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Josephine R. Potuto

*University of Nebraska College of Law*

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# The NCAA Student-Athlete Reinstatement Process: Say What?

JOSEPHINE (JO) R. POTUTO†

## INTRODUCTION

Oklahoma State wide receiver Dez Bryant met with former NFL player Deion Sanders and then lied about it to the National Collegiate Athletic Association (NCAA).<sup>1</sup> He lost

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† Potuto is the Richard H. Larson Professor of Constitutional Law at the University of Nebraska College of Law. She is the university's Faculty Athletics Representative (FAR), a required campus position at all NCAA member institutions. Potuto served nine years as a member of the Committee on Infractions (COI) (two years as a Chair), more than four years on the Division I Management Council, including service on both its Legislative Review and Administrative Review Subcommittees, and as a member of the NCAA Special Review Committee that evaluated and made operational a special consultant's report on enforcement and infractions. Potuto also is past president of the 1A FAR (FARs at NCAA Division I, Football Bowl Subdivision universities) and serves on the 1A FAR Board. She owes thanks to several individuals who helped her find information on the NCAA Division I student-athlete reinstatement and administration committee processes: Jennifer Heppel, Associate Commissioner, Big Ten Conference; Jamie Vaughn, Associate Director for Compliance, University of Nebraska; and Laure Ragoss, Director of Athletics Compliance, University of Nebraska. She also thanks the University of Nebraska Law College for a research grant that facilitated the writing of this Article.

1. Dave Curtis, *Suspension Ends Season for Oklahoma State's Dez Bryant*, SPORTING NEWS (Oct. 28, 2009, 2:10 AM), <http://www.sportingnews.com/ncaa-football/story/2009-10-27/suspension-ends-season-for-oklahoma-states-dez-bryant>. The NCAA is a private association that regulates intercollegiate athletic competition among four-year colleges and universities. It has more than 1200 members. *Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Jan. 25, 2015). The NCAA has three divisions and three subdivisions in Division I. See *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited Jan. 25, 2015); see also 2013-14 NCAA Division I, II, III manuals, available at <http://www.ncaapublications.com>. NCAA members also include the athletic conferences to which colleges and universities belong. The numbers reported here include neither athletic conferences nor affiliated members. NCAA Division I typically is the focus of discussion about the NCAA. See Josephine (Jo) R. Potuto et. al., *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 883-84, nn.10-14 (2014)

a season of competition eligibility.<sup>2</sup> Johnny Manziel, the Texas A&M Heisman Trophy-winning quarterback, reportedly received thousands of dollars from broker-dealers to autograph memorabilia; a picture surfaced showing him signing an autograph for one of the dealers.<sup>3</sup> He lost the first half of A&M's 2013 season-opening game.<sup>4</sup> In the same month in 2014, information surfaced suggesting that Todd Gurley, the Georgia Heisman candidate running back, and Jameis Winston, the Florida State Heisman-winning quarterback, both sold autographs for cash.<sup>5</sup> Gurley lost four games;<sup>6</sup> Winston continued to play.<sup>7</sup> The father of Cam Newton, the

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[hereinafter Potuto, *What's in a Name*]. For that reason, all NCAA bylaw citations in this Article are to the 2013-14 NCAA Division I Manual. See Nat'l Collegiate Athletic Ass'n, 2013-14 Div. I Manual, arts. 10-22 (Aug. 1, 2013) [hereinafter NCAA Bylaws]. 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. See *Student-Athlete Reinstatement Frequently Asked Questions*, NCAA, at Questions 1, 2, 4, <http://www.ncaa.org/compliance/reinstatement/student-athlete-reinstatement-frequently-asked-questions> [hereinafter *Reinstatement Questions*]. The Committee on Competitive Safeguards and Medical Aspects of Sports (CMAS), together with its staff, handles drug cases for all three divisions. NCAA Bylaws, *supra*, art. 21.2.2.1.

2. Curtis, *supra* note 1.

3. *Half-Game Penalty for Johnny Manziel*, ESPN (Aug. 29, 2013) [hereinafter *Half-Game*], [http://espn.go.com/college-football/story/\\_id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls](http://espn.go.com/college-football/story/_id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls); Darren Rovell, *Photo Shows Manziel Signing*, ESPN (Sept. 13, 2013), [http://espn.go.com/college-football/story/\\_id/9669838/photo-shows-johnny-manziel-signing-autographs-south-florida-autograph-broker-drew-tieman](http://espn.go.com/college-football/story/_id/9669838/photo-shows-johnny-manziel-signing-autographs-south-florida-autograph-broker-drew-tieman); George Schroeder, *Analysis: the Johnny Manziel Autograph Case*, USA TODAY (Aug. 16, 2013), <http://www.usatoday.com/story/sports/ncaaf/sec/2013/08/15/johnny-manziel-texas-am-ncaa-investigation-autographs-for-money/2662257>.

4. *Half-Game*, *supra* note 3; Rovell, *supra* note 3; Schroeder, *supra* note 3.

5. Josh Peter, *Dealers Argue Ethics of College Athlete Autographs*, USA TODAY (Oct. 15, 2014, 6:35 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/10/15/james-spence-jameis-winston-todd-gurley-autographs-florida-state-georgia/17301169>.

6. Drew Laing, *NCAA Reveals Punishment for Todd Gurley*, SATURDAY DOWN SOUTH (Oct. 29, 2014, 9:19 AM), <http://www.saturdaydownsouth.com/georgia-football/todd-gurley-punishment-revealed-ncaa>.

7. Peter, *supra* note 5.

Auburn Heisman-winning quarterback, attempted to shop him to Mississippi State for several thousand dollars.<sup>8</sup> Newton never stopped playing.<sup>9</sup> Georgia wide receiver A.J. Green sold the jersey he wore in the 2009 Independence Bowl for \$1000.<sup>10</sup> He lost four games.<sup>11</sup> Ohio State football players sold football gear and memorabilia, and traded game tickets for free or reduced-cost tattoos.<sup>12</sup> The value per player ranged from \$1000 to \$2500.<sup>13</sup> They also competed while ineligible. They lost the first five games of the 2011 season but not the Sugar Bowl game that ended the 2009 season.<sup>14</sup> At least sixty-one Florida State student-athletes in ten sports committed academic fraud; many if not most competed while ineligible.<sup>15</sup> They lost thirty percent of their season's games.<sup>16</sup> For the football players that meant four games,<sup>17</sup> including the Music

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8. *Auburn Releases Cam Newton Docs*, ESPN (Nov. 4, 2011) [hereinafter *Newton Docs*], [http://espn.go.com/college-football/story/\\_id/7190987/auburn-tigers-records-reveal-details-cam-newton-scandal](http://espn.go.com/college-football/story/_id/7190987/auburn-tigers-records-reveal-details-cam-newton-scandal).

9. *Id.*

10. Marc Weiser, *Receiver Returns this Week from Four-Game Suspension*, ONLINE ATHENS (Sept. 29, 2010), [http://www.onlineathens.com/stories/092910/foo\\_712693319.shtml](http://www.onlineathens.com/stories/092910/foo_712693319.shtml).

11. *Id.*

12. *Ohio State Football Players Sanctioned*, ESPN (Dec. 23, 2010), <http://sports.espn.go.com/ncf/news/story?id=5950873>.

13. *Id.*

14. *Id.* The exclusion of bowl games from a reinstatement condition is to apply only "in very limited circumstances" where student-athlete culpability is "minimal." NCAA Divs. I, II & III Comms. on Student-Athlete Reinstatement, Policies and Procedures, 15-16 (2013) [hereinafter *Reinstatement Policies and Procedures*].

15. NCAA Div. I Comm. on Infractions, Florida State University Public Infractions Report No. 294, at 2 (Mar. 6, 2009) [hereinafter *Florida State Infractions Report*], available at [assets.sbnation.com/assets/80240/FSUNCAA\\_Report.pdf](http://assets.sbnation.com/assets/80240/FSUNCAA_Report.pdf); see Katie Thomas & Ken Belson, *Documents in Fraud Case Made Public by Florida State*, N.Y. TIMES, (Oct. 15, 2009), [http://www.nytimes.com/2009/10/15/sports/15ncaa.html?\\_r=0](http://www.nytimes.com/2009/10/15/sports/15ncaa.html?_r=0).

16. Heather Dinich, *NCAA Penalties Extend to 10 FSU Sports*, ESPN (Mar. 6, 2009), <http://sports.espn.go.com/ncf/news/story?id=3958292>; see Florida State Infractions Report, *supra* note 15, at 2-3.

17. Football teams play twelve games. See *infra* note 41. The Division I Committee on Infractions vacated football team wins because football players competed while ineligible. Florida State Infractions Report, *supra* note 15, at 16.

City Bowl, which ended the 2007 season.<sup>18</sup> So what is going on here?

Seeming inconsistencies in reinstatement decisions partially are explained by what can be proved rather than what the media report.<sup>19</sup> Todd Gurley admitted his conduct;<sup>20</sup> Winston and Manziel did not.<sup>21</sup> Reinstatement decisions also partially are explained by different approaches to the quantum of evidence needed to reach a decision, particularly when a decision relies on reasonable inferences from information.<sup>22</sup> Competing as an ineligible student-athlete is an NCAA violation.<sup>23</sup> Reinstatement decisions may differ based on how violation-risk averse a university is, as well as how reluctant it is to penalize a student-athlete when

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18. Dinich, *supra* note 16.

19. The autograph dealer who confirmed payment to Manziel in an interview with ESPN refused to talk to the NCAA. See Peter Berkes, *Johnny Manziel Briefly Suspended, Ending NCAA Autographs Investigation*, SB NATION (Aug. 28, 2013, 3:10 PM), <http://www.sbnation.com/college-football/2013/8/28/4668634/johnny-manziel-suspended-texas-a-m>. Manziel would have violated NCAA bylaws. See NCAA Bylaws, *supra* note 1, art. 12.5.2.1 (advertisement and promotions after becoming a student-athlete). For the reinstatement condition, see Nat'l Collegiate Athletic Ass'n, NCAA Division I Student-Athlete Reinstatement Guidelines, 4-5, 13 (2014) [hereinafter Reinstatement Guidelines], available at <http://www.ncaa.org/sites/default/files/Division%20I%20Guidelines%20%28May%202014%29.pdf>. Manziel's one-half game penalty was self-imposed by Texas A&M. See Berkes, *supra*.

20. Drew Laing, *UGA Releases Statement on Todd Gurley's Suspension, Gurley Admits Mistakes* (Oct. 22, 2014, 9:22 AM), <http://www.saturdaydownsouth.com/georgia-football/gurley-admits-mistake-uga-file-reinstatement-request-ncaa>.

21. Darren Rovell & Justine Gubar, *Sources: NCAA Investigating Manziel*, ESPN (Aug. 4, 2013, 11:50 AM), [http://espn.go.com/espn/otl/story/\\_id/9537999/otl-ncaa-investigating-johnny-manziel-profiting-autographs](http://espn.go.com/espn/otl/story/_id/9537999/otl-ncaa-investigating-johnny-manziel-profiting-autographs); Brent Sobleski, *Report: Over 2,000 Pieces of Signed Jameis Winston Memorabilia Discovered*, NBC SPORTS (Oct. 17, 2014, 12:04 AM), <http://collegefootballtalk.nbcsports.com/2014/10/17/report-over-2000-pieces-of-signed-jameis-winston-memorabilia-discovered>.

22. Information inferential that payments were made include the facts that the same autograph dealer offered for sale and issued certificates of authenticity for the Manziel-, Gurley-, and Winston-autographed items. The certificates were in sequential order. There were hundreds or thousands of autographs by each student-athlete. See Peter, *supra* note 5; Rovell & Gubar, *supra* note 21; Sobleski, *supra* note 21.

23. See NCAA Bylaws, *supra* note 1, art. 14.10.1.

information is ambiguous. Reinstatement decisions also partially are explained by technicalities in what NCAA bylaws prohibit.<sup>24</sup> Had money actually been paid to Cam Newton's father, there would have been a violation.<sup>25</sup> 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.<sup>26</sup>

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,<sup>27</sup> who took

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24. 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. *See* NCAA Bylaws, *supra* note 1, art. 16.11.2. The Ohio State football players, by contrast, violated the preferential treatment prohibition because the tattoo parlor owner was not a booster. *See* NCAA Bylaws, *supra* note 1, art. 12.1.2.1.6.

25. *See* NCAA Bylaws, *supra* note 1, arts. 12.1.2.1.6 (Preferential Treatment, Benefits or Services), 12.3.3 (Athletics Scholarship Agent); Matt Hinton, *NCAA Finds Pay-For-Play, but Cam Newton is in the Clear (for Now)*, YAHOO (Dec. 1, 2010), [http://sports.yahoo.com/ncaa/football/blog/dr\\_saturday/post/NCAA-finds-pay-for-play-but-Cam-Newton-is-in-th?urn=ncaaf-290855](http://sports.yahoo.com/ncaa/football/blog/dr_saturday/post/NCAA-finds-pay-for-play-but-Cam-Newton-is-in-th?urn=ncaaf-290855); *Newton Docs*, *supra* note 8. The Reinstatement Guidelines were revised in May 2012 to respond to facts such as those in Newton's case. They now specify 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 19, at 11. The guideline further states that if money is provided to a prospective student-athlete or his family member that a prospective student-athlete is permanently ineligible. *Id.*

26. *See* NCAA Bylaws, *supra* note 1, art. 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 or friends . . ."). The presumptive reinstatement condition is repayment of the benefit and sitting out thirty percent of a season's competitions. *See id.* art. 14.10.2.

