staff's and as they look to hire new coaches, especially coaches with a checkered past.

E. Indiana Moves On

The rebuilding process is underway in Bloomington and Tom Crean knows he has his work cut out for him. In the 2008-2009 season, Crean guided his team to a 6-25 record. The team consisted of eight freshman and only three players taller than 6-foot-6. Even amid the recent scandal and uncertainty surrounding the program Crean has been able to secure what is considered one of the nation's top incoming
recruiting classes for the 2009-2010 season. It will be years before one will be able to look back on this scandal and effectively evaluate the long-term effects the scandal had on Indiana’s basketball program and Institution as a whole.

While this might seem like an open and shut case, the Indiana situation is just one example of similar problems occurring at NCAA institutions nationwide. For one, should institutions actually be punished for actions of individual coaches or coaching staffs for which they had no part or influence in? If so, what theories justify holding a university liable for the actions of a few, specific individuals? Not only does the decision to punish the school effect the institution, it also affects the student-athletes and the incoming coaching staffs. Many of these student-athletes lives are altered as they are forced to transfer to new schools and the incoming coaching staff is forced to work under a situation that was created by actions of a previous staff. In this situation alone, all but two of the players making up the Indiana roster under Sampson left the school just months after the allegations surfaced and new coach, Tom Crean, was forced to deal with stringent recruiting limitations. In determining if the school itself, the future coaches and players should be forced to bear the punishment for others actions, it is important to look at the effects of these strict penalties. Does the punishment have a deterrent effect on coaches and institutions going forward? Is the situation different where an institution hires a person with a questionable track record? Should that institution be held to a strict liability standard? In all, the aim of this article is to evaluate the Infraction Committee's decision in this case and decide if it is the best solution to apply to deter future transgressions, to help better the specific institutions in the long-run, and at the same time to remain fair to those individuals who will be affected by the punishment.

III. NCAA Rules and Previous Precedent

A. Generally

The NCAA Rules and Bylaws govern not only the NCAA itself, but also the member institutions and the student-athletes at those institutions. These Bylaws govern the Infractions Committee as it considers what findings and penalties to hand down in each specific case. The pertinent provisions in the following cases come from “The Principle

47. Committee Punishes IU, supra note 35.
48. Marot, supra note 3.
of Rules Compliance” or Bylaw 2.8.49 The three subparts discuss the responsibility of the institution, the responsibility of the NCAA and the penalty for non-compliance with the Bylaws.50 Section 2.8.1 states that “[e]ach institution shall comply with all applicable rules and regulations of the Association in the conduct of its intercollegiate athletic programs,” and that all staff, student-athletes and other people who represent the institutions athletic interests are to comply with all NCAA rules and the institution is responsible for such compliance.51 The NCAA, on the other hand, is to afford all the member institutions, their staff’s and their student-athlete’s fair procedures in evaluating an alleged violation of compliance.52 The penalties for such non-compliance are subject to “such disciplinary and corrective actions as may be determined by the Association.”53

A quick look at these specific sections of the NCAA’s Bylaws seems to establish the basis of the liability for institutions such as Indiana University. In Indiana’s situation, Sampson, as a member of one of its coaching staffs, is an individual representing its athletics interests and; therefore, Indiana is responsible for his compliance with the applicable Association rules. Therefore, at first glance, the Bylaws of the NCAA create sufficient grounds for the charges against Indiana in this specific case. However, it requires a much deeper look into other specific cases evaluated by the NCAA to evaluate if the NCAA’s decision was fair and justified.

B. Infractions at Brigham Young University

On March 11th, 2008 the NCAA released its public infractions report against Brigham Young University (BYU).54 The infraction was due to a violation of recruiting legislation specifically related to the treatment of a Cuban defector, who BYU was recruiting for its men’s volleyball team. In the summer of 2005, a mother of a student-athlete at BYU gave financial assistance to the prospective student-athlete.55 In December of the same year, the school determined that the pros-

50. Id.
51. Id. at § 2.8.1.
52. Id. at § 2.8.2.
53. Id. at § 2.8.3.
54. NCAA Major Infraction Case Search, https://webl.ncaa.org/LSDBilexec/miSearch (search “Institution” for “Brigham Young University”; then follow “Violation of NCAA legislation in the men’s volleyball. . .” hyperlink) [hereinafter BYU Case].
55. Id.
pect was ineligible because of the loan and other benefits received by the recruit. BYU in turn, self-reported the violations to the NCAA and a hearing was setup to evaluate the allegations against the institution.

