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## COMMENT

# THE ADIDAS COLLEGE BASKETBALL SCANDAL AND ITS AFTERMATH

AUSTIN MALINOWSKI\*

### I. INTRODUCTION

Nearly every year there is a new scandal or conflict in college sports that makes headlines, whether that may be a scandal regarding a student athlete receiving impermissible benefits, recruiting violations, or some sort of academic fraud. Many scandals and eligibility issues that have arisen in college athletics have led to lawsuits against the National Collegiate Athletic Association (NCAA) and changes in the NCAA bylaws.<sup>1</sup> The attacks against the NCAA have come in the form of constitutional claims,<sup>2</sup> antitrust claims,<sup>3</sup> Title IX claims,<sup>4</sup> and law of private associations claims.<sup>5</sup> Recently, there was a notable scandal in college basketball that has led to changes for the players, and potentially high school basketball in the near future.<sup>6</sup> The allegations from the 2017 scandal, which have since resulted in several guilty verdicts, claimed that numerous collegiate players were receiving money under the table from agents

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1. See, e.g., *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (resulting in college athletes receiving scholarships up to the full cost of living).

2. See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988).

3. See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

4. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999).

5. See *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621 (Colo. App. 2004).

6. Marc Tracy, *N.C.A.A. Alters Rules for Agents and Draft in Wake of Basketball Corruption Scandal*, N.Y. TIMES, Aug. 8, 2018, <https://www.nytimes.com/2018/08/08/sports/ncaa-basketball-agents.html>. The rule changes do not apply to high school players yet and will only apply upon a change to the National Basketball Association's Collective Bargaining Agreement. *Id.*

acting as “runners” for Adidas.<sup>7</sup> The NCAA responded in the form of a rule change that allows for draft eligible male basketball players to hire agents and receive other benefits, yet maintain their amateur status if they are not selected by a professional team.<sup>8</sup> Despite best intentions, did this recent change to the NCAA amateurism rules subject the NCAA to yet another lawsuit?

The changes to the bylaws apply to all eligible male basketball players, but they do not apply to female basketball players<sup>9</sup> or to other collegiate athletes.<sup>10</sup> This recent change contributes to the current inconsistencies in the NCAA bylaws regarding the use of agents. Nearly all collegiate sports have different rules pertaining to the use of agents and how hiring an agent may affect their eligibility.<sup>11</sup> The new change to the rule applying to *only* male basketball players appears on its face as if it would be a violation of the Equal Protection Clause of the Fourteenth Amendment, but since the holding in *National Collegiate Athletic Ass’n. v. Tarkanian*, one can no longer make a constitutional claim against the NCAA.<sup>12</sup> Further, the holding in *National Collegiate Athletic Ass’n v. Smith* prevents a collegiate athlete from bringing a Title IX claim against the NCAA.<sup>13</sup> Therefore, the two best options to challenge any NCAA rule are to bring an antitrust suit or a law of private associations suit.

This comment will focus on a law of private associations claim and not an antitrust claim that could be made against the NCAA. Unlike federal antitrust laws which focus on “preserving free and unfettered competition,”<sup>14</sup> courts will only question the decisions of private associations, such as the NCAA, when it can be shown that “decisions are made arbitrarily and capriciously.”<sup>15</sup> Although it appears on its face that allowing only male basketball players to retain their eligibility after an unsuccessful draft restricts competition, courts have tended to side with the NCAA when its amateurism rules are challenged on antitrust

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7. “Runners” are essentially the middle-man between the player and the apparel company. Marc Tracy, *Three Found Guilty in N.C.A.A. Basketball Recruiting Scheme*, N.Y. TIMES, Oct. 24, 2018, <https://www.nytimes.com/2018/10/24/sports/ncaa-basketball-adidas-guilty.html>.

8. Tracy, *supra* note 6.

9. See *Committed to Change*, NCAA, <http://www.ncaa.org/about/committed-change> (last visited Feb. 1, 2018).

10. *Id.*

11. See 2018-19 NCAA DIVISION I MANUAL, art. 12.3, at 71-72 (2018) [hereinafter NCAA MANUAL].

12. 488 U.S. 179 (1988).

13. See 525 U.S. 459 (1999).

14. *The Antitrust Laws*, FED. TRADE COMM., <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Mar. 8, 2018).

15. Benjamin A. Menzel, *Heading Down the Wrong Road?: Why Deregulating Amateurism May Cause Future Legal Problems for the NCAA*, 12 MARQ. SPORTS L. REV. 857, 865 (2002).

grounds.<sup>16</sup> For that reason, I believe the best avenue to attack the recent change to the structure of college basketball would be under a law of private associations claim.

Part II of this comment will provide a brief history of the NCAA's amateurism rules and the goals that the NCAA tries to achieve through the enforcement of those rules. Part III will discuss the development of collegiate agency laws, examine what the current state of the agency rules are today in collegiate athletics, and discuss what has transpired in college athletics that led to the rule change. Part IV will examine a hypothetical situation where a female college basketball player brings a claim against the NCAA for a violation of the law of private associations (LPA) after the reinstatement of her amateur eligibility was denied following an unsuccessful draft. Finally, Part V of this comment will discuss what should be done in the future regarding NCAA amateurism and agents.

After considering all of the legal matters, a female collegiate basketball player can most likely make a legitimate claim under the law of private associations because allowing male, but not female, basketball players to enter the National Basketball Association (NBA) draft, receive extra benefits during the draft process, and maintain their amateur status is arbitrary and capricious. The Women's National Basketball Association (WNBA) is consistently gaining popularity and drawing in a larger, more diverse fan group.<sup>17</sup> Basketball related rules should apply to both male and female players to avoid "writ[ing] [women] out of history."<sup>18</sup> Although on the surface it may appear to be justifiable to exclusively allow men to be the recipient of this benefit, but there is no legitimate reason for not applying this rule to age-eligible female basketball players. Thus, the rule is arbitrary and capricious in its application.

## II. HISTORY OF THE NCAA'S AMATEURISM RULES

The NCAA has always attempted to differentiate its athletes from professional athletes by standing behind the pillar of amateurism. However, the meaning of amateurism has been evolving since the early days of college athletics. The NCAA has been subject to criticism and countless lawsuits, but its adherence to amateurism has not waived and there is no indication its position will change in the near future.

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16. See Daniel E. Lazaroff, *An Antitrust Exemption For the NCAA: Sound Policy or Letting the Fox Loose In the Henhouse?*, 41 PEPP. L. REV. 229, 231 (2014) (citing to several unsuccessful antitrust claims challenging the NCAA's amateurism rules).

17. Jerry Barca, *Why Are WNBA TV Ratings Rising?*, FORBES, July 9, 2018, <https://www.forbes.com/sites/jerrybarca/2018/07/09/why-are-wnba-tv-ratings-rising/#65a8adb6f83f>.

