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Katherine Ross

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# The Potential Role of ADR in NCAA Academic Fraud Cases

*Katharine Ross\**

## I. INTRODUCTION

College sports have a far-reaching impact on society. In fact, college sports sometimes dictate not only the enrollment levels and reputations of post-secondary institutions, but influence city infrastructure, traffic flow, and television programming. Such influence is made possible by the National Collegiate Athletic Association's ("NCAA") unchecked ability to govern collegiate sports in the United States.<sup>1</sup> The lack of oversight of the NCAA has sparked controversy between the NCAA and its member institutions, as well as between the NCAA and the public, over weaknesses in the current system for investigation and punishment of academic misconduct (e.g., concerns over due process, failure to prioritize athlete interests, inconsistent means of investigation, the unpredictable imposition of sanctions, and harm to student-athletes).<sup>2</sup> In essence, the NCAA's current system is imbalanced and unfair, punishing some schools but not others, and disciplining student-athletes who were uninvolved in any actionable violations.<sup>3</sup>

Arbitration, already utilized by professional sports associations in their salary negotiations and disciplinary proceedings,<sup>4</sup> could improve the NCAA's system and provide more equitable outcomes for student-athletes and postsecondary institutions alike. Arbitration is efficient, confidential, and, most importantly, it allows for neutral arbitrators who are specialized in the pertinent area of law.<sup>5</sup>

This Comment will analyze the NCAA's investigation and adjudication of academic fraud and its enforcement of policies over college sports' many actors. Section II explores the creation of the NCAA and its infraction process, and Section III raises points of criticism against that infraction process. To illustrate common criticisms, Section IV compares cases surrounding the University of Missouri and the University of North Carolina, focusing on the disproportionate punishments and inadequate due process. Finally, Section V of this Comment will delve into the ways in which investigation and enforcement could benefit from third-party involvement, specifically through arbitration. As an option for investigation and adjudication, arbitration could alleviate many concerns with the NCAA's current

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\* B.A., University of Missouri 2017, J.D. Candidate, University of Missouri School of Law, 2020. The author would like to thank Robert Bailey, Assistant Dean at the School of Law, for his guidance and encouragement.

1. David Ridpath et al., *NCAA Academic Fraud Cases and Historical Consistency: A Comparative Content Analysis*, 25 J. LEGAL ASPECTS SPORT, 75, 75 (2015).

2. *Id.* at 78.

3. Souichi Terada, *NCAA Denies Mizzou's Appeal, Upholds Sanctions Against Football, Softball, Baseball*, KC STAR (Nov. 26, 2019), <https://www.kansascity.com/sports/college/sec/university-of-missouri/article237792374.html>.

4. See Christian Dennie, *The Benefits of Arbitration: Arbitration in NCAA Student-Athlete Participation and Infractions Matters Provides for Fundamental Fairness*, 46 U. MEM. L. REV. 135, 147-62 (2015).

5. *Id.* at 147.

conflict response method, particularly those pertaining to the grant of due process and the oversight and protection of individuals beneath its umbrella.

## II. REGULATING COLLEGE SPORTS: THE BIRTH AND GROWTH OF THE NCAA

For over a century, the NCAA has dealt with many ongoing concerns, namely increased player pressure and inadequate regulations.<sup>6</sup> After originally addressing concerns through record-keeping and the creation of uniform playing rules, the NCAA expanded its regulation power to allow punishment for violations of its code of conduct through a Committee on Infractions (“COI”).<sup>7</sup> Violations include instances of academic misconduct, such as falsifying academic records or relying on substantial academic assistance that is not available to the general student body.<sup>8</sup> This system presents problems because the various NCAA administrative bodies—including the COI—are made up of individuals from NCAA member institutions.<sup>9</sup> Because individuals from member institutions are involved in the punishment of other member institutions, including those that may not be as well-represented in NCAA administrative bodies, fairness is often called into question.<sup>10</sup> Although NCAA administrators understand the current system is flawed, attempted reform has resulted in the NCAA’s increased power *without* adequately addressed the shortcomings of its disciplinary process.<sup>11</sup>

### A. History of the NCAA

The NCAA was not always the center of collegiate sports regulation.<sup>12</sup> The NCAA was formed in the early 1900s in response to growing concerns over issues surrounding collegiate sports.<sup>13</sup> Specifically, concerns rose over extreme pressure to win games brought about, in large part, by the increased commercialization of sports.<sup>14</sup> Further, institutions touted the need for regulations to promote and ensure fairness and safety.<sup>15</sup> As the need for facilitated conferences and playing schedules rose, institution presidents began to realize how difficult it could be to oversee intercollegiate athletics through faculty or student governance alone.<sup>16</sup> Thus, the idea for regulation on a broader, more uniform level gained traction, and Chancellor Henry MacCracken of New York University eventually called a meeting of

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

7. E. Woodrow Eckard, *The NCAA Cartel and Competitive Balance in College Football*, 13 REV. INDUS. ORG. 347, 348 (1998).

8. *Understanding NCAA Academic Misconduct Rules: A Guide to Promoting & Protecting Academic Integrity*, NCAA 3 (2018), [https://www.ncaa.org/sites/default/files/2018DIENF\\_AcademicMisconductBooklet\\_20180321.pdf](https://www.ncaa.org/sites/default/files/2018DIENF_AcademicMisconductBooklet_20180321.pdf) [hereinafter *Understanding NCAA Academic Misconduct Rules*].

9. *Division I Committee on Infractions*, NCAA, <http://www.ncaa.org/governance/committees/division-i-committee-infractions> (last visited Apr. 7, 2020).

