Time to Pay Student-Athletes?: Creating a Dispute Resolution System in the Wake of Current Legislative Efforts to Attack NCAA Amateurism Standards

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I. INTRODUCTION

Today, collegiate sports maintain a nearly year-long stranglehold on sports media coverage. Under this scrutiny, however, the harsh realities of student-athlete compensation (or lack thereof) have come to the forefront of societal discourse. Although the National Collegiate Athletic Association (hereafter the "NCAA") has remained a regulatory giant in the collegiate world, they continue to face intense opposition to many of their policies. Specifically, with the growing pressure to remove restrictions on a student-athlete's ability to profit off their name, image, and likeness, individualized arbitration/mediation should be incorporated into the NCAA model to maintain fair collegiate competition and academic growth.

At a broad view, this note will address the inevitability of student-athlete payment in the coming years and how the NCAA system should be adjusted to maintain its current viability. Part II will discuss the history of the NCAA and its development as one of the most important regulatory structures for collegiate institutions. Part III will examine the current NCAA dispute resolution process and explain the problems such a process imposes on institutions and individual student-athletes. Part IV will discuss limitations the collegiate model places on the applicability of a new dispute resolution model. Lastly, Part V will explain why the addition of a mediation service will allow for the NCAA to maintain its viability as a collegiate regulatory institution and develop a system for student-athletes to enter the marketplace.

II. THE NCAA: PAST AND PRESENT

A. *A Brief History of the NCAA*

Beginning in 1905, American society began to push for a regulatory body to improve safety within collegiate sports.[1] Although initial efforts specifically sought to limit the number of football deaths and injuries, a group of educators, along with assistance from the White House, officially founded the NCAA in 1910 "to formulate rules that could be applied to the various intercollegiate sports."[2] More significantly, the formation of the NCAA served as a response to issues that many institutions face today: the pressure to win and the need for regulations that ensure fairness and safety.[3]

In the first couple of years after its formation, the NCAA played a small role within intercollegiate athletics.[4] However, as institutions began to

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[1] Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 13. Specifically, the NCAA's role was limited to making rules for football and

develop strong athletics programs, public interest in collegiate athletics began to grow as well.[5] With this new commercialization and media interest, the NCAA was forced to expand its governance and issue new regulations designed to equalize the recruiting environment.[6] Specifically, by the end of the 1950s, the NCAA was able to negotiate its first media contract in excess of one million dollars.[7] As a result, the growing commercialization of sports throughout the United States not only gave the NCAA a platform to grow but also the resources to do so.[8]

Beginning in the mid- to late-1900s, the NCAA began to experience criticism of its enhanced enforcement capacity.[9] In response, the NCAA instituted various systemic changes designed to address the alleged unfairness in the exercise of enforcement authority.[10] By the early 1970s, it had separated the prosecutorial and investigate roles of its Committee on Infractions and created divisions designed to "better reflect [each school's] competitive capacity."[11] However, criticisms of the intercollegiate governing body continued as universities and other institutions began to see the revenue-generating potential of athletic programs—another product of the increased commercialization. Because these institutions began to face the pressure of supporting winning sports programs without sacrificing academic values, various university presidents formed the Presidents Commission, which ultimately changed the structure of the NCAA altogether.[12]

Throughout all of the NCAA's attempts to respond to criticisms of their enforcement authority, current years have shown that they are mounting a response to growing financial concerns. For many years after the first football game was televised in the 1950s, the televising of football games remained under the control of the NCAA.[13] However, in *NCAA v. Board of*

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other sports, and the creation of national championship sporting events. *Id.*

[5] *Id.* at 14.

[6] *Id.* The NCAA's first attempt at leveling the field in recruiting was the "Sanity Code," a regulation designed to "alleviate the proliferation of exploitive practices in the recruitment of student-athletes." *Id.* However, the "Code" was ineffectual because its only sanction was expulsion and later repealed in 1951. *Id.* at 15 (citing Rodney K Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 992 (1987)).

[7] *Id.* at 15.

[8] *See id.*

[9] *Id.* at 15–21.

[10] *Id.* at 15.

[11] *Id.* at 15 (alteration in original).

[12] *Id.* at 16–17. The involvement of individual university presidents eventually led to the creation of an Executive Committee and a Board of Directors for each division, both of which is made up of presidents or chief executive officers. *See id.* at 17. As a result, the NCAA became a governing body run exclusively by the individual institutions themselves. *Id.* at 17.

[13] *Id.* at 19.

Regents, the Supreme Court upheld a challenge to this NCAA control and held that they had violated antitrust laws.[14] Now, because certain schools can benefit directly from television and other media revenue, the NCAA has worked to expand its enforcement authority to rebalance the playing field between schools that attract the revenue and those that do not.[15]

Lastly, another area that has impacted the role (and ultimately the history) of the NCAA has been the implementation of Title IX legislation by Congress. Emphasizing the presence of gender inequality throughout intercollegiate athletics, Title IX required institutions to provide for, and financially support, equal opportunities for women in collegiate sports.[16] Because of the insufficient revenue generated by collegiate athletic programs that greatly benefit from Title-IX protection, revenue-generating sports such as football and basketball gained even more attention.[17] Subsequently, equity concerns have come to the forefront of NCAA criticism, whereas many individuals have begun to question the inability of student-athletes to receive a cut of the profit.[18]

B. *Present State of NCAA Pressure and Litigation*

As previously alluded to, the increase in media coverage of collegiate athletics coupled with its economic impact on individual institutions has placed a "great strain on the capacity of the NCAA to govern intercollegiate athletics."[19] In recent years, the conversation and criticism regarding the NCAA has centered on one topic: the inability of student-athletes to use their name, image, and likeness for profit.[20] Under current NCAA standards, a student-athlete may not profit off of the use of their name, image, or appearance in any sort of promotional activity.[21] Despite generating billions of dollars in revenue each year, student-athletes are required to adhere to these "strict rules of amateurism" that "force them to 'live hand to mouth.'"[22]

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[14] *Id.*; *see also* NCAA v. Board of Regents, 468 U.S. 85 (1984).

