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## Penalty on the Field: Creating a NCAA Sexual Assault Policy

Trisha Ananiades

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# Articles

## PENALTY ON THE FIELD: CREATING A NCAA SEXUAL ASSAULT POLICY<sup>1</sup>

TRISHA ANANIADES\*

### I. INTRODUCTION

Between 2010 and 2011, there were three separate incidents of sexual assault at Marquette University, involving five student-athletes at the school.<sup>2</sup> In one case, a female student went to a party on October 30, 2010 at a dormitory where many athletes lived.<sup>3</sup> At the party, alcohol was served to the women and the victim heard one athlete say, “[w]e’re (going to have sex with) these bitches tonight.”<sup>4</sup> Later that evening, “one athlete trapped her in the bedroom . . . grabb[ed] her by the ears[,] and forc[ed] her to perform oral sex.”<sup>5</sup> She subsequently left the bedroom and was given more shots of alcohol by another athlete.<sup>6</sup> The victim “went [in]to a different bedroom with three other athletes” and one athlete slammed and locked the door in the face of the woman’s “friend who was worried about her safety.”<sup>7</sup> One athlete put his hand in her pants and the other “put her hand in his pants.”<sup>8</sup> The woman’s friend found someone to unlock the door and found the woman

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1. Although there can be several different gender combinations for sexual assault, the vast majority of sexual assaults committed are male aggressors and female victims. This is the assumption underlying the entire paper.

\* J.D. Candidate, May 2012, Harvard Law School; B.A., University of California Los Angeles, 2004. I would like to thank my husband Spyro for his love and support. I would also like to thank Baine Kerr and Diane Rosenfeld for all their help in learning about Title IX and sharing the dark side of collegiate athletics. Finally, thank you to all the courageous women who have come forward to share their stories of sexual assault by college athletes. Your strength is an inspiration.

2. See Ryan Haggerty et al., *One Woman’s Lonely Stand at Marquette: Student Breaks Silence About the Night She Says She Was Sexually Assaulted by Athletes, So Other Women Won’t Have to Feel They’re Alone*, CHI. TRIB., Oct. 28, 2011, at C1, available at [http://articles.chicagotribune.com/2011-10-28/sports/ct-met-marquette-sex-cases-20111028\\_1\\_athletes-campus-security-sexual-assault-policies](http://articles.chicagotribune.com/2011-10-28/sports/ct-met-marquette-sex-cases-20111028_1_athletes-campus-security-sexual-assault-policies) (describing sexual assault incidents at Marquette University).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

“slumped down in a chair with her pants undone and an athlete standing over her.”<sup>9</sup>

On October 31, the coaches and athletes met shortly after she made her allegations of sexual assault, which, according to prosecutors, gave each athlete the opportunity “to compare stories” before being independently questioned by detectives.<sup>10</sup> Each athlete was punished for breaking the student code of conduct and team rules, but none was barred from competition due to the allegations.<sup>11</sup> The university administrative hearings found three of the student-athletes “responsible for ‘harassment’” and a fourth was found “responsible for ‘sexual assault’”<sup>12</sup> On appeal, this finding was reduced to harassment. The misconduct on the part of the athletic department led to the resignation of the athletic director and caused Marquette to revamp its system for when student-athletes are accused of a crime.<sup>13</sup> The school stated that all athletes involved were punished under the student code of conduct, but would not disclose the punishment the student-athletes received.<sup>14</sup> This is just one of the many examples of the types of sexual assault that occurs on college campuses every year.<sup>15</sup>

With the promulgation of the “Dear Colleague Letter” from the Department of Education Office of Civil Rights, more guidance has been given to universities about how they must handle sexual assault allegations.<sup>16</sup> Explicit in the letter was that the regulations applied “to all students, including athletes.”<sup>17</sup> There is no requirement, however, as to the punishment for a student-athlete who is

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *See id.* (discussing response of director and university to allegations); *see also Marquette Names Williams New AD*, *SI.COM* (Dec. 6, 2011, 12:34 AM), <http://sportsillustrated.cnn.com/2011/basketball/ncaa/12/06/marquette.williams.ap/index.html> (explaining university decision to name new vice president and athletic director).

14. *See Marquette Response to Allegations Eyed*, *ESPN* (Nov. 11, 2011, 1:00 PM), [http://espn.go.com/college-sports/story/\\_/id/7220087/marquette-golden-eagles-feds-review-response-sex-assault-allegations](http://espn.go.com/college-sports/story/_/id/7220087/marquette-golden-eagles-feds-review-response-sex-assault-allegations) (stating that Interim Athletic Director Mike Broecker did not reveal punishment distributed).

15. For another example of a sexual assault complaint against a collegiate student-athlete, see *infra* notes 21-27 and accompanying text.

16. *See Dear Colleague Letter*, *DEP'T OF EDUC. OFFICE OF CIVIL RIGHTS*, 2 (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (outlining procedures to be taken by universities in event of sexual assault).