10. Smith, *supra* note 6, at 17.

11. *Id.* at 12.

12. *Id.* at 12–13 (early interschool athletic events were often organized by students and sponsored by wealthy businesses).

13. *Id.* at 12.

14. *Id.* at 11.

15. *Id.* at 12.

16. Smith, *supra* note 6, at 11.

representatives of the nation's major intercollegiate football programs.<sup>17</sup> This was the first of many meetings from which the NCAA began to take shape.<sup>18</sup>

Following World War II, increased access to higher education across the nation led to greater public interest in collegiate athletics.<sup>19</sup> Increased radio and television use in American homes created more broadcasting opportunities, and the NCAA signed its first television contract in the 1950s for one million dollars.<sup>20</sup> Also during that time, college sports encountered its first gambling scandals, complaints of excessive recruiting, and a resulting wave of strong reform in punishment procedures.<sup>21</sup> Member institutions were separated into Divisions I, II, and III in the 1970s to help reflect the competitive capacity of smaller schools in comparison to larger ones.<sup>22</sup>

By the mid-1970s, the NCAA had acquired additional authority to punish school athletes, coaches, and administrators directly.<sup>23</sup> This increase in power was met with heavy criticism from the public, primarily due to the purportedly unfair enforcement of NCAA policies.<sup>24</sup> Meanwhile, university and college administrators began to recognize the revenue and reputational gain tied to the success of their athletic programs.<sup>25</sup> Accordingly, presidents of institutions started to play an active role in NCAA governance and proposed rule changes.<sup>26</sup> For example, the Board of Directors is the highest governing body for Division I, made up of twenty-four members with seats that rotate between all the member institutions.<sup>27</sup> The Presidential Forum is the advisory body for the Board, and it is made up of thirty-two presidents and chancellors of member institutions—over one-thousand colleges and universities<sup>28</sup>—representing each conference.<sup>29</sup> Subsequently, the line between member institution employees and NCAA employees blurred, and further concern grew over fair judgment and due process with regard to infraction procedures.<sup>30</sup> As one sports writer commented, “There is no doubt who is running college sports. It’s the college presidents.”<sup>31</sup>

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17. *Id.* at 12.

18. *Id.*

19. *Id.* at 14.

20. *Id.* at 15.

21. *Id.* at 14.

22. Smith, *supra* note 6, at 15 (for example, smaller schools are categorized as Division III and only compete against other Division III schools).

23. *Id.* at 16.

24. *Id.*

25. *Id.*

26. *Id.*

27. Brian Burnsed et al., *How the NCAA Works*, NCAA (2015), <http://www.ncaa.org/champion/how-ncaa-works>.

28. *What is the NCAA?*, NCAA (Jan. 2020), <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa>.

29. Burnsed et al., *supra* note 27.

30. Smith, *supra* note 6, at 17.

31. Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 *IND. L. J.* 985, 997 (1987).

*B. Investigation and Enforcement  
of Academic Fraud*

The latest NCAA infraction model categorizes misconduct into four levels.<sup>32</sup> Level 1 violations include only the most egregious conduct, while the Level 4 designation is reserved for the most minor infractions.<sup>33</sup> Academic misconduct is considered to be Level 1, even if only to dispel accusations of leniency for non-action that arose amid the first highly-publicized academic misconduct allegations.<sup>34</sup> Academic misconduct includes alteration or falsification of an academic record, as well as substantial academic assistance from school staff that is not generally available to the school's students.<sup>35</sup> There are generally two factors the NCAA considers when determining whether to get involved in an instance of academic misconduct.<sup>36</sup> First, the NCAA will examine whether the act committed affected the particular athlete's eligibility.<sup>37</sup> Next, the NCAA will ascertain whether members of the athletic department, administration, or faculty participated in the alleged misconduct.<sup>38</sup> The NCAA expects member institutions to enforce policies pertaining to academic misconduct and report misconduct to the COI if it reaches a certain threshold of severity.<sup>39</sup>

The COI is an independent administrative body made up of volunteers, typically current or former member institution staff, members of the general public with formal legal training, and athletic administrators with compliance experience.<sup>40</sup> The COI is responsible for investigating and deciding cases involving the alleged infractions of NCAA member institutions.<sup>41</sup> To fulfill that role, the COI conducts hearings, finds facts, determines violations of NCAA policies, and hands down punishment.<sup>42</sup> Penalties for violations include public reprimand and censure, athletic department probation, vacating of wins, development of comprehensive educational programs on NCAA legislation, payment of fines, and the submittal of a report of misconduct to the institution's accrediting agency.<sup>43</sup> Although the COI panel appears impartial, its findings have created an imbalanced system of investigation and punishments.

### III. AN IMBALANCED SYSTEM

Through the creation of the term "student-athlete," the NCAA attempted to convey that college athletes are students first while also protecting itself against any workers' compensation legal battles.<sup>44</sup> The NCAA's blatant invention of new

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32. *New Violation Structure Introduced*, NCAA (Aug. 1, 2013), <http://www.ncaa.org/about/resource/media-center/news/new-violation-structure-introduced>.

33. *Id.*

34. *Id.*

35. *Understanding NCAA Academic Misconduct Rules*, *supra* note 8.

36. Ridpath, *supra* note 1, at 80.

37. *Id.*

38. *Id.*

39. *Id.* See generally *Division I Committee on Infractions*, *supra* note 9.

40. *Division I Committee on Infractions*, *supra* note 9.

