

THE NCAA SHOULD ADOPT A UNIFORM STUDENT-ATHLETE DISCIPLINE POLICY

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I. INTRODUCTION

“[A]n athlete can, theoretically, face immediate suspension for improperly accepting a cheeseburger from a booster, yet continue playing while charged with a felony.” – L.A. Times.¹

The National Collegiate Athletic Association (“NCAA”)² rules the mega-money collegiate sports world with a powerful iron hand. Through its 427-page manual,³ the NCAA regulates everything from team movie rentals⁴ to the permissible length of a uniform’s washing instruction tag.⁵ There are enough rules to make college compliance directors dizzy. However, one key rule is missing. Nowhere in the voluminous manual does any form of the word “arrest” appear. Despite delving into just about every area of regulation imaginable, the NCAA has chosen to remain silent on the ever-increasing issue of college athletes getting into trouble with the law.⁶ Instead, decisions on how to handle troubled players facing criminal charges and convictions are left to each individual university, each of which have a vested interest in athletic success.⁷

¹ David Wharton & Gary Klein, *Lax Environment*, LOS ANGELES TIMES, April 16, 2006, at D1.

² The NCAA is a voluntary collegiate athletic organization formed to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” NCAA CONST., art. 1.3.1, *reprinted in* NAT’L COLLEGIATE ATHLETIC ASS’N, 2008-2009 NCAA DIVISION I MANUAL 1 (2008) [hereinafter NCAA MANUAL], available at http://www.ncaapublications.com/Uploads/PDF/Division_1_Manual_2008-09e9e568a1-c269-4423-9ca5-16d6827c16bc.pdf.

³ *Id.*

⁴ NCAA BYLAWS, art. 16.7.2, *reprinted in* NCAA MANUAL, *supra* note 2, at 200. Team movies are allowed the night before a game.

⁵ NCAA BYLAWS, art. 12.5.4.1, *reprinted in* NCAA MANUAL, *supra* note 2, at 75. The tag cannot exceed 2 ¼ square inches.

⁶ STEWART MANDEL, BOWLS, POLLS & TATTERED SOULS 244-250 (John Wiley & Sons, Inc. 2007).

⁷ *Id.* at 250.

Under the current system, the NCAA can suspend an athlete for accepting bail money from a school booster,⁸ but can do nothing about the underlying arrest or the resulting conviction. For example, in 1992, a star basketball player for the University of Nevada-Las Vegas (“UNLV”) scored a game-high 26 points the night after being arrested and charged with obstructing a police officer.⁹ The NCAA did not suspend the athlete following the arrest, which occurred when he allegedly became abusive with a police officer at a restaurant near campus.¹⁰ Rather, what got the star athlete in trouble with the NCAA was the \$200 he received from an academic adviser to post bail in time for the team’s next game.¹¹

A second equally perplexing situation occurred when the NCAA suspended 26 University of Wisconsin football players and three basketball players for accepting improper discounts on shoes.¹² The punishment from the NCAA was far from a wrist-slap either, as 11 of the football players were given three-game suspensions, and two basketball players were forced to sit out eight games.¹³ These players were accused of receiving interest-free credit from an athletic store and discounts of 25 to 40 percent on shoes and clothing.¹⁴ Had the players stolen the shoes and been arrested instead, the NCAA would have done nothing about it.¹⁵

The UNLV bail money incident and the improper shoe discounts at Wisconsin shed light on a serious problem with discipline handed down by the NCAA. While the NCAA has power to punish the lesser

⁸ See NCAA BYLAWS, art. 13.2, reprinted in NCAA MANUAL, *supra* note 2, at 96. This bylaw section stands for the proposition that no student-athlete can receive improper benefits from anyone connected with the university, whether it be boosters or university officials. This broad rule covers virtually any gift or benefit received by a student-athlete.

⁹ *Top UNLV Player is Charged with Obstructing Police Officer*, THE TORONTO STAR, Jan. 28, 1992, at C8. The athlete allegedly became abusive with an officer responding to a disturbance call at a fast-food restaurant. After posting bail, UNLV allowed the athlete to play in a basketball game the following night. *Id.*

¹⁰ *Id.*

¹¹ See *No Easy Rider in Jail Bail*, CHI. SUN-TIMES, Feb. 4, 1992, at 6 [hereinafter *No Easy Rider*]. The NCAA declared the athlete ineligible until he paid the \$200 back. The only reason the athlete received punishment was because he accepted bail money, not because he was arrested. *Id.*

¹² See Andrew Bagnato, *NCAA Ruling Shocks Badgers; 26 on Football Team Suspended*, CHI. TRIB., Sept. 1, 2000, at N1; *Other Shoe Drops for Wisconsin; Violations: Linton, Davis Suspended for First Eight Games*, TELEGRAPH HERALD (Dubuque, IA), Oct. 5, 2000, at B1 [hereinafter *Other Shoe Drops*]. The improper discounts on shoes were reportedly between 25 and 40 percent, plus interest-free credit. *Id.*

¹³ *Other Shoe Drops*, *supra* note 12, at B1.

¹⁴ *Id.*

¹⁵ This proposition is supported by the fact that the NCAA has no rules in place to discipline players for being arrested. See MANDEL, *supra* note 6, at 250.

offenses of receiving bail money or shoe discounts, its current rules do not permit it to do anything about bigger issues like arrests and convictions. Instead of rulemaking, the NCAA chooses to rely on its member institutions to issue punishments for criminal matters.

The main purpose of this Article is exposing and shedding light on a wide-spread problem that is occurring on college campuses throughout the nation.¹⁶ College athletics is big business.¹⁷ The pressure of success comes from all angles: coaches, fans, players, parents, boosters, and university officials. While the NCAA aims to regulate and issue punishment in a uniform fashion to protect its integrity, it is letting the issue of arrests and convictions slip through the cracks. Allowing each of its member institutions to be the sole decision-maker on the issue of disciplining student-athletes for run-ins with the law compromises the integrity of the NCAA and each of its member institutions when athletic departments “drop the ball” in terms of punishing troubled athletes.¹⁸ The end result is mixed; some universities merely slap wrists,

¹⁶ Disclaimer: This Article merely addresses the need for the NCAA to enact a uniform student-athlete discipline policy instead of leaving the individual universities as the sole decision makers for punishment of players who are arrested or convicted. Valid arguments can, and have been made that the NCAA already has too much power. Delving into those discussions is not the purpose of this Article. For a quality discussion on some of the NCAA's perceived pitfalls, see DON YAEGER, *UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL* (1991); Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487 (1995).

Since the NCAA is regulating just about every facet of intercollegiate athletics, the time has come for it to begin punishing student-athletes for perhaps the most serious of problems: arrests and convictions. My proposal will advocate 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.

This Article is not intended to capture every single instance of student-athletes being arrested and punished. It is merely a snapshot of the hundreds of arrests that occur each year involving student-athletes. As a result, the majority of the specific examples in this Article will focus on the arrests of football players because of the expansive media attention surrounding them. Arrests in other sports often never reach the public's attention because athletes in those sports are not as high-profile. Some universities have taken proactive measures to protect the integrity of their institution. For that, they should be commended. However, this Article will provide snapshots of a few of the schools who have taken a lax approach toward disciplining troubled athletes in certain instances.

¹⁷ See Fran Blinebury, *Bowl Money is About to Fill Some College Coffers to Overflowing, Renewing Debate About Whether Student-Athletes – THE REAL STARS – Should Share in the Bounty; Does Distribution of Dollars Make Sense?*, THE HOUS. CHRON., Dec. 2, 2007, at Sports 1. Coaches are being paid up to \$4 million a year, schools are receiving up to \$17 million for reaching the football Bowl Championship Series, and the NCAA gets \$545 million from CBS for rights to the NCAA Basketball Tournament in March. *Id.*

¹⁸ This overarching idea of “integrity” refers to the public and private image that the NCAA and its member institutions seek. The idea of integrity plays a key role throughout this Article. The public image of these entities can be damaged by non-uniform rules because they can lead to skepticism and favoritism, thereby negatively impacting the integrity (or public image) of those involved. Likewise, as this Article attempts to show, the integrity

while others deliver harsh, but even-handed punishment. In light of the NCAA's quest for uncompromised integrity, as well as uniformity between its member institutions, it is time for the NCAA to adopt a student-athlete discipline policy that each of its member institutions must follow. The intent of a student-athlete discipline policy is not to judge who is guilty or not guilty under the same standards as would apply in a court of law; rather, it is meant to set high standards for student-athletes representing the NCAA and each member institution.

Part II of this Article will present a four-month study by *USA Today* that helped to expose a lack of uniformity exhibited by universities concerning the punishment of student athletes who had been arrested or convicted.¹⁹ This section will bring attention to specific approaches and the problems associated with them, as well as reasons why the NCAA has chosen not to get involved.

Part III of this Article will address the NCAA's power to regulate its member institutions. The NCAA has already created hundreds of uniform rules by which all its members must abide. For example, the NCAA forces players to sit out for gambling,²⁰ failing drug tests,²¹ accepting improper benefits,²² not meeting academic requirements,²³ and transferring to other institutions.²⁴ As it currently stands, the NCAA will suspend student-athletes for participating in unsanctioned 5-on-5 basketball tournaments,²⁵ but will do nothing to punish a player

(or public image) of the NCAA and its member institutions takes a hit every time a troubled athlete goes unpunished after an arrest or conviction.

For further discussion about the how the image of a university can be tainted by the actions of its coaches and troubled athletes, see Ken Hambleton, *Myths, Misconceptions About NU Still Survive*, LINCOLN J. STAR (Neb.), Nov. 30, 2005, at C1.

See also Randy Ludlow, *Ohio University; AD Given Power to Punish Athletes; New Discipline Policy Expected to be in Place Early in 2007*, THE COLUMBUS DISPATCH (Ohio), Oct. 4, 2006, at C1 (an official at Ohio University said its student-athlete discipline policy was put in place to stress the idea that players are expected to meet higher ethical standards to protect the university's reputation and integrity).

¹⁹ Steve Wieberg, *More Schools Laying Down the Law*, USA TODAY, Sept. 18, 1998, at 17C [hereinafter *Laying Down the Law*].

²⁰ NCAA BYLAWS, art. 10.3, *reprinted in* NCAA MANUAL, *supra* note 2, at 48.

²¹ NCAA BYLAWS, art. 31.2.3, *reprinted in* NCAA MANUAL, *supra* note 2, at 380-81.

²² NCAA BYLAWS, art. 13.2, *reprinted in* NCAA MANUAL, *supra* note 2, at 96-98.

²³ NCAA BYLAWS, art. 14.3, *reprinted in* NCAA MANUAL, *supra* note 2, at 142. This section deals with the initial eligibility of incoming freshmen.

²⁴ NCAA BYLAWS, art. 14.5.1, *reprinted in* NCAA MANUAL, *supra* note 2, at 154. In certain sports, like football, if a player transfers from one Division I-A (now called FBS) school to another, the player must sit out one full year before becoming eligible to compete at his or her new school, unless an exemption or waiver is received.

