NCAA Enactment of a Disciplinary Policy: Uniformity to Regain Institutional Legitimacy

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Cover Page Footnote
Matteson Landau, J.D. 2024, Pepperdine Caruso School of Law; B.S. Sport Management/B.B.A. Marketing 2020, University of Texas at Austin. I would like to thank Professor Maureen Weston and Professor Joel Johnson for their encouragement and assistance in drafting and improving this article.
NCAA ENACTMENT OF A DISCIPLINARY POLICY: UNIFORMITY TO REGAIN INSTITUTIONAL LEGITIMACY

By Matteson Landau*

This article examines issues surrounding decentralized disciplinary systems and inconsistent enforcement against student-athletes who engage in criminal misconduct across the National Collegiate Athletic Association ("NCAA"). The NCAA recognizes the inherent conflicts of interest that arise when institutions are left to regulate their own recruiting practices. To negate these conflicts, the NCAA has established a robust disciplinary system, the NCAA Committee on Infractions, which oversees investigations into violations of NCAA Bylaws, reviews materials provided by the athlete and/or institution, and issues binding rulings which may include suspensions and fines. Yet the NCAA fails to see how the same conflict issues arise when schools are left in charge of investigating and imposing suspensions or disciplinary measures on their own star student-athletes for violating the law. While some institutions implement policies to ensure fairness, others deal with criminal misconduct allegations on an ad hoc basis. The resulting patchwork system of enforcement creates loopholes in which athletes can transfer from school to school to avoid appropriate punishment. This article argues that the NCAA has the knowledge and resources necessary to implement a centralized disciplinary enforcement policy. Such a policy would absolve individual institutions of the responsibility to issue fair discipline despite adverse incentives. Furthermore, stepping into a new area of regulation provides an avenue for the NCAA to remain relevant in an era of increasing conference autonomy, expiry of amateurism, and an ever-shifting college athletics landscape.

*Matteson Landau, J.D. 2024, Pepperdine Caruso School of Law; B.S. Sport Management/B.B.A. Marketing 2020, University of Texas at Austin. I would like to thank Professor Maureen Weston and Professor Joel Johnson for their encouragement and assistance in drafting and improving this article.
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I. INTRODUCTION

The National Collegiate Athletic Association’s (“NCAA”) Constitution states that the NCAA is a “self-governing organization” whose basic purpose is to “support and promote healthy and safe intercollegiate athletics.”1 Yet, the NCAA has no specific penalties for sexual assault, criminal misconduct, or violence.2 While an individual institution may impose disciplinary actions, an athlete who is suspended or expelled from one university is free to transfer to another institution.3 Following the implementation of the NCAA Transfer Portal4 in 2018, athletes can easily switch schools, conferences, or divisions without sacrificing their eligibility, which allows an athlete facing disciplinary action at one school to jump ship and leave the consequences of their misconduct behind.5

In some cases, athletes do not have to transfer schools to escape disciplinary consequences.6 For example, during the 2022-2023 academic year, Mazi Smith, a starting defensive lineman for the University of Michigan Wolverines football team, continued participating in team activities while

1. See Nat’l Collegiate Athletic Ass’n Const. pmbl.

2. See Kenny Jacoby, NCAA Looks the Other Way as College Athletes Punished for Sex Offenses Play On, USA TODAY (Dec. 16, 2019, 9:06 AM), https://www.usatoday.com/in-depth/news/investigations/2019/12/16/ncaa-looks-other-way-athletes-punished-sex-offenses-play/4360460002/ [https://perma.cc/6MBN-GW4G] (noting that “the NCAA notoriously metes out punishments to student athletes for bad grades, smoking marijuana or accepting money and free meals” and “ unlike the pro leagues, the NCAA has no personal conduct policy and no specific penalties for those who commit sexual assault”).