17. *Id.* at 8 n.22.

found responsible for sexual assault.<sup>18</sup> Disciplinary action can be a minor punishment.<sup>19</sup> In addition, discipline can also be avoided if the student-athlete decides to transfer to another school.<sup>20</sup>

In April 2002, Colorado State University (“CSU”) freshman linebacker Frostee Rucker was arrested on charges of sexual assault of a female acquaintance and indecent exposure to another female.<sup>21</sup> Rucker was subsequently suspended from the football team.<sup>22</sup> Ultimately, Rucker pled guilty to a reduced charge of harassment and was ordered to serve a one-year deferred sentence.<sup>23</sup> A concurrent university judicial investigation resulted in Rucker’s expulsion from CSU.<sup>24</sup> Instead of appealing the expulsion, Rucker decided to transfer, and ended up at the University of Southern California, playing on their football team.<sup>25</sup> In effect, Rucker was never punished; he largely escaped the stigma of his criminal behaviors and was still able to play college football.<sup>26</sup> He went on to a successful college career and now plays in the National Football League.<sup>27</sup>

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18. *See id.* at 8 (refraining from outlining special disciplinary measures for student-athletes). *But see id.* at 8 n.22 (“If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures.”).

19. For a further discussion of the player charged with sexual assault only receiving suspension as punishment, see *infra* notes 21-23 and accompanying text.

20. For a further example of student-athletes escaping punishment for sexual assault by transferring schools, see *infra* notes 21-26 and accompanying text.

21. *See* Natalie Meisler, *Rams’ Rucker Arrested on Sexual Assault Charges*, DENVER POST, Apr. 21, 2002, at C-24 (reporting sexual assault at Colorado State University). Although this occurred prior to the promulgation of the “Dear Colleague” letter, by all accounts, the university handled the matter in accordance with the requirements set forth under the letter.

22. *See* Natalie Meisler, *Justin Gallimore to Cards*, DENVER POST, Apr. 23, 2002, at D-07 (discussing Rucker’s suspension).

23. *See* Steve Springer et al., *Rucker Is Charged with Battery*, L.A. TIMES, June 22, 2006, at D9, available at <http://articles.latimes.com/2006/jun/22/sports/sp-news-wire22> (noting that Rucker was charged with sexual assault and indecent exposure in 2002 and “accepted one-year deferred sentence” on harassment charge).

24. *See* Natalie Meisler, *Lubick Can’t Tap Broncos for Ideas: CSU’s Early Game Scrambles Plans*, DENVER POST, July 25, 2002, at D-01 (noting Rucker’s expulsion).

25. *See* Gary Klein, *USC Report: Matchup Has Extra Meaning for Rucker*, L.A. TIMES, Sept. 10, 2004, at D-6 (discussing Rucker’s transfer from CSU); *see also* Meisler, *supra* note 24 (noting Rucker’s transfer to University of Southern California).

26. *See* Greg, *The Horrible Tale of Frostee Rucker*, DELENDA EST CARTHAGO (July 7, 2006), <http://delendaestcarthago.blogspot.com/2006/07/horrible-tale-of-frostee-rucker.html>, (“Frostee Rucker will probably never pay for what he’s done, as long as he can play football.”).

27. *See* NATIONAL FOOTBALL LEAGUE, <http://www.nfl.com/player/frostee-rucker/2506908/profile> (last visited Apr. 5, 2012) (listing Rucker as defensive end for Cincinnati Bengals).

The National Collegiate Athletic Association (“NCAA”) details in the NCAA Constitution and Bylaws (as part of the NCAA Division I Manual) the responsibilities of universities in dealing with student-athletes.<sup>28</sup> These duties include those that regulate the off-field conduct of the student-athletes, providing for student-athlete welfare (including protecting the health of athletes and providing them with a safe environment), and setting academic standards for student-athletes.<sup>29</sup> Sexual assault by male student-athletes against women is not a new phenomenon on college campuses, but the NCAA does not currently have a policy to revoke a student-athlete’s eligibility for committing a sex crime. Disciplinary decisions are left up to member institutions, which can be problematic because schools are self-interested parties.<sup>30</sup> In fact, female victims often have a difficult time dealing with university administrators when they try to press charges against male student-athlete perpetrators.<sup>31</sup> Female victims of student-athletes also have an additional burden because the athletes are well known on campus and often have the support of current students, fans, and the community.

This article argues that the NCAA should adopt a policy about sexual assault consistent with its responsibilities set forth in the NCAA Manual to ensure the health and safety of student-athletes, as well as the espoused principles of intercollegiate athletics.<sup>32</sup> Furthermore, the NCAA is better equipped to implement consistent punishment for student-athletes, as it is a national body that is more

28. See generally 2009-2010 NCAA Division I Manual, available at <http://www.ncaapublications.com/productdownloads/D110.pdf> [hereinafter NCAA Manual] (containing comprehensive list of guidelines governing NCAA).

29. See *id.* at art. 2.2.3 (“It is the responsibility of each member institution to protect the health of and provide a safe environment for each of its participating student-athletes.”); *id.* at art. 2.5 (setting forth educational mission).

30. See *Bloom v. NCAA*, 93 P.3d 621 (Colo. Ct. App. 2004) (granting student-athletes standing to sue NCAA as third party beneficiaries to agreements between universities and NCAA). The grant of this right implicitly recognized that the interests of student-athletes and universities could be misaligned because of the commercialism of college athletics. Accord Joel Eckert, *Student-Athlete Contract Rights in the Aftermath of Bloom v. NCAA*, 59 VAND. L. REV. 905, 907 (2006) (discussing the outcome of *Bloom* decision).

31. See Merrill Melnick, *Male Athletes and Sexual Assault*, 63 J. PHYSICAL EDUC., RECREATION & DANCE 32, 34 (1992) (describing difficulties facing female sexual assault victims). Whether or not universities actually cater to student-athletes, at a minimum, that is the perception of students. In the wake of the University of Colorado sexual assault scandal, student MacKenzie Rhodes said, “I think any university is going to cater to people who are bringing in that much money.” John Ingold et al., *Gang Rape Alleged at CU*, DENVER POST, Dec. 14, 2001, at A-01.