At the hearing in front of the Infractions Committee, BYU’s President stated that BYU “know[s] that the institution is responsible for the acts of its employees and supporters who may intentionally or unintentionally violate NCAA rules, and [BYU] ha[s] acknowledged institutional responsibility for the resulting infractions.” The Committee upheld a failure to monitor charge against both the head coach at the time of the infraction and against BYU. The Committee found a sufficient basis for the failure to monitor charge against the institution due to the fact that the school had known the recruit was on campus and had even given cautionary instructions to the coaching staff about the recruit. With this knowledge BYU then failed to follow-up in any manner to ensure that the school had complied with NCAA rules. The Committee added three years of probation and a public reprimand to BYU’s self-imposed penalties of a reduction in scholarships and recruiting limits on the program.

When comparing the situation at BYU to the case at Indiana it seems surprising that the NCAA came down the way it did. In both cases the respective compliance departments were aware of a specific potential for violations, be it a recruit living on campus or a coach with a history of violating the rules. In BYU’s case, its failure to follow-up on a high risk situation led to its failure to monitor charge while Indiana’s failure to monitor charge resulted from its failure to monitor Sampson close enough. In the end both programs were handed similar penalties in the form of their self-imposed reduction of scholarships and recruiting limits as well as the NCAA’s three year probation and public reprimand. It is hard to believe both programs were given the same punishment based on the Committee’s rationale in the BYU case. In that case, the Committee felt the coach should have been more alert to the possibility of violations due to his experience as a coach and his training. Along a similar line of reasoning, should Indiana not be held to a higher standard due to the past history of the coach it hired and his past issue with the same exact impermissible phone calls? It seems it would be hardly just if two men’s basket-

56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
ball programs were punished the same when one institution hired a known cheater as its coach and the other program had instead opted for the rule-abiding coach and both turned out to be cheaters. Is the former not more culpable because it knowingly hired this individual with the bad track record, making his transgressions more foreseeable? This analysis will be conducted more in depth below using the legal theories of negligent hiring and strict liability.

C. Infractions at the University of Oklahoma

On May 25th, 2006 the NCAA released a public infractions report against the University of Oklahoma. The infractions occurred from 2000 to 2004 when Kelvin Sampson was the head men's basketball coach at the University. The violations consisted of 577 impermissible telephone calls to seventeen recruits over the four year period. The Infractions Committee characterized Sampson's actions as a complete disregard for NCAA rules regarding telephone contact limitations. Rather than accept responsibility, Sampson deemed the calls hard work as opposed to cheating. These violations occurred while Sampson was the President of the National Association of Basketball Coaches (NABC), a group which had identified impermissible calls as a serious issue in recruiting violations. Sampson and his staff were able to get away with the calls by purposefully failing to record all the calls on call logs as Oklahoma's procedures required. The violations led to failure to monitor charges against both Sampson and the University.

The Committee found the charge against Sampson justified because he “created an environment in which telephone contact rules were consciously ignored.” This blatant disregard for the rules was demonstrated after an opposing coach notified Sampson that one of his assistant’s was violating the call rules and Sampson rather than report the violation or do anything to change the behavior, instead encouraged it in the name of hard work. The Committee also found

62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
the charge against Oklahoma to be justified. The Committee found that the institution failed to put in place sufficient rules to ensure the staff was in compliance with the telephone rules and the system to track and monitor calls was insufficient because there was no set system to track the calls or spot check to ensure the actual bills matched up with the log sheets that were completed by the staff. In support of these findings, the Committee found the 500 impermissible calls in four years to be sufficient evidence that the system was inadequate. On top of that, the review of the records was sporadic and the coaches were taken at their word, even when a minor review of the call logs and bills would have shown the impermissible calls. The Committee charged the University with a failure to monitor charge as opposed to a lack of institutional control charge because the infractions entailed only one aspect of one sport. In all, the Committee found that the system currently in place was insufficient to monitor the actions of the basketball program. As a result of its findings, the Committee approved the self-imposed scholarship reduction and recruiting limitations while also imposing a public reprimand and two year probation on the institute.

