

Unsportsmanlike conduct, constitutional guarantees and the student-athlete: A policy recommendation

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Unsportslike conduct may be represented by a variety of different acts including arguing with the umpire, throwing a tennis racquet in disgust, spitting on a fan, or hitting an opposing player. As illustrated by the above scenarios, unsportslike behaviors vary in severity. Based in part upon NCAA and conference policies, some student-athletes, for example, face significant consequences such as losing the remainder of their eligibility for the particular academic year as a result of alleged unsportslike conduct ("Men's College Basketball: News," 1999). On the other hand, other student-athletes are subject to nominal consequences such as a limited practice and/or game suspension ("Athlete reprimanded in men's tennis for unsporting behavior," 1998). Similarly, some student-athletes receive extensive due process procedures while others receive minimal due process procedures. This paper examines the legality of eligibility denials based on unsportslike conduct and related due process concerns. Part I of this paper examines the definition and appeal processes for acts of unsportslike conduct as defined by the NCAA and select member conferences. Part II of this paper discusses the property right associated with athletic participation. Part III suggests that existing policies fail to provide adequate due process provisions. Part IV of this paper provides a recommended uniform unsportslike policy for adoption by the NCAA. Part V offers concluding comments.

I. Unsportslike Conduct and Policy Provisions

The NCAA adopted a Committee on Sportsmanship and Ethical Conduct in January, 1997; effective August, 1997 (NCAA Division I Manual, 21.1.10, 1998-1999). The 1998-1999 NCAA Manual (1998-1999, pp. 131-132) defines unethical conduct as consisting of, but not limited to, the following:

- a) Fraudulence in connection with entrance or placement examinations;
- b) Engaging in any athletics competition under an assumed name or with intent otherwise to deceive;
- c) Dishonesty in evading or violating NCAA regulations; or
- d) Knowingly furnishing the NCAA or the individual's institution false or misleading information concerning the student's involvement in or knowledge of matters relevant to a possible violation of NCAA regulations.

The manual makes no reference to sportsmanship or what qualifies as unsportslike conduct. As explained in the 1998-1999 Division I NCAA Manual, conferences may be members of the NCAA when agreeing to operate in "accordance with the constitution, bylaws and other legislation of the Association" (i.e., NCAA) (p. 14). Each conference member, in turn, operates by its own set of guidelines and policies. Member conference guidelines can be

stricter than NCAA guidelines. NCAA member conferences appear to address unsportslike conduct as it applies to the student-athlete on a continuum. Some member conferences are rather definitive regarding unsportslike conduct on behalf of the student-athlete while other conference handbooks fail to address the issue at all. The Big 12 and the Southeastern Conference (SEC) represent conferences that do not address unsportslike conduct as it applies to the student-athlete. For example, nowhere in the 1998-1999 Big 12 Conference Handbook is the issue of sportslike conduct addressed. Similarly, the SEC handbook does not address unsportslike conduct as it applies to the student-athlete (SEC Manual, 1998). Other conferences, like the Pac-10 Conference, address required student-athlete sportslike conduct in a vague and nebulous fashion. For example, the 1998-1999 Pac-10 Conference Handbook states (p. 61),

Student-athletes must honor the responsibilities which accompany the privilege of representing a Pac-10 institution by adhering to Conference and playing rules, and the Sportsmanship Statement. Student-athletes are expected to treat opponents with respect. They must be aware significant penalties will be applied for fighting, taunting an opponent, or other unethical conduct.

The Pac-10 Conference Handbook fails to identify exactly what types of activity or behaviors qualify as unsportslike conduct.

The Missouri Valley Conference (MVC), on the other hand, represents a conference that is much more definitive regarding unsportslike conduct. According to Section 7.3 of the 1998-1999 MVC Conference Manual (p. 17),

It shall be the responsibility of each member institution to ensure that all individuals employed by or directly associated with the athletics program of that institution, including its student-athletes, conduct themselves in a sportslike manner when representing their university, especially at intercollegiate athletic contests. Acts of unsportslike conduct shall include but not be limited to the following:

7.3.1.1 Striking or physically abusing an official,

opposing coach or player.

7.3.1.2 Intentionally inciting participants or spectators to violent or abusive action.

7.3.1.3. Using obscene gestures, profane or unduly provocative language or action toward officials, opponents or spectators.

