

**Reflections on Muddy Waters, Marijuana, and Moving Goalposts:
Against “Returning” Reggie Bush’s Heisman**

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When the National Collegiate Athletic Association (NCAA) adopted new rules allowing college athletes to profit off their name, image, and likeness (NIL) in July 2021, few people took more interest than Reggie Bush.

In 2005, the famed running back was the centerpiece of the University of Southern California’s (USC) offense, which by the end of that season had helped the Trojans run up an incredible 34-game winning streak. Even as USC lost the 2005 BCS Championship game to Vince Young’s Texas team, all eyes were on Bush who just three weeks earlier was awarded the Heisman Trophy, garnering the second-highest voting point total in history to beat out Young.

Five years later, however, an NCAA investigation concluded that during the 2005 season Bush and his family had received almost \$300,000 in cash and gifts that were considered “impermissible benefits” at the time.¹ Spurred by similar allegations against USC star basketball player O.J. Mayo, the NCAA came down hard. Bush was ruled retroactively ineligible; USC’s football program was given a two-year postseason ban, had its football scholarships reduced, and was ordered to vacate all wins in which Bush competed, including the 2005 Bowl Championship Series (BCS) National Championship.² Further, USC was required to disassociate itself from Bush, meaning he

would be barred from participating in any university activity or from having contact with anyone involved with the football program.³ He became *persona non grata* at USC.

But of all the implications of the NCAA's decision, the one that stung the most was the Heisman. Being ruled retroactively ineligible to play college football made Bush ineligible for the trophy he ostensibly won in near-record fashion. Amid talk that the Heisman Trust, the organization that officially administers the award, was considering revoking it anyway, Bush publicly forfeited the trophy in 2010.⁴ He remains the first and to-date only of the 88 Heisman winners to return the award.

So, when the new NIL framework took effect, Bush wanted answers. Most of all, he wanted his Heisman back.

Taking his case to Twitter, he wrote "It is my strong belief that I won the Heisman Trophy 'solely' due to my hard work and dedication on the football field and it is also my firm belief that my records should be reinstated."⁵ The implication is clear: whatever rules he had broken had no bearing on his on-field performance and should not be grounds for his disqualification, especially since those rules were now no longer rules.⁶

The case for Reggie Bush getting back his Heisman appears even stronger than that. Indeed, my colleague Chase Wrenn and I have written part of it.⁷ We argue that the rules, past and present, preventing NCAA athletes from earning money from their athletic achievements should not be rules in the first place. College athletes — whom the NCAA cunningly labels "student-athletes" to avoid having to pay workers compensation⁸ — are not better students or better athletes for the requirement of playing without pay. And

while there may be equity and fairness considerations in deciding *how* and *how much* to pay athletes, there is no obvious *athletic* justification for forcing athletes to remain unpaid altogether.

In addition, there is a moral argument against amateurism and the NCAA's enforcement of it. The man most responsible for the creation and legacy of NCAA amateurism, former executive director Walter Byers, acknowledged the disturbing parallels to slavery, writing in his memoir that, "the college player cannot sell his own feet (the coach does that) nor can he sell his own image (the college will do that). This is the plantation mentality resurrected and blessed by today's campus executives."⁹ Former players such as Arian Foster liken the arrangement to indentured servitude.¹⁰

Amateurism denies college athletes the ability to bargain over the terms of their compensation. With the NCAA's cartel-like stranglehold on the market for sub-elite sports, aspiring professional athletes in football and basketball are effectively forced to take it or leave it. For generations of athletes, amateurism has been the price of the opportunity to prove oneself for the professional leagues. This is exploitation as plain as day.

Furthermore, as I've argued elsewhere, which sports we play and what rules those sports have are up to us; our decisions of what to play and how are, in the end, arbitrary and unnecessary.¹¹ We need no argument to have a foot race involving hurdles; we need only insist that we want to see a race like that. Likewise, those who would rather run a race without hurdles are free to do so. Leagues too are free to adopt whatever rules they

and their constituent members agree to. Which is to say that nothing prevented the NCAA from undoing amateurism long ago.

So, not only is there no competitive reason to have rules enforcing amateurism, and not only is there a moral argument against such rules, but there is and was nothing — beyond the potential loss of profit the NCAA and its member schools might suffer by compensating athletes — standing in the way of unwriting the rules that Reggie ran afoul of.

Why *shouldn't* Reggie get his Heisman back? Why *shouldn't* the NCAA reinstate him?