5. See, e.g., Jacoby, supra note 2 (LaDarrius Jackson, after being expelled for violation of USF’s non-consensual sexual intercourse policy and awaiting criminal charges, transferred to Tennessee State and played the same season, “expulsion and ongoing criminal case posed no obstacle to his collegiate football career”).

facing felony charges for illegally carrying a concealed weapon.\(^7\) Similarly, Arterio Morris played an entire season for the University of Texas Longhorns basketball team and contributed to the team’s Elite Eight run without facing any internal discipline for pending domestic violence charges.\(^8\) In yet another example, the top-ranked University of Alabama Crimson Tide basketball team allowed Brandon Miller to continue playing despite his involvement in a fatal shooting perpetrated by one of his teammates during the season.\(^9\) While the aforementioned university athletics programs allowed athletes to participate without consequences, other institutions are setting a very different standard for their athletes, implementing zero-tolerance policies for sexual assault or criminal misconduct.\(^10\)

Perhaps NCAA athletes should be free to engage in misconduct without facing sport-specific consequences. After all, they are still subject to the same criminal and civil liability that all citizens face.\(^11\) However, the NCAA’s self-stated focus on “Integrity and Sportsmanship” and the precedent of professional sports leagues establishing personal conduct policies seems to suggest a higher standard of character expected in sports.\(^12\)

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7. See id.


(“ESPN’s 2015 ‘Outside the Lines’ investigation released crime statistics of 20 college campuses from 2009 to 2014. This study suggests that college athletes are much more likely to avoid prosecution for crimes than non-athletes.”).

12. See *Sportsmanship*, NCAA, https://www.ncaa.org/sports/2021/6/18/sportsmanship.aspx [https://perma.cc/3ZSY-M2VV] (“It is not by accident that the pursuit of the highest levels of integrity and sportsmanship is a core value of the NCAA, as the Association was founded in an attempt to address unsportsmanlike acts and other issues that cost the lives of student-athletes.”); see also *League Policies for Players*, NAT’L FOOTBALL LEAGUE (2022), https://nflpaweb.blob.core.windows.net/website/Departments/Salary-Cap-Agent-Admin/2022-NFL-
This article will highlight the systematic disciplinary problem occurring in college athletics and offer a proposed solution. Part II will describe the NCAA’s current model which provides institutions full discretion to implement, or refrain from implementing, their own misconduct discipline policies, and describe the NCAA’s enforcement power over its member institutions, including where the NCAA currently chooses to exercise that power. Part III will analyze two main problems with the current model of decentralized discipline enforcement and touch briefly on subsidiary issues or claims that could arise. Part IV will propose adoption of a uniform disciplinary policy and highlight the benefits of implementation and enforcement by the NCAA as a tool to regain legitimacy in a college sports landscape dominated by name, image, and likeness (“NIL”) deals and College Football Playoffs.

II. THE CURRENT MODEL: INSTITUTIONAL DISCRETION

A. NCAA Constitution

The NCAA Constitution grants the NCAA power to “establish the rules for sports competitions and participation,” delegates to member institutions the duty of ensuring “participating student-athletes are in good standing with the member institution, the conference, division and national Association,” and provides that any authority not enumerated in the NCAA Constitution is reserved to the divisions. The NCAA Constitution does not expressly address jurisdiction over student-athletes in the area of criminal misconduct, but a constitutional amendment can be passed by a two-thirds majority vote of the present delegates.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.


B. Division I Manual: Operating and Administrative Bylaws

The 2022-23 NCAA Division I Manual is 473 pages long, but does not once address criminal misconduct by student-athletes or employees.\(^{18}\) Article 10 addresses Ethical Conduct, but defines ethical conduct as “Honesty and Sportsmanship” and only sets out disciplinary procedures for student-athletes who engage in the knowing use of banned drugs or sports wagering activities.\(^{19}\) The bylaws outline extensive policies regarding amateurism, recruiting, and maintenance of academic eligibility to compete, mostly focusing on prohibiting student-athletes from receiving unfair assistance or compensation which would invalidate their amateur status.\(^{20}\) Article 19 establishes the NCAA Infractions Program, which is designed to “uphold integrity and fair play among the NCAA membership, and to prescribe appropriate and fair penalties if violations occur” by creating an independent committee which issues rulings providing “fairness of procedures and . . . timely resolution.”\(^{21}\) The Division I Enforcement Charging Guidelines provide uniform standards for evaluating “serious breaches of conduct,” giving the Infractions Committee legitimacy.\(^{22}\) However, the infractions process only holds individuals and institutions accountable for violations of NCAA bylaws.\(^{23}\) Therefore, under the current model, the Infractions Committee cannot hear cases or issue disciplinary rulings relating to violence, sexual assault, or criminal misconduct.\(^ {24}\)

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19. Id. at art. 10.