32. See NCAA Manual, art. 21.2.2.2 at 331 (listing enhancement of student athletes’ health and safety as primary duty of Committee on Competitive Safeguards and Medical Aspects of Sports).

disinterested than member institutions.<sup>33</sup> In addition, the NCAA has leverage in the form of financial benefits offered to member institutions to combat the real or perceived problem of student-athlete preference in disciplinary decisions.<sup>34</sup> Because this rule would fall within the scope of the NCAA's authority, it should withstand judicial scrutiny if challenged in court.<sup>35</sup>

## II. STUDENT-ATHLETES AND SEXUAL ASSAULT

The Department of Justice Campus Sexual Assault Study reports that one in five women have experienced an attempted or completed sexual assault during college.<sup>36</sup> Research suggests that male student-athletes have a higher tendency to commit violent crimes than do non-athlete peers. Critics argue that athletes as a population do not commit more than their proportional share of sexual assault and that it is media coverage of athletes' lives and sexual assault cases that gives a distorted impression of athlete culpability.<sup>37</sup>

Yet, numerous studies disprove that claim. Researchers from the University of Illinois found that male student athletes, on average, commit more sexual assaults than the general male population of a university.<sup>38</sup> Men on sports teams or clubs on campus comprised less than 2% of the total male population but made up 22.6% of sexual assault perpetrators.<sup>39</sup> A 1993 study conducted by Northeastern University and the University of Massachusetts reviewed 107 cases of sexual assault reported at thirty Division I schools between 1991-1993, concluding that male student-athletes, compared to the rest of the male student population, are responsible for a significantly higher percentage of the sexual assaults reported to judicial affairs on the campuses of Division I

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33. See *id.* at art. 3.2.5.1 at 21 (explaining that NCAA already retains power to discipline member institutions).

34. For further discussion on financial incentives, see *infra* Part III.B.

35. For further discussion on judicial scrutiny, see *infra* Part IV.

36. See Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study*, NAT'L INST. OF JUST., Dec. 2007, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (documenting extent of sexual assault problem on college campuses).

37. See CARYN E. NEUMANN, *SEXUAL CRIME: A REFERENCE HANDBOOK* 38 (2010) (citing former University of Arkansas Athletic Director Tom Jackson, who said "his research did not indicate that athletes commit a disproportionate number of sexual assaults").

38. Mary Pat Frintner & Laurina Rubinson, *Acquaintance Rape: The Influence of Alcohol, Fraternity Membership, and Sports Team Membership*, 19 J. SEX EDUC. & THERAPY 272, 280-81 (1993).

39. *Id.* at 280.

institutions.<sup>40</sup> Although male student-athletes made up only 3.3% of the collegiate population at those schools, they represented 19% of the alleged sexual assault perpetrators in judicial affairs records.<sup>41</sup> When the study included alleged domestic violence along with sexual assault allegations, male student-athletes comprised 35% of the alleged perpetrators.<sup>42</sup> Although this study's data is up to twenty years old, more recent studies support its findings.

A September 1998 USA Today study found that more than 175 athletes were arrested for criminal activity at the 112 Division I schools between 1997 and 1998.<sup>43</sup> The majority of the crimes were reported as assault, sexual assault, or another violent crime.<sup>44</sup> The study also found that seventy football players at universities having a nationally ranked football team at the time had been charged with some crime that year.<sup>45</sup> One example cited was Cecil Collins, a football player at Louisiana State University ("LSU") who was accused of breaking into two apartments and fondling women.<sup>46</sup> Upon his dismissal from the LSU football team, he transferred to McNeese State University and was then dismissed from that team because he failed a court-administered drug test.<sup>47</sup> Another researcher found that twenty-two of the 125 publicly reported arrests of college or professional athletes between January and September 2010 were for crimes against women.<sup>48</sup>

A subsequent six-month investigation on college athletics and crime by CBS and Sports Illustrated also found sobering results.<sup>49</sup> The news outlets conducted exhaustive criminal background checks on every player on the opening-day rosters of Sports Illustrated's 2010 preseason "Top 25" college football teams—2,837

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40. Todd Crosset et al., *Male Student-Athletes and Violence Against Women: A Survey of Campus Judicial Affairs Offices*, 2 J. VIOLENCE AGAINST WOMEN 163, 173 (1996).

41. *Id.* at 174.

42. *Id.* at 171.

43. Steve Wieberg, *More Schools Laying Down the Law*, USA TODAY, Sept. 18, 1998, at 17C.

44. *Id.*

45. *Id.*

46. *Id.*

47. *See id.* (illustrating that perhaps the problem has shifted from one of university enforcement of sexual assault policies to one of consistently disciplining student-athletes and closing the loophole so that student-athletes do have to bear some form of punishment for their actions).

48. Jeff Benedict, *An Alarming Number of College Athletes Charged with Serious Crime*, SI.COM (Sept. 8, 2010), [http://sportsillustrated.cnn.com/2010/writers/jeff\\_benedict/09/08/athletes.crime/index.html#ixzz0yx8IPtqi](http://sportsillustrated.cnn.com/2010/writers/jeff_benedict/09/08/athletes.crime/index.html#ixzz0yx8IPtqi).