18. *Id.* (quoting Bleacher Report's Natalie Weiner).

*A. Development of Amateurism in College Sports*

Organized college sports existed prior to the creation of the NCAA, and even those athletes were to adhere to a strict amateurism policy. Since the 1890's college sports have been able to turn a large profit, while at the same time preventing their athletes from reaping any financial compensation.<sup>19</sup> The prevention of collegiate athletes from receiving financial compensation was justified by the argument that if it were not for the amateurism rules "rich schools [would] buy championships."<sup>20</sup> The NCAA began using the term "student athlete" decades later to justify the existence of amateurism rules and as a justification for the organization to withhold other benefits.<sup>21</sup> Walter Byers, who was the first executive director of the NCAA coined the term "student-athlete" in the 1950's in order to avoid paying out workers compensation benefits.<sup>22</sup> The "student-athlete defense" was used to defeat a former Texas Christian University football player's worker compensation claim after the school refused to continue paying his medical expenses stemming from an injury suffered while at school.<sup>23</sup>

The landscape of the NCAA's amateurism policy would drastically change as a result of multiple landmark decisions in the Supreme Court and in other jurisdictions. In the 1980's, a number of schools brought suit against the NCAA with hopes that a court would rule in their favor and prevent the NCAA from restricting the sale of their television rights.<sup>24</sup> In the majority opinion, the court ruled against the NCAA, but Justice Stevens stated in dicta that "in order to preserve the character and quality of the 'product,' athletes must not be paid,"<sup>25</sup> solidifying the demarcation between collegiate and professional athletes. In *O'Bannon v. National Collegiate Athletic Ass'n*, the Ninth Circuit took this statement from the Supreme Court to mean that schools must not provide compensation to the athletes beyond "the cost of attendance."<sup>26</sup>

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19. Karen Given, *Tracing the Origins of College Sports Amateurism*, WBUR (Oct. 13, 2017), <https://www.wbur.org/onlyagame/2017/10/13/ncaa-amateurism-origins-history>.

20. *Id.*

21. Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/>.

22. *Id.*

23. *Id.*; See generally *Waldrep v. Texas Emp'rs Ins. Ass'n*, 21 S.W.3d 692 (Tex. App. 2000).

24. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 94-95 (1984).

25. *Id.* at 102.

26. 802 F.3d 1049, 1079 (9th Cir. 2015).

Beyond the aforementioned cases, there are a number of important cases that challenged various amateurism rules.<sup>27</sup> Although the utilization of the court system over the past forty years has resulted in great strides for “student-athletes,”<sup>28</sup> the NCAA has been resilient and continues to hold on tight to amateurism. These courtroom victories and losses for student-athletes have molded the NCAA and amateurism into what it is today.

### *B. Current Status of Amateurism in Collegiate Sports*

At the center of college sports and the NCAA are a number of core values. Some of the current core values of the NCAA include a model of athletics that balances athletics with academics, maintaining integrity and sportsmanship, and fostering an inclusive culture for those of all backgrounds.<sup>29</sup> Although these core values imply the importance of amateurism in college sports, the bylaws of the NCAA manual make this point abundantly clear. According to the NCAA manual, the main purpose of the NCAA “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, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”<sup>30</sup>

To ensure amateurism is achieved in college sports today, each athlete must register with the “NCAA Eligibility Center” prior to participation.<sup>31</sup> The NCAA will engage in an evaluation of each athlete to determine whether past actions render said athlete ineligible. There are a number of activities that the NCAA looks for that may affect eligibility, including but not limited to participating in tryouts or practices with a professional team, accepting benefits from an agent or a potential agent, accepting benefits for one’s performance in a sporting event, and entering into an agreement with an agent.<sup>32</sup> Although the NCAA has just recently made a change in men’s basketball allowing players to utilize agents, among other things,<sup>33</sup> the NCAA seems to be sticking to its guns when

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27. See *Oliver v. Nat’l Collegiate Athletic Ass’n*, 920 N.E.2d 203 (Ohio Com.Pl. 2009) (attacking agent rules); See *Bloom v. Nat’l Collegiate Athletic Ass’n*, 93 P.3d 621 (Colo. App. 2004) (attacking the receipt of money for advertisements); See *Nat’l Collegiate Athletic Ass’n v. Lasege*, 53 S.W.3d 77 (Ky. 2001) (attacking the NCAA’s determination that the athlete was ineligible based off a previous professional status).

28. The determination that collegiate athletes can receive financial aid up to the full cost of attendance still remains as one of the greatest courtroom victories for college athletes. See *O’Banion*, 802 F.3d at 1079.

29. *NCAA Core Values*, NCAA, <http://www.ncaa.org/about/ncaa-core-values> (last visited Feb. 1, 2019).

30. NCAA MANUAL, *supra* note 11, art. 1.3.1, at 1.

31. *Amateurism*, NCAA, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Mar. 8, 2019).

32. *Id.*

33. Tracy, *supra* note 6.

it comes to compensating athletes.<sup>34</sup> NCAA President Mark Emmert believes that paying college athletes is out of the question because the student-athletes are getting a “pretty good deal” by receiving an education while developing their skills and abilities at the same time.<sup>35</sup> Thus, certain deviations from amateurism may be allowed, while others go too far.

The NCAA’s continuing dedication to amateurism has invited a number of outspoken critics to voice their opinion. LeBron James, one of the most recognizable athletes in the world, is open about his anti-NCAA sentiment and has been quoted stating the organization is “corrupt.”<sup>36</sup> James’ comments made headlines amidst the college basketball scandal that is the subject of this comment.<sup>37</sup> Former National Basketball Association (NBA) Coach Stan Van Gundy echoed James’ distaste for the NCAA, referring to the college sports giant as “maybe the worst organization—in sports [because] [t]hey certainly don’t care about the athlete.”<sup>38</sup> Before the new college basketball rule has even had a chance to be tested, it has received some less than favorable reviews as well.<sup>39</sup> Although some pieces of the rule change have been deemed to be significant, critics believe that the rule change favors only the largest schools and the most touted prospects.<sup>40</sup> Further, it has been said that the use of agents, among other benefits, only for men’s basketball will lead to a potential fallout and pushback from other collegiate sports.<sup>41</sup>

It is clear that there is currently a clash of interests between the NCAA and the “student-athletes” and it appears that such divide has always existed between the two sides. Despite all of the challenges to the policy of amateurism, only minor strides have been made for collegiate athletes. The most recent rule change indicates that there is effort being made on behalf of the NCAA to make

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34. Ralph D. Russo, *NCAA to Protect Amateurism as Defined Amid Hoops Changes*, AP NEWS (Mar. 29, 2018), <https://apnews.com/d2259aefb8654614b36cf27e6de50ef1>.

