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Letter from the Editor

Welcome to the Third Annual Santa Clara Sports Law Symposium. This year we discuss the widely disputed role of athletics in higher education. We are proud to

present to you the second edition of the Selected Proceedings of the Santa Clara Sports Law Symposium. We were pleasantly surprised by the large number of article submissions we received for this year's edition. Thank you to all of the authors who took the time to send us these fourteen articles to share with the Symposium attendees.

I must personally thank Professor Ron Katz, who continues to be instrumental in the success of this young publication. Certainly this publication would not exist without the help of Professor Katz. Thank you, Professor Katz, for your dedication, support and advice throughout this process.

I must also thank our editors. This year our editors worked extremely hard to prepare nearly three-times more articles than were prepared for last year's edition. The large variety of topics and viewpoints that appear in this year's edition would not be possible without the hard work of these editors.

Finally, thank you for attending this year's Symposium and taking the time to read our publication. We hope you find both the Symposium and the Selected Proceedings enjoyable and informative.

Respectfully Submitted,

Jacob Vigil

BACKGROUND NOTES ON SPORTS ETHICS

By Kirk O. Hanson and Matt Savage

The Institute for Sports Law and Ethics is unique in its dual emphasis on both sports law and sports ethics, and on the relationship between the two. But what really is sports ethics? What topics do you talk about when you are concerned with ethics as well as the law?

On the following pages, we have summarized our understanding of the concerns of sports ethics. These background notes are only the start of a multiyear dialogue and are meant to stimulate questions and discussion at this Symposium.

The following notes address:

- I. What Role Does Ethics Play in Sports?
- II. Ethics in Professional Sports
- III. Ethics in College Sports
- IV. Ethics in Youth Sports

We hope you will respond to these background notes by giving us your suggestions for additional sports ethics topics and questions to be addressed. We will post additional ideas on the Institute's website.

Please send your suggestions for additional sports ethics topics to Matt Savage at msavage@scu.edu. Matt is a 2012 graduate of Santa Clara University, a college athlete, and a former "Hackworth Fellow in Ethics" at Santa Clara's Markkula Center for Applied Ethics. He will be working with the Institute and Ethics Center to map the issues to be addressed.

I. What Role Does Ethics Play in Sports?

To understand the role ethics plays in sport and competition, it is important to make a distinction between gamesmanship and sportsmanship.

Gamesmanship is built on the principle that winning is everything. Athletes and coaches are encouraged to bend the rules wherever possible in order to gain a competitive advantage over an opponent, and to pay less attention to the safety and welfare of the competition. Some of the key tenants of gamesmanship are:

- *Winning is everything*
- *It's only cheating if you get caught*
- *It is the referee's job to catch wrongdoing, and the athletes and coaches have no inherent responsibility to follow the rules*
- *The ends always justify the means*

Some examples of gamesmanship are:

- *Faking a foul or injury*
- *Attempting to get a head start in a race*
- *Tampering with equipment, such as corking a baseball bat in order to hit the ball farther*
- *Covert personal fouls, such as grabbing a player underwater during a water polo match*
- *Inflicting pain on an opponent with the intention of knocking them out of the game, like the Saint's bounty scandal*
- *The use of performance-enhancing drugs*
- *Taunting, or intimidating an opponent*
- *A coach lying about an athlete's grades in order to keep him or her eligible to play*

All of these examples place greater emphasis on the outcome of the game, rather than the manner in which it is played.

A more ethical approach to athletics is sportsmanship. Under a sportsmanship model, healthy competition is seen as a means of cultivating personal honor, virtue, and character. It contributes to a community of respect and trust between competitors, and in society. The goal in sportsmanship is not simply to win, but to pursue victory with honor by giving one's best effort.

Ethics in sport requires four key virtues: fairness, integrity, responsibility, and respect.

Fairness

- *All athletes and coaches must follow established rules and guidelines of their respective sport*
- *Teams that seek an unfair competitive advantage over their opponent create an uneven playing field which violates the integrity of the sport*
- *Athletes and coaches are not discriminated against, or excluded from participating in a sport based on their race, gender, or sexual orientation*
- *Referees must apply the rules equally to both teams, and cannot show bias or personal interest in the outcome*

Integrity

- *Similar to fairness, in that any athlete that seeks to gain an advantage over his or her opponent by means of a skill that the game itself was not designed to test demonstrates a lack of personal integrity and violates the integrity of the game*

- *For example, when a player fakes being injured or fouled in soccer, they are not acting sportsmanlike because the game of soccer is not designed to measure an athlete's ability to flop. It is a way of intentionally deceiving an official into making a bad call, which only hurts the credibility of the officiating, and ultimately undermines the integrity of the game*

Responsibility

- *To be sportsmanlike requires players and coaches to take responsibility for their performance, as well as their actions on the field. This includes their emotions.*
- *Many times athletes and coaches will make excuses as to why they lost the game. The most popular excuse is to blame the officiating. The honorable thing to do instead is to focus only on the aspects of the game that you can control, i.e. your performance, and to question yourself about where you could have done better.*
- *Responsibility also requires that players and coaches be up to date on the rules and regulations governing their sport*
- *Responsibility also demands that players and coaches conduct themselves in an honorable way off the field, as well as on it*

Respect

- *All athletes should show respect for teammates, opponents, coaches and officials*
- *All coaches should show respect for their players, opponents, and officials*
- *All fans, especially parents, should show respect for other fans, as well as both teams and officials*

The sportsmanship model is built on the idea that sports both demonstrates and encourages character development, which then influences the moral character of the broader community. How we each compete in sports can have an effect on our personal moral and ethical behavior outside of the competition.

Some argue for a “bracketed morality” within sports. This approach holds that sport and competition are set apart from real life, and occupy a realm where ethics and moral codes do not apply. Instead, some argue, sports serves as an outlet for our primal aggression, and a selfish need for recognition and respect gained through the conquering of an opponent. In this view, aggression and victory are the only virtues. For example, a football player may be described as mean and nasty on the field, but kind and gentle in everyday life. His violent disposition on the field is not wrong because when he is playing the game he is part of an amoral reality that is dictated only by the principle of winning. Sports ethics rejects this view.

An ethical approach to sport rejects this bracketed morality, and honors the game and one's opponent through tough, but fair play. This means understanding the rules and their importance in encouraging respect for your opponent who push you to be your best

II. Ethics in Professional Sports

Professional sports are central to American culture. Not only is the Superbowl the most watched event each year on television, but tens of millions of Americans attend professional sports games in person each year and even more follow their favorite team's and player's behavior in the media.

Ethical issues in professional sports are widely debated in the press. They include the following:

- **What is the role of professional sports in American culture?**

Most regard professional sports as a form of entertainment. We root for our favorite team because we love the excitement we feel when they win, and we feel the pain and disappointment when they lose. In the era of ESPN and Budweiser, professional athletes are often treated like rock stars, and worshipped by countless number of fans. But, for those that think ethics plays a role in sports, professional athletes are held to a higher standard. They are seen as role models responsible for setting an example for others to follow, especially young people.

Most would agree that sports have the power to bring a community together. Rooting for our favorite teams has a way of uniting people with different backgrounds and experiences under one common symbol. People often say that a sports team reflects the character of its hometown, and the people that live in it. Some, though, take it a step further and argue that a city's professional sports teams actually play a significant role in shaping the values and character of society in general. For instance, if a player were to break the law during the off-season, but then come back to lead his or her team to a championship, most people would quickly dismiss the transgression, and celebrate the player as a hero. What does it say about a society when the success of its athletes causes it to suspend, or lower the standards of behavior? Is it right to give our most prominent athletes a free pass when it comes to their actions? Is it fair to the average citizen? Do professional athletes have an ethical responsibility to set an example for the people living in their communities? Or are they simply entertainers, providing a service?

- **How do you define cheating in professional sports?**

There is so much money at stake in professional sports, both for the players and for the owners, that the temptation to "game" the system or cheat is particularly strong.

Some would argue that the role of a coach and athlete is to seize as much of an advantage as possible, following the rules but trying to get around them whenever possible. Others would argue players, coaches and owners should follow the “spirit” of the rules. Some even argue “game ethics” makes it okay to cheat if you don’t get caught.

When cheating is discovered – whether it is a corked bat, a drug-enhanced performance, or a legal but shabby practice, what should be the penalty? Is cheating a big thing or a small thing? Should cheating, for example, lead to expulsion from the sport?

- **Who is responsible for the health and safety of professional athletes? Who decides when to go back in a game?**

The recent “Bounty” scandal involving the New Orleans Saints, as well as all of the research coming out about the dangers of head injuries and concussions in professional football have made player safety one of the major concerns of professional sports. However, not everyone is so concerned.

There is a debate within sports like football and hockey about the feasibility of making the sport safer. The evidence is fairly clear that concussions should be taken seriously by players and coaches, but some argue that the culture of the sports is just too inherently violent to change.

Money influences decisions regarding safety as well. The average NFL career is only 3-5 years, and with most contracts structured in a way that is heavy on incentives rather than guaranteed money, players have tremendous pressure to remain on the field in order to make as much money as possible. And who decides if the player plays hurt or goes back in? Often coaches are put in a position where a doctor tells him that a player has suffered a concussion and should not go in, but a player will try and cover it up, and want to play through it. Does a coach respect the autonomy of the player? Or is taking him or her out of the game in order to ensure their health and safety the right thing to do?

- **What is a professional athlete’s responsibility to his or her community?**

A large part of ethics is defining a person’s moral responsibilities to others. In the case of professional athletes, what is their moral responsibility to the city or community that they represent? How far should that responsibility extend, for example, in regulating a professional athlete’s behavior?

Most would agree that players have a duty to give back to the fans that support them through some sort of community service. Many athletes have foundations in their names, and offer their notoriety in order to gain support for a particular cause. Is it an ethical obligation? And how much should an athlete do?

What about an athlete’s off-field behavior? Every off-season, stories appear on ESPN about an athlete getting in trouble with the law. We don’t often see it derail,

or affect their status on the team. Of course they may go to jail, but then they still can come back, and, if they are good enough athletes, still play professional sports. Some argue that athletes are human, and that if a player shows true remorse for his or her actions, then they deserve our forgiveness. A prime example is Michael Vick. Is this ethical? Others argue that due to the prominent role of athletes as role models in the community, the standard for their behavior ought to be higher.

III. Ethics in College Sports

In the last few years, countless ethical issues have arisen in the world of college sports. A series of scandals involving players receiving improper benefits, coaches involved in recruiting violations, and most recently the tragedy at Penn State, have challenged the integrity of college athletics, leaving many to wonder if sports are compatible with the goals of higher education. Some of the key ethical questions, regarding college sports include:

- **Are College Sports Compatible with the Goals of Higher Education?**

There is a tension these days between the goals of major college athletic programs, and the mission of the universities they represent. Much of the tension arises from a lack of understanding between the two sides, but is there a fundamental problem?

Many people mistakenly assume that college administrators are opposed to sports and athletic achievement. People working in higher education usually view the role of athletics differently than most casual sports fans. Many educators see sports as an important *supplement* to a student-athlete's overall education. The physical strength, and character gained from playing sports is an important part of a universities mission in educating the whole person – mind, body, and soul. Many alumni and fans, however, believe the athlete is on campus to play sports.

Some observers believe that the classic educational model is far too idealistic, and outdated. This is not to say they don't believe sports can teach a person important life lessons. It is just that the world of college athletics has become so prominent, and so competitive, that things like education are not taken as seriously, or viewed as importantly as success on the field. For some athletic department staff, simply keeping a player academically eligible is considered to be enough. They do not push their athletes to excel in the classroom the same way they push them to excel in their sport.

- **Do we exploit college athletes if we don't pay them?**

Without a doubt, one of the major debates in the world of college sports is whether or not student athletes should be paid, at least in revenue generating sports (i.e. football, and men's basketball). Those that think they should believe that colleges and universities generating millions of dollars in revenue are unjustly exploiting the labor of student-athletes by not giving them their fair share of the profits. They do not believe that the value of a full-ride athletic scholarship is equivalent to the

multi-million dollar coach's salaries and television contracts, especially when universities lower their academic standards in order to keep players eligible to win games and generate more revenue. They argue that the entire system is hypocritical, and that universities unethically exploit their best athletes for money, and that paying those athletes is the most important step in undoing the unfairness.

On the other side of the debate are those that believe paying college football players and basketball players would compromise the goals of higher education. They point to the fact that only a handful of colleges actually make a profit, and that most of the money generated by these programs goes to support other non-revenue generating programs, such as Olympic sports. They view it as unjust to eliminate athletic opportunities for most in order to pay a few. The goal of an athletic department, in their view, is not to make money. It concerns them when they hear people mock the value and importance of a free education. To these, any money generated by a team's performance ought to be reinvested back into the education of the student-athlete because after all, universities are in the business of education, not minor league football.

- **Do collegiate sports do enough to protect the health and safety of athletes?**

Safety is always a concern at any level of competition. However, with college athletes, the situation is unique because of the rules governing a player's eligibility.

Under the NCAA's current system for Division I, student-athletes have 5 years to complete 4 years of athletic eligibility. A player may petition for a 6th year if they receive an injury that prevented them from competing in one of those years. However, the NCAA has not been consistent in its rulings regarding medical redshirt petitions. This can cause players to ignore minor injuries for fear of losing eligibility, putting them at risk for even greater harm.

Some criticize colleges for not treating players as employees, in order to avoid paying medical costs for a debilitating injury. Most schools do cover medical costs of injured players while they are enrolled in school and still officially on the team. However, once a player graduates, or stops playing due to injury, the university is no longer liable for his or her medical costs, which makes many people question the integrity of college athletic policies. They believe universities ought to be doing more to take care of injured athletes.

- **Are NCAA rules, regulations and penalties fair and effective?**

The NCAA is arguably one of the most scrutinized governing bodies in all of sports. College athletics still operates under the amateurism model for its student-athletes, and the NCAA is responsible for laying out the guidelines for schools to follow in order to preserve a student-athlete's amateurism. Many believe that the rules go too far.

The number one criticism is that the rules are too restrictive, and they punish the wrong people. An example is the recent penalties levied against USC because of

the improper benefits their former running back Reggie Bush received while attending the school. Bush was long gone by the time the NCAA came down on USC, as was the head coach Pete Carroll. Instead of directly punishing the player that broke the rules, the NCAA could only punish the institution in which it occurred, and many find this to be unfair and unethical.

The other major criticism is that the rules are too restricting on a players' liberty. Athletes are not allowed to accept even so much as a meal from someone because of their athletic achievements while in college, and many find that to be unfair. Critics also feel it is hypocritical of universities to turn around and sell the imaging rights of their brand and their athletes to EA Sports videogames for millions of dollars.

Those that defend the NCAA believe strongly in the amateur model. They see the NCAA's role as defending the integrity of sports, as well as preventing the "win-at-all-costs" mentality from becoming the culture within a college athletic department. That, they say, leads to unethical and corrupt behavior, such as the recent tragedy at Penn State.

IV. Ethics in Youth Sports

Every year, millions of young boys and girls sign-up to play in local youth sports leagues across the country. From hockey to little league baseball, many youth dream of one day playing under the lights, in a packed stadium, in front of thousands of screaming fans. Unfortunately, for most young people, that dream will never become a reality. This leaves us to wonder, what is the real role of youth sports in society? Is it only to recognize the select few destined for athletic greatness, and to weed out the rest? Or, is there an inherent value to youth to playing sports, even if a career ends in the third grade? If so, what is that value, and how can we it maximize it?

There are at least five fundamental ethical questions facing youth sports.

- **What is the purpose of Youth Sports?**

Some recognize the value of youth sports for its ability to instill strong and positive character in young boys and girls. Sports can help a young person learn important life lessons like how to work hard, persevere, be a team player, set goals, and follow rules.

Others treat sports as a means of identifying great athletes at a young age. The system of youth sports begins to look like ladder, with each step representing the next competitive tier a player must reach until they are at the top. They may acknowledge the important life lessons learned along the way, but ultimately sports is meant to identify those few individuals that shine, and to work on honing their

skills so that they can make it to the next level of competition. This approach may recognize little responsibility to those who don't keep climbing the ladder.

- **Does youth sports do enough to protect the health and safety of youth?**

Promoting a healthy, active lifestyle through fitness and exercise is an obvious benefit to playing sports at a young age. With childhood obesity rising, developing healthy habits early can be important to ensuring a child continues to make healthy choices in the future, and learns to respect their body and treat it well.

Safety is a concern at all levels of sports, but perhaps more so for young kids whose bodies are still maturing and developing. The effects of performance-enhancing drugs on a young person's body can be extremely dangerous, and even life threatening. Part of the moral responsibility of coaches and parents of young athletes is to make sure they understand that the choices they make with regard to their bodies can have lasting effects – both positive and negative.

Recent developments have also provided vivid reminders that every adult involved in youth sports has an obligation to protect youth from sexual abuse and from all forms of harassment and bullying. How to do this effectively is a critical ethical question.

- **Is winning everything? Or does everyone deserve a trophy?**

One of the debates that is constantly raging in youth sports is who should get awards. Some argue that sports for young kids should be about having fun, and always encouraging one another and staying positive. Therefore, everyone deserves a trophy because ultimately winning and losing doesn't matter.

There are others who disagree, and argue that one of the greatest lessons sports can teach a person at any age is how to deal with failure. Life is challenging, and everyone faces disappointment sooner or later. The great thing about sports is that it teaches a person how to respond to disappointment in a positive way. A young athlete learns to view losing not as a failure, but as a challenge to work even harder, so that next time they can be successful. Of course, the belief that only the youth who are climbing the ladder toward athletic prominence are important can label almost all as failures.

- **What is ethical coaching?**

How a young athlete develops both within their sport, and as a person, has a lot to do with how he or she is coached. Youth can be very impressionable, and it is important that a coach recognize his or her role in the athletic and personal development of each individual participant.

Often a coach will tear a player down in order to inspire them and make them better. However, some athletes do not respond well to this coaching strategy, and it can often destroy a young person's confidence and self-esteem. Fitting coaching to the individual is, many believe, the coach's fundamental ethical obligation.

Of course, a coach may be too relaxed in disciplining his or her players, and may fail to instill them with a proper attitude and character. It is the responsibility of a coach to recognize the needs of each individual player, and to meet those needs differently. This requires a tremendous amount of compassion and understanding.

- **How should parents behave?**

Whether as a player, coach, official, parent or spectator, we have all experienced those parents at youth games who just seem to take the game too seriously. Parents must realize that they play as much a role in how a young boy or girl views sports as anyone else, even if they are sitting in the stands.

Parents that constantly throw tantrums, yelling and screaming at coaches, officials or their own children, are setting an example for their children about how to behave when things don't go their way. It is easy to appreciate a parent that is passionate about their child's success, but when that passion goes too far it can be damaging to others. Finding the right balance is an ethical obligation – and challenge.