49. *See id.* (stating major results of investigation).



players in total.<sup>50</sup> On those teams, more than 200 players were either arrested or cited by the police 277 times.<sup>51</sup> Nearly forty percent of those offenses were serious crimes (approximately 110 offenses), including twenty-five arrests for assault and battery, robbery, domestic violence, and sex crimes (accounting for approximately nine percent of arrests).<sup>52</sup> This study only looked at reports made to police and does not account for reports made to university judicial affairs offices where there could have been additional cases.<sup>53</sup>

There have been several theories posited on the relationship between student-athletes and sexual violence. One theory advanced by scholars is the idea of “macho groupthink” within locker rooms and on the field spilling into the athletes’ home lives.<sup>54</sup> Melnick posited that “aggression on the playing field, sexist language and attitudes used in the locker room and an inordinate need to prove one’s maleness can combine in complex ways to predispose some male athletes towards off-the-field hostility.”<sup>55</sup> Others have found that male membership groups such as athletic organizations—particularly those thought to be prestigious—foster rape-supportive beliefs.<sup>56</sup> Perhaps surprisingly, athletes in contact sports and non-contact sports are equally likely to hold these beliefs.<sup>57</sup>

### III. THE MODERN NCAA

The NCAA is a voluntary, unincorporated administrative agency that organizes the athletic programs of many colleges and

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50. *Id.*

51. *Id.*

52. *Id.*

53. *See id.* (recounting process of searching names and vital information at courthouses and law enforcement agencies, but not university records, in seventeen states).

54. *See id.* at 61 (acknowledging belief that athletic subculture may be significant contributor to athlete’s greater propensity to engage in violent sexual activity).

55. Melnick, *supra* note 31, at 33.

56. *See also* Scot B. Boeringer, *Associations of Rape-Supportive Attitudes with Fraternal and Athletic Participation*, 5 VIOLENCE AGAINST WOMEN 81, 85-86 (1999). Athletes responded more positively to 56% of the rape-supportive statements such as “[w]omen like to be physically ‘roughed up’” and “[it’s] [w]omen’s own fault if partners force sex on them” in the study than the control group, which responded positively to 8% of the statements. *Id.*

57. *See* Dave Smith & Sally Stewart, *Sexual Aggression and Sports Participation*, 26 J. SPORT BEHAVIOR 384, 392 (2003) (finding that win-oriented attitudes found in competitive athletes accounts for sexually aggressive behavior, regardless of participation in any particular type of sport).

universities in the United States.<sup>58</sup> It was originally formed in order to establish safety standards for football.<sup>59</sup> Although the NCAA still promulgates many rules on safety standards for all athletes, it has evolved into a multi-billion dollar organization, with the primary focus on Division I football and basketball.<sup>60</sup>

#### A. NCAA Structure and Enforcement Procedures

There are currently 1,066 active member schools—broken into three different divisions—and over 1,200 member institutions in the NCAA.<sup>61</sup> Upon admission to the NCAA, the member school agrees to follow the NCAA Manual and other legislation promulgated by the NCAA.<sup>62</sup> Some of the stated purposes of the NCAA include upholding the principle of institutional control of, and responsibility for, intercollegiate sports consistent with the obligations under the Manual; legislating upon any subject of general concern to members related to the administration of intercollegiate athletics; and student-athlete health and well-being.<sup>63</sup> The primary con-

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58. See *NCAA v. Miller*, 10 F.3d 633, 635 (9th Cir. 1993) (comprising 1,056 members made up of colleges, universities, and other educational institutions in each of fifty states).

59. See *About the NCAA: History*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history> (last visited Apr. 5, 2012) (recognizing dangerous nature of football at time, including gang tackling, that resulted in injuries and death). Considering the poor conditions, people at the time believed that college football needed reform or to be abolished. See *id.* (outlining need for athletic reform in colleges and universities).

60. See *Health and Safety*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/Health+and+Safety/index.html> (last visit Apr. 5, 2012) (listing safety policies and standards).

61. See *NCAA Members by Division*, NCAA, <http://web1.ncaa.org/onlineDir/exec/divisionListing> (last visit Apr. 5, 2012) (displaying schools in Division I, II, and III). The differences in divisions are based on the number of sports the school is required to sponsor for each gender, scheduling criteria for the caliber of opponents the teams must play, and financial aid requirements. See *Differences among the Three Divisions*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/Differences+Among+the+Divisions/> (last visited Apr. 5, 2012). Division I is further broken down into the Football Bowl Subdivision (formerly Division I-A) and the Football Championship Subdivision (formerly Division I-AA), based on minimum attendance rules. *Id.*

62. See NCAA MANUAL, *supra* note 28, at art. 3.2.1.2; see also *id.* at art. 1.3.2 (stating that member institutions “shall be obligated to apply and enforce this legislation . . .”).

63. See *id.* at art. 1.2(b); see also *id.* at art. 1.2(h); *id.* at art. 2.2. Article 2.2.2 sets forth the principle of Cultural Diversity and Gender Equity, which states, in part, that it is the responsibility of each member institution to establish and maintain an environment that values gender equity among its student-athletes. *Id.* In addition, Article 2.3.2 advances the statement that the NCAA should adopt legislation to enhance member institutions’ compliance with applicable gender equity laws. *Id.*

cerns of the NCAA are keeping the principles of amateurism in collegiate athletics and differentiating college athletics from professional sports.<sup>64</sup> To that end, the NCAA seeks to ensure that intercollegiate athletics are well-integrated into the general educational mission of member schools.<sup>65</sup>

In order to be eligible for intercollegiate athletic competition, student-athletes must meet a number of different NCAA requirements. In addition to academic requirements and other requirements that go toward preserving amateurism (e.g., preventing student-athletes from accepting endorsements), the NCAA has also promulgated rules on ethical conduct that regulate student-athletes' off-field behavior. Examples of regulated conduct include substance abuse and gambling.<sup>66</sup>

The NCAA also has a mechanism for investigating infractions by member institutions, including its students. For the NCAA's purposes, infractions committed by student-athletes are attributed to the member institution.<sup>67</sup> While the NCAA has the authority to sanction member institutions, it does not have the ability to sanction individual student-athletes; however, the NCAA may compel universities to sanction the student-athlete by revoking the athlete's eligibility.<sup>68</sup> The NCAA may initiate an investigative process when it

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64. *See id.* at art. 1.3.1 (stating that NCAA wants to create "clear line of demarcation between intercollegiate athletics and professional sports").