²⁵ See Heather A. Dinch, *Two Terps Suspended for Opener; Gist, Milbourne to Sit Because They Played in Unapproved Event; College Basketball Preview*, THE BALTIMORE SUN, Nov. 7, 2007, at 3E. Two University of Maryland basketball players were suspended for one game

charged with murder. This decision is not because the NCAA lacks the power to punish student-athletes who are accused or convicted of crimes. Indeed, the United States Supreme Court gave the NCAA broad power to regulate in *NCAA v. Tarkanian*.²⁶ This Part of the Article will explain how the NCAA received its power to regulate, and how it has used this authority.

Part IV will address specific instances in which member institutions have allowed athletes who were charged or convicted of crimes to go unpunished, thus damaging the integrity of the institution and the NCAA.²⁷

A few universities, on the other hand, have reacted swiftly to concerns of light punishments for troubled athletes by enacting uniform enforcement guidelines to discipline student-athletes who have gotten into trouble with the law. Part V will focus on those schools and their unique written policies.

Part VI will propose that the NCAA adopt its own student-athlete discipline policy that will set the floor for punishing athletes who are arrested or convicted of crimes. Under this proposal, each individual university is free to discipline its student-athletes above and beyond the NCAA's minimum guidelines. This section will discuss problems with the current system, which allows the universities to make their own decisions instead of letting the NCAA become involved. While other scholarly articles have focused on punishing athletes for specific crimes,²⁸ this Article will call attention to the need for an expansive student-athlete discipline policy that will cover all arrests and convictions and demonstrate to student-athletes that participating in college athletics is privilege, not a right.²⁹

by the NCAA for participating in an unsanctioned 5-on-5 basketball tournament, which is in violation of NCAA bylaw 14.7.2.

²⁶ 488 U.S. 179 (1988).

²⁷ Alabama, Bucknell, Lehigh, Marshall, Michigan State, and Nebraska are some of the schools who will be mentioned. See *infra* Part IV.A-E.

²⁸ See generally Deborah Reed, *Where's the Penalty Flag? A Call for the NCAA to Promulgate an Eligibility Rule Revoking a Male Student-Athlete's Eligibility to Participate in Intercollegiate Athletics for Committing Violent Acts Against Women*, 21 WOMEN'S RTS. L. REP. 41, 43 (1999) (advocating that the NCAA has the authority to take strict action to combat crime); Kimberly M. Trebon, Note, *There is No "I" in Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes*, 4 DEPAUL J. SPORTS L. CONTEMP. PROBS. 65 (2007) (advocating for an NCAA rule that would strip eligibility from student-athletes accused of committing group sexual assault).

²⁹ Student-Athlete Responsibility Statement, West Virginia University (2007) (on file with author, and West Virginia University Athletic Department). This document, which every student-athlete at WVU must sign, reads: "Participation in sports at West Virginia University is not a right, but a *privilege*." (emphasis in original).

This Article will conclude with Part VII, which stresses the importance of a uniform student-athlete discipline policy. Until the NCAA steps in, the integrity of each member institution, and college athletics in general, will continue to take a back seat to wins and losses in a system where the NCAA has the power to do more to an athlete who gets a discount on shoes than to an athlete who steals them.

II. A PROBLEM EXPOSED

Four months, 200 interviews, and stacks of newspaper articles led *USA Today* to a simple conclusion: universities are all over the map in terms of how they deal with athletes who have been arrested or convicted of crimes, and the NCAA is unlikely to do anything about it.³⁰ As a result, some schools have elaborate written policies;³¹ some, like West Virginia University, leave disciplinary issues up to each particular coach;³² some let the athletic director decide;³³ and others take it completely out of the athletic department's hands.³⁴

This lack of uniformity inevitably creates problems. Some schools punish athletes,³⁵ while others merely let the legal system run its course.³⁶ This fact is underscored by the idea that it is hard for university officials to be objective about their own players, especially ones that could affect the outcomes of games. "The bottom line is [that] your job's at stake," said LaVell Edwards, who spent 29 years as Brigham Young University's football coach.³⁷

³⁰ *Laying Down the Law*, *supra* note 19, at 17C.

³¹ *Special Report: Colleges Confront Athlete's Crimes*, USA TODAY, Sept. 18, 1998, at 20C [hereinafter *Special Report*] (in 1998, the University of Georgia had a written policy that governed immediate suspensions for athletes charged with felonies, while leaving discipline issues involving misdemeanors to the discretion of the coach).

³² *Id.* This type of a policy leads to inconsistent punishment between players and sports.

³³ *Id.* (in 1998, the final disciplinary decisions at the University of Florida were left to the athletic director, who consults with judicial affairs, the university attorney, and, at times, the school president).

³⁴ *Id.* (in 1998, Northwestern University kept the athletic department out of its disciplinary decisions, and instead relied on the vice president of student affairs. As a result, the school's star running back was suspended by the university for the final game of the season after being accused of gambling).

³⁵ *Id.* Northwestern squeezes the athletic department out of the process so that the decision can be made on the merits of the case, rather than whether the athlete is a starter or not. *Id.*

³⁶ Ed McGranahan, *Vincent to Play Despite Pending DUI Charge*, THE GREENVILLE NEWS (S.C.), Dec. 14, 2007, at 1C (a Clemson University football player who was charged with a DUI was allowed to play in the team's bowl game after the coach said he would issue discipline after the "legal process runs its course").

³⁷ *Laying Down the Law*, *supra* note 19, at 17C.

In conducting its study, *USA Today* sent a survey about formal discipline policies to all 112 NCAA Division I-A universities. Of the 82 responses, only 30 had formal policies on how their school dealt with athletes accused of committing crimes.³⁸ The majority of responding schools decided to leave discipline decisions to coaches, many of whom are paid handsomely to produce wins and revenue for the university.³⁹

When the University of Oklahoma rolled out a strict student-athlete discipline policy in 1989, it was applauded after a number of serious off-the-field events had damaged the reputation of the football powerhouse.⁴⁰ The school enacted a strict policy that called for automatic suspensions of players as long as charges were pending for any crime “except traffic offenses or offenses not involving moral turpitude.”⁴¹ However, by 1998, as the number of arrests declined, so too did the football team’s success, leaving some questioning whether a strict discipline policy was in the university’s best interest.⁴² One former Oklahoma recruit and state senator likened the school’s approach to the strict Ivy League, and reasoned that off-the-field problems are acceptable as long as the team is vying for a national title.⁴³ Despite fears that a strict policy would doom Oklahoma forever, it is has been able to regain its place as a college football powerhouse, and still maintain its integrity by keeping the strict policy.⁴⁴

However, the majority view among college coaches is that overall success is more important than anything else. In a study produced by the *Journal of Higher Education* in 1990, NCAA Division I head football coaches were asked to indicate the most important reason why serious cheating violations occurred in their sport.⁴⁵ Pressure to win

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Steve Wieberg, *Changes at Oklahoma Not Universally Lauded*, USA TODAY, Sept. 18, 1998, at 19C [hereinafter *Oklahoma Changes*].

⁴¹ *Id.* The policy remains the same today. See Univ. of Okla. Board of Regents Policy Manual 81 (2007), available at http://www.ou.edu/regents/official_agenda/CURSUPolicyManual.pdf.

⁴² *Oklahoma Changes*, *supra* note 40, at 19C (“People say, ‘I wish Barry [Switzer] was back. I wish we had some of those off-the-field problems and were vying for a national championship.’ That’s what we’re all saying. . . . We’ve had an overkill,” a former Oklahoma recruit and state senator said).

⁴³ See *id.* See also *supra* note 42 and accompanying text.

⁴⁴ A University of Oklahoma football player was suspended for the 2008 Fiesta Bowl against West Virginia University after he was arrested for allegedly attempting to steal a jacket from an Arizona mall. See Jake Trotter, *Stoops Says Granger Will Stay on Team*, THE OKLAHOMAN (Oklahoma City, Okla.), Jan. 5, 2008, at 1C.

⁴⁵ Francis T. Cullen, Edward J. Latessa & Joseph P. Byrne, *Scandal and Reform in Collegiate Athletics: Implications from a National Survey of Head Football Coaches*, 61 J. HIGHER EDUC. 50, 54 (1990).

accounted for an alarming 67.2 percent of the votes, followed by pressure from boosters and alumni (9.2 percent) and pressure to keep their job (6.7 percent).⁴⁶ Many of the coaches who believe cheating occurs because of the pressure to win are the same coaches who make the ultimate disciplinary decisions when their players are arrested or convicted of crimes. Former University of Miami football coach Larry Coker put it best when he reasoned that a coach can feel good about suspending players until he or she loses a game,⁴⁷ “That you suspend [players] and that you’re a stand-up guy is forgotten pretty quickly,” Coker said.⁴⁸

With this “win at all costs” mentality in mind, the overwhelming response by university officials throughout the nation during the 1998 study was that the NCAA had no business getting involved in disciplining student-athletes who are accused or convicted of crimes.⁴⁹ This was the prevailing view, even though some schools, like Michigan State, did not suspend players who plead guilty to assault and battery for tossing people in dumpsters.⁵⁰ One university official opposed to a formal discipline policy by the NCAA argued, “We’re the most over-regulated body known to man. We’ve got to rival the IRS.”⁵¹ This remark begs the question of why the NCAA over-regulates almost everything, but leaves critical issues, such as disciplining players for arrests and convictions, completely unregulated.

As media attention increasingly intensifies when athletes are arrested, there are some schools that would welcome intervention by the NCAA. One university official said a uniform student-athlete discipline policy should be similar to the drug-testing program already in place by the NCAA, while another said universities would be more willing to listen to a proposal if it were a minimum rule that the schools would have the option to go above and beyond.⁵² This Article will propose that the NCAA do the latter, and set a minimum student-athlete discipline policy that will give individual schools the freedom to issue

⁴⁶ *Id.*

⁴⁷ See MANDEL, *supra* note 6, at 246.

⁴⁸ *Id.*

⁴⁹ Steve Wieberg, *NCAA Not Likely to Jump into Fray in Any Specific Way*, USA TODAY, Sept. 18, 1998, at C20 [hereinafter *NCAA Not Likely*].

⁵⁰ See *Special Report*, *supra* note 31, at 20C. Former Michigan State football coach Nick Saban said an athlete was “one misstep away” from being suspended after the athlete pled guilty to two counts of assault and battery and one count of entry without permission as a result of two separate incidents with law enforcement. *Id.*

⁵¹ *Laying Down the Law*, *supra* note 19, at 17C.

⁵² *NCAA Not Likely*, *supra* note 49, at C20.

additional punishment exceeding that which is handed down by the NCAA.⁵³

As a result of the *USA Today* article and increased media coverage, many schools have attempted to adopt formal student-athlete disciplinary policies.⁵⁴ However, the NCAA has continued to remain on the sidelines. In light of the *USA Today* study, one commentator has suggested that universities need to involve individuals from outside the program to look for solutions.⁵⁵ This commentator might not have had the NCAA in mind when making this suggestion, but as the next section of this Article points out, the NCAA has the power to address the issue.

