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The NCAA Student-Athlete Reinstatement Process: Say What?

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THE NCAA STUDENT-ATHLETE REINSTATEMENT PROCESS: SAY WHAT?

Josephine (Jo) R. Potuto*

The NCAA regularly is criticized for its impact on student-athletes who have no voice in creating the bylaws that affect them and, it is argued, no alternative to the NCAA if they want to attend college and also compete in varsity athletics. Chief among the complaints is how student-athlete violations are handled. Most often the critics ignore or fail to appreciate the magnitude of potential student-athlete violations. Almost always the process by which student-athlete violations are handled is assumed, wrongly, to mirror the Committee on Infractions process, with NCAA staff investigations, adversarial presentations, and committee fact findings. Nothing could be further from the truth.

The prime purpose of this Article is to shine a spotlight on the reinstatement process, to explain how it is structured, how it operates, and why, as well as the legal context in which it operates. The Article also advances reforms to enhance transparency in student-athlete reinstatement decisions, cross-case consistency, and cross-institutional confidence.

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I. INTRODUCTION

Oklahoma State running back Dez Bryant met with former NFL player Deion Sanders and then lied about it to the National Collegiate Athletic Association (NCAA).¹ He lost a season of competition eligibility.² Johnny Manziel, the Texas A&M Heisman Trophy winning quarterback, reportedly received thousands of dollars from broker-dealers to autograph

¹ The NCAA is a private association that regulates intercollegiate athletic competition among four-year colleges and universities. It has close to 1100 members. March 3, 2014 email from Katy Yurk, NCAA Associate Director of Academic and Membership Affairs, to JRPotuto, on file in the office of JRPotuto; March 5 email from Katy Yurk, NCAA Associate Director of Academic and Membership Affairs, to JRPotuto, on file in the office of JRPotuto. The NCAA has three divisions and three subdivisions in Division I. See 2013-14 NCAA Division I, II, III manuals, <http://www.ncaapublications.com/>. The specific membership breakdown is: Division I, 346 (Football Bowl Subdivision, 123; Football Championship Subdivision, 123, subdivision without football, 100); Division II 298; Division III 439. The numbers are from the NCAA database administrator. NCAA members also include the athletic conferences to which colleges and universities belong. The numbers reported here include neither athletic conferences nor affiliated members. Id. The National Association of Intercollegiate Athletics (NAIA) also regulates intercollegiate athletics competition. Its members generally are part of a state college system. See the NAIA website at <http://naia.cstv.com>.

² Curtis, Suspension Ends Season for Oklahoma State's Dez Bryant, Sporting News.com (October 28, 2009).

memorabilia; a picture surfaced showing him signing an autograph for one of the dealers. He lost the first half of A&M's 2013 season opening game.³ The father of Cam Newton, the Auburn Heisman winning quarterback, attempted to shop him to Mississippi State for several thousand dollars. Newton kept playing.⁴ Georgia wide receiver A.J. Green sold the jersey he wore in the 2009 Independence Bowl for \$1000. He lost four games.⁵ Ohio State football players sold football gear and memorabilia and traded game tickets for free or reduced-cost tattoos. The value per player ranged from \$1000 to \$2500.⁶ They also competed while ineligible. They lost the first five games of the 2010 season but not the Sugar Bowl game that ended the 2009 season.⁷ At least 61 Florida State student-athletes in ten sports committed academic fraud; many if not most competed while ineligible.⁸ They lost 30 percent of their season's games.⁹ For the football players that meant four games,¹⁰ including the Music City Bowl which ended the 2007 season.¹¹

So what is going on here?

³ Schroeder, Analysis: the Johnny Manziel Autograph Case, USA Today (August 16, 2013); Rovell, Photo Shows Manziel Signing, ESPN.com (September 13, 2013); Half-Game Penalty for Johnny Manziel, ESPN.com news services (August 29, 2013).

⁴ Auburn Releases Cam Newton Docs, ESPN.go.com (November 5, 2011); http://espn.go.com/college-football/story/_/id/7190987/auburn-tigers-records-reveal-details-cam-newton-scandal.

⁵ Tucker, AJ Green: "I Sold Jersey for 'Extra Cash' During Spring Break," AJC.com (September 26, 2010).

⁶ Ohio State Football Players Sanctioned, ESPN.com (December 26, 2010).

⁷ Ohio State Football Players Sanctioned, ESPN.com (December 26, 2010). The exclusion of bowl games from a reinstatement condition is to apply only "in limited circumstances" where student-athlete culpability is "minimal." NCAA Divisions I, II, and III Committees on Student-Athlete Reinstatement Policies and Procedures, at 15-16 (hereafter Reinstatement Policies and Procedures).

⁸ Infractions Report No. 294 (Florida State, March 6, 2009) at 2. See Thomas and Belson, Documents in Fraud Case Made Public by Florida State, http://www.nytimes.com/2009/10/15/sports/15ncaa.html?_r=0 (October 14, 2009).

⁹ Dinich, NCAA Penalties Extend to 10 FSU Sports, ESPN College Football (March 7, 2009), <http://sports.espn.go.com/ncf/news/story?id=3958292>. A couple of the 61 student-athletes had a more substantial withholding condition imposed. Infractions Report No. 294 (Florida State, March 6, 2009) at 2-3.

¹⁰ Football teams play 12 games. See note 31 infra. The Division I Committee on Infractions vacated football team wins because football players competed while ineligible. Infractions Report No. 294 (Florida State, March 6, 2009) at 16.

¹¹ Dinich, NCAA Penalties Extend to 10 FSU Sports, ESPN College Football (March 7, 2009), <http://sports.espn.go.com/ncf/news/story?id=3958292>.

Student-Athlete violations are handled by the NCAA Student-Athlete Reinstatement staff and Committee.¹² Seeming inconsistencies in reinstatement decisions partially are explained by what can be proved rather than what the media report. Johnny Manziel would have received a much greater penalty had the autograph dealers confirmed to Texas A&M what they told ESPN.¹³ Reinstatement decisions also partially are explained by technicalities in what NCAA bylaws prohibit.¹⁴ Had money actually been paid to Cam Newton's father, there would have been a violation.¹⁵ Had Cam Newton attended Mississippi State, where the offer to pay was made, there would have been a violation even if no money changed hands.¹⁶

¹² NCAA Bylaw 21.7.7.3.1. NCAA Division I typically is the focus of discussion about the NCAA. See Potuto, What's in A Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes, 92 Ore. L. Rev. 879, 883-84, n.10-14 (2014). For that reason, all NCAA bylaw citations are to the 2013-14 NCAA Division I Manual. Similarly, all references to the reinstatement process and student-athlete reinstatement committee are to Division I. There are separate Student-Athlete Reinstatement Committees for each division. The processes do not differ among them, and the same NCAA staff support them. Student-Athlete Reinstatement Frequently Asked Questions at 2, <http://www.ncaa.org/compliance/reinstatement/student-athlete-reinstatement-frequently-asked-questions> (hereafter Reinstatement Questions). CMAS, together with its staff, handles student-athlete reinstatement cases for all three divisions. NCAA Bylaw 21.2.2.1. The processes employed are the same for all divisions.

¹³ He would have violated NCAA Bylaw 12.5.2.1 (advertisement and promotions after becoming a student-athlete). For the reinstatement condition, see Reinstatement Guidelines, Bylaw 12 Guideline at 4; 12.5 (8) at 13 (hereafter Reinstatement Guidelines). See Berkes, Johnny Manziel Briefly Suspended, Ending NCAA Autographs Investigation, SB Nation (August 28, 2013), <http://www.sbnation.com/college-football/2013/8/28/4668634/johnny-manziel-suspended-texas-a-m>.

¹⁴ For example, both the Ohio State football players and A.J. Green received money prohibited under NCAA bylaws. A.J. Green violated the extra benefit prohibition because his payment came from a booster. NCAA Bylaw 16.11.2. The Ohio State football players, by contrast, violated the preferential treatment prohibition because the tattoo parlor owner was not a booster. NCAA Bylaw 12.1.2.1.6.

¹⁵ See NCAA Bylaws 12.1.2.1.6 (preferential treatment, benefits or services); 12.3.3 (athletics scholarship agent). See Auburn Releases Cam Newton Docs, ESPN.go.com (November 5, 2011); http://espn.go.com/college-football/story/_/id/7190987/auburn-tigers-records-reveal-details-cam-newton-scandal; Matt Hinton, NCAA Finds Pay-For-Play, But Cam Newton Is in The Clear (for Now) (December 1, 2011), http://sports.yahoo.com/ncaa/football/blog/dr_saturday/post/NCAA-finds-pay-for-play-but-Cam-Newton-is-in-th?urn=ncaaf-290855. The reinstatement guideline was revised in May 2012 to respond to facts such as those in Newton's case. It now specifies that a prospective student-athlete who permits a third party to be involved in his recruitment will be presumed to know of the actions of the third party and is responsible for them even if no payment was made. The Reinstatement Committee describes reinstatement in these cases as "limited" and not available at the university that would have benefitted from his enrollment. Reinstatement Guidelines, supra note 13, Guideline No. 7 (b), at 11. The guideline further states that if money is provided a prospective student-athlete or his family member that a prospective student-athlete is permanently ineligible.

¹⁶ NCAA Bylaw 13.2.1 ("an institution's staff member or any representative of its athletics interests shall not be involved, directly or indirectly, . . . in offering to give . . . benefits to a prospective student-athlete or his or her relatives and friends"). The presumptive reinstatement condition is repayment of the benefit and sitting out 30 percent of a season's competitions. See NCAA Bylaw 14.10.2.

A perception of hopelessly irreconcilable decisions is exacerbated by the failure of critics to distinguish between reinstatement cases and enforcement/infractions cases such as the University of Southern California case that featured Reggie Bush, its Heisman winning running back,¹⁷ who took money and other benefits from two agents.¹⁸ This is like comparing apples to oranges.

Except for drug violations,¹⁹ student-athlete violations are handled exclusively by the Student-Athlete Reinstatement Committee and its staff.²⁰ The NCAA Committees on Infractions, by contrast, deal with institutional responsibility, as well as the culpability of coaches and other staff members. The infractions and reinstatement committees have different governing principles, decision-makers, systems for processing violations,²¹ time lines, and reporting lines within the NCAA.²²

¹⁷ And then Heisman forfeiting running back. Reggie Bush Forfeits His Heisman Trophy Award, Fox News (September 14, 2010), <http://www.foxnews.com/sports/2010/09/14/reggie-bush-forfeits-heisman-trophy-award>.

¹⁸ Infractions Report No.323 (University of Southern California, 2010). See, e.g., Mandel, With Harsh USC Penalties NCAA Sends Warning to All Elite Programs, *Inside College Football*, Sports Illustrated, [cnn.com](http://www.cnn.com) (June 10, 2010); See, e.g., Bass, Penn State Ruling Confirms NCAA's Only Consistency is Inconsistency, [gamedayr.com](http://www.gamedayr.com) (September 24, 2013); Schroeder, Analysis: the Johnny Manziel Autograph Case, *USA Today* (August 16, 2013);; Coppens, NCAA Shows Inconsistency Again in Sanctions Against Montana, *Chrystal Ball run*, [Bloguin.com](http://www.bloguin.com) (July 27, 2013); Kensing, Mississippi State Decision Reflects Inconsistencies in the NCAA, [saturdayblitz.com](http://www.saturdayblitz.com) (June 7, 2013); Norlander, NCAA Punishment is Inefficient, Inconsistent, Compromised: Here's How to Fix It, [CBSSports.com](http://www.cbssports.com) (October 25, 2012); Fiutak, USC Paying for NCAA's Inconsistency?, [Foxsports.com](http://www.foxsports.com) (May 26, 2011); <http://msn.foxsports.com/collegefootball/story/usc-football-hit-harshly-by-inconsistent-ncaa-penalty-052611> Bill N., NCAA Corruption in USC Reggie Bush, Auburn Cam Newton, and North Carolina Cases, *Bleacher Report* (Dec.5, 2010), <http://bleacherreport.com/articles/535023-do-the-usc-reggie-bush-auburn-cam-newton-and-other-cases-show-a-corrupt-ncaa>.

¹⁹ A subcommittee of the Committee on Competitive Safeguards and Medical Aspects of Sports (CMAS) handles student-athlete drug violations. NCAA Bylaw 21.2.2; NCAA Bylaws 12.2.2.2 (d); 31.2.3 to 31.2.3.8; 2013 NCAA Drug Testing Program Manual, Chapter IV, www.ncaa.org/drugtesting (hereafter Drug Testing Book). This process also is independent of the enforcement/infractions process. For a discussion of the NCAA drug testing program and procedures, see text accompanying notes 163 to 179 *infra*.

²⁰ NCAA Bylaw 14.11.

²¹ See Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Process: The Laws That Regulate Them and the Nature of Court Review*, 12 *Vand. J. Ent. and Tech. Law* 257, 282-83 (2010) (hereafter *NCAA Processes*). Critics also challenge infractions decisions as inconsistent one to the other. See, e.g., Adelson, *No Bowl Ban for Miami Hurricanes*, [ESPN.com](http://www.espn.com) (October 23, 2013); Ellis, *Miami Football to Lose Nine Scholarships over Three years; No Bowl Ban from NCAA* (October 22, 2013).

²² The NCAA enforcement staff works within the enforcement/infractions process. See generally NCAA Bylaw Chapter 19.

Much has been written about the NCAA enforcement staff and the Committee on Infractions, both in law reviews²³ and in the popular media.²⁴ By contrast, the Student-Athlete Reinstatement Committee and staff operate under the radar. The reinstatement process is poorly understood, and its procedures are often assumed, wrongly, to mirror those of enforcement/infractions.²⁵ This Article shines a spotlight on the reinstatement process, describing how it works; where and why it differs from the enforcement/infractions process; and the deferential judicial standard of review accorded student-athlete eligibility decisions. Also discussed is what happens in student-athlete drug appeals.

II. NCAA VIOLATIONS

NCAA bylaws set conduct standards for coaches, other staff, and student-athletes,²⁶ and define and regulate student-athlete competition eligibility.²⁷ NCAA bylaws also describe the processes by which bylaws are enforced and violations are punished.²⁸

²³ See, e.g., Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 Wyo. L.Rev. 215 (2012); Potuto & Parkinson, *If It Ain't Broke, Don't Fix It: An Examination of the NCAA Division Infractions Committee's Composition and Decision-Making Process*, 89 Neb. L.Rev. 437 (2011); Weston, *NCAA Sanctions, Assigning Blame Where It Belongs*, 52 B.C.L.Rev. 551 (2011); Rudderman, *Major Violations for the NCAA: How The NCAA Can Apply the Dodd-Frank Act to Reform Its Own Corporate Governance Scheme*, 23 Marq. Sports L. Rev. 103 (2012); Rogers & Ryan, *Navigating The Bylaw Maze In NCAA Major-Infractions Cases*, 37 Seton Hall L. Rev. 749 (2007); Green, *Comment, Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 Duke L.J. 99 (1992).

²⁴ E.g., Taylor, *NCAA Denies USC Request for Reconsideration of Sanctions*, NBC Sports (Sept. 27, 2013), <http://collegefootballtalk.nbcsports.com/2013/09/27/ncaa-denies-usc-request-for-reconsideration-of-sanctions/>; Mandel, *Enforcement Experience Offers Rare Inside Look at NCAA Infractions*, Sports Illustrated (May 12, 2011), http://sportsillustrated.cnn.com/2011/writers/stewart_mandel/05/12/enforcement.experience/; Zenor, *NCAA Rolls Crimson Tide for Violations*, College Football (Feb. 1, 2002), <http://usatoday30.usatoday.com/sports/college/football/2002-02-01-alabama-violations.htm>.

²⁵ The Restitution Rule has been explained, and upheld, by courts. See, e.g., *NCAA v. Lasege*, 53 S.W.3d 77, 87-88 (Ky. 2001). It had been criticized. See, e.g., Ross, Karcher, Kensinger, *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J.C. & U.L. 79 (2014) (hereafter *Restitution Rule*); Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until Oliver v. NCAA*, 11 Fla. Coastal L. Rev. 459 (2102).

²⁶ See, for example, NCAA Bylaws 11.1.1 and 16.02.3.

²⁷ See NCAA Bylaw 14.11. Student-athletes must comply with campus academic and conduct requirements applicable to all students. NCAA Bylaw 14.01.2. They also must comply with NCAA bylaws that set minimum academic standards for competition eligibility. These standards cover full time enrollment, NCAA Bylaw 14.1.7; initial eligibility, NCAA Bylaws 14.3.1 to 14.3.6; and continuing eligibility, NCAA Bylaws 14.4.1 to 14.4.3.9. They dictate amateur status. NCAA Bylaw Chapter 12. They prohibit the use of controlled substances. NCAA

All NCAA violations have two culpable parties, the individual who “did the deed” and the member university responsible for the individual’s conduct.²⁹ More than 460,000 student-athletes compete at NCAA member institutions.³⁰ Estimated conservatively, each year there are at least 25,000 college athletic competitions.³¹ The sheer number of athletes and potential athlete eligibility cases sets the NCAA apart from entities such as the International Olympic Committee³² and professional sports leagues³³ that also administer athletic competition.³⁴

Bylaw 18.4.1.5. They prohibit the receipt of extra benefits. NCAA Bylaw 16.02.3. Benefits are cash, gifts, services, and favors. A benefit is an “extra” benefit, and prohibited, when it is special to student-athletes and not generally available to all students or specific cohorts of them. Id.

²⁸ See NCAA Bylaw Chapter 19; NCAA Bylaw 14.11.