In comparing this decision with the decision in the Indiana case, it seems the Committee was very fair to Indiana. In the Oklahoma case the 500 calls over four years alone was sufficient to demonstrate the compliance system was inadequate. Therefore, the 100 impermissible calls in just one year at Indiana also seems to be a fair indicator that its compliance system was inadequate and that a failure to monitor charge was justified. The only difference in the punishments was the additional year given to Indiana. Should there have been a stiffer penalty because Indiana took that risk and hired Sampson, the coach who made the 500 impermissible calls at Oklahoma? The infractions report describes Sampson as consciously disregarding a rule he knew very well as President of the NABC. He also continued to disregard the rule after being notified by other coaches that his assistants were undertaking these rules violations. What made Indiana think he would change his ways? Should it be held to a higher standard and more culpable for making a questionable hiring? Indiana’s response is that it did in fact impose higher standards in that it reviewed 100% of the

71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
staff's calls, but that due to the false reporting it could not look at
them all. While that is a valid argument, Indiana was on notice of this
type of behavior and it does not seem to be entirely unfair or unjusti-
fied that it should be held more culpable for enabling Sampson to
continue his unethical pattern; thus, making the additional year of
probation justified.

D. Infractions at Middle Tennessee State

On May 22nd, 2008, the NCAA released the public infractions re-
port against Middle Tennessee State women's volleyball program.\textsuperscript{78}
The student-athlete had played professionally and told a graduate as-
sistant of the program that she also had been paid.\textsuperscript{79} At some point
the head coach learned of the athlete playing professionally overseas
and at no point did the coach notify the institute or its compliance
office.\textsuperscript{80} In one specific instance, the coach instructed the student-ath-
lete not to mention that she had been paid to play overseas on her
"international student-athlete form."\textsuperscript{81} The Infractions Committee
found inadequate oversight by Middle Tennessee State's compliance
staff to the coach and the volleyball program.\textsuperscript{82} The Committee found
the failure to monitor justified even though the coach kept informa-
tion from the compliance office because other clues, such as the ath-
lete's old age and four year gap in activities should have led the
institute to investigate the athlete's eligibility status.\textsuperscript{83}

In this case, Middle Tennessee State was given a public reprimand,
two years of probation, forced to vacate all wins the athlete partici-
pated in and forced to reduce the amount of scholarships given out by
the volleyball program.\textsuperscript{84}

While the specific violations of this case are not similar to the Indi-
ana situation, both cases involve a coach's conscious disregard for an
NCAA rule of which they had knowledge; hence, the two situations
are analogous. In the Middle Tennessee State case, the NCAA seems
to impose a higher duty on the University due to the suspicious his-
tory of the student-athlete.\textsuperscript{85} This seems comparable to the heightened

\textsuperscript{78} NCAA Major Infraction Case Search, https://web1.ncaa.org/LSDBi/exec/miSearch (search
"Institution" for "Middle Tennessee State University"; then follow "Violations in the women's
volleyball program. . ." hyperlink) [hereinafter Middle Tenn. Case].

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Id.
duty that the Committee cited Indiana owed due to Sampson's past history and the likelihood he would act unethically again. In this case, the Infractions Committee also seems to hold that advising or warning by the compliance office is not sufficient, but rather the office needs to investigate further and follow-up on potential violations. Applying this rationale to the Indiana situation, it seems fair that Indiana be held to a higher duty due to Sampson's history. Were there clues similar to those in the Middle Tennessee State case that Indiana should have noticed causing a more thorough investigation? The compliance agreements that Sampson signed are comparable to the warning given by the compliance office in this case in that that alone does not end the job of the compliance office, they are to go deeper and investigate and ensure that a violation did not or does not occur.