[15] Smith, *supra* note 1, at 19.

[16] *Id.* at 19–20.

[17] *Id.* at 20.

[18] *See id.*; *see generally* Rachel Schwarz, *Timeout! Getting Back to What Title IX Intended and Encouraging Courts and the Office of Civil Rights to Re-evaluate the Three-Prong Compliance Test*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 633 (2014).

[19] Smith, *supra* note 1, at 22.

[20] *See e.g.* Michael McCann, *Key Questions, Takeaways from the NCAA's NIL Announcement*, SPORTS ILLUSTRATED (Oct. 29, 2019), https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-announcement-takeaways-questions.

[21] *See* DIVISION I MANUAL §12.5 (NAT'L COLLEGIATE ATHLETIC ASS'N 2019).

[22] Christopher Sweeney, *Judges are not 'Super Referees': Why a Qualified Statutory Exemption to the Sherman Act is Needed to Reform the NCAA and its Exploitive Amateur Model*, 49 J. MARSHALL L. REV. 125, 126 (2015).

Consequently, student-athletes who are found guilty of having used their name, image, or appearance for pay may lose their amateur status—a necessary element to participate in NCAA-sponsored, intercollegiate athletics.[23] However, because of the intense media coverage of collegiate athletics today, the NCAA has begun to face major opposition to this rule.[24]

Significantly, some state legislatures have begun to force the reconsideration of the rule. In September of 2019, the California Governor signed the Fair Pay to Play Act into law.[25] Although the bill would not go into effect until 2023, this new piece of legislation would allow student-athletes within the State of California to profit from the use of their name, image, and likeness.[26] More importantly, the bill would actually make it illegal for institutions to strip students of their scholarship money for generating money on their own accord.[27] Within a month of the California bill being signed into law, a state representative in Florida introduced a similar bill.[28]

Despite its original strong opposition to each bill, the NCAA responded with a statement in favor of negotiating a system that would allow student-athletes to benefit financially from the use of their name, image, and likeness.[29] However, in contrast with the proposed state systems of unlimited payment opportunities a unanimous vote by the NCAA Board of Governors would "permit students participating in athletics the opportunity to benefit from the use of their name, image, and likeness in a manner *consistent with the collegiate model*."[30] In other words, a system that allows student-athletes to seek monetary profit must not interfere with the NCAA's primary concerns of increasing integrity, maintaining the health and wellness of student-athletes, establishing clear differences between amateur and professional athletics, and

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[23] *See* DIVISION I MANUAL §12.01.1 (NAT'L COLLEGIATE ATHLETIC ASS'N 2019).

[24] *See e.g.* Matt Brown, *What Happens Next After California's Governor Signed a Bill to Pay NCAA Players*, SBNATION (Sept. 30, 2019), https://www.sbnation.com/college-basketball/2019/9/30/20891426/california-bill-sb-206-pay-player-likeness-ncaa.

[25] *Id.*

[26] *Id.* Of note, at the time this article was published, the NCAA strongly opposed the bill and threatened to ban California schools from tournaments during the postseason. *Id.*

[27] Neil Adler, *NCAA Basketball: Florida Lawmaker Proposes Name, Image and Likeness Bill*, FANSIDED (Oct. 2018), https://bustingbrackets.com/2019/10/01/ncaa-basketball-florida-lawmaker-proposes-name-image-and-likeness-bill/.

[28] Dennis Dodd, *Name, Image, and Likeness Rights Will be a Boon for Florida, California in Recruiting*, CBS SPORTS (Oct. 9, 2019), https://www.cbssports.com/college-football/news/name-image-and-likeness-rights-will-be-a-boon-for-florida-california-in-recruiting/.

[29] Steve Berkowitz, *NCAA Board of Governors Opens Door to Athletes Benefitting from Name, Image, and Likeness*, USA TODAY (Oct. 29, 2019), https://www.usatoday.com/story/sports/college/2019/10/29/ncaa-board-opens-door-athletes-use-name-image-and-likeness/2492383001/.

[30] *Id.* (*emphasis added*).

ensuring that academics remain the top priority.[31] In proposing this style of negotiation system, the NCAA has shown that they are open to changing their profitability policies, so long as that change does not involve sacrificing the ideals of the organization itself.

Aside from proposed and deferred state bills, the U.S. court system has begun to scrutinize the current NCAA regulations dramatically, indicating a general distrust of the organization. Although plaintiffs have attacked the NCAA regulations through various legal mechanisms,[32] no arguments have been more effective than arguing alleged violations of the Sherman Antitrust Act.[33] Beginning with the Supreme Court decision in *NCAA v. Board of Regents,*[34] courts have viewed many NCAA regulations as an unreasonable restraint on economic competition between institutions that sponsor collegiate athletics.[35] As previously mentioned, the Supreme Court in *Board of Regents* held that the NCAA's control of televised football games violated the Sherman Act because institutions "[lost] their freedom to compete for better television contracts."[36] Consequently, due to the NCAA's influence, the Court found that the price of television contracts were "unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market"—an effect intended to be voided by anti-trust laws.[37] A resulting view of the NCAA as an organization that violated anti-trust laws began to permeate throughout societal discourse, and proponents of student-athletes began to view amateurism rules as an unreasonable restraint.[38]

Following these previous successful arguments, because the Supreme Court did not declare the NCAA's amateurism rules "valid as a matter of law,"[39] student-athletes have achieved some success in attacking the NCAA model using the same strategy of leveraging the Sherman Antitrust Act.[40] In *O'Bannon v. NCAA*, the 9th Circuit Court of Appeals echoed the previous Supreme Court decision by reaffirming that "NCAA regulations are subject to

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[31] *See id.*; *see also* DIVISION I MANUAL §1.2 (NAT'L COLLEGIATE ATHLETIC ASS'N 2019); Smith, *supra* note 1.