Article Accompanying the Keynote Address

Amateurism, Professionalism, Commercial Activity and Intercollegiate Athletics: Ambivalence about Principles

By: Wallace Renfro
NCAA Vice President and Chief Policy Advisor

Intercollegiate athletics in the United States – a phenomenon in its scale and scope that is unique to America – is a little more than 150 years old. The first recorded athletics contest between two institutions of higher education was conducted in 1852 and predates both the creation of the NCAA in 1906 and the development of national policy through NCAA regulation in 1921. Ironically, that first contest, a rowing regatta between the men of Harvard and the men of Yale August 3, 1852, was not associated with either institution nor did it predate the introduction of commercial activity associated with college sports. Indeed, the race came about at the urging of James Elkins, superintendent of the Boston, Concord and Montreal Railroad in order to sell tickets to fans to travel and watch the contest.¹ It was a commercial venture on the part of the railroad and its enterprising superintendent who understood the attraction of an athletics event between two of America’s great institutions of higher education. Intercollegiate athletics and commercialism were simultaneously introduced into American higher education and culture.

Soon, stands at rowing regattas were being constructed “for those who were willing to pay 50 cents.”² Local businesses were advertising their goods and services to fans and boosters, hoping to cash in on the increased foot traffic.³ As other sports were added to collegiate athletics programs, there was increasing interest in tapping commercial resources to offset the cost of equipment, travel, room and board, and facilities. This was especially so inasmuch as students themselves were the team managers and had to pay their own way if other funding was not available. Before the turn of the new century, running tracks were being constructed for collegiate competition; and soon after the dawn of the 20th century, the first football stadiums were built on campus. Where campus facilities did not exist, communities were vying for the opportunity to host intercollegiate events for the economic impact such contests would have on their businesses. The interest among students to participate in athletics against other students, the interest among fans and spectators to watch and root for their favorite sides, the interest of the media to report the results as news, and the interest of commercial entities to associate with and profit from

¹ See RONALD A. SMITH, *SPORTS & FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS* 3 (1988).

² *Id.* at 32.

³ See generally *id.* at 32-34.

the contests were fast established as facts of the campus athletics experience and the American culture.

There is a temptation in the modern era of intercollegiate athletics to perceive that commercial activity is a recent development fostered by television and embraced by athletics administrators to swell coffers, build ever-expanding programs, and increase payrolls for coaches and other personnel. It is true that television has had an enormous impact on the exposure of intercollegiate athletics with the growing need to acquire programming inventory as broadcast platforms mushroomed. First radio and then television clearly added to the exposure of what once were regional match-ups. Today, an entire nation – and indeed, the world – understands the significance of regular-season contests between Michigan and Ohio State, Texas and Oklahoma, Alabama and Auburn, Notre Dame and Southern Cal. In fact, the Internet presents nearly unlimited access for even the smallest intercollegiate programs. But as history shows, the presence of commercial activity within the context of intercollegiate athletics is as old as the games themselves and it is growing. Through marketing and promotion, the hype and drama associated with these games challenge anything that professional sports can offer. Because of the high interest, advertisers and marketers at local, regional and national levels are eager for an association with such events and with the institutions of higher education that sponsor the teams. Depending on the relative competitiveness or circumstances of the games, corporations are willing to pay premium prices for the opportunity to put their products before the eyes of an enormous audience across a broad spectrum of media.⁴

In the complex world of 21st century higher education, intercollegiate athletics in NCAA Division I is often viewed as “big business” and as such operating out of context with the purpose for which those institutions that sponsor college sports exist. Former NCAA President Myles Brand, through speeches, media interviews and writings, advocated the view that participation in college sports enhances the educational experience of student-athletes and that such educational value is the only rational reason for the continued support of intercollegiate athletics in higher education.⁵

He also characterized what higher education has sanctioned and supported for a century and a half as the “collegiate model of sports.”⁶ In his State of the Association address to the NCAA in 2007, Brand articulated the principles that distinguish intercollegiate athletics but are not uniformly

⁴ See generally Michael Felder, *College Football: Why The Marketplace Is Ripe For Everyone To Profit* (Aug. 20, 2012), <http://bleacherreport.com/articles/1304018-college-football-why-the-marketplace-is-ripe-for-everyone-to-profit>.

⁵ See Dr. Peg Brand & NCAA, *A Tribute to Dr. Myles Brand: 1942-2009*, OHIO UNIVERSITY CENTER FOR SPORTS ADMINISTRATION, http://www.sportsad.ohio.edu/features/index.html?article_id=179.

⁶ See Myles Brand, President, NCAA, Luncheon Keynote Address at the Tulane University National Symposium on Athletics Reform: Sustaining The Collegiate Model of Athletics (Nov. 11, 2003).

achieved throughout the enterprise. Relevant to this discussion are two: 1) Those who participate in college sports are students; and 2) College sports are wholly embedded in the university.⁷ He goes on to explain what separates intercollegiate athletics from what is commonly understood in a capitalistic environment as big business:

Athletics, like the university as a whole, seeks to maximize revenues. In this respect, it has an obligation to conduct its revenue-generating activities in a productive and sound business-like manner. Anything less would be incompetence at best and malfeasance at worst. That is, on the revenue side, the input side, athletics, like the university itself, must follow the best business practices. On the expenditure side, the output side, as it were, athletics must follow its not-for-profit mission. Like the university as a whole, athletics must maximize the best experiences of the students, including maximizing the number of participation opportunities.⁸

It is to this end of generating revenue in order to maximize participation opportunities and the student-athlete experience that intercollegiate athletics has found ready sources of financial support from commercial entities. Over the last two decades, athletics conferences and the NCAA itself have been particularly successful at reaching beyond the public and private dollars that institutions themselves depend on for support. Created in the beginning to organize athletics competitions among a dozen or fewer institutions geographically and philosophically connected, conferences in Division I have increasingly become the marketing and business-generating agent for the institutions. And the conferences have been highly successful in their development of commercial relationships. This infusion of corporate dollars for athletics in Division I has been critical not only for covering the costs at the campus levels, but also in the expansion and support of championship and participation opportunities at both conference and NCAA levels in all three divisions of the Association.

It is clear that commercial activity associated with intercollegiate athletics is not new; and if the Collegiate Model of Sports is to be sustained – if revenue is to grow in order to maximize participation opportunities and experiences -- then commercial activity is not likely to go away.

Despite this simple truth, higher education, the media and the general public project ambivalence about the commercial aspects of intercollegiate athletics. Much of the ambivalence or confusion comes from a firm and even fervent commitment to the principle of amateurism but with an ironic lack of understanding of the term. America inherited the term from Europe but never embraced it in the same way wealthy Europeans did as a class distinction. What worked to set intercollegiate athletics apart from professional sports at Oxford

⁷ See Myles Brand, President, NCAA, State of the Association at NCAA Convention: Citizens in a Civil Society (Jan. 15, 2007).

⁸ *Id.*

and Cambridge – that the amateur was of a social class that could afford both the time and expense of sport without compensation or reimbursement – has never worked as well in the egalitarian culture of America’s institutions of higher education.⁹ Indeed, American universities not only opened their doors to the broadest spectrum of the nation’s 19th century citizenry, but welcomed and even recruited students onto their athletics teams on the merits of physical talent rather than economic advantages. The American version of amateurism that developed as athletics increasingly became a part of the student experience on campuses across the country was not a way to keep social classes apart; instead, it was a commitment to the avocational approach to athletics in the university environment as opposed to the vocational approach in professional sports and to the concept that intercollegiate athletics was an adjunct activity to higher education. And as would become apparent with the founding of the NCAA in 1906, amateurism was the chief mechanism for differentiating between the two models.

So, while the impact of commercial activity and the interests of commercial entities have been present from the beginning – and indeed have helped salve the irritation of faculty and others that athletics financially distracts from the educational mission of the academy – the scale and scope of such activities juxtaposed against a rigid commitment to play without pay for the athletes has never made for a comfortable seat where the two notions can rest side by side. In the November 1915 issue of *Atlantic Monthly* magazine, William T. Foster, President of Reed College, observed that “the old distinction between professional and amateur athletics is of little use.”¹⁰ Nearly a century later, Foster’s lament that “when athletics are conducted for business, the aims are (1) to win games... (2) to make money... (3) to attain individual or group fame and notoriety” continues to speak for many critics of intercollegiate athletics.¹¹

As both practical and imperative as commercial support has been to the creation, rise and expansion of intercollegiate athletics, it has burdened the conscience of all who assume amateurism must first and always be held apart from concerns about money. It is helpful, therefore, to recall that the NCAA’s long-ago adopted principle of amateurism as it relates to intercollegiate athletics has almost nothing to say about compensation and everything to say about motivation. The Principle of Amateurism memorialized in the Association’s Constitution declares that “participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation... is an avocation, and [they] should be protected from exploitation by professional and commercial enterprises.”¹² Clearly, the student-athlete and

⁹ See PETER LIKINS ET AL., FINAL REPORT OF THE NCAA TASK FORCE ON COMMERCIAL ACTIVITY IN DIVISION I INTERCOLLEGIATE ATHLETICS 4, (2009).

¹⁰ William T. Foster, *An Indictment of Intercollegiate Athletics*, 116 ATLANTIC MONTHLY 577, 577 (Nov. 1915).

¹¹ *Id.*

¹² *NCAA Division I Manual*, at 4, 2012-13, available at <http://www.ncaapublications.com/p-4284-2012-2013-ncaa-division-i-manual-available-for-order-now-for-delivery-after-aug-1.aspx>.

the student-athlete alone is the object of amateurism in the American sense of the term as applied to intercollegiate athletics. Attempting to analyze the merits or the abominations of commercial activity in the context of college sports has become so burdened by a romantic yearning for a mythical era of amateurism and, as it is often put, “all that goes with it” that a fair accounting of its impact and potential limitations cannot be achieved in an emotionally neutral environment. It can be argued that commercialism for the purpose of generating the revenues that support intercollegiate athletics is no more incompatible with amateurism than the acquiring and selling of physical or financial assets are to the purpose of philanthropy. The goal in both is to monetize the assets of an enterprise – the entertaining features of sports in the case of intercollegiate athletics – to support and extend to as many as possible the inherent values of the enterprise itself. The principle of amateurism as applied to the student-athlete should stand apart from the consideration of how commercial activity in college sports is governed.

Although the definition of amateurism noted above does not explicitly note the requirement for those who would be student-athletes to choose this particular model over others, the language suggests an implicit relationship. Indeed, as the NCAA has gone about remodeling the bylaws that govern college sports, the rewritten definition includes the “choice” language.¹³ The new definition says: “Member institutions shall conduct their athletics programs for students who participate as a part of their educational experience, thus maintaining a line of demarcation between student-athletes who choose (emphasis added) to participate in the Collegiate Model from athletes competing in the professional model.”¹⁴

Even at the most elite levels of any Olympic or non-revenue sport, the amateur status of the participants is so rarely challenged as to be an insignificant concern. These sports depend largely or even entirely on revenue generated elsewhere within the athletics department or subsidized from the university’s general funds. The level of commercial activity associated with such sports is generally limited to gate receipts or minor corporate relationships. We universally understand that these student-athletes, some of whom may very well go on to professional careers in golf, tennis or baseball, for the most part are “motivated primarily by education and by the physical, mental and social benefits to be derived.”¹⁵ If any of these sports were suddenly to attain the same levels of interest and attention given to football and men’s basketball, if tens of thousands of fans were to clamor for tickets to competition events, if television were to vie for broadcast rights, if the student-athletes were to acquire significant celebrity status through media attention, we would over time likely begin to question the amateur status of the participants not because their motivation had changed but because the scale of commercial activity and media

¹³ Draft of National Collegiate Athletic Association commitments governing intercollegiate athletics, June 15, 2012

¹⁴ *Id.*

¹⁵ *NCAA Division I Manual*, *supra* note 12 at 4.

attention had changed. We would be wrong to do so, but that is exactly the ambivalence that has developed with regard to the revenue sports.

We have come to substitute sport-generated revenue for the program as a metric for determining amateurism rather than the motivation or intent of the student-athlete. The success of commercial activity for a sport does not alter either the status or expectation of intent for the amateur student-athlete.

The second concept that adds to America's collective ambivalence about the relationship of commercial activity to intercollegiate athletics is that while participation is to be an avocation for students, college sports as an enterprise is a *professional* undertaking for everyone else. Furthermore, the generating of revenues to help offset expenses must be guided by the same sound business principles as any commercial entity. When Harvard met Yale in the first rowing contest in 1852 and Princeton traveled to Rutgers for the first intercollegiate football game in 1869, it was the result of students seeking freedom from their 19th century classrooms. But once the colors were raised and the pride of victory was contested, it was not long until the professional – that is to say, paid – coach was introduced to improve the chances of winning. Before the establishment of the NCAA in 1906, nearly every sport had coaches who were paid for their expertise. The expansion toward programs with multiple sports led inevitably to a need for professional management of budgets and schedules, the hiring of coaches and other personnel, the building of facilities to host events, and the development of revenues to pay for the enterprise.

In recent years, however, the rapid and seemingly unconstrained escalation of compensation for coaches and others has contributed for most observers to their discomfort with the relationship between the amateur status of student-athletes and the professional status of all others. The better context for consideration of just how large compensation packages should become, however, is the disproportion of such packages to compensation levels for others employed within higher education and the failure by many to appreciate or even recognize educational value imparted through participation in college sports.¹⁶ There may be, and in fact I would argue there are, other good reasons to challenge the level to which compensation packages for head coaches in football and men's basketball have risen. The most used, and most obvious, argument *for* such packages – which usually include salary, product endorsements, summer camps, television shows and speaking engagements – is that they are driven by the marketplace. In the case of football, certainly, the market has come to include NFL coaches. Expanding the market for college coaches to include the pricing standard for NFL coaches produces a tension between the purpose-driven, not-for-profit status of higher education and the way in which it

¹⁶ See Erik Brady, Jodi Upton & Steve Berkowitz, *Salaries for College Football Coaches Back on Rise*, USA TODAY (Nov. 17, 2011, 11:02 AM), <http://www.usatoday.com/sports/college/football/story/2011-11-17/cover-college-football-coaches-salaries-rise/51242232/1>. See also *Table: Average Faculty Salaries, 2011–12*, THE CHRONICLE OF HIGHER EDUCATION (Apr. 8, 2012), <http://chronicle.com/article/Interactive-Table-Average/131433/>.

then engages a broad free-market community. The tension comes not because it is economically impossible or even imprudent for a university to look beyond the historical confines of academia for expertise; higher education not infrequently recruits faculty from among those who have gained celebrity status elsewhere. That is an economic consideration. The tension comes from whether it is appropriate for higher education to shop for expertise in markets that clearly will lead to exaggerated compensation differences with most other members of the campus. This is a moral question. The price of eggs in a given market is the same for all buyers regardless of how much those buyers pay for products elsewhere. The economic question is whether a given buyer can afford to shop for eggs in a market where the prices are arbitrarily higher than what they might otherwise experience; the moral question is whether they ought to shop in that market.

In time, higher education will undoubtedly have to address both of those questions with regard to where it shops for coaches and other athletics personnel. However, such considerations should and must stand apart from the principle of amateurism. The amateur status of student-athletes should not constrain the professional status of coaches and others engaged in college sports or the level of compensation for those individuals.

Consider a parallel scenario by way of analogy – the market transfer of university-based research. Suppose that a university-employed researcher, one who may even have been recruited from outside the academy and compensated handsomely and who while using the facilities and equipment of the university, and depending on its students for much of the actual work, discovers a new drug. Assuming that the drug successfully moves to market, the researcher and the university could stand to make millions from the discovery. Indeed, changes in a university’s ability to participate in the windfall of intellectual discovery brought about by the Bayh-Dole Act of 1980 has spurred the growth of “tech transfer” offices on campuses across the country.¹⁷ Professors with an idea have left the lecture hall and entered the very commercial world of turning their discoveries into competitive businesses. To be sure, the students engaged in the research have benefited from the experience, but do not participate in the royalties or revenue unless the discovery was theirs. There is concern in academia, as Janet Rae-Dupree notes in a New York Times article in 2008, that such practices have distorted the concept of innovation and discovery as a “value of knowledge “ development and put the focus on profit and marketability.¹⁸ But while some researchers have become millionaires and university coffers have been enhanced through the exploitation of innovation, no one argues that the status or motivation of students has changed. There is no hue and cry that the student is no longer a student because the researcher has become a highly compensated professional, because the university invests in new labs to

¹⁷ Howard Bremer, Joseph Allen & Norman J. Latker, *The Bayh-Dole Act and Revisionism Redux*, 3 LIFE SCIENCES LAW & INDUSTRY REPORT 3 (2009).

¹⁸ See Janet Rae-Dupree, *When Academia Puts Profit Ahead of Wonder*, N.Y. TIMES, September 6, 2008, available at <http://www.nytimes.com/2008/09/07/technology/07unbox.html?pagewanted=all..>

encourage additional discovery, or because new revenue streams are generated through commercial initiatives.

Within intercollegiate athletics, similarly, none of the development of professional staffs, build out of facilities or generating of revenues through commercial arrangements inherently conflicts with or diminishes the status of student-athletes as amateurs. The problem is that despite the evidence of history to the contrary, we extend the concept of amateur to the enterprise itself. We think of amateurism not only as it relates to the student-athlete, but for “all that goes with it.”

To be clear, student-athletes are amateurs; intercollegiate athletics is not. The enterprise itself may not be professional, but those employed to administer and coach clearly are.

On one hand, such growth of staff, facilities and the need for their management is no different in athletics than for any other activity on campus that is developed in response to need or interest. As the curriculum of higher education in the 18th and 19th century evolved into that of the comprehensive universities of the 20th century, music, journalism and computer science – as examples – were introduced and had to be supported by an infrastructure of personnel, facilities and development. The difference in athletics is the media attention that college sports attracted, the public enthusiasm that fans and alumni demonstrated, and the commercial interest that was generated by both. In addition, the emotional engagement that intercollegiate athletics stimulates, the media and business awareness that follows run so parallel to college sports’ professional counterpart that those who view all that pertains to higher education from the viewpoint of the academy are made uncomfortable by the proximity. Dr. Charles Kennedy, chairman of the Princeton University Board of Athletic Control, was among the first to voice his concern in 1923 at an NCAA Convention, when he said, “one meets constantly the expression of fear lest athletics are being commercialized; a fear of the size of our organizations, of the amounts of money involved in them, and of the business organizations that it has been necessary to set up to control them.”¹⁹

The question of whether there should be a connection between higher education-sponsored athletics and the commercial activity that has grown up around such events (regardless of the ambivalence about the propriety of amateurism being under attack or the spreading of professionalism into the infrastructure for college sports) was answered when the first ticket was sold and the first coach was hired. All that has followed is an issue of scale and scope. To be certain, commercial activity cannot be stripped away from intercollegiate athletics at any level. Higher education requires of college sports programs, as it does of any other component of the campus, that the activity

¹⁹ Dr. Charles Kennedy, Princeton Univ. Bd. of Athletic Control, *Proceedings of the Eighteenth Annual Convention of the National Collegiate Athletic Association*, (Dec. 28, 1923).

offset at least some of its costs by generating revenue. And as public support for higher education has decreased and private support and grown over the last four decades, the need to monetize the assets of an institution and to encourage corporate and private investment in the very basics of the academy, intercollegiate athletics will be pressed more aggressively to develop wider revenue streams through commercial activity.