27. And then Heisman forfeiting running back. *Reggie Bush Forfeits his Heisman Trophy Award*, FOX NEWS (Sept. 14, 2010), <http://www.foxnews.com/sports/2010/09/14/reggie-bush-forfeits-heisman-trophy-award>.

money and other benefits from two agents.<sup>28</sup> This is like comparing apples to oranges.

Except for drug violations,<sup>29</sup> student-athlete violations are handled exclusively by the Student-Athlete Reinstatement Committee and its staff.<sup>30</sup> 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

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28. NCAA Div. I Comm. on Infractions, University of Southern California Public Infractions Report No. 323, at 55-57 (June 10, 2010), *available at* <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=691&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED>; *see, e.g.*, Jonathan Bass, *Penn State Ruling Confirms NCAA's Only Consistency is Inconsistency*, GAMEDAYR (Sept. 24, 2013, 4:12 PM), <http://gamedayr.com/sports/ncaa-penn-state-scholarships-ruling-inconsistency>; Andrew Coppens, *NCAA Shows Inconsistency Again in Sanctions Against Montana*, BLOGUIN (July 27, 2013, 1:19 PM), [bloguin.com/crystalballrun/2013-articles/ncaa-shows-inconsistency-again-in-sanctions-against-montana.html](http://bloguin.com/crystalballrun/2013-articles/ncaa-shows-inconsistency-again-in-sanctions-against-montana.html); Pete Fiutak, *USC Paying for NCAA's Inconsistency?*, FOX SPORTS (May 26, 2011), <http://www.foxsports.com/collegefootball/story/usc-football-hit-harshly-by-inconsistent-ncaa-penalty-052611>; Kyle Kensing, *Mississippi State Decision Reflects Inconsistencies in the NCAA*, SPORTS ILLUSTRATED (June 7, 2013), [saturdayblitz.com/2013/06/07/Mississippi-state-ncaa](http://saturdayblitz.com/2013/06/07/Mississippi-state-ncaa); Stewart Mandel, *With Harsh USC Penalties, NCAA Sends Warning to All Elite Programs*, SPORTS ILLUSTRATED (June 10, 2010), <http://www.si.com/more-sports/2010/06/10/USC-penalties>; 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>; Matt Norlander, *NCAA Punishment is Inefficient, Inconsistent, Compromised; Here's How to Fix It*, CBS SPORTS (Oct. 25, 2012, 11:03 AM), <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/20681711/ncaa-punishment-is-inefficient-inconsistent-and-compromised-heres-how-to-fix-it>; Schroeder, *supra* note 3.

29. A subcommittee of CMAS handles student-athlete drug violations. *See* NCAA Bylaws, *supra* note 1, arts. 21.2.2, 12.2.2.2, 31.2.3–31.2.3.8; Nat'l Collegiate Athletic Ass'n, 2013-14 NCAA Drug-Testing Program, 4-12 (July 2013) [hereinafter Drug-Testing Program], *available at* <https://www.ncaa.org/sites/default/files/5.%20Drug%20Testing%20Program%20Book%202013-14.pdf>. This process also is independent of the enforcement/infractions process. For a discussion of the NCAA drug testing program and procedures, see *infra* text accompanying notes 179-95.

30. *See* NCAA Bylaws, *supra* note 1, arts. 14.11, 21.7.7.3.3.

violations,<sup>31</sup> timelines, and reporting lines within the NCAA.<sup>32</sup>

Much has been written about the NCAA enforcement staff and the Committee on Infractions, both in law reviews<sup>33</sup> and in the popular media.<sup>34</sup> By contrast, the reinstatement process is poorly understood, and its procedures are often assumed, wrongly, to mirror those of enforcement/infractions.<sup>35</sup> This Article shines a spotlight on

31. See Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 283-84 (2010) [hereinafter Potuto, *NCAA Processes*]. Critics also challenge infractions decisions as inconsistent one to the other. See, e.g., Andrea Adelson, *No Bowl Ban for Miami Hurricanes*, ESPN (Oct. 22, 2013) [http://espn.go.com/college-sports/story/\\_/id/9861775/miami-hurricanes-avoid-bowl-ban-lose-nine-scholarships-part-ncaa-sanctions](http://espn.go.com/college-sports/story/_/id/9861775/miami-hurricanes-avoid-bowl-ban-lose-nine-scholarships-part-ncaa-sanctions); Zac Ellis, *Miami Football to Lose Nine Scholarships over Three Years; No Bowl Ban from NCAA*, SPORTS ILLUSTRATED (Oct. 22, 2013), <http://www.si.com/college-football/campus-union/2013/10/22/miami-hurricanes-ncaa-sanctions>.

32. The NCAA enforcement staff works within the enforcement/infractions process. See generally NCAA Bylaws, *supra* note 1, arts. 19.01–19.6.

33. See, e.g., Jerry R. Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 WYO. L. REV. 215 (2012); Josephine (Jo) R. Potuto & Jerry R. Parkinson, *If It Ain't Broke, Don't Fix It: An Examination of the NCAA Division I Infractions Committee's Composition and Decision-Making Process*, 89 NEB. L. REV. 437 (2011); Mike Rogers & Rory Ryan, *Navigating The Bylaw Maze In NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749 (2007); Jason P. 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); Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551 (2011); Robin J. Green, Note, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99 (1992).

34. See, e.g., Stewart Mandel, *Enforcement Experience Offers Rare Inside Look at NCAA Infractions*, SPORTS ILLUSTRATED (May 12, 2011), <http://www.si.com/more-sports/2011/05/12/enforcement-experience>; John Taylor, *NCAA Denies USC Request for Reconsideration of Sanctions*, NBC SPORTS (Sept. 27, 2013, 12:24 PM), <http://collegefootballdiscuss.nbc.com/2013/09/27/ncaa-denies-usc-request-for-reconsideration-of-sanctions>; John Zenor, *NCAA Rolls Crimson Tide for Violations*, USA TODAY (Feb. 1, 2002), <http://usatoday30.usatoday.com/sports/college/football/2002-02-01-alabama-violations.htm>.

35. 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 has been criticized. See, e.g., Richard G. 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 (2010); Stephen F.



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.

### I. NCAA VIOLATIONS

NCAA bylaws set conduct standards for coaches, other staff, and student-athletes<sup>36</sup> and define and regulate student-athlete competition eligibility.<sup>37</sup> NCAA bylaws also describe the processes by which bylaws are enforced and violations are punished.<sup>38</sup>

All NCAA violations have two culpable parties: the individual who “did the deed” and the member university responsible for the individual’s conduct.<sup>39</sup> More than 460,000 student-athletes compete at NCAA member institutions.<sup>40</sup> Estimated conservatively, each year there are at least 25,000 college athletic competitions.<sup>41</sup> The sheer number of athletes

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Ross, Richard T. Karcher & S. Baker Kensinger, *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J.C. & U.L. 79 (2014).

36. See, e.g., NCAA Bylaws, *supra* note 1, arts. 11.1.1, 16.02.3.

37. See *id.* art. 14.11. Student-athletes must comply with campus academic and conduct requirements applicable to all students. See *id.* art. 14.01.2. They also must comply with NCAA bylaws that set minimum academic standards for competition eligibility. These standards cover full-time enrollment, *id.* art. 14.1.7, initial eligibility, *id.* arts. 14.3.1–14.3.6, and continuing eligibility, *id.* arts. 14.4.1–14.4.3.9. They dictate amateur status. *Id.* art. 12. They prohibit the use of controlled substances. *Id.* art. 18.4.1.5. They prohibit the receipt of extra benefits. *Id.* art. 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.*

38. See *id.* arts. 14.11, 19.

39. See Potuto, *NCAA Processes*, *supra* note 31. The sole exception is student-athlete drug violations. These are solely the responsibility of a student-athlete so long as an institution has met its obligation of institutional control by providing its student-athletes adequate education on NCAA proscribed drugs and the NCAA drug program.

40. *Student-Athletes*, NCAA, <http://www.ncaa.org/student-athletes> (last visited Jan. 26, 2015).

41. There are three NCAA divisions and three subdivisions in Division I. Using extremely conservative estimates, there are at least 9840 annual competitions

and potential athlete eligibility cases sets the NCAA apart from entities such as the International Olympic Committee (IOC)<sup>42</sup> and professional sports leagues<sup>43</sup> that also administer

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held in the Division I FBS. There are 123 FBS universities. See Written Testimony of Dr. Mark A. Emmert, NCAA President, before Senate Commerce, Science, and Transportation Committee, at 3 (July 9, 2014), available at [http://www.ncaa.org/sites/default/files/2014\\_Sen\\_Commerce\\_Committee\\_Written\\_Testimony\\_Final%20Version.pdf](http://www.ncaa.org/sites/default/files/2014_Sen_Commerce_Committee_Written_Testimony_Final%20Version.pdf). Each FBS university must sponsor at least sixteen sports. NCAA Bylaws, *supra* note 1, art. 20.9.9.1. Virtually all sponsor many more; Ohio State University sponsors thirty-six. See *Our Mission*, OHIO STATE ATHLETICS, <http://www.ohiostatebuckeyes.com/ot/mission-statement.html> (last visited Jan. 26, 2015). 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 twelve regular season competitions in 2012-13. See *Swimming and Diving: 2012-13 Schedule*, NEBRASKA ATHLETICS, [http://www.huskers.com/SportSelect.dbml?SPSID=85&SPID=31&Q\\_SEASON=2012](http://www.huskers.com/SportSelect.dbml?SPSID=85&SPID=31&Q_SEASON=2012) (last visited Jan. 26, 2015). The Alabama women's outdoor track and field team, as another example, competed in six meets. See *Track & Field, Cross Country: 2012-2013 Schedule*, ALABAMA ATHLETICS, <http://www.rolltide.com/sports/c-xctrack/sched/alab-c-xctrack-sched.html> (last visited Jan. 26, 2015). Team sports generally have many more competitions. Baseball heads the list, with fifty-six possible regular season games. NCAA Bylaws, *supra* note 1, art. 17.2.5.1. Men's and women's basketball teams may play twenty-nine regular season games. *Id.* art.17.3.5.1. Football trails with twelve regular season games. *Id.* art. 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 9840 ( $5 \times 1968$ ). 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.

42. See MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 258-62 (3d ed. 2013). There are twenty-eight summer and seven winter sports administered by the IOC and nearly four hundred events. *Id.* at 261. Approximately 13,300 athletes competed in the most recent summer and winter games (2800 in the 2014 Sochi Winter games, see *FAQ*, OLYMPIC.ORG, <http://registration.olympic.org/en/faq/detail/id/194> (last visited Feb. 26, 2015), and 10,500 in the 2012 London Summer Games, see *2012 London Olympics*, ENGLISH CLUB, <https://www.englishclub.com/vocabulary/sports-olympics-2012-london.htm> (last visited Feb. 26, 2015)).

43. Major league baseball teams play 162 games annually, the most games of any professional sport. There are thirty major league baseball teams. See *Team-by-Team Information*, MLB, <http://mlb.mlb.com/team/index.jsp> (last visited Jan. 26, 2015). The total number of annual games is 2430 ( $15 \times 162$ ). There are forty

athletic competition.<sup>44</sup>

There are four classifications of NCAA violations.<sup>45</sup> Level IV violations are minor, technical violations that were

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players on a team roster and 1200 total players (40 x 30). See *MLB Official Info*, MLB, [http://mlb.mlb.com/mlb/official\\_info/about\\_mlb/rules\\_regulations.jsp](http://mlb.mlb.com/mlb/official_info/about_mlb/rules_regulations.jsp) (last visited Jan. 26, 2015).

44. 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 a rough estimate based on the number of member institutions, see *supra* note 1, and the minimum number of sports sponsored. In Division I, each institution except those in the FBS must sponsor at least fourteen sports, NCAA Bylaws, *supra* note 1, art. 20.9.6, an FBS institution must sponsor sixteen sports, *id.* art. 20.9.9.1; see *id.* fig. 20-1. Division II institutions must sponsor at least ten sports. Nat'l Collegiate Athletic Ass'n, 2013-14 NCAA Div. II Manual, 276-77 (Aug. 1, 2013), available at <http://www.ncaapublications.com/productdownloads/D214.pdf> (Bylaw 20.10.3). Depending on total student enrollment, Division III institutions must sponsor at least five or six sports. Nat'l Collegiate Athletic Ass'n, 2013-14 NCAA Div. III Manual, 187 (Aug. 1, 2013), available at <http://www.ncaapublications.com/productdownloads/D314.pdf> (Bylaw 20.11.3). Number of institutions times number of sports sponsored equals 10,165 head coaches: DI 5090 ((123 x 16) + (223 x 14)); DII 2900 (290 x 10); DIII 2195 (439 x 5). Most FBS institutions sponsor more than the minimum number of sports. Ohio State sponsors thirty-six sports, for example, see *Our Mission*, *supra* note 41, while Nebraska sponsors twenty-two, see *Teams*, NEBRASKA ATHLETICS, <http://www.huskers.com> (last visited Feb. 12, 2015). 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 Bylaws, *supra* note 1, art. 11.7.2. Track and field and cross country have three coaches for the men's team and three for the women's team. *Id.* art. 11.7.4. In addition, most sports are permitted to have unpaid volunteer coaches. *Id.* art. 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 *id.* art. 13.02.14.