7.3.1.4. Engaging in negative recruiting by making unduly derogatory statements about another university's personnel or athletic programs to a prospective student-athlete.

7.3.1.5 Being publicly and unduly critical, in the opinion of the Commissioner, of the Conference and its personnel or another member institution or its personnel.

7.3.1.6 Acting in an unsportslike manner not specifically proscribed.

The breadth of Section 7.3.1.6 (above) engulfs any type of conduct deemed to be "unsportslike" as defined by the Conference officials.

Similar to the NCAA, the appeal processes provided by member conferences remain arbitrary and elusive. As defined by the 1998-1999 MVC Manual (p. 17):

- **Penalty Procedure.** Whenever the Commissioner concludes, after a reasonable investigation, that unsportslike conduct has occurred, the Commissioner shall impose such penalty, as deemed appropriate, by first giving notice to the individual institution. Taking the circumstances into consideration, the Commissioner will then allow the involved institution a reasonable amount of time to take action of its own. (emphasis added)
- **Appeals Process.** An individual who or institution which feels that the penalty is inappropriate, either because the violation did not occur or because the penalty is excessive, may appeal to the Executive Committee by informing the Commissioner of the desire to appeal within forty-eight (48) hours of receipt of the penalty imposed by the Commissioner.
- **Appeals Hearing.** The Executive Committee shall conduct a prompt hearing affording the individual or institution the opportunity to be heard. The Executive Committee may reaffirm, set aside, reduce or increase the penalty as it deems appropriate, giving the individual or institution written

notice of its decision and its reasons. The decision of the Executive Committee shall be final and not subject to further appeal.

Similarly, the Pac-10 Conference empowers the Commissioner to impose a penalty for violations as deemed appropriate. As stated in the 1998-1999 Handbook (p. 58), “. . . the Commissioner is authorized to assess penalties including, but not limited to, probationary status and disqualification to coach, participate, or officiate in one or more contests, or other appropriate penalty.” The decision of the Commissioner can be appealed. In these circumstances, the Pac-10 Compliance and Enforcement Committee meets. As stated in the Pac-10 manual (p. 59),

Any appeal shall be based solely on the record, shall accept the factual findings of the Commissioner, and shall be devoted to a determination of whether the penalty in place is excessive, and, if so, what the appropriate penalty should be.

As apparent from the above, the manner in which penalties are assessed appears to be extremely subjective and the student-athlete appealing a penalty can face a rather subjective appeal process. For example, there is no known NCAA or member conference data base providing unsportslike behaviors and related ramifications that can be reviewed for purposes of uniformity and fairness. There is no stated requirement that either the Executive Committee or the Compliance and Enforcement Committee review past incidents within the existing conference and/or other conferences in an attempt to ensure fairness and uniformity of punishment (if any) being delivered. Consequently, one student-athlete may be subject to a severe penalty while another student-athlete whose behavior was of a similar degree of inappropriateness may be subject to a miniscule penalty by comparison. The authors of this paper suggest the adoption of a uniform sportslike policy that better provides for protection of student-athlete property rights while also ensuring procedural due process provisions for the student-athlete (see Part IV below). Prior to suggesting a uniform policy, it must first be established that a student-athlete possesses a constitutionally protected property right and that due process provisions are

inadequate.

II. The Property Right Associated with Athletic Participation

Much debate has ensued regarding the property right of an intercollegiate athlete. Due to the expanding professional athletic-related opportunities awaiting student-athletes, it seems apparent that the issue regarding the student-athlete's possession of a property right in athletic sport participation is ripe for reconsideration. For example, the number of professional career opportunities within the more common professional sport leagues are abundant. As indicated by Masterallexis (1998), there are 792 professional sport teams in the United States and Canada in baseball/softball, basketball, football, ice hockey, soccer, and lacrosse. Baseball's minor leagues (AAA, AA, A, and Rookie) alone have 180 teams that provide career opportunities for the student-athlete playing baseball. In addition to the traditional sport participation opportunities, student-athletes can also participate in a variety of more recently developed professional sport opportunities. Helitzer (1996) lists 43 sports in which new professional opportunities have developed in recent years. Global sport participation career opportunities also exist in the sports of “Australian Rules and American Football, rugby and rugby union, cricket, baseball, basketball, American football, soccer, hockey, and volleyball” (Masterallexis, 1998, p. 276). According to Helitzer (1996, p. 9), “more than 20 new professional and amateur sports leagues, tournament or conferences are established every year” (emphasis added). As is well known, university athletic programs do not offer varsity teams in the multitude of available professional sports. However, one can assume that the student-athlete's participation as a scholarship athlete provides the necessary conditioning and skill development that can later be transferred to alternative sport participation career opportunities. Similarly, the denial of the right to one's eligibility interferes with the student-athlete's desire to pursue a career of choice. Hence, it can be argued that participation penalties may violate a student-athlete's property right.