Former Harvard University president Derek Bok has been critical of a creeping crisis of commercialism in higher education.²⁰ In his book *Universities in the Marketplace*, he writes, “the saga of big-time athletics reveals that American universities, despite their lofty ideals, are not above sacrificing academic values – even values as basic as admissions standards and the integrity of their courses – in order to make money.”²¹ Despite the public concern of Bok and others regarding the increased commercial nature of the entire campus, it is a fact of 21st century life that institutions of all types will succeed increasingly by their own wits and best efforts to engage the world beyond the campus. Call it what you will – commercialism, the funding of higher education’s co-dependency for new and increased revenue, or even selling out – the time may well come when it will be called “survival” for the academy and for access by a population to an education that is critical to the continuation of both democracy and capitalism. Making money through commercial activity is not the bane of higher education; it is the balm for soothing the economic stress felt by higher education as government dollars decline, tuition dollars max out and philanthropic dollars ebb and flow.

But Bok and other critics are correct that the underlying principles that ensure an independent and philosophically neutral development and promulgation of knowledge must not be compromised.²² Nor should intercollegiate athletics forgo its relationship with higher education or its principles with the idea that doing so will increase the largess of corporate entities that align with the enterprise. Indeed, we know from our experiences with media partners and their advertisers that it is not only the popularity of college sports that is attractive. It is also the values that intercollegiate athletics and higher education foster – team work, hard work, resilience, pursuit of excellence – that appeal to marketing and advertising interests. In fact, if there were no constraints on commercial activity – if colleges and universities were to barter their values (the avocational motivation for athletics participation and the protection of the student-athlete from commercial and professional interests) for a few dollars more – the appeal would be weakened.

The attraction of intercollegiate athletics that allows the enterprise to compete favorably with professional sports for media attention and commercial support is not the athletics superiority of the collegiate product. Professional

²⁰ See DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* (2003).

²¹ *Id.* at 54.

²² *See id.* at 122-138.

athletes are paid for a reason; they are better at what they do than amateurs because playing sports is the professional's job. The attraction is the visceral if not articulated recognition that intercollegiate athletics and higher education share common values and that the keystone to the relationship is the student-athlete who resides in both worlds. That is a value that advertisers and corporations are as interested in preserving as is higher education. Their interest is not in overwhelming the constraints; it is in understanding in clear and unambiguous terms exactly what the constraints are.

As noted earlier, commercial activity associated with intercollegiate athletics is not new, and it is not going away. More importantly, the relationship between commercial entities and college sports, when conducted within the appropriate constraints of higher education, should be encouraged and strengthened. Not only is the revenue from such activity critical to intercollegiate athletics and the colleges and universities that sponsor athletics, it helps engage communities beyond the campus in ways that supports the broader mission of higher education. The best relationship is a reciprocal one in which the corporate world advocates for the values of intercollegiate athletics and carries the messages for higher education. Higher education and intercollegiate athletics, in turn, have an obligation to work with corporations to help them understand the role of universities in the advancement of national well-being and success. As one faculty member has observed, the reciprocal relationship cannot be merely that of the horse and the wagon. The wagon is the partner in the relationship that carries the goods, but it has no influence on the direction it will be pulled. If the relationship is to be truly reciprocal, there must be some curbs that define direction.

If commercial activity is here to stay – and is to be encouraged – for both intercollegiate athletics and all of higher education, what then are the constraints we use to determine how far we can go without compromising our mission or the principles that underpin that mission? How can we move comfortably among the conflicting concepts of commercialism, amateurism and professionalism? Is there a true north that can guide each of us so that the desire to compete doesn't incrementally push all of us beyond the brink? And how will the constraints be put and held in place?

There is a view among critics, the media and the public that the problems and issues associated with intercollegiate athletics are best addressed through national policy put in place by the NCAA. This notion neglects the truth that the sum total of all perceived NCAA "power" represents the minimum ceding possible of responsibility by member colleges and universities to a central authority. The unspoken – yet uncontested – rule of thumb in the development of national policy is that what does not have to be ceded from campus control to NCAA authority should not be ceded. There are four broad areas in which the membership has found it functionally necessary to develop national policy that governs all without consideration of local circumstances: 1) Sustaining the concept of amateur status for student-athletes; 2) Sustaining the legitimacy of

the student-athlete as a student; 3) Ensuring a baseline of competitive equity; and 4) Defining institutional accountability for the management of intercollegiate athletics.²³ To the degree that commercial activity does not attempt to abridge the principles that govern these four areas, member institutions have not found enough common ground on which to erect the constraints that should govern such activity. In other words, colleges and universities have not yet found reason to use national policy (through NCAA legislation) to curb their spending behaviors, but they may in the future.

As with the majority of other issues that confront higher education, the answers to questions about what demarcates reasonable from unacceptable commercial behaviors most likely are apparent only on a campus-by-campus basis. As compelling as it is to find refuge in regulation and national policy that relieves a campus from the difficult decision, it is more likely that each campus must be guided in the decisions regarding commercial activity related to intercollegiate athletics by the principles that guide commercial activity for the rest of the campus. The ways in which higher education encourages private and commercial funds to subsidize athletics initiatives and the conditions it is willing to accept for how those funds will be spent should be consistent with how higher education encourages and accepts private and commercial funds for the rest of the campus. And while the opportunities for development of commercial relationships are likely greater for athletics than many other components of the campus, the principles for doing so should nonetheless be consistent with the way in which the rest of the campus would approach those opportunities if they were available.

In summary, commercialism has been a part of both the development and the sustaining of intercollegiate athletics from the beginning. Intercollegiate athletics and even higher education have turned to commercially generated revenue in no small part because neither is a truly capitalistic enterprise. While both require significant infusions of capital from a variety of sources (public, private and commercial) the motivation for accruing revenue is not profit but rather the support of an overarching purpose – the education of students. The life skills taught through participation in athletics are a significant part of the educational experience for student-athletes. Professionalism – that is the procuring and compensation of coaches, administrators and others – is nearly as old in the context of intercollegiate athletics as commercialism. The constraints on how both of these practices are developed should be in relationship to what is acceptable to higher education. Our ambivalence over the relationship between these practices and the nature of student-athletes as amateurs has burdened our ability to consider appropriate constraints and nurture a reciprocal relationship and has fostered difficulty in preserving a clear separation between the competitors and those who manage and sustain the competition. The task at hand – as media platforms broaden and as institutions reach further beyond the campus for new revenue opportunities – is to align the commercial activity

²³ See *NCAA Division I Manual*, *supra* note 12 at 3-5.

associated with intercollegiate athletics with the rest of higher education and to find the appropriate relationship with corporate America so that both benefit in accordance with their shared values.

Financial Issues in College Athletics

**The NCAA's Indirect Regulation of Lawyer-Agents:
In Direct Conflict with the Model Rules of Professional Conduct**

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Prefatory Note

In 2005, I published the attached article, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*¹ The article explains how the NCAA's "no agent" rule (and more specifically NCAA Bylaw 12.3.2.1), which limits a lawyer's role in representing an amateur athlete with the negotiation of a professional sports contract,² is not only detrimental to the athlete's best interest but also how the rule serves no purpose whatsoever in preserving amateurism. Fast forward seven years and the ethical dilemmas raised in my 2005 article still exist today and have been further magnified by the NCAA's enforcement efforts in recent years. Indeed, perhaps the single largest institutional barrier to ethical behavior in relation to discipline of athletes has been created by NCAA member institutions themselves under the guise of "maintaining a clear line of demarcation between collegiate athletics and professional sports."³ This Prefatory Note will expand upon the underlying issues presented in my prior work by addressing how various NCAA's rules and requirements conflict with a lawyer's ethical responsibilities to his or her client under the Model Rules of Professional Conduct (MRPC) and, therefore, constitute an institutional barrier to ethical behavior.

The question raised here is whether NCAA rules and institutional behavior are inconsistent with the best interest of the client in the lawyer-client relationship and inconsistent with the MRPC. In this regard, I am referring to the ability of a high school or college player to make a fully informed decision whether to sign a professional contract. NCAA rules not only place restrictions on their ability to "test the waters" but also to retain counsel and have counsel speak to, and negotiate with, club personnel on their behalf. This Prefatory Note will address the following institutional barriers to ethical behavior: (1) the NCAA's rule prohibiting agreements with lawyers-agents (Bylaw 12.3.1) and NCAA Bylaw 12.3.2.1, both of which limit a lawyer's ability to effectively

¹ Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. & TECH. L. 215 (2005) (attached as Exhibit 1).

² NCAA BYLAW 12.3.2.1 ("A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered representation by an agent.").

³ NCAA BYLAW 12.01.2.

represent the interests of the client⁴, and (2) the NCAA Eligibility Center’s Questionnaire sent to drafted baseball players in conjunction with the NCAA’s “Unethical Conduct” rule (Bylaw 10.1), which compels a lawyer’s client to divulge confidential information and communications related to the representation.⁵

1. NCAA Bylaws 12.3.1 and 12.3.2.1.

NCAA Bylaw 12.3.2.1 applies to athletes in all sports and prohibits an athlete from having a lawyer engage in *any* communications with professional club personnel including negotiating a professional contract.⁶ This bylaw not only places a teenager or young adult (or their parents) in the unfortunate position of having to negotiate with experienced professionals in an adversarial position, but the bylaw is also inconsistent with MRPC 1.3.⁷ The first Comment to Rule 1.3 provides: “A lawyer should...take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with *zeal in advocacy* upon the client’s behalf.”⁸

The high profile case of *Oliver v. Nat’l Collegiate Athletic Ass’n*⁹ was the first to address the validity of Bylaw 12.3.2.1 in the context of a third-party beneficiary/arbitrary capricious analysis. In May 2008, Andy Oliver was a sophomore college baseball player at Oklahoma State University (OSU) and playing in the post-season when OSU informed Oliver that he was immediately suspended indefinitely for having his lawyers present during contract negotiations with a representative of the Minnesota Twins when he was drafted as a high school senior in 2006.¹⁰ Because Oliver and the Twins did not reach agreement on a professional contract, Oliver elected to attend OSU on a baseball scholarship.¹¹ Oliver challenged his suspension, as a third-party beneficiary to the NCAA bylaws, arguing that (i) Bylaw 12.3.2.1 is arbitrary on its face because preventing an amateur player from having a lawyer communicate and negotiate with a professional club about the *prospect of becoming* a professional athlete is not rationally related to the rule’s purpose of preserving amateurism and helping to maintain a clear line of demarcation between college and professional sports and (ii) Bylaw 12.3.2.1 was arbitrarily applied to Oliver because virtually all amateur baseball players who are draft prospects retain an

⁴ NCAA BYLAW 12.3.1 (“An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport.”); NCAA BYLAW 12.3.2.1.

⁵ NCAA BYLAW 10.1.

⁶ NCAA BYLAW 12.3.2.1.

⁷ MODEL RULES OF PROF’L CONDUCT R.1.3 (2011) (Diligence) (providing that “A lawyer shall act with reasonable diligence and promptness in representing a client.”).

⁸ MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (2011).

⁹ *Oliver v. Nat’l Collegiate Athletic Ass’n*, 920 N.E.2d 203, 211 (OH 2009).

¹⁰ *Id.* at 207.

¹¹ *Id.* at 207.

“advisor” who communicates with professional teams about their “signability” and thus the NCAA selectively enforced the no agent rule against him.¹²

The trial court agreed with Oliver and, in February 2009, struck down Bylaw 12.3.2.1 and granted an injunction preventing the NCAA from enforcing the rule against him.¹³ The court, obviously concerned about the ethical dilemma raised by a private entity’s regulation of the attorney-client relationship, stated: “An attorney’s duty, in Ohio, in Oklahoma, in all 50 states, is to represent his client competently. Perhaps another term is used, other than that of ‘competently,’ within each state’s professional code of conduct, but it all boils down to the attorney being skilled and proficient and simply having the know-how to represent the best interests of his client.”¹⁴ The court further noted that (i) “Bylaw 12.3.2.1 . . . indeed stifles what attorneys are trained and retained to do,” (ii) “[t]he process advanced by the NCAA hinders representation by legal counsel, creating an atmosphere fraught with ethical dilemmas and pitfalls that an attorney consulting a student-athlete must encounter,” and (iii) “no entity, other than that one designated by the state, can dictate to an attorney where, what, how, or when he should represent his client.”¹⁵

The “where, what, how, or when” a lawyer represents his or her client is typically, and should be, expressly set forth in a representation agreement. However, Bylaw 12.3.1 prohibits an athlete from entering an agreement with a lawyer to communicate and negotiate with professional clubs on the athlete’s behalf.¹⁶ As I mentioned in my 2005 article, the prohibition on agreements results in loose, under the table dealings and understandings between the lawyer and athlete and can lead to disputes regarding the terms of the attorney-client relationship, including the scope of services to be provided by the lawyer, the athlete’s right to terminate the relationship, and the lawyer’s fee for services and the manner in which it is to be paid. If an athlete retains someone to provide advice concerning a proposed professional sports contract, the NCAA has indicated that the athlete must pay the advisor’s “going rate for services.” Bylaw 12.3.1 and the requirement to pay an advisor’s “going rate” (however that term is to be interpreted) is inconsistent with MRPC 1.5(c) which permits contingent fee arrangements and requires that a contingent fee agreement be in writing and signed by the client.¹⁷

¹² *See id.*

¹³ *See id.* at 215.

¹⁴ *Id.* at 214.

¹⁵ *Id.* at 214-15.

¹⁶ NCAA BYLAW 12.3.1.

¹⁷ NCAA BYLAW 12.3.1; MODEL RULES OF PROF’L CONDUCT R.1.5(c) (2011) (“A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.”).

2. The NCAA Questionnaire and Bylaw 10.1.

Following the bench trial in February 2009 whereby the court invalidated Bylaw 12.3.2.1 and restored Oliver's eligibility, the judge scheduled a jury trial for mid-October to determine Oliver's damages for being wrongfully suspended.¹⁸ However, one week before the damages trial, Oliver and the NCAA reached a settlement whereby Oliver was paid \$750,000 and the trial court's order invalidating Bylaw 12.3.2.1 was vacated.¹⁹ Around this same time, in August 2009, the "NCAA Eligibility Center" began sending a questionnaire by email to baseball players who were selected by a MLB club in the June draft and decided not to sign a professional contract.²⁰ Among the 18 specific requests for information contained in the questionnaire include the following:

- Did your advisor have any direct communications with any MLB clubs on your behalf?
- Did your advisor discuss your signability with any clubs?
- Estimate the number of times you talked with your advisor.
- Explain the subject matter of each of your conversations with your advisor.
- List all individuals or entities, including MLB clubs, with whom your advisor spoke with on your behalf.
- If you have a written agreement with your advisor, please fax a copy of this agreement to 317-968-5103 as soon as possible (attn: Stephen Webb).
- If you have a verbal agreement with your advisor, please provide a detailed description of the terms of this agreement. (What did you and your advisor agree he would do on your behalf?)
- Provide the number of conversations you had with the MLB club that drafted you regarding your proposed contract after the draft.
- Did your advisor negotiate a contract with the MLB club that drafted you? If not, who negotiated your proposed contract with the club?
- List all individuals within the MLB organization that drafted you with whom you spoke during your negotiations. Please provide contact information (e-mail address and phone number) for each individual.
- Provide the name and contact information (e-mail address and phone number) of your area scout from the team that drafted you.²¹

The questionnaire further asks the athlete to execute and return to the NCAA Eligibility Center a "Prospective Student-Athlete Release" that is attached to the questionnaire which can be sent by the Eligibility Center to the

¹⁸ See Associated Press, *Oliver Receives \$750,000 Settlement*, ESPN.COM (last updated Oct. 8, 2009 6:52 PM), <http://sports.espn.go.com/ncaa/news/story?id=4543864>.

¹⁹ See Associated Press, *Oliver Receives \$750,000 Settlement*, ESPN.COM (last updated Oct. 8, 2009 6:52 PM), <http://sports.espn.go.com/ncaa/news/story?id=4543864>.

²⁰ See attached Exhibit 2 (The questionnaire is sent by email to prospective student athletes).

²¹ See attached Exhibit 2.

MLB Commissioner's Office, MLB clubs and the MLB Scouting Bureau.²² Pursuant to the terms of the Release, the athlete grants permission "to release to authorized representatives of the NCAA Eligibility Center any and all information pertaining to [the athlete's] interactions, or interactions on [the athlete's] behalf, with any MLB club or the Scouting Bureau and to read and make copies of all records pertaining thereto."²³

Lastly, the questionnaire states that an athlete's failure to provide complete and accurate information "could amount to an NCAA Bylaw 10.1 violation which would negatively affect [the athlete's] eligibility at NCAA institutions."²⁴ Bylaw 10.1, which is entitled *Unethical Conduct*, provides that "unethical conduct" by an athlete includes "[r]efusal to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so by the NCAA or the individual's institution."²⁵

The questionnaire (which asks the athlete to divulge confidential information and communications) in conjunction with Bylaw 10.1 (which compels the athlete to divulge the confidential information and communications via threat of ineligibility) runs directly counter to the ethical obligations under MRPC 1.6 (Confidentiality of Information). MRPC 1.6(a) states that "A lawyer shall not reveal information relating to the representation of a client unless the client gives *informed consent*...."²⁶ Although it is the client and not the lawyer who is revealing the information related to the lawyer's representation of the athlete, the questionnaire and Bylaw 10.1 operate as an "end around" MRPC 1.6(a) because it compels the client to reveal information that the lawyer cannot reveal, which thwarts the rule's purpose of protecting the interest of the client. Using the threat of ineligibility, the NCAA is effectively compelling the client to divulge confidential communications with his lawyer and communications between his lawyer and third parties as well as confidential information relating to the lawyer's representation of the client. It cannot be said that the athlete gives informed consent by voluntarily revealing, or authorizing the release of, the confidential information and communications to the NCAA or member institution because consent is typically not deemed effective if given under circumstances of compulsion. Although the NCAA is not a state agency, MRPC 1.6 is broader in scope than the attorney-client privilege and the work-product doctrine which apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.²⁷ MRPC 1.6 also applies in the context of disclosure of confidential information to non-governmental parties and in situations other than those where evidence is sought from the lawyer through compulsion of law.²⁸

²² See attached Exhibit 2.

²³ See attached Exhibit 2.

²⁴ See attached Exhibit 2.

²⁵ NCAA BYLAW 10.1.

²⁶ MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2011).

²⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmts. (2011).

²⁸ See MODEL RULES OF PROF'L CONDUCT R.1.6, cmt. 3 (2011).

The case of *Paxton v. University of Kentucky*²⁹ highlights the institutional barrier to ethical behavior created by Bylaws 12.3.2.1 and 10.1. James Paxton was drafted in June 2009 after his junior year in college but decided not to sign a professional contract and returned to Kentucky for his senior year.³⁰ When Paxton returned to the university that fall, the NCAA wanted to interview him based solely upon a journalist's blog post which suggested that Paxton's lawyer may have had communications with the MLB club that drafted him.³¹ Paxton refused to participate in the interview and then the athletic department informed Paxton that he was being withheld from competition on the basis that his failure to participate in an NCAA interview constituted a violation of the "Unethical Conduct" rule (Bylaw 10.1) and could result in sanctions from the NCAA.³² However, Bylaw 10.1, which defines unethical conduct as a refusal to speak, expressly contradicts Kentucky's code of student conduct which, similar to many university codes of conduct, expressly affords *all students* some basic fundamental due process rights including the right not to speak, *i.e.*, the right not to be compelled to give information and testimony and a further right providing that a refusal to do so shall not be considered evidence of responsibility for an alleged violation.³³

Apparently Kentucky did not believe there was sufficient evidence of a violation of Bylaw 12.3.2.1 because it did not withhold Paxton from competition on that basis. Rather, Kentucky asserted that Paxton was obligated to submit to an NCAA interview on the basis that there were "unresolved eligibility issues" and that "[i]f the Court enters an injunction directing UK to have plaintiff participate in intercollegiate contests when there are unresolved eligibility issues, the Court puts the other student-athletes on the baseball team, the baseball team and the University at risk."³⁴ However, there is no *legal basis* supporting that Bylaw 10.1 trumps or takes priority over the express rights granted under Kentucky's code of student conduct.³⁵ Moreover, Paxton's request for injunctive relief was merely to prevent Kentucky from violating its own code of student conduct. In other words, Paxton was not seeking an injunction directing Kentucky to make him eligible to compete but rather directing Kentucky to simply make a determination whether he violated Bylaw 12.3.2.1 (or any rule or bylaw other than Bylaw 10.1).