20. See id. arts. 10–19.

21. Id. at art. 19; see also RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 94–105 (9th ed. 2019) (detailing the Committee on Infractions’s enforcement process and excerpting a Committee ruling on Reggie Bush’s amateurism violations while at USC).


23. See 2022-2023 Division I Manual, supra note 18, art. 19.01.2 (“The infractions program shall hold institutions, coaches, administrators and student-athletes who violate NCAA bylaws accountable for their conduct, both at the individual and institutional levels.”).

24. See id. art. 19.1 (describing applicable violations and their severity).
C. NCAA Enforcement Power Under NCAA v. Tarkanian

A uniform disciplinary policy for criminal misconduct may seem to raise constitutional and due process concerns for the rights of criminal defendants. Although public universities are typically classified as state actors, the NCAA is not.\(^\text{25}\) Under the 1988 holding in *NCAA v. Tarkanian*,\(^\text{26}\) the Supreme Court ruled that the NCAA was not a state actor, and enforcement of disciplinary decisions by a public university (suspending Coach Tarkanian) did not constitute action “under color of” state or federal law.\(^\text{27}\) Thus the Court dismissed former University of Nevada Las Vegas head coach Jerry Tarkanian’s Section 1983 claim for violation of his due process rights and set the precedent that NCAA disciplinary decisions do not have to meet the standards of constitutional due process.\(^\text{28}\) *Tarkanian* emphasized the voluntary nature of NCAA membership, and the NCAA and its members have consistently emphasized that intercollegiate athletic participation is not a fundamental right, but a privilege.\(^\text{29}\) Subsequent attempts to legislatively limit NCAA enforcement power have been unsuccessful, and the NCAA currently remains free to adopt and enforce bylaws in an “unfettered” manner with few limitations.\(^\text{30}\) NCAA bylaws cannot violate federal or state laws on their face and can potentially be challenged in court if they appear to be discriminatory, arbitrary, or capricious;\(^\text{31}\) however, these burdens are difficult


\(^{26}\) See generally id.

\(^{27}\) Id. at 179–180 (“[E]ven assuming the truth of Tarkanian’s argument that the power of the NCAA is so great that UNLV had no practical alternative but to comply with the Association’s demands, it does not follow that the NCAA was therefore acting under color of state law.”).

\(^{28}\) Id. at 191, 194–95.


\(^{31}\) See Michael Kessler, *Let’s Give It Arrest: Why the NCAA Should Adopt a Uniform Disciplinary Policy*, 26 MARQ. SPORTS L. REV. 433, 442 (2016) (“NCAA rules and bylaws cannot permit the commitment of crimes or torts, must generally comply with federal and applicable state laws, and must comply with the public policy of good faith and fair dealing.”).
to prove, and sports organizations are often granted broad deference in the courts.\textsuperscript{32}

\textbf{D. Recent Updates}

In 2017, the NCAA Board of Governors issued a Policy on Campus Sexual Violence, requiring athletic departments to remain informed on overall campus policies.\textsuperscript{33} At the end of 2019, \textit{USA Today} published an investigation entitled Predator Pipeline,” publicizing the common practice of athletes transferring from one NCAA institution to another after being disciplined administratively or through the courts.\textsuperscript{34} Shortly after this negative publicity, in May 2020, the Board of Governors voted to expand the Campus Sexual Violence policy to require \textit{disclosure} of “conduct that resulted in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence” for any incoming, continuing, or transfer student-athletes.\textsuperscript{35} While this policy is a positive step forward because the NCAA itself is moving towards explicitly addressing violent or criminal misconduct, the policy has been criticized as toothless because it leaves the eligibility and discipline decisions up to university