[32] In recent cases, student-athletes have attempted to attack the NCAA amateurism standard under the Fair Labor and Standards Act. However, courts have refused including student-athletes under the federal guidelines' definition of "employee." Additionally, an athletic scholarship fails to establish an "economic reality" between the athlete and the institution. *See e.g.* Livers v. NCAA, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. May 17, 2018).

[33] *See* BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA: THE CASE FOR LESS COMMERCIALISM AND MORE DUE PROCESS IN COLLEGE SPORTS (2012).

[34] NCAA v. Board of Regents, 468 U.S. 85 (1984).

[35] PORTO, *supra* note 33, at 2.

[36] NCAA v. Board of Regents, 468 U.S. at 106.

[37] *Id.*

[38] *See e.g.,* PORTO, *supra* note 33, at 2.

[39] O'Bannon v. NCAA, 802 F.3d 1049, 1061-64 (2015).

[40] *See generally id.*

antitrust scrutiny."[41] Additionally, the court held that the amateurism rules fixed a part of the price of education — an aspect of the system that has potential anticompetitive effects.[42] As a result, the grant-in-aid cap was raised to the student-athlete's full cost of attendance because it was a "less restrictive alternative" of achieving the NCAA's pro-competitive purpose.[43] However, the court recognized the "tradition of amateurism in support of the college sports market" and therefore left open the question of whether student-athletes could, or should, receive a profit above their costs of attendance.[44]

Most recently, however, the Supreme Court has begun to shift its jurisprudence in a way that benefits student-athletes. In June of 2021, the Court ruled that the NCAA had violated antitrust rules by prohibiting student-athletes from receiving "education-related" benefits from their institutions.[45] Although broader question of direct compensation remains unanswered, many supporters state that this decision is "one more step in a multiyear battle to chip away at the definition of 'amateurism'."[46] In the unanimous decisions, all nine Justices agreed that such a limit on benefits related to a student-athletes' education were unreasonable.[47] However, Justice Gorsuch, in delivering the opinion of the Court, did not give a firm definition of what constitutes an "education-related benefit" and indicated that such power remained with the NCAA.[48]

In response to the Supreme Court decision above, the NCAA subsequently promulgated an interim policy that repealed the name, image, and likeness rules.[49] Despite this quick change, the NCAA President remained adamant that the organization is committed to "work[ing] with congress to develop a solution that will provide clarity on a national level."[50] Notably, this repeal does not apply to rules governing pay-for-play and improper inducements tied to choosing to attend a particular school.[51] Therefore, it appears as though the NCAA is committed to examining the effects of the

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[41] *Id.* at 1079.
[42] *Id.* at 1057-58.
[43] *Id.* at 1074-75.
[44] *Id.* at 1078.
[45] Tim Mullaney, *Supreme Court NCAA ruling and the new future of paying college athletes*, CNBC (Jun. 21, 2021), https://www.cnbc.com/2021/06/21/supreme-court-ncaa-decision-how-college-athletes-plan-to-cash-in.html.
[46] *Id.*
[47] Ariane de Vogue & Chandelis Duster, *Supreme court rules against NCAA, opening door to significant increase in compensation for student athletes*, CNN (Jun. 21, 2021), https://www.cnn.com/2021/06/21/politics/ncaa-supreme-court/index.html.
[48] *Id.*
[49] Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA (Jun. 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.
[50] *Id.*
[51] *Id.*

interim policy on amateurism and the preservation of fair athletics.[52] Consequently, due to the interim nature of the policy, it remains to be seen just how name, image, and likeness rules will appear in the coming future. Therefore, a continued examination of amateurism is warranted.

III. THE CURRENT NCAA MODEL: VIOLATIONS, DISPUTE RESOLUTION, AND ITS EFFECTS ON STUDENT-ATHLETES

In order to better understand the contentious history of amateurism throughout the NCAA's history, it is important to examine the dispute resolution process used by the organization. By examining the process by which the NCAA handles name, image, and likeness violations, we can better understand countervailing issues surrounding recent discourse.

A. *The Current NCAA Dispute Resolution Process*

Today, the NCAA provides a variety of mechanisms for institutions to respond to an allegation of an infraction. From the outset, the NCAA makes it clear that the "mission of the NCAA infractions program [is] to uphold integrity and fair play among NCAA membership, and to prescribe appropriate and fair penalties if violations occur."[53]

First, any individual with information regarding a potential violation of NCAA rules and regulations may report the details of the violation to the NCAA enforcement staff.[54] It is the responsibility of the enforcement staff to determine "whether an investigation is warranted and whether the matter may be resolved without a formal investigation."[55] If enforcement staff decides an investigation is warranted, they will conduct interviews of individuals involved and make such reports available to university officials.[56] However, an individual involved in the alleged violation has the opportunity to negotiate a resolution that is subject to approval by the Committee on Infractions (hereafter the "Committee").[57] If the resolution is not approved, the case is then submitted to the Committee for summary disposition or hearing.[58]

Before referring a case to the Committee, any alleged infraction is sorted into one of three violation levels: a severe breach of conduct (Level I Violation), a significant breach of conduct (Level II Violation), or simply a

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[52] *See id.*

[53] DIVISION I MANUAL §19.01.1 (NAT'L COLLEGIATE ATHLETIC ASS'N 2019).

[54] *See id.* at §19.5.1.

[55] *Id.*

[56] *Id.*

[57] *Id.* at §19.5.12.