35. *Id.* However, Emmert does support the option for male basketball players to forego college and play professionally overseas or in the G-League. *Id.*

36. Kyle Boone, *The NCAA Has a New Critic as LeBron James Says it is a ‘Corrupt’ Organization*, CBS SPORTS (Feb. 27, 2018), <https://www.cbssports.com/college-basketball/news/the-ncaa-has-a-new-critic-as-lebron-james-says-it-is-a-corrupt-organization/>.

37. *Id.*

38. *Id.*

39. Zach Braziller, *NCAA Rule Changes Could Hurt Smaller Schools*, N.Y. POST, Aug. 9, 2018, <https://nypost.com/2018/08/09/ncaa-rule-changes-could-hurt-smaller-schools/>.

40. *Id.*

41. Matt Norlander, *College Basketball Rule Changes: What Will Happen with the NCAA’s New Rules for Recruiting and the NBA Draft*, CBS SPORTS (Aug. 9, 2018), <https://www.cbssports.com/college-basketball/news/college-basketball-rule-changes-what-will-happen-with-the-ncaas-new-rules-for-recruiting-and-the-nba-draft/>.

minor accommodations for its athletes, but the change simply does not go far enough.

### III. AGENTS, THE NCAA, AND SCANDALS. HOW DID WE GET HERE?

As long as there have been NCAA rules intended to preserve the amateur nature of collegiate sports, scandals have arisen from violations of said rules.<sup>42</sup> Many of the most notable scandals have involved the use of agents and the receipt of impermissible benefits.<sup>43</sup> This section will explore how agents have been regulated in collegiate athletics, the scandal that has led to the recent change to men's college basketball, and the current rules regarding agents across collegiate sports.

#### A. Regulation of Agents & NCAA Scandal

Much like other amateurism rules, the NCAA regulates the use of sports agents as a way to differentiate its brand from that of professional sports.<sup>44</sup> The NCAA prohibits its amateur athletes from entering into written or oral contracts with agents because this would cross the line of demarcation between college and professional sports.<sup>45</sup> Further, collegiate athletes have long been prohibited from receiving any sort of extra benefits or gifts from agents or prospective agents.<sup>46</sup> There have been many instances of agents trying to secure the representation of an athlete by breaking these rules. One of the most notable is the former running back from the University of Southern California (USC), Reggie Bush.<sup>47</sup> While at USC, Bush and his family received cash, travel expenses, and a new home from a prospective agent.<sup>48</sup> This violation resulted in severe criticism for both Bush and USC, and ultimately the return of Bush's

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42. See Alan Rubenstein, *The 25 Biggest Scandals in NCAA History*, BLEACHER REPORT (Sept. 20, 2010), <https://bleacherreport.com/articles/468221-the-25-biggest-scandals-in-ncaa-history#slide8>.

43. See *id.*

44. Diane Sudia, *The History Behind Athlete Agent Regulation and the Slam Dunking of Statutory Hurdles*, 8 JEFFREY S. MOORAD SPORTS L.J. 67, 71 (2001).

45. *Id.* at 74; NCAA MANUAL, *supra* note 11, art. 12.3.1, at 71.

46. Sudia, *supra* note 44, at 74-75; NCAA MANUAL, *supra* note 11, art. 12.3.1.3, at 71.

47. Kyle Bonagura, *What to Know About Todd McNair vs. the NCAA*, ESPN (Apr. 17, 2018), [http://www.espn.com/college-football/story/\\_/id/23201815/todd-mcnair-vs-ncaa-reggie-bush-scandal-faq](http://www.espn.com/college-football/story/_/id/23201815/todd-mcnair-vs-ncaa-reggie-bush-scandal-faq).

48. *Id.*



Heisman Trophy.<sup>49</sup> Bush is just one of many athletes that has been sanctioned for violating bylaws related to the regulation of agents.<sup>50</sup>

The most notable challenge to the NCAA's regulation of sports agents in a court setting comes from the Court of Common Pleas in the state of Ohio.<sup>51</sup> In *Oliver v. National Collegiate Athletic Ass'n*, the plaintiff, Oliver, was a high school student who had committed to play baseball at Oklahoma State University but was drafted by the Minnesota Twins Baseball Club as a senior in high school.<sup>52</sup> During the course of negotiations, Oliver's agent was present while the Twins made Oliver an offer, which constituted an NCAA violation.<sup>53</sup> Further, Oliver's agent was in telephone contact with the Twins, also in violation of NCAA rules.<sup>54</sup> The Oliver was suspended by the NCAA and brought a challenge against the NCAA bylaw 12.3.2.1.<sup>55</sup> Oliver claimed that the NCAA bylaw was arbitrary and capricious because it does not "impact a payer's amateur status but instead limits the player's ability to effectively negotiate,"<sup>56</sup> and the court agreed.<sup>57</sup> Ultimately the two parties reached a settlement agreement so there is not any caselaw holding the NCAA bylaw to be arbitrary and capricious, and therefore unenforceable.<sup>58</sup> Without further challenges to the NCAA agent bylaws, it is likely that another athlete simply seeking representation near draft time will unintentionally render themselves ineligible.

It is clear that the NCAA has a strong desire to regulate those who seek to represent its student athletes. It is also clear that student-athletes have a strong desire to seek out representation on their journey to the professional level. By maintaining control over agents, the NCAA attempts to maintain control of student-athletes, but as it will be shown in the next section, the NCAA has struggled to achieve control over either.

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49. *Id.*

50. See, e.g., David Wharton & Baxter Holmes, *O.J. Mayo Scandal Leads to Heavy Sanctions for USC Basketball Team; Team 'Shocked and Saddened,'* L.A. TIMES, Jan. 4, 2010, <http://articles.latimes.com/2010/jan/04/sports/la-sp-usc-basketball4-2010jan04> (discussing O.J. Mayo's agent related scandal).

51. *Oliver v. Nat'l Collegiate Athletic Ass'n*, 920 N.E.2d 203 (Ohio Com.Pl. 2009).

52. *Id.* at 206.

53. *Id.* at 207.

54. *Id.* The NCAA only became aware of these violations after the plaintiff's previous agent notified the NCAA after their contract was terminated. *Id.*

55. *Id.* at 207-08.

56. *Id.* at 208.

57. *Id.* at 216.

58. T. Matthew Lockhart, *Oliver v. NCAA: Throwing A Contractual Curveball at The NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175, 178-79 (2010).