A. The NCAA and Membership Conferences as

State Actors

Prior to suggesting that a student-athlete has a protected property and liberty right in athletic participation, an argument must be made that both the NCAA and membership conferences are state actors. As a private, voluntary organization, the NCAA is not subject to federal constitutional scrutiny unless the Supreme Court recognizes that the NCAA and its practices represent conduct "so entwined with governmental policies or so impregnated with a governmental character as to become subject to constitutional limitations placed upon state actions" (*Evans v. Newton*, 1966, p. 296). Although the Supreme Court held recently that the NCAA is not a state actor in *NCAA v. Smith* (1999), this paper argues that the NCAA and the member conferences do qualify as state actors based on both the public function and entanglement analyses.

1. The Public Function Analysis

According to the public function analysis, a private organization qualifies as a state actor when it performs functions that the government would assume if the private organization ceased to exist. The NCAA does perform functions the individual state institutions (i.e., state actors) would perform if the NCAA did not exist. For example, the NCAA is responsible for hosting championship events, maintaining player and team statistics, determining eligibility standards, compiling and disseminating related rules and regulations, adjudicating appeals, and so on. As stated by the court in *Parish v. NCAA* (1975, pp. 1032-1033),

In a real sense, then, the NCAA by taking upon itself the role of coordinator and overseer of college athletics – in the interest both of the individual student and of the institution he attends – is performing a "traditional government function." . . . Little doubt, in light of the national (and even international) scope of collegiate athletics and the traditional governmental concern with the educational system, that were the NCAA to disappear tomorrow, government would soon step in to fill the void.

As explained by Porto (1987, p. 1157), "Athletic departments at public universities must adhere to NCAA rules just as closely as if those rules were

promulgated directly by the state's legislature or governor, instead of by university executives." If for some reason the NCAA became dormant, state universities desiring to maintain viable athletic programs would have to assume responsibilities currently being performed by the NCAA.

Some argue that the NCAA cannot qualify as a state actor under the public function analysis as a result of the narrowing of the public function concept by the Supreme Court (Riegel & Hanley, 1981; Ponticello, 1991; Porto, 1987; Solar, 1984).

In 1976, the Court in *Hudgens v. NLRB* narrowed the scope of applicability associated with the public function analysis. According to the Court, the private party had to assume all the functions of the state to qualify as a state actor under the public function analysis. The Supreme Court echoed its decision in *Flagg Brother Inc. v. Brooks* (1978). Under the *Hudgens* analysis, the NCAA would have to perform all the functions of an educational institution including athletic governance as well as educational and other academic responsibilities. It should also be noted, however, that the *Flagg* (1978) decision left open the possibility that the applicability of the state actor requirement could be expanded in a subsequent decision.

It is inappropriate and contrary to current common law to narrow the scope of the public function concept in a way which precludes constitutional scrutiny for private, voluntary organizations performing governmental functions. For example, reliance on Title II of the 1964 Civil Rights Act addressing public accommodations and related case law illustrates the unwillingness of the courts and society to camouflage otherwise unacceptable behaviors. For example, truly private clubs (e.g., country club golf courses, private tennis clubs) receive exemption based upon first amendment freedoms under the public accommodation laws. However, court decisions have precluded these establishments from perpetuating discrimination by limiting tee times, excluding women and other minorities, and so on (*Brown v. Loudoun Golf & Country Club, Inc.*, 1983; *Clover Hill Swimming Club, Inc. v. Goldsboro*, 1966; *Stout v. YMCA*, 1968). Similarly, the law interpreting the public function analysis should be reexamined so constitutional guarantees are not lost or buried.

2. The entanglement theory

According to the entanglement theory, state action can extend to a private organization when the activities of the private organization are so intricately intertwined with the activities of an existing state actor. Based upon the entanglement theory analysis, it can be argued that the NCAA is a state actor for the following reasons as discussed in subsequent paragraphs.

a. State institutions financially support the NCAA through annual fee requirements and assessments.