In what follows, I aim to show that despite all appearances to the contrary, there is a strong case against reinstating Reggie Bush's achievements and returning the Heisman Trophy to him. Indeed, it is my view that Reggie didn't win the Heisman in the first place, so talk of "returning it" mischaracterizes the issue from the start. In the immortal words of blues legend Muddy Waters, *you can't lose what you ain't never had*. But I confess the case is complicated, for reasons I've already mentioned and others. It is tempting to think of this case as a matter of rights, or justice, or fairness, or a question of when, why, and for how long punishment is appropriate. And in those terms, it is tempting to think that Reggie Bush *has a right* to the Heisman Trophy, that the NCAA's rules are *unjust* and *unfair*, and that ruling him ineligible and stripping him of the trophy is a *punishment* out of proportion with the gravity of the offense. Tempting though they may be, I think these are the wrong concepts to apply to this case. To see why, let us consider a case where they *do* apply.

Marijuana Legalization and Incarceration: A Parallel?

According to a widely reported statistic, there are roughly 40,000 Americans currently incarcerated for non-violent marijuana possession charges.¹² At the same time, marijuana policies across the country are trending toward decriminalization and legalization, and two-thirds of Americans support legalization, although legalization at every level still seems a ways off.¹³ In the event that weed were to become legal, however, what should become of those still serving time for past crimes that would then no longer be crimes?

Historically, the legal system has not been especially forgiving of those whose acts were criminal by dint of bad timing. Following the end of Prohibition in 1933, for instance, those bootleggers still serving time were largely forced to complete their sentences.¹⁴ In part, that was because the 21st Amendment merely repealed the 18th Amendment; it did not include guidance for those whose convictions relied on the foregone law. Convicted bootleggers could appeal for pardons, but even the 21st Amendment undoing Prohibition gave them no guarantees or rights to a pardon or clemency.

More recently, as states across the country have moved to decriminalize and/or legalize marijuana, there has been a range of approaches to those serving sentences for erstwhile marijuana crimes. In some states, current inmates have few legal recourses. In contrast, California legalized marijuana in 2016 and made its bill retroactive, meaning that anyone serving a sentence for a conviction under the old legal regime could apply for

resentencing. Even still, California's law did not automatically commute the sentences of those serving time for crimes the new law overturned or expunge the records of those who had completed their sentences.

Some groups, such as the Last Prisoner Project, advocate for clemency for those still serving sentences and the expungement of marijuana-related charges if marijuana is decriminalized or legalized. There are at least two arguments on their side.

One concerns basic fairness: if marijuana is legalized but those serving marijuana-related sentences are not released and past convictions are not expunged, then some people will enjoy the benefits of legally buying and selling cannabis while others will continue to suffer punishments for having done the very same thing.

A second argument, tacit in their position, is that continuing to punish people for acts that are no longer criminal fails to serve one of the key purposes of punishment in the first place. Setting fairness aside for a moment, one of the main purposes of criminal punishment is to deter people — both the punished and others — from future violations of the law. But, if there is no relevant law to violate going forward, then continuing to punish people for past violations is no longer justified on deterrence grounds.

The parallels between the matter of marijuana legalization and the change in NIL rules are, I hope, obvious. In both cases, the old rules were morally dubious at best. In both cases, the people who violated those rules were predominantly poor people, especially people of color, with few financial or legal resources. In both cases, there is a sense that the legal response is not commensurate with the seriousness of the offense, outlawed actions — “crimes” — with no clear victim. And, supposing marijuana is

someday legalized, in both cases there would be a set of past transgressors who faced sanctions with potentially long-lasting impacts, and we would be faced with the decision of what to do now with those we imposed those sanctions on.¹⁵

My own view is that marijuana should be fully legalized, and that those still serving sentences for non-violent marijuana offenses should receive clemency and be released immediately. In fact, I will go so far as to say that continuing to incarcerate people for erstwhile crimes that are no longer against the law is unjust. So, given the similarities between these cases, I have some explaining to do as to why, even though I think the NCAA should have done away with amateurism altogether years ago and NIL has now made many previously banned activities permissible, athletes like Reggie Bush who were ruled ineligible for past violations still *shouldn't* have their wins, stats, and records reinstated.

What Is Punishment?

Much has been written about when and why punishment is justified, but much less has been made of what *counts as* punishment, of what punishment *is*. H. L. A. Hart's classic treatment¹⁶ identifies the central case of punishment as meeting the following criteria:

- (i) It must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offense against legal rules.

- (iii) It must be of an actual or supposed offender for his offense.
- (iv) It must be intentionally administered by human beings other than the offender.
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

Obviously, these are intended to define *criminal* punishment, but we might allow ourselves a more expansive interpretation of (ii) and (v) to include not strictly legal systems and rules, and thus make room for punishment in informal contexts. A parent's authority over their children is not primarily *legal* and the rules a child might offend against are seldom *laws*; appropriately modified, however, these criteria fit reasonably well with ordinary cases of how parents punish children.

Not all theorists agree that (i)–(v) are necessary or sufficient, however.¹⁷ One may wonder whether (v), even softened to include parental authority, is necessary. (Could one not punish a friend for violating the norms of the relationship?) In the other direction, some insist that punishment include an additional feature, that it be “intended to communicate moral condemnation” (Ibid., see also Feinberg 1970). I will return to the question of sufficiency momentarily, but at present it seems that any action that meets (i)–(v) is plausibly regarded as punishment, and at first glance the NCAA's treatment of Reggie Bush seems to meet (i)–(v).