\begin{footnotesize}
\begin{enumerate}
\item See, \textit{e.g.}, Frederic J. Frommer, \textit{Play Calling by Congress, NFL and NCAA Allowed Football to Flourish on Weekends}, SPORTS BUS. J. (Dec. 16, 2021), https://www.sportsbusiness-journal.com/SB-Blogs/COVID19-OpEds/2021/12/16-Frommer.aspx [https://perma.cc/94L3-EHF7] (“[T]he Sports Broadcasting Act of 1961 — gave the NFL (and other pro sports leagues) a broadcasting antitrust exemption, while also essentially banning the NFL from televising games on Saturdays during most of the fall, to protect college football. The ban also covers Friday nights in deference to high school football.”); YASSER ET AL., \textit{supra} note 21, at 266–67 (“In \textit{Federal Baseball} the United States Supreme Court ruled that baseball was not subject to the reach of the antitrust laws, but was merely the business of ‘giving the exhibitions of baseball, which are purely state affairs’ and was ‘not a subject of commerce.’”).
\item See Kenny Jacoby, \textit{NCAA Looks the Other Way as College Athletes Punished for Sex Offenses Play On}, USA TODAY (Dec. 16, 2019, 9:06 AM), https://www.usatoday.com/in-depth/news/investigations/2019/12/12/ncaa-looks-other-way-athletes-punished-sex-offenses-play/4360460002/ [https://perma.cc/6MBN-GW4G] (“College athletes can lose their NCAA eligibility in numerous ways, but sexual assault is not one of them. Even when facing or convicted of criminal charges, even when suspended or expelled from school, NCAA rules allow them to transfer elsewhere and keep playing.”).
\item Id. (“Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.”).
\end{enumerate}
\end{footnotesize}
discretion. Overall, while the NCAA Board of Governors has the power to amend the NCAA Constitution or bylaws and create a centralized system to regulate misconduct discipline, it has instead chosen to focus its investigatory power on coaches buying burgers for recruits, while leaving investigation of sexual assault allegations and criminal charges in the hands of individual universities.

III. PROBLEMS WITH INSTITUTIONAL DISCRETION

Leaving the role of disciplinarian to individual athletic departments in sexual assault, criminal misconduct, and violence cases raises a host of problems. This article will address two of the most prominent issues: first, these institutions depend on star athletes to generate revenue and build their national reputation, and second, institutions have vastly different policies, 


39. Id.

enforcement staff, and resources to dedicate to disciplinary proceedings.\textsuperscript{41} The NCAA’s rationale in leaving disciplinary responsibility in the hands of universities may be driven by an attempt to shift the economic and temporal burden of their own disciplinary workload to the schools. However, the NCAA, a 501(c)(3) nonprofit organization, claims to “put its money where its mission is: equipping student-athletes to succeed on the playing field, in the classroom and throughout life.”\textsuperscript{42} The NCAA actually does distribute a bulk of its revenue to its member schools, but even after suffering losses in the COVID-19 pandemic, the NCAA still reported assets worth over $457 million in August 2022.\textsuperscript{43} Between an already developed infrastructure in the Committee on Infractions and a well-butttressed level of asset-backing, it seems financially feasible for the NCAA to adopt and enforce a disciplinary policy.\textsuperscript{44}

\textbf{A. Adverse Incentives for Universities Issuing Discipline}

The logical fallacy of allowing an institution to essentially self-impose punishment is obvious: an athletic department has every reason to minimize problems with its student-athletes to preserve the legitimacy of its public reputation.\textsuperscript{45} If the decision is left to a head coach, whose job security

\begin{itemize}
  \item \textsuperscript{44} See Division I Committee on Infractions, NCAA (Nov. 17, 2013), https://www.ncaa.org/sports/2013/11/17/division-i-committee-on-infractions.aspx [https://perma.cc/9Y9T-HBF5]; Finances, supra note 42.
\end{itemize}
depends on wins and losses, the incentives are similarly misaligned with effective enforcement and rehabilitation. This difficult position usually leads to binary results: a school can minimize discipline by ignoring or covering up an offense, or it can simply dismiss the student-athlete from the team. Often, if a star player generates revenue for the university and contributes to wins for the head coach, the disciplining parties are incentivized to “go to bat” for the student-athlete and find alternatives that preserve their ability to compete. On the other hand, if an athlete is less important to achieving these goals (winning and generating revenue), the disciplining parties could easily choose dismissal from the team, allowing the coach to avoid wasting time and resources on athlete rehabilitation while the university avoids media scrutiny or reputational damage.

During the 2023 Division I Men’s Basketball season, University of Alabama basketball player Darius Miles was charged with capital murder for his role in the fatal shooting of Jamea Harris. Miles, a non-starter who was playing only six minutes per game, was quickly dismissed from the team.