45. Violations once were classified as major and secondary. See Nat'l Collegiate Athletic Ass'n, 2009-10 NCAA Div. I Manual, 289-96 (Aug. 1, 2009) (Bylaw Article 19).

committed inadvertently.<sup>46</sup> By their nature, Level IV violations never involve conduct that may have eligibility consequences for a student-athlete<sup>47</sup> 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.<sup>48</sup> Over the past four years the combined total of cases handled annually by all three Committees on Infractions averaged only 20.5 cases.<sup>49</sup> Fewer than eight of the 20.5 cases entailed a hearing.<sup>50</sup>

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

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46. NCAA Bylaws, *supra* note 1, art. 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 id.* art. 13.6.3; *List of Incidental Infractions (Level IV)*, NCAA, [http://www.ncaa.org/sites/default/files/ATT%2B2\\_Level%2BIV.pdf](http://www.ncaa.org/sites/default/files/ATT%2B2_Level%2BIV.pdf) (last visited Jan. 26, 2015). Level IV violations are handled by Conference offices. NCAA Bylaws, *supra* note 1, arts. 19.11.2, 19.12.2.

47. *See List of Incidental Infractions (Level IV)*, *supra* note 46.

48. 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 Bylaws, *supra* note 1, art. 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. *Id.* art.19.1.2.

49. The Division I Infractions Committee heard no case from June 2013 through July 2014. *See NCAA Infractions Chair on "Cheating Pays,"* ESPN (July 23, 2014), <http://espn.go.com/espn/print?id=11255935&type=story>. In 2010 the three Committees on Infractions together decided only twenty-one total cases (thirteen as summary dispositions); in 2011 there were twenty-two cases (thirteen as summary dispositions); in 2012 there were nineteen cases (thirteen as summary dispositions); in 2013 there were twenty cases (twelve as summary dispositions). Email from Cheryl DeWees, Coordinator of Comms. on Infractions, to Josephine (Jo) R. Potuto (Mar. 7, 2014) (on file with author) [hereinafter DeWees email].

50. Of these, the Division I Committee on Infractions decided thirteen cases in 2010 (six as summary dispositions), fifteen cases in 2011 (eight as summary dispositions), ten in 2012 (five as summary dispositions), and nine in 2013 (four as summary dispositions). DeWees email, *supra* note 49.

to a student-athlete.<sup>51</sup> Approximately four thousand Level III violations are processed annually.<sup>52</sup> Level III violations entail neither enforcement staff investigations nor trigger the Committee on Infractions hearing process. Rather, they are handled by an enforcement director specifically designated for that purpose (Level III Director).<sup>53</sup> The Level III Director makes no fact findings but, instead, imposes penalties based on the facts provided in an institutional self report.<sup>54</sup>

Pursuant to the cooperative principle,<sup>55</sup> universities are required promptly to report suspected violations and to

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51. NCAA Bylaws, *supra* note 1, art. 19.1.3. These violations constitute what formerly were known as secondary violations. See Nat'l Collegiate Athletic Ass'n, 2011-12 NCAA Div. I Manual, 319 (Aug. 1, 2011), *available at* <http://www.ncaapublications.com/productdownloads/D112.pdf> (Bylaw 19.02.2.1); NCAA Bylaws, *supra* note 1, art. 19.9.4(d).

52. Email from Chris Strobel, NCAA Director of Enforcement, to Josephine (Jo) R. Potuto (Jan. 9, 2015) (on file with author). According to Strobel, approximately 4475 cases were processed in 2013, and numbers are likely similar for 2014. *Id.*

53. *Id.* This position formerly was known as the Director of Enforcement for Secondary Violations. See Potuto, *NCAA Processes*, *supra* note 31, at 285.

54. See *Secondary Infractions Self-Reporting*, NCAA, <http://www.ncaa.org/secondary-infractions-self-reporting> (last visited Jan. 26, 2015). There is an online reporting system. See *Requests/Self-Reports Online: Frequently Asked Questions*, NCAA, <https://www.ncaa.org/sites/default/files/RSRO%20FAQs.pdf> (last visited Jan. 26, 2015). 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 Div. I Comm. on Infractions, Marshall University Public Infractions Report No. 191, at 5, 15-17 (Dec. 21, 2001), *available at* <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=522&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED>. The Committee on Infractions found that the violations were more serious than what was set forth even in the third and final self report. See *id.* at 7-8.

55. See NCAA Bylaws, *supra* note 1, art. 19.2.3; Potuto, *NCAA Processes*, *supra* note 31, at 289-92.

cooperate with an NCAA investigation.<sup>56</sup> Coaches, other university staff, and student-athletes agree to adhere to NCAA bylaws and to report suspected violations.<sup>57</sup>

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 presentations<sup>58</sup> resolved by the applicable division's Committee on Infractions.<sup>59</sup> The enforcement staff investigates,<sup>60</sup> makes allegations of violations,<sup>61</sup> compiles the evidence to support its allegations, and presents its evidence at an infractions committee hearing. Coaches charged with violations routinely appear with counsel.<sup>62</sup> The Committee on

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56. See Nat'l Collegiate Athletic Ass'n, 2013-14 NCAA Div. I Manual, arts. 1–6, at arts. 2.1, 2.8, 6.01 (Aug. 1, 2013) [hereinafter NCAA Constitution]; NCAA Bylaws, *supra* note 1, arts. 19.2.1–19.2.3. A fundamental obligation of NCAA membership is that institutions must be rules compliant. NCAA Constitution, *supra*, art. 2.8; NCAA Bylaws, *supra* note 1, art. 19.2.1; Potuto, *NCAA Processes*, *supra* note 31, at 285-86.

57. Coaches and staff have no right to be employed at a university. They annually sign a Certification of Compliance. NCAA Bylaws, *supra* note 1, art. 18.4.2.1.1.4. Coaches, other staff members, and student-athletes commit unethical conduct by “[r]efus[ing] 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 . . .” *Id.* arts. 10.1(a), (d). Student-athletes agree in writing to be NCAA-compliant. See *infra* text accompanying notes 202-09.

58. See NCAA Bylaws, *supra* note 1, art. 19.7. 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 on Infractions. Despite all this, the NCAA does not describe the enforcement process as adversarial. I do.

59. See *id.* Level II cases may be conducted by video conference. See *id.* art. 19.7.7. In addition, some cases may be resolved by summary disposition if all parties consent. See *id.* art. 19.6.1.

60. See *id.* art. 19.5.1.

61. See *id.* art. 19.7.1.

62. See *id.* arts. 19.02.1, 19.7.1.2, 19.7.2, 19.7.3.

Infractions writes detailed infractions reports setting forth the reasons for its findings and the penalties it imposes.<sup>63</sup>

## II. 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.<sup>64</sup> 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.<sup>65</sup> Even for Level I and II violations, reinstatement staff conduct no investigation, make no allegations of violations, and compile no evidence in support of allegations.<sup>66</sup> 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

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63. *Id.* art. 19.8.1.2. There also is a right of appeal to the Infractions Appeals Committee. *See id.* art. 19.10.

64. For a schematic that diagrams the reinstatement process, see *Student-Athlete Reinstatement Process*, NCAA (July 3, 2008), <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.

65. Reinstatement Policies and Procedures, *supra* note 14, at 2; *Reinstatement Questions*, *supra* note 1, Questions 2-4. The exception to reliance on institutional information comes if the enforcement staff begins an investigation of institutional culpability for the violations. In a rare case, it is possible that the reinstatement process may be stayed, pending 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 supra* note 54. 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 infra* notes 249, 252 for a brief description.

66. *See* NCAA Bylaws, *supra* note 1, art. 14.11.3. The most the reinstatement staff may do is request that a university gather and submit additional information. Reinstatement Policies and Procedures, *supra* note 14, at 6.

institution provides a full factual record,<sup>67</sup> and then, based on those reported facts, to assess the degree of student-athlete culpability and decide whether and under what conditions a student-athlete may be reinstated to competition eligibility.<sup>68</sup>

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.<sup>69</sup> Delay in resolution of violations no doubt burdens an institution.<sup>70</sup> 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

67. Reinstatement Policies and Procedures, *supra* note 14, at 2.

68. *See id.*; *Reinstatement Questions*, *supra* note 1, Questions 1-2.

69. *See, e.g.*, NCAA Div. I Comm. on Infractions, University of Tennessee, Knoxville Public Infractions Report No. 375, at 10-11 (Nov. 16, 2012), *available at* <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=820&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED> (enforcement staff interviews began Aug. 30, 2011; Sept. 9, 2011 Notice of Inquiry; case built on information from Infractions Report No. 342); NCAA Div. I Comm. on Infractions, Eastern Michigan University Public Infractions Report No. 379, at 26-27 (Nov. 8, 2012) [hereinafter Eastern Michigan Infractions Report], *available at* <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=819&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED> (institution's investigation began Aug. 23, 2010; Sept. 24, 2010 self report; enforcement staff interviews began Feb. 7, 2011; Aug. 8, 2011 Notice of Inquiry); NCAA Div. I Comm. on Infractions, University of Connecticut Public Infractions Report No. 339, at 48-49 (Feb. 22, 2011), *available at* <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=707&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED> (information surfaced Mar. 25, 2009; Jan. 29, 2010 Notice of Inquiry); NCAA Div. I Comm. on Infractions, Texas Southern University Public Infractions Report No. 278, at 17-18 (July 16, 2008), *available at* <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=653&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED> (July 28, 2006 Notice of Inquiry announcing NCAA investigation); NCAA Div. I Comm. on Infractions, University of Alabama, Tuscaloosa Public Infractions Report No. 193, at 34-35 (Feb. 1, 2002), *available at* <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=526&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED> (institutional report on Nov. 1, 1999; enforcement staff inquiry began Spring 2000; Feb. 21, 2001 Notice of Inquiry).

70. *See, e.g.*, Greg Bishop, *In N.C.A.A. v. Oregon, Justice Waits Again*, N.Y. TIMES (Apr. 17, 2013), [http://www.nytimes.com/2013/04/17/sports/ncaafootball/ncaas-case-against-oregon-moves-slowly.html?\\_r=0](http://www.nytimes.com/2013/04/17/sports/ncaafootball/ncaas-case-against-oregon-moves-slowly.html?_r=0).



affected while recruits wait to learn what institutional penalties will be imposed.

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.<sup>71</sup> 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 at Levels 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.<sup>72</sup> 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.<sup>73</sup> In a perfect world, there

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71. NCAA Bylaws, *supra* note 1, arts. 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 supra* note 41.

72. 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. *See* Roger Ebert, *Rudy*, ROGEREBERT (Oct. 13, 1993), <http://www.rogerebert.com/reviews/rudy-1993>.

73. *See* NCAA Bylaws, *supra* note 1, arts. 14.10.1, 14.10.4.2. Certification of continuing eligibility is the responsibility of the institution at which a student-athlete is enrolled. *See id.* art. 14.01.1. Pre-enrollment, eligibility certification is handled by the NCAA Eligibility Center. *See id.* art.14.1.2.4.1. For information about the Eligibility Center, see *NCAA Eligibility Center High School Portal*, NCAA, [https://web1.ncaa.org/ECWR2/NCAA\\_EMS/NCAA.jsp](https://web1.ncaa.org/ECWR2/NCAA_EMS/NCAA.jsp) (last visited Jan. 26, 2015). If a university has systems in place reasonably calculated to uncover violations, then it will not be found to lack institutional control of its athletic

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 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.<sup>74</sup> 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 because of other factors that weigh against delay while a waiver is processed.<sup>75</sup>

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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.

74. Reinstatement Policies and Procedures, *supra* note 14, 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 orders 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* NCAA Constitution, *supra* note 56, art. 5.4.1 (Interpretations of Constitution and Bylaws); NCAA Bylaws, *supra* note 1, arts. 21.7.7.2.2, 21.7.7.2.3; *see also* NCAA Div. I Legislative Review & Interpretations Comm., Policies and Procedures (Jan. 21, 2011), *available at* [http://web1.ncaa.org/web\\_files/AMA/LRIC/LRIC%20policies%20and%20procedures%203-3-08.pdf](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, West Virginia University Public Infractions Report No. 265 (May 1, 2007), *available at* <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=634&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED>; NCAA Div. I Comm. on Infractions, University of Notre Dame Public Infractions Report No. 163, at 11-12 (Dec. 17, 1999), *available at* <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=496&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED>; *see generally* Potuto, *NCAA Processes*, *supra* note 31, at 273-75. 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.

75. Waivers are administered both by the Student-Athlete Reinstatement Committee and by committees with substantive authority over various bylaws.