E. Infractions at Chicago State University

On December 18th, 2003, the NCAA Infractions Committee released the public infractions report against the Chicago State University women's basketball program. The Institution self-reported numerous NCAA violations in the program and at the time of the self-reporting the head coach was already under a show-cause provision resulting from her involvement in violations of NCAA legislation at a previous institution. The show-cause provision required the head coach to be absent from certain preseason practices, but the coach seemingly ignored the requirements. Other violations in the self-report were similar to violations that the head coach was involved with at her previous institution.

The Infractions Committee considered charging Chicago State with a lack of institutional control because some of the violations were similar to those in which the head coach was involved with at her previous job, but the Committee decided against it for numerous reasons. For starters, the Committee felt that if someone has their mind set on something it is extremely hard, if not impossible, to stop them. "Any system designed to provide institutional control, no matter how well conceived, organized, and implemented, can be undermined for a period of time by an individual determined to violate NCAA rules."
Another factor in deciding against the charge was the Committee’s belief that it cannot interfere with an institutions right to make their own individual staffing decisions. However, the Committee did announce that in its eyes the best safeguard is to retain only staff members who have the utmost integrity and even went on to say that “[s]taffing decisions, particularly those undertaken with notice of past problems, are relevant to a determination of institutional control.”

Fortunately for Chicago State, the institute had employed the coach prior to her being named in the previous case and; therefore, the institute was not on notice of her past issues. The final reason why a lack of institutional control was not given was because of the numerous mitigating factors in this specific situation. These factors include the Institute’s cooperation in the investigation, its self-imposed penalties and corrective actions, the lack of a failure to monitor charge against the school and the fact that no coaches who were part of this dilemma were still at the school. As a result of its findings, the Infractions Committee imposed a public reprimand on the school and two years of probation to go along with its self-imposed penalties.

In comparing this case to the Indiana situation, it again seems Indiana’s penalties were fair. This situation is very similar to that which occurred in Indiana’s case as evidenced by the school citing this case in its response to the NCAA. While the cases involve different types of violations, both involved a coach committing violations that he or she had committed previously at a different institution. However, in Indiana’s case it knew of the pending case against Sampson, while Chicago State had no notice of the case or allegations against its coach until after it had hired and worked with her for a year. This knowledge of the previous violations seems to differentiate the two cases. Between these two situations, it seems fairly evident that Indiana would be the more culpable party due to its knowledge when it made the hiring.

Indiana seems to have dodged a bullet in that the NCAA did not levy a lack of institutional control charge against it. The Committee refrained from charging Chicago State with it because at the time its

92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
98. Chicago State Case, supra note 86.
hiring was a competent decision as mentioned above. It could be argued that Indiana’s decision was not very competent. In the past the Committee has said that staffing decisions are very pertinent to a finding of lack of institutional control and; therefore, the Committee would not have been going against precedent in finding Indiana guilty of such a charge. In the Oklahoma case mentioned previously, the Committee found a failure to monitor charge was more fitting because the violation only affected one aspect of one sport, so seemingly the Committee would have had to find a way to justify expanding the violation to a lack of institutional control to a similar situation. The egregious nature of Sampson’s acts and the extremely questionable nature of the hire could have been cited as justifications for expanding the lack of institutional control charge.

The mitigating factors cited by the Committee seem to be evident in both cases. Both cases involved the utmost cooperation by the liable institutes and the self-imposed penalties and corrective actions were found to be sufficient at both schools. However, where Chicago State was not cited for a failure to monitor charge, Indiana was, and; therefore, it seems that factor operates as justification for a lack of institutional control charge. At Indiana, just as with Chicago State, all the coaches involved in the scandal are gone.

The penalties in the two cases are also similar with Indiana receiving just one extra year of probation. Without arguing for or against charging Indiana with a lack of institutional control it is easy to see how the argument could be made on both sides of the issue based on the various similarities and differences between the two cases. At the very least, it is evident Indiana was lucky to just be charged with a failure to monitor charge and not the lack of institutional control charge that could have likely been justified by NCAA officials.