²⁹ See NCAA Processes, *supra* note 21.

³⁰ <http://ncaa.org/about/who-we-are/membership>; Gary Brown, NCAA.Org, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/September/NCAA+student-athlete+participation+hits+450000>; Written Testimony Mark Emmert, NCAA President, before Senate Commerce, Science, and Transportation Committee at 2 (July 9, 2014), on file in office of JR Potuto.

³¹ There are three NCAA divisions and three subdivisions in Division I. Using extremely conservative estimates, there are at least 9840 annual competitions held in the Division I FBS. There are 123 FBS universities. See Written Testimony Mark Emmert, NCAA President, before Senate Commerce, Science, and Transportation Committee at 3 (July 9, 2014), on file in office of JR Potuto. Each FBS university must sponsor at least 16 sports. NCAA Bylaw 20.9.9.1. Virtually all sponsor many more; Ohio State University sponsors 37. Even using just the minimum number that is required, there are 1968 teams in Division I FBS alone. The maximum number of annual competitions varies by team. As one example, the Nebraska women’s swimming and diving team competed in 12 regular season competitions in 2012-13.

http://www.huskers.com/SportSelect.dbml?&DB_OEM_ID=100&SPID=31&SPSID=85. The Alabama women’s outdoor track and field team, as another example, competed in six meets. <http://www.rolltide.com/sports/c-track/sched/alab-c-xctrack-sched.html>. Team sports generally have many more competitions. Baseball heads the list, with 56 possible regular season games. NCAA Bylaw 17.2.5.1. Men’s and women’s Basketball teams may play 29 regular season games. NCAA Bylaw 17.3.5. Football trails with 12 regular season games. NCAA Bylaw 17.9.5.1. Assuming only ten competitions annually for each FBS team and the minimum number of sports teams sponsored, the number of competitions is 9,840 (5 x 19,680). This number is an undercount as FBS teams routinely play teams from the other subdivisions in Division I. Some sports also play teams in Divisions II and III. The actual number of annual FBS competitions likely is more than 25,000. There are smaller team sponsorship requirements for the other two Division I subdivisions and in Divisions II and III. The number of total competitions, therefore, would not be four times the number in Division I FBS but likely is higher than twice the number in Division I FBS.

³² See Mitten, Davis, Smith, Duru, *Sports Law and Regulation*, at 258-62 (3d ed. 2013). There are 28 summer and seven winter sports administered by the IOC and nearly 400 events. *Id.* at 261. There are approximately 11,000 Olympic athletes. See Olympic.org,

<http://www.olympic.org/athletes?search=1&athletename=total%20number%20athletes%20compete>.

³³ Major league baseball teams play 162 games annually, the most games of any professional sport. There are 30 major league baseball teams. MLB.com, <http://mlb.mlb.com/team/index.jsp>. The total number of annual games is 2430 (15 x 162). There are 40 players on a team roster and 1200 total players (40 x 30). Major League Baseball Official Info, http://mlb.mlb.com/mlb/official_info/about_mlb/rules_regulations.jsp.

³⁴ The NCAA also is different from the Olympics and professional sports in that the NCAA administers institutional violations independent of student-athlete eligibility cases. Exclusive of student-athletes, the number of potential violations also is massive. More than 10,000 head coaches are employed by NCAA institutions. Necessarily this is

There are four classifications of NCAA violations.³⁵ Level IV violations are minor, technical violations that were committed inadvertently.³⁶ By their nature, Level IV violations never involve conduct that may have eligibility consequences for a student-athlete³⁷ and, therefore, are not germane to the discussion in this Article. Level I and II violations are serious and are handled by the particular Committee on Infractions for the NCAA division whose institution committed a violation.³⁸ Over the past four years the combined total of cases handled annually by all three Committees on Infractions averaged only 20.5 cases;³⁹ fewer than eight of the 20.5 cases entailed a hearing.⁴⁰

a rough estimate based on the number of member institutions; see note 13 supra; and the minimum number of sports sponsored. In Division I, each institution except those in the FBS must sponsor at least 14 sports, NCAA Bylaw 20.9.6; an FBS institution must sponsor 16 sports. NCAA Bylaw 20.9.9.1. See Figure 20-1. Division II institutions must sponsor at least ten sports; NCAA DII Bylaw 20.10.3. Depending on total student enrollment Division III institutions must sponsor at least five or six sports. NCAA DIII Bylaw 20.11.3. Number of institutions times number of sports sponsored = 10,165 head coaches: DI 5090 (123 x 16 + 223 x 14); DII 2980 (290 x 10); DIII 2195 (439 institutions x 5). Most FBS institutions sponsor more than the minimum number of sports. Ohio State sponsors 36 sports, for example; See Ohio State Buckeyes Official Website, <http://www.ohiostatebuckeyes.com/#>; while Nebraska sponsors 22. On the other hand, there is overlap in the number of sports that affects the tally for total number of head coaches. For example, indoor and outdoor track and field count as two separate sports as does cross country. If an institution sponsors these three sports for men and women it will have six sports for purposes of NCAA sports sponsorship but likely one head coach for all of them. Similarly there likely will be the same head coach for both court and sand volleyball. Several times that number are employed as assistant coaches. Division I FBS football teams have nine assistant coaches, for example. NCAA Bylaw 11.7.2. Track and field and cross country have three coaches for the men's team and three for the women's team. NCAA Bylaw 11.7.4. In addition, most sports are permitted to have unpaid volunteer coaches. NCAA Bylaw 11.7.4.2.3. Now add athletic administrative staffs; athletic academic support staffs; athletic compliance staffs; sport support staffs; medical, nutrition, and strength and conditioning staffs; marketing, media relations, facilities, events, and development staffs; and boosters. For the definition of a booster, see NCAA Bylaw 13.02.14.

³⁵ Violations once were classified as major and secondary. See 2010 NCAA Division I Manual, Bylaw Chapter 19.

³⁶ NCAA Bylaw 19.1.4. An example is failure to have all required documents (SAT score, high school transcript, etc.) filed before a prospect takes an official visit, when all the documents substantively are sufficient and ultimately were filed. See NCAA Bylaw 13.6.3; List of Incidental Infractions (Level IV), as of August 1, 2013, http://ncaa.org/sites/default/files/Violation%2BStructure_Level%2BIV_Conference%2BInfractions.pdf. Level IV violations are handled by Conference offices. NCAA Bylaws 19.11.2; 19.12.2.

³⁷ See List of Incidental Infractions (Level IV), as of August 1, 2013, http://ncaa.org/sites/default/files/Violation%2BStructure_Level%2BIV_Conference%2BInfractions.pdf.

³⁸ Level I violations are the most serious. They provide or are intended to provide a substantial recruiting or competitive advantage or substantial impermissible benefits. NCAA Bylaw 19.1.1. Examples are academic fraud and cash payments to a recruit that result in the recruit's enrollment at an institution. Level II violations provide more than a minimal but less than a substantial recruiting or competitive advantage or impermissible benefit. NCAA Bylaw 19.1.2.

³⁹ The Division I Infractions Committee heard no case from June 2013 through July 2014. NCAA Infractions Chair Responds To "Cheating Pays," Associated Press (July 23, 2014). In 2010 the three Committees on Infractions together decided only 21 total cases (13 of which as summary dispositions); in 2011 there were 22 cases (13 as

Level III violations are isolated or limited in nature and provide no more than a minimal recruiting or competitive advantage to a university or minimal impermissible benefit to a student-athlete.⁴¹ Approximately 4000 Level III violations are processed annually.⁴² Level III violations entail neither enforcement staff investigations nor mirror the Committee on Infractions hearing process. Rather, they are handled by an enforcement director specifically designated for that purpose (Level III Director).⁴³ The Level III Director makes no fact findings but, instead, imposes penalties based on the facts provided in an institutional self report.⁴⁴

Pursuant to the cooperative principle,⁴⁵ universities are required promptly to report suspected violations and to cooperate with an NCAA investigation.⁴⁶ Coaches, other university staff, and student-athletes agree to adhere to NCAA bylaws and to report suspected violations.⁴⁷

summary dispositions); in 2012 there were 19 cases (13 as summary dispositions); in 2013 there were 20 cases (12 as summary dispositions). March 7, 2014 email from Cheryl DeWees, coordinator of the Committees on Infractions to JRPotuto, on file in office of JRPotuto.

⁴⁰ Of these, the Division I Committee on Infractions decided 13 cases in 2010 (six of which as summary dispositions); 15 cases in 2011 (nine as summary dispositions); ten in 2102 (five as summary dispositions); and nine in 2013 (four as summary dispositions). March 7, 2014 email from Cheryl DeWees, coordinator of the Committees on Infractions to JRPotuto, on file in office of JRPotuto.

⁴¹ NCAA Bylaw 19.1.3. These violations constitute what formerly were known as secondary violations. See 2011 NCAA Division I manual, NCAA Bylaw 19.02.2.1; NCAA Bylaw 19.9.4 (d).

⁴² March 5, 2014 email from Chris Strobel, NCAA Director of Enforcement, to JRPotuto, on file in office of JRPotuto.

⁴³ March 5, 2014 email from Chris Stroebel, NCAA Director of Enforcement, to JRPotuto, on file in office of JRPotuto. This position formerly was known as the Director of Enforcement for Secondary Violations. See NCAA Processes, *supra* note 21, at 284.

⁴⁴ See Secondary Infractions Self-Reporting, <http://www.ncaa.org/secondary-infractions-self-reporting>. There is an on-line reporting system. <https://apps.ncaa.org/?ticket=ST-1394001108r2D835968EDA3FE0CE8>; <https://www.ncaa.org/sites/default/files/RSRO%20FAQs.pdf>. There is no NCAA staff investigation to verify the facts reported or to confirm the completeness of an institutional report unless information surfaces that calls an institutional investigation into question. In such a case, the enforcement staff becomes involved. Consider an infractions case involving Marshall University. The Marshall compliance director initially reported the case as a secondary violation and also filed a reinstatement request. He subsequently filed two additional self reports and reinstatement requests regarding the same violation. Each corrected and amplified information provided in a preceding self report and reinstatement request. The second report was made only after an NCAA investigation was initiated. The third resulted from information surfaced by NCAA enforcement staff during their investigation. NCAA Division I Infractions Report No. 191 at 5, 15 to 17 (Marshall University, Dec. 21, 2001). The committee on Infractions found that the violations were more serious than what was set forth even in the third and final self report. NCAA Division I Infractions Report No. 191 at 7 (Marshall University, Dec. 21, 2001).

⁴⁵ NCAA Bylaw 19.2.3; NCAA Processes, *supra* note 21, at 289-292.

⁴⁶ See NCAA Const. arts. 2.1, 2.8, 6.01; NCAA Bylaws 10.2.2, 19.2.1, 19.2.3. A fundamental obligation of NCAA membership is that institutions must be rules compliant. NCAA Const. Art. 2.8; NCAA Bylaw 19.2.1; NCAA Processes, *supra* note 21, at 285-86, 288.

The process for assessing institutional responsibility for Level I and II violations is the one familiar to commentators, and also the one they often assume is employed in student-athlete reinstatement cases. Institutional responsibility for Level I and II violations involves adversarial presentations⁴⁸ resolved by the applicable Division's Committee on Infractions.⁴⁹ The enforcement staff investigates,⁵⁰ makes allegations of violations,⁵¹ compiles the evidence to support its allegations, and presents its evidence at an infractions committee hearing. Coaches charged with violations routinely appear with counsel.⁵² The Committee on Infractions writes detailed infractions reports setting forth the reasons for its findings and the penalties it imposes.⁵³

III. THE STUDENT-ATHLETE REINSTATEMENT PROCESS

The most fundamental difference between enforcement/infractions and student-athlete reinstatement processes, and likely the least understood, is that there is no equivalent to the Committee on Infractions in student-athlete reinstatement cases.⁵⁴ Even for Level I and II violations, it is a university that investigates, makes the factual conclusions as to what occurred, and concludes that violations were committed.⁵⁵ Even for Level I and II violations,

⁴⁷ Coaches and staff have no right to be employed at a university. They annually sign a Certification of Compliance. NCAA Bylaw 30.3. Coaches, other staff members, and student-athletes commit unethical conduct by "refusing to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so" and by "[k]nowingly furnishing . . . false or misleading information concerning . . . involvement in or knowledge of matters relevant to a possible violation of an NCAA regulation." NCAA Bylaw 10.1 (a), (d). Student-athletes agree in writing to be rules-compliant. See text accompanying notes 185 to 191 *infra*.

⁴⁸ NCAA Bylaw 19.7. As described in text, the NCAA enforcement staff investigates, makes allegations of violations, compiles evidence in support of the allegations, and then presents the case to an applicable Committee of Infractions. Despite all this, the NCAA does not describe the enforcement process as adversarial. I do.

⁴⁹ NCAA Bylaw 19.7. Level II cases may be conducted by video conference. NCAA Bylaw 19.7.7. In addition, some cases may be resolved by summary disposition if all parties consent. NCAA Bylaw 19.6.

⁵⁰ NCAA Bylaw 19.5.1.

⁵¹ NCAA Bylaw 19.7.1.

⁵² NCAA Bylaw 19.02.1; 19.7.1.2; 19.7.2, 19.7.3.

⁵³ NCAA Bylaw 19.8.1.2. There also is a right of appeal to the Infractions Appeals Committee. NCAA Bylaw 19.10.

⁵⁴ For a schematic that diagrams the reinstatement process, see Student-Athlete Reinstatement Process, <http://www.ncaa.org/sites/default/files/Student-Athlete%2BReinstatement%2BProcess%2BChart.pdf>. The student-athlete reinstatement process more closely resembles the enforcement infractions process for secondary violations.

⁵⁵ Reinstatement Policies and Procedures, *supra* note 7, at 2; Reinstatement Questions, *supra* note 12, at 2 to 3. The exception to reliance on institutional information comes if the enforcement staff begins an investigation of

reinstatement staff conduct no investigation, make no allegations of violations, and compile no evidence in support of allegations.⁵⁶ Even for Level I and II violations there is no adversarial hearing. In all reinstatement cases, the exclusive role of the reinstatement staff and the Student-Athlete Reinstatement Committee is to assure that the institution provides a fully developed factual record,⁵⁷ to assess the degree of student-athlete culpability based on the facts reported by an institution, and to decide whether and under what conditions a student-athlete may be reinstated to competition eligibility.⁵⁸

Investigations take time. Level I and II infractions cases always take at least a year between onset of investigation and hearing and often take two years or more.⁵⁹ Delay in resolution of violations no doubt burdens an institution.⁶⁰ Adverse publicity continues until a case is resolved, affecting a university's overall reputation, and likely is an ongoing distraction for day-to-day operations. Recruiting may be affected while recruits wait to learn what institutional penalties will be imposed.

institutional culpability for the violations. In a rare case, it is possible that the reinstatement process may be stayed, waiting the result of the infractions hearing. It also is possible that a reinstatement decision will be revisited based on information culled by the enforcement staff. An example is what happened in an infractions case involving Marshall University. See note 44 *supra*. Typically, however, an enforcement staff investigation and infractions hearing decision occur too late to have impact on competition opportunities for student-athletes who committed the violations. Its impact will fall exclusively on the university. There are differences in the typical reinstatement process when the question is the amateur status of a student-athlete or prospective student-athlete. See notes 219 and 222 *infra* for a brief description.

⁵⁶ NCAA Bylaw 14.11.3. The most the reinstatement staff may do is to request that a university gather and submit additional information. Reinstatement Policies and Procedures, *supra* note 7, at 6.

⁵⁷ Reinstatement Policies and Procedures, *supra* note 7, at 2.

⁵⁸ Reinstatement Policies and Procedures, *supra* note 7, at 2; Reinstatement Questions, *supra* note 12, at 1 to 2.

⁵⁹ See, e.g., Infractions Report No. 339, Case Chronology at 48-49 (University of Connecticut, January 2011) (March 25, 2009 information surfaced; January 29, 2010 Notice of Inquiry); Infractions Report No. 257, Case Chronology at 16-17 (Texas Southern University, July 16, 2008)(July 29, 2006 notice of inquiry announcing NCAA investigation); Infractions Report No. 379, Case Chronology at 27-28 (Eastern Michigan University, November 8, 2012) (institution's investigation began August 23, 2010; enforcement staff interviews began February 7, 2011; September 24, 2012 self report; August 8 2011 notice of inquiry); Infractions Report No. 375, Case Chronology at 11-12 (University of Tennessee, Knoxville, November 16, 2012) (enforcement staff interviews beginning August 20, 2011; notice of inquiry September 9, 2012; case built on information from Infractions Report No. 342); Infractions Report No. 193, Case Chronology at 34-35 (University of Alabama, February 1, 2002) (Institutional report on November 1, 1999; enforcement staff inquiry began Spring 2000; Notice of Inquiry February 21, 2001).

⁶⁰ See, e.g., Bishop, In N.C.A.A. v. Oregon, Justice Waits Again, NY Times, http://www.nytimes.com/2013/04/17/sports/ncaafootball/ncaas-case-against-oregon-moves-slowly.html?_r=0

Without question, however, the consequences of delay fall more heavily on student-athletes. They have only four years of competition eligibility and a five-year window in which to compete.⁶¹ The less time remaining on a student-athlete's five-year competition clock, the more critical the need for quick resolution of any claimed violation. That need for speed is heightened when a reinstatement request is made close to a student-athlete's next scheduled date of competition. A streamlined process to resolve violations, even Level I and II, is, therefore, particularly critical for student-athletes.