²⁹ *Paxton v. Univ. of Ky.*, No. 09-CI-6404 (Ky. Cir. Ct., Jan. 19, 2010).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Univ. of Ky. Student Affairs, *Student Code of Conduct Part I, Article I*, UNIV. OF KY. (last updated Sept. 9, 2011), <http://www.uky.edu/StudentAffairs/Code/part1.html>.

³⁴ See Defendant's Response to Plaintiff's Motion for a Temporary Injunction at 6-7, *Paxton v. Univ. of Ky.*, No.09-CI-6404 (Ky. Cir. Ct. 2010).

³⁵ To the contrary, there is authority supporting the proposition that student-athletes may state a claim for breach of contract if they can "point to an identifiable contractual promise that the [university] failed to honor." *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992); see also *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. App. 1972) (construing an express obligation of student-athlete in scholarship application).

Another NCAA bylaw cited by Kentucky in the *Paxton* case, and which also operates as an additional institutional barrier to ethical behavior, is the “Restitution Rule” (Bylaw 19.7).³⁶ This rule states that the NCAA may sanction an institution and penalize an athlete if the athlete is allowed to compete in accordance with the terms of a court order or injunction and such order or injunction is ultimately reversed on appeal.³⁷ The *Oliver* court struck down the Restitution Rule on the basis that “[s]tudent-athletes must have their opportunity to access the court system without fear of punitive actions being garnered against themselves or the institutions and teams of which they belong.”³⁸ But the Restitution Rule clearly influenced the judge’s decision in the *Paxton* case as lawyers for Kentucky told the judge sitting in Lexington that the entire baseball program and university would be at risk if he ruled for Paxton.³⁹ The Restitution Rule should not have been any concern to the judge in this particular case because, again, Paxton was not seeking a court order mandating that he be allowed to compete but rather mandating that Kentucky make a determination whether he violated Bylaw 12.3.2.1 or any other amateurism rule (which Kentucky would not do based solely upon a blog writer’s comment).⁴⁰ Nevertheless, the judge denied Paxton’s motion for temporary injunction and the court of appeals affirmed.⁴¹

3. Summary and Conclusion.

The NCAA does not directly regulate lawyers but it does so indirectly by regulating the lawyer’s client in a manner that has an adverse effect on the lawyer’s representation of the client to the disadvantage of the client. An important public policy question is whether a private association should be allowed to regulate the attorney-client relationship, particularly in ways that are inconsistent with the Model Rules of Professional Conduct, when (i) the regulation has a very tenuous connection to the preservation of amateurism, (ii) the regulation imposes significant barriers to ethical behavior, and (iii) neither the State Bars nor the State Supreme Courts have given the private association authority to do so.

³⁶ NCAA BYLAW 19.7.

³⁷ NCAA BYLAW 19.7.

³⁸ *Oliver v. Nat’l Collegiate Athletic Ass’n*, 920 N.E.2d 203, 216 (OH 2009).

³⁹ *See* Defendant’s Response to Plaintiff’s Motion for a Temporary Injunction, *Paxton v. Univ. of Ky.*, No.09-CI-6404 (Ky. Cir. Ct. 2010).

⁴⁰ Indeed, before any member institution could even *possibly* be sanctioned under the Restitution Rule there is a chain of events that must take place and in the following order (and the first step did not even occur in the *Paxton* case): First, a student-athlete must be declared ineligible by a member institution and not be reinstated by the NCAA. Second, a court must enter an order or an injunction requiring the institution to disregard the ineligibility determination. Third, the institution must then allow the student-athlete to compete. Fourth, the court’s original order must be subsequently reversed on appeal. Fifth, the NCAA must then make a determination to impose sanctions on the institution under Bylaw 19.7 for allowing the student-athlete to compete.

⁴¹ *Paxton v. Univ. of Ky.*, No. 09-CI-6404 (Ky. Cir. Ct., Jan. 19, 2010).

Exhibit 1

The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?

By Richard T. Karcher*

When one considers what a sports agent does, he or she often recalls the movie *Jerry Maguire*, in which Tom Cruise hustles prospective clients and does whatever it takes to keep or acquire a client, even if it means stealing a client from a competitor. Of course, this reprehensible conduct only takes place among sports agents, not in other industries, right? Sports agents have gained the reputation of being corrupt and “unscrupulous” actors who take advantage of amateur and professional athletes in favor of their own proprietary self-interest. Much of this negative sentiment stems from highly publicized cases involving sports agents engaged in illegal conduct.¹

The crimes committed by a few “bad apples” prompted the enactment of numerous, comprehensive state statutes and governing rules established by professional sports players unions and collegiate athletic governing bodies.² For example, the National Collegiate Athletic Association (NCAA) has enacted a strict set of bylaws regulating the use of agents by amateur athletes. Among these provisions, an amateur athlete is prohibited from retaining anyone, including a *competent* lawyer or agent, to represent him or her in the negotiation of a professional sports contract. This is otherwise known as the “no agent rule.” According to the NCAA, these regulations are necessary to promote and ensure amateurism in intercollegiate athletics.³

When looking at these regulations, the unavoidable question arises: who is the NCAA trying to protect? If the NCAA seeks to protect the amateur athlete, it would seemingly be in the athlete's best interest to have competent representation to deal with professional sports organizations and the complex business and legal issues that surround the world of professional sports. Protecting the athlete from corrupt, unscrupulous sports agents is an understandable and noble objective. But even if the NCAA regulations play a role in deterring corrupt and unscrupulous conduct on the part of agents (a notion that is highly suspect), the rules are detrimental to the athlete if he is precluded from retaining a competent agent or lawyer to advocate on his behalf.⁴

First, this Article will discuss the NCAA regulations applicable to all sports regarding the use of agents by amateur athletes. Next, this Article will discuss (i) the mechanics of the annual Major League Baseball draft, (ii) the

factors that contribute to the necessity and desire for amateur baseball players to retain a competent agent or lawyer before they have extinguished their NCAA eligibility, and (iii) how the NCAA regulations are detrimental to both drafted and draft-eligible amateur baseball players. Finally, this Article will discuss how the NCAA should revise its regulations to better serve the amateur athlete in the sport of baseball without destroying the distinction between amateur and professional sports.

I. The NCAA Regulations Regarding Use of Agents

Section 12.3 of Article 12 (Amateurism) of the NCAA Bylaws governs the use of agents. The guiding principle of Article 12 is that only amateur student-athletes are eligible for participation in intercollegiate athletics.⁵ According to the NCAA, “[m]ember institutions’ athletics programs are designed to be an integral part of the educational program [and] [t]he student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between collegiate athletics and professional sports.”⁶ The NCAA regulations also indicate that “an amateur student-athlete is one who engages in a particular sport for the educational, physical, mental and social benefits derived there from, and for whom participation in that sport is an avocation.”⁷

A. Agreements with Agents

The NCAA regulations prohibit amateur athletes from agreeing to representation by an agent. Bylaw 12.3.1, often referred to as the “no agent rule,” states that “[a]n individual shall be ineligible for participation in an intercollegiate sport if he or she has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport.”⁸ Furthermore, the agency agreement is applicable to all sports unless the contract specifically states that it only applies to a particular sport or sports.⁹ Thus, an athlete who agrees to representation by an agent is ineligible to participate in any sport at any NCAA institution.¹⁰ However, if the athlete and the agent limit their agreement to a particular sport or sports, then the athlete would be ineligible to participate only in such sport or sports.¹¹

The prohibition set forth in Bylaw 12.3.1 is not limited to agreements with respect to professional sports negotiations by an agent on behalf of an athlete that take place while the athlete is enrolled at the institution or has eligibility remaining in that sport. An athlete shall also be ineligible if he or she agrees that the agent will represent him or her in negotiations with professional sports teams that are to take place subsequent to the athlete’s completion of eligibility in that sport.¹²

It is important to note that the NCAA regulations prohibiting amateur athletes from agreeing to representation by an agent apply not only to collegiate

athletes already enrolled in NCAA institutions, but also to high school students or graduates prior to collegiate enrollment.¹³ Thus, even high school students may be declared ineligible to participate in collegiate sports by the NCAA before they even sign a scholarship or Letter of Intent to attend an NCAA institution.

B. Benefits from Prospective Agents

The NCAA has instituted strict regulations with respect to amateur athletes receiving any benefits, financial or otherwise, from agents. The regulations even prohibit the athlete's friends or relatives from accepting such benefits. NCAA Bylaw 12.3.1.2, also known as the "no benefits rule," provides as follows:

An individual shall be ineligible per Bylaw 12.3.1 if he or she (or his or her relatives or friends) accepts transportation or other benefits from:

- (a) Any person who represents any individual in the marketing of his or her athletics ability. The receipt of such expenses constitutes compensation based on athletics skill and is an extra benefit not available to the student body in general; or
- (b) An agent, even if the agent has indicated that he or she has no interest in representing the student-athlete in the marketing of his or her athletics ability or reputation and does not represent individuals in the student-athlete's sport.¹⁴

These regulations apply to the receipt of benefits by any "individual." They apply not only to collegiate athletes already enrolled in NCAA institutions, but they also apply to high school students or graduates prior to enrollment.¹⁵

For example, an amateur athlete's acceptance of automobile transportation from the athlete's campus to a prospective agent's office to discuss services the agent could provide to the athlete upon signing a professional contract is an improper.¹⁶ In addition, a football agent cannot provide transportation to a friend of a member of the local Division I college's baseball team.¹⁷ If an agent provides advice to an amateur athlete about a professional sports contract, with the understanding that the athlete would pay the agent for such services after the athlete has been drafted, regardless of the fact that the agent has the same fee arrangement for all amateur-athlete clients, that too would be an improper benefit according to the NCAA.¹⁸

C. Use of Lawyers and Other Advisors

The NCAA regulations permit an amateur athlete to retain a lawyer for consultation and advice concerning a proposed professional sports contract.¹⁹ However, the lawyer, like an agent, may not represent the athlete in negotiations for such a contract.²⁰ The regulations even prohibit a lawyer from being present during discussions of a contract offer between an athlete and a

professional sports organization or making any contact with a professional organization on behalf of the athlete.²¹ According to the NCAA, “[a] lawyer’s presence during such discussions is considered representation by an agent.”²² Similar to the regulations regarding entering agreements with agents and receiving benefits, these rules also apply to high school players prior to college enrollment.²³ In 1974, the members of the NCAA determined that student-athletes might need legal advice to assist them in evaluating and understanding a professional sports contract offered while they still had collegiate sports eligibility remaining.²⁴ The NCAA decided that, during consideration of such a proposal, a student-athlete “may seek the advice of a lawyer relative to future negotiations or discussion of the individual’s professional aspirations, so long as the lawyer does not become actively involved in negotiations with the professional team or organization.”²⁵ According to the NCAA, “once the student decides to have legal counsel contact the professional club concerning the contract offer, the individual has agreed to be represented by an agent in the marketing of his or her athletics talent, and no longer is eligible per 12.3.2.”²⁶

Interestingly, the NCAA makes no distinction between lawyers and non-lawyers in terms of giving consultation and advice to the athlete. According to the NCAA, Bylaw 12.3.2 “was not intended to restrict individuals other than lawyers (e.g., financial consultants, family friends) from giving advice regarding professional contracts.”²⁷ Thus, any third party is permitted to advise the athlete provided that the “advisor” does not represent the athlete in negotiations for such a contract.²⁸

D. Professional Sports Counseling Panel and Head Coach Exception

Section 12.3.4 of the NCAA Bylaws permits an authorized institutional professional sports counseling panel, implemented by the member institution, to essentially engage in activities that an experienced agent would otherwise do, including the following:

- (a) Advise a student athlete about a future professional career;
- (b) Provide direction on securing a loan for the purpose of purchasing insurance against a disabling injury;
- (c) Review a proposed professional sports contract;
- (d) Meet with the student-athlete and representatives of professional teams;
- (e) Communicate directly (e.g., in person, by mail or telephone) with representatives of a professional athletics team to assist in securing a tryout with that team for a student-athlete;
- (f) Assist the student-athlete in the selection of an agent by participating with the student-athlete in interviews of agents, by reviewing written information player agents send to the student-athlete, and by having direct communication

with those individuals who can comment about the abilities of an agent (e.g., other agents, a professional league's players' association); and Visit with player agents or representatives of professional athletics teams to assist the student athlete in determining his or her market value (e.g., potential salary, draft status).²⁹

Although it is not expressly stated, the NCAA also permits the panel to negotiate a contract with a professional sports organization on behalf of the student-athlete.³⁰

The panel consists of at least three persons appointed by the institution's chief executive officer.³¹ Not more than one person on the panel may be a member of the athletic department staff; all others on the panel must be members of the institution's full-time staff.³² Finally, no institutional staff member who is also an agent may participate as a member on the panel.³³

The legislative intent behind Bylaw 12.3.4, adopted in 1984, is worth noting:

This legislation was intended to encourage member institutions to provide guidance to their student-athletes regarding future athletic professional careers. While legislation previously was adopted to permit institutions to offer career counseling in all areas, in 1984 the membership believed that student-athletes' involvement with professional athletics warranted special attention. While this focus on professional athletics is essential, it should not detract from an institution's role in providing guidance to student athletes in career counseling generally.

Further, this legislation was intended to assist student-athletes in making a decision regarding whether to remain in school or turn professional and providing guidance to student-athletes regarding contracts and agreements with player agents. Additionally, a panel should provide to the student-athlete a realistic appraisal of his or her potential for becoming a successful professional athlete. It is important that the student-athlete receive objective advice from individuals at institutions who have no vested interest in the student-athlete's career. Essentially, a panel should attempt to provide information to the student-athlete regarding professional athletics that he or she may not be able to obtain or understand sufficiently himself or herself.³⁴

Unlike the regulations previously discussed in this Article pertaining to (i) agreements with agents, (ii) the use of lawyers and other advisors, and (iii) the receipt of benefits, the bylaw provisions regarding sports counseling panels only apply to collegiate athletes enrolled in NCAA member institutions.³⁵ Therefore, high school players who have been drafted, or anticipate being drafted, are prohibited under the NCAA Bylaws from receiving *any* assistance in contacting professional teams to secure a tryout, determining their market value, or negotiating a contract with a professional sports organization.

The student-athlete's head coach at the NCAA member institution may contact agents to assist the athlete in selecting an agent and determining his or her market value.³⁶ The coach may also contact professional sports organizations on behalf of the athlete to secure tryouts and to assist the student-athlete in determining his or her market value.³⁷ The coach is not permitted, however, to receive compensation for such services.³⁸ If the head coach partakes in these activities, he or she is then required to consult with and report his or her activities to the institution's professional sports counseling panel; if the institution does not have such a panel, then the coach is to report to the institution's chief executive officer.³⁹

E. Draft Inquiry and Negotiations Without An Agent

The NCAA Bylaws permit amateur athletes to interact with professional sports teams on their own without the use of an agent. For example, an amateur athlete is permitted, both before and after college enrollment, to ask a professional sports organization for information concerning his or her eligibility for the draft or individual market value.⁴⁰ The athlete and his legal guardians are also permitted to negotiate a contract with a professional sports organization.⁴¹

However, an amateur athlete loses eligibility if he or she asks, subsequent to initial full-time collegiate enrollment, to be placed on the draft list or supplemental draft list of a professional sports league even if (i) the athlete asks to have his or her name be withdrawn from the draft list prior to the actual draft, (ii) the athlete's name remains on the draft list but he or she is not drafted, or (iii) the athlete is drafted but does not sign an agreement with any professional sports team.⁴² This NCAA regulation is often referred to as the "no draft rule." The only exception to the rule is for an enrolled student-athlete who plays basketball; he or she may enter his or her name on the draft list one time without jeopardizing his eligibility, provided that the student-athlete is not drafted by any team and that he or she subsequently declares an intention in writing to resume intercollegiate participation within 30 days after the draft.⁴³

III. Application of the NCAA Regulations in Baseball

A. The Major League Baseball Amateur Draft

In June of each year, Major League Baseball conducts its amateur draft, known as the First-Year Player Draft.⁴⁴ In general, players who are eligible to be drafted and sign a professional contract are (i) graduating high school seniors, (ii) college players who have completed their junior year or who are at least 21 years old within forty-five days of the draft, and (iii) junior college players.⁴⁵ The team that drafts a player has the exclusive right to negotiate a professional contract with that player until the player becomes a college player by entering or returning to college.⁴⁶ If a player instead chooses to become a

professional athlete, the player signs a standard minor league player contract.⁴⁷

The only terms and conditions in the standard player contract that are negotiable are (i) the player's signing bonus, which must be stated in a fixed dollar amount and paid to the player before the end of the calendar year, following the date of the contract, (ii) a provision in which the player receives a payment of \$2,500 contingent upon the player being retained by the signing major or minor league club for a period that may not exceed 90 days of the club's playing season, (iii) a provision in which the player receives standard "incentive bonus payments" contingent upon the player being on the roster in a certain classification for 90 days in any one season (\$1,000 for the AA classification, \$1,500 for the AAA classification, and \$5,000 for the major league level), and (iv) the amount to be paid to the player by the club for attendance at a college of the player's choice for tuition, room, board, books and fees pursuant to the college scholarship plan.⁴⁸

B. The "Signability" Factor

In the days, weeks, and months leading up to the draft each year, scouts from all thirty clubs and the Major League Scouting Bureau evaluate all of the draft-eligible amateur players throughout the United States, Canada, and Puerto Rico. As part of the evaluation process, scouts assess a player's skill, makeup, and character. In evaluating character attributes, scouts begin to develop a personal relationship with select players. Scouts even ask players to take psychological exams and to answer a variety of questions in order to assess character and personality traits.

Another important component to a scout's evaluation is the player's "signability." This term, widely used among scouts, players, and agents, refers to the amount of money it will cost a team to sign a particular player to a professional contract if that player is drafted. As one might expect, signability becomes more of a factor with respect to high school seniors and college juniors than with college seniors. This is because younger players have the bargaining leverage of returning to school in the fall following the June draft instead of signing a professional contract.