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 “du 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 clocks 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 intentionally delayed because of competitive interests and also avoids adding an adversarial occasion between the NCAA enforcement staff<sup>76</sup> and a university. Purposeful, undue investigative delay unquestionably is an institutional 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, moreover, 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, only in an extraordinary case would the “ineligible until” approach

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*See infra* note 78. The time it takes for processing a waiver varies both by the nature of the waiver and the committee that decides it.

76. 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.

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.<sup>77</sup> 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.<sup>78</sup> Fourth, in cases in which a university and student-athlete learn of a violation within forty-eight 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 the Reinstatement Committee hears and resolves an appeal.<sup>79</sup>

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77. See *infra* text accompanying note 104.

78. 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 extend for one year a student-athlete's five-year clock, NCAA Bylaws, *supra* note 1, art. 14.2.1.5, and adjust the calculation of what constitutes a season of competition, *see id.* art. 14.2.6.2; *see also* Reinstatement Policies and Procedures, *supra* note 14, at 5-7; Reinstatement Guidelines, *supra* note 19, at 25-30. The Student-Athlete Reinstatement Committee typically takes three weeks to decide a waiver handled on the written record. Reinstatement Policies and Procedures, *supra* note 14, 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, validation of academic records of prospective student-athletes, NCAA Bylaws, *supra* note 1, arts. 14.1.2.2 (High School Review Committee), 14.1.2.3 (Student Records Review Committee), and initial and continuing eligibility of individual student-athletes, *id.* arts. 14.3.1.4 (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. *See, e.g.*, Reinstatement Policies and Procedures, *supra* note 14. 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.

79. Reinstatement Policies and Procedures, *supra* note 14, at 16. Another amelioration relates to disgorgement of benefits received, an absolute condition in all cases. *See infra* note 102. 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 14, 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

Once a university confirms that a student-athlete is ineligible, it typically petitions for reinstatement of eligibility.<sup>80</sup> Because every student-athlete violation is an institutional violation, every reinstatement request includes, or is accompanied by, a report of institutional violation.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> In that event, the Level III Director will forward it to the applicable Committee on Infractions to decide how it should be classified.<sup>84</sup>

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-athlete violation, one that markedly enhances student-athlete culpability.<sup>85</sup> 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

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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.

80. NCAA Bylaws, *supra* note 1, arts. 14.10.1, 14.11.1–14.11.3. The university does so through the NCAA Requests/Self-Reports Online (RSRO) online case management system. Reinstatement Policies and Procedures, *supra* note 14, at 1.

81. *See* NCAA Bylaws, *supra* note 1, art. 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 infra* text accompanying note 242.

82. *See* NCAA Bylaws, *supra* note 1, art. 19.1; *see also* Eastern Michigan Infractions Report, *supra* note 69, at 27 (“The institution emailed its self-report of violations . . . to the former vice president of enforcement.”).

83. *See* NCAA Bylaws, *supra* note 1, art. 19.11.2.

84. *See id.*

85. *Id.* arts. 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. *Id.* art. 14.10.4.2.

when a university did not know and, in the exercise of due diligence, had no reason to know.<sup>86</sup>

### B. *The Student-Athlete Reinstatement Committee and Guidelines*

The Student-Athlete Reinstatement Committee has five members,<sup>87</sup> plus a nonvoting student-athlete from the national Student-Athlete Advisory Committee (SAAC).<sup>88</sup> A high volume of reinstatement petitions is filed annually—

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86. The extent to which the ineligible competition will result in enhanced penalties for the institution depends on the competitive advantage gained and also on whether the institution had a 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.

87. NCAA Bylaws, *supra* note 1, art. 21.7.7.3.1. Committee members are faculty and administrators at member institutions and conferences, not NCAA staff members. *Id.* art. 21.7.1.1. They are appointed through formal NCAA processes. *Id.* art. 21.7.3.3; *see infra* notes 210-11.

88. NCAA Bylaws, *supra* note 1, art. 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: men's and women's track and field have two representatives each; football has four. Policy for Student-Athlete Advisory Committee: University of Nebraska-Lincoln (on file with author); Email from Keith Zimmer, Assoc. Dir. for Life Skills, Univ. of Neb., to Josephine (Jo) R. Potuto (Jan. 9, 2015, 15:03 CST) (on file with author). Representatives from campus SAACs serve on Conference SAACs and have an advisory role in the development of Conference positions on legislative proposals. *See* Big Ten Conference, 2014-2015 Big Ten Conference Handbook 45-46 (Rule 4.4.2.2.C.2). In turn, one student-athlete from each Conference SAAC serves on the Division I national SAAC. NCAA Bylaws, *supra* note 1, art. 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 Division I Student-Athlete Advisory Committee Roster*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=1SAA](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1SAA) C (last visited Jan. 27, 2015). 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.

approximately 1850 petitions were filed in academic year 2010-11, for example, the last year for which data are reported.<sup>89</sup> To manage the volume, the Reinstatement Committee does not handle reinstatement petitions in the first instance.<sup>90</sup> Instead, the Reinstatement Committee has adopted guidelines for handling cases, the reinstatement staff resolves the cases pursuant to these guidelines, and the Reinstatement Committee hears appeals from staff decisions.<sup>91</sup>

Reinstatement Guidelines cover every conceivable type of violation, including those committed by a student-athlete before enrollment at an NCAA institution.<sup>92</sup> 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.<sup>93</sup> Guidelines also may expedite the reinstatement process—an important feature given the heightened need for speed in student-athlete reinstatement cases.<sup>94</sup>

The most significant reinstatement conditions are withholding a student-athlete from competition and decreasing the time on a student-athlete's five-year eligibility

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89. *Reinstatement Questions*, *supra* note 1, Question 9.

90. *See id.* Question 2.

91. *See id.*; Reinstatement Policies and Procedures, *supra* note 14, at 20; *Division I Student-Athlete Reinstatement Committee Duties & Responsibilities*, NCAA, <http://www.ncaa.org/division-i-student-athlete-reinstatement-committee-duties-responsibilities> (last visited Jan. 27, 2015). There are thirty-six pages of guidelines for staff to use in dealing with the consequences to student-athletes attendant on their commission of violations. *See generally* Reinstatement Guidelines, *supra* note 19. The guidelines are available online at the NCAA website.

92. *See generally* Reinstatement Guidelines, *supra* note 19.

93. *See infra* text accompanying notes 268-75 (discussing a failure of transparency and perceived cross-institutional inconsistency in decisions).

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

clock.<sup>95</sup> Level I and II violations and violations committed intentionally by student-athletes can result in withholding of up to an entire season of competition,<sup>96</sup> loss of eligibility for one or more seasons, and sometimes both.<sup>97</sup>

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.<sup>98</sup> Other serious violations—academic fraud,<sup>99</sup> 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.<sup>100</sup> Still other serious violations—lying to NCAA Eligibility Center staff—have a minimum threshold penalty of less than permanent ineligibility (in this case, fifty percent) that can be increased up to permanent ineligibility on a showing that a student-athlete had serious culpability.<sup>101</sup> Violations involving prohibited benefits always require disgorgement of the

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95. In reinstatement parlance, these are known as “sitting” and “charging” conditions.

96. 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 14, at 15.

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

98. Reinstatement Guidelines, *supra* note 19, at 5.

99. NCAA Bylaws, *supra* note 1, art. 10.1(b); Reinstatement Guidelines, *supra* note 19, at 1.

100. In about one percent of the cases, a student-athlete is permanently ineligible. See *Reinstatement Questions*, *supra* note 1, Question 9.

101. See Reinstatement Guidelines, *supra* note 19, at 1. 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. See *id.* at 2-3. 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. *Id.* at 3.



benefit or its value.<sup>102</sup> They also trigger withholding conditions when the amount of the benefit is more than \$100.<sup>103</sup>

The reinstatement staff attempts to resolve a case before a student-athlete's next date of competition.<sup>104</sup> 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.<sup>105</sup> The average time for resolution of a routine case is one week.<sup>106</sup>

As a general rule, only an association member can seek redress from the adverse impact of an association's bylaw or

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102. See NCAA Bylaws, *supra* note 1, art. 16.01.1.1; see, e.g., Reinstatement Guidelines, *supra* note 19, at 5-6, 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. Reinstatement Guidelines, *supra* note 19, at 5-6. In rare circumstances involving minimal student-athlete culpability and no extra benefit, the reinstatement condition may be community service. *Id.* at 32. For benefits that are not cash payments, the Reinstatement Guidelines describe how to calculate their money value. *Id.* at 21-24.

103. NCAA Bylaws, *supra* note 1, art. 16.01.1.1; Reinstatement Guidelines, *supra* note 19, at 20. Extra benefit withholding penalties, for example, begin at ten percent of a year's competitions for benefits over \$100 up to thirty percent for benefits over \$700. Reinstatement Guidelines, *supra* note 19, at 20-21; see also NCAA Bylaws, *supra* note 1, art. 16.11.2.1. Receipt of prize money over necessary expenses pre-enrollment, as another example, triggers a withholding penalty of ten percent of a year's competitions for net prize money over \$500 up to thirty percent for net prize money over \$1000. Reinstatement Guidelines, *supra* note 19, at 5-6; see also NCAA Bylaws, *supra* note 1, art. 12.1.2.1.6. Receipt of prize money over necessary expenses post-enrollment, as a third example, triggers withholding of ten percent of a year's competitions for career prize money over necessary expenses over \$100 up to thirty percent for career net prize money over \$700. Reinstatement Guidelines, *supra* note 19, at 6-7; see also NCAA Bylaws, *supra* note 1, art. 12.1.2.1.6. These withholding penalties may be increased or decreased based on the level of student-athlete culpability. See Reinstatement Guidelines, *supra* note 19, at 6.

104. Reinstatement Policies and Procedures, *supra* note 14, at 2; *Reinstatement Questions*, *supra* note 1, Question 6.

105. Reinstatement Policies and Procedures, *supra* note 14, at 2.

106. *Reinstatement Questions*, *supra* note 1, Question 6. Complicated cases take longer. *Id.*

policy.<sup>107</sup> That means that an NCAA member institution, not a student-athlete, brings a reinstatement request or presents a case in favor of reinstatement.<sup>108</sup> 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 a university enforces the decision against its student-athletes.<sup>109</sup>

Case reports of student-athlete reinstatement decisions typically are posted on the NCAA website and are available as precedent.<sup>110</sup> They are brief summaries with neither institution nor student-athlete identified.<sup>111</sup>

### 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 culpability than a university believes is warranted.<sup>112</sup> Appeals are scheduled based on when a request is received

107. See Potuto, *NCAA Processes*, *supra* note 31, at 267-68.

108. *Reinstatement Questions*, *supra* note 1, Question 7. 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. A university also typically will accede to a student-athlete's request that a petition be advanced. *See infra* note 234; *see also infra* notes 242-43 and accompanying text. In drug appeals, by contrast, a university does not have the discretion to refuse a student-athlete's request that it appeal a positive test. *See infra* note 189 and accompanying text.

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

110. Reports are posted on the NCAA Legislative Services Database for the Internet (LSDBi) or on RSRO. *Reinstatement Policies and Procedures*, *supra* note 14, at 10; *see also* NCAA Case Summary No. 307925 (June 12, 2013) (on file with author) [hereinafter Case Summary 307925]; NCAA Case Summary No. 341806 (May 28, 2013) (on file with author) [hereinafter Case Summary 341806]. Not all case summaries are posted, or remain posted. *See infra* text accompanying notes 268-70.

111. *See, e.g.*, Case Summary 307925, *supra* note 110; Case Summary 341806, *supra* note 110; *see also* *Reinstatement Policies and Procedures*, *supra* note 14, at 13.

112. *See* *Reinstatement Policies and Procedures*, *supra* note 14, at 8.

and a student-athlete's next date of competition.<sup>113</sup> Review of documentation typically takes forty-eight hours but may be expedited if a case warrants urgent consideration.<sup>114</sup> A student-athlete must participate in an appeal.<sup>115</sup>

All bylaw interpretation questions must be resolved before an appeal is heard.<sup>116</sup> A university may relitigate neither its factual conclusions nor its conclusion that particular violations were committed.<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup> All other appeals are conducted by telephone.<sup>120</sup>

The Student-Athlete Reinstatement Committee deliberates and resolves an appeal immediately after a hearing ends. The Committee decision is binding, with no

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113. *Id.* Review by paper record typically takes seven business days. *Id.* The Reinstatement Committee has one or two scheduled appeals times weekly. *Id.*

114. *Id.*

115. *See id.* at 9.

116. *See id.* at 8.

117. *Id.*; see NCAA Division I Student-Athlete Reinstatement: Request to Appeal Decision of Student-Athlete Reinstatement Staff, NCAA (Feb. 18, 2011) (one file with author). If a university produces new evidence on appeal, it may relitigate a fact conclusion. Reinstatement Policies and Procedures, *supra* note 14, at 8-9.

118. *Reinstatement Questions*, *supra* note 1, Question 2.