65. *Id.*

66. *See id.* at art. 10.2-10.3(d) (articulating punishment for administration aware of student athletes taking drugs or other banned substances). "[Student-athletes] shall not knowingly participate in sports wagering activities . . ." *Id.* at art. 10.2.1.1 at 47. Examples of sports wagering activities include Internet gambling; pools and fantasy leagues in which an entry fee is required and there is the opportunity to win a prize; or on any intercollegiate, amateur, or professional team or contest. *Id.* The prohibition on team competitions is limited to the sports in which the NCAA conducts a championship, plus the Division I Football Bowl Subdivision. This means that a student-athlete may not, for example, wager on a National Basketball Association game because the NCAA conducts a championship tournament in basketball. *Id.*; *see also Sports Wagering*, NCAA, <http://www.ncaa.org/wps/wcm/connect/89abb0004233bee4ae98afbb6e5d77b/Student+Athlete+Wagering+FAQS+Final.pdf?MOD=AJPERES&CACHEID=89abb0004233bee4ae98afbb6e5d77b> (last visited Apr. 5, 2012) (answering frequently asked questions on the NCAA's gambling policy for players).

67. *See id.* at art. 32 (describing enforcement policies and procedures).

68. *See* PAUL R. LAWRENCE, UNSPORTSMANLIKE CONDUCT: THE NCAA AND THE BUSINESS OF COLLEGE FOOTBALL 138 (1987) ("If a student-athlete is ineligible under the provisions of the constitution, bylaws or other regulations of the Association, the institution shall be obligated to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition."); *See also* NCAA MANUAL, *supra* note 28, at art. 14.11.1 ("If a student-athlete is ineligible under the provisions of the constitution, bylaws or other regulations of the Association, the institution shall be obligated to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition.").

receives information that an institution “is, has been, or may have been” in violation of NCAA rules, but encourages schools to self-disclose rules violations by considering such self-disclosure to be a mitigating factor in determining the penalty to be levied against a school.<sup>69</sup> Student-athletes in violation of eligibility provisions of the NCAA Manual are ineligible for intercollegiate competition, subject to appeal to the Committee on Student-Athlete Reinstatement for restoration of eligibility.<sup>70</sup> The revocation of eligibility forces the member institution to hold the student-athlete out from intercollegiate competition or risk heavy sanctions for not just the athletic team on which the student-athlete plays but the entire athletic department of the university.<sup>71</sup>

### B. NCAA Financial Strength

Although preserving the principles of amateurism is one of the main goals of the NCAA, college athletics is a huge business.<sup>72</sup> The NCAA holds media rights contracts with various networks for the coverage of championships, including football, basketball, and baseball.<sup>73</sup> For example, the media rights agreement with CBS and Turner Broadcasting for the Division I basketball tournament alone is worth \$10.8 billion, with an estimated \$700 million coming from the 2011 tournament.<sup>74</sup> The revenue streams from all championships comprise over 90% of the NCAA’s operating budget.<sup>75</sup> The NCAA then distributes the majority of the money to member institutions; approximately 60% of all NCAA revenue is distributed to

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69. See NCAA MANUAL, *supra* note 28, at art. 32.2.1.1. *Id.* at art. 32.2.1.2.

70. See *id.* at art. 10.4 (discussing disciplinary actions against students who violate NCAA regulations).

71. See *id.* at art. 19.5.2.2 (describing penalties against administration for condoning student-athlete violations).

72. See *Remaining Eligible*, NCAA (last updated July 20, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Eligibility/Remaining+Eligible/Amateurism> (“Amateur competition is a bedrock principle of college athletics and the NCAA.”).

73. See NCAA, *ESPN Agree to New Deal*, ESPN (last updated Dec. 15, 2011), [http://espn.go.com/college-sports/story/\\_/id/7357065/ncaa-espn-agree-tv-deal-2023-24](http://espn.go.com/college-sports/story/_/id/7357065/ncaa-espn-agree-tv-deal-2023-24) (discussing agreement between NCAA and ESPN for broadcasting championships in various sports through 2023-24 school year).

74. See *Finances – Revenue*, NCAA (last updated Jan. 17, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Revenue> (listing financial breakdown of NCAA revenue); see also Joe Flint, *CBS Cuts in Turner on NCAA Basketball Tournament*, L.A. TIMES, Apr. 23, 2010, at B3, available at <http://articles.latimes.com/2010/apr/23/business/la-fi-ct-turner-20100423> (discussing broadcast deal between CBS and NCAA for college basketball tournament).