[58] *Id.* at §19.6, §19.7. However, only certain cases are sent to the Committee for review. Less severe cases are typically handled without a hearing. *See id.* at §19.01.4.

breach of conduct (Level III Violation).[59] As defined, a Level I Violation is "one or more violations that seriously undermine or threaten the integrity of the NCAA Collegiate Model," whereas a Level II Violation involves conduct that simply "compromise[s] the integrity of" that same model.[60] ~~On the other hand~~, A Level III Violation, the least severe, is "one or more violation that is isolated . . . and provide not more than a minimal . . . benefit" to an athletics program.[61]

Once submitted to the Committee, an institution and individuals involved in the violation have one of two options: summary disposition or an infractions hearing.[62] By avoiding in-person hearings and eliminating significant costs, the summary disposition process is a "streamlined method" for processing major rule violations.[63] To elect a summary disposition, the institution, the involved student-athletes, school administrators, NCAA enforcement staff, and other involved parties, must agree to a report that outlines the facts of the case, the violations that occurred, and the proposed penalties.[64] Once agreement is reached, the report is sent to the Committee for them to either accept the proposed penalties or deny the proposal and recommend a different set of penalties.[65] If the institution does not agree with the Committee's proposed penalties, it may either ask for an expedited hearing before the Committee or appeal the decision to the Infractions Appeals Committee (hereafter the "Appeals Committee").

On the other hand, if the NCAA enforcement staff disagrees with a summary disposition, they may proceed through an Infractions Hearing. An Infractions Hearing is available where there is sufficient details of the alleged infraction such that a hearing panel of the Committee could conclude that an NCAA violation had occurred. Under such circumstances, the NCAA enforcement staff will submit the case for an Infractions Hearing. [66] After notifying the institution and all involved individuals of the hearing, the Committee has the opportunity to receive information from all relevant, institutional parties, excluding confidential sources.[67] Some individuals will be required or recommended to attend the Infractions Hearing, such as the

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[59] *See id.* at §19.1.

[60] *Id.* at §19.1.1, §19.1.2.

[61] *Id.* at §19.1.3.

[62] *Id.* at §19.6.1, §19.8.1. In the most recent edition of the NCAA Manual, the NCAA has included the possibility of a case being subject to "Independent Accountability Resolution."

[63] A GUIDE TO THE SUMMARY DISPOSITION PROCESS 1 (Nat'l Collegiate Athletic Ass'n 2006).

[64] *Id.* at §19.6.2, §19.6.3.

[65] *Id.* at §19.6.4.

[66] *See id.* §19.7.1.

[67] *See id.* §19.7.7.3 & §19.7.7.3.1.

institution's president,[68] the head coach of the sport or sports in question,[69] a representative of the conference to which the institution is a member,[70] or any individual specifically requested by the Chief Hearing Officer.[71] After all necessary interviews, the Committee will issue an Infractions Decision, which "shall contain a statement of the findings of fact, conclusions of violations, penalties, [and] corrective actions."[72] At such time, either party may appeal to the Appeals Committee for further evaluation.[73]

B. *The Effects of the Current NCAA Model on Student-Athletes*

The NCAA's policies and procedures have been adjusted many times throughout the organization's history. Despite these adjustments, there is evidence that the current NCAA regulatory model is negatively impacting the student-athletes it is designed to protect. For example, although the typical NCAA penalty may be imposed on the institution as a whole, it inherently effects the lives of individual student-athletes as well.[74] Consequently, I argue that the NCAA system needs to change to be more receptive to the modern needs of student-athletes, particularly as it relates to the amateurism standards and a student-athlete's right to profit from their name, image, and likeness.

One of the primary negative consequences of the current NCAA violation structure is the emotional toll these violations have on the student-athletes themselves.[75] As an organization dedicated to the needs of student-athletes, it seems counterintuitive for the NCAA to impose such a heavy disciplinary burden on student-athletes for violations that may be unintentional, accidental, or inadvertent. Some scholars suggest that NCAA

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[68] *Id.* §19.7.7.5.2.
[69] *Id.*
[70] *Id.* §19.7.7.5.3.
[71] *Id.* §19.7.7.5.1.
[72] *Id.* §19.8.1.
[73] *See generally id.* §19.10; *see also id.* §19.10.1.1 & §19.10.1.2. In order to set aside a decision on appeal, the appealing party must show that: (1) the panel abused its discretion in assigned a penalty, (2) a factual finding is clearly contrary to information present, (3) the facts found by the panel don't constitute a violation, or (4) there was a procedural error and but for the error, the panel would not have made that conclusion.
[74] For example, one common penalty imposed as a result of in-season violations is a ban on post-season competition. *See* National Collegiate Athletic Association, *Enforcement Process: Penalties,* NCAA (last accessed Jul. 10, 2021), https://www.ncaa.org/enforcement/enforcement-process-penalties. Although this penalty affects the institution as a whole, each player may have separate and distinct reactions to it. Consequently, the imposition of NCAA penalties inherently affects the individual student-athlete.
[75] *See generally* Benjamin R. Buchanan, The Impact of NCAA Sanctions on Student-Athletes (2018) (unpublished Ph.D. dissertation, The Ohio State University) (on file with the University Libraries, The Ohio State University).

penalties can be both overly broad and overly limited.[76] In one sense, penalties for violations often fail to reach the actual wrongdoers responsible for the violation in the first place.[77] In another, more distinct sense, NCAA penalties are imposed on entire institutions, thereby affecting "countless innocent current student-athletes."[78] Therefore, although these penalties are designed to increase integrity within the sport, they instead seem to sew a sense of unfairness into the collegiate athletic atmosphere.