48. See, e.g., Lockhart, supra note 46, at 138 (“Like coaches before him at Alabama, Saban turned to community service instead of suspending the athlete from competition. While community service is unquestionably an honorable deed, Alabama’s policy is perceived to lack punch because athletes are not punished where it hurts - on the athletic field.”); see also Kessler, supra note 47, at 435 (“Other recent examples of schools disciplining student-athletes seem to be following a disturbing trend, especially when ‘star players’ appear to receive favorable treatment in disciplinary sanctions.”).

49. This aspect of institutional decision-making can bring in broader issues such as gender discrimination. Male athletes who participate in inherently aggressive sports are the demographic most likely to engage in aggressive behavior off the field. Yet, these are also the sports which most commonly include star athletes generating significant revenue for the university, while a female athlete in a non-revenue generating sport is not likely to receive the same self-incentivized university protections. See Lydia Bert and Mary Wilfert, Mind, Body and Sport: Interpersonal Violence and the Student-Athlete Population, NCAA (Nov. 5, 2014), https://www.ncaa.org/sports/2014/11/5/mind-body-and-sport-interpersonal-violence-and-the-student-athlete-population.aspx [https://perma.cc/93YW-5JD5].

even though his criminal case had not yet been adjudicated.\textsuperscript{51} On the other hand, the team’s star player and projected NBA lottery pick Brandon Miller, who was present at the shooting and gave Miles the murder weapon, was never disciplined by the university and continued playing, averaging 32 minutes and 18.8 points per game, leading Alabama to the Sweet Sixteen.\textsuperscript{52} While these two athletes played different roles in this incident, it is clear they were also treated differently by the university due to their value on the court.\textsuperscript{53} The decision to allow Brandon Miller’s continued participation came under scrutiny months after the incident, when information about his level of involvement became public.\textsuperscript{54} Head coach Nate Oats was forced to walk back his statement that Miller was merely in the “wrong place at the wrong time,” yet the university did not change its decision to let Miller play throughout the March Madness tournament.\textsuperscript{55} This is a recent and highly publicized example of what likely goes on all across the country when universities are allowed to act in their own best interests with no accountability to their membership organization.\textsuperscript{56}


\textsuperscript{53} See Gotfredson, supra note 52 (“The whole team understands how tragic and serious this situation we’re dealing with is. I think they’re doing a great job. Just understanding that we’re still focused on the task at hand while still understanding how tragic and serious the situation is,” Oats said on February 24.”).

\textsuperscript{54} See Scott Polacek, Alabama’s Nate Oats Clarifies Comments on Brandon Miller Shooting Involvement, BLEACHER REP. (Feb. 21, 2023), https://bleacherreport.com/articles/10066447-alabamas-nate-oats-clarifies-comments-on-brandon-miller-shooting-involvement [https://perma.cc/K9CW-WCLJ] (“Alabama men’s basketball coach Nate Oats issued an apology Tuesday night regarding statements he made after it was revealed Crimson Tide player Brandon Miller allegedly provided the gun used in the shooting death of a 23-year-old woman in January.”).

\textsuperscript{55} Id.; Mike Rodak, Nate Oats: Brandon Miller Was In ‘Wrong Spot at Wrong Time’ Night of Jamea Harris Killing, AL.COM (Feb. 21, 2023), https://www.al.com/alabamabasketball/2023/02/nate-oats-brandon-miller-was-in-wrong-spot-at-wrong-time-night-of-jamea-harris-killing.html [https://perma.cc/WQ8R-SV94].

\textsuperscript{56} See sources supra note 45.
B. Inconsistent Rulings and Variation between Institutions

In addition to the discretion within an athletic department, there is an even wider variance in how different universities and conferences handle and discipline misconduct. While some have strict policies banning athletes found guilty in a criminal or administrative proceeding, other programs reap the on-field benefits by functioning as a transfer portal landing spot for those banned athletes. The conferences and schools that have enacted strict policies typically only apply these policies to athletes who have been convicted of criminal acts, demonstrating how the handling of student-athlete discipline during an investigation is still fully discretionary.

In his 2016 study, Michael Kessler compared how Florida State University (“Florida State”) and the University of Florida (“Florida”) each handled sexual assault allegations against their respective starting quarterbacks. While Florida suspended quarterback Treon Harris as soon as allegations were filed, Florida State allowed Jameis Winston to play throughout a sexual assault investigation without issuing any disciplinary penalties.