Student-athletes who compete are more talented, skilled, or experienced than those who sit on the bench. When a student-athlete competes while ineligible, therefore, it always is a competitive advantage for a team and university.⁶² Depending on the talent level of an ineligible student-athlete, the position played, and the talent level of back-up student-athletes, the competitive advantage can be substantial.

A. Ineligible Until

Under NCAA bylaws, student-athletes are ineligible to compete from the point at which they commit a violation until their eligibility status is resolved.⁶³ In a perfect world, there would be no "ineligible-until" approach but a measured determination made on full information before a student-athlete lost playing time. In a perfect world, no student-athlete ultimately found eligible to compete would have lost games while an investigation proceeded to conclusion. In a

⁶¹ NCAA Bylaws 14.2 (Seasons of Competition), 14.2.1 (Five-Year Rule). There also are only a specified number of competitions per season per sport. See note 31 *supra*.

⁶² An exception is a blowout game when a coach might compete players who otherwise would never see the field. The movie, *Rudy*, illustrates how this occurs, albeit in a fictional account. Rudy, RogerEbert.com (October 13, 1993), <http://www.rogerebert.com/reviews/rudy-1993>.

⁶³ NCAA Bylaws 14.10.1, 14.10.4.2. Certification of continuing eligibility is the responsibility of the institution at which a student-athlete is enrolled. NCAA Bylaw 14.01.1. Pre-enrollment, eligibility certification is handled by the NCAA Eligibility Center. NCAA Bylaw 14.1.2.4.1. For information about the Eligibility Center, see https://web1.ncaa.org/ECWR2/NCAA_EMS/NCAA.jsp. If a university has systems in place reasonably calculate to uncover violations, then it will not be found to lack institutional control of its athletic program because a student-athlete competed while ineligible. Similarly, any penalty for that ineligible competition likely will be mitigated. If a university failed in its monitoring obligation, however, then additional penalties may be imposed by the Committee on Infractions.

perfect world, a university unsure whether a violation was committed would never declare ineligibility due to time pressures but, instead, would first seek a controlling interpretation of a bylaw as applied.⁶⁴ In a perfect world a university would never forego seeking a waiver of the operation of a bylaw because a student-athlete's team is in season or there are other factors that weigh against delay while a waiver is processed.⁶⁵

In a world bound by finites, however, perfect justice for a particular student-athlete must be balanced against the imperatives of rules enforcement in a system that relies on institutions to self report. The "ineligible until" approach incentivizes a university with information about a possible violation to work expeditiously to investigate it, and then, should it decide a student-athlete committed a violation, to report it post haste and seek a student-athlete's reinstatement. If student-athletes could compete until a university completed its investigation and determined there was a violation, then, despite the cooperative principle, the approach "de jour" of some universities might be to stall until the end of a sport's competitive season or at least until after an important competition. Student-athletes with only one or two years remaining on their competition clock might avoid all consequences attendant on a violation. In addition, the "ineligible-until" approach both mutes the suspicion that a university's self report was

⁶⁴ Reinstatement Policies and Procedures, *supra* note 7, at 1. Bylaw interpretations are handled through the NCAA interpretation process. NCAA staff in the Academic and Membership Affairs Group make initial interpretations. They report to and take their marching order from the Legislative Review Interpretation Committee (LRIC). The LRIC provides official interpretations, subject to the authority of the Division I Legislative Council and, ultimately, the Division I Board of Directors. See generally NCAA Processes *supra* note 21, at 16 to 19. NCAA CONST. art. 5.4.1 (Interpretations of Constitution and Bylaws); NCAA Bylaws 21.7.7.2.2, 21.7.7.2.3; *see also* NCAA D1 Legislative Review & Interpretations Comm., Policies & Procedures (Mar. 3, 2008), *available at* http://web1.ncaa.org/web_files/AMA/LRIC/LRIC%20policies%20and%20procedures%203-3-08.pdf. Legislative Interpretation Committee interpretations are official and final once the Legislative Council reviews them. For an illustration of the NCAA model, see NCAA Div. I Comm. on Infractions, Infractions Report No. 265 (May 1, 2007) (West Virginia University); NCAA Div. I Comm. on Infractions, Infractions Report No. 163 11-12 (Dec. 17, 1999) (University of Notre Dame). Seeking a bylaw interpretation can take a day or two, but also can take much longer. Even a day or two may mean a student-athlete loses a competition opportunity. An interpretation that confirms there is a violation means additional delay, as then the reinstatement process must be triggered.

⁶⁵ Waivers are administered both by the Student-Athlete Reinstatement Committee and by committees with substantive authority over various bylaws. See note 69 *infra*. The time it takes for processing a waiver varies both by the nature of the waiver and the committee that decides it.

intentionally delayed because of competitive interests and also avoids adding an adversarial occasion between the NCAA enforcement staff⁶⁶ and a university. Purposeful undue delay unquestionably is a violation. But it must be proved. Sometimes there are obstacles that impede the progress of an investigation. Sometimes being thorough entails slow going.

Even in a world bound by finites, the reinstatement process offers some amelioration of the “ineligible until” approach. First, not only is there typically a consanguinity of interest between a university and its student-athlete, but a student-athlete’s violation also is an institutional violation. There therefore is minimal likelihood of university error in its conclusion that its student-athlete committed a violation. That being so, in only an extraordinary case would the “ineligible until” approach result in a student-athlete losing competition opportunities that otherwise would not be imposed. Second, the reinstatement staff attempts to process cases before a student-athlete’s next competition.⁶⁷ Third, the NCAA waiver process is available when a student-athlete’s circumstance falls within the letter of a bylaw but was not intended to be covered by it.⁶⁸ Fourth, in cases in which a university and student-athlete learn of a violation

⁶⁶ The reinstatement staff does no investigations. If it suspected undue delay, it would turn the matter over to the enforcement staff in the same way that it reports to the enforcement staff if a petition for reinstatement suggests there may be a serious violation, despite the conclusion of the institution as to the level of violation.

⁶⁷ See text accompanying note 95 *infra*.

⁶⁸ The waiver process by itself likely will avoid a student-athlete losing competition time only if a violation is discovered outside a student-athlete’s competition season. The Student-Athlete Reinstatement Committee is authorized to grant five types of waivers that, among other things, can that can extend for one year a student-athlete’s five year clock; NCAA Bylaw 14.2.1.5; and adjust the calculation of what constitutes a season of competition. NCAA 14.2.6.2. See Reinstatement Guidelines, *supra* note 13, at 25 to 30, 32; Reinstatement Policies and Procedures, *supra* note 7, at 5 to 7. The Student-Athlete Reinstatement Committee typically takes three weeks to decide a waiver handled on the written record. Reinstatement Policies and Procedures, *supra* note 7, at 9. Other NCAA committees are authorized to grant waivers from the operation of bylaws that fall within their jurisdiction. Committees with responsibility for particular bylaws consider waivers specific to the bylaws for which they have responsibility. Such bylaw responsibility includes waivers of team CAP rules, NCAA BYLAWS art. 23.1 (Committee on Academic Performance), validation of academic records of prospective student-athletes, *id.* arts. 14.1.2.1 (High School Review Committee), 14.1.2.2 (Student Records Review Committee), and initial and continuing eligibility of individual student-athletes, *id.* arts. 14.3.1.5 (Initial-Eligibility Waivers), 14.4.3.6 (Waivers of Progress-Toward-Degree Rule). Although the NCAA provides no general set of policies and procedures governing all committees, each committee has published policies and procedures governing its operations. For example, see http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/ncaa/NCAA/Legislation%20and%20Governance/Compliance/Student-Athlete%20Reinstatement/student_athlete_reinstatement.html.

within 48 hours of a competition and the staff has reason to believe the Reinstatement Committee might be lenient, a student-athlete may continue to compete until after the Reinstatement Committee hears the appeal.⁶⁹

Once a university confirms that a student-athlete is ineligible, it typically petitions for reinstatement of eligibility.⁷⁰ Because every student-athlete violation is an institutional violation, every reinstatement request includes, or is accompanied by, a report of institutional violation.⁷¹ When a university believes that a violation may be more serious than Level III, it reports its commission to the Vice President for Enforcement rather than to the Level III Director.⁷² On occasion, the Level III Director may decide that the facts set forth in a self report suggest that a violation may be more serious than Level III. In that event, the Level III Director will forward it to the applicable Committee on Infractions to decide how it should be classified.⁷³

Student-athletes who knowingly commit violations are unlikely to report themselves. There may be no witnesses, or at least none who come forward. Inevitably, then, some student-athletes compete while they are ineligible. That ineligible competition is an additional student-

Waivers temper the bright-line operation of bylaws to account for circumstances within a rule's intended scope but not expressly covered by its black letter articulation.

⁶⁹ Reinstatement Policies and Procedures *supra* note 7, at 16. Another amelioration relates to disgorgement of benefits received, an absolute condition in all cases. See notes 93 *infra*. If the amount is too large for a student-athlete to pay, then a repayment schedule can be used, and a student-athlete may compete while making scheduled payments. Reinstatement Policies and Procedures, *supra* note 7, at 17. If a student-athlete fails to make full repayment, an institution for a four-year period may not avail itself of a scheduled payment plan on behalf of another student-athlete. *Id.* at 17-18. Amelioration also is available when a withholding condition is imposed on multiple student-athletes on the same team. In this instance, the condition may be staggered to preserve the opportunity to field a competitive team and to protect the health and safety of student-athletes. *Id.* at 18. A squad of seven members is sufficient for a basketball team. *Id.*

⁷⁰ NCAA Bylaws 14.10.1, 14.11.1 to 14.11.3. It does so through the Academic and Membership Affairs (AMA) online case management system. Reinstatement Policies and Procedures, *supra* note 7, at 1.

⁷¹ NCAA Bylaw 14.11.1. The converse is not always true, as a university might report an institutional violation yet decline to seek a student-athlete's reinstatement to eligibility. See note 213 *infra*.

⁷² http://www.ncaa.org/wps/ncaa?key=/ncaa/NCAA/Legislation%20and%20Governance/Compliance/Secondary%20Infractions/level_II_violations_D-I. See Infractions Report No. 379 (Eastern Michigan University, November 8, 2012), Case Chronology at 27 ("The institution mailed its self report of violations . . . to the former vice president of enforcement").

⁷³ NCAA Bylaw 19.11.2.

athlete violation, one that markedly enhances student-athlete culpability.⁷⁴ That ineligible competition also is an additional violation for which a university must answer in the enforcement/infractions process, even for the period of time when a university did not know and, in the exercise of due diligence, had no reason to know.⁷⁵

B. The Student-Athlete Reinstatement Committee and Guidelines

The Student-Athlete Reinstatement Committee has five members⁷⁶ plus a nonvoting student-athlete from the national Student-Athlete Advisory Committee (SAAC).⁷⁷ A high volume of reinstatement petitions is filed annually -- approximately 1,850 petitions were filed in academic year 2010-11, for example, the last year for which data are reported.⁷⁸ To manage the volume, the Reinstatement Committee does not handle reinstatement petitions in the first instance.⁷⁹ Instead, the Reinstatement Committee has adopted guidelines for handling cases, the

⁷⁴ NCAA Bylaws 14.10.4.1, 14.10.4.2. A student-athlete loses a year of competition for every year of ineligible competition even if the student-athlete did not act purposefully.

⁷⁵ The extent to which the ineligible competition will result in enhanced penalties on the institution depends on the competitive advantage gained and also on whether the institution had process in place reasonably calculated to prevent and uncover violations. If a university has reason to believe a student-athlete might be ineligible but fails to hold him out of competition during the course of the investigation, it takes a big risk. If, at the end of an investigation, it finds that he was ineligible, its culpability, and potential penalty, is enhanced. It is rare, therefore, that a university will spin the wheel, and compete a student-athlete before it either decides that he is eligible or seeks reinstatement of eligibility.

⁷⁶ NCAA Bylaw 21.7.7.3.1. Committee members are faculty and administrators at member institutions and conferences, not NCAA staff members. NCAA Bylaw 21.7.1. They are appointed through formal NCAA processes. NCAA Bylaw 21.7.3. See notes 191 and 192 *infra*.

⁷⁷ NCAA Bylaw 21.7.7.3.1.1. Student-athletes are organized at each university into SAACs, with each sports team represented. At the University of Nebraska, for example, each team has at least one representative (the two largest squads -- track and field and football) have two representatives. Policy, Student-Athlete Advisory Committee, University of Nebraska-Lincoln., on file in office of JRPotuto, UNL Law College; Xx, 2013 Email from Keith Zimmer, Associate Director for Life Skills, to JR Potuto, on file in office of JRPotuto, UNL Law College. Representatives from campus SAACs serve on Conference SAACs and have an advisory role in the development of Conference positions on legislative proposals. See 2013-14 Big Ten Handbook, Rule 4.4.2.2.C.3. In turn, one student-athlete from each Conference SAAC serves on the Division I national SAAC. NCAA Bylaw 21.7.6.2. As with the typical NCAA process for committee appointments, Conferences submit three names for consideration; the DI Administration Cabinet makes the final selection. For a list of current members, see http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=ISAAC. The national SAAC formally takes positions on selected bylaws; these positions are circulated to member institutions. Although advisory, strong opposition by the national SAAC can be influential in the adoption or rejection of a legislative proposal.

⁷⁸ Reinstatement Questions, *supra* note 12, at 4.

⁷⁹ See Reinstatement Questions, *supra* note 12, at 1.

reinstatement staff resolves the cases pursuant to these guidelines, and the Reinstatement Committee hears appeals from staff decisions.⁸⁰

Reinstatement guidelines cover every conceivable type violation, including those committed by a student-athlete before enrollment at an NCAA institution.⁸¹ Reinstatement guidelines cabin staff discretion and enhance the likelihood that cases are treated similarly institution to institution. Institutions rightly are concerned that their student-athletes get a fair deal, particularly with regard to Level I and II violations that may have significant impact on competition opportunities.⁸² Guidelines also may expedite the reinstatement process, an important feature given the heightened need for speed in student-athlete reinstatement cases.⁸³

The most significant reinstatement conditions are withholding a student-athlete from competition and decreasing the time in a student-athlete's five-year eligibility clock.⁸⁴ Level I and II violations and violations committed intentionally by student-athletes can result in withholding of up to an entire season of competition,⁸⁵ loss of eligibility for one or more seasons, and sometimes both.⁸⁶

⁸⁰ See Reinstatement Questions, *supra* note 12, at 2; Reinstatement Policies and Procedures, *supra* note 7, at 20. See Division I Student-Athlete Reinstatement Committee Duties & Responsibilities, <http://www.ncaa.org/division-i-student-athlete-reinstatement-committee-duties-responsibilities>. There are 28 pages of guidelines for staff to use in dealing with the consequences to student-athletes attendant on their commission of violations. Reinstatement Guidelines, *supra* note 13. They are available online at the NCAA website.

⁸¹ *Id.*

⁸² See text accompanying notes 233 to 245 *infra* regarding a failure of transparency and perceived cross-institutional inconsistency in decisions.

⁸³ Because Reinstatement Guidelines set forth presumptive reinstatement conditions, they also narrow the scope of challenges available on appeal and also may reduce the incidence of appeals. Structuring the process to reduce and appeals and expedite the time for resolving them seem worthwhile goals.

⁸⁴ In reinstatement parlance, these are known as "sitting" and "charging" conditions.

⁸⁵ The Reinstatement Committee also specifies how reinstatement conditions are calculated, including which student-athlete competitions count in the withholding calculation. Conference championship games are excluded, for example. Reinstatement Policies and Procedures, *supra* note 7, at 15.

⁸⁶ When a reinstatement condition is a year's withholding and also a season of eligibility, a student-athlete loses two seasons of competition.

The most serious violations – signing a professional contract, for example – result in a student-athlete’s permanent ineligibility with no guideline granting staff discretion to mitigate.⁸⁷ Other serious violations – academic fraud,⁸⁸ for example – have a guideline penalty of permanent ineligibility that can be reduced to one year withholding plus one season loss of eligibility on a showing that a student-athlete had minimal or no culpability.⁸⁹ Still other serious violations – lying to an NCAA enforcement staff representative investigating NCAA violations – have a minimum threshold penalty of less than permanent ineligibility (in this case, 50 percent) that can be increased up to permanent ineligibility on a showing that a student-athlete had serious culpability.⁹⁰ Violations involving prohibited benefits always require disgorgement of the benefit or its value.⁹¹ They also trigger withholding conditions when the amount of the benefit is more than \$100.⁹²

⁸⁷ Reinstatement Guidelines, supra note 13, at 5.

⁸⁸ NCAA Bylaw 10.1(b); Reinstatement Guidelines, supra note 13, at 4.

⁸⁹ In about one percent of the cases, a student-athlete is permanently ineligible. Reinstatement Questions, supra note 12, at 4.

⁹⁰ Conduct that leads to permanent ineligibility includes violations of NCAA Bylaw 10.1 (d) – knowingly providing false or misleading information, deliberate concealment of information, or failure to correct information although there were repeated opportunities to do so. Reinstatement Guidelines, supra note 13, at 2 to 3. If a student-athlete provided false or misleading information or failed to report information, but did not act knowingly, then the Guidelines authorize Reinstatement staff to increase from the Guideline minimum the penalty for the underlying substantive violation committed by a student-athlete.