Being ruled ineligible and consequently having the Heisman Trophy revoked were certainly unwanted consequences for Reggie; his quest to have this undone clearly

indicates that. The NCAA acted after it was discovered that he had potentially violated one or more NCAA rules. And the NCAA had the authority to sanction Bush. In all outward respects, it looks like the NCAA punished Reggie Bush and in refusing to reinstate him, continues to punish him. But the NCAA's response need not, and I contend should not, be thought of as a punishment in the first place. Instead, we should think of Reggie Bush as a case of vacating past results.

As my colleague and I have argued, the practice of vacating past results in response to rules violations is justified as a response to rules violations, even if it's particularly controversial when employed by the NCAA.¹⁸ Far from "rewriting the past" or "pretending what happened didn't actually happen," vacating past results sets the record straight: not everything that happens on the field or during the game counts. Vacating is justified on the same grounds that calling back a touchdown due to a penalty or waiving off a basket due to a foul is justified: the ball ending up in the endzone or the hoop only counts if certain conditions are met. When an offensive player commits holding, even if the action doesn't contribute to the success of the play, the result of the play is (potentially) nullified and a penalty is assessed. It is important to note that, while the penalized team might be disadvantaged by the nullification, the nullification itself is not the penalty. We can see this by considering cases in sports where plays are nullified without penalty, such as when a made basket is not counted because the shot wasn't released in time.¹⁹ In such cases, there is no question as to what happened, it is just that what happened doesn't count. And while the team or player that loses out on an advantage can complain about their bad luck, they can hardly complain that they have

been treated unjustly. The rules, for better or worse, don't allow for touchdowns to count if there was holding or for a basket to count if the shot clock had expired. Them's the rules. Them's the breaks.

What this means is that *not every rule-governed response that is unwelcome to the recipient is or should be thought of as a punishment*. As Mitchell Berman notes, an authority (e.g., the state) might do many things to individuals that they find disagreeable — levy taxes, impose quarantines, conduct compulsory drafts, confiscate their property — that we do not ordinarily classify as *punishing* them.²⁰ In part, this is because such actions by authorities often occur without the victim of the harms violating any law or rule. But the more salient reason these actions don't count as punishment seems to be that their justification (or lack thereof) is independent of the harms that result from them; the state is justified in levying taxes, say, *despite and not because of* the negative impacts ultimately felt by individual taxpayers. In other words, the unpleasant nature of the consequences is a *feature* of punishment, not a bug, whereas the unpleasant consequences of other non-punitive actions, like levying taxes or drafting servicemen, is otherwise an unwanted or unavoidable side effect.

So far, then, it appears that (i)–(v) above are, plausibly, *necessary* features of punishment. But are they sufficient? I contend not. Not every consequence intended as a punishment succeeds in *being* a punishment by the recipient, even when intended to be objectively unpleasant. Parents punish children by sending them to their rooms, but it's not uncommon for the kids to want to be there anyway. And our films and fiction contain characters who, having spent long years in prison, find life on the outside unmanageable

and seek ways to be re-incarcerated. One might respond that, in such cases, incarceration fails to be punishment because it fails to be unpleasant in context. Fair enough; tell it to the judge. Consider, though, a case such as the following:

Brown is the president of the Homeowner's Association (HOA) with a special zeal for rule-following. When residents are behind on their dues, it is Brown's job to collect payment in person. Green is Brown's neighbor, with a penchant for garish lawn ornamentation, tall grass, and a disdain for deadlines. Green and Brown openly detest each other. Suppose Green is behind on his dues. It is Brown's duty to collect, an opportunity he relishes. Ordinarily, Brown would greet all those from whom he's collecting with a cheerful grin to indicate that he holds no hard feelings toward them. Knowing of course that Green will *hate* his personal visit and *especially* his cheerful grin, Brown calls to collect with an *especially* cheerful grin.

Brown's cheerful, grinning visit (i) is unpleasant to Green, (ii) it is for a violation of legal (HOA) rules, (iii) it is directed at Green for his violation, (iv) it is administered intentionally (i.e., with the intention to be unpleasant to the recipient), and (v) it is imposed by an agent of the system against which the offense has been committed. And yet, even though Brown *intends for Green to find his cheerful visit unpleasant*, I contend that Brown cannot be said to be punishing Green. This is because Brown would justifiably cheerfully visit Green *even if* Brown had no intention that Green be displeased

and *even if* Green were not so displeased. In such a case, even though the unpleasant effect is intended *and achieved*, it has independent justification: it is Brown's duty to collect what Green owes, *whether or not* Green finds this unpleasant. Brown's *intending* to displease Green does not and cannot somehow turn the non-punitive action into punishment.²¹

In addition to (i)–(v), it seems that for some treatment to be considered punishment it must also be true that (vi) the treatment would not have been justifiably administered in the absence of the punitive intent. The presence of an independent non-punitive justification over-determines the matter; Brown would be justified in treating Green in a way that Green finds unpleasant *whether or not* Brown intends the unpleasant treatment to be unpleasant or intends it as a response to some violation of legal rules. And if, in fact, Brown *would have administered* the unpleasant treatment to Green on non-punitive grounds even in the absence of the punitive intent, then the treatment should not be regarded as punishment even if the punitive intent is present.