*B. The NCAA's Most Recent Scandal*

As implicated above, the NCAA and its athletes are no stranger to scandals.<sup>59</sup> In 2017, a massive scandal emerged in men's college basketball.<sup>60</sup> The Federal Bureau of Investigation (FBI) uncovered wrongdoing across a number of major schools in college basketball, which led to the removal of one of the nation's most notable coaches, University of Louisville's Rick Pitino, and three different criminal complaints.<sup>61</sup> One of these complaints led to criminal convictions for Adidas executive Jim Gatto, former Adidas consultant Merl Codeand would-be agent Christian Dawkins, all on counts of wire fraud and conspiracy to commit wire fraud.<sup>62</sup> These men are set to be sentenced in early March of 2019.<sup>63</sup> In addition to these men, two more trials are scheduled to proceed in the early months of 2019. The first of which focuses on "former Auburn University assistant coach Chuck Person and Atlanta clothier Rashan Michel."<sup>64</sup> The second trial involves assistant coaches from Arizona, USC, and Oklahoma State.<sup>65</sup>

The investigations and convictions centered around a number of different issues: a quid pro quo where high school prospects would commit to Adidas sponsored schools in exchange for large sums of cash, college coaches accepting payment in exchange for steering players to specific financial advisors, and the creation of a "thriving black market for teenage athletes."<sup>66</sup> The major player in this scheme was the sports apparel giant, Adidas.<sup>67</sup> Adidas executive Jim Gatto was a major player in an agreement to steer a high school standout to the University of Louisville, who had just signed a long term deal with Adidas in exchange for a monetary sum of \$100,000.<sup>68</sup> Several coaches, mentioned above, from "Power 5" conferences attempted to persuade their players to sign with certain advisors upon turning professional, and further attempted to exchange money for commitments to the Adidas brand as an amateur and professional.<sup>69</sup>

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59. See Rubenstein, *supra* note 42.

60. Marc Tracy, *N.C.A.A. Coaches, Adidas Executive Face Charges; Pitino's Program Implicated*, N.Y. TIMES, Sept. 26, 2017, <https://www.nytimes.com/2017/09/26/sports/ncaa-adidas-bribery.html>.

61. *Id.*

62. Emily Caron, *College Basketball Corruption: NCAA Says Sanctions Will Take Time*, SPORTS ILLUSTRATED, Dec. 5, 2018, <https://www.si.com/college-basketball/2018/12/05/ncaa-mark-emmert-hoops-scandal-corruption-sanctions>.

63. *Id.*

64. *Id.*

65. *Id.*

66. Tracy, *supra* note 60.

67. *Id.*

68. *Id.*

69. *Id.*

A number of the nation's top men's players were also named in the investigation as recipients of large sums of money.<sup>70</sup>

As a result of this scandal, the NCAA decided it was time to implement changes to its amateurism bylaws. Men's college basketball players would previously be declared ineligible if they entered the NBA draft and were not chosen, but now players may attend the combine, go undrafted and return to school with their eligibility intact.<sup>71</sup> Further, the NCAA will now allow players to be represented by agents beginning in April 2019 "to help them make informed decisions about going pro."<sup>72</sup> Although the agents must be certified by the NCAA, they may provide the athlete and their family with meals, transportation and lodging when meeting with a professional team.<sup>73</sup> In the case where a student-athlete goes undrafted, the relationship with agent must be terminated when the student returns to school.<sup>74</sup> There are plans for these same rules to apply to "elite" high school players, but this change may not take effect until high school seniors are permitted to enter the NBA draft.<sup>75</sup> Finally, along with less relevant changes, the NCAA will establish a fund for schools who cannot afford to give aid to undrafted returning players.<sup>76</sup> Clearly, the NCAA's changes are providing athletes more options as to how to pursue their future, however, it is only the futures of male athletes that seem important.

### C. Current NCAA Agent Rules

Across the NCAA, nearly every sport is regulated by a different set of rules with regards to the hiring and use of agents. Generally, NCAA bylaw 12.3.1 states that any athlete shall be ineligible to participate in any sport if they have agreed to be represented by an agent "for the purpose of marketing his or her

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70. Mitch Sherman, *Everything You Need to Know About the College Basketball Scandal*, ESPN (Feb. 23, 2018), [http://www.espn.com/mens-college-basketball/story/\\_/id/22555512/explaining-ncaa-college-basketball-scandal-players-coaches-agents](http://www.espn.com/mens-college-basketball/story/_/id/22555512/explaining-ncaa-college-basketball-scandal-players-coaches-agents).

71. Ricky O'Donnell, *4 Takeaways from the NCAA Basketball Rule Changes*, SBATION (Aug. 8, 2017), <https://www.sbnation.com/college-basketball/2018/8/8/17664606/ncaa-college-basketball-reform-fbi-recruiting-changes-player-agents-nba-draft-combine>. In previous years, players could declare for the draft but must withdraw no later than ten days after the combine to maintain eligibility. *Committed to Change*, *supra* note 9. This rule is contingent on the NBA and NBAPA making a rule change. *Flexibility for Going Pro and Getting a Degree*, NCAA (Sept. 20, 2018), <http://www.ncaa.org/about/flexibility-going-pro-and-getting-degree>.

72. *Committed to Change*, *supra* note 9.

73. *Flexibility for Going Pro and Getting a Degree*, *supra* note 71. This change will go into effect when the NCAA and the Uniform Labor Commission can modify the Uniform Athlete Agents Act. *Id.*

74. *Id.*

75. O'Donnell, *supra* note 71.

76. *Flexibility for Going Pro and Getting a Degree*, *supra* note 71.

athletic ability or reputation in that sport.”<sup>77</sup> Although the rule states “his or her,” the exceptions to this general rule only apply to male athletes.<sup>78</sup> Both high school baseball players and men’s ice hockey players may utilize agents prior to beginning their collegiate careers, but must cut ties with them if they decide not to play professionally.<sup>79</sup> These exceptions will allow the athletes and their families to “obtain professional advice and representation in the interest of making the informed decision as to whether to start a professional career.”<sup>80</sup> This benefit will now be available to men’s basketball players who can use professional advice and decide whether going back to school is the right decision for them after going undrafted.

It is quite evident that many events have taken place in college athletics to get to where they are at today. Although there is a strong adherence to amateurism, it appears as if the NCAA has allowed for more leniency and benefits in the wake of national scandals. However, these new benefits fail to extend to female athletes of any sport.

#### IV. CAN JANE DOE SUCCEED ON AN LPA CLAIM AGAINST THE NCAA?

As of now, there has been no legal challenge to the NCAA’s recent rule changes. This is the result of the changes only taking place in the fall of 2018,<sup>81</sup> the pending approval of certain changes by outside organizations or agencies,<sup>82</sup> and the fact that there has not been an NBA or WNBA draft since the passing of these rules. Because there is no case law regarding a challenge to these newly adapted exceptions, this section will have to utilize a hypothetical situation in order to go through a legal analysis of an LPA claim. This section will first identify what needs to be shown to make a valid claim and the corresponding legal standard. It will then provide relevant background information on “Jane Doe.” Finally, this section will analyze the merits of Doe’s claim.