⁹¹ NCAA Bylaw 16.01.1.1. See, e.g., Reinstatement Guidelines, supra note 13, Bylaw Guideline 12.1.2.1.6 (3); Reinstatement Guideline at 6; Bylaw Guideline 16.11.2.1 (3), at 23. For extra benefit and other violations with monetary value benefit to a student-athlete of no more than \$100, disgorgement of the benefit is the only penalty unless there are other circumstances – the benefit was provided by an agent, for example -- associated with the receipt of the benefit. In rare circumstances involving minimal student-athlete culpability and no extra benefit, the reinstatement condition may be community service. Id. at 31. For benefits not cash payments, the reinstatement guidelines describe how to calculate their money value. Id. at 21.

⁹² NCAA Bylaw 16.01.1.1. Reinstatement Guidelines, supra note 13. Extra benefit withholding penalties, for example, begin at 10 percent of a year’s competitions for benefits over \$100 up to 30 percent for benefits over \$700. Id. at 20 to 21; NCAA Bylaw 16.11.2.1. Receipt of prize money over necessary expenses pre-enrollment, as another example, triggers a withholding penalty of 10 percent of a year’s competitions for net prize money over \$500 up to 30 percent for net prize money over \$1000. Id. at 5; NCAA Bylaw 12.1.2.1.6. Receipt of prize money over necessary expenses post-enrollment, as a third example, triggers withholding of 10 percent of a year’s competitions for career prize money over necessary expenses over \$100 up to 30 percent for career net prize money over \$700. Id. at 6 to 7; NCAA Bylaw 12.1.2.1.6. These withholding penalties may be increased or decreased based on the level of student-athlete culpability.

The reinstatement staff attempt to resolve a case before a student-athlete's next date of competition.⁹³ The next two priorities in slotting cases for resolution are the date on which a university submitted a reinstatement request and the date when a violation was discovered.⁹⁴ The average time for resolution of a routine case is one week.⁹⁵

As a general rule, only an association member can seek redress from the adverse impact of an association's bylaw or policy.⁹⁶ That means that an NCAA member institution, not a student-athlete, brings a reinstatement request or presents a case in favor of reinstatement.⁹⁷ A private association can take action only against its own members. That means that reinstatement decisions are directed at a student-athlete's university and, in turn, that the university enforces the decision against its student-athletes.⁹⁸

Case reports of student-athlete reinstatement decisions typically are posted on the NCAA website and are available as precedent.⁹⁹ They are brief summaries with neither institution nor student-athlete identified.¹⁰⁰

C. Appeals

A university may appeal a staff decision to refuse to depart downward from a guideline reinstatement condition or a staff decision assigning a greater degree of student-athlete

⁹³ Reinstatement Questions, *supra* note 12, at 3; Reinstatement Policies and Procedures, *supra* note 7, at 2.

⁹⁴ Reinstatement Policies and Procedures, *supra* note 7, at 2.c

⁹⁵ Reinstatement Questions, *supra* note 12, at 4. Complicated cases take longer. *Id.*

⁹⁶ NCAA Processes, *supra* note 21, at 262-63.

⁹⁷ Reinstatement Questions, *supra* note 12, at 4. A student-athlete's statement is included in a reinstatement request. See note xxx *infra*. A university also typically will accede to a student-athlete's request that a petition be advanced. See note 199 *infra*. Drug appeals are treated differently. Although student-athletes independently may not seek reinstatement of eligibility, they routinely provide written statements that are included as part of a university's reinstatement request.

⁹⁸ This is part of an institution's control obligation and the cooperative principle.

⁹⁹ Reports are posted on the NCAA Legislative Services Database for the Internet (LSDBi) or on AMA Online. Reinstatement Policies and Procedures, *supra* note 7; Appealing Staff Decisions 6 (b), at 10. See also Case Summary 341806 (May 28, 2013); Case Summary 307925 (June 112, 2013), on file in office of JR Potuto. Not all case summaries are posted, or remain posted. See text accompanying notes 220 to 227 *infra*.

¹⁰⁰ See, e.g., Case Summary 341806 (May 28, 2013); Case Summary 307925 (June 112, 2013), on file in office of JR Potuto. See Reinstatement Policies and Procedures, *supra* note 7, at 7 to 14.

culpability than a university believes is warranted.¹⁰¹ Appeals are scheduled based on when a request is received and a student-athlete's next date of competition.¹⁰² Review of documentation typically takes 48 hours but may be expedited if a case warrants urgent consideration.¹⁰³ A student-athlete must participate in an appeal.

All interpretative questions must be resolved before an appeal is heard.¹⁰⁴ A university may relitigate neither its factual conclusions nor its conclusion that particular violations were committed.¹⁰⁵ The Student-Athlete Reinstatement Committee may revise a staff decision or a reinstatement condition but only to decrease the adverse impact on a student-athlete.¹⁰⁶

Appeals from student-athlete reinstatement decisions are handled on the paper record if both the university and reinstatement staff agree and no committee member requests an oral appeal.¹⁰⁷ All other appeals are conducted by telephone.¹⁰⁸ In a typical telephonic appeal, the student-athlete reinstatement staff has ten minutes to describe the facts of a case, provide any precedent on point, and explain its conclusions regarding student-athlete culpability and the reinstatement condition imposed.¹⁰⁹ A student-athlete and university each is allotted ten minutes

¹⁰¹ Reinstatement Policies and Procedures, supra note 7, at 8.

¹⁰² Reinstatement Policies and Procedures, supra note 7, at 8. Review by paper record typically takes seven business days. *Id.* The Reinstatement Committee has one or two scheduled appeals times weekly.

¹⁰³ Reinstatement Policies and Procedures, supra note 7, at 8.

¹⁰⁴ Reinstatement Policies and Procedures, supra note 7, at 8.

¹⁰⁵ If a university produces new evidence on appeal, it may relitigate a fact conclusion. Reinstatement Policies and Procedures, supra note 7, at 8. A university or coach may appeal to the Committee on Infractions from an enforcement staff decision regarding penalties imposed for a Level III violation. NCAA Bylaw 19.11.4.

¹⁰⁶ Reinstatement Questions, supra note 12, at 1.

¹⁰⁷ Reinstatement Policies and Procedures, supra note 7, at 8.

¹⁰⁸ NCAA Bylaw 21.7.7.3.3.1; Reinstatement Policies and Procedures, supra note 7, at 8. Telephone hearings enhance a student-athlete's opportunity to participate as they entail neither travel and travel costs nor missed class time.

¹⁰⁹ Reinstatement Policies and Procedures, supra note 7, at 9. A student-athlete may be represented by counsel on the appeal. *Id.*

to present their positions and respond to questions.¹¹⁰ Then staff, university, and student-athlete each have five minutes for closing statements.¹¹¹

The Student-Athlete Reinstatement Committee deliberates and resolves an appeal immediately after a hearing ends. The Committee decision is binding, with no further review available.¹¹² If the Committee affirms the reinstatement staff's decision, that information is added to the online staff report that summarized the initial reinstatement decision. If the Committee modifies or reverses a staff decision, the staff decision remains on the website with the action of the Committee added, including the rationale for its action.¹¹³

IV. JUDICIAL DEFERENCE TO NCAA STUDENT-ATHLETE ELIGIBILITY DECISIONS

Private associations are afforded considerable leeway by courts to chart their own course, even when their operations are exclusively internal to one state.¹¹⁴ Associations that are national in scope can function effectively across state borders only if there is uniform application of their rules and policies across those borders.¹¹⁵ Associations that regulate competition need uniform rules administered uniformly. The NCAA, the International Olympics Committee,¹¹⁶ and

¹¹⁰ Reinstatement Policies and Procedures, supra note 7, at 9.

¹¹¹ Reinstatement Policies and Procedures, supra note 7, at 10.

¹¹² Reinstatement Policies and Procedures, supra note 7, at 11.

¹¹³ Email from Laure Ragoss, Associate Director of Compliance, University of Nebraska (June 27, 2014) to JR Potuto, on file in office of JR Potuto.

¹¹⁴ See generally, *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000); *Am. Fed. of Tech. Eng'rs v. La Jeunesse*, 347 N.E.2d 712 (Ill.1976); *Gulf S. Conf. v. Boyd*, 369 So.2d 533, 557-57 (Ala. 1979); *Chafee, The Internal Affairs of Ass'ns Not for Profit*, 43 Harv. L.Rev.993, 1022 (1930). The authority to define the scope and meaning of rules is a corollary to the right to adopt them. See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Durfee v. Duke*, 375 U.S. 106 (1963). Deferential review to decisions of a body that adopts and defines the scope and meaning of rules is not confined to the NCAA or other sports authorities. The Supreme Court accepts as dispositive a state court determination of state law. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875). A court reviewing an agency hearing decision defers to agency expertise. 5 U.S.C. § 706 (2006). An arbitrator's decision can be vacated only if it resulted from corruption, fraud, or bias or if the decision was outside the jurisdiction of the arbitrator. 9 U.S.C. §§ 10(a), 11 (2006); see *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001).

¹¹⁵ *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993).

¹¹⁶ Athlete eligibility of Olympic athletes is handled by the Court of Arbitration for Sport (CAS). See Matthew J. Mitten and Hayden Opie, "Sports Law": Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution, 85 Tul. L. Rev. 269, 289 (2010).

professional sports associations in the United States¹¹⁷ all resolve athlete eligibility disputes through systems alternative to the traditional judicial model. The law of private associations, enhanced by the particular need for uniformity in athletic competition, underlies, and explains, the judicial deference afforded to NCAA operations.¹¹⁸

When a university has reason to believe that a student-athlete is ineligible, that student-athlete is withheld from competition until the eligibility issue is resolved.¹¹⁹ Generally that means a student-athlete's violation is reported to the reinstatement staff and the student-athlete fulfills the reinstatement condition thereafter imposed.¹²⁰ Student-athletes can lose all or a substantial part of their competition opportunities by virtue of the violations they commit. They also may refrain from conduct because it would be a violation, thereby losing the opportunities they forewent in order to preserve their eligibility. Nonetheless, student-athletes rarely seek court redress to reverse a decision imposing a period of ineligibility or to enjoin the NCAA from enforcing a bylaw against them.

Like other potential litigants, student-athletes may be deterred from suing by all the factors that constrain litigation generally, including lack of resources to pay for a lawyer.¹²¹

¹¹⁷ Professional sports are organized under the prevailing North American league or association commissioner models. In the United States they are regulated under the federal labor laws. Resort to arbitration to resolve disputes is part of the collective bargaining agreement. See Mitten, Davis, Smith, Duru, *Sports Law and Regulation*, at 386-89, 553-70 (3d ed. 2013).

¹¹⁸ The dormant commerce clause of the Constitution of the United States limits state legislative action that has extraterritorial effect or impact on interstate commerce. NCAA Processes, *supra* note 21, notes 54, 60 to 62, and accompanying text. The Supreme Court of the United States is an overarching authority over states, but only regarding federal questions, not matters reserved to the states to decide. For an illustration of judicial deference in international competition, see *Reel v. Holder*, 3 All ER 321, 1 WLR 1226 (Court of Appeal, Civil Division 1981).

¹¹⁹ To do so is a clear violation of a member university's core obligations of NCAA membership.

¹²⁰ NCAA Bylaw 14.10.1. In some cases, it means that a university obtained a bylaw interpretation that avoids a finding of violation. For a description of the NCAA interpretation process, see note 65 *supra*. In other cases it may mean that a university obtained a waiver from the operation of a bylaw. NCAA Processes, *supra* note 21. The Reinstatement Committee also hears appeals of staff denials of waivers from the operation of a guideline condition. Except in unusual circumstances, these appeals are handled on a written record. Reinstatement Policies and Procedures, *supra* note 7, at 8.

¹²¹ Free or reduced cost legal services would be an NCAA violation if litigation were initiated by a student-athlete. NCAA Bylaws 12.1.2.1.6; 16.11.2. Expenses, including lawyer fees, may be provided for conference or NCAA proceedings. NCAA Bylaws 14.10.2.1, 16.3.2.

Substantial withholding or eligibility conditions are imposed because of serious violations committed purposefully. In these cases, student-athletes might well conclude that they cannot prevail in litigation.¹²² Student-athletes also may have too little time remaining on their competition eligibility clock to warrant a court challenge. Finally, they may be reluctant to be adversaries of their university.¹²³

When student-athletes go to court, they rarely prevail. But many of these victories come on appeal.¹²⁴ Between 1973 and 2014 student-athletes sued the NCAA 45 times,¹²⁵ resulting in 81 trial and appellate decisions.¹²⁶ Trial judges issued injunctions in 18 cases. All but a couple

¹²² See NCAA Bylaw 14.11.3. For the showing they must make, see text accompanying notes 131 to 145 *infra*.

¹²³ When a university fails to file a readmission petition, a student-athlete's main adversary is the university. This is clearest when a university's reasons are grounded in its own interests as, for example, when it has others on a team who can compete or because a coach may not want to deal with uncertainty while a reinstatement process plays out. Potuto, NCAA as State Actor Controversy: Much Ado About Nothing, 23 *Marquette L. Rev.* 1520 at note 121. The university also may be dissuaded by the unenviable situation it would be in should the student-athlete obtain a preliminary injunction lifting her ineligibility. NCAA Bylaw 19.3 (the restitution rule) imposes significant consequences on a university if it competes her pursuant to the preliminary injunction should that injunction later be vacated. Even when a university unsuccessfully sought reinstatement, a university also may be a student-athlete's adversary in litigation because the university provided the facts on which the reinstatement decision was based and made the decision that a violation was committed. Even if an institution first sought an interpretation that on the facts there was no violation, it provided the facts on which the interpretation was based. A university may be disinclined to support a student-athlete's efforts to get a court to overturn a reinstatement decision because litigation poses risks overall to NCAA processes and decision making. It is one thing to work within the system to seek a result; it is another thing to involve the judicial process.

¹²⁴ LeRoy, Courts and the Future of "Athletic Labor" in College Sports, unpublished manuscript on file in the office of JR Potuto. See Barrett, When Students Fight the NCAA in Court, They Usually Lose, *Bloomberg Business Week* (July 2, 2014), <http://www.businessweek.com/articles/2014-07-02/when-students-fight-the-ncaa-in-court-they-usually-lose>.

¹²⁵ LeRoy, Courts and the Future of "Athletic Labor" in College Sports, 10 (2014), unpublished manuscript on file in the office of JR Potuto. Of these, 56 percent involved student-athletes challenging their loss of eligibility. *Id.* at xxxxx.

¹²⁶ LeRoy, Courts and the Future of "Athletic Labor" in College Sports, unpublished manuscript on file in the office of JR Potuto. LeRoy's studied 45 state and federal cases (81 federal and state trial and appellate court rulings) in which student-athletes sued the NCAA covering the years 1973 to 2014. *Id.* at 10. He found that student-athletes prevail at trial in 49 percent of the cases they bring. *Id.* Of the 31 cases that went to a first review (typically an appeal), LeRoy reports that the NCAA prevailed 71 percent of the time (22 cases) and split in another five cases. *Id.* at 11-12. Of seven cases that went to a second review, the NCAA prevailed 71.4 percent of the time (five cases) and split in one. *Id.* at 12. Precise numbers of NCAA wins cannot be determined from these data. A few of the student-athlete trial losses were reversed at the appellate level and then may have again been reversed by a state supreme court, and a few other cases involved removals to federal court or remands. *Id.* See also Barrett, When Students Fight the NCAA in Court, They Usually Lose, *Bloomberg Business Week* (July 2, 2014), <http://www.businessweek.com/articles/2014-07-02/when-students-fight-the-ncaa-in-court-they-usually-lose>.

ultimately were vacated.¹²⁷ A trial and subsequent appeals could take one or two years. At that point, many if not most of these student-athlete plaintiffs will have exhausted their college competition eligibility or in any event have left the university. Although team and individual student-athlete records may be vacated,¹²⁸ no appeals decision can undo a win on the field.¹²⁹ In consequence, the NCAA has adopted the restitution rule.¹³⁰ Given the nature of the restitution rule, it understandably generates criticism notwithstanding the sound reasons for its existence.¹³¹

The restitution rule accounts for a situation in which a student-athlete is ineligible under NCAA bylaws, a court has enjoined enforcement of the ineligibility determination during litigation and appeals, and a university then competes the student-athlete. Pursuant to the restitution rule, the Division I Board of Directors may penalize a university if the NCAA ineligibility decision ultimately is upheld by the courts.¹³² The NCAA restitution rule lessens the possibility that a university will compete a student-athlete during the pendency of litigation or that it will fail to vigorously defend in court its fact conclusion that a violation occurred.

A. Contract-Based Claims

The NCAA essentially is a big, multi-subject, multi-party contract.¹³³ NCAA bylaws govern not only the substantive rights and obligations of membership, they designate the committees with authority over particular bylaws and describe the process by which bylaws are adopted, interpreted, revised, waived, or repealed. Courts enforce NCAA bylaws as they do

¹²⁷ Id at 16.

¹²⁸ NCAA Bylaw 19.13 (a), (b), (c).

¹²⁹ It neither can fully right the competitive advantage already gained nor eliminate the thrill of the win, fan memories, and attendant donor contributions. The NCAA restitution rule is intended to avoid universities competing student-athletes while litigation proceeds. NCAA Bylaw 19.13.

¹³⁰ NCAA Bylaw 19.13.

¹³¹ See Restitution Rule, *supra* note 25.

¹³² NCAA Bylaw 19.13. Penalties range from vacation of records to exclusion from post-season championships.