119. Reinstatement Policies and Procedures, *supra* note 14, at 8.

120. *See id.* 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. A student-athlete and university also are allotted ten minutes each to present their positions and respond to questions. *Id.* at 9-10. Staff, university, and student-athlete each have five minutes for closing statements. *Id.* at 10. A student-athlete may be represented by counsel on the appeal. *Id.* at 9. Telephone hearings enhance a student-athlete's opportunity to participate, as they entail neither travel and travel costs nor missed class time.

further review available.<sup>121</sup> Committee action to affirm, modify, or reverse a reinstatement staff decision is added to the online staff report that summarized the initial reinstatement decision, together with the Committee's rationale for modification or reversal.<sup>122</sup>

### III. JUDICIAL DEFERENCE TO NCAA STUDENT-ATHLETE ELIGIBILITY DECISIONS

Private associations are afforded considerable leeway by courts to chart their own courses, even when their operations are exclusively internal to one state.<sup>123</sup> 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.<sup>124</sup> Associations that regulate competition need uniform rules administered uniformly. The NCAA, the IOC,<sup>125</sup> and professional sports associations in the

121. *Id.* at 11.

122. Email from Laure Ragoss, Assoc. Dir. of Compliance, Univ. of Neb., to Josephine (Jo) R. Potuto (Jan. 9, 2015, 14:45 CST) (on file with author).

123. *See generally* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000); *Gulf S. Conference v. Boyd*, 369 So. 2d 533, 556-57 (Ala. 1979); *Am. Fed'n of Technical Eng'rs v. La Jeunesse*, 347 N.E.2d 712, 715 (Ill. 1976); *Zechariah Chafee, Jr., The Internal Affairs of Associations 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.*, *Durfee v. Duke*, 375 U.S. 106 (1963); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). 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. City of Memphis*, 87 U.S. 590 (1874). A court reviewing an agency hearing decision defers to agency expertise. *See* 5 U.S.C. § 706 (2012); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984). 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 (2012); *see also* *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-10 (2001).

124. *NCAA v. Miller*, 10 F.3d 633, 639-40 (9th Cir. 1993).

125. Athlete eligibility of Olympic athletes is handled by the Court of Arbitration for Sport (CAS). *See* Matthew J. Mitten & 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).

United States<sup>126</sup> 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.<sup>127</sup>

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.<sup>128</sup> Generally, that means a student-athlete's violation is reported to the reinstatement staff and the student-athlete fulfills the reinstatement condition thereafter imposed.<sup>129</sup> 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

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126. 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 ET. AL, *supra* note 42, at 386-89, 553-54.

127. The Dormant Commerce Clause of the Constitution of the United States limits state legislative action that has extraterritorial effect or impact on interstate commerce. Potuto, *NCAA Processes*, *supra* note 31, at 269-72. 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*, [1979] 3 All E.R. 1041 at 1049-50.

128. NCAA Bylaws, *supra* note 1, art. 3.2.4.3. To fail to do so is a clear violation of a member university's core obligations of NCAA membership.

129. *Id.* art. 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 *supra* note 74. In other cases, it may mean that a university obtained a waiver from the operation of a bylaw. See Potuto, *NCAA Processes*, *supra* note 31, at 276. The Reinstatement Committee also hears appeals of staff denials of waivers from the operation of a guideline condition. NCAA Bylaws, *supra* note 1, art. 21.7.7.3.3. Except in unusual circumstances, these appeals are handled on a written record. See *Reinstatement Policies and Procedures*, *supra* note 14, at 8; Potuto *NCAA Processes*, *supra* note 31, at 277.

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.<sup>130</sup> Substantial withholding or eligibility conditions are imposed because of serious violations committed purposefully.<sup>131</sup> In these cases, student-athletes might well conclude that they cannot prevail in litigation. Student-athletes also may have too little time remaining on their competition eligibility clocks to warrant a court challenge. Finally, they may be reluctant to be adversaries of their universities.<sup>132</sup>

When student-athletes go to court, they rarely prevail. But many of the NCAA's victories come on appeal.<sup>133</sup> Between

130. Free or reduced cost legal services would be an NCAA violation if litigation were initiated by a student-athlete. See NCAA Bylaws, *supra* note 1, arts. 12.1.2.1.6, 16.11.2. Expenses, including lawyer fees, may be provided for conference or NCAA proceedings. *Id.* arts. 14.10.2.1, 16.3.2.

131. See NCAA Bylaws, *supra* note 1, art. 14.11.3. For the showing they must make, see *infra* text accompanying notes 139-50.

132. 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. Josephine (Jo) R. Potuto, *NCAA as State Actor Controversy: Much Ado About Nothing*, 23 MARQ. SPORTS L. REV. 1, 20 n.120 (2012) [hereinafter Potuto, *State Actor*]. 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 19.13 (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.

133. Michael H. LeRoy, Courts and the Future of "Athletic Labor" in College Sports 11-12 (unpublished manuscript) (on file with author), *available at* [https://will.illinois.edu/nfs/LAW15-NCAA-2014-LeROY-1\\_3.pdf](https://will.illinois.edu/nfs/LAW15-NCAA-2014-LeROY-1_3.pdf); see Paul M.

1973 and 2014 student-athletes sued the NCAA forty-five times,<sup>134</sup> resulting in eighty-one trial and appellate decisions.<sup>135</sup> Trial judges issued injunctions in eighteen cases. All but a few ultimately were vacated.<sup>136</sup> A trial and subsequent appeals could take one or two years. At that point, many if not most NCAA 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,<sup>137</sup> no appeals decision can undo a win on the field.<sup>138</sup> In consequence, the NCAA has adopted the Restitution Rule.<sup>139</sup>

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

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Barrett, *When Students Fight the NCAA in Court, They Usually Lose*, BLOOMBERG BUSINESSWEEK (July 2, 2014), <http://www.businessweek.com/articles/2014-07-02/when-students-fight-the-ncaa-in-court-they-usually-lose>.

134. See LeRoy, *supra* note 133, at 9-10. Of these, fifty-six percent involved student-athletes challenging their loss of eligibility. *Id.* at 11.

135. *Id.* at 6, 12. He found that student-athletes prevail at trial in forty-nine percent of the cases they bring. See *id.* at 11. Of the thirty-one cases that went to a first review (typically an appeal), LeRoy reported that the NCAA prevailed seventy-one percent of the time (twenty-two cases) and split in another three 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.* at 14-16; see also Barrett, *supra* note 133.

136. LeRoy, *supra* note 133, at 16.

137. NCAA Bylaws, *supra* note 1, arts. 19.13 (a)-(c).

138. 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. See *id.* art. 19.13.

139. See *id.*

courts.<sup>140</sup> 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. Notwithstanding the sound reasons for its existence, the Restitution Rule understandably generates criticism.<sup>141</sup>

#### A. *Contract-Based Claims*

The NCAA essentially is a big, multi-subject, multi-party contract.<sup>142</sup> NCAA bylaws govern not only the substantive rights and obligations of membership, but they also 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 contract terms—in other words, consistent with party intent<sup>143</sup>—so long as bylaws comply with federal or generally applicable state law,<sup>144</sup> including the common law contract principles of fair dealing and good faith.<sup>145</sup> A university may go to court to challenge a refusal to

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140. *Id.* Penalties range from vacating of records to exclusion from post-season championships. *See id.*

141. *See, e.g.,* Ross, Karcher & Kensinger, *supra* note 35.

142. *See* Potuto, *NCAA Processes*, *supra* note 31, at 266-67.

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

144. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (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 of Univ. of Okla.*, 468 U.S. 85, 98-99 (1984).

145. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); 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 *Cottrell v. NCAA*, 975 So. 2d 306, 315 (Ala. 2007); *Cal. State Univ., Hayward v. NCAA*, 121 Cal. Rptr. 85, 88-89 (Cal. Ct. App. 1975); *Bloom v. NCAA*, 93 P.3d 621, 624 (Colo. App. 2004). Courts have even upheld contract terms that transgress the tenets of good faith and fair



depart downward from a guideline reinstatement condition or the assignment of a degree of student-athlete culpability greater than the university believes was warranted.<sup>146</sup> 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.<sup>147</sup>

Student-athletes may challenge an NCAA bylaw or its enforcement only as third-party beneficiaries.<sup>148</sup> Their opportunity to challenge a reinstatement decision, therefore, is no greater than that of a member institution.<sup>149</sup>

Jeremy Bloom played football at the University of Colorado and also was an Olympic skier.<sup>150</sup> He sought to endorse products in his role as a skier and still be eligible to play football. He challenged as arbitrary<sup>151</sup> NCAA bylaws that

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dealing when the result is anticipated in explicit contract language. *E.g.*, *VTR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773, 780 (S.D.N.Y. 1969).

146. *See* Potuto, *State Actor*, *supra* note 132, at 18-19. 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.

147. *E.g.*, *Bloom*, 93 P.3d at 628; *Ind. High Sch. Athletic Ass'n v. Reyes*, 694 N.E.2d 249, 257-58 (Ind. 1997); 6 AM. JUR. 2D *Associations and Clubs* § 28 (1999); Kenneth J. Philpot & John R. Mackall, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903, 911 (1972). 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*, 93 P.3d at 625; RESTATEMENT (SECOND) OF CONTRACTS § 203 (2012). The contract-based standard of review is that generally accorded to private associations. *See, e.g.*, *Am. Fed'n of Technical Eng'rs v. La Jeunesse*, 347 N.E.2d 712, 715 (Ill. 1976).

148. *See* Potuto, *NCAA Processes*, *supra* note 31, at notes 83-85 and accompanying text.

149. E. ALLAN FARNSWORTH, *CONTRACTS* § 10.9 (Erwin Chemerinsky et al. eds., 4th ed. 2004).

150. *Bloom*, 93 P.3d at 622.

151. 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

permit student-athletes to compete professionally in one sport and still retain NCAA eligibility in other sports<sup>152</sup> but, by contrast, render them ineligible for all NCAA sports if they exploit their athletic reputations by endorsing products related to one sport.<sup>153</sup>

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.<sup>154</sup> Losing that attempt, Colorado then requested a waiver from the application of the bylaw.<sup>155</sup> 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.<sup>156</sup>

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.<sup>157</sup> Prior to attending the University of Louisville, Lasege professionalized himself under NCAA bylaws by, among other things, signing a

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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.

152. NCAA Bylaws, *supra* note 1, art. 12.1.3.

153. *Id.* art. 12.5.2.1; *see Bloom*, 93 P.3d at 622. 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 Bylaws, *supra* note 1, arts. 12.4.1.1, 12.5.1.3, 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.

154. *Bloom*, 93 P.3d at 622.

155. *Id.*

156. The court concluded that the "various shades of gray" in the wallpaper of amateurism bylaws did not constitute arbitrary treatment. *Id.* at 627.

157. *NCAA v. Lasege*, 53 S.W.3d 77, 80 (Ky. 2001). For a case involving a high school association that reached the same result, see *Ind. High Sch. Athletic Ass'n v. Reyes*, 694 N.E.2d 249 (Ind. 1997).

contract to play professional basketball.<sup>158</sup> When Louisville found out, it declared Lasege ineligible and sought reinstatement of his eligibility, without success. Pursuant to Reinstatement Guidelines, Lasege was permanently ineligible.<sup>159</sup> 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.<sup>160</sup> The Kentucky Supreme Court nonetheless reversed the trial judge, upholding the reinstatement decision that Lasege was permanently ineligible.<sup>161</sup>

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.<sup>162</sup> 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.<sup>163</sup> The trial judge held that it violated Ohio public policy to prevent a student-athlete from obtaining a lawyer’s help in contract negotiations.<sup>164</sup> 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

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158. *Lasege*, 53 S.W.3d at 80.

159. See Reinstatement Guidelines, *supra* note 19, at 5.

160. *Lasege*, 53 S.W.3d at 81-82 (Ky. 2001).

161. See *id.* at 86.

162. *Oliver v. NCAA*, 920 N.E.2d 203, 206 (Ohio Ct. Com. Pl. 2009), *vacated after settlement*.

163. *Id.* at 207. NCAA amateurism bylaws permit lawyers to represent student-athletes but not to act as agents for them. See NCAA Bylaws, *supra* note 1, art. 12.3.2.

164. *Oliver*, 920 N.E.2d at 215. 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.* at 214.

value.<sup>165</sup> In addition, the decision was 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.<sup>166</sup>

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,<sup>167</sup> state common law tort claims, and federal statutes,<sup>168</sup> including the antitrust laws. To date, none have proved fertile ground for challenges to NCAA bylaws rendering student-athletes ineligible to

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165. 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 twenty 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. Darren Heitner, *Is The NCAA Improperly Suspending Student-Athletes by Relying on the 'No-Agent Rule'?*, FORBES (Feb. 26, 2014, 3:54 PM), <http://www.forbes.com/sites/darrenheitner/2014/02/26/is-the-ncaa-improperly-suspending-student-athletes-by-relying-on-the-no-agent-rule>.

166. See *supra* text accompanying notes 133-36.

167. State statutes that target the NCAA are a different story. See *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993); Potuto, *NCAA Processes*, *supra* note 31, at 269-72.