Due to the steady increase in signing bonuses of drafted players over the past ten to fifteen years, signability has become more and more important to the clubs. The signing bonuses of the players picked first in the baseball draft for the last fifteen years are as follows:

1989: Ben McDonald - \$350,000
1990: Chipper Jones - \$275,000
1991: Brien Taylor - \$1,550,000
1992: Phil Nevin - \$700,000
1993: Alex Rodriguez - \$1,000,000
1994: Paul Wilson - \$1,550,000

1995: Darin Erstad - \$1,600,000
1996: Kris Benson - \$2,000,000
1997: Matt Anderson - \$2,500,000
1998: Pat Burrell - \$3,150,000
1999: Josh Hamilton - \$3,960,000
2000: Adrian Gonzalez - \$3,000,000
2001: Joe Mauer - \$5,150,000
2002: Bryan Bullington - \$4,000,000
2003: Delmon Young - \$5,800,000 guaranteed
salary hat includes a \$3,700,000 signing bonus⁴⁹
2004: Matt Bush - \$3,150,000⁵⁰

It is important to note that a player's draft slot is not necessarily indicative of the amount of a signing bonus. For example, in the 2000 draft, the twelfth pick in the draft received a signing bonus in the amount of \$5,300,00, which is \$2,300,000 more than the first pick that year.⁵¹ In the 2002 draft, the second overall pick received \$600,000 more than the first pick.⁵² In the 2004 draft, third round draft pick Matt Tuiasosopo, a high school player from Woodinville, Washington, signed for \$2,290,000, the equivalent to the bonus that players in the top half of the first round received.⁵³ Thus, it is easy to see how important a player's signability is to the clubs at draft time.

In fact, a player's signability often determines whether a particular club will even consider drafting that player. Prior to the draft, scouts attempt to determine as precisely as possible a player's signability through discussions with the player and/or his representative.⁵⁴ Indeed, the Major League Rules expressly permit club personnel to talk to any player, prior to the draft, "at any time concerning a career in professional baseball and discussing the merits of the player's contracting, when eligible, with any particular [c]lub."⁵⁵

Thus, many clubs engage in "pre-draft dealing" with certain players. In other words, a scout or other front-office personnel engages in negotiations with a player and/or his representative prior to the draft. Essentially, the player makes a commitment to the club that he will sign for a certain amount of money if that club drafts him.⁵⁶ This arrangement can be beneficial to the club and the player because it brings certainty to both sides; thus, a contract can be completed shortly after the draft without the need for prolonged negotiations throughout the summer.⁵⁷

The signing of Matt Bush, the number one draft pick by the San Diego Padres out of a local San Diego high school in 2004, involved a pre-draft deal. Jim Callis from Baseball America discussed the negotiations that took place between Padres general manager, Kevin Towers, and the representatives of Matt Bush just days before the draft:

The deal took four more phone calls, all the Sunday morning before the draft

among Towers and Bush's advisors, Greg Genske and Kenny Felder, both associates of longtime agent Jeff Moorad. They went like this:

Call No. 1: Towers indicates a willingness to spend between \$2.5 million and \$3 million. Knowing Bush isn't the true No. 1 talent, Genske wants the \$3.35 million No. 3 pick Kyle Sleeth received last year. "I'm not sure we can go much lower," Genske says.

Call No. 2: An hour later, Towers calls back and says he probably can't go over 3. Although no Padres deal would slide Bush to at best the Devil Rays at No. 4 or, more likely, the Nos. 7-12 range (meaning just a \$2 million bonus and no hometown team), Genske still comes down to only \$3.25 million. Towers says, "He's from San Diego. You want to go to Tampa Bay? Or later? We're very prepared to roll the dice and take [Stephen] Drew."

Call No. 3: Towers informs Genske, "3.1 is our final offer, or we're walking." Genske counters with 3.15. Towers tells [scouting director, Bill] Gayton, "We could stay at 3, and the kid will call back and take the 3."

Call No. 4: Towers tells Genske, "We have a deal at 3.15."⁵⁸

As a result of the signability factor, increased signing bonuses, and pre-draft dealing, the draft process has become "big business." In addition to employing a staff of full- and part time scouts, clubs hire statisticians to analyze player performance and lawyers to monitor compliance with the Major League Rules and negotiate player contracts. To level the playing field, it is common practice for amateur baseball players to retain agents to assist them with the business aspects of the draft process, which often results in the representative having contact with professional clubs in violation of the NCAA regulations.⁵⁹

C. The Regulations' Effect on Players

Violations of the NCAA Bylaws by amateur athletes can have severe consequences for the athlete and his institution. When the athlete becomes ineligible for competition due to a violation, the member institution can be forced to retroactively forfeit games.⁶⁰ Also, ineligibility can lead to further NCAA investigations, self-imposed probations, NCAA-imposed suspensions, or even program termination.⁶¹ In essence, the NCAA has discretion to impose any sanctions it deems appropriate.

In the summer of 2001, the NCAA exercised that discretion. Before his freshman year at Vanderbilt, Jeremy Sowers and his family retained an advisor regarding a proposed contract after he was drafted in the first round (20th pick) by the Cincinnati Reds. The advisor had contact with one or more representatives of the Reds organization.⁶² Sowers could not reach an agreement with the Reds; he enrolled at Vanderbilt in the fall of 2001. The

NCAA reprimanded Sowers with a six-game suspension for violating the no agent rule.⁶³ This result is disturbing in light of the fact that Sowers retained a competent agent to represent him and advocate on his behalf in his best interest. Sowers did not receive any improper benefits from the agent, nor did the agent engage in any corrupt or unlawful behavior.⁶⁴

Sowers, like any draft-eligible baseball player, is susceptible to violating NCAA rules due to the timing of the draft and the Major League Baseball draft-eligibility rules. The draft takes place at the end, or shortly after the end, of the high school and collegiate baseball regular seasons. Thus, draft-eligible baseball players do not have time to interview prospective agents, to make an informed decision as to who they want to represent them, and to have their representative contact professional clubs on their behalf to assess market value and determine which clubs are most interested. It is, therefore, in the best interest of an amateur baseball player to retain an agent before the season starts.⁶⁵

Baseball is significantly different from other draft sports, such as football. Under the National Football League (NFL) rules, amateur football players are not draft-eligible until the completion of their senior year in college unless, upon completion of their junior football season, they ask to be placed on the NFL draft list. Thus, high school senior football players are not eligible for the NFL draft. As a result, they do not face the difficult decision of whether to sign a professional contract or to enroll in college after being drafted. As for college football players, their season ends in the end of November or early December unless their team attends a bowl game, in which case the season would end in the first week of January at the latest. Therefore, college seniors, as well as college juniors who have declared draft eligibility, have three to four months between the end of the season and the NFL draft in April in which to select an agent and have their representative contact professional clubs on their behalf in preparation for the draft.⁶⁶

After the completion of the season, draft-eligible football players choose an agent and execute a standard representation agreement with the agent issued by the NFL Players Association.⁶⁷ Once the player either completes his senior football season or declares himself draft-eligible after his junior season, he has exhausted his remaining NCAA eligibility in that sport. At that point, the player is not concerned about violating the NCAA's prohibition against entering agreements with agents. In contrast, draft-eligible baseball players are obviously concerned about NCAA compliance because they have remaining NCAA eligibility both before and after the draft.⁶⁸

IV. Revisiting the Regulations: Two Recommendations

A. Permit Players to Retain Agents under the Supervision of the Member Institution

As succinctly stated by one commentator: “The NCAA’s general rule on student-athlete contact with a sports agent is clear: A student-athlete risks losing his or her intercollegiate athletics eligibility by doing anything more than talking with an agent.”⁶⁹ The current NCAA regulations make no distinction between permissible and impermissible conduct on the part of agents. This is because the NCAA has no standing to discipline the agents since agents are not members of the NCAA.⁷⁰ Instead, the NCAA makes the pertinent distinction between an advisor who deals one-on-one with the student-athlete (which is permissible) and an advisor who has direct contact, by way of negotiations or otherwise, with the club (which is impermissible). In essence, the regulations prohibit the student-athlete from retaining a competent lawyer or agent to negotiate a contract to the maximum benefit of the student-athlete; however, they permit an amateur athlete to seek advice from a lawyer about a standard player contract and to negotiate a professional contract with the aid of a member institution’s professional sports counseling panel.

According to the NCAA, these rules are necessary to maintain “a clear line of demarcation between collegiate athletics and professional sports.” The NCAA’s objective, however, is accomplished with the regulation that an amateur athlete is ineligible to compete in a collegiate sport once he or she signs a professional contract in that sport. Simply permitting a student-athlete to retain competent representation to contact professional clubs and to advocate on his behalf to obtain a result that is in his own best interests, financially and otherwise, would not destroy the line of demarcation any more than allowing the student-athlete or the professional sports counseling panel to engage in the same conduct.

Prior to the annual baseball amateur draft, it is clearly in the player’s best interest, due in large part to the signability issue and pre-draft dealing, for him to (i) accurately assess his market value, (ii) evaluate the pros and cons to signing a professional contract after his senior year in high school or junior year in college (as the case may be), (iii) determine for how much he is willing to sign a professional contract and properly convey this information to the clubs, and (iv) learn about the Major League Baseball rules and regulations. Further, once the player is drafted, there is no compelling reason to deny a player the opportunity to obtain maximum value for his services, even if that requires retaining an experienced agent to negotiate with the club. In the NCAA’s view, the student-athlete or the institution’s professional sports counseling panel is best qualified to handle all of these pre- and post-draft responsibilities.⁷¹ This perspective is flawed in numerous respects.

First, the player is clearly not the appropriate person to be handling these responsibilities. The amateur athlete is not experienced in the business aspects of major league baseball to adequately assess his market value or to effectively negotiate a professional contract. He should not be given these responsibilities to maintain in addition to his responsibilities in the classroom and on the field. Second, players graduating from high school are not going to have access to professional sports counseling panels at NCAA member institutions. In effect, the panels are only available to draft-eligible college players. Since it is not mandatory that NCAA member institutions establish a professional sports counseling panel, many colleges and universities do not even offer such a service to their student-athletes. With respect to institutions that do have a panel for the benefit of its student-athletes, it is questionable as to whether the members of that panel are qualified to adequately serve the best interests of the athlete.

Using Villanova University's panel as an example, the Associate Dean of Administration, the Associate Athletic Director, the university's General Counsel, and the chairperson of the Department of Education and Human Services are probably not experienced in baseball talent evaluation or knowledgeable enough about the Major League Baseball rules and regulations. Furthermore, they probably do not have relationships with scouts and front-office personnel. Indeed, these individuals have full-time jobs with major responsibilities at the university and likely cannot devote the necessary time and effort to such details on behalf of the player. In addition, there is an inherent conflict of interest when representatives of the university advise its players whether to sign a professional contract—the school may have an interest in having its players play for the school another year instead of becoming a professional.⁷²

Student-athletes in every major collegiate sport who are professional prospects are going to retain a representative experienced and knowledgeable in their particular sport to assist them in obtaining maximum draft status, and rightfully so. However, with respect to baseball players, the NCAA regulations create an incentive for a player to engage in the agent selection process in isolation, apart from the assistance of the member institution and coaching staff, for fear that the player might lose eligibility or that he or the member institution might be reprimanded. "Unscrupulous" agents thrive in this type of environment.

The NCAA needs to recognize the problems caused by the timing of the baseball draft and the Major League Baseball rules pertaining to draft-eligibility, and make an exception for student-athletes in the sport of baseball to retain agents. If such an exception is made and the fear of NCAA reprimand is removed, more college coaches and member institutions would be inclined to provide assistance to student-athletes in the selection of an agent.⁷³ The role of the professional sports counseling panel would then be limited to the evaluating potential agents who are interested in representing the player and assisting the

player in the selection of a competent representative. Keeping the “no benefits” rule intact would help maintain the integrity of the agent selection process and ensure that players are not subject to undue influence.

B. Standard Athlete-Agent Representation Agreements

The NCAA should also require the student-athlete to execute a standard representation agreement with his agent, similar to the NFL Players Association standard agreement between draft-eligible football players and their agents. In addition to helping to maintain the integrity of the agent selection process, this would enable the NCAA to establish certain terms and conditions governing the relationship between the student-athlete and agent, including the duties, responsibilities, and fees of the agent. Such written agreements would be beneficial to both the athlete and the agent because it would replace the “loose” understandings that often result in disputes between the parties with certainty. The student-athlete would then be required to send a copy of the executed representation agreement to the member institution, where it would be kept on file for a certain period of time for future reference.

V. Conclusion

The NCAA regulations regarding use of agents are not practical for the amateur baseball player. More specifically, the regulations fail to consider the timing of the baseball draft and the Major League Baseball rules regarding draft eligibility. As a result of the huge increases in signing bonuses over the last fifteen years, a player’s signability has become a significant factor in the draft process and pre-draft dealing has become commonplace in the industry—all of which amounts to “big business.” There is no compelling reason to prohibit a player from retaining a competent agent to deal directly with the clubs, both pre- and post-draft, to maximize the player’s draft potential and obtain maximum value for his services. With the assistance of the member institution and its coaching staff in the agent selection process, as well as standardizing player-agent representation agreements, the player is less likely to get involved with an “unscrupulous” agent and the line of demarcation between collegiate athletics and professional sports would remain undisturbed.

ENDNOTES

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¹ One of the most notable cases involved sports agents Norby Walters and

Lloyd Bloom, both of whom were charged with, and convicted by a jury for, multiple crimes, including mail fraud, conspiracy, and racketeering for offering student-athletes money, cars, trips, and other gifts in exchange for the player's agreeing to sign post-dated representation agreements. Rob Remis, *Analysis of Civil and Criminal Penalties in Athlete Agent Statutes and Support for the Imposition of Civil and Criminal Liability upon Athletes*, 8 SETON HALL J. SPORT L. 1, 26–27 (1998); see also MEL LEVINE, LIFE IN THE TRASH LANE: CASH, CARS & CORRUPTION, A SPORTS AGENT'S TRUE STORY (1993). Sports agent Mel Levine was sentenced to 30 months in federal prison for tax and financial fraud in his dealings with professional athletes. *Id.* at 131.

² Many state legislatures have enacted burden- some laws that require all sports agents to register with the state by paying registration fees and posting a bond, both of which can be quite costly, to cover any loss due to the agent's potentially illegal future conduct. Law of Prof'l & Amateur Sports, (West Group) Vol. 1, at 1-12 and 1-13 (Gary A. Uberstine ed., 2002). State regulation of sports agents is beyond the scope of this article. For a discussion on the state regulation of sports agents, see Jan Stiglitz, *NCAA- Based Agent Regulation: Who Are We Protecting?*, 67 N.D. L. REV. 215 (1991); Jan Stiglitz, *A Modest Proposal: Agent Deregulation*, 7 MARQ. SPORTS L.J. 361 (Spring 1997).

³ NCAA Bylaws §§ 12.01.1–12.01.2, available at http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf (Aug. 1, 2004); see also *Summary of NCAA Regulations Related to Agents and Other Amateurism Provisions*, National Collegiate Athletic Association, available at http://www.ncaa.org/agents/ncaa_summary.html (last visited Jan. 28, 2005) [hereinafter *NCAA Amateurism Regulations Summary*].

⁴ As one commentator noted: “Without the help of a reputable agent, student-athletes are left on their own to accurately determine their value to a professional league. Ostensibly, the purpose of the no agent rule is to prevent student-athletes from being able to market their talent as a professional. Unfortunately, the rule actually increases the likelihood that student-athletes will make uninformed and incorrect decisions by impairing their ability to obtain accurate information concerning their potential as professionals.” Todd Fisher, *Amateurism and Intercollegiate Athletics: The Double Standard of Section 12.2.4.2.1*, 3 SPORTS LAW J. 1, 5 (1996). Another author stated: “These amateurism and educational/student welfare protection arguments backing the no agent rule and no draft rules are tenuous at best. Barring an athlete's ability to compete on the collegiate level simply because he wished to explore his worth in his chosen job market does not pre- serve amateurism. The no agent and no draft rules do little to promote amateurism or protect educational values, but rather primarily protect the NCAA's economic interests.” Thomas R. Kobin, *The National Collegiate Athletic Association's No Agent and No Draft Rules: The Realities of Collegiate Sports Are Forcing Change*, 4 SETON HALL J. SPORT L. 483, 515 (1994).

⁵ NCAA Bylaws, *supra* note 3, § 12.01.1.

⁶ NCAA Bylaws, *supra* note 3, § 12.01.2.

- ⁷ *NCAA Amateurism Regulations Summary*, *supra* note 3.
- ⁸ *See also* NCAA Bylaws, *supra* note 3, § 12.1.1(g).
- ⁹ NCAA Bylaws, *supra* note 3, § 12.3.1.
- ¹⁰ *Id.*
- ¹¹ *Id.*
- ¹² NCAA Bylaws, *supra* note 3, § 12.3.1.1.
- ¹³ NCAA Bylaws, *supra* note 3, § 12.01.3. As used in the NCAA Bylaws, the term “individual” refers to “a person prior to and subsequent to enrollment in a member institution,” and if the NCAA regulations refer to the term “student-athlete,” the legislation “applies only to that person’s activities subsequent to enrollment.” *Id.* NCAA Bylaw 12.02.5 further defines a student-athlete as “a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student’s ultimate participation in the intercollegiate athletics program [and] [a]ny other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department, as specified in Constitution 3.2.4.4.” *Id.* § 12.02.5.
- ¹⁴ NCAA Bylaws, *supra* note 3, § 12.3.1.2.
- ¹⁵ *See supra* note 13.
- ¹⁶ *NCAA Amateurism Regulations Summary*, *supra* note 3, § II.D.1.
- ¹⁷ *Law of Prof’l & Amateur Sports*, *supra* note 2, at 1-9.
- ¹⁸ *NCAA Amateurism Regulations Summary*, *supra* note 3, § II.D.3.
- ¹⁹ NCAA Bylaws, *supra* note 3, § 12.3.2.
- ²⁰ *Id.*
- ²¹ *Id.* § 12.3.2.1.
- ²² *Id.*
- ²³ *See supra* note 13.
- ²⁴ *NCAA Amateurism Regulations Summary*, *supra* note 3, § II.E.2.
- ²⁵ *Id.*
- ²⁶ *Id.*
- ²⁷ *Id.* § II.E.1.
- ²⁸ *Id.*
- ²⁹ NCAA Bylaws, *supra* note 3, § 12.3.4. It is questionable as to how and why the panel would assist the student-athlete in the selection of an agent pursuant to Bylaw 12.3.4(f) when retaining an agent is clearly prohibited. *Id.* § 12.3.4(f).
- ³⁰ *NCAA Amateurism Regulations Summary*, *supra* note 3, § II.G.2.b.
- ³¹ NCAA Bylaws, *supra* note 3, § 12.3.4.1. For example, Villanova University’s panel consists of the law school’s Assoc. Dean for Administration, the university’s General Counsel, the Assoc. Athletic Director and the chairperson of the Dept. of Education and Human Services. *Law of Prof’l & Amateur Sports*, *supra* note 2, at 1-10 (citing Robert Garbarino, *So You Want To Be a Sports Lawyer, Or Is It a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor, Contract Representative?*, 1 VILL. SPORTS & ENT. L.J. 25 (1994)).
- ³² NCAA Bylaws, *supra* note 3, § 12.3.4.2.

³³ *Id.*

³⁴ *NCAA Amateurism Regulations Summary*, *supra* note 3, § II.G.1.

³⁵ NCAA Bylaw 12.3.4 uses the term “student-athlete” as opposed to “individual”. NCAA By laws, *supra* note 3, § 12.3.4; *see supra* note 13.

³⁶ NCAA Bylaws, *supra* note 3, § 11.1.4.1.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* § 12.2.4.1.

⁴¹ *Id.* § 12.2.4.3.