IV. Applying Legal Doctrines to the Indiana Case

While the NCAA and its institutions are not under the jurisdiction of America’s system of courts when it pertains to these recruiting violations, the legal doctrines used daily in courtrooms across the country can be used to assess the fairness of holding an institution liable for the independent actions of coaches within its athletic programs.

A. Respondeat Superior Liability

In response to the failure to monitor charge, Indiana claimed the "impermissible calls are a reflection on the veracity of the coaches in

question, not the strength of the monitoring system for recruiting calls. The NCAA continually penalizes institutions for the independent actions of their coaches. Is this a fair practice? The first legal doctrine that can be used to justify and evaluate the NCAA's punishment of these institutions is respondeat superior liability. To evaluate this doctrine, this article will analyze the doctrine generally and then expand on that analysis with two specific cases.

1. Generally

Respondeat Superior imposes vicarious liability on an employer for the tortious acts of an employee in the transaction of the employer's business. One rationale for this liability is to ensure that the enterprise or business pays for the victim's injuries because it has the right to control the employee's conduct. This liability only applies when the culpable employee is acting within the scope of his or her employment. When determining if an employee was acting within the scope of employment a court is to consider if the acts were: foreseeable, done in furtherance of the business, directly or indirectly connected to the business, partly motivated by an intention to serve the employer and expectable in view of the employer's duties. Acts that are performed in a "forbidden method" or in conflict with employer's instructions can still be found to be within the scope of employment so long as the employee was acting "in part to serve the employer's purposes."

Applying these rules, it seems that if a plaintiff would be able to demonstrate some sort of injury against Indiana, the University would be liable for the damages under respondeat superior. Indiana's ability to control Sampson and his staff provide the underlying rationale for applying this doctrine.

The crucial issue seems to be whether Sampson was acting within the scope of employment when he made the impermissible calls. All the factors mentioned above seem to establish that the calls could be deemed to have been within the scope of employment. Based on Sampson's past violations at Oklahoma, the impermissible calls were highly foreseeable and in turn expectable given Sampson's duties to recruit the best players to Indiana to improve its basketball program.

100. Marot, supra note 3.
101. 27 AM. JUR. 2D Employment Relationships § 373 (2008)
102. Id. at § 374.
103. Id. at § 373.
104. Id. at § 379.
105. Id. at § 380.
The calls also seem to have been done in furtherance of the basketball program and Indiana because these calls are intended to land better recruits, which not only increases Sampson's prestige as a coach but will also lead to more wins for the basketball program. These wins will create more publicity for the program and generate more revenue for the University. As a result, the calls not only further the business of Indiana University, but they are also directly related to the University's success. It may be argued that Sampson is motivated solely by personal prestige and success. However, Sampson benefits from Indiana's success on the court and at the cash register because it likely means more incentives for him. As long as Sampson's motivation in making the calls was at least partially motivated to help Indiana's bottom line, they can be found to be within the scope of employment. It follows that although Sampson's calls may have been a "forbidden method" or in conflict with Indiana's instructions for achieving success, under the respondeat superior doctrine, as long as the calls were partly motivated to serve Indiana's purposes, Indiana will be vicariously liable for his actions.

2. Specific Cases

While the fact situations in the following cases involve much more serious events, the legal analysis provided is helpful in analyzing the Indiana situation.

In Gambling v. Cornish, two off-duty Chicago cops asked the plaintiff on a date and when she refused, the cops grabbed her and drove her to a beach, where she was raped.\(^{106}\) The City of Chicago, as a defendant, argued that it could not be liable for the outrageous acts of its employees.\(^{107}\) In deciding the case, the Court turned to Illinois' law of respondeat superior liability.\(^ {108}\) Under Illinois law, employers are liable for the malicious acts of their employees when the acts are undertaken within the scope of employment and in an attempt to further the business of the employer.\(^ {109}\) However, when an act is committed solely for personal benefit of the employee, the employer is not liable.\(^ {110}\) Under § 245 of the Restatement of Agency, a master is liable for acts done by a servant even if the act was unauthorized, as long as the act was not unexpectable in view of the duties of the servant.\(^ {111}\)