III. THE NCAA'S POWER TO ACT

The NCAA is a voluntary collegiate athletic organization⁵⁶ comprised of 1,033 active member institutions.⁵⁷ The membership appoints representatives to serve on committees, which are responsible for introducing and voting on specific rules, known as bylaws.⁵⁸ These bylaws are contained in the 427-page NCAA manual and are to be followed by each member institution.⁵⁹ The purpose of the NCAA bylaws is to ensure a level playing field for competition, while protecting the integrity of the organization and its members.⁶⁰

By its very nature, the NCAA has taken a separate route from the court system's presumption of innocence in criminal matters.⁶¹ Take drug-testing for instance. In the criminal system, if a person is accused of using illegal drugs, he or she possesses many individual rights, including a presumption of innocence, a trial by jury, and the right to appeal.⁶² Under NCAA rules, on the other hand, student-athletes must sign a drug-testing consent form prior to joining the team.⁶³ Conse-

⁵³ See *infra* Part VI.

⁵⁴ See *infra* Parts IV, V. Specific schools and policies will be discussed in these Parts.

⁵⁵ Richard M. Southall, *Good Start, The Bad, and Much Better: Three NCAA Intercollegiate Athletic Department Policy Responses to Criminal Behavior by College Athletes*, 11 J. LEGAL ASPECTS OF SPORTS 269, 280 (2001).

⁵⁶ NCAA: About the NCAA, <http://www.ncaa.org/wps/ncaa?ContentID=246> (last visited Nov. 9, 2008).

⁵⁷ Composition & Sports Sponsorship of the NCAA, http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (Sept. 1, 2007).

⁵⁸ NCAA: Overview, <http://www.ncaa.org/wps/ncaa?ContentID=435> (last visited Nov. 9, 2008).

⁵⁹ NCAA MANUAL, *supra* note 2.

⁶⁰ MICHAEL E. JONES, SPORTS LAW 6 (101 Prod. 1999).

⁶¹ *Id.*

⁶² *Id.*

⁶³ NCAA BYLAWS, art. 14.1.4, *reprinted in* NCAA MANUAL, *supra* note 2, at 130.

quently, if a player tests positive for an illegal drug under NCAA by-laws, the consent form waives any right to a presumption of innocence.⁶⁴ This key distinction exists because participation in inter-collegiate athletics is a privilege, not a right.⁶⁵ Also, because membership in the NCAA is voluntary, the NCAA qualifies as a private actor, and as a result, the individual protections provided for by the legal system are not always applicable.⁶⁶ This fundamental concept brings the discussion to the source of the NCAA's power, *NCAA v. Tarkanian*.⁶⁷

A. *NCAA v. Tarkanian: Unfettered Power*

Tarkanian is the NCAA's legal anchor. In many ways, this monumental case is the NCAA's "hall pass" to regulate with an iron fist without the fear of sizable monetary liability in civil suits for allegedly depriving student-athletes of their individual rights under the United States Constitution.⁶⁸ The *Tarkanian* case arose after UNLV informed its successful head basketball coach, Jerry Tarkanian, that it was going to suspend him.⁶⁹ UNLV was not dissatisfied with Tarkanian's on-the-court performance; his suspension was a direct result of an NCAA report outlining 38 NCAA violations, 10 of which involved Tarkanian, including a serious violation by the coach for failing to fully cooperate with the NCAA investigation.⁷⁰ The NCAA placed the basketball team on a two-year probationary period and threatened further penalties if the university did not cut ties with Tarkanian during this time.⁷¹ In response, Tarkanian brought a lawsuit in a Nevada state court, pleading that his Fourteenth Amendment due process rights⁷² had been violated pursuant to 42 U.S.C. § 1983.⁷³ Tarkanian's main argument

⁶⁴ Jones, *supra* note 60, at 6.

⁶⁵ *Id.* See also Student-Athlete Responsibility Statement, *supra* note at 29 ("Participation in sports at West Virginia University is not a right, but a *privilege*") (emphasis in original).

⁶⁶ Jones, *supra* note 60, at 6.

⁶⁷ *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

⁶⁸ Broyles, *supra* note 16, at 559.

⁶⁹ *Tarkanian*, 488 U.S. at 180.

⁷⁰ *Id.* at 185-86.

⁷¹ *Id.* at 181.

⁷² The Fourteenth Amendment due process clause provides, in part, that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

⁷³ This section provided that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

was that the NCAA was a state actor, subject to the due process clause, and, as a result, the NCAA's recommendation that UNLV cut ties with him was performed "under color of" state law.⁷⁴ Eventually, the Nevada Supreme Court agreed with Tarkanian, holding that the NCAA had indeed engaged in state action when it recommended that the university suspend him.⁷⁵

Coach Tarkanian's victory was short-lived, however, as the United States Supreme Court reversed the Nevada ruling.⁷⁶ In a 5-4 decision authored by Justice John Paul Stevens, the United States Supreme Court held that the NCAA was not engaged in state action; therefore, the due process clause of the Fourteenth Amendment did not apply to its recommendation.⁷⁷ In other words, the NCAA had the power to direct a Nevada state university to comply with its recommendations without the fear of being considered a state actor.

Justice Stevens centered the court's reasoning on one key premise: by voluntarily joining the NCAA, each of its members agreed to follow the rules adopted by the NCAA governing their conduct.⁷⁸ Representatives of member institutions "are expected to cooperate fully" in the enforcement of NCAA rules.⁷⁹ According to the Supreme Court, if member institutions do not agree with NCAA rules and recommendations, universities can always withdraw from the voluntary organization.⁸⁰ In essence, UNLV voluntarily joined the NCAA; therefore, it can either follow NCAA rules or voluntarily leave the organization. The university also had the option of going through the NCAA's legislative process in an attempt to amend any rules that it perceived as unfair or harsh.⁸¹

In a strong dissent, Justice White, a former college and professional football player, argued that the NCAA was, in fact, a state actor because it acted jointly with the state university to suspend Tarkanian.⁸² If the dissent's view had prevailed, the NCAA's power would be severely diminished because it would have to follow rules that protect

42 U.S.C. §1983 (2003).

⁷⁴ *Tarkanian*, 488 U.S. at 182.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 183.

⁷⁹ *Id.*

⁸⁰ *Id.* While this is technically an option, withdrawing from the NCAA would be a financial death blow to a school's athletic program because there are no other high profile options in the collegiate sports world.

⁸¹ *Id.* at 195.

⁸² *Id.* at 200-01.

procedural and substantive due process before it could invoke disciplinary procedures.⁸³

Following the *Tarkanian* decision, some states, including Nevada, tried to take the matter into their own hands by enacting statutes that would have required the NCAA to provide procedural safeguards above and beyond the current NCAA process when dealing with universities in those states.⁸⁴ These attempts have been unsuccessful, however.⁸⁵ In *NCAA v. Miller*, the Ninth Circuit Court of Appeals held that a Nevada statute attempting to place procedural safeguards on the NCAA was unconstitutional because it violated the Commerce Clause.⁸⁶ The court reiterated the Supreme Court's message in *NCAA v. Board of Regents of the University of Oklahoma*⁸⁷ that the NCAA cannot protect the integrity of its product unless all schools operated under the same rules via a mutual agreement – hence the voluntary membership.⁸⁸ Requiring the NCAA to follow specific statutes from 50 different states would be overly burdensome and would lead to uneven results depending on the burden of proof needed to enforce each infraction.⁸⁹

Therefore, unless the Supreme Court overturns or distinguishes *Tarkanian*, it appears the NCAA will continue to have free reign and unfettered power to adopt and enforce its bylaws on its member institutions, each of whom voluntarily joined the organization.⁹⁰ With this legal anchor in place, the NCAA would have little trouble adopting a blanket student-athlete discipline policy for its member institutions to follow. The lone hurdle remaining would be to convince the NCAA's 18-member Board of Directors that such a disciplinary policy is necessary, since the Board must approve any new legislation. Such a policy

⁸³ Jones, *supra* note 60, at 7.

⁸⁴ See Reed, *supra* note 28, at 54 n.121 (Nevada, Florida, Illinois, and Nebraska). Similar legislation was also discussed in Kansas, Kentucky, Missouri, Ohio, and South Carolina. See *NCAA v. Miller*, 10 F.3d 633, 639 n.7 (9th Cir. 1993).

⁸⁵ Reed, *supra* note 28, at 54.

⁸⁶ *Id.* See also *Miller*, 10 F.3d at 638-39.

⁸⁷ 468 U.S. 85, 102 (1984).

⁸⁸ *Miller*, 10 F.3d at 639.

⁸⁹ *Id.* at 639-40. However, one commentator finds the NCAA's argument unpersuasive when the NCAA says that attempts to regulate the organization above and beyond its own procedures would be too costly. The NCAA's multi-million dollar budget, coupled with the slight percentage it allocates to enforcement are reasons the author uses to explain why the cost argument is faulty. See Broyles, *supra* note 16, at 560.

⁹⁰ See Linda Greenhouse, *Justices Uphold N.C.A.A.'s Right to Demand Suspension of Coach*, N.Y. TIMES, Dec. 13, 1988, at A1. An NCAA lawyer was quoted as saying, "I'm tickled to death. I think it will make the NCAA less subject to lawsuits, for one thing. This type of decision says that we're not subject to suit for constitutional violation, that we're treated just like an individual." *Id.*

is not a far stretch when considering the current NCAA policies aimed at providing uniformity across the board.

B. *Connecting the Dots, a.k.a. Rules: What's the NCAA's Goal?*

What is the NCAA's goal in refusing to adopt a uniform discipline policy for student athletes who are arrested or convicted? Rule after rule is spelled out in the 427 pages of small text that comprise the NCAA Manual. The NCAA regulates everything from the number of pages a school's media guide can have⁹¹ to the viability of high school credits earned in a distance learning class.⁹² And, unlike arrests or convictions, if any of these rules are not followed, the NCAA has mechanisms in place to punish rule-breakers.

There is an apparent problem with the NCAA's rationale for punishment. While the NCAA has strong policies involving substantial punishment if athletes cut academic corners,⁹³ fail drug tests,⁹⁴ gamble on games,⁹⁵ or accept meals, cash or discounts,⁹⁶ it has chosen to turn a blind eye toward criminal punishment. Why, in light of the voluminous amount of NCAA regulations and provisions, has the iron-handed NCAA instead left all decisions regarding discipline for arrests and convictions up to the individual member institutions?

The NCAA's failure to adopt a uniform discipline policy has resulted in large disparity between punishments doled out by its member institutions to address the criminal acts of its student-athletes. On one hand, two University of Maryland basketball players were suspended by the NCAA for playing in an unsanctioned 5-on-5 basketball tournament.⁹⁷ On the other hand, because the NCAA has no control over criminal acts, a Michigan State football player received only a verbal warning from his coach for tossing a man into a dumpster, for which he was arrested and pled guilty.⁹⁸ The lack of a uniform NCAA discipline policy is also the reason why a University of Alabama player, charged with criminal mischief, resisting arrest, and providing a false name to police, can walk away without missing a game, while five of his teammates were forced to sit out four games for an NCAA violation involv-

⁹¹ NCAA BYLAWS, art. 13.4.1.1(g), *reprinted in* NCAA MANUAL, *supra* note 2, at 99.