In a 2018 study, Benjamin Buchanan, a then-PhD candidate in the kinesiology program at The Ohio State University, sought to determine the exact emotional toll experienced by student-athletes in the face of NCAA penalties.[79] Through interviews with former student-athletes, his study revealed important emotional themes that were most commonly felt after the imposition of an NCAA penalty on their institution: loss, corruption, disappointment, change/questioning, and stress/instability.[80] Although each emotional theme was poignant, two of the particularly destructive emotions cited as a result of the NCAA regulatory structure were that of loss and stress.[81] Many student-athletes' personal lives were negatively affected by the penalties; they felt a loss of stability, loss of sense of identity and autonomy, and loss or straining of relationships.[82] Most prominent, however, was the negative effect on the student-athletes' academics.[83] Because the NCAA is designed to govern the conduct of educational institutions, and educational institutions are dedicated to the well-being of students overall, a negative impact on student-athletes' academic performance supports the conclusion that the current violation structure does not adequately support NCAA goals. By incorporating a more flexible dispute resolution system to process alleged rule violations, the NCAA can balance its interest with the interests, and overall wellbeing, of student-athletes.

IV. APPLICABILITY OF NEW DISPUTE RESOLUTION PROCEDURES BASED ON THE CURRENT COLLEGIATE ATHLETICS MODEL

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[76] *Id.* at 2 (citing M.A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 53 (2001))

[77] *Id.*

[78] *Id.*

[79] *Id.* at 53–82. The researcher sought to create a "narrative inquiry" of student-athletes' experiences with the NCAA violation structure through interviews with individual study participants. The participants of this specific study included former football players from a Division I FBS institution that paid any time between 2010–2012.

[80] *Id.* at 83–196.

[81] *See id.* at 157–96.

[82] *See id.* at 84–86, 100–01, 186–87.

[83] *Id.* at 184–85; More specifically, the study participants indicated that they lost interest in their academics or found it difficult to pay attention due to all the buzz surrounding the violation decision.

A. *Current Constraint on Collegiate Athletics*

1. *MEDIA AND THE EMPHASIS OF COLLEGIATE ATHLETICS IN AMERICAN SOCIETY*

Today, it is nearly impossible to talk about the collegiate environment without mentioning the state of a university's athletics program. Collegiate athletics "[have] become a social and cultural force" that "stretches across numerous media platforms and outlets, being the focus of television schedules, journalistic column inches, social media trends, and e-gaming formats."[84] Through the use of these media channels, colleges and universities across the country can generate free publicity and "imprint the name of a school upon the public's conscious."[85] As a result, major sports such as Division I basketball and football have amassed revenue streams that rival their professional counterparts.[86] Many researchers have concluded that performance on the field can be directly linked to an increased number of applications, increased state appropriations, and other substantial indirect benefits.[87] Considering the NCAA is a system of governance run by the educational institutions themselves, it would be difficult to envision a system that limits sports media revenue (especially in an era in which the higher education market has continually become more precarious).[88]

At the other end of the spectrum, collegiate athletics has become a significant burden on smaller Division I, II, or III institutions. Due to more limited budgets and a heavy reliance on tuition dollars to fund athletics programs, smaller institutions are forced to weigh the benefits of an NCAA athletics program against other educational programs in allocation funding[89] Many of these smaller athletic programs rely heavily on other sources of financial investment or assistance, such as general university grants.[90] Most importantly, smaller institutional athletic departments, as opposed to larger, Division I institutions, generate much of their funding through donations that are specifically earmarked for the department's use.[91] Many of these smaller

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[84] Oliver Rick, *Is This the Beginning of the End?: Small Colleges and Universities are Questioning the Value of an NCAA Program for Their Student Body, in* SPORT AND THE NEOLIBERAL UNIVERSITY 153, 155 (Ryan King-White ed. 2018).

[85] MURRAY SPERBER, ONWARD TO VICTORY: THE CRISES THAT SHAPED COLLEGE SPORTS 508 (1998).

[86] *Id.*

[87] *See e.g.*, *id.* at 158.

[88] Rick, *supra* note 84, at 158.

[89] *Id.* at 157. Recent estimates show that a smaller athletic program, with a "modest number of sports," can "easily run costs into the millions of dollars."

[90] *Id.* at 155.

[91] *Id.* at 157.

collegiate athletic departments may look to local media markets as a potential source for increased donations or perhaps be forced to cut back on athletic spending altogether if external sources of funding cannot be secured.[92]

2. *"In a Manner Consistent with the Collegiate Model"*

At the organization's inception, educational institutions developed the NCAA in response to concern for student-athlete safety and well-being.[93] Specifically, these institutions founded the NCAA to "protect student-athletes from the dangerous and exploitive athletic practices of the time."[94] However, as the NCAA expanded into the expansive regulatory body it is today, the broad purpose of promoting student-athlete well-being began to morph into more specific sub-values.[95] In fact, the organization now cites sixteen principles that guide their consideration of new legislation, three of which are particularly applicable to the debate at hand: overall educational experience, competitive equity, and amateurism.[96] In response to current challenges to its amateurism rules, the NCAA has agreed to modernize its rules "in a manner consistent with the collegiate model."[97] Because of the NCAA's supposed strict adherence to its principles and values, an analysis of these sixteen principles is necessary to recommending an improved, more sustainable dispute resolution system for the organization moving forward.

First, under the NCAA bylaws, "it is the responsibility of each member institution to establish and maintain an environment in which a student-athlete's activities are conducted as an integral part of the student-athlete's educational experience."[98] In other words, the NCAA views its role as one that ensures that education remains the number one priority of student-athletes as they complete their degrees.[99] Proponents of the current NCAA regulatory system argue that student-athletes already receive sufficient compensation (in the form of athletic scholarships) for their athletic talents.[100]

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[92] *See id.* at 155, 157.

[93] Smith, *supra* note 1, at 12.

[94] John Niemeyer, *The End of an Era: The Mounting Challenges to the NCAA's Model of Amateurism*, 42. PEPP. L. REV. 883, 886 (2015).

[95] *See* Smith, *supra* note 1, at 15–17.

[96] *See The 16 Principles for Conduct of Intercollegiate Athletics*, NAT'L COLLEGIATE ATHLETICS ASS'N, http://www.ncaa.org/about/16-principles-conduct-intercollegiate-athletics [hereinafter NAT'L COLLEGIATE ATHLETICS ASS'N].