41. *Id.*

42. *Id.*

43. Ridpath, *supra* note 1, at 91, 94–95.

44. *Id.* at 77.

terminology to maintain its desired image, in combination with a lack of transparency in its investigations, has caused many to lose faith in the organization.<sup>45</sup> Due process is rarely available for coaches and athletes punished by the NCAA.<sup>46</sup> Further, the NCAA's reputation for inconsistent enforcement brings into question whether current policy discourages honesty.<sup>47</sup> Critics argue that when it comes to internal investigations and self-reporting, transparency can result in harsher punishment.<sup>48</sup> These primary criticisms—lack of due process and inconsistency of enforcement—are explored below.

### A. Creation of the “Student–Athlete”

The term “student–athlete” was coined by the NCAA in order to obscure the relationship between college athletes and the universities they attend.<sup>49</sup> As a past NCAA Executive Director wrote:

[The] threat was the dreaded notion that NCAA athletes could be identified as *employees* by state industrial commissions and the courts. We crafted the term *student–athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as *players* and *athletes*. We told college publicists to speak of “college teams,” not football or basketball “clubs,” a word common to the pros.<sup>50</sup>

By characterizing college athletes as “student–athletes,” the NCAA forestalls some athletes from being labeled as employees.<sup>51</sup> In effect, then, the NCAA—estimated to be a sixty–billion dollar industry—has a free pass to employ students without paying them a competitive wage.<sup>52</sup> The NCAA is supported entirely by revenue garnered through college sports, yet the athletes, who provide the abilities and talent needed for these sports to succeed, are denied the typical benefits an employee might receive in any other context.<sup>53</sup> Most pertinent to this discussion, the NCAA avoids the legal responsibility for “student–athletes” that would normally accompany an employer–employee relationship.<sup>54</sup> When the NCAA infringes on athletes' rights, it might do so in a surreptitious way, for example, by rendering a student ineligible to play a sport, suspending or dismissing a coach, withdrawing scholarships, or banning a student from postseason play.<sup>55</sup> Such

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45. *Id.* at 99.

46. Joshua J. Despain, *From off the Bench: The Potential Role of the U.S. Department of Education in Reforming Due Process in the NCAA*, 100 IOWA L. REV. 1285, 1292 (2015).

47. Alex Schiffer et al., *Mizzou Football Team Banned from Bowl This Season as Part of Academic Fraud Penalties*, KC STAR (Feb. 3, 2019), <https://www.kansascity.com/sports/college/sec/university-of-missouri/article225339255.html>.

48. *Id.*

49. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student–Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 86 (2006).

50. Sean Gregory, *College Athletes Need to Unionize, Now*, TIME (Sept. 28 2013), <https://keepingscore.blogs.time.com/2013/09/28/college-athletes-need-to-unionize-now/>.

51. McCormick & McCormick, *supra* note 49, at 74.

52. *Id.* at 75–76.

53. *Id.* at 76.

54. *Id.* at 86.

55. Despain, *supra* note 46, at 1292.

penalties represent a deprivation of liberty and/or property.<sup>56</sup> Therefore, individuals and institutions subject to punishment are, under the purview of the United States Constitution, entitled to due process.<sup>57</sup>

### B. *A Question of Due Process*

Currently, the NCAA is not restricted by the Fourteenth Amendment's due process requirements.<sup>58</sup> The Fourteenth Amendment has been interpreted by the courts to mean that a private actor is engaged in state action when his or her private conduct is so involved with the government that it calls for Constitutional limits.<sup>59</sup> Before the 1970s, the NCAA was deemed to be a state actor by the courts because of its dependence on public universities.<sup>60</sup> In the 1980s, however, in *NCAA v. Tarkanian*, the United States Supreme Court officially determined the NCAA's imposition of sanctions on a public university did not make the otherwise private association a state actor.<sup>61</sup> The COI, as a result of the investigation of recruiting practices at the University of Nevada, Las Vegas ("UNLV"), uncovered thirty-eight violations committed by UNLV personnel.<sup>62</sup> Among other issues, violations were related to the basketball team's recruiting and failure to provide full cooperation with the NCAA investigation.<sup>63</sup> Ten violations implicated head basketball coach Jerry Tarkanian.<sup>64</sup> The NCAA and investigators from the University worked in tandem during the inspection, and the NCAA subsequently placed the basketball team on a two-year probation and demanded the University sever all ties with Tarkanian or face additional penalties.<sup>65</sup> Although the NCAA was authorized to impose penalties on rule-breaking member institutions, it was not authorized to sanction member institutions' employees.<sup>66</sup> Tarkanian brought suit in Nevada state court, alleging he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U.S.C. § 1983.<sup>67</sup>

While the Nevada court found that the NCAA's conduct constituted state action, the Supreme Court reversed in a 5-4 decision, holding that the NCAA's role in Tarkanian's suspension did not constitute state action, nor was the association a state actor because UNLV suspended Tarkanian in compliance with the NCAA's rules.<sup>68</sup> Put simply, UNLV's decision to adopt NCAA rules did not transform those rules into state rules.<sup>69</sup> Justice White's dissenting opinion, which was supported by

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56. *Id.*

57. *Id.*

58. *Id.* at 1294.

59. *Id.*

60. *Id.*

61. *NCAA v. Tarkanian*, 488 U.S. 179, 180 (1988).

62. *Id.* at 179.

63. *Id.* at 186.

64. *Id.* at 185-86.

65. *Id.* at 200.

66. *Id.* at 179.