⁹² NCAA BYLAWS, art. 14.4.3.4.8, *reprinted in* NCAA MANUAL, *supra* note 2, at 152.

⁹³ NCAA BYLAWS, art. 14.3, *reprinted in* NCAA MANUAL, *supra* note 2, at 142-48.

⁹⁴ NCAA BYLAWS, art. 31.2.3, *reprinted in* NCAA MANUAL, *supra* note 2, at 380.

⁹⁵ NCAA BYLAWS, art. 10.3, *reprinted in* NCAA MANUAL, *supra* note 2, at 48.

⁹⁶ NCAA BYLAWS, art. 13.2, *reprinted in* NCAA MANUAL, *supra* note 2, at 96.

⁹⁷ Dinch, *supra* note 25, at 3E.

⁹⁸ *Special Report*, *supra* note 31, at 20C.

ing the improper receipt of textbooks.⁹⁹ In a sports world where accepting bail money from a booster carries more punishment from the NCAA than an actual arrest,¹⁰⁰ the question remains: what is the NCAA's goal?

1. Shoe Discounts Equal Suspensions: Improper Benefits

The NCAA is quick to punish student-athletes who receive improper benefits. In the so-called "shoe scandal" case at the University of Wisconsin, two basketball players were suspended for eight games each, and 11 football players received three-game suspensions for receiving between 25 and 40 percent discounts on shoes, as well as interest-free credit from an athletic store.¹⁰¹ Several other athletes at the school received lesser suspensions.¹⁰² Punishment for this type of offense is governed by an NCAA bylaw aimed at establishing a uniform system that prohibits student-athletes from obtaining improper benefits. Student-athletes are not permitted to receive improper benefits, such as gifts or loans, as a result of their athletic status and punishment is handed down accordingly if the NCAA discovers that such benefits are being received.¹⁰³

Such a rule for accepting improper benefits¹⁰⁴ is why a UNLV star basketball player could be suspended by the NCAA for receiving \$200 in bail money, despite the fact that the NCAA refuses to regulate the

⁹⁹ See Gentry Estes, *Arrest Behind Him, Deaderick Ready to Step Into Bigger Role*, MOBILE REGISTER (Ala.), Oct. 3, 2007, at C01. See also Tim Gayle, *NCAA Lifts Suspension for Tide Players*, THE MONTGOMERY ADVERTISER (Ala.), Nov. 18, 2007.

¹⁰⁰ See *No Easy Rider*, *supra* note 11, at 6.

¹⁰¹ *Other Shoes Drops*, *supra* note 12, at B1.

¹⁰² *Id.*

¹⁰³ See NCAA BYLAWS, art. 13.2.2, 13.2.2.1, *reprinted in* NCAA MANUAL, *supra* note 2, at 96.

Specifically prohibited financial aid, benefits and arrangements include, but are not limited to, the following:

- (a) An employment arrangement for a prospective student-athlete's relatives;
- (b) Gift of clothing or equipment;
- (c) Cosigning of loans;
- (d) Providing loans to a prospective student-athlete's relatives or friends;
- (e) Cash or like items;
- (f) Any tangible items, including merchandise;
- (g) Free or reduced-cost services, rentals or purchases of any type;
- (h) Free or reduced-cost housing;
- (i) Use of an institution's athletics equipment (e.g., for a high school all-star game); and
- (j) Sponsorship of or arrangement for an awards banquet for high school, preparatory school or two-year-college athletes by an institution, representatives of its athletics interests or its alumni groups or booster clubs.

¹⁰⁴ *Id.*

type or manner of punishment for the actual arrest.¹⁰⁵ The player received more punishment from the NCAA for receiving the bail money than he did from his university for being arrested after he allegedly obstructed a police officer at a restaurant near campus.¹⁰⁶ These are not the only two instances where the NCAA misused its power. In 2007, the NCAA forced five University of Alabama football players to sit out four games each because they improperly received textbooks.¹⁰⁷ And in 2003, an athlete at Mississippi State was suspended for a game after allowing a booster to pay for a set of tires, even though the athlete's mother promptly paid the booster back.¹⁰⁸ The precedent is clear: student athletes can mingle with the wrong crowd in a criminal sense and not face NCAA backlash, but if they cross paths with a booster, punishment from the NCAA is sure to follow.

2. Keep Those Grades Up or Sit Down

Athletes also cannot participate in college athletics if their test scores and grade point averages are not in order.¹⁰⁹ If a high school senior does not score high enough on a college entrance exam, the NCAA will force the student-athlete to sit out a full academic year in order to meet NCAA eligibility requirements.¹¹⁰ The purpose of this rule is to maintain the integrity of its membership's academic institutions, as well as set uniform guidelines for all member institutions to follow.

3. Don't Gamble With the NCAA

If a student-athlete gambles (even legally in Nevada), the NCAA has the power to declare the player immediately ineligible.¹¹¹ The punishment can range from one year¹¹² to a permanent suspension,¹¹³ de-

¹⁰⁵ See *No Easy Rider*, *supra* note 11, at 6.

¹⁰⁶ *Id.*

¹⁰⁷ See Gayle, *supra* note 99. See also Paul Gattis, *Tide Players: No Profit from Books*, HUNTSVILLE TIMES (Ala.), Dec. 18, 2007, at 1E (the players, who receive textbooks at no charge as part of their scholarship, allegedly obtained textbooks for classes they were not enrolled in and gave the books to friends).

¹⁰⁸ David Jones, *College Teams Wary of Too Much Support*, FLA. TODAY (Brevard, Fla.), May 12, 2003, at Sports 1.

¹⁰⁹ NCAA BYLAWS, art. 14.3, *reprinted in* NCAA MANUAL, *supra* note 2, at 142.

¹¹⁰ NCAA BYLAWS, art. 14.3.2.1.1, *reprinted in* NCAA MANUAL, *supra* note 2, at 146.

¹¹¹ NCAA BYLAWS, art. 10.3, *reprinted in* NCAA MANUAL, *supra* note 2, at 48.

¹¹² NCAA BYLAWS, art. 10.3.2(b), *reprinted in* NCAA MANUAL, *supra* note 2, at 48.

A student-athlete who participates in any sports wagering activity through the Internet, a bookmaker or a parlay card shall be ineligible for all regular-season and postseason competition for a minimum of a period of one year from the date of the institution's determination that a violation occurred and shall be charged with the loss of a minimum of one season of eligibility. If the student-athlete is determined to have been involved in a later

pending on the nature of the wager. Only after investigations at Minnesota, Michigan, and Cincinnati and problems at the University of Maine, Northwestern, and Arizona State did the NCAA to create a prohibition on gambling.¹¹⁴ It appears that the NCAA reacted because its integrity, as well as that of its member institutions, was called into question. In light of this, the NCAA adopted a uniform policy that is written to issue punishment to any student-athlete from a member school who engages in improper wagering.¹¹⁵

4. 'Here, Sign This': Consenting to Drug Testing

"Welcome to our school. Sign this." Student-athletes are often met with this introduction the moment they step foot onto a college campus as a freshman or incoming transfer student.¹¹⁶ The NCAA requires each student-athlete to sign a drug-testing consent form each year in order to participate in intercollegiate athletics.¹¹⁷ If a student-athlete receives a positive test for the use of banned drugs, this consent form acts as a waiver of a presumption of innocence. The policy calls for a one-year suspension,¹¹⁸ but an appeals process can result in a lesser penalty.¹¹⁹ Again, this uniform rule was created to protect the integrity of the NCAA and its member institutions by making sure every school operates in the same fashion in regard to a student-athlete's positive drug test.

5. Transfer Here, Lose a Year

Transferring schools carries harsher penalties for student-athletes than transferring illegal drugs under current NCAA rules. If an athlete

violation of any portion of Bylaw 10.3, the student-athlete shall permanently lose all remaining regular-season and postseason eligibility in all sports.

¹¹³ NCAA BYLAWS, art. 10.3.2(a), *reprinted in* NCAA MANUAL, *supra* note 2, at 48. A student-athlete who engages in activities designed to influence the outcome of an intercollegiate contest or in an effort to affect win-loss margins ("point shaving") or who participates in any sports wagering activity involving the student-athlete's institution shall permanently lose all remaining regular-season and postseason eligibility in all sports.

¹¹⁴ John Grady, *Gambling and Collegiate Sport*, 15 J. LEGAL ASPECTS SPORT 95, 100 (2005).

¹¹⁵ NCAA BYLAWS, art. 10.3, *reprinted in* NCAA MANUAL, *supra* note 2, at 48.

¹¹⁶ See Webcast: Kevin Kotsko, West Virginia University Shell Facility Athletic Trainer/ Approved Clinical Instructor, *Reversing Field: Examining Commercialization, Labor & Race in 21st Century Sports Law at the West Virginia University Sports Law Symposium: False Positives: Debating the Merits of Drug Testing* (Oct. 6, 2007), *available at* http://law.wvu.edu/reversingfield/reversing_field_webcasts (Mr. Kotsko's comments about drug testing at West Virginia University begin at 1:20:53 on the webcast).

¹¹⁷ NCAA BYLAWS, art. 14.1.4, *reprinted in* NCAA MANUAL, *supra* note 2, at 130.

¹¹⁸ NCAA BYLAWS, art. 18.4.1.5.1, *reprinted in* NCAA MANUAL, *supra* note 2, at 290.

¹¹⁹ NCAA BYLAWS, art. 18.4.1.5.1.2, *reprinted in* NCAA MANUAL, *supra* note 2, at 290.

transfers from one NCAA Division I institution to another, he or she will not be allowed to participate in athletics at the new institution for one full academic year, unless the transfer rule is exempted or waived.¹²⁰ For instance, if a football player from San Diego, California, transferred from the University of California-Los Angeles to San Diego State University because he wanted to be closer to home, he would have to sit out one full season. It would not matter if the athlete had a 4.0 grade point average and was double-majoring in pre-med and dietetics, nor would it matter if he had never had a run-in with the police. The policy is simple: if you transfer between Division I schools, you must sit out a year.¹²¹

The NCAA adopted this policy to prevent student-athletes from transferring for athletic reasons,¹²² to allow the athletes to adjust to the new environments, and to prevent the exploitation of student-athletes.¹²³ Despite challenges to this rule, courts have continued to uphold it.¹²⁴ Therefore, the NCAA can continue to heavily regulate collegiate athletics, and member institutions must either abide by the rules or voluntarily withdraw from the organization.¹²⁵ The transfer rule is just one example of such regulation.

C. *What's Missing Here?*

How is a student-athlete discipline policy aimed at punishing athletes who are arrested or convicted of crimes different from the aforementioned NCAA rules? It is uniform and aimed at protecting the

¹²⁰ NCAA BYLAWS, art. 14.5.1, *reprinted in* NCAA MANUAL, *supra* note 2, at 154; *see also infra* note 121 (providing some of the exceptions to the transfer rule).