[97] Dan Wolen, *Opinion: Name, image and likeness debate moves to center stage at this year's NCAA convention*, USA TODAY (Jan. 19, 2020), https://www.usatoday.com/story/sports/college/2020/01/19/ncaa-new-rules-name-image-likeness-debate-mark-emmert/4517888002/.

[98] 2019-20 NCAA DIVISION I MANUAL §2.2.1 (2019).

[99] *See id.*

[100] Katherine Kargl, Note, *Is Amateurism Really Necessary or is it an Illusion*

Specifically, they argue that the payment of athletes would severely undermine the universities' main objective of educating their students, whether athletes, or not.[101] Allowing student-athletes to profit off of their own name, image, or likeness, creates an increased risk that education will be pushed to the side to pursue lucrative deals and endorsements.[102]

In addition to the pursuit of education, NCAA regulations additionally state that "[t]he structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to ensure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics."[103] Significantly, in the early days of the NCAA's creation, many institutions noticed that the increasing commercialization of collegiate athletics created a significant problem of cheating and unfair sport's practices.[104] In fact, the first NCAA constitution set out regulations that prohibited institutions from inducing, particularly financially, players to come and play for their teams; instead, student-athletes were simply supposed to play "for the pleasure derived from athletics" without seeking financial gain.[105] By limiting the amount of money student-athletes could accept from their institutions in exchange for their participation in a specific sport, and by erasing any possibility of commercial sponsorship, the NCAA aimed to level the playing field among universities by eliminating such financial incentives as a recruiting strategy.[106]

Ultimately, the aforementioned two principles heavily influence topic at issue in today's social discourse—amateurism. As previously stated, the NCAA's regulations incentivize student-athletes to be motivated primarily by "education and by the physical, mental and social benefits to be derived [from the sport]."[107] In addition, the NCAA's regulations seek to protect student-athletes "from exploitation by professional and commercial enterprises."[108] By

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Supporting the NCAA's Anticompetitive Behaviors?: The Need for Preserving Amateurism in College Athletics, 2017 U. Ill. L. Rev. 379, 392.

[101] *Id.* at 393–394 (critics of the NCAA system argue that "free education" is considered insufficient compensation for many student-athletes because they view the universities as failing to ensure that theirs student-athletes actually obtain a valuable college degree).

[102] *See e.g.*, Niemeyer, *supra* note 94, at 891.

[103] 2019-20 NCAA DIVISION I MANUAL §2.10 (2019).

[104] *See* Smith, *supra* note 1, at 11; For example, institutions attempted to use athletes who were not students. Smith, *supra* note 1, at 11.

[105] *See* Kargl, *supra* note 100, at 381.

[106] *See* Smith, *supra* note 1, at 11 & 15 (this commitment to athletic integrity and fairness in competition is reflected in other areas of the NCAA legislation, such as the creation of different divisions to "better reflect [each school's] competitive capacity.").

[107] 2019-20 NCAA DIVISION I MANUAL §2.9 (2019); *See also* Kargl, *supra* note 100, at 380.

[108] 2019-20 NCAA DIVISION I MANUAL §2.9 (2019).

labeling student-athletes as amateurs, the NCAA and member institutions are seek to firmly demarcate the line between collegiate and professional athletics.[109] Most importantly, the amateurism bylaws serve as an all-encompassing set of regulations to protect the wellbeing of student-athletes as they pursue a collegiate education. The amateurism bylaws are ultimately necessary to preserve the "education first" mentality and prevent "college sports from morphing into a . . . semi-professional training ground" that destroys any integrity within sport.[110]

3. *TITLE IX*

One important aspect of the current collegiate athletic environment that has largely been ignored throughout recent debates over the recall of amateurism legislation has been Title IX.[111] The United States Congress enacted Title IX in 1972, and it was initially intended to combat sex discrimination in academia.[112] However, subsequent courts and legislation have continually applied Title IX to collegiate athletics, thereby causing an additional financial strain on many higher-ed institutions.[113] As a result of this application, male (and female) athletic opportunities have become very limited in order to comply with the provisions of Title IX.[114]

Most significantly, scholars have begun to argue that any sort of market revenue could be extremely relevant to the calculation of whether a university's athletics program has complied with the provisions of Title IX.[115] In a basic sense, Title IX "requires that institutions that receive federal funds offer equal athletic opportunities to women and men."[116] Although there are many criteria for determining the equal treatment of male and female student-athletes, no criterion addresses problems at issue today—promotional or commercial activities.[117]

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[109] *See* Kargl, *supra* note 100, at 380–83 (in addition to restrictions on the amount of money student-athletes may accept form their institution or a third party, the NCAA has also promulgated rules the involve the use of agents, ability to participate in professional competitions, ability to accept benefits from professional sports organizations, and more).

[110] *Id.* at 410.

[111] *See e.g.*, Kristi Dosh, *Name, Image and Likeness May Cause Significant Title IX Turmoil*, FORBES (Jan. 21, 2020), https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/#918b7b37625b.

[112] *See* Schwarz, *supra* note 18, at 634.

[113] *See id.*

[114] *See id.* at 635 (Schwarz is careful to indicate that women's sports are equally affected by Title IX legislation because one-way institutions circumvent its requirements is a simple refusal to add more female opportunities in general).

[115] *See* Josephine R. Potuto, *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 939 (2014).

[116] *Id.* at 938.

[117] *See id.*

V. THE DEVELOPMENT OF A SYSTEM OF MEDIATION IS NECESSARY TO ALLOW STUDENT-ATHLETES TO PROFIT OFF THEIR NAME, IMAGE, AND LIKENESS

Although the NCAA has recently suspended its name, image, and likeness prohibitions, the interim nature of the policy requires an examination of dispute resolution in the face of continued amateurism.[118]As a result, to preserve the fundamentals of collegiate athletics, the NCAA regulations should be amended to include mandatory mediation provisions. Mediation, as a flexible dispute resolution process, allows student-athletes to develop contracts to profit off of their name, image, and likeness, while also providing the NCAA an avenue to advocate for fairness in athletics.