67. A 42 U.S.C. § 1983 claim allows an individual to bring a suit against any person "who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" deprives that individual of his or her rights created by the U.S Constitution or federal statutes.

68. *NCAA v. Tarkanian*, 488 U.S. at 180.

69. *Id.* at 179-80.

three others,<sup>70</sup> argued precedent required the arrangement be deemed state action, as both entities were responsible for the decision to fire Coach Tarkanian.<sup>71</sup>

If the majority had agreed with Justice White, and the NCAA's sanctions were deemed to be state action, then the court would also likely have ruled that Tarkanian had been deprived of his right to due process.<sup>72</sup> The Fourteenth Amendment, however, only applies to those acting under the "color of state law." Thus, the NCAA was not held to the same standard of due process as the state and remains free from defending against due process allegations brought by coaches and athletes.<sup>73</sup> This decision set a precedent for the NCAA's unlimited governance of collegiate sports because the NCAA no longer has to answer to the government for its involvement in university punishment, and individuals are unable to appeal their punishments outside of the NCAA.<sup>74</sup>

Justice White's dissent raised concerns that are arguably more applicable today than they were in 1988. Since *Tarkanian*, numerous college sports scandals, involving academic fraud, recruiting violations, and improper pay to athletes, have arisen across the United States.<sup>75</sup> An FBI-led investigation in 2017 uncovered multiple six-figure payments to college basketball players, as well as bribes to coaches.<sup>76</sup> More than a quarter of Division I institutions were caught committing major violations such as recruiting infractions or academic fraud between 2005 and 2015.<sup>77</sup> As one scandal after another came to light, the public and the accused institutions began to question whether those involved were receiving due process from the NCAA and its COI.<sup>78</sup> The reality of the sweeping and often inconsistent NCAA-imposed penalties is that student-athletes may be unjustly punished for the systemic failures of their schools, coaches, and administrators, making system reform imperative.<sup>79</sup>

### III. INCONSISTENT SANCTIONS

The NCAA's COI, responsible for imposing sanctions on schools engaged in misconduct, has been facetiously referred to as the "random punishment generator" for allegedly imposing sanctions with no uniform system.<sup>80</sup> A more serious criticism of the system is that the NCAA uses situational ethics in determining when to investigate and implement sanctions.<sup>81</sup> Situational ethics presumes that those in

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70. *Id.* (Justices Brennan, Marshall, and O'Connor joined Justice White in dissent).

71. *Id.* at 200.

72. *Id.* at 187.

73. *NCAA v. Tarkanian*, 488 U.S. at 193.

74. *Id.* at 179.

75. Sean Gregory, *N.C. Academic Fraud Decision Exposes College Sports Hypocrisy*, TIME (Oct. 13, 2017), <https://time.com/4981782/north-carolina-academic-fraud-decision-exposes-college-sports-hypocrisy/>.

76. *Id.*

77. Doug Lederman, *The Rule Breakers*, INSIDE HIGHER ED (Jan. 11, 2016), <https://insidehighered.com/news/2016/01/11/96-division-i-colleges-violated-major-ncaa-rules-last-decade>.

78. Schiffer, *supra* note 47.

79. Gregory, *supra* note 50.

80. Joan Niesen, *The NCAA's Random Punishment Generator Hit Missouri at the Worst Possible Time*, SPORTS ILLUSTRATED (2019), <https://www.si.com/college/2019/01/31/missouri-postseason-ban-ncaa-barry-odom-kelly-bryant>.

81. Sara Ganim, *NCAA Punishment is Anyone's Guess*, CNN, <https://www.cnn.com/2015/08/12/us/ncaa-academic-fraud/index.html> (last updated Aug. 12, 2015).



authoritative positions will make decisions based on what will benefit a certain situation rather than what is right.<sup>82</sup> Studies have shown that the NCAA is more likely to punish an institution that does not generate as much revenue than institutions with booming athletic departments.<sup>83</sup> As one researcher commented, “What is best for the situation is best for the NCAA.”<sup>84</sup> Comparing the University of North Carolina’s (“UNC”) institutional academic fraud that went unpunished with the University of Missouri’s heavy sanctions after a rogue tutor engaged in academic misconduct reveals just one example of the NCAA’s situational ethics.<sup>85</sup> Such inconsistent implementation can harm athletes’ education, as well as their athletic careers.<sup>86</sup> To avoid such disparate treatment in the future, the NCAA needs to implement a more consistent, neutral, and predictable system.<sup>87</sup>

### A. *The University of North Carolina*

A study published by the Journal of Legal Aspects of Sport in 2015 analyzed the consistency of the NCAA’s COI decisions to impose sanctions on institutions for academic fraud in men’s basketball and football since 1990.<sup>88</sup> The study was inspired by a string of decisions declining to investigate several serious allegations of collusion between athletic department officials among large, Power Five Conference institutions intended to impact athletes’ eligibility with fraudulent grades.<sup>89</sup> The study compared cases of academic fraud adjudicated by the COI to similar cases that were not so adjudicated.<sup>90</sup> Basketball and football were chosen for review based on the majority of revenue these sports bring in for member institutions.<sup>91</sup>

Results of the study showed that many of the same issues that meet both tests for academic fraud—staff involvement and effecting eligibility—permeate cases the NCAA declined to investigate or adjudicate.<sup>92</sup> In cases left uninvestigated, most notably involving UNC, many students were found to have participated in no-show classes and unauthorized grade changes in order to remain eligible athletes.<sup>93</sup> At least two UNC staff members were directly involved in that particular case.<sup>94</sup> These two facts constitute a *prima facie* case of academic fraud that should have been investigated by both UNC and the NCAA.<sup>95</sup> The NCAA, however, determined that the classes were not a scheme to keep players eligible, as they were offered to both

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82. Ridpath, *supra* note 1, at 76.