¹³³ NCAA Processes, *supra* note 21, at 262-63.

contract terms – in other words, consistent with party intent,¹³⁴ so long as bylaws comply with federal or generally applicable state law,¹³⁵ including the common law contract principles of fair dealing and good faith.¹³⁶ A university may go to court to challenge a refusal to depart downward from a guideline reinstatement condition or the assignment of a degree of student-athlete culpability greater than the university believes was warranted.¹³⁷ To prevail, a university must show inconsistency in guideline application so random as to be arbitrary, or absence of supporting rationale or factual basis so extreme as to constitute bad faith or targeted bias.¹³⁸

Student-athletes may challenge an NCAA bylaw or its enforcement only as third-party beneficiaries. Their opportunity to challenge a reinstatement decision, therefore, is no greater than that of a member institution.¹³⁹

¹³⁴ RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981).

¹³⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Generally applicable laws arise in a host of areas—among them, non-discrimination statutes, mandatory terms of employment such as minimum wages, maximum interest rates that may be charged in time-purchase agreements, and restraints of trade. If a particular NCAA bylaw operates as a restraint of trade under the federal antitrust laws, then a member institution may sue the NCAA on this basis. *See, e.g., NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

¹³⁶ *See* RESTATEMENT (SECOND) OF CONTRACTS § 205; Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964). For cases involving the NCAA where a court made explicit that review of bylaws was limited to assuring good faith and fair dealing, see *California State Univ., Hayward v. NCAA*, 121 Cal. Rptr. 85, 88-89 (Cal. App. 1975); *Cottrell v. NCAA*, 975 So. 2d. 306, 315 (2007); *Bloom v. NCAA* 93 P.3d 621 (Colo.App.2004). Courts have even upheld contract terms that transgress the tenets of good faith and fair dealing when the result is anticipated in explicit contract language. *E.g., VTR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773 (S.D.N.Y.1969).

¹³⁷ Reinstatement Policies and Procedures, *supra* note 7, at 8. A university also may challenge the authority of the Student-Athlete Reinstatement Committee to adopt a particular guideline applied against it. To prevail, a university must show that no NCAA bylaw or policy granted the authority to the Committee. Even should it prevail, NCAA members need only revise controlling bylaws explicitly to grant the authority. This means that the student-athlete in the instant reinstatement case is eligible but that similar claims in future are foreclosed.

¹³⁸ *E.g., Indiana High School Association v. Reyes*, 694 N.E. 2d 249, 257-58 (Ind. 1997); *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); *Kenneth Philpot and John Mackall, Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 Stanford L.Rev. 903,911; 6 Am. Jur. 2d, Associations and Clubs § 28 (2007). To best effectuate party intent, contract terms are read in light of the contract in its entirety, not by treating particular provisions in a vacuum. *See, e.g., Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); RESTATEMENT (SECOND) OF CONTRACTS § 203. The contract-based standard of review is that generally accorded to private associations. *See, e.g., American Federation of Technical Engineers v. La Jeunesse*, 347 N.E.2d 712, 715 (Ill.1976).

¹³⁹ FARNSWORTH, *supra* note 29, § 10.9.

Jeremy Bloom played football at the University of Colorado and also was an Olympic skier.¹⁴⁰ He sought to endorse products in his role as a skier and still be eligible to play football. He challenged as arbitrary¹⁴¹ NCAA bylaws that permit student-athletes to compete professionally in one sport and still retain NCAA eligibility in other sports¹⁴² but, by contrast, render them ineligible for all NCAA sports if they exploit their athletic reputations by endorsing products related to one sport.¹⁴³

The University of Colorado first pursued an NCAA bylaw interpretation that would have permitted Bloom to endorse products as a skier and still play football. Losing that attempt, Colorado then requested a waiver from the application of the bylaw.¹⁴⁴ Colorado again lost. Bloom then sued, seeking a court order to prohibit the NCAA from enforcing bylaws against him that would render him ineligible if he endorsed products. He lost.¹⁴⁵

Perhaps the best illustration of the steep climb faced by a student-athlete who challenges an adverse reinstatement decision on contract grounds is that of Muhammed Lasege, an international student-athlete.¹⁴⁶ Prior to attending the University of Louisville, Lasege professionalized himself under NCAA bylaws by, among other things, signing a contract to play

¹⁴⁰ Bloom v. NCAA 93 P.3d 621 (Colo.App.2004).

¹⁴¹ Although the Colorado Court of Appeals found none of Bloom's claims persuasive, it discussed ways that NCAA bylaws could be challenged as arbitrary. The court discussed the prohibition on student-athlete product endorsements compared to permitted institutional endorsements where institutions derived revenues (student-athletes wearing logos during competition). Yet another example provided was the grant of waivers from application of a bylaw to some student-athlete but not others when the underlying circumstances are similar. A final example is treating a waiver request from one institution with less care and attention than that given other institutions.

¹⁴² NCAA Bylaw 12.1.3.

¹⁴³ NCAA Bylaw 12.5.2.1; *Bloom*, 93 P.3d 621 at 362. The bylaws also prohibit student-athletes from modeling clothes, hosting a TV show, or pursuing other paid business opportunities available because of athletic ability or reputation. NCAA Bylaw 12.4.1.1;12.5.1.3; and 12.5.2.1. The Bloom factual record was murky regarding whether Bloom's endorsements related to one sport, skiing, and did not implicate his other sport, football. The likelihood that endorsements by a two-sport student-athlete cannot be neatly cubby-holed as related to one of the sports is a prime reason why the NCAA does not try.

¹⁴⁴ *Bloom*, 93 P.3d 621.

¹⁴⁵ The court concluded that the "various shades of gray" in the wallpaper of amateurism bylaws did not constitute arbitrary treatment. *Id.*

¹⁴⁶ NCAA v. Lasege, 53 S.W.3d 77 (Ky.2001). For a case involving a high school association reached the same result, see *Indiana High School Athletic Ass'n v. Reyes* 694 N.E. 2d 249 (1997).

professional basketball. When Louisville found out, it declared Lasege ineligible and sought reinstatement of his eligibility, without success. Pursuant to reinstatement guidelines, Lasege was permanently ineligible.¹⁴⁷ Lasege then sued. The trial judge found “overwhelming and mitigating circumstances” in Lasege’s favor, including a professional contract possibly unenforceable due to coercion in obtaining it, and Lasege’s “economic and cultural disadvantages [and] complete ignorance” of NCAA bylaws.¹⁴⁸ The Kentucky Supreme Court nonetheless reversed the trial judge, upholding the reinstatement decision that Lasege was permanently ineligible.

A rare example of a student-athlete who prevailed on a contract challenge is Andrew Oliver, a baseball pitcher at Oklahoma State University. Oliver was drafted by the Minnesota Twins after his third year at Oklahoma State. He was declared ineligible for intercollegiate competition because his lawyer was present during contract discussions between him and Twins management, conduct that the NCAA treated as prohibited agent involvement.¹⁴⁹ The trial judge held that it violated Ohio public policy to prevent a student-athlete from obtaining a lawyer’s help in contract negotiations.¹⁵⁰ It seems doubtful that the trial judge would have been similarly impelled to find a violation of public policy had access to a lawyer not been at issue. For that reason alone, the decision likely has limited persuasive value.¹⁵¹ In addition, the decision was

¹⁴⁷ Reinstatement Guidelines, *supra* note 13, at 5.

¹⁴⁸ NCAA v. Lasege, 53 S.W.3d 77, 81-82 (Ky.2001).

¹⁴⁹ NCAA amateurism bylaws permit lawyers to represent student-athletes but not to act as agents for them. NCAA Bylaw 12.3.2.

¹⁵⁰ *Oliver*, 155 Ohio Misc.2d 17, 920 N.E.2d 203 Ohio Com.Pl. 2009). The judge also stated his concern with NCAA bylaws that permit student-athletes to hire lawyers but then “attempt to control what that lawyer does”

Id.

¹⁵¹ The NCAA continues to enforce the NCAA agent bylaw as it applies to lawyers. A 2014 case involved a lawyer who attended contract negotiations between a student-athlete at the University of Oregon and the Philadelphia Phillies. The student-athlete was charged 20 percent of competitions in the 2014 season. The Philadelphia Phillies reported the lawyer’s presence to the NCAA. The Major League Baseball Players Association (MLBPA) is investigating whether the Phillies action creates an issue for the MLBPA. Heitner, Is The NCAA Improperly Suspending Student-Athletes by Relying on the “No-Agent Rule,” *Forbes* (February 27, 2014),

not appealed. There is no knowing whether it would have been upheld on appeal, and the data discussed earlier suggest that it would not have been.

Jeremy Bloom, Muhammed Lasege, and Andrew Oliver made contract law claims against the operation of NCAA eligibility bylaws. Student-athletes sometimes base their challenges in other sources of law. Here too they face a steep climb.

B. Antitrust Claims

The NCAA is not per se exempt from the coverage of generally applicable state statutes,¹⁵² state common law tort claims, and federal statutes,¹⁵³ including the antitrust laws. To date, none have proved fertile ground for challenges to NCAA bylaws rendering student-athletes ineligible to compete.¹⁵⁴ Potentially the most available ground for challenge, in scope of coverage and relevance to NCAA operations, is the antitrust laws. The antitrust laws prohibit monopolies¹⁵⁵ and unreasonable restraints of trade by entities with sufficient market share when

<http://www.forbes.com/sites/darrenheitner/2014/02/26/is-the-ncaa-improperly-suspending-student-athletes-by-relying-on-the-no-agent-rule>.

¹⁵² State statutes that target the NCAA are a different story. *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993). See *NCAA Processes*, supra note 7.

¹⁵³ In *Cureton v. National Collegiate Athletic Association*, African-American prospective student-athletes sued under Title VI of the Civil Rights Act of 1964, claiming a disparate impact effect in the inclusion of a minimum standardized test score that prospective student-athletes had to meet for initial eligibility. 198 F.3d 107 (3d Cir. 1999); 42 U.S.C. § 2000d *et seq.* A predicate to coverage under Title VI is that a program receives federal funds. The NCAA was exempt from the coverage of Title VI, not because per se the NCAA is exempt from federal statutes but because the NCAA does not receive federal funds. 198 F.3d 107 (3d Cir. 1999).

¹⁵⁴ A 2013 class action lawsuit Sam Keller, a former student-athlete, claimed that the NCAA violated his state right of publicity. Third Consolidated Amended Class Action Complaint at 2, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:09cv01967, 2013 WL 3772677 (N.D. Cal. July 18, 2013). Keller challenged a college football videogame in which avatars of actual players were used. The NCAA licensed its name and likeness for use in the game. The NCAA settled with the Keller plaintiffs for \$20 million. See Marot, *NCAA Reaches \$20M Settlement in Keller's Video-Games Suit*, FoxSports.com (June 10, 2014), <http://msn.foxsports.com/arizona/story/ncaa-reaches-20m-settlement-in-keller-s-video-games-suit-061014>. It also ceased licensing its name and logo for use in the videogame. See Rovell, *EA Sports Settles With Ex-Players*, ESPN.com (September 26, 2013)

http://espn.go.com/college-football/story/_/id/9728042/ea-sports-stop-producing-college-football-game.

¹⁵⁵ Sherman Anti-Trust Act, 15 U.S.C.A. § 2.

they act in concert.¹⁵⁶ The antitrust question for group entities such as the NCAA is whether the procompetitive effects of group conduct predominate over the anticompetitive effects.¹⁵⁷ In practice, courts have treated NCAA eligibility rules and enforcement policies as virtually per se legal under the antitrust laws.¹⁵⁸

Renee Smith challenged as an unreasonable restraint of trade¹⁵⁹ NCAA bylaws that, at the time of her lawsuit, permitted a student-athlete who graduated without exhausting competition eligibility to compete as a graduate student only at the university where she competed as an

¹⁵⁶ Sherman Anti-Trust Act, 15 U.S.C.A. § 1. *See* Washington v. NFL Ventures, 880 F. Supp.2d 1004 (D. Minn. 2012) (holding that former NFL players failed to state antitrust claim in allegation that the NFL monopolized the market in game footage).

¹⁵⁷ American Needle, Inc. v. National Football League, 560 U.S. 183 (2010). Although most claimed antitrust violations are evaluated under a rule of reason approach, the Supreme Court has found some conduct – price fixing between competitors, for example – as so anticompetitive as to be a per se antitrust violation. *Id.* Athletic competition requires some level of cooperation between competitors. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 S.Ct. 2948, 2961 (1984). As a result, the Supreme Court has held that conduct that in other contexts would be treated as a per se violation should be evaluated under a rule of reason approach regarding the NCAA. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 S.Ct. 2948, 2961 (1984).

¹⁵⁸ *E.g.*, Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992) (NCAA bylaws that prohibit hiring agent or declaring for professional draft do not violate antitrust laws). A 2013 antitrust challenge against the NCAA claims an antitrust violation arising out of NCAA use of student-athlete names and likenesses and NCAA prohibition on student-athlete opportunity to exploit their names and likenesses. *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, Third Consolidated Amended Class Action Complaint (July 18, 2013). The plaintiffs do not seek reinstatement of eligibility or a prohibition on bylaws that would render them ineligible were they to exploit their names and likenesses. *Id.* Many of the student-athlete antitrust court challenges are directed to financial aid limits. Two cases were filed in 2014. Alston v. NCAA challenges a scholarship cap that fails to cover full cost of attendance. Shawne Alston suing NCAA, others, ESPN.com, (March 6, 2014), http://espn.go.com/college-football/story/_/id/10558893/ncaa-conferences-sued-scholarship-value. Jenkins v. NCAA challenges any scholarship limit, even full cost of attendance. Dennie, Jenkins v. NCAA: Another Antitrust Lawsuit Challenging the Athletic Scholarship, Barlow, Barsek, & Simon, LLP, Barlow, Garsek & Simon, LLP (March 18, 2014), <http://www.bgsfirm.com/college-sports-law-blog/jenkins-v-ncaa-another-antitrust-lawsuit-challenging-the-athletic-scholarship>. A 2006 antitrust challenge to scholarships capped at tuition, room and board, and books ended in a 2008 settlement by which class members had access to educational funds and an existing NCAA fund was expanded to provide more funds for current student-athletes. White v. NCAA, Civil Case No. 06–999, Docket No. 72, slip op. (C.D.Cal. Sept. 20, 2006); Solomon, NCAA's Latest Cost of Attendance Debate Offers Questions, No Answers, CBSSports.com (May 7, 2014). *See also*, Agnew v. NCAA, 683 F.3d 328, 340-46 (7th Cir.2012) (NCAA bylaws that limit scholarship to costs of education do not violate antitrust laws; bylaws that promote amateurism and most if not all eligibility bylaws are “presumptively procompetitive”); Rock v. NCAA, 928 F. Supp. 1010 (S.D.Ind.2013) (NCAA bylaws that cap the number of scholarships, prohibit multi-year scholarships, and, in Division III, provide no athletic scholarships do not violate antitrust laws); *In Re* NCAA IA Walkon Football Players Litigation, 398 F.Supp. 2d 1144 (W.D.Wash.2005) (NCAA bylaws that cap the number of scholarships do not violate antitrust laws); McCormack v. NCAA, 845 F.2d 1338, 1343-45 (5th Cir.1988) (NCAA bylaws that limit scholarships do not violate antitrust laws).

¹⁵⁹ Sherman Act, 15 U.S.C. §§ 1, 2. Smith also raised a state contract claim and a claim of gender discrimination under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681. Before bringing her lawsuit, Smith, through her university, first sought a waiver to allow her to compete at Hofstra and Pittsburgh. The waiver was denied.

undergraduate.¹⁶⁰ The Third Circuit first found that the antitrust laws were inapplicable to NCAA eligibility bylaws because the bylaws regulate no commercial activity.¹⁶¹ The court further found that, even if the antitrust laws applied, limiting student-athlete postgraduate competition opportunities was not “plainly anticompetitive.”¹⁶²

V. THE NCAA DRUG TESTING PROGRAM AND APPEALS PROCESS

Student-athlete violations include the ingestion of banned substances.¹⁶³ Drug violations are handled by the Drug-Education and Drug-Testing Subcommittee (Drug Test Subcommittee) of CMAS.¹⁶⁴ A student-athlete is ineligible to compete from the notice of a positive test for a banned substance¹⁶⁵ unless and until an appeal is resolved in his favor¹⁶⁶ or he serves out the period of ineligibility. In the latter case, a student-athlete is not automatically restored to eligibility. For that to happen, he must first both be retested for the presence of a banned

¹⁶⁰ *Smith v. NCAA*, 139 F.3d 180 (3d Cir.1998). NCAA bylaws now permit what Smith sought to do. NCAA Bylaws 14.1.8.1; 14.2; 14.2.1.

¹⁶¹ *Smith v. NCAA*, 139 F.3d 180, 186-87 (3d Cir 1998), vacated on other grounds, 525 U.S. 459 (1999) (citing *NCAA v. Bd of Regents*, 468 U.S. 101 (1978)). The Third Circuit distinguished the scope of the antitrust laws, which is limited to commercial and business activities, to remedies that may be provided once injury is found. *Smith v. NCAA*, 139 F.3d 180, 186 (*comparing* *Reitver v. Sonotone Corp.*, 442 U.S. 330, 338-39, 99 S. Ct. 2326, 2330-31 (1979) *with* *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n. 7, 79 S. Ct. 705, 710 n. 7 (1959)). See also *Marucci Sports, LLC v. NCAA*, 751 F.3d368, 374 (5th Cir. 2014).

¹⁶² *Smith v. NCAA* at 186.

¹⁶³ NCAA Bylaw 10.2.