I belabor this issue because *the NCAA considers* the practice of ruling players ineligible and vacating their results *as a kind of punishment*. That is, the NCAA considers ineligibility and vacation as penalties that are more or less appropriate given the seriousness of a violation, thereby invoking the punitive intent. According to the NCAA's own website, "NCAA sanctions must be legitimately punitive to be effective. The intent of penalties is to ensure they are sufficient to deter schools from breaking the rules again and that they remove any competitive advantage that may have been gained."²² But this attitude is entirely unhelpful: by considering ineligibility and the vacation of records a

punishment, it invites questions about why such treatment is justified. Punishment, as we've just seen, is distinguished from unpleasant-but-non-punitive treatment by being intended to be so, such that it would not have been justifiably performed were it not so intended. This feature of punishment in turn invites questions about why such mistreatment is justified; what is it about the offending behavior that *merits* mistreatment as a response? And it is against the backdrop of such questions that the problems with the NCAA's amateur code stands in sharp relief: there is nothing inherently wrong with college players receiving compensation for their on-field efforts and no clear reason why there should be any rules prohibiting it. So, it would seem, there is no clear reason why those who violate such rules should *deserve intentional mistreatment* except for the weak reason that there happens to be a rule against it. That weak reason disappears altogether when the rule is repealed. And so, if we consider Reggie Bush's treatment as *punishment*, there seems to be no good answer as to why he should continue to be subject to intentional unpleasant treatment for doing something that was once wrong only because it was against the rules, and which we now no longer think is even worth having rules against.

As I have argued, however, ruling Bush ineligible and thereby invalidating his Heisman trophy does not count as punishment — even though the NCAA intends it as such! — if the same treatment could and would have been administered even in the absence of such punitive intentions. And in fact it *would have been*. Had the outside payments to Bush and his family been discovered before he joined the Trojans, the NCAA still could and would have ruled him ineligible, in which case he would never

have taken the field. But *preempting* an ineligible player's achievements can't easily be said to be punishment; Little League baseball isn't *punishing* all those ineligible overage kids by denying them the opportunity to dominate their less-physically mature peers, whether or not the organizers intend such a judgment to be disagreeable. Similarly, discounting the apparent achievements of ineligible players who compete is justified by the constitutive rules of the game, whether or not officials have punitive intent in enforcing such rules.

If the foregoing is correct, then *punishment* is not the right conceptual lens for looking at the NCAA's handling of Bush's case. Intending something as a punishment — even if it is received as such — does not make it so, I've argued, if there is an independent justification for the same treatment. And so, complaints that the NCAA's "punishment" of Bush was/is unfair fall short of showing that the NCAA's *treatment* of Bush was *unjustified*.

Not a Question of Justice or Rights

The word "punishment" has wider application than the central case identified by philosophers and modified above. So, someone might say, what matters is not whether we call the NCAA's response to Bush "punishment" but whether he was treated *justly*. Even if the NCAA's decision to rule Bush retroactively ineligible can be justified non-punitively, it may still be true that they treated and continue to treat him unjustly. And if, as I suggested above, the case of Reggie Bush is formally analogous to the possible case of non-violent marijuana offenders in a post-legalization world, it remains to be seen why

continuing to discount Bush's performance *isn't* unjust while continuing to incarcerate the latter *would be*.

We need not have a fully enumerated theory of rights to see an important difference between the case of convicted cannabis law offenders in a post-legalization world and the case of Reggie Bush after NIL. A pair of basic distinctions should be sufficient. One is the distinction between negative and positive rights. Very roughly, a negative right is a right *against* interference by others, whereas a positive right is a right *to* some good or service or treatment by or from others. If I have a negative right, others have a corresponding duty *not to* act against me in certain ways. If I have a positive right to something, (some) others have a corresponding duty *to do or provide* something to me.²³

A second distinction is between rights that are plausibly natural and others that are acquired.²⁴ That is, there are rights (and their attending obligations) that I have in virtue of being human, and others that I have only in virtue of being an American citizen, or only in virtue of being older than 16 (or 18, or 21). For example, we all plausibly have a *prima facie* right to do what we will — a right to liberty — that obliges others — the state, in particular — to leave us be. But only some of us might have acquired the right to drive, or the right to run for public office. Even fewer of us will acquire other rights, such as the right to coach or play on a team, or the right to be called a champion. The relevant legitimate authority of the system that bestows such rights is typically the arbiter and administrator of which individuals have which rights.