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77. NCAA MANUAL, *supra* note 11, art. 12.3.1, at 71.

78. *Id.* See NCAA MANUAL, *supra* note 11, art. 12.3.1.1, at 71 (discussing exceptions for baseball and men’s ice hockey); See also *Committed to Change*, *supra* note 9 (discussing new exception for men’s basketball).

79. NCAA MANUAL, *supra* note 11, art. 12.3.1.1, at 71.

80. Alex Kirshner, *The NCAA is Acknowledging That it Won’t Collapse if Players Can Sign with Agents*, SBINATION (Jan. 20, 2018), <https://www.sbnation.com/2018/1/20/16911646/ncaa-rules-agents-hockey-baseball-football-basketball>.

81. See O’Donnell, *supra* note 71.

82. See *Flexibility for Going Pro and Getting a Degree*, *supra* note 71 (mentioning the fact that the Uniform Athlete Agents Act needs to be revised before agents may be allowed to pay for the expenses of collegiate athletes).

*A. Law of Private Associations*

Unlike making a constitutional claim, a Title IX claim, or an antitrust claim, making a claim under the law of private associations (LPA) is not a statutory claim that can be made. The law of private associations is a common law claim that can be made based on the holding of a cluster of cases.<sup>83</sup> Courts will impose certain restrictions on private associations but are generally deferential to the decision making and rules of the private association.<sup>84</sup> Further, it may be difficult to bring an LPA claim against the NCAA outside the state they are headquartered in, Indiana, because a court would likely find that applying the private association laws of each state against the NCAA would be a violation of the Dormant Commerce Clause.<sup>85</sup>

There are several main cases that make up the basic rudiments of an LPA claim, none of which have made their way to the Supreme Court. In *California State University, Hayward v. National Collegiate Athletic Ass'n*, two college freshmen were ruled ineligible by the NCAA because of insufficient grades.<sup>86</sup> The university challenged the decision to rule the two players ineligible because it asserted the NCAA failed to follow its own rules, to which the NCAA responded by arguing courts shall not interfere with private associations.<sup>87</sup> The judges in this case held that a court may interfere with the affairs of a private voluntary association “where the action by the association is in violation of its own bylaws or constitution.”<sup>88</sup> However, courts will not interfere when the association is disciplining or expelling one member of the association when the action is taken in good faith and accordance with its adopted law and rules.<sup>89</sup> Thus, a party has a strong LPA claim if it can be shown that a private association violated its own rules or law of the land.

The next case that courts rely on when looking at an LPA claim is *Charles O. Finley & Co., Inc. v. Kuhn*.<sup>90</sup> In this case, the owner of the Oakland Athletics Baseball Club challenged the decision of the Commissioner of Major League Baseball, Bowie Kuhn, who vetoed the sale of three Athletics players to other

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83. See Matthew Mitten, *The Penn State “Consent Decree”: The NCAA’s Coercive Means Don’t Justify Its Laudable End, But is There a Legal Remedy?*, 41 PEPP. L. REV. 321, 331 n. 63 (2014).

84. Cal. State Univ., *Hayward v. Nat’l Collegiate Athletic Ass’n*, 121 Cal.Rptr. 85, 88-89 (Dist. Ct. App. 1975); Courts are generally deferential to the NCAA when it comes to any sort of litigation. Lockhart, *supra* note 58, at 186-88.

85. See *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993) (invalidating a Nevada statute that attempted to regulate the NCAA, a private association because of commerce clause issues).

86. Cal. State. Univ., *Hayward*, 121 Cal.Rptr. at 88.

87. *Id.*

88. *Id.*

89. *Id.* at 88-89.

90. 569 F.2d 527 (7th Cir. 1978).

professional teams.<sup>91</sup> After deliberations, the court concluded that the decision was made in “good faith, after investigation, consultation and deliberation, in a manner which he determined to be in the best interests of baseball.”<sup>92</sup> The court took the holding in *California State University, Hayward v. National Collegiate Athletic Ass’n* a step further and held that in addition to following their own rules, private associations must also provide claimants with the basic rudiments of due process of law.<sup>93</sup>

Finally, there are three sport specific cases that use the LPA’s “arbitrary and capricious” standard of review in their respective challenges against NCAA amateurism rules. The first case, *Oliver v. National Collegiate Athletic Ass’n*, involved a challenge to the NCAA bylaw that restricted the presence of an agent in the course of professional baseball contract negotiations.<sup>94</sup> Because this case was ultimately settled,<sup>95</sup> it does not provide any precedential direction, but it can demonstrate that NCAA rules are not immune from challenges which use an arbitrary and capricious standard.

The remaining two cases involving the NCAA provide more guidance as to how courts will rule on an LPA claim. In *Bloom v. National Collegiate Athletic Ass’n*, Bloom was a collegiate athlete who utilized his professional status as an Olympian to secure endorsement deals.<sup>96</sup> Bloom discontinued his endorsement deals, sought a waiver of the NCAA rule prohibiting endorsements, and brought action against the NCAA upon the denial of the waiver.<sup>97</sup> One of Bloom’s arguments was that the NCAA “is arbitrary in the way it applies its bylaws among individual students.”<sup>98</sup> Although Bloom was unsuccessful at proving his case, one could bring a successful claim if the student-athlete could demonstrate that the NCAA was arbitrarily applying its rules to athletes.<sup>99</sup>

The final case, *National Collegiate Athletic Ass’n v. Lasege*, expands on the rights of collegiate athletes.<sup>100</sup> In *Lasege*, the plaintiff was a Nigerian citizen who was declared ineligible to play basketball at the University of Louisville because he “sign[ed] explicit contracts with a sports agent and a professional team” prior to playing at the University of Louisville.<sup>101</sup> Although the court in

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91. *Id.* at 530-31.

92. *Id.* at 539.

93. *Id.* at 544.

94. 920 N.E.2d 203, at 208 (Ohio Com.Pl. 2009).

95. Lockhart, *supra* note 58, at 178-79.

96. 93 P.3d 621, 622 (Colo. App. 2004).

97. *Id.* at 622-23.

98. *Id.* at 627.

99. *Id.* at 627-28.

100. 53 S.W.3d 77 (Ky. 2001).