⁴² *Id.* § 12.2.4.2. Section 12.2.4.2 is not applicable to baseball players because, under the Major League Rules, a player does not become draft-eligible by making a declaration. Baseball players are automatically draft-eligible if they meet certain requirements. *See infra* Part III.A. For a discussion of the applicability of the NCAA no draft rule in football, *see* Kobin, *supra* note 4.

⁴³ NCAA Bylaws, *supra* note 3, § 12.2.4.2.1.

⁴⁴ Major League Rule 4(b) [hereinafter MLR].

⁴⁵ MLR 3(a)(2)–(4).

⁴⁶ MLR 4(d)(3). However, if a drafted high school senior attends a junior college, or a drafted junior college player returns to junior college, then the club that drafted the player retains the exclusive right to negotiate with that player up until the seventh day prior to the next player draft. MLR 4(f). This is known as a “draft and follow” player.

⁴⁷ MLR 3(b)(2).

⁴⁸ MLR 3(c)(4). In certain rare circumstances, a very talented drafted player might be able to negotiate and sign a major league contract, which essentially allows the player and the team to negotiate a salary structure in which the player is paid over a term of years.

⁴⁹ *No. 1 Draft Picks, 1965-2002*, BaseballAmerica, at <http://www.baseballamerica.com/online/draft/toppicks03.html> (2003); *see also* Marc Topkin, *Devil Rays Sign No. 1 Overall Pick Young*, at <http://www.baseballamerica.com/to-day/draft/030909dyoungsigns2.html> (Sept. 9, 2003).

⁵⁰ *2004 Draft: Round 1*, Baseball America, at <http://www.baseballamerica.com/draftdb/rnd.php?rnd=1> (last visited Jan. 28, 2005).

⁵¹ *2000 Draft Signing Bonuses*, Baseball America, at <http://www.baseballamerica.com/online/draft/bonus2000.html> (2002).

⁵² *2002 Signing Bonuses Top 10 Rounds*, Baseball America, at <http://www.baseballamerica.com/online/draft/bonus02.html> (2004).

⁵³ *2004 Draft: Round 3*, Baseball America, at <http://www.baseballamerica.com/draftdb/rnd.php?rnd=3> (2004).

⁵⁴ *See, e.g.* Jim Callis, *Drew’s draft-day drop spurs volatile first round*, *BASEBALL AM.*, July 5-18, 2004, at 10. Regarding Matt Bush, the first pick in the first round of the 2004 draft who signed for the lowest amount for a number one

overall pick since the 2000 draft, Callis noted: The Padres insist that it's a misperception that their choice was based primarily on finances. They don't deny that money always enters into decisions at the top of the draft, but they viewed Bush as the best high school prospect in the draft. The bottom line was that they thought he was a better value at \$3.15 million than any of their other targets would be wherever their final price tags ended up. [Jered] Weaver, who like [Stephen] Drew is advised by Scott Boras, reportedly wants an eight-figure deal similar to what Mark Prior got from the Cubs as the No. 2 choice in 2001. [Jeff] Niemann is expected to command a bonus in the \$3 million-\$4 million range. "From the information that we had gathered, from their advisers, at least what their expectations were, we didn't see the value in there," [general manager Kevin] Towers said. *Id.*

⁵⁵ MLR 3(g)(1).

⁵⁶ It is important to note that pre-draft dealing, while commonplace in the industry, is not permitted under Major League Baseball Rules. Therefore, pre-draft discussions and verbal agreements are non-binding to the club and the player. See Tom Haudricourt, *Brewers' Draft Plans Hinge On Other Teams*, MILWAUKEE J. SENTINEL, June 2, 1997, at Sports p.3. For example, when the General Manager of the Milwaukee Brewers, Sal Bando, was asked whether the Brewers violated major league and NCAA rules by striking a pre-draft deal with 1996 first round pick Chad Green, Bando said, "You can't actually sign it, but you can talk to his representative and agree in principle on something and complete it after the draft.... You can't have a written contract, but you can talk money with his representative.... Everybody does it." *Id.*

⁵⁷ See, e.g., Michael Belmont, *2003 Draft Review*, BravesBeat.com, at http://www.bravesbeat.com/article_622.shtml (June 3, 2003) (Regarding 2003 supplemental first round draft pick, Luis Atilano, "Since there appears to be a pre-draft deal, you can expect him in Orlando this season.... Shortly after the pick was made, the folks at Baseball America announced that [Jarrod] Saltalamacchia followed Atilano by signing a pre-draft deal. You can also expect him to go to Orlando.").

⁵⁸ Callis, *supra* note 54, at 11.

⁵⁹ As one author correctly surmised: "One can only conclude that there is not necessarily anything 'per se unethical' in contacting an athlete and asking to represent the athlete in negotiations with professional sports teams. In fact, not only is such conduct not necessarily unethical, it may be entirely ethical and extremely beneficial to the athlete for numerous reasons. First, the agent might be a highly qualified, experienced agent, capable of securing a multi-million dollar deal for the athlete. Second, even if the agent is not as experienced and well-known as other agents, it is becoming widely recognized that having an agent is usually better than no agent at all since a competent agent may have more knowledge of contract and labor laws, and better negotiation skills, than many athletes. The agent may level the playing field between the professional team and athlete and have access to more information than the average athlete will have in his or her possession." Remis, *supra* note 1, at 29-30.

⁶⁰ Law of Prof'l & Amateur Sports, *supra* note 2, at 1-10.

⁶¹ *Id.* NCAA Bylaw 14.11.1 states: “If a student-athlete is ineligible under the provisions of the constitution, bylaws or other regulations of the Association, the institution shall be obligated to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition.” NCAA Bylaws, *supra* note 3, § 14.11.1.

⁶² Press Release, Vanderbilt University, Baseball’s Jeremy Sowers to Miss Two Starts (Feb. 1, 2002), *available at* <http://www.vanderbilt.edu/commodores/baseball/pressbox/Releases/020201.htm>.

⁶³ *Id.* In June of 2004, after his junior year at Vanderbilt, Sowers was again drafted in the first round, this time by the Cleveland Indians with the sixth pick overall. *2001 Draft Signing Bonuses*, Baseball America, at <http://www.baseballamerica.com/online/draft/bonus2001.html> (2001).

⁶⁴ According to Vanderbilt, which appealed the NCAA’s decision to no avail, “Sowers did nothing wrong, received no material benefit and had been saying all along he planned to play collegiately.” Press Release, *supra* note 62. Vanderbilt Head Coach Roy Mewbourne stated: “We were very disappointed with the NCAA’s position.... The Sowers family took great pains to handle everything properly so any penalty seems extremely harsh to us. We’ve known about this for some time so it does not upset our season’s plans as much as we think it’s unfair to an honest student-athlete.” *Id.*

⁶⁵ When an amateur baseball player “retains” an agent, the player and the agent do not sign a representation agreement because the NCAA rules prohibit such agreements. Therefore, the player and the agent have a very “loose” understanding that the agent will represent the player in the draft process. This often creates disputes down the road between the parties as to the terms of the representation, including the agreed upon duties and responsibilities of the agent before and after the draft and the agreed upon fee to be paid to the agent.

⁶⁶ See, e.g., Joe Kay, *No Picnic for Top Picks; Preparing for draft day is a full-time job for stars such as Roethlisberger*, FLA. TIMES-UNION, Feb. 29, 2004, at C-16. Ben Roethlisberger was a highly-touted quarterback and pro prospect who left Miami University of Ohio after his junior year to enter the 2004 NFL draft. After the completion of the collegiate football season, Ben moved to California and hired an agent (Leigh Steinberg) who began preparing Ben for the draft and contacting NFL clubs on Ben’s behalf. In the article, Kay expounded on Ben’s daily routine, and in particular Steinberg’s efforts to elevate Ben’s draft position, during the months leading up to the 2004 draft: Roethlisberger spent the last two months getting ready to make a good impression on teams looking for a franchise player. Roethlisberger, who was one of Ohio’s top prep passers at Findlay High School, moved to Newport Beach, Calif., so he could work out every day in warmer weather. His daily routine includes an hour of weight training, an hour or more working out with a quarterback coach, then a session at Steinberg’s office getting mail and doing interviews. There’s another hour-long workout to improve his speed before the day is done.... There’s also some travel. Steinberg took him to the Senior Bowl to meet NFL scouts, coaches and general managers. He also brought Roethlisberger to Super Bowl week in Houston, helping him get another foot in

the door while getting a look at the mass media. “I was kind of star-struck to see people like Ronnie Lott, Joe Montana, Howie Long, Cris Carter, Warren Moon,” Roethlisberger said. “I had posters of these guys.” *Id.*

⁶⁷ This standard agreement specifically states the obligations of the agent and the player, and a fee to be paid to the agent in the amount of 3% of the compensation received by the player.

⁶⁸ For a discussion about the detrimental effects of the NCAA rules on amateur football players, see Kobin, *supra* note 4. The author argues that, since the no draft rule does not apply to baseball players, football players are actually worse off than baseball players because the baseball player drafted after his junior season, unlike the football player, can return to school for his senior year if he cannot come to terms with the club that selects him in the draft. *Id.* at 516–19. He argues that football players who have completed their junior season are further harmed by the no agent rule because they need competent representation in order to make an informed decision about whether to declare draft-eligibility after their junior season. *Id.* However, a college football player who completes his junior season and is considering whether to declare draft eligibility is permitted to retain an experienced and competent advisor to help him make the decision. If, after consulting with his advisor, he determines that it is in his best interest to declare himself eligible, then the advisor can immediately begin contacting clubs on his behalf.

Furthermore, signability is not a significant factor to the clubs in football as it is in baseball because the draft compensation system in football is much more structured and predictable with the salary cap. Thus, pre-draft dealing is not as common a practice in football as it is in baseball. *Id.*

⁶⁹ Law of Prof'l & Amateur Sports, *supra* note 2, at 1-8.

⁷⁰ *Id.* at 1-11. “[A]thlete agents having no affiliation with a university are beyond the reaches of the NCAA’s enforcement jurisdiction, as the NCAA is merely a private organization comprised of its voluntary institutional membership. The athlete, although not a member of the NCAA, can be disciplined indirectly since the NCAA can force the member institution to which the student athlete is enrolled to declare the athlete ineligible for further intercollegiate competition.” Remis, *supra* note 1, at 9.

⁷¹ According to the NCAA, “a panel should provide the student-athlete a realistic appraisal of his or her potential for becoming a successful professional athlete. It is important that the student-athlete receive objective advice from individuals at institutions who have no vested interest in the student-athlete’s career.” *NCAA Amateurism Regulations Summary*, *supra* note 3, § II.G.1.

⁷² See Stiglitz, *A Modest Proposal: Agent Deregulation*, *supra* note 2, at 364 (“As long as the institution has a vested, financial interest in encouraging the student to stay, full time employees of the institution may not be wholly neutral.”).

⁷³ The University of Miami, for example, requires every agent to register with the university’s NCAA compliance office prior to speaking with any student-athlete. The University ensures that the agent has been certified by the State of Florida (which is a state law requirement, *see* FLA. STAT. ANN. § 468.453 (West 2001)), and also requires the agent to complete a questionnaire in order

to obtain references and certain information about the agent and his company.

Exhibit 2

Dear Baseball Prospective Student-Athlete:

This e-mail is being sent to gather initial information from you regarding your request for amateurism certification by the NCAA Eligibility Center. It is our staff's understanding that you were selected by a Major League Baseball (MLB) club in the June 2010 Rule 4 Draft and have decided not to sign a professional contract. Please provide the following information relating to your contact with MLB clubs and your relationship with your advisor:

1. Provide the name and contact information (e-mail address and phone number) of your advisor.
2. Is your advisor an attorney?
3. Did your advisor have any direct communications with any MLB clubs on your behalf?
4. Did your advisor discuss your signability with any clubs?
5. Provide a detailed description of the services provided to you by your advisor (for example, discussions regarding your signability number, continuing in school versus signing a professional contract, contract offers, MLB questionnaires, medical history, performance, etc.):
 1. Estimate the number of times you talked with your advisor.
 2. Explain the subject matter of each of your conversations with your advisor.
6. List all individuals or entities, including MLB clubs, with whom your advisor spoke with on your behalf.
7. Have you ever agreed with your advisor that he would serve as your agent if you signed a contract with a club or if you are drafted again in the future?
8. Did your advisor provide anything to you or your family in addition to the services listed above (e.g., meals, transportation to showcases, tryout expenses)?
9. How much was the fee you paid for your advisor's services?
10. What percentage of your signing bonus would your advisor have received had you signed? (This would have been discussed during your initial meeting(s) with your advisor).
11. If you have a written agreement with your advisor, please fax a copy of this agreement to 317-968-5103 as soon as possible (attn: Stephen Webb).
12. If you have a verbal agreement with your advisor, please provide a detailed description of the terms of this agreement. (What did you and your advisor agree he would do on your behalf?)
13. Did your advisor talk to the MLB club that drafted you regarding your contract offer?
14. List all individuals within the MLB organization that drafted you with whom you spoke after the 2010 draft.
15. Provide the name and contact information (e-mail address and phone number) of your area scout from the team that drafted you.

Please note that NCAA regulations require you to provide complete and accurate information to the NCAA Eligibility Center relating to your amateurism certification request. Any failure to do so could amount to an NCAA Bylaw 10.1 violation which would negatively affect your eligibility at NCAA institutions.

Please include your name in the subject line of the reply e-mail.

Finally, for the NCAA institutions that have received this e-mail (which was sent as a blast to ensure that the certification reviews began as soon as possible after this year's signing deadline) – your institution has one or more of the baseball prospects to whom this e-mail is being sent on your active IRLs. If you would like to know which of your prospects received this e-mail, please feel free to contact the amateurism certification baseball inquiry line at 317/223-0707.

The Impact on Demand from Winning in College Football and Basketball: Are College Athletes More Valuable than Professional Athletes?

By: Daniel A. Rascher
Chad D. McEvoy

Acknowledgements: The authors would like to thank Giseob Hyun for his research assistance.

Comparing nine existing studies on the attendance demand for professional and college football and men's basketball and conducting our own analysis, we find that the sensitivity of attendance to winning is higher in college football than professional football and it is higher in college basketball than professional basketball. This shows that variation in winning matters more to fans in college than in the pros. If it is true that college athletes impact their team winning as much as the professionals do, then it is consistent with the notion that college athletes are relatively more important to their league's revenue than professional athletes are.

I. Introduction

There is an abundance of literature in sports economics that focuses on some aspect of demand. In fact, the only line of research that may be more abundant is the many productivity studies of athletes/teams, etc. The demand research most often utilizes live attendance as the measure of demand. The assumption that supply is fixed at full capacity helps avoid the simultaneity problem that exists in most other areas of economics that include studies of demand and supply. More recent research on demand has focused on television viewership as a measure of demand.¹

The literature almost always (if not always) includes some measure of the quality of play, either relative quality of play, absolute quality of play, or both. The relative quality of play is often characterized as the winning percentage of the home team and the winning percentage of the visiting team. Sometimes they are added together to account for total quality of the contest and sometimes they are subtracted to allow for the closeness of the contest or the uncertainty of outcome (UOH) of the game.² Other measures of absolute quality might be a dummy variable indicating a major conference in college sports.

Typically, the researcher is uninterested in the impact of winning on demand – it is usually thought of as a control variable. This is not because winning is

¹ See, e.g., Scott Tainsky & Chad D. McEvoy, *Television broadcast demand in markets without local teams*, 13 J. SPORT ECON., 250 (June 2012).

² Brian Soebbing provides a nice summary of the uncertainty of outcome literature and competitive balance in sports economics. See Brian P. Soebbing, *Competitive Balance and Attendance in the Sports Industry*, in THE BUSINESS OF SPORTS: PERSPECTIVES ON THE SPORTS INDUSTRY 51 (B. Humphreys & D. Howard eds., 2008).

unimportant, quite the contrary, but other variables of interest are usually the focus. These include studies of the race of players, the race of the community, the impact of a new stadium, the impact of prices, the presence of star athletes, the impact of promotional activity, and so on.

This research note focuses on understanding the impact of winning on demand for college football and men's basketball compared with professional football and basketball. Specifically, the analysis measures the elasticity (or sensitivity) of attendance to winning (hereafter "winning elasticity"). The incremental impact of the players shows itself best through winning, as opposed to other demand variables such as price, population, weather, weekend game, etc. Player quality also reveals itself via the "star" quality of a player above and beyond his ability to generate wins. This star factor has been captured in some of the sports demand literature, often as the number of players on the team who are on some sort of all-star team or make the Pro Bowl in the National Football League (NFL). It should be noted that winning is also a function of coaching quality. That issue is not fully examined in this research note, but is discussed in the final section of the article.

Thus, there is a link between player quality and winning, and winning and demand. The overarching question is whether player quality in college athletics has a larger, similar, or smaller impact on demand than in professional sports. On the margin, do differences in the quality of college football players, as revealed through winning, cause demand to rise or fall more than in the pros? Similarly, what is the result for men's basketball?

The rest of this research note consists of an examination of a sample of the existing research on demand in the NFL, National Basketball Association (NBA), and National Collegiate Athletic Association (NCAA), and what the implied winning elasticities are in each league. Then, an analysis utilizing men's college basketball data is undertaken to allow for more direct comparisons to the existing NBA literature. Lastly, implications of the findings, [[the relative importance of coaching to winning across college and the professional leagues]], and directions for future research are discussed.

II. Existing Research

Depken (2001) examines fan loyalty in the NFL utilizing annual data from 1990-1997.³ Although not the focus of the study, the results show that the winning elasticity is 0.10 – 0.11 (or 10-11%). The models also include lagged winning percentage, with an elasticity of 0.09. Combined, the results suggest that an increase in winning percentage by 10% increases attendance by 1% in both the current and following year. See Table 1 for a summary of the findings across the various studies.

³ Craig Depken, *Fan Loyalty in Professional Sports: An Extension to the National Football League*, 2 J. SPORTS ECON. 275 (Aug. 2001).

Rascher, Brown, Nagel and McEvoy (2012) analyzed annualized NFL attendance data from 1989-2003, focusing on the importance of new stadiums in minimizing the variance in future revenues.⁴ Across the various models, the winning elasticity ranged from 11% to 15%. Spenner, Fenn, and Crooker (2010) study the notion of rational addiction by sports fans in their consumption behavior.⁵ Importantly, their model includes both lagged and lead attendance as independent variables (with attendance as the dependent variable). Econometric models containing lagged (or lead) versions of dependent variables tend to show the impact of other independent variables as being much smaller than would be the case if there were no lagged or lead dependent variables included. Thus, the winning elasticity implied in the model is only 3%.

Welki and Zlatoper (1994) analyze individual NFL game attendance for the 1991 season.⁶ Using a Tobit analysis to avoid the problem of sellouts in the NFL, the coefficient on winning percentage is statistically significant, implying a winning elasticity of 13%.⁷ The authors note that the Tobit results are very similar to the OLS results.