¹²¹ Minor exceptions do exist under narrow circumstances, provided that the transfer occurs in a sport other than basketball, bowl subdivision football (formerly Division I-A), or men's ice hockey. *See* NCAA Bylaws, art. 14.5.2.10, *reprinted in* NCAA MANUAL, *supra* note 2, at 160; *see also* Jonathan Jenkins, Note, *A Need for Heightened Scrutiny: Aligning the NCAA Transfer Rule with its Rationales*, 9 VAND. J. ENT. & TECH. L. 439, 452 (2006).

¹²² The phrase "athletic reasons" is intended to encompass the idea that a player should not be able to transfer to a university just because the new school has a better athletic team or coach. *See* Jenkins, *supra* note 121, at 454-59.

¹²³ Jenkins, *supra* note 121, at 454-59.

¹²⁴ *See* Tanaka v. Univ. of S. Cal., 252 F.3d 1059 (9th Cir. 2001) (Ninth Circuit Court of Appeals upheld a district court's ruling that the NCAA's transfer rule did not violate the Sherman Act. The plaintiff alleged that the rule had a significant anticompetitive effect. However, the court reasoned that there was no significant anticompetitive effect because the rule was national in scope); *see also* McHale v. Cornell Univ., 620 F. Supp. 67 (N.D. N.Y. 1985) (Plaintiff alleged that Cornell University violated his constitutional rights by enforcing the NCAA's transfer rule. The court denied plaintiff's motion for a preliminary injunction because the plaintiff failed to show that "the NCAA's actions are reasonably attributable to the state," and therefore there was no state action on which to base the constitutional claim); *see also* Jenkins, *supra* note 121, at 453 n.91.

¹²⁵ Jenkins, *supra* note 121, at 454-59. *See also* discussion in *supra* Part III.A.

integrity of the NCAA and its member institutions. In all of the above examples of NCAA regulation, the organization's integrity would have been compromised had it not taken measures to correct perceived problems. In such instances, the NCAA regulates with an iron fist that delivers harsh punishments in a uniform fashion for rule-breakers. One key question remains: has the NCAA's integrity been compromised to the point where a uniform student-athlete discipline policy dealing with arrests and convictions is needed?

IV. NO NCAA RULE, NO SUSPENSION

Unquestionably, the NCAA is an extremely powerful organization. As described in the previous section, the NCAA has enacted by-laws on numerous occasions when its integrity was being questioned or compromised. Yet, when it comes to criminally accused or convicted athletes, the NCAA has kept its iron fist at bay.¹²⁶ As a result, student-athletes are treated differently depending on the discipline policy, or lack thereof, at each individual school. Some integrity-compromising examples are provided below.¹²⁷

A. *In-house at Alabama*

Alabama football coaches should be commended for creativity. Retirement homes, special needs children, and the squeaky clean cars at the local county jail have benefited from the arrests of two Alabama football players.¹²⁸ And the football team didn't miss a beat, as these creative forms of punishment took the place of on-the-field suspensions.¹²⁹ When Alabama's star linebacker was arrested, and later pled guilty, for possession of marijuana and carrying a gun without a permit, former Crimson Tide coach Mike Shula made him wash cars at the county jail and volunteer at a school for children with disabilities.¹³⁰ No suspension occurred, and the same player led the team in tackles in

¹²⁶ MANDEL, *supra* note 6, at 250 ("While there are NCAA bylaws regarding everything from the length of practices to the length of jersey sleeves, there is no rule against suiting up a convicted felon").

¹²⁷ This section will focus on a few schools that have not punished troubled athletes. This is not intended to be a comprehensive list; instead, it is merely a snapshot into an ongoing problem in collegiate athletes. It needs to be noted that some schools do punish student-athletes following convictions and arrests. Likewise, even schools in this section that have been lax toward some athletes have delivered harsh punishment to others. However, because the NCAA has not adopted a uniform rule, the results are uneven and unpredictable.

¹²⁸ See Kevin Scarbinsky, Editorial, *Shula Misses Chance to Play the Tough Guy*, BIRMINGHAM NEWS (Ala.), Sept. 8, 2006, at 1B; *see also* Estes, *supra* note 99, at C01.

¹²⁹ *Id.*

¹³⁰ Ian R. Rapoport, *Simpson Works at Jail, School; Punishment for Arrest in Summer*, BIRMINGHAM NEWS (Ala.), Sept 7, 2006, at C1.

its season-opening win.¹³¹ Local media criticized Coach Shula's refusal to comment publicly about player discipline because the silence made people wonder if the program, in fact, punished players for getting arrested or convicted.¹³² One local columnist succinctly summarized the chain of problems associated with the NCAA's choice to leave discipline decisions up to university coaches and administrations:

Individual schools, in turn, tend to leave such discipline to the director of athletics, who in turn usually leaves discipline up to the head coaches, believing the head coach best knows his players. Unfortunately, that often leads to inconsistency in the way punishment is handled, which can lead to problems among teammates, as well as between athletes on different teams within the same athletic department.¹³³

A year later, new Alabama coach Nick Saban was faced with a decision on how to punish an athlete who was arrested and charged with criminal mischief, resisting arrest, and providing a false name to police.¹³⁴ Like coaches before him at Alabama, Saban turned to community service instead of suspending the athlete from competition.¹³⁵ 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.

B. *Bad Call at Marshall*

Two days before Mark Snyder's Marshall University football team hoped to break a seven-game winless start to the 2007 season, his starting middle linebacker turned himself in following criminal complaints charging him with felony burglary and two misdemeanors of domestic battery and battery on a female.¹³⁶ After being released on bail, the student-athlete played two days later and was a key contributor in a victory.¹³⁷ News of the criminal charges did not reach the local media until the week after the arrest, and Snyder defended his move by saying "[a]s the facts were presented to me, I'm confident that this will be

¹³¹ *Id.*

¹³² Scarbinsky, *supra* note 128, at 1B.

¹³³ Ray Melick, *Past Policy Hasn't Stopped Bad Behavior*, BIRMINGHAM NEWS (Ala.), July 6, 2006, at B1.

¹³⁴ Estes, *supra* note 99, at C01.

¹³⁵ *Id.* The student-athlete did not miss any games, but had to work at a retirement home. *Id.*

¹³⁶ Jack Bogaczyk, Editorial, *Bad Calls Make it Tough at Marshall*, CHARLESTON DAILY MAIL (W.Va.), Nov. 5, 2007, at 1B.

¹³⁷ Chuck Landon, *Marshall Expects Charges Against Johnson to be Dismissed*, CHARLESTON DAILY MAIL (W.Va.), Oct. 30, 2007, at 4B [hereinafter *Marshall Expects*].

resolved this week.”¹³⁸ However, when the charges were not resolved, Snyder quickly moved to suspend the athlete, a suspension that continued through the final four games of the season.¹³⁹

To Snyder’s credit, he has been labeled as more of a disciplinarian than past coaches at the university.¹⁴⁰ However, that did not stop local media from calling out the perceived blunder. A long-time and well-respected journalist questioned how the coach could let an athlete play when faced with a felony charge and misdemeanor charges for battery involving the opposite sex.¹⁴¹ Apparently, school officials mistakenly believed the charges would disappear once all the facts of the case surfaced.¹⁴²

Marshall University’s athletic department does not have a formal student-athlete discipline policy. Disciplinary action is up to the discretion of the coach, subject to review and change by the administration.¹⁴³ However, letting an athlete with a pending felony charge play in a game appears to be in direct conflict with a 2001 article in the *Journal of Legal Aspects of Sport*, which reported that Marshall University automatically suspends athletes charged with a felony.¹⁴⁴

¹³⁸ *Id.*

¹³⁹ Chuck Landon, *Marshall Linebacker Suspended*, CHARLESTON DAILY MAIL (W.Va.), Nov. 2, 2007, at 1B; see also Chuck Landon, *Marshall’s Snyder Has Eye on Former SMU Head Coach*, CHARLESTON DAILY MAIL (W.Va.), Jan. 21, 2008, at 1B (after the season ended, the student-athlete decided to forgo his senior season for a chance at the National Football League).

¹⁴⁰ See Bogaczyk, *supra* note 136, at 1B; see also Chuck Landon, *Marshall Tackle’s Career Might Be Over with Arrest*, CHARLESTON DAILY MAIL (W.Va.), April 28, 2006, at 4B (Snyder dismissed the team’s starting defensive tackle following an arrest for felony drug possession); see also Chuck Landon, *Herd’s Bradshaw Charged with Burglary*, CHARLESTON DAILY MAIL (W.Va.), Jan. 19, 2006, at B1 [hereinafter *Bradshaw Charged with Burglary*] (Snyder suspended an offensive lineman for one game following a DUI arrest).

¹⁴¹ See Bogaczyk, *supra* note 136, at 1B. The journalist wrote: “Someone gave Snyder some bad advice, or talked him into something. It really doesn’t matter whom or how. When a team is going bad, the head coach can’t heap more issues onto the mess.” *Id.*

¹⁴² The university’s student newspaper obtained a copy of the police report, which indicated that the athlete’s girlfriend said he grabbed her by the hair and struck her in the head. A neighbor attempted to help the girlfriend, but the athlete allegedly knocked the neighbor to the ground. According to the report, the athlete was sprayed with mace by the neighbor and subsequently forced his way into the girlfriend’s apartment by kicking the door. The police report did not indicate if anything was stolen from the apartment. Katharine Phillips, *Linebacker’s Case Goes to Grand Jury*, THE PARTHENON (Huntington, W.Va.), Nov. 2, 2007, available at <http://media.www.marshallparthenon.com/media/storage/paper534/news/2007/11/02/News/Linebackers.Case.Goes.To.Grand.Jury-3074643.shtml>; see also Bogaczyk, *supra* note 136, at B1.

¹⁴³ E-mail from Derek Gwinn, Associate Athletic Director for Compliance, Marshall University (Nov. 14, 2007, 09:35:00 EST) (on file with author).

¹⁴⁴ Southall, *supra* note 55, at 271.

The lack of a uniform policy leads to varied results. In January of 2006, Marshall's star running back was arrested on a felony burglary charge for allegedly stealing a Playstation 2 video game system from another student's dorm room.¹⁴⁵ The athlete, who first claimed he was just borrowing the video game system, pled guilty to misdemeanor petty larceny after prosecutors dropped the felony burglary charge.¹⁴⁶ The arrest and guilty plea resulted in two years of probation,¹⁴⁷ but the athlete was not suspended for any games the following season.¹⁴⁸ However, another Marshall University football player was suspended for the 2006 season opener after he was arrested for driving under the influence, leaving the scene of an accident, obstructing a police officer, and driving on a suspended license a week before the team's game with in-state rival West Virginia University.¹⁴⁹

C. 'One Misstep Away' at Michigan State

Eight arrests, ten charges, and four convictions. The end result? This Michigan State football player was "one misstep away" from being suspended.¹⁵⁰ This highly publicized quote from then-football coach Nick Saban was made after one of his players pled guilty to two counts of assault and battery for getting into an altercation with a dorm worker and throwing a man into a dumpster.¹⁵¹ According to reports, this student-athlete was arrested eight different times, charged with ten crimes, and received four convictions, but never missed a game¹⁵² until leaving the program for personal reasons.¹⁵³

¹⁴⁵ *Bradshaw Charged with Burglary*, *supra* note 140, at B1. The athlete had prior legal trouble at the University of Virginia when he was arrested for under-age drinking and carrying an open container. The university suspended the athlete for the school year, which led to his enrollment at Marshall. He received probation for the incident in Virginia. *Id.*

¹⁴⁶ John Branch, *Giants Both Hopeful and Wary of One Rookie's Potential*, N.Y. TIMES, May 13, 2007, at Sports 6.