83. Ganim, *supra* note 81.

84. *Id.*

85. Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN, <https://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html> (last updated Oct. 23, 2014); Schiffer, *supra* note 47.

86. Niesen, *supra* note 80; Gregory, *supra* note 50.

87. Niesen, *supra* note 80.

88. Ridpath, *supra* note 1, at 77.

89. *Id.* at 78. Specifically, the University of Michigan, the University of North Carolina, and Auburn University.

90. *Id.*

91. *Id.* at 77.

92. *Id.* at 95.

93. *Id.* at 96.

94. Ridpath, *supra* note 1, at 96.

95. *Id.*

athletes and non-athletes.<sup>96</sup> Later, the former head football coach, John Bunting, directly contradicted the NCAA's conclusion by admitting he knew of the phony courses and stated they were part of a strategy designed to keep players eligible.<sup>97</sup> A report produced in the course of the University's own investigation shows that, during Bunting's years as head coach, there was a pronounced rise in enrollment of football players in the suspect courses.<sup>98</sup> The NCAA did not finish its own inquiry until 2017, three years after the University's internal investigation was finalized.<sup>99</sup> The NCAA found that UNC had not violated NCAA academic rules.<sup>100</sup>

In contrast with the UNC investigation, the case of the much smaller Marshall University involved allegations of academic fraud in which an assistant professor provided advanced copies of an exam to football players, then attempted to cover up his mistake by giving all students an "A" grade.<sup>101</sup> Much like the UNC case, there was no evidence the professor acted in concert with the athletic department, and the benefit of the high grade was offered to every student in the class, not just athletes.<sup>102</sup> Despite the similarities to the UNC case, however, the NCAA determined the institution had committed a Level 1 academic fraud violation—the most serious of violations.<sup>103</sup> Disparate treatment in dealing with comparable acts likely stems from the fact that Marshall University, unlike UNC, is not an athletic powerhouse, and thus lacks the same amount of leverage over the NCAA.

This is just one of the many examples disclosed in the study, and it perfectly illustrates the unexplained factual similarities between adjudicated and unadjudicated cases.<sup>104</sup> Another example from the study discusses the virtually identical cases of academic fraud between Arkansas State University and Florida State University.<sup>105</sup> While both cases involved student-athletes receiving grade changes and competing while ineligible, Florida State received no monetary fine while Arkansas State was fined nearly forty-four thousand dollars from an athletic budget that is small by Division I standards.<sup>106</sup> Florida State is a strong football school that won a national title in 2014,<sup>107</sup> and the majority of the NCAA's revenue comes from such championship games.<sup>108</sup> The discrepancy in the punishments levied against Florida State and Arkansas State suggest that the NCAA chooses when to get involved in academic fraud cases based on how much it benefits from a given institution's autonomy.<sup>109</sup> UNC and other similar athletic powerhouses like Florida State are much more valuable to the NCAA's revenue stream than Marshall

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96. *Id.*

97. Ganim & Sayers, *supra* note 85.

98. *Id.*

99. Bill Chappell, *NCAA 'Could not Conclude Academic Violations' in UNC Athletics Scandal*, NPR (Oct. 13, 2017), <https://www.npr.org/sections/thetwo-way/2017/10/13/557581005/ncaa-could-not-conclude-academic-violations-in-unc-athletics-scandal>.

100. Gregory, *supra* note 75.

101. Ridpath, *supra* note 1, at 97.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 95.

106. *Id.*

107. Associated Press, *Florida State Wins National Title with Touchdown in Final Seconds*, ESPN (Jan. 7, 2014), <https://www.espn.com/college-football/recap?gameId=340060002>.

108. *Where Does the Money Go?*, NCAA (2018–19), <http://www.ncaa.org/about/where-does-money-go>.

109. Ridpath, *supra* note 1, at 95.

University and Arkansas State.<sup>110</sup> It is no surprise, then, that the study found the COI takes into consideration what institution it will be investigating before determining “proper” sanctions.<sup>111</sup>

### B. *The University of Missouri*

More recently, the University of Missouri was penalized for academic misconduct after a tutor self-reported completing coursework for twelve student-athletes for the duration of 2016.<sup>112</sup> The University fully cooperated with the subsequent NCAA investigation of the allegations, a decision they later learned was a mistake.<sup>113</sup> In UNC’s case, the athletic department stood behind its offering of sham courses, arguing that such conduct was admissible because the courses were open to athletes and non-athletes alike.<sup>114</sup> Yet, in Missouri’s case, simply admitting fault authorized the NCAA to impose harsh sanctions.<sup>114</sup> Missouri received post-season bans on all sports involved, recruiting restrictions, scholarship reductions, vacated wins, and a three-year probation.<sup>115</sup>

In the past two decades, across 360 Division I institutions, approximately nine football bowl game bans have occurred, and only for the most serious of violations.<sup>116</sup> Missouri received this punishment despite the COI panel noting that “the record does not support a broader institutional scheme.”<sup>117</sup> When asked whether such punishments might discourage schools from self-reporting to the NCAA, the Chief Hearing Officer stated, “Hopefully schools would accept responsibility like Missouri did.”<sup>118</sup> That seems unlikely, as Missouri’s case has demonstrated a heavy incentive to do otherwise.<sup>119</sup>

The University of Missouri immediately attempted to appeal the imposed sanctions, focusing on an abuse of discretion argument.<sup>120</sup> A former compliance officer for the University who was involved in the initial investigation believed there was hope of overturning the post-season bans based on the NCAA’s own bylaws.<sup>121</sup> The bylaws intend to promote protection of current student-athlete welfare, while the investigation promoted the punishment of current student-athletes who were not involved in the actual violations.<sup>122</sup>

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110. *Id.* at 98.