¹⁶⁴ NCAA Bylaw 21.2.2. 2013-14 NCAA Drug-Testing Program Appeals Process (“Appeals Process”) available at http://www.ncaa.org/wps/myportal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/legislation+and+governance/eligibility+and+recruiting/drug+testing/ncaa+drug+testing+appeals+process (hereafter Drug Appeals). CMAS is a 20-member committee comprised of faculty, medical professionals, a lawyer, and a voting member from the national SAAC. The full CMAS includes two athletic trainers, an active coach, a representative from the Football Rules Committee, individuals experienced both in exercise physiology research and sports medicine research, at least five members with expertise in drug testing, and a high school representative. See http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=SAFEGUARDS. CMAS also adopts drug testing policies and procedures, subject to NCAA Executive Committee has final approval for these procedures and ultimate authority for implementation of the NCAA drug testing program. NCAA Const. art.2.1. [check]

¹⁶⁵ These include stimulants, anabolic agents, alcohol and beta blockers, diuretics and masking agents, and street drugs. NCAA Bylaw 31.2.3.4; NCAA Drug Testing Book, *supra* note 19, at 2.

¹⁶⁶ NCAA Bylaw 18.4.1.5. Drug Testing Book, *supra* note 19, Chapter IV, art.8.2.4 at 10. Full procedures are available at www.ncaa.org/drugtesting.

substance and test negative and then be restored to eligibility by the Student-Athlete Reinstatement Committee.¹⁶⁷

Student-athletes may participate in intercollegiate athletic competition only if they agree to submit to random, suspicionless drug testing.¹⁶⁸ The presumptive penalty for a first-time positive test for a banned substance is a year's withholding from competition as well as loss of one year's competition eligibility.¹⁶⁹ Universities provide drug education to student-athletes that includes information on banned drugs and the eligibility consequences of ingesting them.¹⁷⁰ A presumptive penalty is avoided completely if a student-athlete ingested a banned substance provided by a third party and neither knew nor reasonably could have known it was a banned substance or if drug collection or testing procedures were not followed and this failure materially affected the integrity of a sample.¹⁷¹ The presumptive penalty may be reduced to half a year if a student-athlete can show significant mitigation, such as the inadequacy of a university's drug

¹⁶⁷ Drug Testing Book, supra note 19, Art. 9 at 12.

¹⁶⁸ NCAA Const.Art. 3.2.4.7; Bylaw 14.1.4. Testing occurs at NCAA championships and during the off season. Student-athletes in Division I also consent to testing at bowl games. The NCAA's list of banned substances includes performance-enhancing drugs such as anabolic steroids, stimulants (e.g., cocaine and amphetamines), and certain illegal recreational drugs such as marijuana and heroin. NCAA 2012-2013 Drug-Testing Program, Chapters I and IV, art.1 at 2,4, available at [http://www.ncaa.org/wps/myportal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Legislation and Governance/Eligibility and Recruiting/Drug Testing/drug_testing.html](http://www.ncaa.org/wps/myportal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Legislation%20and%20Governance/Eligibility%20and%20Recruiting/Drug%20Testing/drug_testing.html). A student-athlete who are ineligible due to a positive drug test are subject to NCAA retesting at any time during the period of ineligibility. Drug Testing Book, supra note 19, at 12.

¹⁶⁹ NCAA Bylaw 18.4.1.5.1. Drug Appeals, supra note 163, ¶¶5(a),(b), (c), 10. After serving the required suspension, a student-athlete also must test negative for any banned drugs and be cleared by NCAA Student-Athlete Reinstatement for his or her eligibility to compete in intercollegiate athletics to be restored. Drug Testing Book, supra note 19, Chapter IV, art. 9.0 at 12.

¹⁷⁰ Drug Testing Book, supra note 19, at 3. Student-athletes also are warned both that they should seek advice before ingesting any nutritional supplement and that they take such a substance at their own risk. *Id.* NCAA universities also have drug testing programs. Drug Testing Book, supra note 19, Chapter 5, at 13. In 2009 and 2011 the NCAA research staff compiled information on institutional programs. NCAA Research, Drug Education / Drug Testing Survey: Preliminary Results (November 2011), <http://www.ncaa.org/sites/default/files/15.%20Institutional%20Drug%20Education%20and%20Testing%20Survey%202011.pdf>; NCAA 2009 Survey: Member Institution's Drug-Education and Drug-Testing Programs, <http://www.ncaa.org/sites/default/files/16.%20Institutional%20DrugEducation%20and%20TestingSurvey2009.pdf>.

¹⁷¹ Drug Appeals, supra note 163, ¶5(a), (b). When a substance is provided by an athletic administrator, a student-athlete may show that he asked questions before ingesting a substance and neither knew nor reasonably could have known that he was given bad information.

education program or that the ingestion of a banned substance was due to circumstances out of a student-athlete's control.¹⁷²

Like reinstatement appeals, drug test appeals are conducted by telephone. By contrast to student-athlete reinstatement cases, a student-athlete may insist that his university appeal a positive drug test.¹⁷³ Like student-athlete reinstatement cases, student-athletes must participate in an appeal and may have a lawyer to assist them.¹⁷⁴ Both the student-athlete and university have an unrestricted right to present evidence and witness testimony and to ask questions of those who collected the sample or tested the substance.¹⁷⁵ The Drug Test Subcommittee deliberates and decides the appeal immediately after the appeal is concluded.¹⁷⁶

Drug Test Subcommittee decisions are final. By contrast to reinstatement appeals, Drug Test Subcommittee decisions neither are posted on the NCAA website nor available as precedent to student-athletes who appeal a positive drug test.

Although the Supreme Court of the United States has not evaluated the adequacy of the NCAA drug testing program, there is little reason to suppose that it would fail constitutional muster. The Court has described as “minimally intrusive” drug tests of grade and high school student-athletes pursuant to protocols that mirror those of the NCAA.¹⁷⁷ In *Hill v NCAA*,¹⁷⁸ the

¹⁷² Drug Appeals, supra note 163, ¶5(c). Mitigating factors neither include evidence of a student-athlete's good character or remorse nor the amount of a banned substance and whether it enhanced competitive performance. *Id.*

¹⁷³ Drug-Testing Book, supra note 19, 8.2.4.1, at 11.

¹⁷⁴ In appeals from positive drug tests and also from staff reinstatement decisions, a university or other individual may pay a lawyer to represent a student-athlete. See note 121 supra.

¹⁷⁵ Drug Appeals, supra note 163, ¶¶5, 8.

¹⁷⁶ Drug Appeals, supra note 163, ¶9.

¹⁷⁷ *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (xxx); and held such a program constitutional at least when the only consequence of a positive test result is participation ineligibility. The Court also upheld random urinalysis of students competing in team academics or participating in other extracurricular activities such as band and choir. The Court also has described as constitutional other programs employing drug testing protocols similar to that used by the NCAA. See, e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct.1384 (1989) (random urinalysis of treasury department employees on promotion or when carrying guns); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (random urinalysis of railroad employees). See *Board of Education v. Earls*, 536 U.S. 822, 824, 122 S.Ct. 2559, 2567-69 (2002).

California Supreme Court considered whether student-athlete privacy rights under the California Constitution were violated by NCAA random, suspicionless drug testing. The court found that a student-athlete's privacy interest is outweighed by the NCAA's legitimate interests in safeguarding the integrity of intercollegiate athletic competition and in protecting the health and safety of student-athletes.¹⁷⁹

VI. DUE PROCESS, STUDENT-ATHLETES, AND NCAA DECISION MAKING

Student-athletes cannot successfully raise a 14th amendment due process challenge to NCAA reinstatement or drug appeal processes both because the NCAA is not a state actor¹⁸⁰ and because student-athletes have no constitutional reliance interest in the opportunity to compete in a college sport.¹⁸¹ Even were a due process claim available, moreover, NCAA processes likely are adequate, or could be made so without fundamental changes.¹⁸²

Procedural due process means that individuals with constitutionally cognizable liberty or property interests¹⁸³ that may be abridged by official action must have notice of that action and a reasonable opportunity to show an unbiased fact finder that the action should not be enforced

¹⁷⁸ 865 P.2d 633 (Cal.1994). See also *Brennan v. Bd. of Trustees for University of Louisiana Systems*, 691 So.2d 324 (La. App. 1997) (University of Southwestern Louisiana's suspension of student-athlete from participation in its football player for violating NCAA drug testing program does not violate his privacy rights under Louisiana constitution).

¹⁷⁹ 865 P.2d at 658. The court described its role in review as treating NCAA policies and objectives "not with hostility or intense skepticism, but with a 'respectful presumption of validity.'" *Id.* at 660.

¹⁸⁰ The Constitution of the United States applies to state actors, not private ones. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *The Civil Rights Cases*, 109 U.S. 3 (1883). The NCAA is not a state actor. *Tarkanian v. NCAA*, 488 U.S. 179, 196-97, 109 S. Ct. 454, 464-65 (1988).

¹⁸¹ Student-athletes have no judicially cognizable right to compete. See, e.g., *Graham v. NCAA*, 804 F.2d 953, 955 (6th Cir. 1986); *Colo. Seminary v. NCAA*, 570 F.2d 320, 321 (10th Cir. 1978); *Bloom v. NCAA*, 93 P.3d at 624 (xxxxx); *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005) (stating that "the overwhelming majority of jurisdictions" find no due process constitutional right of students to participate in college athletics competition); *Hart v. NCAA*, 550 S.E.2d 79, 86 (W. Va. 2001). Like student-athletes and NCAA competition, amateur athletes have no constitutional right to compete in the Olympics. *DeFrantz v. United States Olympic Comm*, 492 F. Supp. 1181 (D.D.C. 1980). There also is no fundamental right to practice a profession. E.g., *Dittman v. California*, 191 F.3d 1020, 1031 n. 5 (9th Cir.1999); *Amunrud v. Board of Appeals*, 158 Wash.2d 208, 220, 143 P.3d 571 (2006), cert.den., 549 U.S. 1282 (2007). *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005); *Hart v. NCAA*, 550 S.E.2d 79, 86 (W. Va. 2001).

¹⁸² NCAA As State Actor Controversy: Much Ado about Nothing, 23 *Marquette Sports Law Review* 1, 74 n.64 (2012) n. 64, to 76XXXXXX?.

¹⁸³ E.g., *Board of Curators v. Horowitz*, 435 U.S. 78 (1978).

against them.¹⁸⁴ The constitutional adequacy of procedure varies by context according to how high the value placed on the particular substantive interest to be abridged.¹⁸⁵

A. The Process Provided

Student-athletes are informed of NCAA bylaws that affect them as well as the potential consequences should they commit violations. As a condition of their competition eligibility, they annually agree in writing to abide by NCAA bylaws and to report positive drug test results.¹⁸⁶ Before signing, they are directed to review a summary of pertinent NCAA bylaws (bylaws specifically referenced cover ethical conduct¹⁸⁷ amateurism,¹⁸⁸ academic eligibility,¹⁸⁹ drug use,¹⁹⁰ and extra benefits¹⁹¹). Student-athletes also regularly receive rules education on those bylaws.¹⁹²

In both reinstatement and drug appeals, committee members are appointed by an NCAA cabinet comprised of faculty and staff from member universities and conferences, not NCAA administrators or staff.¹⁹³ Reinstatement Committee and CMAS members serve two consecutive

¹⁸⁴ *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975).

¹⁸⁵ See, e.g., *Mathews v. Elridge*, 424 U.S. 319 (1976); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

¹⁸⁶ In what is called the student-athlete statement, student-athletes also agree to report violations they may have committed as well as violations of others of which they have knowledge. NCAA Const. Art. 3.2.4.6; NCAA Bylaws 14.1.3.1, 30.12; NCAA Form 12-3a, NCAA Form 08-31, Student-Athlete Statement, NCAA Division 1. See Oregon L.Rev. ---, n.173.

¹⁸⁷ NCAA Bylaw Chapter 10.

¹⁸⁸ NCAA Bylaw Chapter 12.

¹⁸⁹ NCAA Bylaw Chapter 14.

¹⁹⁰ NCAA Bylaws 18.4 and 31.2.3.

¹⁹¹ NCAA Bylaw 16.02.3.

¹⁹² The Student-Athlete Reinstatement Committee publishes a calendar which lists by month when instruction on specified bylaws should occur. NCAA Student-Athlete Reinstatement Calendar of Reminders with Suggested Items to Review. A mitigating factor is the failure of a university to provide rules instruction on a bylaw that a student-athlete failed to follow. 2013-14 NCAA Drug Testing Program Appeals process, 5, C, I, at 3, on file in office of JR Potuto. Student-athletes also receive specific education on what constitutes a banned drug, the NCAA drug-testing program and their responsibilities pursuant to it. See note 79 *supra* and accompanying text.

¹⁹³ The DI Administration Cabinet has 21-members. It makes appointments to most NCAA committees. It operates independently of NCAA senior administrative staff. For a list of current members, see http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=ISAAC.

three-year terms;¹⁹⁴ on occasion they serve longer to assure continuity of experience.¹⁹⁵ In both reinstatement and drug test appeals, committee members hear no cases involving institutions from the same athletic conference as their institution.¹⁹⁶ In both reinstatement and drug test appeals committee members include faculty and others not embedded in the competitive athletic environment.¹⁹⁷ In both reinstatement and drug test appeals, the appeals committee has no ex parte communications with NCAA staff.¹⁹⁸ In drug test appeals, moreover, the names of both the student-athlete and university bringing an appeal are withheld from the drug test subcommittee.¹⁹⁹

In reinstatement cases, the decision that violations were made and the facts supporting the decision both come from a student-athlete's own university, not NCAA staff or an NCAA committee. In almost all cases a university's interests are consonant with its student-athlete, and a university fact finder is active to locate facts that show either that no violation was committed or that mitigation is warranted.²⁰⁰ A student-athlete's statement is included in a university's

¹⁹⁴ NCAA Division I Student-Athlete Reinstatement Committee, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1REINSTATE. Members rarely fail to serve two full terms. There is an NCAA process for filling vacancies that unexpectedly arise. There are divisional and other demographic criteria for committee service. The most typical reasons that a committee member resigns from a committee, or declines a second term, are inability to handle the heavy work load or movement to a position at a university in a different conference. The author knows of no instance in which a member of the Reinstatement Committee or, for that matter, any NCAA committee, failed to complete a term because of pressure to resign related to committee decisions. During the author's service on the Committee on Infractions, several resignations occurred because of the heavy time demands of the Committee and on one member resigned because of appointment to another NCAA committee with heavy time demands.

¹⁹⁵ For example, in 2014 the term of David Wells was extended by one year by the Administration Cabinet. See February 1, 2014 Memorandum from the Division I Student-Athlete Reinstatement Committee to the Division I Administration Cabinet, Meeting Materials of Division I Administration Cabinet at 143 (requesting one-year extension in term of David Wells because of loss of two of five committee members and the need "to ensure continuity of issue review and stabilization of the committee . . . in a time of change for Division I governance"), <http://www.ncaa.org/sites/default/files/DI%20Admin.%20Cabinet%20materials%20%202.14.pdf>.

¹⁹⁶ See Reinstatement Policies and Procedures, supra note 7, at 14; Drug Appeals, supra note 163, at 1.

¹⁹⁷ Current members include a faculty member and a physician as well as two head trainers and a director of sports medicine. Drug Appeals, supra note 163, at 1.

¹⁹⁸ Reinstatement Policies and Procedures, supra note 7, at 12.

¹⁹⁹ Drug Appeals, supra note 163, ¶3.

²⁰⁰ See *Bloom* at (through Colorado Bloom "with the full assistance and support of Colorado" Bloom "effectively submitted three petitions to the NCAA" and thereby was able "to fully present" his case). A university's incentive

reinstatement request.²⁰¹ In drug appeals a positive test results from formal testing protocols and procedures promulgated by the National Center for Drug Free Sport.²⁰² A student-athlete may insist that a university appeal a positive test.

In both reinstatement and drug test appeals, the range of consequences that may be imposed are cabined in advance by articulated, published guidelines. In both reinstatement and drug test appeals student-athletes participate in the appeal and may be assisted by a lawyer.²⁰³ Student-athletes in drug test appeals have a full right to present information and also to question those with information. In both reinstatement and drug test appeals, proceedings are recorded. In both reinstatement and drug test appeals student-athletes are informed of the decision and rationale.²⁰⁴ Student-athlete reinstatement decisions are posted on the NCAA website and available as precedent. This is not the case in drug appeals. Instead, the NCAA treats each drug appeal as separate and independent from any other. The appeal opportunity is to provide evidence of mitigation particular to a student-athlete's own case.²⁰⁵

B. The Process Due If the NCAA Were Subject to Constitutional Due Process Strictures

NCAA bylaws involve a large and complex subject matter that extends well past competition rules and amateurism bylaws to include a host of academic eligibility bylaws, financial aid requirements, play/practice requirements, student-athlete preferential treatment, and

to fully consider whether a violation was committed is heightened because a student-athlete's violation also is one for which it independently may be sanctioned. For a discussion of mitigation in the Florida State academic fraud case, see notes 226 to 231 *infra* and accompanying text.

²⁰¹

²⁰² NCAA Const. Art. 3.2.4.7; Drug-Testing Book, *supra* note 19, at 5 to 12. The procedures govern specimen collection, chain of custody, certification of collectors, selection of athletes for testing, notification of selection, laboratory processes, and notification of results.

²⁰³ Lawyer fees may be covered by a student-athlete's university. See note 121 *supra*.

²⁰⁴ In drug testing procedures a student-athlete is notified of a right to appeal, has the right to direct the institution to appeal. Drug Testing Book, *supra* note 19, at 11, and has a full right to participate in the appeal. In reinstatement appeals a student-athlete is required to participate in the appeal.