75. See *Finances – Revenue*, *supra* note 74 (listing financial breakdown of NCAA revenue).

Division I members via their conferences (e.g., Big 10, Pacific 12).<sup>76</sup> For 2010-2011 school year, the total revenue distributed to Division I members amounted to more than \$478 million.<sup>77</sup>

Student-athletes, particularly basketball and football players, play a crucial role in revenue generation for schools through ticket sales and contracts, and indirectly through increased institutional giving and exposure.<sup>78</sup> Donations and applications to universities increase dramatically directly after basketball and football success.<sup>79</sup>

#### IV. WITHSTANDING LEGAL CHALLENGES

The Supreme Court previously held that the NCAA is not a state actor because the multitude of institutions that affect NCAA policy are from different states and do not act under the color of any one state's laws.<sup>80</sup> In addition, federal laws such as Title IX do not apply to the NCAA.<sup>81</sup> Therefore, NCAA action is equivalent to private conduct and courts will not apply the Fourteenth Amend-

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76. See *Finances – Distributions*, NCAA (last updated Jan. 17, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Finances+Distributions> (describing distribution of revenue to Division I membership).

77. See *id.* (noting amount of revenue distributed during 2010-2011 year). This money does not include funding received by universities invited to play in the Bowl Championship Series (“BCS”) football games, the most prestigious post-season games in college football. See *Revenue Distribution Data Released*, Bowl Championship Series (last updated Jan. 25, 2011), <http://www.bcsfootball.org/news/story?id=6057935> (discussing BCS net revenue from 2010-2011 championship games). In the 2010-2011 BCS games, the automatic qualifier conferences received at least \$21.2 million each. See *id.* (listing net distributions made to various conferences).

78. See SCOTT R. ROSNER & KENNETH L. SHROPSHIRE, *THE BUSINESS OF SPORTS* 544 (2004) (“Athletics is an integral source of name exposure for almost every university and often the only frequent source of exposure for schools possessing little in the way of academic reputation.”).

79. See J. Brad Reich, *All the [Athletes] are Equal, But Some are More Equal Than Others: An Objective Evaluation of Title IX's Past, Present, and Recommendations for its Future*, 108 PENN ST. L. REV 525, 554 (2003) (citing increase in donations and applications at Gonzaga University after success of its basketball team in NCAA tournament); see also Robert Baade & Jeffery Sundberg, *Fourth Down and Gold to Go? Assessing the Link Between Athletics and Alumni Giving*, 77 SOC. SCI. Q. 789, 800 (1996) (finding positive relationship between university donations and postseason appearances). Cf. Brad R. Humphreys & Michael Mondello, *Intercollegiate Athletic Success and Donations at NCAA Division I Institutions*, 21 J. SPORT MGMT. (Apr. 2007) (concluding that postseason success in football and basketball leads to increased gifts restricted for use of athletic department for some schools, but no increase in unrestricted giving to university).

80. See *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988) (ruling that NCAA is private entity).

81. See *NCAA v. Smith*, 525 U.S. 459, 468-70 (1999) (holding that receipt of federal funds was not enough to “subject the NCAA to suit under Title IX”).

ment's Due Process Clause to the Association's actions.<sup>82</sup> As a result, student-athletes have had very few successes in bringing claims against the NCAA.<sup>83</sup> Student-athletes may, however, challenge an NCAA rule on other grounds.<sup>84</sup>

In *Brennan v. Board of Trustees for the University of Louisiana Systems*,<sup>85</sup> the court held that the NCAA's drug testing policy, as applied by individual member institutions, did not violate athletes' privacy interests.<sup>86</sup> The court noted three reasons for its finding.<sup>87</sup> First, student-athletes already have diminished expectations of privacy because of the nature of intercollegiate athletics.<sup>88</sup> This requires the routine sharing of personal information with coaches and trainers.<sup>89</sup> Second, when a school provides advance notice of testing and the opportunity to consent to such testing, a student-athlete's reasonable expectation of privacy is further diminished.<sup>90</sup> Finally, the court found that the NCAA had a legitimate, well-founded interest in protecting the integrity of NCAA athletics and in protecting the health and safety of student-athletes.<sup>91</sup>

In *Bloom v. NCAA*,<sup>92</sup> the appeals court upheld the NCAA bylaw prohibiting student-athletes from receiving endorsements and dismissed a claim by Bloom that the rule as applied to him was arbitrary and capricious.<sup>93</sup> The trial court found that the NCAA consistently applied the rule to other athletes, which was affirmed

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82. See *Tarkanian*, 488 U.S. 179 at 191, 195-97 (holding that protections of Fourteenth Amendment do not apply to private conduct and because NCAA's conduct cannot be fairly attributable to any one state, it amounts to such private conduct).

83. See Eckert, *supra* note 30, at 905, 912 (2006) (discussing difficulties of student-athletes being able to bring successful claims against NCAA due to Court's finding that NCAA is not state actor).

84. See e.g., *Brennan v. Bd. Of Trs. for Univ. of La. Sys.*, 691 So. 2d 324 328-30 (La. Ct. App. 1997) (challenging NCAA action under constitutional and tort theories); *Bloom v. NCAA*, 93 P.3d 621, 625-27 (Colo. Ct. App. 2004) (challenging NCAA action as arbitrary and capricious as a third party beneficiary (athlete) to the contract between the NCAA and a member institution).

85. 691 So. 2d at 329.

86. See *id.* at 328-29 (discussing lowered expectation of privacy in student-athlete context).

87. *Id.* at 329-30.

88. *Id.*

89. See *id.* (noting that frequent discussion regarding private information with coaches "diminish[es] expectation of privacy").

90. *Id.*

91. *Id.*

92. 93 P.3d 621 (Colo. Ct. App. 2004).