Over half of the NCAA member institutions are state institutions (Parish v. NCAA, 1973). Annual membership fees to the NCAA are based upon the member institution's student enrollment. Since state institutions have larger student enrollments, it can be deduced that state institutions generate a majority of the membership fee contributions and fund a substantial part of the NCAA's operating budget. In addition, NCAA member institutions are subject to financial assessments relative to emergency fiscal needs of the NCAA. For example, member institutions were recently assessed and required to pay a proportionate share of the multi-million settlement payment to the successful plaintiffs in Law et al. v. NCAA, the so-called "restricted earnings" case (1998). This use of state funds to support the efforts of a private organization seems to present a clear nexus between the NCAA and state institutions.

The issue of funding was a critical factor in the U.S. Supreme Court's decision in NCAA v. Smith (1999) relative to the applicability of Title IX to the NCAA. In reversing the Third Circuit Court of Appeals, the Court dismissed the above "nexus" argument stating, "An entity that receives dues from recipients of federal funds does not thereby become a recipient itself" (p. 926). The decision in Smith appears to be narrowly focused on Title IX. The financial support of the NCAA by its member institutions, compounded with the other factors mentioned below, create the entanglement necessary for an otherwise private entity (i.e., the NCAA) to be held a state actor for consideration of due process requirements.

b. The NCAA host events on state property (i.e.,

the state colleges and universities athletic facilities).

An early 1960 Court decision defines this facility-related private/public nexus. In *Burton v. Wilmington Parking Authority* (1974), a black man was denied service in a coffee shop. The coffee shop was located on a public parking facility and leased from the public parking authority. The defendants argued that they were immune from constitutional scrutiny since their coffee shop was a private business (versus government owned and operated). The Court, in deciding for the plaintiff, found the coffee shop to be a state actor. The coffee shop's location in the public parking facility was a factor in this Court's decision.

The apparent nexus between the NCAA and state institutions seems apparent when looking at related case law. As indicated by the Supreme Court of Colorado in *Lewis v. Colorado Rockies Baseball Club* (1997), otherwise private organizations can be subject to constitutional restraints. As stated by the court (p. 272),

While the Rockies are a private entity, Coors Field and the surrounding sidewalks and walkways at issue are owned by a public entity, the Stadium District. Thus, the Rockies' policies are subject to applicable constitutional constraints.

Similar to the Lewis (1997) case, one can deduce that NCAA sponsored tournaments playing on state property create the necessary entanglement to qualify the NCAA as a state actor.

c. The NCAA operations (e.g., coaching, monitoring student eligibility) are carried out by state actors.

The NCAA and conference manuals detail extensive rules and regulations that must be adhered to by athletic department employees. Athletic department councils and their employees represent state actors as they adhere and enforce established rules and regulations developed by the NCAA and member conferences. As explained in *Greene v. Athletic Council of Iowa State University* (1977, p. 560),

The record shows the athletic council is an entity established by administrative officials of Iowa State University to manage and control the intercollegiate athletic program of the university. Regulations of the National Collegiate Athletic Association (NCAA) and Big 8 Athletic Conference, of which Iowa

State University is a member, require institutional control of the program.

The entanglement seems apparent when state actors (i.e., government employees) initiate and implement the rules and regulations of a private voluntary organization.

d. Individuals employed by the state-supported schools are actively involved in developing NCAA policy.

As noted in the NCAA Manual, an annual convention is held to act on legislative and other matters where active NCAA members and member conferences possess voting privileges. The entanglement between state institutions and the NCAA is further recognized as NCAA committees are comprised, in part, with state university representatives responsible for NCAA policy development (NCAA, 1999). In 1999, for example,

- 80% of the individuals serving on the NCAA Division I Board of Directors (BOD) are representatives from state institutions,
- 60% of the individuals serving on the 1999 Division I-AA and I-AAA NCAA BOD are representatives from state institutions,
- 60% of the individuals serving on the NCAA Executive Committee are representatives from state institutions, and
- 65% of the individuals serving on the NCAA Division I Management Council represent individuals from state institutions.

As illustrated, there is strong evidence that state actors devise and articulate the policies of the NCAA.

e. The NCAA engages in both short-term and long-term development and revenue sharing activities.