There are two studies reviewed that focus on attendance demand for college football. Groza (2010) investigated how changing conferences affected demand,⁸ and found “teams that changed conferences enjoyed an increase in attendance even after controlling for the increase in quality of competition.”⁹ Groza’s four models (two using OLS and two using Tobit analysis) have a winning percentage coefficient between 0.28 and 0.33. The model that the article bases its discussion on has a coefficient of 0.315. The results suggest that the winning elasticity is about 23%.¹⁰

Price and Sen (2003) analyze game day attendance for the 1997 season.¹¹ Utilizing wins in the last eleven games instead of winning percentage, they get coefficients ranging from 2,280 to 3,048, depending on whether stadium capacity is used as an independent variable. The implied winning elasticities range from

⁴ Daniel Rascher, Matthew Brown, Mark Nagel, & Chad McEvoy, *Financial Risk Management: the Role of a New Stadium in Minimizing the Variation in Franchise Revenues*, 13 J. SPORTS ECON. 431 (August 2012).

⁵ Erin LeAnne Spenner, Aju J. Fenn, & John R. Crooker, *The Demand for NFL Attendance: A Rational Addiction Model*, 8 J. BUS. & ECON. RESEARCH 21 (Dec. 2010).

⁶ Andrew M. Welki & Thomas J. Zlatoper, *US Professional Football: The Demand for Game-Day Attendance in 1991*, 15 MANAGERIAL AND DECISION ECONOMICS 489 (Sept./Oct. 1994).

⁷ A Tobit analysis uses information from uncensored (not sold out) games to inform the true underlying demand for censored (sold out) games.

⁸ Mark D. Groza, *NCAA Conference Realignment and Football Game Day Attendance*, 31 MANAGERIAL AND DECISION ECONOMICS 517 (2010).

⁹ *Id.* at 517.

¹⁰ It should be noted that Groza uses the percentage of the capacity of the stadium filled as the dependent variable instead of attendance.

¹¹ Donald I. Price & Kabir C. Sen, *The Demand for Game Day Attendance in College Football: An Analysis of the 1997 Division I-A Season*, 24 MANAGERIAL AND DECISION ECONOMICS 35 (Jan./Feb. 2003).

31% to 41%. As discussed further in the conclusions, the winning elasticity appears higher in college football than in professional football.

Table 1. Elasticity of attendance with respect to winning

Sport	Authors	Dependent Variable	Independent Variable	Coefficient	Statistical Significance	Elasticity
NFL ¹	Depken, 2001	Log of annual attendance, 1990 - 1997	Log of current year's winning percentage	0.102	6.38	0.10
NFL ²	Rascher, Brown, Nagel, McEvoy, 2012	Annual attendance for each NFL team from 1989 - 2003	Annual wins	9,447	significant at 1% level	0.15
NFL ²	Rascher, Brown, Nagel, McEvoy, 2012	Annual attendance for each NFL team from 1989 - 2003	Annual wins	6,509	significant at 1% level	0.11
NFL ³	Spenner, Fenn and Crooker, 2010	Total annual attendance for each NFL team from 1983 to 2008	Team winning percentage for each season	26	3.11	0.03
NFL	Welki and Zlatoper, 1994	Individual game attendance for the 1991 season	Home team's winning percentage prior to game	16,535	6.38	0.13
College Football ⁴	Groza, 2010	Percentage of the home team's stadium that was filled on game day for 2002 through 2007	Winning percentage over the previous eleven games	0.315	40.81	0.23
College Football ⁵	Price and Sen, 2003	Game day attendance during the 1997 Division I-A regular season	Team's number of wins during its last 11 games	3,048	95.88	0.41
College Football ⁵	Price and Sen, 2003	Game day attendance during the 1997 Division I-A regular season	Team's number of wins during its last 11 games	2,280	74.63	0.31
NBA ⁶	Rascher and Solmes, 2007	Attendance per game	Home team's current winning percentage	7,425	significant at 1% level	0.21
NBA	Mongeon and Winfree, 2011	Log of gate attendance per capita	Winning percentage	0.33	4.97	0.17
College Basketball ⁷	McEvoy and Morse, 2007	Per game attendance for 2003-04 and 2004-05 seasons	Home team's winning percentage prior to game	1.16	2.63	0.08
College Basketball ⁸	Authors analysis with 2003-04 data	Per game attendance	Home team's winning percentage prior to game	3.2	8.47	0.31
College Basketball ⁸	Authors analysis with 2004-05 data	Per game attendance	Home team's winning percentage prior to game	3.5	5.24	0.33

¹Also includes lagged winning percentage (which is significant with coef. of 0.089). Thus, looking at current + lagged importance would yield an elasticity of 0.191

²The coefficient on wins ranged from 6,509 to 9,447.

³The model contains both lagged and lead attendance (it is an addiction model). Models with lagged dependent variables tend to drown out the effects of other coefficients, thus this is a lower-bound value for the underlying data.

⁴This is for 21 teams that went through conference realignment during the time period.

⁵The coefficient on wins ranged from 2,280 to 3,048.

⁶This included lagged number of wins from the previous season, which was significant. This often dampens the impact of current winning.

⁷This model included the home team ranking (RPI), which was significant. RPI and winning percentage are collinear causing both coefficients to be less interpretable than if only one of the variables were used. This data was examined directly by authors.

⁸This analysis utilized the data from McEvoy and Morse (2007), but re-analyzed it without the RPI variable (see note 7).

Switching to basketball, Rascher and Solmes (2007) looked at how the closeness of the contest affected demand using game-by-game data for the 2001-02 NBA season.¹² They found that winning percentage of the home team up to the point of the game had a significant and positive impact on attendance demand. The implied winning elasticity is 21%. This model also included the number of wins from the previous season (which was also found to be significant), possibly dampening the current season winning elasticity. Mongeon and Winfree (2012) review six seasons in the NBA (seasons beginning in 1999-2004) in order to compare attendance demand to television demand. The winning elasticity is 17%.¹³

¹² Daniel Rascher & John Paul Solmes, *Do Fans Want Close Contests?: A Test of the Uncertainty of Outcome Hypothesis in the National Basketball Association*, 2 INTERNATIONAL JOURNAL OF SPORT FINANCE 130 (2007).

¹³ Kevin Mongeon & Jason Winfree, *Comparison of Television and Gate Demand in the National Basketball Association*, 15 Sport Management Review 72 (Feb. 2012).

McEvoy and Morse (2007) analyzed game-by-game attendance in Division I college basketball for the 2003-04 and 2004-05 seasons in order to determine whether a game being televised negatively impacts attendance.¹⁴ In other words, they investigated the question of whether television and live gate demand are substitutes or perhaps complements. The model used both home team winning percentage at the time of the game and RPI (Rating Percentage Index). Both of those are measures of team quality (with RPI additionally measuring the strength of schedule) and in order to make a more straightforward comparison to the existing NBA literature, it is helpful to analyze winning percentage in isolation. The actual calculation of winning elasticity in the McEvoy and Morse (2007) article shows an elasticity of 8%. As shown in the next section, when isolating the impact of winning percentage, the winning elasticity changes substantially.

III. Data Analysis & Results

The data from McEvoy and Morse contain game-by-game attendance for both the 2003-04 and 2004-05 seasons as well as the explanatory variables.¹⁵ Our analysis contains 697 observations from 2003-04. The model chosen accounts for multicollinearity issues found amongst the variables and also is a reduced form version including only variables significant at the 10% level. The coefficients remaining in the reduced form model are consistent with what McEvoy and Morse find, as is the goodness-of-fit of the model. Heteroscedasticity is controlled for using robust estimators. As Table 2 shows, the coefficient on winning percentage of the home team is about 3.2, which is nearly three times as large as the coefficient in the original article (1.16) because RPI has been removed. Re-calculating the corresponding winning elasticity shows that it is 31%.

The 2004-05 data reveal similar findings. Utilizing 648 observations, the goodness-of-fit is also about 76% (meaning that about 76% of the variation in attendance is explained by the independent variables). After controlling for multicollinearity (by dropping some variables) and heteroscedasticity, the coefficient on winning percentage is 3.453, implying a winning elasticity of 33%.

¹⁴ McEvoy & Morse, *An Investigation of the Relationship Between Television Broadcasting and Game Attendance*, 2 INTERNATIONAL JOURNAL OF SPORT MANAGEMENT AND MARKETING 222 (2007).

¹⁵ *See Id.*

Table 2. Analysis of McEvoy and Morse (2007) data without RPI

Model:	2003-04 OLS	2004-05 OLS
F-statistic	139****	120****
R-squared	0.76	0.76
Number of Observations	697	648
Dependent Variable	Per Game Attendance	Per Game Attendance
Independent Variables:		
Constant	-2,089****	-3,141****
National broadcast	1,180***	1,872****
Monday	-610**	-900***
Wednesday	-580**	-1,045***
Thursday	-586**	-694***
Night game	--	627***
Home team winning percentage	3.19****	3.45****
Visiting team RPI from prior year	-8.5****	-5.1****
Visiting team winning percentage	--	1.44***
Conference game	790****	--
Public university	896****	747***
Enrollment	.067****	.055****
Population of county	-.00036****	-.00046
Ticket price - most common	379****	407****
SEC game	2,084****	1,796****
ACC game	2,806****	--
Pac-10 game	1,465***	2,000****
Big East game	3,462****	--

Significance: * - 10% level; ** - 5% level; *** - 1% level; **** - 0.1% level.

IV. Conclusion & Discussion

This analysis compared the impact of winning on attendance demand – specifically, the elasticity of attendance to winning (the percentage change in attendance divided by a 10% change in winning percentage). Utilizing findings from various published demand studies in football and basketball revealed a general pattern in that college football and basketball has a demand that is more sensitive to winning by the home team. While comparing across different studies, with different underlying samples and different explanatory variables, is not as preferable as conducting studies utilizing the same years and same explanatory variables, these are the chosen final demand models of the available published work. Another limitation is that some of the studies included multiple measures of team quality, making it difficult to isolate the impact of winning percentage on live ticket demand.

That led us to take McEvoy’s and Morse’s data and re-analyze it having removed home team RPI, so winning percentage could be viewed sequestered from other team quality variables. Those findings show that college basketball

demand is more sensitive to winning than professional basketball, consistent with the football findings.

Can we conclude that college football and basketball players have a higher marginal impact on winning than their professional counterparts? We note that this may be counter-intuitive, perhaps hypothesizing that demand for college sports would be influenced by elements of tradition and loyalty to the university, particularly by alumni. One potentially confounding factor is the influence of coaching. If we assume that college and professional coaches have similar impacts on winning or that college coaches don't have a greater impact on winning than professional coaches, then it is consistent with the notion that changes in the quality of college athletes (revealed through winning) affect demand more than professional athletes. This issue warrants further research.

Another important area of study for future research would be to look at the impact of winning on demand using television ratings instead of attendance. Changing the channel is a lot less effort than choosing to attend or not attend a sporting event. Tainsky (2010) shows that the elasticity of winning to television viewership for professional football, 0.29, is generally higher than for the attendance studies listed in Table 1. Kanazawa and Funk (2001) show that winning elasticity for NBA games ranges from 0.80 to 1.7 (depending on which model specification is used).¹⁶ Thus, television viewers are more sensitive to changes in winning percentage of the home team (in terms of whether to watch or not) than live gate viewers are. That is not surprising given that much more goes into the decision to attend a live sporting event than to watch one on TV (the overall costs and opportunity costs are higher for attending a live event). What are the winning elasticities for college sports on television?

¹⁶ Mark Kanazawa & Jonas Funk, *Racial Discrimination in Professional Basketball: Evidence from Nielsen Ratings*, ECONOMIC INQUIRY 599 (2001).

Don't Allow Pay-for-Play to Fool You¹

By: Linda Robertson

Nick Saban makes \$5.9 million. Mack Brown makes \$5.1 million. John Calipari makes \$4.6 million.

The commissioners of the Southeastern Conference, Big 12, Big Ten and ACC all make \$1 million.

The Bowl Championship Series struck a \$500 million deal with ESPN. The NCAA will reap \$10.8 billion from March Madness during a 14-year TV deal with CBS and Turner Sports. That's *b* as in bouncing basketballs.

The enterprise of college sports is marinating in money, right? So why shouldn't those poor overworked and undervalued student-athletes get a cut?

Isn't it time to pay college athletes?

The pay-for-play debate, which has waxed and waned for 100 years, is a hot topic once again as the NCAA weighs reform to counter the effects of astronomical salaries, escalating TV revenue and proliferating scandals.

If athletes were paid they wouldn't have to sell their jerseys for cash and tattoos. They wouldn't be tempted by advances from agents or strip-club feasts from boosters. They wouldn't have their father shopping their quarterbacking talent for \$180,000. They would be compensated fairly for the riches they bring their schools. They would no longer be exploited by the powers who profit from their sweat.

End the hypocrisy. End the injustice.

Isn't it time to pay college athletes?

No. It isn't. Not now, not ever.

The arguments for paying Hurricanes, Gators, Seminoles, Buckeyes or Trojans are as cynical as a crooked agent's smile and as shallow as an obsequious booster's handshake.

Athletes receive free tuition, housing, food, books, medical care, tutoring, athletic apparel – which could be worth more than \$50,000 a year. They practice in

¹ Originally published in the Miami Herald on November 5, 2011.

palatial facilities and showcase their talent to future employers on national TV. They leave college debt-free, unlike many students.

Besides, there's already a system for paying athletes.

"It's called professional sports, and I love them," NCAA president Mark Emmert said. "But that's not what college sports is about. If we are going to pay student-athletes why even have university-based teams? Just go watch a pro game."

Emmert wants to update scholarships so that athletes can cover the "cost of attendance" with an extra \$2,000 a year for expenses such as cell phones, snacks, entertainment, travel back home and clothing that doesn't have Nike swooshes on it. That seems reasonable, if colleges can fit it into their budgets.

But the argument to pay athletes their "fair market value" is an entirely different idea – one that is impractical and that would obliterate the essence and appeal of college sports.

Those in favor of pay-for-play blithely cite capitalism. A recent report by a college athletes' advocacy group calculated that if colleges shared their revenues the average football player would be worth \$121,000 a year (with a Texas player worth the most, at \$513,000) and the average basketball player would be worth \$265,000 (with a Duke player worth the most, at \$1 million). Allow players to share in TV and merchandising revenue, the group says. Let them earn what they would in an open market so they don't have to seek money on the black market.

Except this isn't capitalism. It's a fantasyland where institutions of higher learning with billions in endowments raise tuition every year and claim tax-exempt status. It's a sacred place behind ivy-covered walls where wealthy alums buy a luxury stadium suite and write it off as a charitable expense.

A big problem with paying athletes is that 90 percent of college athletic departments lose money. So how, exactly, are colleges going to pay athletes unless they cut sports or slash rosters? Who sets the scale? Do all athletes in all sports receive the same pay? Does the quarterback get more than the center? Does the soccer team get stiffed? If a school doesn't pay female basketball players equally, can it afford a Title IX lawsuit? What is the point of college sports if a college only fields a couple expensive teams?

Not only would paying athletes create an exclusive tier of power schools and masses of have-nots, but it would open a sinkhole of complications. If athletes are employees, shouldn't they pay taxes on their salaries? What about worker's compensation claims? Could they form unions and go on strike?

Paying athletes would further separate them from their fellow students and negate the campus experience. Might as well create semi-pro teams and slap a sponsor's name on the jerseys.

But the Big House in Ann Arbor would be half empty. The RVs would stop their weekend treks through Alabama. There would be no need for the Boomer Sooner wagon or the Seminole on horseback. Who cares about tradition, pageantry and allegiance to the alma mater when the athletes aren't playing for the university – they're playing for the paycheck.

If being a college football player is no more than a full-time job – and UM coach Al Golden said as much when he implied his players should be watching film during lunch – then the NFL ought to create a minor league. The NBA has the D-League but nobody wants to play in that wasteland, even with pay.

Probably because a free education is tremendously valuable. It's a priceless opportunity, a gift that gives for a lifetime. To be a college athlete is enriching, in and of itself. The paycheck can wait.

National Letter of Indenture:

How College Athletes are similar to, and in many ways worse off than, the indentured servants of colonial times.

By: Andy Schwarz and Jason Belzer

It is part of the mythos of college sports; young men and women enter our nation's universities as student-athletes and, after their playing careers have ended, they graduate and go on to great, successful lives. For many, the belief in the transformative power of an athletic scholarship is a true faith. Yet for a significant number of student-athletes, particularly in the sports of basketball and football, the compensation they receive in the form of a free education does little to steer them off a path in which they achieve far less than their more accomplished teammates.

Like many of today's college athletes, Daniel Dulany, a Queens native, came from family of modest means. His father had recently run into financial troubles, so Daniel was forced to transfer from an expensive private school. The free ride he received to Maryland was a blessing for his family. Daniel had always aspired to be an attorney, and promised himself that he would work hard and eventually get into law school.¹

John Noblin, on the other hand, was a Norfolk native and grew up a Cavalier at heart. A young man from a family of little means, the prospect of four years in Virginia with the opportunity to practice his craft, and a free education along with room and board was a dream come true. Sure, the days would be long, especially during the summer grind preparing for the fall season, but he would take to the field in search of glory.²

Dulany finished in three years, and went to work for George Platter II, a successful lawyer.³ He traveled to London and upon finishing law school, returned to Maryland and was admitted to the bar. He became a prominent attorney in Annapolis, and later a major land developer.

Hard work and a dream do not guarantee success. Noblin was not as fortunate as Dulany, and eventually entered the construction business.⁴ Maybe Noblin was not to blame for his lack of success; maybe it was the fault of his agent, David Warren, for getting him a raw deal in the first place. Whatever the reason, Noblin would become just another statistic in a system where unpaid labor was exchanged for the promise of success that often was out of reach.

¹ See *Daniel Dulany: Indentured Servant to Statesman*, TEACHING AM. HISTORY IN MD, <http://teachingamericanhistorymd.net/000001/000000/000050/html/t50.html> (last visited July 26, 2012).

² See *Indentured Servants Basic Search Results*, VIRTUALJAMESTOWN.ORG, http://www.virtualjamestown.org/indentures/search_indentures.cgi?start_page=10&search_type=basic&db=bristol_i nd&servant_In=% (last visited July 26, 2012).

³ See TEACHING AM. HISTORY IN MD, *supra* note 1.

⁴ See VIRTUALJAMESTOWN.ORG, *supra* note 2.

Among today's college athletes, for every Daniel Dulany there are many John Noblins. Yet, for all the similarities, neither John nor Daniel ever played college sports. In fact, when Dulany immigrated from Queens County, Ireland in 1703 and Noblin from Norfolk, England in 1655, it would be more than a hundred years before the University of Virginia or Maryland would be established.⁵

Both Dulany and Noblin came to Colonial America as indentured servants, part of a system for recruiting labor to America that flourished in the Mid-Atlantic colonies of Virginia, Maryland, and Pennsylvania.⁶ Indentured servitude was vital to the immigration of Europeans to the English colonies; by the late 1700s, more than half of all immigrants arriving in Philadelphia were indentured in some form.⁷ Indenture was a term for a contract – one which bound the worker to a specific master for a fixed term. Indentured servants were promised free passage across the Atlantic, room and board, and often a chance to get an education or learn a trade as long as they fulfilled their contracts and served their masters without pay for four years or so. Dulany was one of the few fortunate ones who built a notably prosperous career out of the hundreds of thousands of indentured servants who came to this land with the hopes of creating a better life for themselves and their families.