These program-to-program variations in investigatory and disciplinary policies can ultimately lead to harmful and damaging situations and put other athletes at risk. In February 2023, New Mexico State University was forced to suspend its entire men’s basketball program indefinitely and cancel the

57. See Kenny Jacoby, NCAA Adopts Policy to Vet College Athletes for Sexual Assault, But Lets Them Stay Eligible, USA TODAY (May 6, 2020, 2:31 PM), https://www.usatoday.com/story/news/investigations/2020/05/04/ncaa-requires-vetting-athletes-sexual-assault-violence/3077489001/ (“A handful of NCAA conferences and schools ban athletes who’ve been criminally convicted or disciplined by their schools for sexual and other violent offenses, including the SEC, Big 12, Pac-12, Big Sky, Southern and Mid-American conferences, as well as Indiana University and the University of Texas-San Antonio (UTSA).”).

58. See id.

59. See id.

60. Kessler, supra note 47, at 434–35.

61. Id.

62. See Kenny Jacoby & Savannah Kuchar, Colleges Rely on Honor System When Checking Sexual Assault Background of Student Athletes, USA TODAY, (Oct. 30, 2023, 8:26 PM), https://www.usatoday.com/in-depth/news/investigations/2023/10/30/ncaa-athlete-sexual-assault-vetting-dont-ask-dont-tell/70371805007/ (“[I]f an athlete answers “no” to a list of questions about criminal convictions and school disciplinary action, officials at many multi-sport powerhouses – the University of Alabama, Louisiana State University, Ohio State University and more – generally take their word for it.”).
remainder of their season due to an epidemic of violent misconduct.\textsuperscript{63} First, in November 2022, a member of the team “shot and killed a University of New Mexico student,” after which coaches and staffers became involved and potentially assisted in trying to cover up the incident.\textsuperscript{64} At this point, the school was free to conduct investigations and enforce discipline upon players and employees itself, but due to the unprecedented situation of athlete involvement in a deadly shooting followed by allegations of rampant hazing within the team, it had no guidelines or precedent to follow.\textsuperscript{65} The lack of institutional leadership led to chaos within the team, which continued uninhibited until a team member filed a police report against three of his own teammates for “false imprisonment, harassment and counts of criminal sexual contact.”\textsuperscript{66} After that, the university took the unprecedented step of shutting down the program mid-season, left out to dry by the NCAA with no guidance or alternatives.\textsuperscript{67}

Overall, individual institutional discretion in disciplinary policies creates a patchwork system of loopholes and inconsistency for student-athletes, making standards of compliance unclear and opportunities for rehabilitation unavailable.\textsuperscript{68} While outside the scope of this article, disparate enforcement


\textsuperscript{64} Id.

\textsuperscript{65} See id. (“The shutdown of a Division I program in midseason for reasons other than a spate of injuries or, more recently, a COVID-19 outbreak, is virtually unheard of. SMU’s football program canceled its 1988 season after the NCAA handed it the ‘death penalty’ the year before, but that move was made before the season was underway.”).

\textsuperscript{66} Id.; see also Vince Rodriguez, New Mexico Is Falling Short in Hazing Prevention, KOAT 7 (Apr. 12, 2024, 1:53 PM), https://www.koat.com/article/nmsu-hazing-scandal-allegations/60440737 [https://perma.cc/9B5X-QYD7] (“William Benjamin believes that these alleged incidents of hazing could have been stopped months earlier if New Mexico State University took more action following a deadly shooting involving members of the same basketball team.”).


between universities, especially within the same state or conference, could raise legal issues of racial discrimination and equal protection.69

IV. PROPOSING A SOLUTION: BENEFITS OF A UNIFORM DISCIPLINARY POLICY

Undoubtedly, the NCAA has considered adopting a uniform disciplinary enforcement policy, as evidenced by its expansion of the Policy on Campus Sexual Violence.70 But this “toothless” policy does not live up to the NCAA’s proclaimed mission and standards. As former University of Kansas athlete and sexual assault victim Daisy Tackett said, “The NCAA should take on the liability if it means protecting students, instead of protecting themselves.”71

A. Structural Options

The Board of Governors enacting a uniform disciplinary policy through an amendment to the NCAA Constitution or through passing a new bylaw is the biggest hurdle to implementation.72 In terms of structuring an enforcement procedure, the NCAA has numerous sources to reference.73 First, the solution to the problem of the NCAA’s enforcement inconsistency, calling it “just one of many, larger hypocrisies besetting the NCAA these days”).