In its most basic form, mediation is simply the process of "trying to reconcile the difference between individuals and groups."[119] However, in most recent years, it has blossomed into a popular method of settling business disputes and has taken on certain features and characteristics that make it attractive in specific settings.[120] Today, mediation is defined as "a voluntary, non-binding, 'without prejudice' process that uses a neutral third party (mediator) to assist the parties in dispute to reach a mutually agreed settlement without having to resort to court."[121] From this definition, we can begin to see the aspects of mediation that make it attractive within the NCAA setting: a neutral third party, mutual agreement, and non-binding judgments.

As previously stated, the overarching purpose of the NCAA is to promote the interests of the student-athletes it was originally designed to regulate.[122] Therefore, the inclusion of a true alternative dispute resolution with the current NCAA structure should promote the same. Significantly, mediation has been praised as a process that incorporates wider issues, interests, and needs while still allowing the parties to retain control over the decision-making.[123] As is evident by its current regulatory structure over collegiate athletics, the NCAA possesses "the capacity to be a dictator."[124] Critics, for example, have been quick to attack the "financial, practical and legal complications" that the NCAA places in the path of student-athletes

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[118] *See* Hosick, *supra* note 49.

[119] IAN S. BLACKSHAW, SPORT, MEDIATION AND ARBITRATION 19 (2009).

[120] *Id.* at 47 (the Court of Arbitration for Sport has adopted a mediation service because it has served as a "very appropriate for settling the commercial/financial issues and consequences . . . which often follow from a doping case.").

[121] *Id.*

[122] *See generally* Niemeyer, *supra* note 94, at 886.

[123] *See* BLACKSHAW, *supra* note 119, at 18.

[124] PORTO, *supra* note 33, at 19.

because of the "power [they have] over almost every aspect" of their lives.[125] Although the current NCAA violation structure incorporates parts of traditional litigation,[126] and thereby gives both institutions and student-athletes an opportunity to argue for themselves, mediation attempts to give everyone an equal seat at the table. By using a neutral third party, any potential imbalance in power between parties can be dealt with and mitigated in order to ensure all interests are being discussed and addressed adequately.[127]

Most importantly, the inclusion of a neutral third party helps to alleviate any concerns of procedural unfairness. Throughout the current NCAA model for dispute resolution, nearly every party (such as the prosecutor, judge, and the jury) is an employee of the NCAA, and therefore "owe[s] allegiance to" the regulatory body.[128] As a result, many athletes, and their respective institutions, worry about whether such proceedings will be fair to them.[129] Additionally, the current NCAA process affords the accused less due process protections than traditional litigation.[130] Although mediation is a different process, and therefore provides for different structures of due process, "fairness is [still] considered a fundamental of mediation."[131] By providing for a neutral third party, student-athletes and institutions can be sure that the process will take into account their interest, and the resulting settlement or agreement is fair for all parties.

Relatedly, the ability of parties to retain control throughout the mediation process allows for more creative decision-making.[132] Accordingly, one of "[t]he main advantage[s] of the mediation process is to permit the

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[125] Bill Savage, *'Indentured' Scathes NCAA over control of Student-Athletes*, CHICAGO TRIBUNE (Mar. 10, 2016, 10:21 AM), https://www.chicagotribune.com/entertainment/books/ct-prj-indentured-ncaa-joe-nocera-ben-strauss-20160310-story.html (alteration in original).

[126] *See generally* DIVISION I MANUAL §19 (NAT'L COLLEGIATE ATHLETIC ASS'N 2019).

[127] *See* Omer Shapira, *Exploring the Concept of Power in Mediation: Mediators' Sources of Power and Influence Tactics*, OHIO ST. J. DISP. RESOL. 535, 535–69 (2009). Shapira "submits that familiarity with the bases of power would enable mediators to better understand what they actually do and how they can do it better." *Id.* at 568. Therefore, it is important to ensure that, within potential NCAA mediation, a powerful mediator is serving as the neutral third party.

[128] PORTO, *supra* note 33, at 13. In fact, Porto goes on to describe a "widespread view that the [NCAA] has a 'home field advantage' in enforcement cases." *Id.* (alteration in original).

[129] *See id.*

[130] *See id.* at 12, 24.

[131] Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281, 282 (2012) (alteration in original). According to codes of conduct, the perception of fairness in mediation requires mediators "to remain impartial, to avoid conflict of interests, and to avoid unfair influence that results in a party entering a settlement agreement."

[132] *See e.g.*, BLACKSHAW, *supra* note 119, at 18.

parties to work out their own solution to their dispute with the assistance of the mediator."[133] First, by sufficiently addressing the power dynamics at work throughout the NCAA model, mediation would allow the NCAA to ensure basic collegiate ideals are being incorporated into potential student-athlete profitability contracts. Again, the NCAA is unlikely to adopt or repeal a rule, such as a rule against receiving profit from your name, image, or likeness, unless the change is "consistent with the collegiate model."[134] Therefore, for change to be successful, the NCAA might require a promise, for example, that the education of student-athletes and integrity of collegiate athletics shall remain unaffected by any media contracts proposed to the student-athletes.[135] In mediation, the NCAA can work to limit a potential contract for profit through a settlement of differences.[136]

Additionally, mediation is a process "without prejudice."[137] This means that, in contrast to arbitration and litigation, mediation does not create "a binding decision" "imposed on the parties by a judge or an arbitrator."[138] Therefore, without a binding outcome, either party to the mediation is free to pursue further dispute resolution proceedings.[139] Consequently, any dispute that is not solved through mediation between the NCAA and a student-athlete or institution could then proceed to the normal resolution procedure set out in current NCAA regulations. This, again, helps to ensure that the current NCAA principles are preserved.