These revenue sharing activities illustrate the combined effort by the NCAA, member conferences, and state institutions to execute related operations. For example, the NCAA distributed \$147,348,995 to its conference members in 1997-1998 (NCAA, 1999). Since 1991, the NCAA has distributed \$798,958,257 to its member conferences (NCAA, 1999). The entanglement appears obvious as the NCAA provides monies to member conferences and state schools to fund and maintain state-owned equipment, facilities, employees, and student benefits.

As demonstrated in the above paragraphs, the

apparent partnership existing between the NCAA, member conferences, and state schools reflect the concept of entanglement. As succinctly stated by the U.S. Court of Appeals for the District of Columbia in *Howard University v. NCAA* (1975, p. 220), "the NCAA and its member public instrumentalities are joined in a mutually beneficial relationship, and in fact may be fairly said to form the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny." Similar to the NCAA, one can also argue that the member conferences are also state actors based on either the entanglement and/or public function concept.

B. The Property Right of Athletic Participation

Once established that the NCAA and the membership conferences are state actors, it is appropriate to discuss the scholarship student-athlete's property right in athletic participation. There are three primary reasons justifying the student-athlete's property right associated with athletic participation.

1. Justified Entitlement

The Court's 1972 definition of a property interest in *Board of Regents v. Roth* has a significant presence in ascertaining what qualifies as a property interest. The Roth Court required that a person have a "legitimate claim of entitlement" to a property right as determined by an independent source. Court decisions dealing with interscholastic issues (*Dallam v. Cumberland Valley School District*, 1975; *Goss v. Lopez*, 1975; *Mitchell v. Louisiana High School Athletic Association*, 1970) have argued that statutory laws mandating school attendance created the entitlement as established by an independent source (i.e., state law). The authors of this article suggest that the athletic scholarship does represent a claim of entitlement that is determined by the student-athlete's signing with the particular institution of higher education.

The paucity of student-athletes actually securing a professional contract is often used as a reason to refute the entitlement requirement. Case law dealing with the property right associated with athletic participation has stated that athletic participation is a privilege and the probability of any one student-athlete succeeding in a professional capacity is too speculative (Wong, 1994). This perspective represents erroneous thinking for two primary reasons. As stated by

the Supreme Court in *Board of Regents v. Roth* (1972, p. 565),

The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the due process clause (emphasis in original).

It is inappropriate to suggest that scholarship student athletes pursuing their chosen career are somehow accorded less protection than students pursuing careers in other academic disciplines (e.g., women's studies, history). In fact, Eitzen and Sage (1997) reported that in 1992, 68,000 men played college football, basketball and baseball in America. That same year, 2,490 of those men were offered professional contracts; this equates to a 3.6% placement rate. Although not as high as some might like, the student-athlete's eligibility does translate to a protected property right. Further, as mentioned before, the traditional sports of football, basketball and baseball now represent only a miniscule fraction of the sport-related career opportunities now available to capable and skilled male and female student-athletes.

2. Athletics as a Marketable Career

Some courts have recognized the economic livelihood associated with intercollegiate athletics (*Behagen v. Intercollegiate Conference of Faculty Representatives*, 1972; *Davis v. Meek*, 1972). The U.S. district court in *Behagen v. Intercollegiate Conference of Faculty Representatives* noted the similar market opportunities existing between academic degree programs and athletic participation. As stated by the *Behagan* court (1972, p. 604), "Surely, the interests of college athletes in participating in activities which have the potential to bring them great economic rewards are no less substantial" than traditional academic education opportunities.

There are a few cases with limited applicability that have accepted the scholarship student-athlete's right to participation as a constitutionally protected property interest (*Behagen v. Intercollegiate Conference of Faculty Representatives*, 1972; *Hall v. The University of Minnesota*, 1982; *Regents of the University of Minnesota v. NCAA*, 1976). Legal scholars have referred to *Goss v. Lopez* (1975) when interpreting the existence of a student-athlete's property right in athletic participation (*Porto*, 1987; *Riegel*

& *Hanley*, 1981). In *Goss*, the Supreme Court considered whether nine Ohio high school students suspended from high school for 10 days due to disruptive and disobedient conduct represented a denial of a property right without due process. Relying on an Ohio law providing free education to all between six and 21 years, the Court held that the plaintiffs did have a property right that could not be denied without due process. A significant outcome of the *Goss* case hinged on the fact that subsequent court decisions concluded that the *Goss* decision did not create a property interest in each individual component of the educational process (e.g., academics, drama, athletics). In *Dallam v. Cumberland Valley School District* (1975, p. 361), the court stated,

The myriad activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights, each cognizable under the Constitution.