\(^{107}\) Id.
\(^{108}\) Id.
\(^{109}\) Id.
\(^{110}\) Id. at 1154-5.
\(^{111}\) Id. at 1155.
While an act done solely for personal reasons prevents the application of this doctrine, an act done only partially for personal gain does not bar the application.\(^\text{112}\) In applying these rules, the court held that the off-duty cops were not acting within their scope of employment at the time of the alleged acts.\(^\text{113}\) For one, their conduct was too outrageous for it to be considered expectable.\(^\text{114}\) On top of that, the acts of the officers had no intent to further the City's interest, but were motivated solely by a desire to gratify their personal interests.\(^\text{115}\)

In applying this case to Indiana's situation it is easy to see that Sampson's acts are far less egregious than those cited in the *Gambling* case. However, the principles can still be applied to determine if Sampson's impermissible calls would make Indiana liable as his employer under the *respondeat superior* doctrine. Under Illinois law, as expressed in *Gambling*, Indiana would be liable for the malicious acts of Kelvin Sampson, as its employee, if such acts were committed during the course of his employment as head coach and done to benefit Indiana's interests.

Sampson's intentional violation of the telephone contact limits seems to fit the malicious act requirement. Black's Law Dictionary defines malice as an intent to commit a wrongful act.\(^\text{116}\) Sampson certainly had the intent to commit a wrongful act which in this case was knowingly violating telephone contact limits on a regular basis.

The major hurdles in establishing this claim against Indiana would be demonstrating that Sampson's calls were in the course or scope of his employment and done for the benefit of Indiana University. Indiana will attempt to argue that Sampson's acts were for his sole benefit and, therefore, it is not liable, but it could easily be argued that his actions were only partially personally motivated as they also were intended to improve Indiana's basketball team and in turn increase revenues for Indiana. As mentioned above, if one's personal motive is only part of his or hers motivation the *respondeat superior* doctrine can still be applied and, therefore, could still likely be used against Indiana.\(^\text{117}\) Indiana may also argue that Sampson's acts were not within his duties in that it did not want him to cheat or undertake recruiting in the outrageous manner that he did. However, using §245 as cited in *Gambling*, if an unauthorized act was not unexpectable

\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Id.

\(^{115}\) Id.

\(^{116}\) *Black Law Dictionary* 976 (8th ed. 2004).

\(^{117}\) *Gambling*, 426 F. Supp. at 1155.
DOES THE CRIME JUSTIFY THE PUNISHMENT?

than the employer is still liable. In Indiana's case, while it did not authorize Sampson to make impermissible calls, him doing so was certainly foreseeable due to his previous violations. Applying all of the rules announced in *Gambling*, it seems that the theory of *respondeat superior* would be a sufficient legal justification to hold Indiana liable for the acts of Kelvin Sampson.

An additional look at this doctrine is provided by evaluating Indiana's situation with *Patterson v. Blair*.\(^\text{118}\) The case involved an employee of the defendant company shooting the tires of plaintiff's vehicle in an attempt to repossess the car for the company.\(^\text{119}\) Under Kentucky law, an employer is not liable unless the acts of the employee were calculated to advance the cause of the employer.\(^\text{120}\) The courts in Kentucky focus on the motive of the employee to determine if he or she was acting within the scope of his or her employment.\(^\text{121}\) The court claims this doctrine is justified because it gives "employers an incentive to hire only careful employees."\(^\text{122}\) In the end, the court found the defendant company liable because the employee was acting to further their business interests by trying to get the car back.\(^\text{123}\)

Again this case presents a drastically different situation than that which was present at Indiana, but this case just goes to show that even outrageous conduct, be it shooting the tires of a car or intentionally violating a known rule over 100 times can be held against an employer. The big issue under this case is determining whether Sampson's actions were in fact "calculated to advance the cause of the principal." It seems likely that his actions would be found to be calculated to help Indiana because these excessive calls help him recruit better, which not only makes him a better coach but also makes Indiana's basketball team better. This better basketball team in turn generates more publicity and revenue for the school and; therefore, it could be argued that Sampson's actions were calculated to help Indiana. As a result, a Kentucky court is likely to pin liability on Indiana based on the above analysis.