111. *Id.* at 97.

112. Schiffer, *supra* note 47.

113. *Id.*

114. See Chappell, *supra* note 99; Bennett Durando, *Experts: ‘Tough Road Ahead’ if MU Wants to Overturn NCAA Sanctions in Appeal*, COLUMBIA MISSOURIAN (Feb. 2, 2019), [https://www.columbia-missourian.com/sports/mizzou\\_football/experts-tough-road-ahead-if-mu-wants-to-overturn-ncaa/article\\_99fbc1c2-2751-11e9-b230-6fb430e98cdc.html](https://www.columbia-missourian.com/sports/mizzou_football/experts-tough-road-ahead-if-mu-wants-to-overturn-ncaa/article_99fbc1c2-2751-11e9-b230-6fb430e98cdc.html).

114. Durando, *supra* note 114.

115. Schiffer, *supra* note 47.

116. Austin F. Eggers et al., *The Negative Effect of NCAA Football Bowl Bans on University Enrollment and Applications* 6 (Appalachian State Univ. Dep’t of Econ., Working Paper No. 18-13, Aug. 2018), <https://econ.appstate.edu/RePEc/pdf/wp1813.pdf>.

117. Schiffer, *supra* note 47.

118. *Id.*

119. *Id.*

120. See *id.*; Durando, *supra* note 114.

121. Telephone Interview with former Mizzou Compliance Officer who wished to remain anonymous (2019).

122. Schiffer, *supra* note 47.

Punishment will have serious repercussions for the University of Missouri. A study completed by Appalachian State University in 2013 found that football bowl bans on Division I universities lower the quantity of applications, admittances, and enrollment.<sup>123</sup> Additionally, the limits on recruiting and reduction in the athletic budget will have an impact that may take years of recovery.<sup>124</sup> University of Missouri athletes, coaches, and administrators feel the sanctions are unfair and have expressed that sentiment openly.<sup>125</sup> Because the violations occurred in 2015, most of the punishment falls on student–athletes who were not involved in the punishable conduct.<sup>126</sup> The students who participated in the academic fraud have long since graduated.<sup>127</sup> Additionally, the University waited on the appeal process until November 2019, ten months from the date the original sanctions were levied.<sup>128</sup> An unprecedented amount of time passed with no decision rendered.<sup>129</sup> Missouri’s case is not the only cause for concern when it comes to NCAA enforcement.<sup>130</sup> Unrest over the NCAA’s persistent inconsistency demands a different approach, and one that is not entirely foreign to the world of sports.<sup>131</sup> Alternative dispute resolution methods have the potential to restore impartiality, fairness, and trust in intercollegiate athletics.<sup>132</sup>

### C. Criticism of the NCAA System

The NCAA’s refusal to punish the University of North Carolina for nearly two decades of academic fraud established a status quo of inconsistent, money–dependent enforcement.<sup>133</sup> Over the course of fourteen years, thousands of UNC athletes participated in no–show classes and received unauthorized grade changes.<sup>134</sup> Despite striking similarities to other cases of academic fraud punished by the NCAA, the NCAA declined to hand down punishment, characterizing the problem as an institutional issue, rather than an athletic one.<sup>135</sup> Other member institutions, outraged by the decision, accused the NCAA of hypocrisy and a self–serving agenda.<sup>136</sup> Researchers who have analyzed the NCAA’s adjudication over the past couple of decades say the lack of consistency not only harms the integrity of college sports, but it also harms the NCAA’s image.<sup>137</sup>

When the NCAA does not punish a school for engaging in academic fraud, it puts athletes’ education at risk.<sup>138</sup> In a perfect world, student–athletes work hard in

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123. Eggers, *supra* note 117, at 2.

124. Durando, *supra* note 114.

125. Schiffer, *supra* note 47.

126. *Id.*

127. Niesen, *supra* note 80.

128. Terada, *supra* note 3.

129. Dennis Dodd, *Missouri Football in Limbo as Program Waits for NCAA to Rule on its Bowl Ban Appeal*, CBS SPORTS (Oct. 15, 2019), <https://www.cbssports.com/college-football/news/missouri-football-in-limbo-as-program-waits-for-ncaa-to-rule-on-its-bowl-ban-appeal/>.

130. *See generally* Ridpath, *supra* note 1.

131. Dennie, *supra* note 4, at 147.

132. *Id.* at 163.

133. Gregory, *supra* note 75.

134. Ridpath, *supra* note 1, at 76, 96.

135. *Id.* at 98.