¹⁴⁷ *Id.*

¹⁴⁸ *College Football – Ahmad Bradshaw Player Page*, SPORTS ILLUSTRATED, available at <http://sportsillustrated.cnn.com/football/ncaa/players/12456> (statistics show that the athlete played in all 12 games of the 2006 season).

¹⁴⁹ *Marshall's Moore Arrested, Suspended*, CHARLESTON GAZETTE (W.Va.), Aug. 27, 2006, at 1C.

¹⁵⁰ *MSU: Policy is Strict Enough: Athlete Conduct Code Allows Coach to Discipline*, THE DETROIT NEWS, April 30, 1999, at E1 [hereinafter *MSU Policy*].

¹⁵¹ *Id.*

¹⁵² However, another report indicated that the player did miss two games as a sophomore after he was arrested for alleged credit card fraud, a charge that was later dropped. See Drew Sharp, *Newkirk's Return Gives Spartans Needed Experience on Defense*, DETROIT FREE PRESS, Sept. 20, 1997, at B1.

¹⁵³ *MSU Policy*, *supra* note 150, at E1

Michigan State's policy, which calls for a scholarship to be revoked if a player is *convicted* of a major felony, gives coaches discretion on how to discipline players.¹⁵⁴ In a span between 1996 – when the policy was adopted – and 1999, *The Detroit News* reported that at least 12 “major-sport Spartans” had been arrested and convicted of 15 different crimes.¹⁵⁵ The harshest punishments were a three-game suspension for a football player¹⁵⁶ and a half-game suspension for two basketball players. The other athletes were not suspended.¹⁵⁷ Despite those statistics, one university official publicly stated that a stricter policy was not needed.¹⁵⁸ The coaches defended the policy because it allowed them to avoid a “one shoe fits all” decision. “If everything was written down, and there were rules to go by and there was no flexibility in it, then one shoe fits all sizes and everybody gets treated the same way no matter what they did and what their history's been,” Coach Saban said.¹⁵⁹ This mentality seems to conflict with the 427 pages of NCAA bylaws, which appear to treat everyone in the same way in order to protect integrity and provide for uniformity.

Michigan State's policy is still receiving criticism for putting coaches in a “bad spot” concerning disciplining their own players.¹⁶⁰ An argument has been made that the coaches should only coach and the administrators should review issues involving a student's behavior.¹⁶¹ This latest criticism came after current Michigan State football coach Mark Dantonio did not suspend three football players who were facing felony robbery charges.¹⁶² One newspaper wrote, “[t]he timeline – from the courtroom appearance to the felony charges to one of the accused in a Spartan jersey in a Big Ten football game – was only 72 hours.”¹⁶³ Apparently there was hope that the new football coach would take a tougher stance toward players charged with crimes; however, he took the same one as those before him.¹⁶⁴ John L. Smith, Mr.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* The athlete was charged with two felony counts of home invasion for burglarizing rooms. He was sentenced to probation under a first-time-offender program. *Id.*

¹⁵⁷ *Id.* Players that were convicted of disorderly conduct, shoplifting, and assault and battery, were not suspended by Michigan State. *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Editorial, *MSU Rules: University Puts Coaches in Bad Spot Over Discipline*, LANSING STATE J. (Mich.), Nov. 1, 2007, at A6 [hereinafter *MSU Rules*].

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Where's the Tough Love, Coach D?: MSU Football Coach Missed Chance to do the Right Thing*, GRAND RAPID PRESS (Mich.), Oct. 29, 2007, at C2.

¹⁶⁴ *MSU Rules*, *supra* note 160, at A6.

Dantonio's predecessor, was often criticized for being inconsistent in disciplining players,¹⁶⁵ which is a problem that arises when universities allow coaches to have full discretion.

This type of policy seems to scream of inconsistency. As the editorial board of the *Lansing State Journal* pointed out, "[w]ould a baseball player or women's basketball player face the same sanctions for the same offense as a football starter?"¹⁶⁶ It is a valid question, and one that cannot be answered when a policy calls for broad discretion vested in a highly interested coach instead of calling for overarching rules. To be sure, coaches are hired to win games, not to be legal experts. But, under a policy like that of Michigan State, it appears that winning games and being a legal expert go hand in hand – coaches try to do both. Coaches are aware of this too, as they can manipulate words in order to justify results. MSU basketball coach Tom Izzo once said, "[t]he key word (in the student-conduct policy) is 'convicted.' Until someone has been convicted, there's not a thing I can do."¹⁶⁷

While an "innocent until proven guilty" argument exists, it is important to consider that not all charges end up being tried, even in cases where the athlete did in fact commit the crime.¹⁶⁸ Pre-trial diversion agreements or plea deals can be made so that individuals can have charges substantially reduced or even dropped.¹⁶⁹ Therefore, a policy that only issues punishment for convictions has an inherent loophole. A key feature of a feasible student-athlete discipline policy would be to stress the ideas that a suspension from athletics is not equal to jail time and that participation in collegiate athletics is a privilege, not a right.¹⁷⁰ The NCAA already suspends athletes for far less severe issues than arrests or convictions. The underlying concept for a student-athlete discipline policy is that it would deter criminal behavior and make athletes think twice about putting themselves in bad situations. As one university official has said, in order to protect the reputation and integrity of the institution, athletes must be expected to meet higher ethical standards.¹⁷¹

¹⁶⁵ *Id.* ("One decision would be for discipline before a court had ruled; another decision would be to wait to see what the court did before meting out any punishment").

¹⁶⁶ *Id.*

¹⁶⁷ *MSU Policy*, *supra* note 150, at E1.

¹⁶⁸ See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 1* (Oxford University Press 2007).

¹⁶⁹ See Mike Casazza, *Stewart Dismisses Three Players*, CHARLESTON DAILY MAIL (W.Va.), Feb. 8, 2008, at B1 (three West Virginia University football players entered into pre-trial diversion agreements to avoid felony charges).

¹⁷⁰ See Student-Athlete Responsibility Statement, *supra* note at 29 ("Participation in sports at West Virginia University is not a right, but a *privilege*") (emphasis in original).

¹⁷¹ Ludlow, *supra* note 18, at C1.

D. *Nightmare in Nebraska*

Perhaps no school in the last 20 years of collegiate athletics has received as much criticism as the University of Nebraska did for a flurry of incidents occurring during its National Championship season of 1995. At the center of the controversy was a star running back who ran for two touchdowns in the national title game.¹⁷² As Nebraska fans celebrated a championship, many around the nation scratched their heads at the timing of the player's reinstatement to the team. In September of 1995, the player was accused, and later found guilty, of assaulting an ex-girlfriend.¹⁷³ According to police and witness reports, he threw the woman onto the bathroom floor and dragged her down three flights of stairs.¹⁷⁴ Nebraska coach Tom Osborne kicked the player off the team immediately, only to reinstate him six weeks later, in time to finish the season and lead the team to a national championship.¹⁷⁵ Osborne defended his actions by saying, "[t]he easy thing would have been to dismiss him, probably permanently. But basically, after examining all the factors involved, many of which you will never be privy to, and shouldn't be, we simply didn't feel it was the right thing to do."¹⁷⁶

Coaches can also go too far with a discretionary policy. Coach Osborne was accused of doing just that in the mid-1990s. Soon before one of his players was charged with felonies of unlawfully discharging a firearm and using a weapon to commit a felony,¹⁷⁷ Osborne took the gun in question and locked it in a cabinet. Osborne did not immediately turn over the weapon, but he did say that police likely would have never recovered the gun had he not made the student-athlete turn it over to him.¹⁷⁸ Osborne allowed the student-athlete to continue playing, stating that the athletic department had taken a parental role in supporting the athlete because he was raised by his grandmother.¹⁷⁹

In a separate 1994 incident, a woman who had accused a Nebraska player of alleged sexual assault said that Coach Osborne tried to intimi-

¹⁷² Don Markus, *Phillips Runs Back into the Limelight; Tumultuous Season Ends with Big Performance for Nebraska Running Back*, THE BALTIMORE SUN, Jan. 3, 1996, at D6.

¹⁷³ Malcolm Moran, *College Football; Nebraska Allows Phillips to Return*, N.Y. TIMES, Oct. 24, 1995, at B11 [hereinafter *Nebraska Allows*].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ The player pled no contest and saw jail time. See Steve Wieberg, *Nebraska: 'A Very Defining Case': Did Players Get Away with Too Much?*, USA TODAY, Sept. 18, 1998, at C19 [Hereinafter *A Very Defining Case*].

¹⁷⁸ Michael Farber, *Coach and Jury; Nebraska Players Charged with Crimes Have a Steadfast Ally in the Man Who Runs the Program, Tom Osborne*, SPORTS ILLUSTRATED, Sept. 25, 1995, at 31.

¹⁷⁹ *Id.*

date her before the trial so the player would not get into trouble.¹⁸⁰ The football player received 18 months probation after pleading no contest to the third-degree sexual assault charge, but he was allowed to remain on the football team and served as one of the team's captains.¹⁸¹ The same player also faced a separate civil suit involving sexual harassment alleged by a different woman.¹⁸² A public defender pointed out the flaw in Coach Osborne's approach toward handling disciplinary situations, saying, "[h]e tends to believe anything these kids tell him."¹⁸³ There is nothing wrong with a coach caring about his or her players. In fact, it should be encouraged. But this example of intense bias sheds light on the current problem of letting coaches deal with disciplinary issues in a discretionary fashion when players get in trouble with the law.

Damage to the university's integrity has already been felt, as Nebraska is still remembered as much for the off-the-field incidents during the 1994 and 1995 seasons as for the ensuing national championship.¹⁸⁴ The Nebraska situation has been called a "defining case" that made people look closer at the issue of disciplining student-athletes facing criminal charges.¹⁸⁵ Yet, a uniform national policy still does not exist.

E. *It's Not Just the Big Boys*

Wrist-slaps for criminal charges do not only occur at large universities; they occur at smaller schools as well. For example, a star linebacker at Lehigh University was allowed to continue playing after allegedly punching a woman in the face a few hours after a football game.¹⁸⁶ In addition to the victim, the university also suffered a black eye when news reached the press that the school allowed the three-time all-league player to continue playing. The victim reportedly was not the only one who suffered a black eye when news reached the press that the university allowed the three-time all-league player to continue play-

¹⁸⁰ *Id.*

¹⁸¹ *Id.* The athlete had to complete a private program that university officials would not discuss. *Id.*

¹⁸² Malcolm Moran, *Fiesta Bowl: The Battle for No.1; Cornhuskers Defend Title and Image*, N.Y. TIMES, Dec. 31, 1995, at 8-1 [hereinafter *Fiesta Bowl*].