168. In *Cureton v. NCAA*, 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, 111 (3d Cir. 1999); see also 42 U.S.C. §§ 2000d-1–2000d-7 (2012). 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. *Cureton*, 198 F.3d at 114-18.

compete.<sup>169</sup> Potentially the most available ground for challenge, in scope of coverage and relevance to NCAA operations, is the antitrust laws. The antitrust laws prohibit monopolies<sup>170</sup> and unreasonable restraints of trade by entities with sufficient market share when they act in concert.<sup>171</sup> The antitrust question for group entities such as the NCAA is whether the procompetitive effects of group conduct predominate over the anticompetitive effects.<sup>172</sup> In practice, courts have treated NCAA eligibility rules and enforcement policies as virtually per se legal under the antitrust laws.<sup>173</sup>

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169. In a 2013 class action lawsuit, Sam Keller, a former student-athlete, claimed that the NCAA violated his state right of publicity. *See* Third Consolidated Amended Class Action Complaint at 3, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. 09-cv-01967, 2013 WL 3772677 (N.D. Cal. July 18, 2013). Keller challenged a college football videogame in which avatars of actual players were used. *Id.* The NCAA licensed its name and likeness for use in the game. *Id.* The NCAA settled with the Keller plaintiffs for \$20 million. *See* Michael Marot, *NCAA Reaches \$20M Settlement in Keller's Video-Games Suit*, FOX SPORTS (June 10, 2014, 7:55 PM), <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* Darren Rovell, *EA Sports Settles With Ex-Players*, ESPN (Sept. 26, 2013), [http://espn.go.com/college-football/story/\\_/id/9728042/ea-sports-stop-producing-college-football-game](http://espn.go.com/college-football/story/_/id/9728042/ea-sports-stop-producing-college-football-game).

170. Sherman Antitrust Act § 2, 15 U.S.C. § 2 (2012).

171. *Id.* § 1; *see* *Washington v. NFL Ventures, L.P.*, 880 F. Supp. 2d 1004, 1008 (D. Minn. 2012) (holding that former NFL players failed to state antitrust claim in allegation that the NFL monopolized the market in game footage).

172. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 202-04 (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—so anticompetitive as to be a per se antitrust violation. *Id.* at 203. Athletic competition requires some level of cooperation between competitors. *See* *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103 (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. *Id.* at 103-04.

173. *See, e.g.,* *Smith v. NCAA*, 139 F.3d 180, 184-87 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992) (holding that 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. Third Consolidated Amended Class Action Complaint, *supra* note 169, at 4. The plaintiffs do not seek reinstatement of eligibility or a prohibition on bylaws that would render them

Renee Smith challenged as an unreasonable restraint of trade<sup>174</sup> 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 undergraduate.<sup>175</sup> The Third Circuit first found that the antitrust laws were inapplicable to NCAA eligibility bylaws because the bylaws regulate no commercial activity.<sup>176</sup> The

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ineligible were they to exploit their names and likenesses. *Id.* at 191-98. 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 (Mar. 5, 2014), [http://espn.go.com/college-football/story/\\_id/10558893/ncaa-conferences-sued-scholarship-value](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. Christian Dennie, *Jenkins v. NCAA: Another Antitrust Lawsuit Challenging the Athletic Scholarship*, BARLOW, BARSEK, & SIMON, LLP (Mar. 18, 2014, 6:32 PM), <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*, No. 06-999, 2006 WL 8066802 (C.D. Cal. Sept. 20, 2006); Jon Solomon, *NCAA's Latest Cost of Attendance Debate Offers Questions, No Answers*, CBS SPORTS (May 6, 2014, 11:11 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24553166/ncaa-s-latest-cost-of-attendance-debate-offers-questions-no-answers>; *see also* *Agnew v. NCAA*, 683 F.3d 328, 340-46 (7th Cir. 2012) (holding NCAA bylaws that limit scholarship to costs of education do not violate antitrust laws and that bylaws that promote amateurism and most if not all eligibility bylaws are “presumptively procompetitive”); *McCormack v. NCAA*, 845 F.2d 1338, 1343-45 (5th Cir. 1988) (finding NCAA bylaws that limit scholarships do not violate antitrust laws); *Rock v. NCAA*, 928 F. Supp. 2d 1010 (S.D. Ind. 2013) (holding 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 I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (holding NCAA bylaws that cap the number of scholarships do not violate antitrust laws).

174. *See* Sherman Antitrust Act, §§ 1, 2, 15 U.S.C. §§ 1, 2 (2012). 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 (2012). 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. *Smith*, 139 F.3d at 183.

175. *Smith*, 139 F.3d at 182. NCAA bylaws now permit what Smith sought to do. *See* NCAA Bylaws, *supra* note 1, arts. 14.1.8.1, 14.2, 14.2.1.

176. *Smith*, 139 F.3d at 186 (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)). The Third Circuit distinguished the scope of the antitrust

court further found that, even if the antitrust laws applied, limiting student-athlete postgraduate competition opportunities was not “plainly anticompetitive.”<sup>177</sup>

#### IV. THE NCAA DRUG TESTING PROGRAM AND APPEALS PROCESS

Student-athlete violations include the ingestion of banned substances.<sup>178</sup> Drug violations are handled by the Drug-Education and Drug-Testing Subcommittee (Drug Test Subcommittee) of CMAS.<sup>179</sup> A student-athlete is ineligible to compete upon notice of a positive test for a banned substance<sup>180</sup> unless and until an appeal is resolved in his favor<sup>181</sup> or he serves out the period of ineligibility. In the latter case, a student-athlete is not automatically restored to

laws, which is limited to commercial and business activities, to remedies that may be provided once injury is found. *Id.* at 184-86 (comparing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979), with *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959)); *see also* *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 374 (5th Cir. 2014).

177. *Smith*, 139 F.3d at 186 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

178. *See* NCAA Bylaws, *supra* note 1, art. 10.2.

179. *See id.* art. 21.2.2; *see also* *Drug Testing Appeals Process*, NCAA (Aug. 2014), <http://www.ncaa.org/health-and-safety/policy/drug-testing-appeals-process> [hereinafter *Drug Appeals*]. CMAS is a twenty-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 Committee on Competitive Safeguards and Medical Aspects of Sports*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=SAFE GUARDS](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=SAFE_GUARDS) (last visited Jan. 29, 2015). CMAS also adopts drug testing policies and procedures, subject to final approval by the NCAA Executive Committee, which has ultimate authority for implementation of the NCAA drug testing program. NCAA Constitution, *supra* note 56, art. 2.1.

180. These include stimulants, anabolic agents, alcohol and beta blockers, diuretics and masking agents, and street drugs. NCAA Bylaws, *supra* note 1, art. 31.2.3.4; *Drug-Testing Program*, *supra* note 29, at 2.

181. NCAA Bylaws, *supra* note 1, art. 18.4.1.5; *see also* *Drug-Testing Program*, *supra* note 29, at 11. Full procedures are available at <http://www.ncaa.org/health-and-safety/policy/drug-testing>.

eligibility. For that to happen, he must first both be retested for the presence of a banned substance and test negative and then be restored to eligibility by the Student-Athlete Reinstatement Committee.<sup>182</sup>

Student-athletes may participate in intercollegiate athletic competition only if they agree to submit to random, suspicionless drug testing.<sup>183</sup> 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.<sup>184</sup> Universities provide drug education to student-athletes that includes information on banned drugs and the eligibility consequences of ingesting them.<sup>185</sup> 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

182. Drug-Testing Program, *supra* note 29, at 12.

183. NCAA Constitution, *supra* note 56, art. 3.2.4.7; NCAA Bylaws, *supra* note 1, art. 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. Drug-Testing Program, *supra* note 29, at 2, 4. Student-athletes who are ineligible due to a positive drug test are subject to NCAA retesting at any time during the period of ineligibility. *Id.* at 12.

184. NCAA Bylaws, *supra* note 1, art. 18.4.1.5.1; *see also Drug Appeals*, *supra* note 179, ¶¶ 5(a)–(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. *See* Drug-Testing Program, *supra* note 29, at 12.

185. Drug-Testing Program, *supra* note 29, 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 Program, *supra* note 22, at 13. In 2009 and 2011 the NCAA research staff compiled information on institutional programs. *See* NCAA Research, Drug Education / Drug Testing Survey: Preliminary Results (Nov. 15, 2011), <http://www.ncaa.org/sites/default/files/15.%20Institutional%20Drug%20Education%20and%20Testing%20Survey%202011.pdf>; NCAA Comm. on Competitive Safeguards & Med. Aspects of Sports, NCAA 2009 Survey: Member Institution's Drug-Education and Drug-Testing Programs, <http://www.ncaa.org/sites/default/files/16.%20Institutional%20Drug%20Education%20and%20TestingSurvey2009.pdf> (last visited Jan. 29, 2015).



affected the integrity of a sample.<sup>186</sup> 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 education program or that the ingestion of a banned substance was due to circumstances out of the student-athlete's control.<sup>187</sup>

Like reinstatement appeals, drug test appeals are conducted by telephone.<sup>188</sup> By contrast to student-athlete reinstatement cases, a student-athlete may insist that his university appeal a positive drug test.<sup>189</sup> Like student-athlete reinstatement cases, student-athletes must participate in an appeal and may have a lawyer to assist them.<sup>190</sup> 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.<sup>191</sup> The Drug Test Subcommittee deliberates and decides the appeal immediately after the appeal is concluded.<sup>192</sup>

Drug Test Subcommittee decisions are final. By contrast to reinstatement appeals, Drug Test Subcommittee decisions are neither 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

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186. *Drug Appeals*, *supra* note 179, ¶¶ 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.

187. *See id.* ¶ 5(c). Mitigating factors include neither evidence of a student-athlete's good character or remorse nor the amount of a banned substance and whether it enhanced competitive performance. *Id.*

188. *See Drug-Testing Program*, *supra* note 29, at 12; *Drug Appeals*, *supra* note 179, ¶ 2.

189. *Drug-Testing Program*, *supra* note 29, at 11.

190. 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 id.* at 12; *Drug Appeals*, *supra* note 179, ¶ 4.

191. *See Drug Appeals*, *supra* note 179, ¶¶ 5, 8.

192. *See id.* ¶ 9.

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.<sup>193</sup> In *Hill v. NCAA*,<sup>194</sup> the 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.<sup>195</sup>

#### V. DUE PROCESS, STUDENT-ATHLETES, AND NCAA DECISION-MAKING

Student-athletes cannot successfully raise a Fourteenth Amendment due process challenge to NCAA reinstatement or drug appeal processes both because the NCAA is not a state actor<sup>196</sup> and because student-athletes have no

193. *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002); *see* *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding such a program constitutional at least when the only consequence of a positive test result is participation ineligibility). The Court also upheld random urinalysis testing for 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.*, *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 676-77 (1989) (discussing random urinalysis of treasury department employees on promotion or when carrying guns); *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 606 (1989) (discussing random urinalysis of railroad employees).

194. 865 P.2d 633 (Cal. 1994); *see also* *Brennan v. Bd. of Trs. for Univ. of La. Sys.*, 691 So. 2d 324, 329 (La. Ct. App. 1997) (holding University of Southwestern Louisiana’s suspension of student-athlete from participation in its football program for violating NCAA drug testing program did not violate his privacy rights under Louisiana Constitution).

195. *See Hill*, 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 (quoting *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 n.28 (1984)).

196. The Constitution of the United States applies to state actors, not private ones. *See Barron v. Baltimore*, 32 U.S. 243, 247 (1833); *see also* *The Civil Rights Cases*, 109 U.S. 3, 13 (1883). The NCAA is not a state actor. *See Tarkanian v. NCAA*, 488 U.S. 179, 196-97 (1988).

constitutional reliance interest in the opportunity to compete in a college sport.<sup>197</sup> Even were a due process claim available, moreover, NCAA processes likely are adequate, or could be made so without fundamental changes.<sup>198</sup>

Procedural due process means that individuals with constitutionally cognizable liberty or property interests<sup>199</sup> 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 against them.<sup>200</sup> The constitutional adequacy of procedure varies by context according to how high the value placed on the particular substantive interest to be abridged.<sup>201</sup>

#### A. *The Process Provided*

Student-athletes are informed of NCAA bylaws that affect them, as well as the potential consequences should they commit violations. NCAA bylaw requirements are incorporated into the scholarship agreements that student-athletes sign.<sup>202</sup> As a condition of their competition eligibility, they annually agree in writing to abide by NCAA bylaws and to report positive drug test results.<sup>203</sup> Before signing, they are

197. 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 621, 624 (Colo. App. 2004); *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, 85-86 (W. Va. 2001). Like student-athletes and NCAA competition, amateur athletes have no constitutional right to compete in the Olympics. *DeFrantz v. U.S., Olympic Comm.*, 492 F. Supp. 1181, 1188 (D.D.C. 1980). There also is no fundamental right to practice a profession. *See, e.g.*, *Dittman v. California*, 191 F.3d 1020, 1031 n.5 (9th Cir. 1999); *Amunrud v. Bd. of Appeals*, 143 P.3d 571, 577 (Wash. 2006).

198. *See Potuto, State Actor, supra* note 132, at 12 n.64.

199. *See, e.g.*, *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 82 (1978).

200. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

201. *See, e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mathews v. Eldridge*, 424 U.S. 319, 330-32 (1976).

202. *See Big Ten, Big Ten Tender of Financial Aid Form* (on file with author).