101. *Id.* at 81.

this case did not rule in Lasege's favor,<sup>102</sup> it did come to a number of conclusions. The court found that, although private associations should "paddle their own canoe," relief should be granted if the NCAA acts arbitrarily and capriciously towards its student-athletes.<sup>103</sup> Further, challenges to a student-athlete's eligibility should involve a "complex balancing of competing interests."<sup>104</sup>

Based on the relevant case law, one has a valid case if they can show one or more of the following: the private association does not follow its own rules,<sup>105</sup> the private association does not provide a claimant with procedural due process,<sup>106</sup> the private association applies its rules arbitrarily and capriciously,<sup>107</sup> or the association (NCAA) acts arbitrarily or capriciously towards a student-athlete.<sup>108</sup>

### *B. Jane Doe's Unfortunate Draft*

As stated above, the NCAA rule change is so new that all of the intricacies of the rule have not been completely finalized. Further, because this change occurred in August of 2018 there has not been an NBA or WNBA draft that would allow the rule change to be utilized by a men's basketball player. For these reasons, it is necessary to analyze this potential legal issue with the aid of a hypothetical athlete (Jane Doe).

Jane Doe is a starting basketball player at Marquette University, but has not quite stood out on a national level to the extent that many of the other NCAA women's basketball players have this season. Although she is a junior at Marquette, she is eligible after this season to enter the WNBA Draft and wishes to pursue a professional career. In order for any female player to be eligible for selection in the WNBA draft they must be "at least twenty-two . . . years old during the calendar year in which such draft is held and she either has no remaining intercollegiate eligibility or renounces her remaining intercollegiate eligibility by written notice at least ten . . . days prior to such draft."<sup>109</sup> To ensure Doe is eligible for the draft based on the eligibility requirements of the

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102. *Id.* at 89.

103. *Id.* at 83.

104. *Id.*

105. Cal. State. Univ., Hayward, 121 Cal.Rptr. at 88-89.

106. Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527, 544 (7th Cir. 1978).

107. Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 627 (Colo. App. 2004).

108. Nat'l Collegiate Athletic Ass'n v. Lasege, 53 S.W.3d 77, 83 (Ky. 2001).

109. Collective Bargaining Agreement Between Women's National Basketball Association and Women's National Basketball Association Players, art. VIII(1)(b), at 105, <https://wnbpa.com/wp-content/uploads/2017/07/WNBA-CBA-2014-2021Final.pdf> (last visited Feb. 2, 2019).

Collective Bargaining Agreement, Doe's birthday is on June 1, 2019 where she will be turning twenty-two, thus making her eligible.

Doe will sign an agent in attempt to market her skills to WNBA clubs and ultimately enter the WNBA draft, which is currently a violation of the NCAA rules.<sup>110</sup> Further, while attempting to market her skills, Doe's agent pays for her travel to meet with various teams, and he also covers all of Doe's meals.<sup>111</sup> Ten days after the draft, where Doe ultimately goes undrafted, she declares her intent to return to Marquette for her senior season and provides Marquette's athletic director with notice of her intent in writing.<sup>112</sup> However, when the NCAA becomes aware that Doe agreed to be represented by an agent in writing and the agent provided her with money for transportation and meals, it declared her ineligible for her senior season. Doe promptly files a lawsuit against the NCAA in the state of Indiana claiming that the NCAA is treating her arbitrarily and capriciously. She further argues that the NCAA rule allowing for males to retain their eligibility after hiring an agent and receiving benefits is arbitrary and capricious in its application because a female that engages in the same activities will be declared ineligible.

### *C. The Merits of Doe's Claim*

To succeed on her LPA claim and get a court ordered injunction, Jane Doe will need to show that the NCAA rule allowing for male basketball players to return to school after hiring an agent and entering the draft, but not the females, is arbitrary and capricious. To make this determination, it will be necessary to show that females are as deserving of receiving the benefits that male basketball players are.

First of all, one of the underlying reasons for the rule change aside from the NCAA scandal was to allow draft-eligible players to return to school.<sup>113</sup> Last year there were only six men's collegiate basketball players who declared for the draft, signed agents, attended the draft combine, and went undrafted.<sup>114</sup> There were sixty-nine players who were invited to the combine, so it is clear that this rule would have applied to only a small subset of the players.<sup>115</sup> Conversely, there have been a handful of age-eligible female basketball players

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110. See NCAA MANUAL, *supra* note 11, art. 12.3.1, at 71. "A women's basketball player can enter the draft and retain eligibility if they go undrafted, but they must not use an agent and may not receive extra benefits." NCAA MANUAL, *supra* note 11, article 12.2.4.2.1.2, at 70.

111. NCAA MANUAL, *supra* note 11, art. 12.3.1.3, at 71.

112. See NCAA MANUAL, *supra* note 11, art. 12.2.4.2.1.2, at 70.

113. See O'Donnell, *supra* note 71.

114. *Id.*

115. *Id.*



who left school with a year of collegiate eligibility left with hopes of being selected by a WNBA team.<sup>116</sup> Clearly, just like the men, many young women wish to start their career as soon as possible. Further, it has been argued that the number of females who plan to leave early for the WNBA draft is only going to increase going forward.<sup>117</sup> In the 2017 and 2018 WNBA drafts a number of prospects, including one of the highest ranked draft prospects from 2018, Azura Stevens,<sup>118</sup> would not have been eligible to return to school had they not been drafted.<sup>119</sup>

There would be a strong argument that because both the female and male basketball players have the ability to enter their respective drafts when they have NCAA eligibility remaining that treating the two parties differently would be arbitrary and capricious. Much like their male counterparts, females have a strong incentive to leave school early and enter the WNBA draft. Although there remains a great disparity between male and female athletes, the average salary for a WNBA player is near \$75,000 a year.<sup>120</sup> This number is expected to rise in the future, giving draft-eligible players a greater incentive to leave early.<sup>121</sup> Male players have the same monetary incentive to enter the NBA draft early.<sup>122</sup> It is evident that the men are receiving greater flexibility regarding going pro or getting a college education, while the women are not so fortunate.

Although *Oliver* was settled and is not precedent, a court would likely come to the same conclusion as the *Oliver* court did prior to the settlement. The court in *Oliver* stated that the rule prohibiting an agent being present during contract negotiations was arbitrary and capricious because the rule was overreaching and was only self-serving to the NCAA.<sup>123</sup> In this case, Jane Doe would likely show that allowing the male basketball players to hire agents and return to school, but refusing the same service to the female players is self-serving to the NCAA. Allowing standout male players to return after an unsuccessful draft is good for

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116. Doug Feinberg, *For 2nd Straight Year, Player Declares Early for WNBA Draft*, USA TODAY (Apr. 5, 2016), <https://www.apnews.com/4dfa8bafc54a45e283e38a50d2776382>.

117. *Id.*

118. *2018 WNBA Draft*, WNBA, <https://www.wnba.com/draft2018profile/azura-stevens/> (last visited Mar. 8, 2019).