In other words, the purpose of an educational institution is to provide the student an academic plan of study that creates marketable career opportunities. Secondary activities like athletics merely represent gratuitous product extensions that serve to complement the student's enjoyment of individual academic pursuits. These individual activities (e.g., band, athletics, drama) could not represent individual property interests without overwhelming the courts with property right-related litigation. However, the subsequent interpretations of the *Goss* decision fail to recognize the marketability of a professional career in athletics. Rather, case law assumes that the academic plan of study represents the primary component in education leading to marketable career opportunities.

The above analysis, however, carries limited merit. It is well established that academic plans of study in law, medicine, education, and so on represent constitutionally protected property rights (*Bleicker v. Board of Trustees of Ohio State, Etc.*, 1980; *Ross v. Pennsylvania State University*, 1978). Echoing *Riegel & Hanley* (1981), it is our opinion that similar to other academic plans of study, athletic participation opportunities also lead to marketable career opportunities. As stated by *Riegel & Hanley* (1981, p. 501, 505),

The courts have failed to recognize a property interest in intercollegiate athletics because too

much emphasis has been placed upon the theory that athletics is one component among many in the educational process, one that serves to "round out" the learning experience. Instead, college level athletics may often be the only educational process for the athlete. The college athlete needs the opportunity to develop skills, and to avoid arbitrarily imposed disciplinary measures that restrict the development of skills, just as any other student who attends a university with the hopes of moving into a specified career. . . ."Big-time" college athletics today is more a preparatory process for a chosen occupation than a component of the educational process.

The U.S. District Court for the District of Minnesota recognized in *Hall v. The University of Minnesota* (1982) the jeopardy placed on an athlete's career due to denial of eligibility. In *Hall* (1982), a college basketball player was denied eligibility due to a failure to be enrolled in a degree program. As stated by the court in *Hall* (1982, p. 106), According to the evidence, . . . If the plaintiff is denied the opportunity to participate in intercollegiate basketball competition on behalf of the University of Minnesota during winter quarter 1982, his chances for a professional career in basketball will be impaired; . . . The plaintiff would suffer a substantial loss if his career objectives were impaired. The findings of the court go on to predict that without athletic participation, the individual student-athlete will fall from a second round NBA draft choice to a sixth round NBA draft choice. Further, as noted by this court, "The bachelor of arts, while a mark of achievement and distinction, does not in and of itself assure the applicant a means of earning a living." Athletic participation can, in fact, lead to a variety of sport career-related opportunities and deserves the constitutional guarantees provided similar protected property rights.

3. The Letter of Intent as a Valid Contract

Viewing the student-athlete's letter of intent (i.e., one-year scholarship) as a contract more clearly delineates the property interest in athletic participation. The U.S. District Court considered the contractual issue in a footnote in *Colorado Seminary v. NCAA* (1976). As stated in the footnote (p. 895),

It is that the contracted for property interest is not just the scholarship funds received in exchange for the athletes' service. The contractual interest includes the expectation that the student will be allowed to participate in intercollegiate competition, the only contingency being that he is good enough to make the team and that he avoid injury.

The letter of intent can be argued as possessing all the elements required of a contract. According to Carpenter (1995), a valid contract must contain (a) an offer, (b) an acceptance, (c) consideration, (d) a meeting of the minds, (e) a legal subject matter, (f) legal capacity, and (g) precise contractual language. The following identifies each of these elements as related to the letter of intent.

- a) An offer – the letter of intent;
- b) An acceptance – the signed letter of intent by the student-athlete;
- c) Consideration – the tuition, room, and board in exchange for expected participation;
- d) A meeting of the minds – understanding of expectations and commitments;
- e) A legal subject matter – intercollegiate athletic participation;
- f) Legal capacity – over the age of majority; not incapacitated; and
- g) Precise contractual language – terms written in a matter to be understood by both parties.