In thinking about cases where right and rules conflict, it's helpful to consider which kind(s) of rights are at play. And it is worth noting that even the strongest natural right is not inviolable: my right to liberty cannot mean a right to do *whatever* I please, especially if what *pleases me* also *harms you*. The starting point for any conversation about curtailing natural rights is John Stuart Mill's Harm Principle: that the only legitimate grounds for restricting the freedom of individuals is to prevent them from harming *others*.²⁵

If there are any natural rights, the right to liberty — to do as one pleases short of harming another — is one. And as officially illegal activities go, possessing and/or consuming a drug such as marijuana, less dangerous than either tobacco or alcohol, fits that description. Plausibly, there is a strong natural right, deriving from the right to liberty consistent with the Harm Principle, to possess and/or use marijuana (or alcohol, or tobacco). For the state to limit such a natural right in the absence of clear harm to others requires a significant moral justification. In making laws, the state cannot permissibly just “say so” for no good reason. And while this isn't the space for a full discussion, suffice it to say that no such moral justification for a ban on cannabis seems likely; the historical explanation for why it became illegal in the first place is morally indefensible.²⁶ As such, there's a powerful moral argument that the state is wrong to outlaw possession of marijuana and wrong to punish people for doing so; wrong because such laws are unjustified and unjustifiable infringements on a strong natural right.

Of course, even an overall-just system of laws will contain some unjust statutes; a perfectly just legal system is the stuff of Plato's imagination. So, one might say, even if

the state *is* wrong to outlaw marijuana possession, the state's overall justice and legitimacy entails that procedurally just punishments are justified insofar as respect for the system requires that we accept even those outcomes we disagree with. And, supposing an unjust law is overturned, one might still say that ongoing punishments issuing from violations of that former law remain justified for the same reason.

This “respect for the law” argument in favor of continuing punishment of past violations of since-overturned laws is rather weak, and in fact can be turned in the opposite direction. It is one thing if, for instance, someone receives a speeding ticket for traveling 60 in a 45-mph zone, which in the days following is changed to a 65-mph zone. The ticketed driver might reasonably complain, “Why should I pay a fine *now* for doing *then* what's *now* not illegal?” Here, we might respond that while the specific speed limit has been changed, there remains a speed limit to follow. And while we might have no good reason for drawing the line exactly *here* or *there*, we have very good reasons for drawing a line *somewhere* — speed limits are important to public safety and impose minimal restrictions on the natural right to liberty. So, speed limits *in general* are morally defensible uses of the state's power to curtail individual liberty, even if a specific limit is more or less arbitrary and/or arbitrarily changed. Respect for the legitimate power of the state to enforce speed limits *in general* plausibly does provide grounds for enforcing punishment for past violations of since-changed laws since other laws of the same sort remain in place.

Things are different, I contend, with marijuana. The state arguably had no legitimate grounds for outlawing cannabis possession or use in the first place and has no

such grounds to continue doing so. If such laws are overturned entirely — that is, if the state recognizes it does not have sufficient grounds to restrict action in the first place — the justification for continuing to punish past violations disappears entirely.

Incarceration is a constant, ongoing violation of a person's natural rights; it therefore requires a constant, ongoing justification. And the state has no such constant or ongoing justification to punish violations of a law it had and has no prior justification to impose.²⁷ If anything, insisting that punishments for erstwhile crimes continue after they have been legalized threatens to undermine respect for the law. What *respectable* system of law continues to punish those who have done what the state no longer thinks is punishable?

It is tempting to think of the NCAA and Reggie Bush in similar terms, but there is a crucial difference: the NCAA is not the state, there is no natural right to play college football or to be given the Heisman, and while there may be a natural right to earn a living as one chooses, the decision to subject oneself to the NCAA's amateurism mandates is a voluntary one.

There may be a natural human right to leisure or play in general. But college football exists only because of a highly artificial conventional arrangement of universities collaborating to decide upon rules for who may play and how. If there are any rights to play college football, they are acquired positive rights. Not everyone can play, and not all of those who can play *may play*.

College football is, after all, a game. As with any game, there are rules that specify how the game is to be played. At the end of the day, our choices of which games to play and by which rules are more or less arbitrary. There is no deeper moral basis for

why football should have 11 players on a side than just the decision to require 11, no more and no less. There is no deeper moral or athletic *reason* why the 110-meter high hurdles should have hurdles, or have hurdles exactly 42 inches high, or be *exactly* 110 meters than that we simply decide that it should. As Bernard Suits writes in his *locus classicus* of the philosophy of sport, “to play a game is to voluntarily attempt to overcome unnecessary obstacles.”²⁸ It is precisely because such limitations are ultimately unnecessary that our voluntary attempts to overcome them can so easily be thought of as playful. Playing poker is more fun than paying taxes, even though one may lose money, because one does not *have to* and does not *have to risk* doing so. Choosing which games to play — and how to play them — is an exercise in autonomy, for both players and gamewrights. This is not to say that every choice of rule is equally good, either morally or competitively.²⁹ But it is to say that, within very basic moral guardrails, there is a wider-than-normal range of rules we might impose on each other in the effort to create and play games.³⁰