93. See *id.* at 622-23 (ruling that Bloom could not accept endorsement deals while remaining eligible to play college football).

in the appellate court's decision.<sup>94</sup> The standard of analysis to find if a rule is arbitrary and capricious is that the rule in question must be manifestly arbitrary, unreasonable, or unfair.<sup>95</sup> Because courts pay deference to NCAA bylaws, an NCAA rule implementing a sexual assault policy is likely to withstand judicial scrutiny.<sup>96</sup>

## V. A NEW SEXUAL ASSAULT POLICY

The NCAA should promulgate a new eligibility rule in order to stop sexual violence. The new rule would simply state "a student-athlete is ineligible to play in any intercollegiate athletic competition if the student has been found responsible for the sexual assault of another." This rule would allow a victim to bring charges against an offending student-athlete through university hearings or through the criminal justice system, allowing for flexibility.

### A. Eligibility and Enforcement

Enforcement of the rule would be similar to enforcement of any other NCAA eligibility rule. The victim must make a complaint to either the appropriate university personnel or to the police. During the investigation and adjudicatory process, the student-athlete would retain his eligibility to participate in intercollegiate athletics. If the student-athlete is found responsible at the university hearing or found guilty in court, the athlete is immediately ineligible to compete and loses all NCAA eligibility. As with other NCAA infractions resulting in a loss of eligibility, the student-athlete may appeal the decision.<sup>97</sup> If the university does not comply with the rule, a complaint could be filed by any party, which would give rise to an NCAA investigation. Penalties for the school would range from probation of the applicable sport team, to loss of scholarships used for student-athletes if the school was found as a repeat of-

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94. *Id.* at 627-28.

95. *See id.* at 623 (citing *Bd. of Cty Comm'rs v. Fixed Base Operators, Inc.*, 939 P.2d 464, 467 (Colo. App. 1997)).

96. *See NCAA v. Lasege*, 53 S.W.3d 77, 84 (Ky. 2001) (finding in favor of NCAA, recognizing that it is inappropriate for judicial entity to substitute its decision for that of NCAA in student-athlete eligibility matter); *see also Hall v. NCAA*, 985 F. Supp. 782 (N.D. Ill. 1997) (holding that NCAA's eligibility requirements were valid and that student-athlete failed to meet them, thereby making determination that student-athlete was ineligible not arbitrary).

97. *See NCAA MANUAL*, *supra* note 28, at art. 14.12.1 (discussing student-athlete appeals process).

fender of this rule, and up to a show-cause penalty on the high end for willful, wanton violations of the rule.<sup>98</sup>

### B. Making the Case For a New Rule

The general public is becoming tired of seeing stories of criminal athletes. An ESPN SportsZone poll found that 84% of the public believes that colleges should revoke the scholarship of a student-athlete who is convicted of a crime.<sup>99</sup> Some scholars have advocated for the NCAA to create an eligibility rule that would restrict a student-athlete's eligibility over allegations of sexual assault.<sup>100</sup> The rationale is that if student-athletes are permitted to play until the culmination of the adjudicatory process, this incentivizes schools to delay the process so the athlete will not be punished until his eligibility naturally expires.<sup>101</sup> That policy is not likely to succeed because, despite a relatively low false allegation rate, the fear of false allegations would doom support for such a policy.<sup>102</sup> Second, the promulgation of the "Dear Colleague" letter by the Department of Education's Office of Civil Rights ("OCR") now explicitly states that a school should complete an investigation on sexual assault within sixty days.<sup>103</sup> The schools should treat the athlete-perpetrators the same as any other male student perpetrator. Thus, the problem shifts from the length of time it takes a university to investigate to the problem of adequate punishment for perpetrators.

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98. For a more detailed description of the NCAA enforcement process, see *Investigations*, NCAA (last updated Oct. 17, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Process/>.

99. Jeffrey Isaac, *Professional Athletes and Violent Crime*, SAN DIEGO DAILY TRANSCRIPT (Aug. 1, 2006), [http://www.sddt.com/Commentary/article.cfm?Commentary\\_ID=28&SourceCode=20060801tbh](http://www.sddt.com/Commentary/article.cfm?Commentary_ID=28&SourceCode=20060801tbh) (detailing statistics for athletes who commit crimes).

100. See Deborah Reed, Note, *Where's the Penalty Flag? A Case 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) (noting that NCAA is most powerful organization in intercollegiate athletics, and therefore is proper authority to take action against male student-athletes who are violate with women); see also Christopher Flores, *When Athletes Are Accused*, CHRON. HIGHER EDUC., Apr. 19, 2002, at 43 (quoting Kathy Redmond of National Coalition Against Violent Athletes who said, "as soon as an allegation has been made, [athletes] should be suspended pending the outcome.").

101. Reed, *supra* note 100, at 56.

102. See SARAH McMAHON, *STUDENT-ATHLETES, RAPE-SUPPORTIVE CULTURE, AND SOCIAL CHANGE* 15 (2004), available at [http://sexualassault.rutgers.edu/pdfs/student-athletes\\_rape-supportive\\_culture\\_and\\_social\\_change.pdf](http://sexualassault.rutgers.edu/pdfs/student-athletes_rape-supportive_culture_and_social_change.pdf) (detailing deep fears student-athletes have of false accusations for sexual assault and rape).