It is logical to deduce that at a minimum, a one-year bilateral contract is formed since the student-athlete receives tuition, learning and enhancement of skills, travel opportunities, opportunity for individual publicity, board, and room, for example, while the educational institution receives the player's athletic skills, knowledge, and capabilities. Even though there is an absence of explicit language in the letter of intent regarding expectations of play, it does not negate the existence of an oral contract that implies participation expectations (Porto, 1987).

Reliance on the analysis used in ascertaining whether a Western Michigan University scholarship football player qualified as an employee of the university further solidifies the notion that the letter of intent can represent a protected property right similar to an employment contract. In *Coleman v. Western Michigan University* (1983), the court considered the

following factors when determining the existence of an “expressed or implied contract for hire” (Coleman, 1983, p. 225). These factors included:

- a) The proposed employer’s right to control or dictate the activities of the proposed employee;
- b) The proposed employer’s right to discipline or fire the proposed employee;
- c) The payment of “wages” and, particularly, the extent to which the proposed employee is dependent upon the payment of wages or other benefits for his daily living expenses; and
- d) Whether the task performed by the proposed employee was “an integral part of the proposed employer’s business.”

The Court of Appeals of Michigan went on to say that no single factor is dispositive and that all should be taken in to account when determining the existence of an employment relationship” (Coleman v. Western Michigan University, 1983). Applying each of the above factors to college athletics in the 21st century appears to present the employment relationship discussed by the above court. First, as in any sport, the coaching staff dictates the activities (e.g., positions played, playing time, practice time) of the student-athlete. Second, the coach is not obligated to renew the one-year letter of intent. Third, the letter of intent and related scholarship does provide economic benefits depended on by the student-athlete. Meals, books, tuition, and so on all reflect current and ongoing financial needs of the student-athlete. And fourth, college athletics has become an integral component of university operations. The integral role of athletics in higher education is well established. For example, Coakley (1994) and Coughlin and Ereksen (1986) all recognize the institutional visibility received from high profile athletic programs. Coughlin and Ereksen (1986) also found that athletic success relates positively with (a) the number of individuals who voluntarily give monies to the institution and (b) the amount of state aid provided per student. Sigelman and Bookheimer (1984) found that success in football could positively impact contributions to the athletic program. One can then deduce that the increased money donated to athletics benefits the broader institution as athletics require less institutional support. As apparent, the student-athlete’s possession of a property right can be established, in addition to the

avenues presented earlier, via the letter of intent signed by both the student-athlete and the athletic director of the state institution.

III. Violation of Due Process

Assuming a property right has been established, it is necessary to show that either substantive and/or procedural due process guarantees have been violated. The following paragraphs discuss how current NCAA and member conference policies regarding unsportslike conduct and related appeal procedures arguably violate both substantive and procedural due process guarantees.

A. Violation of Substantive Due Process

Substantive due process focuses on the merit of the particular law or regulation. Regulations which are arbitrary or capricious fail to provide for substantive due process. Plaintiffs have long argued that NCAA rules and regulations are arbitrary and capricious (Howard University v. NCAA, 1973; NCAA v. Tarkanian, 1988). Existing language in current NCAA and conference manuals defining unsportslike conduct and related grievance procedures generate similar questions of elusiveness and questionable interpretations. As mentioned above, the NCAA fails to specifically address sportslike conduct. Further, the conference manuals are not consistent in how they define sportslike conduct or related grievance and appeal procedures. Consequently, a student-athlete who has been denied eligibility based on alleged unsportslike conduct could argue that NCAA and/or member conference policies defining unsportslike conduct are vague and indefinite. Similarly, one could argue that procedures relating to the ultimate determination of unsportslike conduct are arbitrary, capricious and lacking in the provision of basic due process, and that penalties meted out are inconsistent if not in definite conflict. For example, what might be determined to be unsportslike conduct justifying suspension or loss of eligibility in one conference might not be in another. Further, in today’s environment, the determined penalty or “punishment” in one conference could be severe (loss of player’s eligibility for participation in conference or NCAA championships) while in another conference, the penalty or “punishment” could be a “slap on the wrist” (letter of reprimand to the player’s University). In view of what is

at stake for today's student-athlete, such variances do not seem appropriate or within the reasonable bounds of fairness or due process.