119. For a list of undrafted female basketball players, see *2017 WNBA Draft: Undrafted Players*, DRAFT SITE, <https://www.draftsite.com/wnba/draft-history/2017/undrafted/> (last visited Feb. 1, 2019).

120. Nancy Lough, *The Case for Boosting WNBA Player Salaries*, CONVERSATION (Aug. 9, 2018), <http://theconversation.com/the-case-for-boosting-wnba-player-salaries-100805>.

121. *See id.*

122. See Jason Belzer, *2018 NBA Draft: First-Round Rookie Salary Projections*, FORBES, June 22, 2018, <https://www.forbes.com/sites/jasonbelzer/2018/06/22/2018-nba-draft-1st-round-rookie-salary-projections/#691f35ff642d> (projecting the salaries and bonuses for the incoming rookies prior to last year's NBA Draft).

123. *Oliver v. Nat'l Collegiate Athletic Ass'n*, 920 N.E.2d 203, 216 (Ohio Com.Pl. 2009).

business and will allow men's programs and the NCAA to continue to reap enormous revenues from the return of their standouts.<sup>124</sup> Further, it is self-serving to continue to adhere to the principal of amateurism with regards to low revenue female basketball programs,<sup>125</sup> but stray away from this principal for the high revenue male programs. The ability of the small number of those with remaining eligibility who went undrafted last year to return and generate hype, and in turn revenues for the NCAA, indicates the rule is self-serving to the financial interests of the NCAA.

Further, it can likely be shown that the denial by the NCAA of Jane Doe's return to college basketball would be an arbitrary and capricious action taken towards a student-athlete.<sup>126</sup> The NCAA states it wants to give "basketball student-athletes more freedom and flexibility" to make the decision to enter a professional sports league or remain in school, which it does for only half of the basketball players.<sup>127</sup> Not providing that "freedom and flexibility" to females, who also may enter their draft with remaining eligibility, with hopes of becoming a professional basketball player is arbitrary and capricious.<sup>128</sup> The number of female athletes that have begun to leave early for the draft, who also leave behind college eligibility, is increasing.<sup>129</sup> However, the NCAA saw that an exception to its amateurism rules should only be applied to a small subset of male players who take the same risk.<sup>130</sup> The NCAA's actions do not seem to support its pillar of flexibility, at least not for all.

Conversely, there would likely be a strong argument on behalf of the NCAA that there is no violation because the NCAA is not arbitrarily applying its rules. In *Bloom v. National Collegiate Athletic Ass'n*, the court found the NCAA was not acting arbitrarily and capriciously for failing to grant a waiver to the plaintiff because he failed to show any inconsistency in the application of the rules.<sup>131</sup> Much like *Bloom*, the NCAA would attempt to show the two groups are not the same, and therefore there is no inconsistency in the application of its rules. In this case the NCAA would likely argue that female basketball players are not in

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124. Brandon Wiggins, *The 25 Schools That Make the Most Money in College Basketball*, BUSINESS INSIDER (Mar. 31), <https://www.businessinsider.com/louisville-was-college-basketballs-biggest-money-maker-in-2016-2018-2>. Eight different men's programs brought in over \$20 million in revenue in 2016. *Id.*

125. Brandon McClung, *Top 20 Women's College Basketball Programs by Revenue*, SPORTS BUS. J. ISS. (Mar. 12, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/03/12/In-Depth/Team-revenue.aspx>.

126. Nat'l Collegiate Athletic Ass'n v. Lesege, 53 S.W.3d 77, 83 (Ky. 2001)

127. *Flexibility for Going Pro and Getting a Degree*, *supra* note 71.

128. *Id.*

129. Feinberg, *supra* note 116.

130. *See* O'Donnell, *supra* note 71.

131. *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 628 (Colo. App. 2004).

the same position as the males with regards to the draft because a greater number of males enter the draft with remaining college eligibility.<sup>132</sup> Further, the NCAA would likely argue that allowing males to utilize certified agents is necessary to combat the consistent scandals and bribery that plagues men's college basketball,<sup>133</sup> which is not as prevalent on the female side.

Although these appear to be logical arguments, it is likely that Jane Doe could still show the differential treatment is arbitrary and capricious. While a greater number of males with eligibility remaining enter the draft, it appears that a growing number of females in the same position are entering their respective draft and should be provided with the same protections.<sup>134</sup> Further, much like their counterparts, there is a financial incentive to leave early for the female players, and although it is less than the males,<sup>135</sup> they have a difficult choice to make between entering the draft or remaining at school. An athlete, male or female, with a difficult choice to make regarding their future would benefit from consultation with an agent.<sup>136</sup> Finally, it is arbitrary and capricious that any male player may receive meals, lodging, transportation, and financial aid from an agent and return to school,<sup>137</sup> but a similarly situated female player who chooses to exercise her right to leave school early may not without conceding her eligibility. Female players who choose to prematurely pursue their professional dreams should be provided with the same benefits and amenities as the men who choose to do the same.

Although courts are deferential to private associations,<sup>138</sup> there is likely a strong claim that the new changes to the NCAA amateurism rules would be a violation of the laws of private associations. The rule changes, although very beneficial to young males who wish to pursue their professional dreams, are arbitrary and capricious due to the lack of application to similarly situated female players. For the reasons mentioned above, Jane Doe would have a strong

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132. Of the sixty players included in the 2019 mock NBA draft, only ten are seniors. *2019 Mock Draft*, NBADRAFT.NET, <https://www.nbadraft.net/nba-mock-drafts/?year-mock=2019> (last visited Feb. 1, 2019).

133. See Michael McCann, *What's Really to Come from the NCAA's Student-Athlete Agent Announcement?* SPORTS ILLUSTRATED, Aug. 8, 2018, <https://www.si.com/college-basketball/2018/08/08/ncaa-agents-student-athlete-one-and-done-nba-draft>.

134. See Feinberg, *supra* note 116.

135. See Nancy Lough, *The Case for Boosting WNBA Player Salaries*, CONVERSATION (Aug. 9, 2018), <http://theconversation.com/the-case-for-boosting-wnba-player-salaries-100805>.

136. Jerry R. Parkinson, *Oliver with a Twist: The NCAA's No-Agent Rules Applied to Non-Lawyer Representatives of Baseball Student-Athletes*, 41 J.C. & U.L. 257, 258 (2015).

137. *Flexibility for Going Pro and Getting a Degree*, *supra* note 71.

138. See *Cal. State Univ., Hayward v. Nat'l Collegiate Athletic Ass'n*, 121 Cal.Rptr. 85, 88-89 (Cal. Dist. Ct. App. 1975). Courts are generally deferential to the NCAA when it comes to any sort of litigation. See Lockhart, *supra* note 58, at 186-88.

claim against the NCAA, and could likely succeed in receiving an injunction against the NCAA.