In addition, many games impose rules on *who* may play and under what conditions. Eligibility rules are not uncontroversial³¹, but they are widely accepted nonetheless. When they arise, complaints typically aim at the athletic or competitive (ir)relevance of requiring that players meet (or *not* meet) some criteria. And from this arises the objection that requiring college athletes to remain amateurs does not make them better athletes or students; it serves no purpose other than to limit the power of athletes.³²

Although there is no competitive *justification* for amateurism rules, and players are not better players for remaining amateurs, there are doubtless competitive *effects* of such rules. Some players were probably *worse off* as athletes for following the rules, preferring to remain safely eligible and foregoing potentially lucrative-but-impermissible benefits, devoting time that could have been invested in additional practice and training instead to part-time jobs or idleness. Other potential players likely opted out of playing altogether, preferring or needing to make a living rather than remain an eligible full-time amateur athlete chasing a dream. In short, the enforcement of amateurism unquestionably acted as a sort of filter, limiting both the number and ability of some potential competitors. Despite Bush's insistence that his achievements were due solely to his hard work and dedication on the field, there is no telling how much hard work or dedication he would have been able to devote had he not received extra-legal benefits. Equally, there is no telling how many or which potential competitors would have played — rather than opt for paid work — or would have played *better* had they been able to receive the same benefits Bush received.

For better or worse, amateurism was, in 2005, a significant “unnecessary obstacle” that constituted the game of college football. The price of failing to successfully overcome that obstacle was, sadly, ineligibility. Regardless of his intent — and I have no reason to think that he believed his actions were impermissible — Reggie Bush failed to meet the demands of the rules for eligibility, rules which undoubtedly affected the competitive environment in which he succeeded. And so, as I said at the outset, Reggie Bush didn't win the Heisman Trophy in 2005 because he didn't eligibly play in 2005.

Yes, everyone saw what he did on the field — and what he did on the field was amazing!
But what he did on the field *didn't count*.

As I also said above, however, leagues are free to adopt *and change* whatever rules they and their constituent members agree to. So, just as the NCAA and its member schools were free to demand amateurism of players — and, let's not forget, players were free to forego the constraints of amateurism and refuse to play altogether — so too the NCAA is free to decide *now* to change its rules for how to credit past achievements. Which is to say, there is no *a priori* reason why the NCAA *couldn't* retroactively reclassify Bush as eligible and count his on-field performance for the purposes of records and awards. So why *shouldn't they*?

My answer is this: to “return” Reggie’s Heisman would be to change the significance of the award. The Heisman Trophy Trust calls it “the most prestigious award in college football,” and voters are instructed that “recipients must be in compliance with the bylaws defining an NCAA student athlete.”³³ Of course, given the byzantine nature of the NCAA’s restrictions, there is no telling whether an athlete actually is or was in full compliance with NCAA bylaws. Of the 88 people to have been awarded the trophy, there is no telling how many, like Reggie, in fact ran afoul of NCAA eligibility rules. We *don't know* if Archie Griffin or Mark Ingram or Joe Burrow remained legally eligible. But we *do know* Reggie Bush *did not*.

It is one thing to change one’s assessment of the past in light of new information: to determine, upon further review and against the initial ruling of the officials, that the ball did not really go through the uprights is not changing history, it is setting (our

account of) history aright. But to count the kick anyway is to change the rules of a game already played; it is, almost literally, to *move the goalposts*.

Reggie Bush wasn't eligible to play NCAA football in 2005. He therefore wasn't eligible to win the Heisman Trophy; the initial awarding of it to him was a mistake and his later forfeiture of it rectified that error. And unless the NCAA decides to quite literally rewrite the history of college football before NIL, Bush remains ineligible to receive credit for his on-field performances with USC. Reggie Bush didn't *lose his Heisman* and he can't *get it back*, because he *never won it in the first place*.

¹ "NCAA Hits USC with Big Punishments." FOX Sports. FOX Sports, June 10, 2010.

<https://www.foxsports.com/stories/college-football/ncaa-hits-usc-with-big-punishments>.

² "University of Southern California Public Infractions Report June 10, 2010." Accessed August 29, 2022. <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102369>.

³ The original penalty was *permanent* disassociation. The NCAA later changed its rules to limit disassociation penalties to 10 years.

⁴ "Reggie Bush to Forfeit Heisman." ESPN. ESPN Internet Ventures, September 14, 2010. <https://www.espn.com/los-angeles/ncf/news/story?id=5572827>.