B. Violation of Procedural Due Process

Similarly, a student-athlete alleged to have committed an act of unsportslike conduct could argue that procedural due process provisions were abridged. Although there are fundamental determinants associated with procedural due process, the Court has recognized the need for flexibility. As stated by the Court in *Morrissey v. Brewer* (1972), "Due process is flexible and calls for such procedural protection as the particular situation demands." The Court provided a three-prong analysis in *Mathews v. Eldridge* (1976) for use when ascertaining the degree of appropriate due process to be given in any one situation. The Court's three-prong analysis looks at the following:

1. The private interest affected by the official action;
2. The risk of an erroneous deprivation of such interest through the procedures used, and the value of additional procedural safeguards; and
3. The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

First, it is well established that the more significant the interest, the greater the due process required. From the perspective of a scholarship student-athlete, the private interest of a marketable career is significant and deserving of appropriate due process provisions. Second, one could argue that the "procedural safeguards," if any, are minimal since (a) the NCAA Manual does not define unsportslike conduct, (b) member conference policies lack uniformity and often fail to adequately define unsportslike conduct, and (c) NCAA and conference appeal procedures leave little room for objective decision making. Third, the government's interest in protecting individual property rights is well established and administrative and policy-related suggestions that would better ensure procedural due process provisions create minimal burdens for the government (see section IV, Policy Recommendations).

IV. Policy Recommendations

As discussed throughout this paper, there is limited, if any, consistency among NCAA and member conference policies and related due process provisions. Our policy recommendations include the following:

- Adoption by the NCAA of a policy similar to the portion of the MVC policy, section 7.3 (see earlier portion of paper). Although behaviors identified are not all encompassing, the dileneation does provide student-athletes with an idea of what qualifies as unsportslike behaviors.
- The creation of a nationwide data base that would record all unsportslike conduct and related ramifications by student-athletes playing for NCAA member institutions. This database would be maintained by the NCAA and used as a research tool when ascertaining various behaviors and related consequences. In addition, the database should be published annually. Annual publication assists with accountability and also serves as a means of educating the student-athlete as to what behaviors are unacceptable and the related consequences for such actions.
- Each NCAA member institution and contest officials must report acts of student-athlete unsportslike conduct to the member conference to which the student-athlete's institution belongs. The appropriate committee as designated by the member conference will assemble facts and hear interpretations from all involved parties, research prior acts of a related degree and respective penalties, and then make a decision on the appropriate penalty to accompany the student-athlete's unsportslike behavior. NCAA member institutions which are not a member of any one conference, similar to the above, assemble facts and hear interpretations from all involved parties, research prior acts of a related degree and respective penalties, and then make a decision on the appropriate penalty to accompany the student-athlete's unsportslike behavior.
- The member conference's committee decision or the decision of the independent institution will be communicated in writing to the student-athlete, the official, and the school or player who was the recipient of the aberrant behavior if applicable. Facts supporting the decision shall be detailed in the written document provided to each of the parties above.

- If any of the above parties (i.e., student-athlete who is responsible for the behavior, the official, and/or the player or institution who was subject to the behavior) believes an inappropriate decision has been made (e.g., penalty is too excessive or too lenient, or arguing whether the unsportslike conduct actually occurred as interpreted), the decision can be appealed to the NCAA's Committee on Sportsmanship and Ethical Conduct within one week.
- Upon appeal, the party and appropriate representatives (i.e., attorney, institutional representatives) shall be given an opportunity to refute information contained in the written document before the NCAA's Committee on Sportsmanship and Ethical Conduct. All hearings will be conducted within one week upon receiving the student-athlete's appeal.
- The NCAA's Committee on Sportsmanship and Ethical Conduct will then have 48 hours to make its decision. All final decisions shall be communicated to the appropriate parties in writing.

V. Conclusion

Behaviors qualifying as unsportslike conduct are vast and varied. Unfortunately, consequences associated with such behaviors also often are vast and varied. The severity of consequences can deprive student-athletes of property rights and deprive the individual of constitutional guarantees of due process. While the above policy will not make unsportslike-related decisions easy, it does represent an improvement on policy currently existing in NCAA and member conference manuals. Benefits of the above policy include its uniformity among NCAA member institutions provided, in part, by the nationwide database of unsportslike behaviors and related assigned penalties. In addition, the above policy provides for an appeal by a second governing body. For example, the MVC's existing policy has the same governing organization review the initial penalty. In comparison, the proposed policy strives to provide a subsequent review by a different governing body. This review practice would better eliminate appellate decisions influenced by ego, control issues, and/or prior involvement.

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