136. Gregory, *supra* note 75; Ridpath, *supra* note 1, at 96.

137. Ganim, *supra* note 81.

138. Gregory, *supra* note 75.

the classroom as well as on the field, and they receive an education in return.<sup>139</sup> When education is not taken seriously, as in the case of sham classes at UNC, student-athletes may graduate with an inadequate education in spite of all the work they have put in.<sup>140</sup> On the other hand, for those schools that are harshly punished, sanctions can keep athletes from competing and, consequently, put students' future athletic careers in jeopardy.<sup>141</sup>

## V. ARBITRATION CAN IMPROVE THE SYSTEM

NCAA member institutions and the coaches, administrators, and student-athletes involved could benefit greatly from a more predictable, consistently-applied system.<sup>142</sup> The current process is full of uncertainty and poses great risks both for institutions that choose to self-report, as did the University of Missouri, and those that do not, like UNC.<sup>143</sup> The NCAA has undeniably struggled to balance the specific needs and expectations of different institutions with the responsibility of implementing fair policy across the board.<sup>144</sup> At this point in time, the NCAA is often criticized for falling short with regard to both of those competing responsibilities.<sup>145</sup> Alternative dispute resolution ("ADR"), specifically arbitration, can address the NCAA's current problems and elevate the system into one that is more balanced and respected.

### A. The Value of ADR

ADR, in general, could solve many of the problems posed by the current NCAA process. ADR places responsibility on the parties involved to come face-to-face with the reality of the sanctioning process.<sup>146</sup> For an offending institution, it creates an opportunity for administrators, coaches, and athletes to recognize and accept responsibility for the harm caused.<sup>147</sup> ADR methods bestow upon the parties the power and authority to help decide what the final punishments will be.<sup>148</sup> If any number of ADR processes followed self-reporting, relevant actors would have a real incentive to come forward: the chance to be heard and understood.<sup>149</sup> In addition, the COI could listen to individuals and assess the situation instead of blindly searching for the mitigating factors at play. When the selected ADR process came to a close, the outcry and criticism for lack of due process and fair decision-making would be dissipated by the COI's opportunity to help every person involved

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139. *Id.*

140. *Id.*

141. Niesen, *supra* note 80.

142. See Nancy Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 660 (2004).

143. Schiffer, *supra* note 47.

144. Ridpath, *supra* note 1, at 95.

145. Gregory, *supra* note 75.

146. Welsh, *supra* note 143, at 577.

147. *Id.* at 581.

148. Dennie, *supra* note 4, at 166.

149. Welsh, *supra* note 143, at 581.

understand and accept the policy that must be applied.<sup>150</sup> ADR opportunities could prevent repeat offenses that often occur in institutions today, as ADR methods have been shown to be a more satisfying way of settling disputes.<sup>151</sup> Mediation, for example, attempts to enable the parties to reach an agreement together by guiding them through information exchange, facilitating interest identification, and focusing on underlying issues in a confidential setting.<sup>152</sup> Similarly, arbitration is known for its usefulness in resolving disputes between players, agents, and team management quickly with little-to-no publicity.<sup>153</sup> A drawn out decision-making process harms student-athletes, resulting in frustration and uncertainty during an already short competition season.<sup>154</sup> Even if traditional use of arbitration in NCAA disputes is not possible due to the lack of student-held rights, some methods used in arbitration could still be employed to make the infraction process more fair, consistent, and efficient.

### B. Arbitration as an Alternative

Arbitration has great potential in the context of collegiate sports, and it is already employed by Major League Baseball (“MLB”), the National Basketball Association (“NBA”), the National Football League (“NFL”), the National Hockey League (“NHL”), the Professional Golfing Association (“PGA”), and the United States Olympic Committee (“USOC”).<sup>155</sup> In fact, arbitration is the most dominant tribunal to resolve disputes in the professional sports industry.<sup>156</sup>

Arbitration among professional athletes started with players’ support of the system in regulating conflicts with their agents.<sup>157</sup> Now, multi-layered systems designed to address grievances are readily offered to players and their administrators as a means to resolve a wide range disputes.<sup>158</sup> Arbitrators have broad decision-making powers but typically do not challenge modern legal restraints. Thus, arbitrators constantly balance regulation enforcement and equitable remedy.<sup>159</sup> Given the widespread acceptance of this method of dispute resolution in the sports industry, it is a wonder that arbitration has not been employed in intercollegiate athletics. That said, the disparity most likely stems from the fact that student-athletes lack many of the legal rights that professional athletes enjoy.<sup>160</sup>

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150. *Id.*

151. Lederman, *supra* note 77; Welsh, *supra* note 143, at 581.

152. Welsh, *supra* note 143, at 581; Ruth Raisfeld, *How Mediation Works: A Guide to Effective Use of ADR*, 33 EMP. REL. L. J. 1, 3 (2007).

153. Jeffrey Meyer, *The NFLPA’s Arbitration Procedure: A Forum for Professional Football Players and Their Agents to Resolve Disputes*, 6 OHIO ST. J. ON DISP. RESOL. 107, 112 (1990).

154. Terada, *supra* note 3.

155. Dennie, *supra* note 4, at 148.

156. *Id.* at 147.

157. Meyer, *supra* note 154, at 107–08.

158. See Dennie, *supra* note 4, at 148.

159. Meyer, *supra* note 154, at 113.

160. The NCAA prohibits amateur athletes from considering professional sports with the assistance of an agent. NCAA, DIVISION I MANUAL § 12.3.2.1 (2019) (“A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer’s presence during such discussions is considered representation by an agent.”).

Even with student–athletes’ limited legal rights, some of arbitration’s features could be mirrored to make the infraction process more speedy and equal across institutions.<sup>161</sup> For example, replacing the COI with something akin to an arbitration panel represents a radical change that could elicit positive results.<sup>162</sup> Arbitration panels, comprised of appointed arbitrators well–versed in the industry, provide efficient, confidential dispute resolution services.<sup>163</sup> Under a panel procedure, disputes would be investigated by neutral arbitrators with experience in sports industry matters.<sup>164</sup> The exact form and features of such a change are uncertain, but the NCAA can—as a preliminary step—borrow methods from the professional sports industry to revitalize its current procedures.