72. See NCAA CONST. art. V.

73. See, e.g., Collective Bargaining Agreement, NAT’L BASKETBALL ASSOC., art. VI, § 16 (Jan. 1, 2017) https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-
NCAA could model a “Committee on Disciplinary Enforcement” after the well-established Committees on Infractions, which already exist at each divisional level. The NCAA could utilize the same (or similar) requirements in the selection of neutral committee members and, given the frequency of recruiting violation allegations, likely have a strong understanding of the time, resources, and labor necessary to set up a functional system.

Alternatively, the NCAA could look to U.S. professional sports leagues for structural guidance. For example, the National Basketball Association’s (“NBA”) collective bargaining agreement includes a “Joint NBA/NBPA Policy on Domestic Violence, Sexual Assault, and Child Abuse” which establishes a policy committee and outlines disciplinary authority standards including aggravating factors. The National Women’s Soccer League (“NWSL”) provides dual disciplinary authority to an athlete’s team and the NWSL, but both follow generally agreed upon “principles of progressive discipline.” Most professional leagues, including the NBA and NWSL, employ a neutral arbitrator for the disciplinary appeals processes. The NCAA could consider an arbitration model of disciplinary enforcement, or use an arbitrator to decide appeals of any Committee on Disciplinary Enforcement decisions. In creating its disciplinary policy, the NCAA should consider including another structural feature modeled after the professional leagues: the

NBPA-Collective-Bargaining-Agreement.pdf  [https://perma.cc/T6M3-LJ5R] [hereinafter NBA Collective Bargaining Agreement].


75. See Division I Committee on Infractions, supra note 74 (“In accordance with NCAA Bylaw 19.3.1, the COI membership shall include, where reasonably possible: current or former presidents, chancellors, directors of athletics; former coaches; representatives from conference offices; faculty/staff; athletics administrators with compliance experience; and general public members who have formal legal training but who are not associated with a collegiate institution, conference, or professional or similar sports organization and who do not represent coaches or athletes in any way.”).

76. See NBA Collective Bargaining Agreement, supra note 73, art VI § 16.

77. Collective Bargaining Agreement Between the National Women’s Soccer League Players Association and National Women’s Soccer League, NAT’L WOMEN’S SOCCER LEAGUE PLAYERS ASS’N, art. 17, § 17.1 (April 29, 2022), https://www.nwslplayers.com/_files/ugd/84dade_f54a9ed0c1fa4bd48f5275563a3f9e04.pdf [https://perma.cc/7G2S-5987].

78. See, e.g., id. at art. 18.
prohibition of duplicative punishment. Professional teams have concurrent disciplinary powers with the overarching league, however duplicative punishment is prohibited. Similarly, the NCAA should grant universities the power to discipline their athletes under their own authority, but this must not shield schools or athletes from an NCAA investigation and ruling. The NCAA disciplinary decisions would serve as a uniform “floor” standard of punishment, and schools would have discretion to issue further consequences but not to lessen them.

Finally, if the NCAA remains hesitant to take responsibility and fulfill its mission, a proposed next step toward uniformity would be the enactment of binding or recommended disciplinary guidelines. Like the guidelines created by the United States Sentencing Commission followed throughout the U.S. Criminal Justice system, the NCAA Disciplinary Guidelines could, at the very least, provide a disciplinary framework for athletic departments to follow, and establish a baseline level of consistency across each division.

79. Duplicative punishment is similar to double jeopardy and occurs in sports if an athlete or coach is subject to discipline from both the team and the conference or league for the same misconduct. See, e.g., NBA Collective Bargaining Agreement, supra note 73, art. VI, § 10 (“One Penalty. The NBA and a Team shall not discipline a player for the same act or conduct. The NBA’s disciplinary action will preclude or supersede disciplinary action by any Team for the same act or conduct.”).