¹⁸³ Farber, *supra* note 178, at 31.

¹⁸⁴ Ken Hambleton, *Myths, Misconceptions About NU Still Survive*, LINCOLN J. STAR (Neb.), Nov. 30, 2005, at C1. See also *A Very Defining Case*, *supra* note 177, at C19.

¹⁸⁵ *A Very Defining Case*, *supra* note 177, at C19.

¹⁸⁶ Bill Tattersall & Gary R. Blockus, *Lehigh Football Player Charged in Assault; Campus Police: Linebacker Punched Woman in Face. Team Allows Him to Keep Playing*, MORNING CALL (Allentown, Pa.), Dec. 5, 1998, at B12.

ing.¹⁸⁷ The school's football coach decided it was best to let the judicial system run its course before the football team reacted with a suspension; therefore, the student-athlete was allowed to continue playing in the NCAA Division I-AA playoffs. Lehigh's athletic director backed his coach's decision, saying the "coaches know our kids better. I defer to them in that regard."¹⁸⁸

In another case, a Bucknell University football player was not suspended after he was convicted of aggravated assault. The student-athlete was even permitted to study abroad during the spring semester¹⁸⁹ even though the victim he assaulted suffered a fractured cheekbone, nerve damage, and a concussion.¹⁹⁰

V. ANSWERING THE CALL: SOME SCHOOLS ADOPT TOUGH POLICIES

"Many schools will wish they had the clarity this policy brings. It will make our athletes proud, it will make them clear on what the standards are, and it emphasizes that participation is a privilege." – Ohio University official.¹⁹¹

A. Ohio University Responds to Embarrassment

Ohio University was embarrassed. When a *Columbus Dispatch* investigation revealed that none of the 17 football players who had been arrested in an eleven-month period had received suspensions, the university had one of two choices to make: do nothing, or fix the problem.¹⁹² Ohio chose the latter. Believing that head football coach Frank Solich was being too soft on his players, the university drafted a comprehensive student-athlete discipline policy.¹⁹³

In the university's eyes, the need for a strict policy was simple: if players "are not sanctioned by the university, it raises serious and substantive concerns regarding our policies and procedures. These con-

¹⁸⁷ *Id.* According to this newspaper account, some football players tried to grab all the copies of the student newspaper because it contained information about the incident. *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Daniel Golden, *When College Athletes Misbehave, Often There's Only Token Punishment; It's a Crime*, THE BOSTON GLOBE, Sept. 11, 1995, at 39.

¹⁹⁰ *Id.*

¹⁹¹ See *infra* note 206.

¹⁹² Ludlow, *supra* note 18, at C1 (Head football coach Frank Solich did not suspend the players, some of whom were convicted of assault and drunken driving. Instead, the athletes were required to spend six days studying in the football office).

¹⁹³ Ohio Athletics Student-Athlete Code of Conduct and Discipline Policy, 1 (2007), available at <http://ohiobobcats.cstv.com/compliance/compl-student-ath-code-conduct.html> (also on file with author) [hereinafter Ohio Policy].

cerns connect directly to our institutional values and integrity.”¹⁹⁴ In other words, by not punishing troubled athletes, the integrity of the university was compromised. “We had too much discretion inside the system in terms of judgments being made by the coach and athletic director,” a trustee chairman said. “We are not a school where winning at all costs is what we are for.”¹⁹⁵

Ohio University’s policy has a clear mission statement:

Participation in athletics is a privilege, not a right subject to NCAA and MAC rules and regulations. . . . The intent of this Code of Conduct and Discipline Policy is not . . . to judge who is guilty or not guilty under the same standards as would apply in a court of law. It is meant to set high standards for the department’s expectations of how student-athletes represent Ohio University and to state the potential consequences for those student-athletes who make poor choices, reflecting negatively on themselves and Ohio University.¹⁹⁶

This statement expresses a key theme of this Article: participating in athletics is a privilege that can be stripped away if the integrity of the university or the NCAA is compromised. Under Ohio University’s policy, athletes must inform their head coach of any legal or campus-related charge within twelve hours. A one-game suspension will occur if the student-athlete fails to inform the coach of the incident within the allotted time period.¹⁹⁷ The disciplinary policy is broken down into five levels, which are summarized below:

Level One: Campus or residence hall violations, such as noise, trash or other campus citations.

Punishment: Verbal reprimand from the head coach.¹⁹⁸

Level Two: Alcohol or substance violations on campus that do not result in arrest.

Punishment: A written reprimand from the athletics director, and depending on the offense, a minimum of a 5 percent suspension for NCAA contests and practices may be appropriate. The suspension will be determined based on the student-athlete’s history and the facts.¹⁹⁹

Level Three: Lower-level misdemeanors, such as alcohol or substance violations that result in an arrest or a required court appearance.

¹⁹⁴ Press Release, Ohio University President McDavis, Board of Trustees Executive Committee Issue Joint Statement Concerning Behavior of 17 Football Players (Oct. 4, 2006) (on file with author) (transcript available on LexisNexis).

¹⁹⁵ Ludlow, *supra* note 18, at C1.

¹⁹⁶ Ohio Policy, *supra* note 193.

¹⁹⁷ Ohio Policy, *supra* note 193, at 2.

¹⁹⁸ *Id.* at 3.

¹⁹⁹ *Id.*

This section also covers disorderly conduct, misdemeanor drug possession or use, and resisting arrest without physical harm to the officer.

Punishment: If arrested, there is an immediate suspension until all the facts of the incident are reviewed by the athletic director and head coach. The violation will result in a suspension from 10-25 percent of NCAA authorized contests, depending on the severity of the offense. The student-athlete must also complete a counseling and evaluation session. In addition to alerting the student-athlete's parents, the university will place the athlete on probation for one calendar year. A second offense could jeopardize the athlete's privileges for the remainder of the year.²⁰⁰

Level Four: Serious misdemeanors, such as assault, shoplifting, theft, drug possession or use classified above a minor misdemeanor, sexual misconduct, and resisting arrest with physical harm to the officer.

Punishment: If arrested, there is an immediate suspension until all the facts of the incident are reviewed by the athletic director and head coach. The violation will result in a suspension from 50 percent of NCAA authorized contests. If the charges result in a sentence that involves serving jail time, the student-athlete will be suspended until the time has been served. The student-athlete must also complete a counseling and evaluation session, and is placed on probation for the remainder of his/her time at Ohio University. A second offense could result in the athlete losing his/her privileges and scholarship permanently.²⁰¹

Level Five: All felonies, regardless of the nature of the charge.

Punishment: A felony charge will result in the immediate suspension from all athletic related events, and a conviction will result in immediate dismissal from the team and loss of athletics aid.²⁰²

Appeals Process: A student-athlete may appeal if he or she believes his or her situation presents special circumstances that would make the sanctions manifestly unfair or if there is significant evidence that would justify a different outcome.²⁰³

The new policy has already been applied to an unfortunate and tough set of circumstances. An Ohio University football player was charged with a misdemeanor for transferring alcohol to a minor after a

²⁰⁰ *Id.* at 4.

²⁰¹ *Id.* at 5.

²⁰² *Id.* at 6.

²⁰³ *Id.*

fellow athlete fell to her death from a hotel balcony.²⁰⁴ The death was ruled accidental, but the student-athlete received a Level Three violation for the misdemeanor and was subject to suspension of 10 to 25 percent of the regular season games. Despite feeling remorse for the student-athlete and saying he was a “very good young man,” the athletic director at Ohio University stuck to his school’s student-athlete discipline policy.²⁰⁵

Ohio University officials hope this policy will become a model other institutions will follow. “Many schools will wish they had the clarity this policy brings. It will make our athletes proud, it will make them clear on what the standards are, and it emphasizes that participation is a privilege,” a university board member said.²⁰⁶

B. *Oregon State Reacts With Reputation on the Line*

A problem existed, and Oregon State responded. Embarrassing arrests of the university’s athletes led to a push to enact a student-athlete discipline policy.²⁰⁷ Oregon State’s policy breaks offenses into specific categories, which provide the *minimum* punishment required for each criminal charge or conviction as follows:

Minor in Possession of Alcohol: If a student-athlete under the age of 21 is charged with underage possession of alcohol, he or she will be suspended for a minimum of one contest, in addition to attending an alcohol awareness class and counseling. A second offense will result in a suspension of at least 30 percent of competition. A third offense will result in an immediate suspension from all athletic activity, and if the athlete is convicted, it will result in permanent dismissal from the team.²⁰⁸

DUI: A student-athlete charged with a DUI is subject to a minimum suspension of 20 percent of competition, an alcohol awareness class, and counseling. A second offense would result in immediate sus-

²⁰⁴ Kantele Franko, *Two Face Charges in Soccer Player’s Accidental Death*, THE POST (Athens, Ohio), (Sept. 4, 2007), available at <http://www.thepost.ohiou.edu/Articles/News/2007/09/04/20897>.

²⁰⁵ *Id.*

²⁰⁶ Press Release, Ohio Univ., Revised Ohio University Student-Athlete Conduct Policies Unveiled (Dec. 1, 2006), available at <http://www.ohio.edu/outlook/06-07/December/199n-067.cfm> (also on file with author).

²⁰⁷ Editorial, *A Gray Area*, OSU DAILY BAROMETER, May 5, 2005. See also Ken Davis, *New Game Plan: Prevent Offense; Schools Get Tougher With Off-Field Behavior*, HARTFORD COURANT (Conn.), May 22, 2005, E3 (Oregon State athletes had been arrested for crimes like driving under intoxication and assault. Two players were charged with assaulting a taxi driver and offering to pay the \$20 fare with marijuana).

²⁰⁸ Oregon State Athletic Department Discipline Policy Chart, Oregon State University (2007) (on file with author).

pension from all athletic activity, and permanent dismissal from the team upon conviction.²⁰⁹

Possession of Controlled Substances: A student-athlete charged with the possession of a controlled substance (cannabis, narcotics, steroids, etc.) is subject to a minimum suspension of 20 percent of competition, immediate inclusion in the random drug testing pool, and counseling. If it involves a felony, and there is a plea of no contest, a guilty plea, or a conviction, then permanent dismissal will be imposed. A second offense will result in immediate suspension from all athletic activity.²¹⁰

Physical Assault: A student-athlete charged with physical assault is subject to a minimum suspension of 10 percent of competition, and counseling. If it involves a felony, and there is a plea of no contest, a guilty plea, or a conviction, then permanent dismissal will be imposed. A second offense will result in immediate suspension from all athletic activity.²¹¹

Sexual Offenses: A student-athlete charged with a misdemeanor sexual offense is subject to a minimum suspension of 30 percent of competition, and counseling. If it involves a felony, and there is a plea of no contest, a guilty plea, or a conviction, then permanent dismissal will be imposed. A second offense will result in immediate suspension for all athletic activity.²¹²

Felony: If a student-athlete is charged with a felony, he or she will be suspended immediately from athletic competition until the legal process runs its course. If he or she convicted of a felony, or pleads no contest or guilty to a felony, the student-athlete will be dismissed from the team permanently.²¹³

Critics of Oregon State's policy contend that it leaves no room for the gray area of particulars that are unique to each situation. However, as the editorial board of the *OSU Daily Barometer* also commented, "maybe that's just the way it should be."²¹⁴

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Oregon State Athletic Department Discipline Policy, Oregon State (2007) (on file with author).