²⁰⁵ July 1, 2014 email from Mary Wilfert, Associate Director, NCAA Sports Science Institute, to Josephine (Jo) R. Potuto, on file in office of JR Potuto. The failure to provide case information is not optimum process. See text accompanying note 225 *infra*.

extra benefits. The expertise needed goes beyond the particular substantive rules to familiarity with campus processes and even to faculty prerogatives.²⁰⁶

Perhaps the most direct parallel to student-athlete eligibility challenges on due process grounds are cases that deal with the adequacy of process afforded students faced with consequences to their student status. In these contexts, a formal hearing is not required. Instead, "an informal give and take" suffices where students have an opportunity to tell their story.²⁰⁷ University committees that hear student appeals are comprised of faculty and administrators at a university.²⁰⁸ Students rarely succeed in challenges to university decisions regarding admissions, continued matriculation, academic standards and academic dismissals, or to challenges to student-discipline decisions.²⁰⁹ Challenges to a grade or grading practice succeed only on

²⁰⁶ A Drug Test Subcommittee appeal, moreover, is heard by committee members with a breadth of expertise and background, offering deliberations from a variety of perspectives. Drug Appeals, *supra* note 163, ¶1.

²⁰⁷ *Goss v. Lopez*, 419 U.S. 546, 95 S.Ct. 729 (1975). The reported cases are those involving K-12 students, where courts have found that students have a right to a public education.

²⁰⁸ In other contexts, a hearing body also may be comprised of members of an association and still constitute the process that is due. It also occurs in trade associations. *See, e.g.,* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CAL. L. REV. 313 (2006). In prison disciplinary proceedings, the hearing body may be comprised of prison officials, even wardens. *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974). But see *Hooters of America, Inc. v. Phillips*, 173 F. 3d 933 (4th Cir.1999). The Hooters Court was concerned that the hearing body to decide employee rights was exclusively within the appointing authority of the employer. In part this describes the NCAA Student-Athlete Reinstatement Committee. Some of the concerns raised by the Hooters Court, however, seem absent from the NCAA process. As the text describes, there are important differences between the NCAA process (factfinding by university; previously articulated guidelines, etc.) that distinguish the NCAA reinstatement process. These are additional to the differences in court treatment of cases decided in the educational and employment contexts.

²⁰⁹ *E.g.,* *Board of Curators v. Horowitz*, 435 U.S. 78 (1978); *Harris v. Blake*, 798 F.2d 419 (10th Cir. 1986); *Susan "M" v. New York Law School*, 556 N.E. 2d 1104 (N.Y. 1990); *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Tobias v. University of Texas at Arlington*, 824 S.W.2d 201 (Tex. App.-Ft. Worth 1991); *Davis v. Regis College*, 830 P.2d 1098 (Colo. App. 1991); *Shahrabani v. Nova University*, 779 F. Supp. 599 (S.D. Fla. 1991). What must be shown is infringement on a protected right. The challenge in *Cureton v. NCAA*, for example, was to the disparate impact of rules on African-American prospective student-athletes, not to the substantive merit of the academic or admissions standards adopted. 198 F.3d 107 (3d Cir.1999). *See Grutter v. Bollinger*, 539 U.S. 306, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304; *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411 (2003).

evidence of serious wrongdoing by a faculty member.²¹⁰ Courts also routinely reject student claims based on the quality of the education received.²¹¹

If the NCAA were put to a 14th amendment due process test, the student-athlete drug test appeals process seems clearly constitutional and the student-athlete reinstatement process also seems to pass constitutional muster. One potential issue in student-athlete reinstatement cases is that a student-athlete cannot independently trigger a reinstatement request and has neither a formal right to be heard directly in the initial reinstatement process nor to challenge a university's factual conclusions.²¹² Notwithstanding the formal limits, however, a university must include a student-athlete's statement of what occurred, and why, in a reinstatement petition. In addition, if a student-athlete is sufficiently insistent that a university file a reinstatement request or appeal an adverse staff reinstatement decision, the realities are that a university likely will comply to avoid becoming a clear target should a student-athlete bring suit.

VII. CONCLUDING COMMENTS AND RECOMMENDATIONS FOR CHANGE

The fact that the NCAA student-athlete reinstatement and drug test appeals processes can withstand legal and constitutional challenges by no means ends the story. The member institutions that comprise the NCAA should seek to provide optimum fairness to student-athletes, not settle for what minimally they must do. NCAA processes regularly are criticized for their impact on student-athletes who have no voice in creating the bylaws that affect them²¹³ and, it is

²¹⁰ *Naragon v. Wharton*, 737 F.2d 1403 (1984) (trading grade for sex). See *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992) (grade imposed out of spite).

²¹¹ *E.g.*, *Ross v. Creighton*, 957 F.2d 410 (8th Cir. 1992) (no cause of action for educational malpractice or negligent college admission and contract claim only if specific contract promise and student-athlete can show he was barred from any meaningful education).

²¹² In practice, however, if a student-athlete insists that a university request reinstatement, it likely will do so, and include information a student-athlete believed relevant. See text accompanying notes 216-17 *infra*.

²¹³ The NCAA legislative process includes deadlines for submitting proposals; required rationales for proposals; and publication of proposals to all member institutions. See, e.g., *Publication of Proposed Legislation* at <https://web1.ncaa.org/LSDBi/pdf/propRpt?propRptSubmit=Generate%20POPL&division=1&conventionYear=2012> "Ancillary" associations such as those of coaches and faculty athletics provide perspectives. Each NCAA institution

argued, no alternative to the NCAA if they want to attend college and also compete in varsity athletics.²¹⁴ As discussed previously, trial courts often decide in favor of student-athletes only to be reversed on appeal. This raises substantial enforcement issues should student-athletes compete until appeals are completed. It also gives rise to the restitution rule, propelled by legitimate interests but with negative optics easy to attack.²¹⁵

has a student-athlete advisory committee (SAAC). Each conference has a SAAC comprised of members from campus SAACs. The national SAAC is comprised of representative from each conference SAAC. Student-athletes have a formal role through their conference and national SAACs. See, e.g., Hostick, "SAAC Emphasizes Group's Role As Change Agent," NCAA.org (November 8, 2011). Even though advisory, strong opposition by the national SAAC can be influential in the adoption or rejection of a legislative proposal. In addition, a student-athlete serves as a non-voting member on each of the six NCAA Division I cabinets. NCAA Bylaws 21.7.5.1.1.1; 21.7.5.2.1.1; 21.7.5.3.1.1; 21.7.5.2/1.1; 21.7.5.5.1.1; 21.7.5.6.1.1. Four association-wide committees, including the Olympic Sports Liaison Committee; NCAA Bylaw 21.2.5; and Sportsmanship and Ethical Conduct Committee; NCAA Bylaw 21.2.8; have a student-athlete member from each of the three divisions who collectively share one vote. The other committees are the Minority Opportunities and Interests Committee; NCAA Bylaw 21.2.4; and the Women's Athletics Committee; NCAA Bylaw 21.2.10. As discussed infra, there is one student-athlete on the 20-member Committee on Competitive Safeguards and Medical Safeguards of Sport and also one student-athlete who serves in an advisory capacity to the five-member Student-Athlete Reinstatement Committee. NCAA Bylaw 21.7.7.3. For all these committees, a current list of members can be found at the NCAA website at http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=. The particular committee acronyms (that come after "=" in the site address) are, respectively, MOIC, COMWA, CONDUCT, and LIAISON. Two voting members of the Men's Basketball Issues Committee (16 members); NCAA Bylaw 21.7.5.5.3.1.1; Women's Basketball Issues Committee (16 members); NCAA Bylaw 21.7.5.5.3.2.1; and Football Issues Committee (24 members); NCAA Bylaw 21.7.5.5.3.3.1 are student-athletes. For a list of current members, see http://www.ncaa.org/wps/myportal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/leg. There are no student-athletes on any committee charged with interpreting bylaws or granting waivers from their operation. These include committees with responsibility for rules enforcement and for resolution of eligibility issues. NCAA Bylaws 19.1.1; 21.7.5.1.3.1 to 21.7.5.1.3.2; 21.7.7.2; 23; and 22.1.1. There also are no student-athletes on committees that evaluate transcripts or academic records; NCAA Bylaws 21.6.3 to 21.6.5; or on committees that establish policies for evaluating academic information. For example, the High School Review Committee establishes policies to evaluate the validity of high school curricula; NCAA Bylaw 14.1.2.2; and the Student Records Review Committee establishes policies to evaluate the validity of a prospective student-athlete's academic credentials. NCAA Bylaw 14.1.2.3. The policies of both committees are subject to approval by the Academic Cabinet. NCAA Bylaws 14.1.2.2; 14.1.2.3. Other committees with no student-athlete members are the association-wide Playing Rules Oversight Panel; NCAA Bylaw 21.1.1.2; the Honors Committee, NCAA Bylaw 21.2.3.1; the Research Committee; NCAA Bylaw 21.2.7.1; scholarship committees; NCAA Bylaws 21.2.6; 21.2.9; sports rules committees; NCAA Bylaws 21.3.2 to 21.3.11; and most championship and sports issues committees. NCAA Bylaws 21.7.5.5.3.1 to 21.7.5.5.3.22.

²¹⁴ See, e.g., Restitution Rule, *supra* note 25. This is not entirely accurate. The National Association of Intercollegiate Athletics (NAIA) also regulates intercollegiate athletics competition. Its members generally are part of a state college system. See the NAIA website at <http://naia.cstv.com>. The National Junior College Athletic Association administers athletic competition for student-athletes enrolled in two-year post high-school educational institutions. For information on the governance of junior college athletics, see <http://www.njcaa.org>. The authors understand, and supports, the opportunity for student-athletes to find a college or university that matches both their academic interests and their desire to compete at the highest level possible. It nonetheless is a little troubling to talk about student-athlete college choices only in terms of their athletic opportunities.

²¹⁵ Restitution Rule, *supra* note 25.

For all these reasons, it is in the NCAA's interests to reform the reinstatement process. The question, therefore, is what more the NCAA feasibly might do for student-athletes within the limits of efficient and prompt bylaw enforcement of student-athlete violations.²¹⁶

A. Greater Student-Access in Reinstatement Process

Reinstatement cases lead to student-athletes losing competition opportunities. Yet student-athletes formally may not request reinstatement should their university decline to do so,²¹⁷ challenge a university's rendition of relevant facts, or appeal a reinstatement decision independent of their university.

In the great bulk of student-athlete reinstatement cases the current process not only works well for overall bylaw administration and enforcement, but it also advances student-athlete interests by providing quick resolution. The facts in the great bulk of cases are uncontested by student-athletes. The consequences to them are minimal. They and their university have privity of interest.

The focus of fairness concerns, then, is those cases where student-athletes lose substantial competition opportunities and they contest the facts and conclusions reported by their university. There are strong equity considerations that argue for enhanced access by student-athletes in these situations, even if, as is likely, substantive results may be unaffected.

²¹⁶ In addition to the possible substantive changes to decisions were athletes given a larger voice, reforms also might increase the confidence of athletes, and that of the public, in the fairness of NCAA processes. See authorities cited at note 216 *infra*.

²¹⁷ There are several reasons why a university would decline to process a reinstatement request. First, of course, it might decline if it believes the facts of a violation are clear and the guideline reinstatement condition would cover all remaining time on a student-athlete's clock. It also might decline due to general university or athletics department policies governing the nature of a particular violation, or in the interests of efficiency and reasonable allocation of staff time. A student-athlete's comparatively limited athletics ability, his past non-adherence to team rules, or the fact that incoming prospects adequately can replace him may also influence a university's decision.

Perceptions of fairness are important.²¹⁸ An individual's assessment that a process was fair directly relates to the degree to which there is opportunity to be heard and to make a case. Had the American colonists felt that they were involved in decisions whether and how much they would be taxed, they might not have tossed tea into Boston Harbor and we might now still be singing, "God Save the Queen."

Although true that a university likely will forward a reinstatement petition if a student-athlete insists and include whatever documents and information a student-athlete requests, a university also likely will signal its lack of support for the request. In fact, its obligations of membership mean it needs to include its assessment as to the facts. In the current process, where a university makes the factual conclusions on which the reinstatement staff and committee act, the reinstatement staff and committee are unlikely to give credence to a student-athlete's contrary position.

In outlier situations, moreover, a university involved in a serious infractions case may seek to shift culpability away from itself and onto a student-athlete.²¹⁹ In these situations, a student-athlete's independent access and opportunity to present a position may have substantive import.

One reform, therefore, is for student-athletes facing substantial eligibility consequences to have an independent voice in reinstatement processes. A suggested place to draw the line would be when the reinstatement condition is equivalent to, or more than, withholding of ½ a season of competition and either a student-athlete contests the factual conclusions reached by a

²¹⁸ See, e.g., Tom R. Tyler, *Why People Obey the Law* 273-74, 278 (2d ed. 2006); Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 *Pol. Behav.* 119, 135 (2003); Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *Law & Soc'y Rev.* 103, 132 (1988); Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 *Law & Soc'y Rev.* 809, 827 (1994).

²¹⁹ At any rate, a student-athlete may accuse a university of doing so.

university or a university declines to seek reinstatement. The situations in which a student-athlete contests the facts and conclusions found by a university likely are quite rare. Rare or not, however, a student-athlete should have the right to an independent assessment by the reinstatement committee and staff.

There are difficulties with providing student-athletes an independent voice.²²⁰ The first is one of form. NCAA members are institutions, not individuals. Opening NCAA processes to non-members carries risk to the structure and autonomous decision making of the NCAA and, indeed, any private association. Those risks are not negligible. Nonetheless, student-athletes already have the right to trigger drug test appeal hearings. In addition, for many years coaches and others at risk for findings of serious violations have attended infractions committee hearings.²²¹

A second, and more significant, problem is that giving student-athletes an independent voice in the reinstatement process means that the Student-Athlete Reinstatement Committee and its staff will referee disputes between a student-athlete and a university. There likely will need to be substantial reworking of current roles and modes of operation to accommodate this new role, even if it will be triggered infrequently. Because of the time pressures of reinstatement cases, moreover, fact resolution may need to be done on less than full information. In addition, a university typically will seek reinstatement to eligibility of its student-athletes, and as soon as possible, even though it reaches facts and conclusions adverse to them. The result is that the Student-Athlete Reinstatement Committee and its staff may need to resolve a fact dispute

²²⁰ For a fuller discussion of the difficulties, see NCAA Processes, *supra* 21.

²²¹ At one time, a coach at risk for findings of violations would present his response through his institution, even if his position was adverse to the university's. See *Tarkanian v. NCAA*, 488 U.S. 179, 109 S. Ct. 454 (1988). Subsequent to *Tarkanian*, NCAA infractions processes were changed to permit coach participation. Potuto, NCAA as State Actor Controversy: Much Ado About Nothing, 23 *Marquette L. Rev.* 1520 (2013).

without a true adversarial presentation. Attempting to correct for this latter eventuality raises a third problem.

Level I and II violations committed by a student-athlete result in a hearing before the Committee on Infractions regarding institutional culpability for those same violations. Infractions committee hearings are based on investigation and the bringing of charges by NCAA enforcement staff.²²² Universities and their coaches may contest the enforcement staff's allegations. They also may disagree with each other as to what transpired and whose is the responsibility.²²³ The Committee on Infractions sits as a fact finder.

Should reinstatement cases become adversarial, resolution of time-sensitive reinstatement cases obviously would be delayed. If a student-athlete remains ineligible until the eligibility is resolved, then the longer time for resolution may work injury if the ultimate decision takes longer than the period of non-competition ultimately imposed. Conversely, if a student-athlete may compete until a final decision, then bylaw enforcement will be adversely affected as student-athletes may escape any competition consequences.

Yet a fourth problem is the potential of different fact findings by the Committee on Infractions and Student-Athlete Reinstatement Committee. The need for speed in student-athlete reinstatement cases likely means that those processes might be handled by paper submissions or proceed on a truncated record. The need for speed also means that a reinstatement case will be resolved more quickly than the related infractions case. There may be inconsistent results in the two proceedings because of the fuller exploration available at an infractions hearing or because the additional time to investigate leads to other evidence being uncovered, developed, and presented.

²²² See text accompanying notes 48 to 53 *supra*.

²²³ See generally NCAA Processes, *supra* note 21, at 319 to 322.

Inconsistent results can be ameliorated if the wall of separation between enforcement and reinstatement staff functions were dismantled and broader, mandated, involvement of the enforcement staff were provided in all cases in which a student-athlete participated independently in the process. The enforcement staff would provide all facts and information developed during its investigation of a related Level I or II institutional case²²⁴ and also review all submissions to the reinstatement staff provided by a university and student-athlete.²²⁵ The enforcement staff would conduct an independent investigation if it determined that the submissions were incomplete or inadequate.²²⁶ Although time-sensitive reinstatement decisions still may limit how much the enforcement staff can assist the reinstatement staff,²²⁷ free use of enforcement staff information would at least reduce the potential for inconsistency between reinstatement and infractions decisions.

Ultimately, however, inconsistent results still may occur. These results need to be accepted as a reflection of the requisites of the two systems and the imperfection of any system, not an indictment of these particular ones.