80. See, e.g., NBA Collective Bargaining Agreement, supra note 73.


82. See T. Matthew Lockhart, The NCAA Should Adopt a Uniform Student-Athlete Discipline Policy, 16 UCLA ENT. L. REV. 119, 122 (2009) (advocating “for the NCAA to set the floor for punishment, thereby making the initial punishment uniform across the nation. Each individual university will be free to punish athletes above and beyond the NCAA’s initial punishment.”).

83. See Aaron Hernandez, Step One: Solving the NCAA Sexual Assault Problem, 32 MARQ. SPORTS L. REV. 157, 161 (2022), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1811&context=sportslaw [https://perma.cc/VG8J-YJ6H] (explaining “the legal underpinnings of the NCAA and why the Association would be able to enact enforceable legislation making sexual assault an NCAA violation”).

B. Benefits to the NCAA

Now more than ever, the NCAA is in an era of heightened scrutiny and weakened legitimacy, largely due to conference realignment, the College Football Playoff, and the legalization of athlete NIL rights. As the Southeastern and Big 10 Conferences continue to increase concentration of top-tier institutions, they gain autonomy and leverage relative to the NCAA. While the NCAA sanctions the Division 1 Football Championship Series (“FCS”), the elite Football Bowl Series (“FBS”) schools all compete for a place in the College Football Playoff. In July 2021, NCAA athletes became able to profit from NIL deals for the first time following the implied stance of approval from the United States Supreme Court in NCAA v. Alston. The NCAA was seemingly caught off-guard because rather than providing a uniform policy on NIL, the NCAA’s interim policy largely deferred to state law and individual school reporting requirements. Then, in April 2022, the

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89. Michelle Brutlag Hosick, NCAA Adopts Interim Name, Image and Likeness Policy, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://archive.is/aclfIT] (“The policy provides the following guidance to college athletes, recruits, their families and member schools: Individuals can engage in NIL activities that are consistent with the law of the state where the school is located.
NCAA abruptly announced that Mark Emmert, President of the NCAA since 2010, would be stepping down.90 This abrupt resignation raised questions about his leadership and perhaps signaled that the NCAA realized its own missteps with respect to the aforementioned issues.91 In December 2022, the NCAA announced Emmert’s successor would be former Governor of Massachusetts Charlie Baker, who took office as NCAA President in March 2023.92 Considering its recent track record of blunders, implementation of a robust and uniform disciplinary policy by recently-appointed NCAA President Charlie Baker would signal a shift in the NCAA’s effectiveness and help it hold on to what power and legitimacy it has retained in college athletics.93

V. CONCLUSION

Overall, a uniform disciplinary policy centrally enforced by the NCAA upon its member institutions would benefit all parties involved.94 Student-athletes would be subject to consistent, understandable conduct requirements on and off the field and be held responsible for their actions instead of finding

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91. See id.

ties%20of%20the%2072nd%20governor%20of%20Massachusetts [https://perma.cc/VS46-YSYB] (“Baker has arrived at the NCAA at a moment of significant transformation. Legal shifts in the environment surrounding college sports have challenged the NCAA’s ability to serve as an effective national regulator for college athletics, resulting in an untenable patchwork of individual state laws.”).

93. See id.

94. See Aaron Hernandez, Step One: Solving the NCAA Sexual Assault Problem, 32 MARQ. SPORTS L. REV. 157, 157 (2022), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1811&context=sportslaw [https://perma.cc/VG8J-YJ6H], (“Since the NCAA is a member association, the controversies the Association has faced over time are largely dictated by the demands and interests of its member institutions.”).
loopholes to evade disciplinary consequences. Coaches and athletic departments would not be placed in the dilemma where enforcement of ethical punishment standards leads to self-sabotage in terms of revenue and game wins. Further, they could implement their own supplementary discipline procedures if they so choose. Institutions will be protected from issuing discriminatory rulings which may lead to legal claims of violations of equal protection, due process, and Title IX. Instead of pushing every resource into defending the antiquated concept of “amateurism” in college sports, the NCAA can legitimize itself in the public eye by acting in furtherance of its purpose to “support and promote healthy and safe intercollegiate athletics.” This article does not go so far as to suggest a normative policy for when or how student-athletes should be punished, it merely proposes that whatever that standard may be, it should be centralized and uniformly applied by the NCAA. Such a policy would provide the consistency and clarity necessary to equitably enforce discipline across race and gender currently lacking in intercollegiate athletics.


98. See NCAA CONST. pmbl.