²¹⁴ *A Gray Area*, *supra* note 207.

VI. TIME FOR THE NCAA TO ADOPT A UNIFORM STUDENT-ATHLETE DISCIPLINE POLICY

“What we’re doing is feeding them fame, celebrity and entitlement, but we’re not feeding them consequences and character. It’s a recipe for disaster.” – Katherine Redmond, sexual assault victim.²¹⁵

When the *Los Angeles Times* mused that an athlete could “face immediate suspension for improperly accepting a cheeseburger from a booster, yet continue playing while charged with a felony,” it was not far off.²¹⁶ Student-athletes are serving eight-game suspensions for receiving discounts on shoes,²¹⁷ but it’s exceedingly possible that the same athletes would not have been punished as harshly had they simply tucked the shoes under their jackets, slipped out of the store, and entered into a plea deal for reduced charges. Under today’s NCAA rules, the acceptance of bail money carries more punishment than the actual arrest.²¹⁸

As long as the NCAA continues to leave the disciplinary policy for criminal behavior to the discretion of its member institutions, uneven punishment will continue to reign supreme. In turn, integrity and uniformity will suffer. Some institutions, like Ohio University and Oregon State University, will penalize athletes for arrests and convictions, while others will not. All schools, however, will abide by the same rules regarding jersey length, pre-game movie rentals, and shoe discounts. If a student-athlete transfers from Florida State to Kent State, he will sit out one full year under NCAA rules. But, if he intends to transfer marijuana, he’ll only have to sit out one game, and the athletic director will defend the decision by saying the student-athlete “is not a drug user.”²¹⁹

As was stated in the beginning of this Article, the NCAA has problems. It almost certainly exercises too much control. However, it still has a fundamental responsibility: its rules are aimed at leveling the playing field by making sure every one of its voluntary member institu-

²¹⁵ David Wharton & Gary Klein, *Lax Environment*, LOS ANGELES TIMES, April 16, 2006, at D1. Redmond brought a civil action against a former Nebraska football player for sexual assault. She later founded the National Coalition Against Violent Athletes in Colorado. *Id.*

²¹⁶ *Id.*

²¹⁷ *Other Shoe Drops*, *supra* note 12, at B1.

²¹⁸ *No Easy Rider*, *supra* note 11, at 6.

²¹⁹ Elton Alexander, *Cribbs Will be Back as Quarterback at Kent After Agreeing to a Plea Bargain*, PLAIN DEALER (Cleveland, Ohio), June 16, 2004, at D3. Kent State’s star quarterback, now an NFL wide receiver, had charges reduced from drug-trafficking to fifth-degree felony drug possession after a plea bargain. He wasn’t allowed to practice with the team during the winter and spring, but returned to the playing field after serving a one-game suspension. *Id.*

tions plays by the same rules. These rules are intended to protect the integrity of not only the NCAA, but of the member institutions as well. Therefore, if the NCAA is going to maintain its tremendous power to regulate everything from the length of media guides to sending text messages to potential recruits,²²⁰ something needs to be done about criminal behavior.

A. *Rolling Out the Carpet Instead of Sweeping it Under the Rug*

Five headlines. . .and that was just one day. When Tony Barnhart, a nationally-known sports journalist, browsed the internet one Wednesday morning in 2004, the top five headlines involved college athletes in trouble with the law.²²¹ Barnhart has grown tired of the excuses – that for every bad apple, there are dozens of good ones; that the media blows this issue out of proportion. Fed up with the excuses, Barnhart wrote:

All of those things may be true. But they are also irrelevant. What is relevant is that respected institutions of higher learning are being embarrassed by a small segment of their students. Compassion is a noble thing, but there comes a point where the integrity of the institution must prevail over those who feel that their athletic gifts give them a blank check at the bank of public decorum. . . .Bad behavior by any student hurts the university. When it is by athletes, it makes the front page. That may not be fair, but it is the reality.²²²

The reality of the current situation is that the NCAA needs to take control.²²³ The NCAA should adopt a policy similar to that of Ohio University or Oregon State.²²⁴ It needs a visible policy, one including the principle idea that collegiate athletics is a privilege not a right, and the privilege can be taken away if the student-athlete compromises the integrity of the university and the NCAA due to his or her criminal involvement. The policy must be clear, apparent, uniform, and direct. It must treat every student-athlete the same, whether the individual is a Heisman Trophy winner or a backup pole-vaulter. Below is a sample proposal adapted from Ohio University's policy, with some changes. Level One and Two from Ohio's policy have been removed because they deal with campus situations that do not involve arrests or court

²²⁰ *NCAA Uphold Text-Message Ban*, THE PROVIDENCE JOURNAL, Jan. 13, 2008, at C-08.

²²¹ Tony Barnhart, *Four Ideas for Dealing with Bad Apples*, THE ATLANTA JOURNAL-CONSTITUTION, Aug. 8, 2004, at D17.

²²² *Id.*

²²³ I understand this statement will make some critics of the powerful NCAA cringe. But understand that I am simply stating that if the NCAA is going to continue to have tremendous power, disciplining players for criminal misbehavior is an area that needs to be addressed in order to protect integrity and establish uniformity.

²²⁴ See discussion *supra* Part V.A-B.

dates. This proposal is merely the groundwork. The ultimate goal, however, is simply getting the NCAA to adopt a uniform policy, with the particulars of the policy fleshed out by the organization and its member institutions. With that in mind, I propose a starting point.

B. *The Ground-floor Proposal*²²⁵

Violations of the NCAA Student-Athlete Code of Conduct will result in immediate disciplinary action. Violations will be categorized into levels, and the corresponding disciplinary action will reflect the severity of the offense. A student-athlete may appeal disciplinary action if he or she believes his or her situation presents special circumstances that make the assigned sanctions manifestly unfair or if there is significant evidence that would justify a different outcome. Individual team and institution policies may result in a greater, but not lesser, penalty than what is described herein.

1. Level One

Lower Level Misdemeanors: e.g., alcohol or substance violations resulting in an arrest and/or a required court appearance; incidents where the student-athlete has placed himself or herself in a position where he or she could do harm to himself, herself or others; attempting to purchase, purchasing or possessing alcohol while underage, disorderly conduct, minor misdemeanor drug possession or use, possession of drug paraphernalia, resisting arrest without physical harm to the law enforcement officer.

Punishment: If arrested, the violation will result in a suspension from 10-25 percent of NCAA authorized athletics contests, depending upon the severity of the offense. The percentage of the suspension will be based on the number of NCAA permissible contests. Suspensions will be appropriate to the charge and may carry over to the next competitive season. The NCAA reserves the right to lengthen the suspension based on a review of the facts of the case or a conviction.

The student-athlete will be placed on probation for a period of one calendar year. A subsequent offense during the probationary period may result in loss of athletics privileges for the remainder of the academic year. The NCAA will review each case based on the facts presented. Additional sanctions for a second offense may be made following the resolution of the second charge.

²²⁵ This proposal is merely a starting point. It has been adapted from Ohio University's student-athlete policy. See Ohio Policy, *supra* note 193.

2. Level Two

Serious Misdemeanors: e.g., DUI, assault, drug possession or use classified above a minor misdemeanor, shoplifting, theft, sexual misconduct, resisting arrest with physical harm to the law enforcement officer.

Punishment: If arrested, the violation will result in suspension from 50 percent of athletic contests. If misdemeanor charges result in a sentence involving jail time, the student-athlete will be suspended from all athletic activities until the time has been served.

The student-athlete will be placed on probation for the remainder of his or her time as a collegiate athlete. A subsequent offense of a similar nature at any time during the student-athlete's career will result in dismissal from the team.

3. Level Three

Felonies: e.g., any felony regardless of the nature of the charge.

Punishment: A level three charge will result in immediate suspension from all athletic related events. A level three conviction will result in immediate dismissal from the team.

C. *Outweighing the Bad*

One of the main arguments for not implementing a uniform student-athlete discipline policy for all NCAA member institutions to follow is that the NCAA is trying to play judge and jury.²²⁶ The gist of the argument is that the NCAA would be violating the presumption of innocence if it punished student-athletes who were charged with crimes.²²⁷ However, safeguards are in place to prevent manifest injustice, and the NCAA can restore an athlete's eligibility.²²⁸ It is important to remember that the NCAA is merely telling a troubled athlete that he or she cannot play in a game; it is not throwing the athlete in jail.

An NCAA policy also would not infringe too significantly on the rights of its member institutions because each school could deliver punishment above and beyond the NCAA's minimum requirements. If the goal of punishment is really to advance the ideas of integrity, uniformity, and privilege, then the benefits outweigh the drawbacks.²²⁹ This

²²⁶ See Reed, *supra* note 28, at 52 n.104.

²²⁷ *Id.* at 52 n.107.

²²⁸ *Id.*

²²⁹ See *MSU Policy*, *supra* note 150, at E1 (Jeffrey R. Caponigro, an author of a book dealing with athletes in crisis, said, "I think it's important to have policies and procedures that mean something. And it's important to show the rest of the team these rules are going

type of policy would eliminate the biased discretion of win-at-all-cost coaches, while allowing the NCAA to deliver even-handed punishment to student-athletes at every member institution.²³⁰ Likewise, an institution does not have to worry about its integrity being compromised by a win-at-all-cost mentality because the initial punishment would be out of its hands.²³¹ If the institution wants to go above and beyond the NCAA's mandate, it would be free to do so.

VII. CONCLUSION

Now is the time for the NCAA to align its objectives. Does it really want to be able to punish a student-athlete for receiving discounts on shoes, but not be able to punish a student-athlete who is convicted of a felony? *NCAA v. Tarkanian* has given the organization power to regulate broadly among its voluntary members. In many ways, the NCAA has done just that. It will punish student-athletes for playing in 5-on-5 basketball tournaments, for improperly receiving textbooks, and transferring from one school to another. It even punishes student-athletes for accepting bail money. But it chooses to do nothing about the underlying arrest or resulting conviction.

What is missing here? A plan to fix the mess. One such plan is proposed herein.

to be enforced. We all have vulnerabilities. We need to prevent those vulnerabilities from turning into crises").

²³⁰ It also eliminates the possibility that two athletes at the same school could be issued uneven punishment because one of the coaches is a disciplinarian and the other is a wrist-slapper.

²³¹ See Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J. L. & SOC. PROBS. 167, 195 (1998) (reasoning that a school is "likely to lose applicants if it is exposed as an institution that gives athletes preferential treatment in cases of sexual assault and domestic violence"). This rationale can be extended to the majority of crimes in general, as parents do not want to send their children to places where crime is not punished.