⁵ Bush, Reggie. "My Statement... Pic.twitter.com/Kbyqxghncf." Twitter. Twitter, July 1, 2021.

<https://twitter.com/ReggieBush/status/1410661680334315521?s=20&t=ehSfg43muWpaOdpkGsisrA>.

⁶ For its part, the Heisman Trust intimated that it would welcome Bush back into the Heisman family should the NCAA retroactively reinstate him. The NCAA subsequently issued a statement asserting that Bush’s past actions would still not be permitted under the new NIL regime. See Reimann, Nicholas. “Reggie Bush Won’t Get Heisman Back after NCAA Ruling.” *Forbes*. *Forbes Magazine*, July 28, 2021.

<https://www.forbes.com/sites/nicholasreimann/2021/07/28/reggie-bush-wont-get-heisman-back-after-ncaa-ruling/?sh=784cd33ecbb5>. As I will argue, though, whether his past actions remain against the rules is not determinative of whether he should or should not be reinstated.

⁷ Bordner, Seth, and Chase Wrenn. “Setting the Record Straight: A Defense of Vacating Wins in Response to Rules Violations.” *Journal of the Philosophy of Sport* 48, no. 2 (2021): 169–85. <https://doi.org/10.1080/00948705.2021.1895822>.

⁸ So sayeth Walter Byers, the first executive director of the NCAA. According to Byers, in the 1950s the NCAA and its member schools faced “a serious, external threat that prompted most of the colleges to unite and insist with one voice that, grant-in-aid or not, college sports still were only for ‘amateurs.’ That threat was the dreaded notion that NCAA athletes could be identified as *employees* by state industrial commissions and the courts. We crafted the term *student-athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes.” Byers, Walter, and Charles H. Hammer. *Unsportsmanlike Conduct: Exploiting College*

Athletes. Ann Arbor: The University of Michigan Press, 2010. See also Branch, Taylor. “The Shame of College Sports.” *The Atlantic*. Atlantic Media Company, July 29, 2021. <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> and *Schooled: The Price of College Sports*. Makuhari Media, 2013.

⁹ Branch, Taylor. (2021) op. cit.

¹⁰ See *Schooled* (2013) op. cit.

¹¹ Bordner, S. Seth. “Why You Don’t Have to Choose between Accuracy and Human Officiating (but You Might Want to Anyway).” *Philosophies* 4, no. 2 (2019): 33. <https://doi.org/10.3390/philosophies4020033>.

¹² See, for instance, Oleck, Joan. “With 40,000 Americans Incarcerated for Marijuana Offenses, the Cannabis Industry Needs to Step up, Activists Said This Week.” *Forbes*. *Forbes Magazine*, June 26, 2020. <https://www.forbes.com/sites/joanoleck/2020/06/26/with-40000-americans-incarcerated-for-marijuana-offenses-the-cannabis-industry-needs-to-step-up-activists-said-this-week/?sh=54b5d7f7c16f> and Sigman, Zoe. “The Women Fighting for Cannabis Justice and Data Transparency in the U.S. Prison System.” *Vogue*, April 20, 2021. <https://www.vogue.com/article/cannabis-justice-data-transparency-us-prison-system>. The number is hard to pin down precisely, both because it includes federal and unevenly-reported state figures, and because it is debatable what counts as “non-violent.”

¹³ Daniller, Andrew. “Two-Thirds of Americans Support Marijuana Legalization.” *Pew Research Center*. *Pew Research Center*, May 30, 2020.

<https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/>.

¹⁴ See Okrent, Daniel. *Last Call: The Rise and Fall of Prohibition*. New York: Scribner, 2011.

¹⁵ I say ‘we’ here though, of course, the NCAA is a non-profit association of educational institutions, not a democratically governed institution. Nevertheless, the NCAA answers to its members and the laws of our country no less than the approval of fans and the forces of the market. How the NCAA handles past violations of amateur restrictions is a matter that we — fans and voters — can and should have a say in.

¹⁶ A., Hart H L. *Punishment and Responsibility Essays in the Philosophy of Law*. Edited by John Gardner. Oxford: Oxford Univ. Press, 2009.

¹⁷ See Berman, Mitchell N. “The Justification of Punishment.” *The Routledge Companion to Philosophy of Law*, 2012. <https://doi.org/10.4324/9780203124352.ch10>.

¹⁸ See Bordner and Wrenn (2021) op. cit.

¹⁹ The inverse case — where a penalty is assessed although nothing is nullified — also happens, such as when a technical foul is assessed in basketball or an unsportsmanlike penalty is assessed in football for behavior that occurs outside of the normal action.

²⁰ Berman (2012) op. cit.

²¹ One might reply that Brown’s cheerful greeting is not part and parcel of his duty as an agent of the system. Certainly, I doubt that even the most micromanaging HOA bylaws specify that their dues collectors must do their jobs with a cheerful grin! Even so, we are supposing that Brown is doing his job in just the same way he normally would. It is, so to

speak, a bonus that in this instance his normal custom allows him to irritate his detested neighbor.