### B. Negligent Hiring

A second legal theory that could be used to justify the holding of institutions liable for the actions of their coaching staff's is the negli-
gent hiring doctrine. This doctrine is especially applicable to Indiana’s situation.

1. **Generally**

Under the negligent hiring doctrine, employers are held directly liable for their hiring of incompetent, or unsuitable employees who injure third parties by their tortious acts.\(^{124}\) Recovery is predicated on the plaintiff’s ability to show that the employer should have known that its employee’s conduct would create an unreasonable risk of harm.\(^{125}\)

This theory differs from *respondeat superior* liability in a few ways. For one, it is not the employee’s acts that establish the cause of action, but rather the employer’s negligent hiring that proximately causes an injury.\(^{126}\) Also, negligent hiring does not require that the employee be acting within the scope of employment when the injuries to the plaintiff occurred as *respondeat superior* does.\(^{127}\)

In Indiana’s situation, it appears that a plaintiff who is able to demonstrate some form of an injury would be able to succeed under a negligent hiring cause of action as long as it could establish all the required elements in the specific jurisdiction.

2. **Examples of Specific Elements Required**

a. **State of Ohio**

In *Hout v. City of Mansfield*, an Ohio District Court specifically lays out the five elements of a negligent hiring claim: (1) the existence of an employment relationship; (2) the employee’s incompetence; (3) the employer’s actual or constructive knowledge of such incompetence; (4) the employee’s act caused the plaintiff’s injuries; and (5) the employer’s negligence in hiring the employee was the proximate cause of the plaintiff’s injuries.\(^{128}\) The liability of the employer is determined by the foreseeability of the employee’s act.\(^{129}\)

Was Indiana negligent in its hiring of Kelvin Sampson? Using the elements espoused in *Hout*, an evaluation of the argument on both sides can be conducted. The first element is satisfied because everyone will agree that there was an employment relationship between Sampson and Indiana University for him to coach the men’s basketball

\(^{124}\) 27 *AM. JUR. 2D* *Employment Relationship* § 389 (2008).
\(^{125}\) *Id.*
\(^{126}\) *Id.* at § 390.
\(^{127}\) *Id.* at § 391.
\(^{129}\) *Id.*
team. As for the second element, Black’s Law Dictionary defines incompetence as a “state or fact of being unable or unqualified to do something.” The liability of Indiana for a negligent hiring would turn on how a court would decide this element. Did his past transgressions make him unable to follow the recruiting rules? Judging by his blatant violation of the rules at Oklahoma the argument could be made that he is unable to follow the NCAA’s rules, specifically those pertaining to telephone contacts, and; therefore, he could be unqualified to work at an NCAA institution. It seems like it might be a stretch to make this argument due to his past coaching success, but nonetheless it is not inconceivable that a court or governing body could be swayed due to Sampson past transgressions.

Assuming Sampson is found to be incompetent, Indiana’s knowledge of this incompetence was evident from the day it announced his hiring. Indiana’s president Adam Herbert stated that Sampson’s violations were a big concern, but that the University had reviewed them and was satisfied that Sampson could run its program. Therefore, element three is easily satisfied. Moving to element four, the plaintiff in the specific case would have to prove that Sampson’s actions caused some injury to them. Some of the injured parties from this action are the University, due to the public image hit, the basketball program that is decimated for years to come and the players who had their lives altered as a result of the massive housecleaning project that occurred after the allegations surfaced. Assuming one of these parties demonstrated an injury, the court would then move onto the fifth element, proximate causation. On the surface it seems logical that but for Indiana hiring Sampson, these violations would not have occurred when and how they did. The similarity between the violations at both Oklahoma and Indiana increase the support for the position that Sampson’s hiring was the proximate cause of the recruiting violations. Since Sampson had done this before, Indiana’s hiring of him enabled him to do it again.