203. 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

directed to review a summary of pertinent NCAA bylaws (bylaws specifically referenced cover ethical conduct,<sup>204</sup> amateurism,<sup>205</sup> academic eligibility,<sup>206</sup> drug use,<sup>207</sup> and extra benefits<sup>208</sup>). Student-athletes also regularly receive rules education on those bylaws.<sup>209</sup>

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.<sup>210</sup> The Reinstatement Committee and CMAS members serve two consecutive three-year terms;<sup>211</sup> on occasion, they serve longer to assure

which they have knowledge. NCAA Constitution, *supra* note 56, art. 3.2.4.6; NCAA Bylaws, *supra* note 1, art. 14.1.3.1; *see also* NCAA Form 13-3a, NCAA Form 08-31, Student-Athlete Statement-NCAA Division I; Potuto, *What's in a Name*, *supra* note 1, at 913 n.173.

204. *See* NCAA Bylaws, *supra* note 1, art. 10.1.

205. *Id.* art.12.01.1.

206. *Id.* art. 14.01.2.

207. *Id.* arts. 18.4.1.5, 31.2.3.

208. *Id.* art. 16.02.3.

209. 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*, NCAA <https://www.ncaa.org/sites/default/files/NCAA%2BStudent-Athlete%2BCompliance%2BCalendar.pdf> (last visited Jan. 29, 2015). A mitigating factor is the failure of a university to provide rules instruction on a bylaw that a student-athlete failed to follow. *See* Drug Appeals, *supra* note 179, ¶ 5(c)(i). Student-athletes also receive specific education on what constitutes a banned drug, the NCAA drug-testing program, and their responsibilities pursuant to the program. *See* Drug-Testing Program, *supra* note 29, at 3-4.

210. The DI Administration Cabinet has twenty-one members. It makes appointments to most NCAA committees. It operates independently of NCAA senior administrative staff. For a list of current members, see *Division I Administration Cabinet Roster*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=1ADC](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1ADC) (last visited Jan. 29, 2015).

211. *Division I Committee on Student-Athlete Reinstatement*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=1REI](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1REI) NSTATE (last visited Jan. 29, 2015). 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

continuity of experience.<sup>212</sup> In both reinstatement and drug test appeals, committee members hear no cases involving institutions from the same athletic conference as their institution.<sup>213</sup> In both reinstatement and drug test appeals, committee members include faculty and others not embedded in the competitive athletic environment.<sup>214</sup> In both reinstatement and drug test appeals, the appeals committee has no ex parte communications with NCAA staff.<sup>215</sup> In drug test appeals, moreover, the names of both the student-athlete and the university bringing an appeal are withheld from the Drug Test Subcommittee.<sup>216</sup>

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.<sup>217</sup> In almost all cases, a university's interests are consonant with those of 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

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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 one member resigned because of appointment to another NCAA committee with heavy time demands.

212. For example, in 2014, the term of David Wells was extended by one year by the Administration Cabinet. See Memorandum from NCAA Div. I Comm. on Student-Athlete Reinstatement, to NCAA Div. I Admin. Cabinet (Feb. 10, 2014), available at <http://www.ncaa.org/sites/default/files/DI%20Admin.%20Cabinet%20materials%20%202.14.pdf> (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.").

213. See Reinstatement Policies and Procedures, *supra* note 14, at 14; *Drug Appeals*, *supra* note 179, ¶ 1.

214. 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 179, ¶ 1.

215. Reinstatement Policies and Procedures, *supra* note 14, at 12.

216. *Drug Appeals*, *supra* note 179, ¶ 3.

217. See Reinstatement Policies and Procedures, *supra* note 14, at 1-2.

warranted.<sup>218</sup> A student-athlete's statement is included in a university's reinstatement request.<sup>219</sup> In drug appeals, a positive test results from formal testing protocols and procedures promulgated by the National Center for Drug Free Sport.<sup>220</sup> A student-athlete may insist that a university appeal a positive test.<sup>221</sup>

In both reinstatement and drug test appeals, the range of consequences is 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.<sup>222</sup> Student-athletes in drug test appeals have a full right to present information and also to question those with information.<sup>223</sup> In both reinstatement and drug test appeals, proceedings are recorded.<sup>224</sup> In both reinstatement and drug test appeals, student-athletes are informed of the decision and rationale.<sup>225</sup> Student-athlete reinstatement decisions are posted on the NCAA website and

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218. See *Bloom v. NCAA*, 93 P.3d 621, 628 (Colo. App. 2004) (“[W]ith 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 to fully consider whether a violation was committed is heightened because a student-athlete's violation also is one for which the university independently may be sanctioned. For a discussion of mitigation in the Florida State academic fraud case, see *infra* notes 235-42 and accompanying text.

219. Reinstatement Policies and Procedures, *supra* note 14, at 1.

220. NCAA Constitution, *supra* note 56, art. 3.2.4.7; Drug-Testing Program, *supra* note 29, at 5-12. 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. See Drug-Testing Program, *supra* note 29, at 5-12.

221. See Drug-Testing Program, *supra* note 29, at 11.

222. Lawyer fees may be covered by a student-athlete's university. See *supra* note 130.

223. Drug Appeals, *supra* note 179, ¶ 8.

224. See Reinstatement Policies and Procedures, *supra* note 14, at 14.

225. 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 Program, *supra* note 29, 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. Reinstatement Policies and Procedures, *supra* note 14, at 9.

available as precedent.<sup>226</sup> 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.<sup>227</sup>

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 extra benefits. The expertise needed goes beyond the particular substantive rules to familiarity with campus processes and even to faculty prerogatives.<sup>228</sup>

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 stories.<sup>229</sup> University committees that hear student appeals are comprised of faculty and administrators at a university.<sup>230</sup> Students rarely succeed in challenges to

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226. See *supra* note 122 and accompanying text.

227. Email from Mary Wilfert, Assoc. Dir., NCAA Sports Sci. Inst., to Josephine (Jo) R. Potuto (Jan. 9, 2015, 21:39 CST) (on file with author). The failure to provide case information is not optimum process. See *infra* text accompanying note 246.

228. 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 179, ¶ 1.

229. *E.g.*, *Goss v. Lopez*, 419 U.S. 565, 584 (1975). The reported cases are those involving K-12 students, where courts have found that students have a right to a public education.

230. In other contexts, a hearing body also may be comprised of members of an association and still constitute the process that is due. This is the case 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, 1726 (2001); Eric A. Feldman, *The Tuna Court: Law and Norms in*

university decisions regarding admissions, continued matriculation, academic standards and academic dismissals, and in challenges to student discipline decisions.<sup>231</sup> Challenges to a grade or grading practice succeed only on evidence of serious wrongdoing by a faculty member.<sup>232</sup> Courts also routinely reject student claims based on the quality of the education received.<sup>233</sup>

If the NCAA were subject to a Fourteenth Amendment due process test, the student-athlete drug test appeals process would seem clearly constitutional, and the student-athlete reinstatement process also would seem 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

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*the World's Premier Fish Market*, 94 CAL. L. REV. 313, 314 (2006). In prison disciplinary proceedings, the hearing body may be comprised of prison officials, even wardens. *See* *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974). *But see* *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999). The *Hooters* court was concerned that allowing the hearing body to decide employee rights was exclusively within the appointing authority of the employer. *See id.* at 938-39. 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.

231. *See, e.g.*, *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978); *Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990); *Harris v. Blake*, 798 F.2d 419 (10th Cir. 1986); *Shahrabani v. Nova Univ.*, 779 F. Supp. 599, 601 (S.D. Fla. 1991); *In re Susan M. v. N.Y. Law Sch.*, 556 N.E.2d 1104 (N.Y. 1990); *Davis v. Regis Coll., Inc.*, 830 P.2d 1098 (Colo. App. 1992); *Tobias v. Univ. of Tex. at Arlington*, 824 S.W.2d 201 (Tex. App. 1991). What must be shown for students to succeed in a challenge 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 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

232. *See, e.g.*, *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992) (discussing grade imposed out of spite); *Naragon v. Wharton*, 737 F.2d 1403 (5th Cir. 1984) (discussing trading grade for sex).

233. *See, e.g.*, *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992) (finding no cause of action for educational malpractice or negligent college admission and finding contract claim only if specific contract promise exists and student-athlete can show he was barred from any meaningful education).



reinstatement process, nor to challenge a university's factual conclusions.<sup>234</sup> 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.

## VI. 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 did not vote on the bylaws that affect them<sup>235</sup> and, it is argued, have

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234. In practice, however, if a student-athlete insists that a university request reinstatement, it likely will do so, and will include information a student-athlete believes relevant. *See infra* notes 242-43 and accompanying text.

235. There is more opportunity for student-athlete influence on the development and import of bylaws than critics typically concede. Each NCAA institution has a student-athlete advisory committee (SAAC). Each conference has a SAAC comprised of members from campus SAACs. The national SAAC is comprised of representatives from each conference SAAC. Prior to 2015, and continuing in the new governance structure, student-athletes have a formal role in governance through their conferences and national SAACs. *See, e.g.,* Michelle Brutlag Hosick, *SAAC Emphasizes Group's Role as Change Agent*, NCAA (Nov. 8, 2011), <http://fs.ncaa.org/Docs/NCAANewsArchive/2011/november/saac%2Bchair%2Bemphasizes%2Bgroups%2Brole%2Bas%2Bchange%2Bagentdf30.html>. Even though advisory, strong opposition by the national SAAC has been influential in the adoption or rejection of a legislative proposal. The student-athlete voice and influence has increased in the Division I governance structure that took effect in 2015. Beginning in 2015, Division I governance has two parts, an autonomy side and a joint governance side. The autonomy side is comprised of sixty-five universities, each with one vote. There also are fifteen voting student-athlete members on the autonomy side. On the joint governance side voting is by conferences. There are two voting student-athlete members on the Division I Council, the prime legislative authority on the joint governance side. In addition, there is a voting student member on each of the seven committees that report to

no alternative to the NCAA if they want to attend college and also compete in varsity athletics.<sup>236</sup> As discussed previously,

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the Council. See Michelle Brutlag Hosick, *Student Voice, Student Vote Continues to Grow Stronger: Council Sets Up Division I Committees*, NCAA (Feb. 5, 2015, 1:10 PM), <http://www.ncaa.org/about/resources/media-center/news/student-voice-vote-continues-grow-stronger>. Even in the former governance structure, moreover, a student-athlete served as a non-voting member on each of the six NCAA Division I cabinets. NCAA Bylaws, *supra* note 1, arts. 21.7.5.1.1.1, 21.7.5.2.1.1, 21.7.5.3.1.1, 21.7.5.4.1.1, 21.7.5.5.1.1, 21.7.5.6.1.1. Four association-wide committees, including the Olympic Sports Liaison Committee, *id.* art. 21.2.5, and Committee on Sportsmanship and Ethical Conduct, *id.* art. 21.2.8, have a student-athlete member from each of the three divisions who collectively share one vote. There also was a student-athlete on, among others, the twenty-member CMAS, a student-athlete who served in an advisory capacity to the five-member Student-Athlete Reinstatement Committee, and student-athlete members on the Men's Basketball Issues Committee (sixteen members), NCAA Bylaws, *supra* note 1, art. 21.7.5.5.3.1.1, Women's Basketball Issues Committee (sixteen members), *id.* art. 21.7.5.5.3.2.1, and Football Issues Committee (twenty-four members), *id.* arts. 21.2.2.1, 21.7.5.5.3.3.1, 21.7.7.3.1.1. The other committees are the Minority Opportunities and Interests Committee, *id.* art. 21.2.4, and the Committee on Women's Athletics, *id.* art. 21.2.10. As discussed below, there is one student-athlete on the twenty-member Committee on Competitive Safeguards and Medical Safeguards of Sports and also one student-athlete who serves in an advisory capacity to the five-member Student-Athlete Reinstatement Committee. *Id.* arts. 21.2.2.1, 21.7.7.3.1.1. For all these committees, a current list of members can be found at the NCAA website. See *Committee on Sportsmanship and Ethical Conduct*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=CONDUCT](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=CONDUCT) (last visited Jan. 30, 2015); *Committee on Women's Athletics*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=COMWA](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=COMWA) (last visited Jan. 30, 2015); *Minority Opportunities and Interests Committee*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=MOI](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=MOI) (last visited Jan. 30, 2015); *Olympic Sports Liaison Committee*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=LIAISON](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=LIAISON) (last visited Jan. 30, 2015). Committees with no student-athlete representation included those charged with interpreting bylaws or granting waivers from their operation, including committees with responsibility for rules enforcement and for resolution of eligibility issues, and committees that evaluated academic records. See NCAA Bylaws, *supra* note 1, arts. 21.6.3–21.6.5, 21.7.5.1.3.1–21.7.5.1.3.2, 21.7.7.2.2.1.1; see, e.g., *id.* arts. 14.1.2.2, 14.1.2.3. Other such committees were the association-wide Playing Rules Oversight Panel, *id.* art. 21.1.1.1, the Honors Committee, *id.* art. 21.2.3.1, the Research Committee, *id.* art. 21.2.7.1, scholarship committees, *id.* arts. 21.2.6, 21.2.9, sports rules committees, *id.* arts. 21.3.2–21.3.11, and most championship and sports issues committees, *id.* arts. 21.7.5.5.5.3.1–21.7.5.5.5.3.22.