²² “Enforcement Process: Penalties.” NCAA.org. Accessed August 29, 2022.

<https://www.ncaa.org/sports/2013/11/27/enforcement-process-penalties.aspx>.

²³ The duties of both sorts can be waived by the rights-bearer. Typically, negative rights are thought to be stronger, and their duties to apply more widely, than positive rights and their corresponding duties. So, for example, my right to life is plausibly a negative right (i.e., the right *not* to be fatally harmed) that normally generates a duty of every agent that they not kill me. But were I to pay for something (a meal, say) and thereby acquire the positive right to be given it, my positive right is not a duty that *everyone* individually owes to me. Nor is a violation of my positive right to be given what I’ve paid for typically of the same strength and seriousness as a violation of a negative right to non-interference.

²⁴ The distinction is typically made between natural and *legal* rights, but I prefer “acquired” here since the key difference is that non-natural/legal rights only arise within a system. Such rights are acquired when and if someone appropriately enters the rights-conferring system, and it is the system (legal or otherwise) that determines the application and extent of such rights.

²⁵ Mill, John Stuart. *On Liberty*. Edited by David Spitz. New York: Norton, 1975.

²⁶ See Tikkanen, Amy. “Why Is Marijuana Illegal in the U.S.?” Encyclopædia Britannica.

Encyclopædia Britannica, inc. Accessed August 29, 2022.

<https://www.britannica.com/story/why-is-marijuana-illegal-in-the-us>.

²⁷ Those wrongfully convicted of crimes the state has legitimate bases for punishing present a helpful analogy. When we discover that an innocent person has been wrongfully convicted and incarcerated for murder, say, we do not ordinarily think they must serve out their sentence on the basis of the state’s legitimate authority to punish actual murderers. That is because, whatever the state’s legitimate authority, it does not include the right to punish the innocent; to do so is to impermissibly infringe on the natural right to liberty. The fact that a jury might have reasonably-though-wrongly determined the person was guilty does not justify such an infringement. Likewise, I might add, the fact that the Heisman voters in 2005 reasonably-though-wrongly thought Bush was eligible to receive the award does not mean he rightly won it.

²⁸ Suits, Bernard. *The Grasshopper: Games, Life and Utopia*. Toronto: University of Toronto Press, 2020.

²⁹ See Bordner (2019) op. cit.

³⁰ Consider: it is normally and rather obviously wrong to punch a stranger in the face. But that moral restriction itself can be suspended, if mutually and voluntarily agreed upon, if the participants want to box.

³¹ See, for instance, the case in Brown, W. M. “Ethics, Drugs, and Sport.” *Journal of the Philosophy of Sport* 7, no. 1 (1980): 15–23.

<https://doi.org/10.1080/00948705.1980.9714363> against rules enforcing PED bans which, *inter alia*, amounts to an argument against any restrictions on who may perform or how.

³² I’ve said that the organizers of sports are free to set what rules they like. I have also claimed that some rules — rules enforcing NCAA amateurism especially — are

exploitative. Thus, it may seem my view is that *organizers are free to engage in exploitation*. In only one sense of “free,” this is true. Exploitative rules are not logically incompatible with the concept of a game or a sport. It is not as if, in adopting a rule that exploits a particular group or player, the activity thereby fails to count as a game or a sport altogether. College sports are still sports despite the exploitation of top football and basketball talent; Major League Baseball was still a game even when it was closed to players of color. This is the sense in which organizers are free to impose whatever rules they like, even exploitative ones: an exploitative sport will still be a sport.

I have said that amateurism in the NCAA is exploitative and also that the decision to subject oneself to the NCAA’s rules is a voluntary one. This may sound jarring or even absurd, but it is not. An instructive parallel is the lottery. Given the overwhelming odds against winning, it’s irrational for *anyone* to play the lottery. And yet millions play *voluntarily*, largely out of a combination of *desperation* for a fix to their financial woes and *ignorance* of their infinitesimal chances of succeeding. (And those running the lotteries *know this*.)

Amateur NCAA football and basketball are not unlike the lottery in this way: success in college is the surest way to being picked by professional leagues where minimum salaries start in the six figures — the *surest* way, but still an overwhelmingly unlikely one. Desperation and ignorance conspire to convince college athletes to agree to voluntarily accept amateurism against their interests no less than lottery winners voluntarily give away their money.

My contention then is that the NCAA was and is, in some sense, free to require amateurism of its players, and that its potential players were and are free to refuse, but also that the NCAA *ought not* impose such rules *because* they are exploitative — because they are designed to take advantage of the desperation and/or ignorance of, and serve only to limit the power of, those they are applied to.

³³ “Heisman Trophy Balloting Info.” Heisman, November 29, 2021.

<https://www.heisman.com/about-the-heisman/balloting-info/>.