In all, it seems that if a party could prove (1) that Sampson was incompetent to hold the heading coaching position and (2) that they suffered an injury as a result of his hiring they could successfully bring a cause of action in Ohio against Indiana under Hout for their negligent hiring.

b. State of Texas

In *Dangerfield v. Ormsby*, a Texas appellate court applied a three prong test to determine if an employer was liable for a negligent hiring.132 The court held that an employer is liable if it: (1) hires an incompetent or unfit employee, (2) that it knows was incompetent or unfit, and (3) who proximately causes the injury to the injured party.133 The court went on to hold that where there is nothing in an employee’s background that would cause him or her not to be hired by a reasonable employer the employer was not negligent.134

Applying the guidelines set forth by the Texas court, it seems that the first prong is easily satisfied. Indiana knowingly hired an incompetent employee as explained above. The second prong will depend on how much Indiana knew about what went on at Oklahoma. Did it know he encouraged the violations and called it hard work and not cheating? If yes, then this prong is met because a reasonable employer with that knowledge is not likely to hire the individual. However, if it did not know all the details, many employers would probably take a chance given Sampson’s past success as a coach. As for the causation element, that is also the same as above, in that it seems Indiana did cause the injury by allowing Sampson to make this impermissible calls by giving him the employment opportunity to do so.

As with *respondeat superior*, it seems likely that Indiana could be liable for the negligent hiring of Sampson as long as a plaintiff could come forward and demonstrate some form of actionable injury.

### C. Strict Liability

“Our point was when you hire someone who had serious problems at an institution, you’re almost strictly liable for their actions going forward.”135 That was commissioner Jim Delany’s response to the finding of Indiana guilty for failure to monitor its men’s basketball program after hiring Kelvin Sampson.136 What exactly is strict liability and should it be imposed in situations such as this where a school hires someone with a checkered past?

Strict liability is liability based solely on an action being undertaken but not due to any fault of the person or entity that is found liable.137 Put another way, strict liability “exists in the case of acts which, al-

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133. *Id.*
134. *Id.*
135. Committee Punishes IU, supra note 35.
136. *Id.*
137. 74 AM. JUR. 2D Torts § 12 (2008).
though lawful, are so fraught with possibility of harm to others that the law treats them as allowable only on the terms of insuring the public against injury."\textsuperscript{138} Liability stems from the undertaking of an intentional behavior that exposes the public to a high risk that it otherwise would not be subject to.\textsuperscript{139} The storage of explosives, products liability cases and conducting of blasting operations are just some of the examples of actions that invoke the doctrine of strict liability.\textsuperscript{140}

Looking at the above examples, the application does not seem to fit with the Indiana situation. However, in the NCAA’s eyes, within its small jurisdiction, the hiring of a coach who has previously violated its rules can be seen as an action that exposes the institute, student-athletes and fans to an abnormal risk of future infractions. Delany’s view on the Infraction Committee’s report seems dead on. No matter how close Indiana supervised Sampson it was on the hook for any of his actions that violated NCAA rules because of the abnormal risk it knowingly took when hiring him.

\textbf{V. Conclusion}

Did the NCAA Infractions Committee get Indiana’s punishment right? That answer will likely depend on who is evaluating the situation. Looking at the situation objectively, it seems the penalties were fair. The penalties given to Indiana were in accordance with previous penalties handed out by the Infractions Committee in similar situations. While some may argue that additional punishment may have been warranted, it is important to remember that the penalties handed down are not meant “to ‘cripple’ a team and should instead focus on making the institutions better.”\textsuperscript{141} The penalties and the media humiliation Indiana suffered serve not only as a lesson to Indiana going forward but also to every other NCAA institution in how they conduct their athletic programs and hire their men and women to run their programs. On the other hand, some may argue that no additional penalties were necessary because it was unfair to hold the University for liable when it did nothing wrong. However, a thorough look at the NCAA’s precedent as well as the legal theories of \textit{respondeat superior} liability and negligent hiring provide numerous justifications for holding Indiana responsible. In all, it seems that the punishment handed down by the Infractions Committee was fair and legally defensible.

\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at § 13.
\textsuperscript{141} Marot, \textit{supra} note 28.