In the National Hockey League, players may file appeals for penalties imposed on them for off–ice conduct.<sup>165</sup> An impartial arbitrator uses a standard of review based on whether the NHL commissioner’s penalty was supported by substantial evidence and was not unreasonable based on: (1) the facts and circumstances; (2) the proportion of the penalty to the offense; and (3) the interests of both the player and the NHL.<sup>166</sup> Presently, there are three primary arguments a school can make to appeal NCAA penalties, and none of them take into account the best interests of the athletes.<sup>167</sup> The interests of athletes, however, remain at stake. Often times, current athletes are punished for misconduct committed by athletes who competed for the school years before and under different coaching administrations.<sup>168</sup> The NCAA would do well to take student–athlete interests into account when making its decisions.

For professional golf, the PGA Tour Handbook states that an arbitration panel has forty–five days from the start of a dispute to conduct a hearing and fifteen days from the close of the evidence to render a written decision.<sup>169</sup> The University of Missouri’s appeal hearing was in mid–July.<sup>170</sup> The committee typically takes between four and eight weeks to issue a final decision, a timeframe that already extends far beyond that of professional sports arbitration panels.<sup>171</sup> Missouri awaited a decision until November, though the decision should have been announced, at the latest, by September.<sup>172</sup> The NCAA could benefit from implementing a hard deadline in its appeals process to alert all actors when they should be prepared for a decision. Dragging disputes through participating sports’ seasons when the athletes are unsure whether they will have a chance to compete in the post–season is frustrating and unnecessary.<sup>173</sup>

The U.S. Olympic Committee’s arbitration method is unique because it deals with amateurs and professionals alike.<sup>174</sup> The bylaws of the USOC set forth

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161. Dennie, *supra* note 4, at 162–63.

162. *Id.* at 168.

163. *Id.* at 147.

164. *Id.* at 163.

165. Collective Bargaining Agreement Between Nat’l Hockey League & Nat’l Players’ Ass’n, art. 18–A § 4 (Feb. 15, 2013), [http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL\\_NHLPA\\_2013\\_CBA.pdf](http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf).

166. *Id.*

167. Durando, *supra* note 114.

168. Schiffer, *supra* note 47.

169. PGA TOUR, ANTI–DOPING PROGRAM MANUAL 4, 15–17 (2018).

170. Dodd, *supra* note 130.

171. *Id.*

172. *Id.*; Terada, *supra* note 3.

173. Dodd, *supra* note 130.

174. Dennie, *supra* note 4, at 159–60.

regulations and penalties for violations.<sup>175</sup> If athletes are not satisfied with the suggested resolution to their complaints, they can file a claim with the American Arbitration Association.<sup>176</sup> The bylaws also provide a way to expedite the proceeding.<sup>177</sup> In this way, the USOC has come up with a grievance process involving arbitration that is accessible to amateur athletes.<sup>178</sup> The NCAA should act in accord with the USOC's process for resolving disputes.<sup>179</sup>

Replacing the COI with an arbitration panel would solve many of the above-listed problems with current NCAA procedures.<sup>180</sup> The NCAA's regulations and bylaws act as a type of contract between the parties, and they could easily incorporate an arbitration clause into the required agreement. When disputes arise, the NCAA could select neutral arbitrators for their panel from the American Arbitration Association, just like USOC,<sup>181</sup> while ensuring that those hearing the dispute possess detailed sports industry knowledge.<sup>182</sup> Arbitrators have the ability to issue subpoenas, so the dispute process could progress more quickly and allow greater access to witnesses and information.<sup>183</sup> Arbitration would also offer parties more due process by requiring both the NCAA and the member institution to respond to the arbitration panel acting as a higher body,<sup>184</sup> lessening the NCAA's concurrent power as the prosecution and jury.<sup>185</sup>

## VI. CONCLUSION

Competitive sports unavoidably cultivate an environment in which rule-breaking will occur. Academic fraud is a long-standing issue, but the NCAA has not handled it with fundamental fairness and efficiency. Employing ADR methods, like arbitration, allows for procedural justice through discussion and decision-making between all the parties.<sup>186</sup> Within this decision-making process, ADR, particularly arbitration, provides a unique opportunity for moral growth and transformation.<sup>187</sup> Professional sports administrations use arbitration because of its efficiency and confidentiality.<sup>188</sup> Overall, using arbitration in tandem with investigation and adjudication would likely mitigate some of the widespread frustration with the NCAA as an entity.<sup>189</sup> The NCAA should consider changing its model of dispute resolution to ensure due process, efficiency, and protection of athlete interests.

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175. U.S. Olympic Comm., *Bylaws* (2014), <http://www.teamusa.org/~media/TeamUSA/Documents/Legal/Governance/2013%20Q4Bylaws%20Revisions%20120613.pdf>.

176. *Id.* § 9.7.

177. *Id.*

178. Dennie, *supra* note 4, at 162.

179. *Id.* at 136.

180. *Id.* at 168.

181. *Id.*

182. *Id.*

183. UNIF. ARBITRATION ACT § 17(A) (2000), [http://www.uniformlaws.org/shared/docs/arbitration/arbitration\\_final\\_00.pdf](http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf) (Nat'l Conference of Comm'rs of Unif. State Laws).

184. Dennie, *supra* note 4, at 170.

185. Durando, *supra* note 114.

186. Welsh, *supra* note 140, at 580.

187. *Id.* at 586.

188. Dennie, *supra* note 4, at 147.

189. *Id.* at 173.