236. See, e.g., Ross, Karcher & Kensinger, *supra* note 35. This is not entirely accurate. The National Association of Intercollegiate Athletics (NAIA) also regulates intercollegiate athletics competition. Its members generally are part of

trial courts often decide in favor of student-athletes only to be reversed on appeal.<sup>237</sup> 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 that are easy to attack.<sup>238</sup> At the same time, institutional fact-finding and violation determinations may result in dissimilar decisions in similar cases based on the rigor and investigative expertise of university investigators, the quantum of evidence universities require before making a decision that violations were committed, and in differences between universities as to where they tolerate risk of error (concluding there was no violation and erring by competing an ineligible student-athlete, or concluding there was a violation and erring by depriving an eligible student-athlete of competition opportunities).

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 to foster cross-institutional, consistent treatment of student-athlete eligibility issues as well as to provide the fullest protection of student-athlete interests within the limits of efficient and prompt bylaw enforcement of student-athlete violations.<sup>239</sup>

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a state college system. *See About the NAIA*, NAIA, [http://www.naia.org/ViewArticle.dbml?DB\\_OEM\\_ID=27900&ATCLID=205323019](http://www.naia.org/ViewArticle.dbml?DB_OEM_ID=27900&ATCLID=205323019) (last visited Jan. 30, 2015). 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 author understands, 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.

237. *See supra* notes 132-34 and accompanying text.

238. Ross, Karcher & Kensinger, *supra* note 35, at 87.

239. In addition to the possible substantive changes to decisions when student-athletes have a larger voice, reforms also might increase the confidence of student, and that of the public, in the fairness of NCAA processes. *See infra* note 241.

A. *Greater Student-Athlete Access in the Reinstatement Process*

Reinstatement cases may result in student-athletes losing competition opportunities. Yet student-athletes formally may not request reinstatement should the university decline to do so,<sup>240</sup> challenge a university's rendition of relevant facts, or appeal a reinstatement decision independent of the 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 the university have privity of interest.

The focus of fairness concerns, then, is those cases where student-athletes lose substantial competition opportunities and contest the facts and conclusions reported by the 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.

Perceptions of fairness are important.<sup>241</sup> 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

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240. 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 athletic 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.

241. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 273-74, 278 (2d ed. 2006); Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 *POL. BEHAV.* 119, 135 (2003); Tom R. Tyler, *Governing amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 *LAW & SOC'Y REV.* 809, 827 (1994); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *LAW & SOC'Y REV.* 103, 132 (1988).

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 will 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.<sup>242</sup> 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 the reinstatement processes. A suggested place to draw the line would be when the reinstatement condition is equivalent to, or more than, withholding of one-half of a season of competition and either a student-athlete contests the factual conclusions reached by a 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.<sup>243</sup> 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

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

243. For a fuller discussion of the difficulties, see Potuto, *NCAA Processes*, *supra* note 31.

association.<sup>244</sup> Those risks are not negligible. Nonetheless, student-athletes already have the right to trigger drug test appeal hearings.<sup>245</sup> In addition, for many years coaches and others at risk for findings of serious violations have attended infractions committee hearings.<sup>246</sup>

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 when it reaches facts and conclusions adverse to them. A university may be disinclined vigorously to dispute a student-athlete's rendition of the factual circumstances as, after all, if the student-athlete prevails there will be a quicker return to competition eligibility. The result is that the Student-Athlete Reinstatement Committee and its staff may need to resolve a fact dispute 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.<sup>247</sup>

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244. Giving student-athletes a larger, formal voice in NCAA processes already has occurred.

245. See Drug-Testing Program, *supra* note 29, at 11.

246. 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 *NCAA v. Tarkanian*, 488 U.S. 179 (1988). Subsequent to *Tarkanian*, NCAA infractions processes were changed to permit coach participation. See Potuto, *State Actor*, *supra* note 132, at 14-15.

247. See *supra* notes 55-60 and accompanying text.

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.<sup>248</sup> The Committee on Infractions sits as a fact-finder.

Should reinstatement cases become adversarial, resolution of time-sensitive reinstatement cases 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 the 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 fact exploration available at an infractions hearing or because the additional time to investigate leads to other evidence being uncovered, developed, and presented.

Inconsistent results could be ameliorated were the enforcement staff to have broad, mandated involvement in all cases in which a student-athlete participates 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 case<sup>249</sup> and also review all

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248. See Potuto, *NCAA Processes*, *supra* note 31, at 320-22.

249. 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 Bylaws, *supra* note 1, art. 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. See Reinstatement Policies and Procedures, *supra* note 14, at 1, 5-7. 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

submissions to the reinstatement staff provided by a university and student-athlete.<sup>250</sup> The enforcement staff would conduct an independent investigation if it determined that the submissions were incomplete or inadequate.<sup>251</sup> Although time-sensitive reinstatement decisions still may limit how much the enforcement staff can assist the reinstatement staff,<sup>252</sup> 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.

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conducted by the agents, gambling, and amateurism staff (AGA). AGA staff deal exclusively with student-athlete and prospective student-athlete violations. *See* Reinstatement Policies and Procedures, *supra* note 14, at 3.

250. Currently this occurs only on the request of the reinstatement staff. *See* Reinstatement Policies and Procedures, *supra* note 14, at 1.

251. Currently, the enforcement staff may conduct an investigation to develop the facts, but only if the university agrees. *Id.* at 2-3. 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 indicating that a reinstatement decision was too lenient because it was based on limited information, the decision can be rescinded and the university becomes subject to hearing and penalties through the enforcement/infractions process. *Id.* at 3, 12.

252. 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 Dir. (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. *Id.*



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

1. Pre Submission

a. *Greater Standardization of Information Submitted.* An essential predicate to cross-institutional consistency in results is cross-institutional consistency in the information vetted and then submitted. Reinstatement requests are submitted online, and certain information must be provided.<sup>253</sup> 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.<sup>254</sup>

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”).<sup>255</sup> 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. 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.<sup>256</sup> It should be required to highlight any inconsistencies in what individuals reported as well as why it credited one version rather than another.

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253. See NCAA Student-Athlete Reinstatement Request (last accessed June 5, 2014) (on file with author). 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. See *id.*

254. See *id.* 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. *Id.* For a fuller list of what should be included in a standard form, see Potuto, *NCAA Processes*, *supra* note 31, at 329.

255. *Id.*

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

b. *Minimum Bylaw Requirements.* There are cases where a university believes there is evidence to show a violation was committed but the evidence forms an insufficient basis for making a decision. There also are cases where the speed of an investigation requires a decision when an investigation is not as full as it could be were there no time pressures to get an eligibility issue resolved. No matter how a university resolves these cases there is risk of error. There also is the potential, and certainly the perception, that a university is unwilling to find violations were committed because a student-athlete is a valuable competitor, particularly if he competes in the revenue sports of football and men's basketball.

There was a time in NCAA history when academic eligibility to compete was exclusively the domain of each NCAA member university.<sup>257</sup> Actual or perceived failures to maintain institutional academic standards led to the articulation of NCAA minimum academic standards.<sup>258</sup> It may be that a similar bylaw baseline requirement is needed regarding institutional student-athlete eligibility investigations.

## 2. Post Submission

In the current system, the reinstatement staff on occasion has departed 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 the Florida State University academic fraud case that was mentioned at the outset of this Article.<sup>259</sup>

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

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257. See WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES, 157-58 (1995).

258. See *id.* at 158.

259. See *supra* note 15 and accompanying text.

online exam administered in the athletic department.<sup>260</sup> They either provided exam answers to student-athletes or answered the questions for them.<sup>261</sup> At least sixty-one student-athletes cheated with their assistance.<sup>262</sup>

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 clocks.<sup>263</sup> Notwithstanding the Guideline, the reinstatement staff imposed only a withholding condition of loss of thirty percent of a season's competition opportunities and no loss of eligibility.<sup>264</sup> 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.<sup>265</sup>

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.<sup>266</sup> Second, it is difficult to credit a claim that the student-athletes neither knew nor had reason to know that they cheated. Third, thirty-nine of the student-athletes initially denied involvement 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.<sup>267</sup>

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260. See Florida State Infractions Report, *supra* note 15, at 5.

261. *Id.* There also were associated institutional violations relating to the provision of impermissible benefits and a failure to monitor by the institution.

262. Florida State acknowledged that more than sixty-one student-athletes were involved; it was unable to develop evidence to prove this, however. *Id.* at 2.

263. *Id.* at 2.

264. *Id.* at 3.

265. *Id.* at 2 (Florida State "strongly believed that its processes and personnel were primarily responsible for the improper assistance" and argued that culpability centered on the institution).

266. *Id.* at 1.

267. See *id.* at 2.

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.<sup>268</sup>

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 thirty percent of a year.<sup>269</sup> The case was 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, contrasted with the Ohio State case also mentioned at the outset of this Article, highlights other issues in the current student-athlete reinstatement process—a perception of cross-case inconsistency combined with a nuanced decision-making that undermines institutional confidence in equal treatment. The Florida State football players sat out the

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

269. After the academic fraud violations were committed at Florida State, but before the infractions case was heard, the Student-Athlete Reinstatement Committee revised upward 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. See NCAA Bylaws, *supra* note 1, art. 10.1(b); Reinstatement Guidelines, *supra* note 19, at 4.

Music City Bowl as one of the games in the four-game withholding condition that was imposed.<sup>270</sup> 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."<sup>271</sup> 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 who received extra benefits and competed while they were ineligible.<sup>272</sup> 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 that decision or posit reasons for it. Even if the reasons were good in both cases, moreover, they were not made sufficiently explicit and, therefore, there is no way to evaluate whether the two decisions are consistent. In addition, it can be argued that the two decisions, matched together, were handled with too fine a touch.

### 3. Transparency

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 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. Were

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270. See Dinich, *supra* note 16.

271. Reinstatement Policies and Procedures, *supra* note 14, at 16.

272. See *supra* notes 11-14 and accompanying text.

a case summary to have been posted in the Florida State academic fraud case, 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 the student-athletes lost the bowl game because they had more than minimal responsibility. Similarly, an Ohio State case summary would 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.<sup>273</sup> 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 rather than the presumptive guideline, the reinstatement staff or committee should write a full case description with rationale for how the facts warranted departure from the guideline condition.

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 one-half of a season

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273. See Reinstatement Policies and Procedures, *supra* note 14, at 9, 12; see, e.g., The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2012); 34 C.F.R. pt. 99 (2014) (privacy of student education records).

or more. The university and student-athlete could be required to sign a confidentiality agreement before having access to the full case record.<sup>274</sup>

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.<sup>275</sup> 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.

#### 4. Broad Strokes and No Discretion

Transparency is perhaps the most critical component in assuring cross-institutional confidence and cross-case consistency. Standardization of information enhances confidence in the inputs of the reinstatement process. But the reinstatement process also requires attention to the output side.

a. *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 Guidelines. Eliminating such staff

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274. 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.

275. Something of this kind currently is provided by the enforcement staff regarding twenty-five cases processed by the Division I Committee on Infractions. NCAA Division I Enforcement Case Analysis Library (Aug. 5, 2013), [http://www.ncaa.org/sites/default/files/CaseAnalysisLibrary\\_080513.pdf](http://www.ncaa.org/sites/default/files/CaseAnalysisLibrary_080513.pdf). The enforcement case analysis provides a case-by-case summary but not a summary in gross of the cases.

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 Reinstatement Guidelines eliminates the concern, however unfounded, that staff discretion may be influenced by too close a connection with a particular university,<sup>276</sup> by universities with particularly persuasive or aggressive leaders, or by the intervention of senior NCAA administrators.<sup>277</sup> 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.

b. *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.<sup>278</sup> 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 greater than the \$1000 A.J. Green got for his jersey,<sup>279</sup>

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276. 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.

277. 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.

278. 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.

279. See *supra* text accompanying notes 10-11.



committed at least some of the violations intentionally,<sup>280</sup> and competed while ineligible.<sup>281</sup> 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.<sup>282</sup> And yet, the Florida State players committed academic fraud, among the most serious of violations, and lost only four games. Then there are Johnny Manziel and Jameis Winston, 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, undermines 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,<sup>283</sup> NCAA bylaw enforcement is too much focused on results in the particular.

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280. See NCAA Div. I Comm. on Infractions, Ohio State University Public Infractions Report No. 358, at 5 (Dec. 20, 2011) [hereinafter Ohio State Infractions Report], available at <https://web1.ncaa.org/LSDBI/exec/miSearch?miSearchSubmit=publicReport&key=726&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED>; see also Reinstatement Guidelines, *supra* note 19, at 10-11. At least some of the Ohio State violations were committed intentionally.

281. See Ohio State Infractions Report, *supra* note 279, at 5-6. Ineligible competition is a violation additional to the receipt of money benefits. See NCAA Bylaws, *supra* note 1, art. 14.01.1.

282. See, e.g., Reinstatement Guidelines, *supra* note 19, at 10-11. Academic fraud is an example.

283. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177-78 (1989).

*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 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 all 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.