Aside from the enhanced procedural protections of individual parties, the addition of mediation services provides enhanced privacy and reputational protections for student-athletes. Inherent in the idea of enhancing student-athlete well-being is the maintenance of personal privacy.[140] Because collegiate athletics have become so commercialized in recent years, athletes

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[133] *Id.* at 19 (alteration in original).

[134] Wolen, *supra* note 97.

[135] *See* NAT'L COLLEGIATE ATHLETICS ASS'N, *supra* note 96.

[136] *See* BLACKSHAW, *supra* note 119, at 31–32. In this setting, "settlement" means a "mediated settlement agreement," a term defined as "a settlement agreement arrived at through mediation." *Mediated Settlement Agreement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[137] BLACKSHAW, *supra* note 119, at 19.

[138] *Id.*

[139] *See id.* at 20 & 31. Importantly, within the context of mediation, settlements only become binding once agreed to by contract. As a result, for future dispute resolution proceedings to remain viable, mediation agreements would need to remain informal. For the NCAA to ensure compliance with the "current NCAA model," any binding settlements would need to explicitly set out the terms of the agreement to allow for future dispute resolution for any slight deviations.

[140] *See* Samuel D. Warren & Louis D. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890). In their famous article, Warren and Justice Brandeis present one of the first formulations of the right to privacy and explain how the development of the "press" can "subject[] [an individual] to mental pain and distress." *Id.* (alteration in original).

are being subjected to more and more media exposure.[141] Unfortunately, much of the negative media exposure is a result of the NCAA penalties placed on individual athletes, coaches, and institutions.[142] As stated previously, an imposition of penalties by the NCAA can negatively affect a student-athlete's mental health and collegiate experience.[143] In response, the individuals subject to penalties are forced to divulge private details due to media and societal pressures for clarification.[144] By creating an option for mediation services, disputes can be worked out before penalties must be imposed.[145] Therefore, athletes and institutions can avoid responding to media pressures once they are forced to miss a game. Additionally, confidentiality within the mediation process provides increased privacy protections to both parties in dispute.[146] Because the mediation process calls for "mediators to be free to conduct mediations without fear that their notes might be disclosed," courts have been reluctant to dissolve the confidentiality barrier.[147] As a result, when taking into account the media landscape that has encompassed collegiate athletics, mediation provides an avenue to the right to privacy.

Arguably, some of the most difficult barriers to an athlete's ability to profit off their name, image, and likeness are the restrictions imposed on institutions by Title IX.[148] Ultimately, the ability to mediate individual athlete contracts and allow for creative solutions can help sidestep possible issues. Due to the "proportionality prong" of which many institutions are basing their compliance with Title IX, it would be difficult to classify student-athletes as employees and provide for collective bargaining agreements.[149] Although the test does not necessitate equal money to be spent on each athletic program, it does require that each athletic opportunity is funded appropriately depending

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[141] *See* Buchanan, *supra* note 75, at 7.

[142] *See id.*

[143] *See infra* III.B.

[144] For example, Ohio State football player Chase Young disclosed to the public that he had received a loan from a family friend only after it was announced that he had been suspended for a certain number of football games. Díamarias Martino, *Ohio State's Star Football Player Suspended for Accepting Loan*, CNBC (Nov. 8, 2019, 5:25 PM), https://www.cnbc.com/2019/11/08/ohio-states-star-football-player-suspended-for-accepting-loan.html.

[145] *See* BLACKSHAW, *supra* note 119, at 20.

[146] *See* Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy*, 27 OHIO ST. J. DISP. RESOL. 539, 540 (2012).

[147] *See e.g.,* Tony Allen, *Mediation: Protection by Privilege and Confidentiality? A Review of* Cumbria Waste Management and Another v. Baines Wilson, *in* SPORT, MEDIATION AND ARBITRATION 21 (2009).

[148] *See e.g,* Schwarz, *supra* note 18, at 634.

[149] *See id.* at 644. Under this prong, "all . . . assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program." Because it is the easiest requirement to comply with, many institutions will base their Title IX compliance on it.

on the needs of the sport.[150] Therefore, the classification of student-athletes as employees of their respective institutions would likely create problems, such as who gets paid and how much they should be paid.[151] In contrast, many scholars have called for classifying collegiate athletes as "self-employees," thereby allowing them to enter the marketplace on their own.[152] By allowing student-athletes to profit in such a way, and providing mediation services to manage such contracts through the NCAA, many problems of proportionality would be avoided. Under this model, institutional athletic programs are not being funded by their respective institutions, and each athlete is provided those same opportunities proportional to their marketability.

I. CONCLUSION

For over 100 years, the NCAA has played an important role in collegiate athletics. Although its powerful expansion has been met with critique and uproar, the NCAA continues to operate with student-athlete wellbeing at the forefront. With the current temporary repeal of its name, image, and likeness standards, the NCAA will need to develop a system of dealing with such a change in the system. When considering the various limits and constraints on the collegiate athletics environment, it becomes necessary to explore other forms of dispute resolutions. Specifically, mediation presents the best system to encompass the change in collegiate regulation, while still providing for the core NCAA ideals of education and integrity in sport. The ability to develop creative solutions to incorporate the interests of all involved parties is invaluable within the collegiate environment, as athletes and institutions continue to face opposition from a variety of entities. Because collegiate athletics will remain in the public eye for years to come, the NCAA needs to adapt and provide for different ways to serve the numerous athletes that will decide to continue their sport through their college years.

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[150] *Id.*

[151] *See* Niemeyer, *supra* note 94, at 925–26.

[152] Christine Colwell, *Playing for Pay or Playing to Pay: Student-Athletes as Employees Under the Fair Labor Standards Act*, 79 LA. L. REV. 899, 937 (2019); *see also* Niemeyer, *supra* note 94, at 927–28.