#### V. THE RELATIONSHIP BETWEEN COLLEGE ATHLETICS AND AGENTS GOING FORWARD

In the wake of the Adidas college basketball scandal, a number of NCAA critics provided their two cents as to how prevent scandals going forward. Despite the fact that there appears to be no intentions to pay collegiate athletes in the foreseeable future,<sup>139</sup> NCAA critic Jay Bilas believes that allowing college athletes to sell their services in a free market is the only way to prevent future scandals.<sup>140</sup> However, in addition to the NCAA's adherence to amateurism, the holding in *O'Bannon v. National Collegiate Athletic Ass'n* acts as another barrier to financially compensating college athletes beyond the price of school,<sup>141</sup> which ultimately renders Bilas' argument unrealistic at this point. For this reason, a more reasonable solution shall be implemented that will both keep the status quo of amateurism, while at the same time allowing collegiate athletes to make those important choices regarding their professional futures.

The NCAA currently allows for three exceptions to the general prohibition of the use and signing of agents: men's ice hockey,<sup>142</sup> baseball,<sup>143</sup> and now men's basketball.<sup>144</sup> It is clear there is some flexibility with regards to athlete representation, so logically the next step would be to allow all draft eligible athletes to retain player agents. This practice has worked for both men's ice hockey and baseball. The NCAA allows players in those specific sports to retain agents who can help them through the draft process, which may start in high school for the top prospects.<sup>145</sup> In neither hockey nor baseball has the use of agent resulted in significant problems, nor has it prevented high school prospects from attending college and having promising careers.<sup>146</sup> Further, the popularity of these sports has not been reduced by allowing for a minor encroachment on the "spirit of amateurism."<sup>147</sup>

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139. Russo, *supra* note 34.

140. Jay Bilas, *Why the College Basketball Scandal Won't Get Fixed Until the NCAA Pays Athletes*, ESPN (Sept. 28, 2017), [http://www.espn.com/mens-college-basketball/story/\\_/id/20841877/untill-ncaa-solves-money-problem-pays-athletes-problems-continue](http://www.espn.com/mens-college-basketball/story/_/id/20841877/untill-ncaa-solves-money-problem-pays-athletes-problems-continue).

141. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1079 (9th Cir. 2015).

142. NCAA MANUAL, *supra* note 11, art. 12.3.1.1, at 71.

143. *Id.*

144. *Flexibility for Going Pro and Getting a Degree*, *supra* note 71.

145. Kirshner, *supra* note 80.

146. *Id.*

147. *Id.*

Not only will the integrity of collegiate athletics remain intact but allowing for the athletes to hire agents would also result in greater decision making by collegiate athletes. Young athletes of all sports may need the professional opinion of an agent regarding the decision to even enter a professional draft,<sup>148</sup> and “are seldom equipped to negotiate effectively” without the assistance of an experienced agent or advisor.<sup>149</sup> Allowing young athletes to use agents would “put them in a position to get the advice they need,” prior to entering the draft and throughout the entire draft process.<sup>150</sup> Further, if the NCAA is willing to allow basketball players to return to school after hiring an agent and entering the draft, it is logical this exception should be extended to other sports as well. Providing “freedom and flexibility” should be benefits that extend to all collegiate athletes, and not simply the subcategory of athletes that were involved in the most recent scandal.<sup>151</sup>

There are a number of concerns regarding the use of player agents in college sports such as further scandal, undue influence, and discouragement of the best choice of the athlete.<sup>152</sup> The NCAA put a number of safeguards in place for the change recently made to men’s basketball that could apply to all collegiate athletes. First, prior to signing with an agent the athlete would need to request an evaluation from an advisory committee, which provides the athlete with information regarding the decision to enter the draft.<sup>153</sup> Further, any agent who wishes to work with college athletes “must be certified by an NCAA program with standards for behavior and consequences for violations.”<sup>154</sup> Finally, the NCAA has created two new adjudicative bodies—the Complex Case Unit and the Independent College Sports Adjudication Panel—to aid hearing cases and sanctioning violations of all Division I rules.<sup>155</sup> If these or similar safeguards could be applied to all collegiate sports, players would receive the benefits of

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148. See *Flexibility for Going Pro and Getting a Degree*, *supra* note 71 (discussing the importance of making an informed decision as to whether or not a college basketball should turn pro or stay in school).

149. Jerry R. Parkinson, *Oliver With a Twist: The NCAA’s No-Agent Rules Applied to Non-Lawyer Representatives of Baseball Student-Athletes*, 41 J.C. & U.L. 257, 258 (2015).

150. Teddy Cahil, *New NCAA Basketball Rule Could Lead To Push For Liberalizing Baseball Agent Rules*, BASEBALL AMERICA, Aug. 10, 2018, <https://www.baseballamerica.com/stories/new-ncaa-basketball-rule-could-lead-to-push-for-liberalizing-baseball-agent-rules/>.

151. *Flexibility for Going Pro and Getting a Degree*, *supra* note 71.

152. See generally, Adam Epstein & Bridget E. Niland, *Sports Agent Litigation and the Regulatory Environment*, 11 ATLAN. L.J. 36 (2009).

153. *Flexibility for Going Pro and Getting a Degree*, *supra* note 71.

154. *Id.*

155. Jeremy Bauer-Wolf, ‘Committed Change’ for Men’s Basketball, INSIDE HIGHER ED (Aug. 9, 2018), <https://www.insidehighered.com/news/2018/08/09/new-ncaa-rules-allow-mens-basketball-players-have-agents-return-college-if-undrafted>.

sports agents, and the NCAA in return would stand firmly on its amateurism pillar with security and regulations.

Ultimately, the NCAA needs to continue to evolve. Athletes continue to bring more value to the organization and are need in something more than education in return. The NCAA has already made exceptions to three sports, shouldn't the next step be to create a universal exception for draft eligible athletes? The NCAA's most recent regulatory additions demonstrate that it is ready and able to take on the additional responsibility of regulating agents for male basketball players. Why not the rest of its amateur athletes?

## VI. CONCLUSION

College sports have come a long way, and it appears from this rule change that the NCAA is on the right path to giving amateur athletes more benefits. However, it is clear that much still needs to be done to level the playing field for male and female athletes. Further, there is more that can be done to help young collegiate athletes make the best decisions for their future and potential professional careers. By allowing draft eligible athletes from all collegiate sports to consult agents and make an educated decision regarding their future, while maintaining their eligibility at the same time, appears to be the next step for college athletics. If the NCAA is not ready for this type of solution, at the very least the same rules should apply to both male and female basketball players for the reasons described above. Finally, if the NCAA continues to move forward while leaving its female athletes behind, it is quite likely it will subject itself to a lawsuit it is likely to lose.