²²⁴ Currently a university (and its Conference) is notified if the Committee on Infractions makes a finding that affects the eligibility of its student-athletes. NCAA Bylaw 19.9.12. The university then is expected to take action or be subject to penalties for its failure to do so. In addition, the enforcement staff may provide information, or participate in a reinstatement appeal, in the absence of infractions committee findings, but only on request. Reinstatement Policies and Procedures, *supra* note 7, at 2, 10. Not only should the general authority of the enforcement staff to intervene be broadened, but the authority should be extended to the NCAA Eligibility Center and to investigations conducted by the agents, gambling, and amateurism staff (AGA). AGA staff deal exclusively with student-athlete and prospective student-athlete violations. Reinstatement Policies and Procedures, *supra* note 7, at 3.

²²⁵ Currently this occurs only on the request of the reinstatement staff.

²²⁶ Currently, the enforcement staff may conduct an investigation to develop the facts, but only if the university agrees. Reinstatement Policies and Procedures, *supra* note 7, at 3. Currently, a university may proceed without accepting the facts that the enforcement staff develops, although it does so at its peril. If information later develops that a reinstatement decision was too lenient because based on limited information, the decision can be rescinded and the university is subject to hearing and penalties through the enforcement/infractions process. Reinstatement Policies and Procedures, *supra* note 7, at 3.

²²⁷ The enforcement staff also attempts to move quickly. AGA staff complete investigation in three months on average; some cases are resolved in twenty-four hours. The average time comes from the enforcement staff case management major case tracking system. The database includes all AGA and major cases. Telephone Interview with Rachel Newman-Baker, former AGA Director (June 27, 2009). AGA and reinstatement staffs have regular interaction. AGA staff also have three to five joint investigations annually with the major case enforcement staff.

B. Cross-Institutional Confidence, Cross-Case Consistency, and the Need for Transparency

In the current system, the reinstatement staff may depart downward from a guideline reinstatement condition even if the guideline grants no explicit discretion to do so. In the current system, such a staff decision may be archived to avoid its use as precedent should the Reinstatement Committee ultimately fail to endorse the staff decision. This happened in an academic fraud case at Florida State University.

Three academic services staff members of the Florida State athletic department – an academic advisor, a learning specialist, and a tutor – helped student-athletes cheat on an online exam administered in the athletic department. They either provided exam answers to student-athletes or answered the questions for them.²²⁸ At least 61 student-athletes cheated with their assistance.²²⁹

At the time the violations were committed, the minimum reinstatement condition for academic fraud was that student-athletes would be withheld from competition for a year and also lose one year from their five-year competition clock.²³⁰ Notwithstanding the guideline, the reinstatement staff imposed only a withholding condition of loss of 30 percent of a season's competition opportunities and no loss of eligibility. The reinstatement staff reported that it did so because the student-athletes ultimately came forward to admit their culpability and the university took primary responsibility for the academic fraud.²³¹

²²⁸ Infractions Report No. 294 (Florida State, March 6, 2009) at 5. There also were associated institutional violations relating to the provision of impermissible benefits and a failure to monitor by the institution.

²²⁹ Florida State acknowledged that more than 61 student-athletes were involved; it was unable to develop evidence to prove this, however. Infractions Report No. 294 (Florida State, March 6, 2009) at 2.

²³⁰ Infractions Report No. 294 (Florida State, March 6, 2009) at 2.

²³¹ Infractions Report No. 294 (Florida State, March 6, 2009) at 2 (Florida State “strongly believed that its processes and personnel were primarily responsible for the improper assistance” and argued that culpability centered on institution).

The staff decision is subject to criticism. First, academic fraud is one of the most serious of all NCAA violations and, indeed, the most serious violation that a student can commit.²³² Second, it is difficult to credit a claim that the student-athletes neither knew nor had reason to know that they cheated. Third, 39 of the student-athletes initially denied and only admitted culpability after Florida State officials told them of the deal. In other words, mitigation was impelled not by student-athlete contrition or forthright acceptance of responsibility but because otherwise the student-athletes might have escaped all eligibility consequences.²³³

The point here is not whether the reinstatement staff's ultimate decision was correct but to underscore the lack of transparency involved. When the reinstatement staff departs downward from a guideline reinstatement condition – whether the guidelines explicitly grant discretion or not -- there is no appeal from the decision and no adversarial party to bring an appeal. The Reinstatement Committee later may fail to approve the guideline departure or the reasons for it. When that occurs, the case neither is posted on the NCAA website nor may be used as precedent in later cases. Even if a decision is posted, moreover, the information is set forth in a truncated case summary stated in conclusory terms. There may be insufficient factual information from which to derive a full understanding of the scope of the violations and the rationale for a downward departure.²³⁴

In the Florida State academic fraud case, a presumptive reinstatement condition of sit a year and also lose a year became a condition of lose 30 percent of a year.²³⁵ The case was

²³² See Infractions Report No. 294 (Florida State, March 6, 2009) at 1.

²³³ See Infractions Report No. 294 (Florida State, March 6, 2009) at 2.

²³⁴ The case summary also might not easily be found as it would not name the university.

²³⁵ After the academic fraud violations were committed at Florida State, but before the infractions case was heard, the Student-Athlete Reinstatement Committee revised upwards the presumptive withholding condition for academic fraud. At the time of the Florida State violations, the presumptive condition was sit a year, lose a year. The current guideline prescribes permanent ineligibility that may be reduced to one year withholding plus one season loss of eligibility on a showing that a student-athlete had minimal or no culpability. NCAA Bylaw 10.1(b); Reinstatement Guidelines, supra note 13, at 4.

archived. We know about the reinstatement staff decision and its reasons only because Florida State's academic fraud case was heard by the Committee on Infractions and, unusual in an infractions report, the reinstatement decision was discussed in some detail in the infractions report.

The resolution of the Florida State academic fraud case also highlights an issue of cross-case consistency and the nuanced decision making that undermines institutional confidence. The Florida State football players sat out the Music City Bowl as one of the games in the four-game withholding condition that was imposed.²³⁶ In substantially reducing the presumptive reinstatement condition, the reinstatement staff accepted Florida State's contention that the university, not the players, had prime responsibility. The exclusion of bowl games from a reinstatement condition occurs when student-athlete culpability is "minimal."²³⁷ Yet the Florida State players did not play in the bowl. By contrast, the bowl game was excluded from the reinstatement condition served by the Ohio State football players described earlier who received extra benefits and competed while they were ineligible.²³⁸ One can posit reasons for the inclusion of the bowl game in the Florida State withholding condition. Because of the absence of a full explanation in the Ohio State case, it is difficult to evaluate the decision. Even if the reasons were good in both cases, the problem is that they were not made explicit. In addition, it can be argued that the two decisions, matched together, were handled with too fine a touch.

1. Transparency

²³⁶ Dinich, NCAA Penalties Extend to 10 FSU Sports, ESPN College Football (March 7, 2009), <http://sports.espn.go.com/nf/news/story?id=3958292>.

²³⁷ Reinstatement Policies and Procedures, *supra* note 7, at 15-16.

²³⁸ See notes 6 and 7 *supra* and accompanying text.

Greater transparency would better assure that member universities are in charge of reinstatement policy. Greater transparency would bolster confidence in cross-institutional consistency. Greater transparency would permit member universities to evaluate application of reinstatement guidelines and, in turn, might provide impetus to move toward less nuanced decision making and more defensible reinstatement decisions in gross.

(a). Case Summaries. Reinstatement case summaries are posted on the NCAA website, but they typically include only a very brief rendition of the facts of a case, stated in conclusory terms, often with little or no fact-specific rationale to explain the decision and the reinstatement condition imposed. Consider the Florida State academic fraud case. Were a case summary to have been posted, it is extraordinarily unlikely that it would even have mentioned that the bowl game was included in the reinstatement condition and, if it did, it would simply have reported in conclusory terms that its inclusion was due to the fact that the student-athletes had more than minimal responsibility. Similarly, the posted Ohio State case summary does not explain in specific terms what, precisely, led to a conclusion that the football players had minimal responsibility for the violations and, therefore, could compete in the bowl game. The information provided in the two case summaries would hardly have illuminated the different treatment in the two cases.

Student-athlete privacy interests must be protected in the posting of reinstatement case summaries.²³⁹ Nonetheless, information currently posted appears more truncated than needed, particularly in setting forth a clear rationale for a decision and clear provision of relevant factors. When a guideline is applied with no guideline-authorized mitigation or enhancement, a brief case rendition may be sufficient. For cases in which guideline mitigation or enhancement is applied

²³⁹ See, for example, The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99 (privacy of student education records). See Reinstatement Policies and Procedures, *supra* note 7, at 9, 12.

rather than the presumptive guideline, the reinstatement staff or committee should write a full case description with rationale for how the facts warranted mitigation or enhancement.

The goal should be to post as much information as possible consistent with student-athlete privacy rights. To achieve this, lawyers with expertise in privacy law should be consulted to recommend what might be posted; their charge should be to facilitate the fullest dissemination of information permitted by law. They also should consider the extent to which information excluded from a posted website summary might be contained in a fuller case record available to student-athletes and universities (redacting the names of student-athlete and university) who file a reinstatement appeal involving the same bylaw violation when the withholding or ineligibility condition is ½ a season or more. The university and student-athlete could be required to sign a confidentiality agreement before having access to the full case record.²⁴⁰

(b). Annual Report of All Case Summaries. The reinstatement staff should prepare an annual report created from all reinstatement case summaries with details case to case and also organized in gross as to the considerations that led to upward or downward departures from a guideline reinstatement condition.²⁴¹ This report should be posted on the NCAA website.

(c). Drug Appeals. Reports of drug appeals currently are not posted. To the extent possible, information should be provided for drug appeals similar to that posted in reinstatement case summaries. Of particular importance is that case precedent be provided to student-athletes appealing positive drug tests. The need to assure a consistent application of penalty guidelines is as strong in drug appeals as it is in student-athlete reinstatement cases.

²⁴⁰ Of course, there is risk that if litigation follows, the fuller record will become a court document. In consequence, this recommendation is preliminary only and needs vetting by NCAA legal counsel.

²⁴¹ Something of this kind currently is provided by the enforcement staff regarding 25 cases processed by the Division I Committee on Infractions. Enforcement Case Analysis Library, <http://www.ncaa.org/enforcement?division=d1>. The enforcement case analysis provides a case by case summary but not a summary in gross of the cases.

2. Cross-Institutional Confidence and Cross-Case Consistency

Transparency is perhaps the most critical component in assuring cross-institutional confidence and cross-case consistency. Other components are standardization of information, elimination of staff discretion to depart from guidelines, and less nuanced decision making.

(a) Greater Standardization in Information Submitted. An essential predicate to cross-institutional consistency in results is cross-institutional consistency in the information submitted. Reinstatement requests are submitted online, and certain information must be provided.²⁴² Questions as to the scope of the university inquiry conducted, however, are insufficiently focused to provide a comfort level that a university did a thorough job of vetting a case.²⁴³

At a minimum a university should be required to provide the names of all individuals with information about a violation (currently a university lists individuals “involved in the circumstances of a request”). It should be required to explain why it believes no other individuals have information. It should be required to provide summaries of the salient information provided by each of the individuals with information.²⁴⁴ It should be required to list the individuals who conducted interviews of those with information. It should be required to append interview transcripts or to explain why interviews either were not conducted or were not recorded.²⁴⁵ It should be required to highlight any inconsistencies in what individuals reported as well as why it credited one version rather than another.

²⁴² See Online reinstatement form on file in office of JR Potuto. The form asks for background information on student-athletes, including whether the student-athlete was recruited, whether the student-athlete is receiving financial aid, and how many seasons of eligibility remain. It asks whether a student-athlete received rules education and for any precedent on which a university relies.

²⁴³ See Online reinstatement form on file in office of JR Potuto. The questions on the online form currently are worded in general terms -- “How was the violation discovered?;” “Describe the facts associated with the reinstatement request.” The online form also asks for a written statement from the student-athlete describing the circumstances of the violation. For a fuller list of what should be included in a standard form, see NCAA Processes, *supra* note 21, at 327.

²⁴⁴ It

²⁴⁵ An explanation that the violation was minimal and admitted would suffice.

(b) No Staff Authority Except Explicitly Granted. Reinstatement Committee protocols should be revised so that staff in no circumstances may exercise discretion not granted in reinstatement committee guidelines. Eliminating such staff authority would avoid “one-off” situations in which student-athletes at one university receive a concession available to no other student-athletes. Eliminating the authority for staff to depart from a guideline also assures that any such concession is made by those charged with making NCAA policy, the representatives of member universities and conferences. In turn, eliminating staff authority to depart from guidelines eliminates the concern, however unfounded, that staff discretion may be influenced by too close connection with a particular university,²⁴⁶ by universities with particularly persuasive or aggressive leaders, or by the intervention of senior NCAA administrators.²⁴⁷ In situations such as Florida State, where staff believe the facts impel a result not anticipated in reinstatement guidelines, the full reinstatement committee should be convened.

(c) Golden Rope not Golden Thread. As discussed at the outset, there are explanations for what appear to be inconsistent results in student-athlete reinstatement cases. And yet, it also may be said that NCAA bylaw applications sometimes are too nuanced to make good sense, either in cross-case consistency or in perceptions of fair treatment of student-athletes.²⁴⁸ On paper, reinstatement conditions are more severe when student-athletes violate more than one NCAA bylaw or commit violations intentionally. And yet, the Ohio State football players had money benefits equal to or more than A.J. Green, committed at least some of the violations

²⁴⁶ This is not to suggest that staff members act with bias or animus. The author knows of no such instance. It is simply to suggest that perceptions of even-handed treatment would be enhanced.

²⁴⁷ The author also has heard concerns expressed that persistent and repetitive entreaties by a university can prompt the reinstatement staff or NCAA senior administrators to grant downward departures from guideline reinstatement conditions. The author has no evidence that this has occurred, but the fact that some believe it to be true is reason to create a more transparent process.

²⁴⁸ A related problem is NCAA bylaws. They are too numerous, too situation-specific, and at times too complex. They underpin and to some extent drive the nuances in reinstatement decisions.

intentionally,²⁴⁹ and competed while ineligible.²⁵⁰ Nonetheless, they lost only one more game than he (and did not lose the Sugar Bowl game). On paper some violations trigger more severe reinstatement conditions because of the nature of the violation.²⁵¹ And yet, the Florida State players committed academic fraud, among the most serious of violations, and lost only four games. Then there is Johnny Manziel, and the conclusion that the available evidence and reasonable inferences were insufficient to find a violation.

The effort to achieve perfect justice tailored precisely to differences in the facts of each case, however slight or non-material the differences, risks loss of a general, clearly consistent application and, therefore, consistency across a breadth of cases similar in substantial part one to the other. Student-Athlete Reinstatement decisions, and the underlying guidelines, should be joined by a golden rope, not thread. Nuanced treatment in each case neither provides sufficient notice when violations will trigger substantial withholding or ineligibility conditions nor enhances a perception of evenhandedness in decision making. In the age-old struggle between perfect justice to individuals and the need for clear rules that advance justice over a class of cases,²⁵² NCAA bylaw enforcement is too much focused on results in the particular.

C. Explaining Reinstatement

Enhancing transparency, institutional confidence, and cross-case consistency is critical, and all to the good. Achieving better public, and for that matter institutional, understanding of the reinstatement process also is needed. The NCAA currently does very little to explain the

²⁴⁹ Division I Infractions Report No. 358 at 5 (Ohio State University, December 20, 2011). See, e.g., Reinstatement Guidelines, *supra* note 13, Bylaw 12.1.2.1.6 (c) Reinstatement Guideline at 10. At least some of the Ohio State violations were committed intentionally.

²⁵⁰ Division I Infractions Report No. 358 at 5 (Ohio State University, December 20, 2011). Ineligible competition is a violation additional to the receipt of money benefits. See NCAA Bylaw 14.01.1.

²⁵¹ See, for example, Reinstatement Guidelines, *supra* note 13, Guideline No. 7, at 10. Academic fraud is an example.

²⁵² See, e.g., Scalia, 56 U. Chi. L. Rev. 1175, University of Chicago Law Review (1989).

reinstatement process. It also does very little to respond to questions or correct misinformation. This must change. The NCAA needs to be active and vocal to explain the process. Standing mute and taking the hits is no way to run a railroad, and certainly not one whose train the author seeks to ride. That said, however, no matter what the NCAA does, it cannot achieve better understanding on its own. What *should* happen is the following.

Scrutiny of NCAA decisions should compare and contrast reinstatement decisions with other reinstatement decisions (and enforcement/infractions decisions with other enforcement/infractions decisions). There may be a wolf lurking just outside the door, but it is not in sheep's clothing, and should not be reported as such.

Guideline reinstatement conditions should be made public. Violations are not all equal and do not trigger the same guideline reinstatement condition. Commentators justly might criticize guidelines that differentiate among violations that appear to them to warrant similar treatment. But scrutiny of a particular reinstatement case and the reinstatement conditions imposed should focus on the particular bylaws violated and on the application of the particular guideline at issue.

Above all, commentators should begin their analysis by recognizing that the source for the facts and conclusions in reinstatement cases is a student-athlete's university and not the NCAA student-athlete reinstatement committee or staff. Commentators also should acknowledge the range and magnitude of student-athlete violations and what that portends for how a system operates.

Reforms to the student-athlete reinstatement process may be warranted, and the author proposes some here. If reforms are to come, however, they should proceed from a clear understanding of the circumstances and requisites of collegiate competition and the current

process by which student-athlete violations are handled. Otherwise, a reform may be directed to change a system that, because ill-understood, does not have the adverse consequences the reformer identifies. Bad in itself, but worse if a reform brings little or no gain to procedural and substantive fairness for student-athletes but added difficulty in effective enforcement of student-athlete violations.