103. DEPT. OF EDUC. OFFICE OF CIVIL RIGHTS *supra* note 16, at 12.



An NCAA sexual assault policy would not create an undue burden on student-athletes, nor on the NCAA. Rather, the policy simply would force student-athletes to be culpable for their behavior by closing the currently existing loophole and preventing student-athletes from transferring schools to continue playing their sport and would ensure a level of uniformity in disciplinary actions across all member institutions. As an eligibility rule, a student-athlete would retain the same rights that he would have for any other eligibility rule. If a student-athlete's eligibility were to be revoked subsequent to being found responsible for sexual assault, under the appropriate NCAA regulation, he would be permitted work with the university to submit an appeal.<sup>104</sup> NCAA policy also would provide the student-athlete with certain due process guarantees, such as timely process, representation of legal counsel during NCAA enforcement staff questioning, and a four-year statute of limitations on violations.<sup>105</sup>

Second, a sexual assault policy fits the stated principles of the NCAA of enhancing the position of athletics at universities, ethical conduct, and gender equity.<sup>106</sup> Critics of a sexual assault policy might argue that substance abuse and gambling policies regulate off-field conduct that is reasonably related to the stated mission and principles of the NCAA and that justifies the rule, whereas a sexual assault policy does not have the same relationship. This argument

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104. See NCAA MANUAL, *supra* note 28, at art. 19.6.4 (explaining that "if an institution concludes that continued application of the rule(s) would work an injustice on any student-athlete, an appeal shall be submitted to the Committee on Student-Athlete Reinstatement and promptly reviewed").

105. See *id.* at art. 32.3.2 ("The enforcement staff shall make reasonable efforts to process infractions matters in a timely manner."). "When an enforcement staff member conducts an interview that may develop information detrimental to the interests of the individual being questioned, that individual may be represented by legal counsel throughout the interview." *Id.* at art. 32.3.6. The NCAA Manual also mandates a four-year statute of limitations on violations involving student-athletes or institutions. See *id.* at art. 32.6.3 (citing four-year statute of limitations policy in NCAA Manual).

106. See *id.* at art. 1.3.1 ("A basic purpose of [the competitive athletics programs of member institutions] is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and . . . retain a clear line of demarcation between intercollegiate athletics and professional sports."). The Principle of Sportsmanship and Ethical Conduct standards for intercollegiate athletics promote the character development of student athletes. See *id.* at art. 2.4 (describing values and standards required by NCAA to "enhance the integrity of higher education and to promote civility in society, student-athletes, coaches, and all others associated with these athletics programs"). The NCAA Manual also addresses gender-equity. See *id.* at art. 2.3.2 ("The Association should not adopt legislation that would prevent member institutions from complying with applicable gender-equity laws, and should adopt legislation to enhance member institutions' compliance with applicable gender-equity laws.").

fails in several respects. First, the prohibition on gambling does not just encompass gambling on the student-athlete's own team or school, but a ban on gambling on all team sports.<sup>107</sup> This was done out of a concern that gambling threatens the well being of student-athletes and the integrity of intercollegiate athletic competitions.<sup>108</sup> Certainly the fact that student-athletes are a much higher risk in a university community to commit acts of sexual assault undermines the integrity of intercollegiate athletics and puts the well-being of at least female student-athletes at risk. Second, while a ban on performance-enhancing drugs would admittedly be reasonably related to the mission of amateur athletics competitions, the ban is extended to street drugs, which would not have positive effects on athlete performance.<sup>109</sup> Moreover, the ban extends to offseason when the student-athlete is not playing the sport, so there is no safety risk for the athlete in a game.<sup>110</sup>

## VI. CONCLUSION

The NCAA should promulgate this proposed eligibility rule to revoke a student-athlete's eligibility to compete in intercollegiate athletics if he is found responsible for committing sexual assault. The NCAA has the authority to create such a rule under its By-laws.<sup>111</sup> Moreover, as a national organization created to organize and conduct the affairs of collegiate athletics, the NCAA is uniquely well positioned to promulgate and enforce such a rule with consistency across all member institutions. Member institutions have disciplined their student-athletes at varying levels and the power the NCAA wields over schools will result in better enforcement of sexual assault policies and laws already currently in effect. It is imperative that something is done to combat the issue of student-athlete

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107. *See id.* at art. 10.3 (explaining "sports wagering activities" policy for staff members of institution's athletics department, non-athletics department staff members who have some responsibility in athletics department, student-athletes, and staff members of a conference office).

108. *See NCAA Behind The Blue Disk - Gambling on College Sports: What's the Big Deal?*, NCAA (Oct. 15, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Behind+the+Blue+Disk/Behind+the+Blue+Disk++Gambling+on+College+Sports> (explaining execution of NCAA's gambling policy and how NCAA defines gambling).

109. *See NCAA MANUAL*, *supra* note 28, at art. 31.2.3.4 (explaining NCAA's banned drug policy).

110. *See id.* at art. 10.2 (explaining procedural requirements where member institution's athletic department has knowledge of student-athlete's use of banned substance).

111. *See id.* at art. 5.3.2 (citing to NCAA's authority to adopt or amend legislation that will be included in bylaws if approved).

perpetrated sexual violence. The prevalence of incidents in the media has left a negative impression of athletes to the general public. As this could also affect the revenue earned by the NCAA for broadcast of championships, the NCAA itself has a financial interest in intervening.

Allowing student-athletes to transfer to other schools to avoid disciplinary measures sends a message to female students and to the general public that athletes are above the rules due to their status. Given the statistically significant number of student-athletes who perpetrate acts of sexual assault, this is a sports-related problem and there is not an organization better than the NCAA—a sports organization—to promulgate a rule to combat the issue.