Indentured servants typically lacked the resources to pay their way to a better world and thus faced a hard bargain – stay behind in their old lives with little prospect of advancement or else spend several years working only for room and board and training in the hope of bettering themselves. Some purchased passage by signing themselves into indenture in Europe; their shippers would then sell and assign their contract to a master in the colonies. As the market evolved, however, it became more common for the servants to choose their own master once they reached the colonies, negotiating their best terms they could, including the length of service and whether families could stay together.⁸ On average, in exchange for passage across the Atlantic, a male indentured servant arriving in Philadelphia in the mid-18th century could expect to give up 4.4 years of his life working without compensation, save for room, board and a chance to hone his craft,⁹ much as the

⁵ See *Facts at a Glance*, UNIVERSITY OF VIRGINIA, <http://www.virginia.edu/Facts/> (last visited July 26, 2012); see also *University of Maryland Timeline*, UNIVERSITY OF MARYLAND, <http://www.urhome.umd.edu/timeline/> (last visited July 26, 2012).

⁶ See David W. Galenson, *The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis*, 44 No. 1 J. ECON. HIST. 1 (Mar. 1984).

⁷ See Farley Grubb, *Redemptioner Immigration to Pennsylvania: Evidence on Contract Choice and Profitability*, 46 No. 2 J. ECON. HIST. 407 (June 1986); see also Farley Grubb, *The Incidence of Servitude in Trans-Atlantic Migration, 1771-1804*, 22 Issue 3 EXPLORATIONS ECON. HISTORY 316 (1985).

⁸ Servants who sold their own contracts in the colonies were known as “redemptioners.” Redemptioners comprised the vast majority of servant contracts sold in Philadelphia in the second half of the 18th century. See GRUBB, *supra* note 7, at 408, Table 1.

⁹ See Farley Grubb, *The Market for Indentured Immigrants: Evidence on the Efficiency of Forward-Labor Contracting in Philadelphia, 1745-1773*, 45 No. 4 J. ECON. HIST. 855, 858 (Dec. 1985).

typical college athlete can expect to spend 4 or 5 years earning money for his school paid only in room, board, and tuition and coaching.

Just as the prospects of an average college athlete having a successful professional career are quite small, the chances that an indentured servant would rise to a position of true prosperity or fame were also few and far between.

The system of indentured servitude arose to solve an economic problem – workers in Europe could not afford passage to the colonies of North America, and merchants and farmers in the colonies needed labor. Indentures allowed workers to buy their passage on credit, promising multiple years of labor in exchange for passage to America.¹⁰ Indentured servants earned less than equivalent free laborers, forced to choose between languishing at home or selling themselves at a discount into a system in which masters extracted a portion of their value in exchange for their “free” ride.

Modern day student-athletes, operating in a system eerily similar to that in which Dulany and Noblin served, face similar challenges -- low prospects of turning professional in their sports after their college careers are over and a system in which a good deal of their value is transferred to others.

Before proclaiming that college athletics is a modern-day form of indentured servitude, it is important to note several important differences. In key respects, college athletes face a more daunting economic reality. Would-be indentured servants actually operated in a vigorously competitive market; the more talented the servant, the better the terms he (or she) could demand,¹¹ including a reduction in the length of servitude.¹² Servants also made cash payments to lower the length of service and negotiated whether they would receive guaranteed training in a trade and whether education would be provided.¹³

In contrast, athletes heading into college face a solid cartel¹⁴ – an agreement among the otherwise independent colleges and universities that make up the NCAA to fix the price offered for athletes’ services, agreeing that no school will offer more compensation than room, board, tuition, fees, and required books and

¹⁰ See *supra* note 9, at 855.

¹¹ See DAVID W. GALENSON, *WHITE SERVITUDE IN COLONIAL AMERICA: AN ECONOMIC ANALYSIS* 97 (1981).

¹² As one such example, Daniel Dulany was able to shorten his indenture to only three years because he was more skilled than the average servant. It was common among adult apprentices to hold the minimum length of service at four years. See GALENSON, *supra* note 11, at 103.

¹³ See GALENSON, *supra* note 11, at 103.

¹⁴ A cartel of every buyer in the market is a monopsony. This is the buyers’ analogy of a monopoly, where there is only one buyer. In its dismissal of *Agnew v. NCAA* for failing to state a relevant market, the Seventh Circuit recognized that: “This appears to be a clear monopsony case, since the NCAA is the only purchaser of student athletic labor.” *Agnew v. NCAA*, 683 F.3d 328, 337 (7th Cir. 2012).

supplies, so there is no direct economic competition.¹⁵ Thus, unlike their skilled counterparts in the days of indentured servants, college athletes cannot receive a cash inducement to sign up or the promise of a cash payment upon completion of their term.

When, after settling litigation on the issue in 2006¹⁶ and with the media questioning why so-called “full ride” scholarships don’t actually cover the full cost of attending college, the NCAA board of directors sought to allow (but not require) schools to offer their most valued recruits an annual cash payment up to \$2,000, the overwhelming majority of the cartel’s members voted to forbid such a practice.¹⁷ So on this key dimension, the absence of competition for college athletes has put these athletes in a much worse position, financially, than their counterparts in the days of indentured servants.

In many ways the contracts which indentured servants signed before leaving England for the colonies could be seen as a de facto “letter of intent,” similar to the ones student-athletes sign when they commit to play sports at a particular school. Yet unlike student-athletes, the colonial system evolved so that once indentured servants arrived in the new world, they usually had up to 30 days for their contracts to be brought out by a family member, friend, or someone willing to give an advance in order to hire them for their services.¹⁸ The professional baseball world is similar; when a high school player is drafted before college, and can choose to go play professional or enter college with the hopes being redrafted at some later point in time.¹⁹ Of course, this luxury exists because there is a free market alternative in the MLB, which is willing to put a value on players before they enter college. College football and basketball lack a competitive alternative for recruits.

Though differing in degree, the punishment laid on indentured servants for attempting to get out of their contracts shares much in common with NCAA rules

¹⁵ Although in almost any other industry, such a cartel operating out in the open would be a per se violation of the antitrust laws, no one has directly challenged the NCAA front-and-center on whether this aspect of the cartel is illegal. The NCAA argues that the Supreme Court has blessed its cartel via dicta in *NCAA v. Board of Regents of the University of Oklahoma*. See Donald Remy, *Why the New York Times' Nocera is wrong*, NCAA.ORG (Jan. 6, 2012), available at

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/January/Why+the+New+York+Times+Nocera+is+wrong>.

¹⁶ The case was *White v. NCAA*. One of the authors (Schwarz) was one of the three economists who conceived the *White* case, which was settled out of court. See Stipulation and Agreement of Settlement Between Pls. and Def. NCAA at 3. *White v. NCAA*, No. CV06-0999 VBF (MANx) (C.D. Cal. Jan. 29, 2008), 2008 WL 890625.

¹⁷ See Andy Schwarz, *The \$2,000 Stipend and the Rule of Reason: an Antitrust Analysis*, SPORTS LITIGATION ALERT VOL. 8, ISSUE 24 (Dec. 21, 2011), available at <http://sportsgeekconomics.tumblr.com/post/15083501409/the-2-000-stipend-and-the-rule-of-reason-an-antitrust>.

¹⁸ See Richard Hofstadter, *White Servitude*, <http://www.montgomerycollege.edu/Departments/hpolscrw/whiteser.html> (last visited July 24, 2012).

¹⁹ See FIRST YEAR PLAYER DRAFT OFFICIAL RULES, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited July 24, 2012).

that penalize college athletes if they want to transfer to a different institution.²⁰ NCAA bylaws require athletes who transfer to a member institution on the same divisional level to complete a full year of residency before becoming eligible to play at the new school.²¹ Penalties for servants who breached their contracts ranged from extending their contracts by double the time the master lost while they were gone to as much a ten-to-one penalty authorized in Maryland at one time.²² Both systems saw extending the period of indenture as the best punishment for seeking mobility.

To the extent college sports has an interest in preventing athletes from changing teams on a (say) weekly basis, nevertheless rules requiring college athletes to sit for a year when transferring to another institution goes far beyond this legitimate concern, and school and league policies totally prohibiting the transfer to a conference foe or school rival make clear these rules are designed for the benefit of a specific school, not to preserve the legitimacy of the sport. For the majority of college athletes, such policies do nothing but force them to spend extra time in school when they would be better served graduating on-time or pursuing their professional careers. And the issue affects a substantial portion of college athletes: transfer rates amongst Division I men's basketball players are as high as 10.9%, and up to 40% of all such players won't be playing for their initial teams by their junior year because they transferred, dropped out or moved on from the sport completely.²³

Although indentured servants had many more freedoms than slaves, they were still considered chattels of their master and the contracts which they were bound could be bought and sold at will.²⁴ Much to the chagrin of the servant, the individual he committed to serve upon his arrival to the colonies could send him off on a whim to much less favorable circumstances.²⁵ In this respect, the unfortunate reality that servants faced was far worse than, but not entirely different from, the rules that govern scholarship length from 1973 to 2011.

Prior to the 2011-2012 recruiting season, NCAA institutions could only grant scholarships to college athletes on a one-year basis, renewable or cancellable

²⁰ "A student who transfers (see Bylaw 14.5.2) to a member institution from any collegiate institution is required to complete one full academic year of residence (see Bylaw 14.02.13) at the certifying institution before being eligible to compete for or to receive travel expenses from the member institution (see Bylaw 16.8.1.2), unless the student satisfies the applicable transfer requirements or qualifies for an exception as set forth in this bylaw." NCAA DIVISION I MANUAL, art. 14, § 5, cl. 1 (2011).

²¹ See *Id.*

²² See HOFSTADTER, *supra* note 18.

²³ See Jim Halley & Steve Weinberg, *Athlete Movement in Division I Basketball Raising 'Alarm'*, USATODAY.COM, Jun 24, 2012,

<http://www.usatoday.com/sports/college/mensbasketball/story/2012-06-24/Athlete-movement-in-Division-I-basketball-raising-alarm/55798356/1>.

²⁴ See GALENSON, *supra* note 6, at 10.

²⁵ See GALENSON, *supra* note 6.

entirely at the coach's or school's discretion.²⁶ Under this system coaches could get rid of an athlete who did not fit into their system or who was not developing as quickly as hoped.²⁷ Unlike their athletes (who still face a transferring penalty for breaching their letter-of-intent if their coach leaves), coaches have no waiting period when switching schools and until this change in the length of a scholarship, schools had no waiting period to replace a player dismissed under a non-renewed scholarship.

Despite operating under by-laws which purport to be focused on the welfare of college athletes,²⁸ when the NCAA held a vote to allow (but not to require) schools to offer four- or five-year scholarships, 205 of 330 Division I institutions voted against the new rule and the measure passed by the narrowest of margins, as a supermajority of 207 schools was needed to uphold the ban.²⁹ This does not guarantee that an athlete will receive a multi-year deal, but at least in this small way competition can work to ensure that the most meritorious will be able to bargain for better terms. Here clearly, as difficult as the NCAA cartel makes it for college athletes, their freedom of movement is several steps above that of chattel.

Although college athletes' freedom of movement is less restricted than indentured servants' freedom was, economically college athletes may fare worse than indentured servants. In both systems, the would-be employers provided room and board instead of paying the going rate for free laborers. Because of competition, the master of an apprentice could expect to pay about 70% of what a comparable unskilled free laborer could command over the span of a 4-plus year indenture.³⁰ If the indentured servant were skilled, the master might pay only 55% of a free

²⁶ Louis Hakim, *The Student-Athlete vs. The Athlete Student: Has The Time Arrived For An Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 148 (2000).

²⁷ After taking over the program in the spring of 2012, new SMU head men's basketball coach Larry Brown cut several players from the existing team roster, including starting point guard Jeremiah Samarrippas. When asked for the reasoning behind his decision, Brown told Samarrippas that "[he] wasn't good enough to play for him", despite starting all 31 games the previous season. See Mercedes Owens, *Brown's Cutting Down*, THE DAILY CAMPUS (Southern Methodist University), Apr. 28, 2012, available at http://www.smudailycampus.com/sports/brown-s-cutting-down-1.2861328?fb_ref=.T5q-koUR_L8.like&fb_source=home_multiline#.T-pZMrVQ41L.

²⁸ See NCAA DIVISION I MANUAL, art. 2, § 2, cl. 2.2 (2011). "THE PRINCIPLE OF STUDENT-ATHLETE WELL-BEING: Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes."

²⁹ The rule had been passed by the NCAA Board of Directors, so a 62.5% supermajority was required to override the bylaw. The override vote received 62.1% support, leaving it two votes short of the required 62.5%. Josh Levin, *The Most Evil Thing About College Sports*, SLATE.COM (May 17, 2012), http://www.slate.com/articles/sports/sports_nut/2012/05/ncaa_scholarship_rules_it_s_morally_indefensible_that_athletic_scholarships_can_be_yanked_after_one_year_for_any_reason_.html.

³⁰ An unskilled free laborer in the mid-eighteenth century could expect to earn 46.8 Pennsylvania pounds a year if he worked six days per work. The average annualized cost of an indenture, plus room, board, clothing, and other expenses of the servant, cost 33.6 pounds. In other words, a contract for the right to six days a week of labor sold for 71.7% of what six days per week of free labor would have cost. In exchange, the owner of the indenture contract took on the risk of sickness (the servant still needed to be feed and housed when sick, while a free laborer would go unpaid) and of escape. See Farley Grubb, *The Auction of Redemptioner Servants, Philadelphia, 1771-1804: An Economic Analysis*, 48 No. 3 J. ECON. HIST. 583 (Sept. 1988).

artisan's wage. Considering the risks the master took, for an indentured servant to give up 30%-45% of his earning potential was perhaps not too steep a price to pay given that he had no other means to pay his own way to the colonies,³¹ and the bargain a master received was about comparable to the risks he undertook in committing to four or more years of food, housing, and training.

The situation is noticeably different (and worse) for our modern indentureds, the young and talented men who perform their craft on the gridiron or the hardwood, but lack the ability to negotiate a free market wage. College athletes are much closer in their economic situation to baseball players in the days of the Reserve Clause prior to free agency. Under the reserve clause system, a player was bound permanently to the team who signed him first.³² When a contract ran out, all Major League teams colluded, agreeing not to make an offer to another team's player. In a very real sense, this put him in a state of permanent indenture -- Curt Flood famously called himself a "well-paid slave"³³ -- and as a result teams could drive very hard salary bargains.

In a seminal work in sports economics,³⁴ Gerald Sculley found that before free agency introduced a relatively free market for players, players earned approximately 20% of their net marginal revenue product,³⁵ i.e., the rate that would prevail in a free market.³⁶ At the time of the first challenges to the reserve clause, the standard line was that without this form of indentured servitude, "Professional baseball...would simply cease to exist,"³⁷ Even George Steinbrenner famously said that "I am dead set against free agency. ... It can ruin baseball."³⁸ Despite these dire predictions, 36 years after the end of the reserve

³¹ The economic literature on indentures has generally concluded that when the risks inherent in a multi-year commitment by a master are taken into account, pricing for indentures was consistent with an efficient market, i.e., there were no super-competitive profits from acquiring an indentured servant relative to a free laborer, despite the pricing difference.

³² According to Paragraph 10A of Major League Baseball's Uniform Player Contract, "If... the Player and the Club have not agreed upon the terms of [a new contract offered by the team following the expiration of the Player's original contract], then on or before 10 days after... March 1 [of the preceding year], the Club shall have the right by written notice to the Player as said address to renew this contract for the period of one year on the same terms." This contract provision, known as the "Reserve Clause", essentially gave the team unilateral rights to renew his contract, and thus fundamentally ownership over the player in perpetuity unless they decided to release or trade him. James B. Dworkin, *Owners versus Players: Baseball and Collective Bargaining*, Boston: Auburn House Publishing Company, 1981, p. 63

³³ For a discussion of Curt Flood's efforts to end the reserve clause see Brad Snyder, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS.

³⁴ Gerald Sculley, *Pay and Performance in Major League Baseball*, AMERICAN ECONOMIC REVIEW, Vol 64., No. 6 (Dec. 1974), 915-930.

³⁵ A "player's marginal revenue product in baseball is the ability or performance that he contributes to the team and the effect of that performance on gate receipts." *Id.* at 916.

³⁶ "If the labor market in organized baseball were perfectly competitive, player salaries would be equated with player marginal revenue products (MRP)." *Id.* However Sculley (p. 929) found that "average players receive salaries equal to about 11 percent of their gross and about 20 percent of their net marginal revenue products."

³⁷ Snyder, *supra*, 108.

³⁸ Ocala Star-Banner, March 22, 1977.

clause, the demise of the multi-billion dollar baseball industry has yet to materialize.

At the schools in college sport's six major conferences,³⁹ the reported value of the athletic scholarship awarded to all football and men's basketball athletes averages between 5-10% of each respective school's football and basketball revenue. For example, in the Atlantic Coast Conference (ACC), which lies in the heart of where the indenture system was most common in colonial America, its schools⁴⁰ provide scholarships that the schools themselves valued (in 2009-10) at an average of \$31,675 a year including the value of room and board.⁴¹ While a scholarship covering approximately 90% of the full cost of attending an ACC school is certainly valuable (much as was passage across the Atlantic and four years of room and board to an eighteenth century stone mason in training), total reported scholarship costs represent only 5.6% of the football and basketball revenues of those ACC schools.⁴²

What might these athletes earn under competition if the current agreement among all NCAA schools not to compete on economic terms were lifted? One analogy is baseball, where collusion held pay to one-fifth the market value of the players. If the same held true for college athletes, that 5.6% figure would rise to approximately 28% of revenue. In the ACC that would mean a package of benefits worth, on average, \$158,000, of which the currently provided scholarship would comprise 20%.⁴³ Put differently, that could mean the market rate for those one hundred athletes is about \$125,000 per year higher than the current indentured value.⁴⁴

³⁹ These six conferences, the ACC, the Big East, the Big Ten, the Big Twelve, the SEC, and the Pac-12 are also sometimes referred to as the BCS AQ conference, because under the current conference bowl rules (set to expire after 2013) these six conferences' champions receive an automatic bid to one of the five BCS ("Bowl Championship Series") bowl games.

⁴⁰ This average is taken from the NCAA Accounting Submissions for 2010 for Clemson, Georgia Tech, Maryland, North Carolina State, Virginia, and Virginia Tech, received via freedom of information act requests. Efforts to receive the equivalent documents from the other schools in the ACC were rebuffed.

⁴¹ When working with NCAA accounting numbers, it is important to recognize that the amount a school charges its own athletic department is not an accurate reflection of the actual costs incurred. As one example, schools typically charge their athletic departments twice as much for books than they costs to acquire, with the profit showing up, not on the athletic department's book, but on the bookstore's ledger. Nevertheless, while these figures likely represent an overestimate, they can serve as an upper bound of the true cost to a school of providing an athletic scholarship.

⁴² Total football and basketball revenues specifically assigned by the six ACC schools in the study total \$202.9 million, which comprises 88% of all sport-specific revenue. This analysis adds in 88% of non-sport specific revenue for an allocated Football and Basketball revenue total of \$321.8 million. Scholarship costs provided by these schools comprise 5.6% of the allocated total. Without the allocation, the percentage would be 8.9%.

⁴³ This figure is comparable to other recent estimates of the value of an ACC player. For example, Ramogi Huma and Ellen Staurowsky estimate that the average ACC football and basketball athlete is worth \$158,466. Ramogi Huma & Ellen Staurowsky, *Study: College Athletes Worth 6 Figures, Live Below Federal Poverty Line*, NATIONAL COLLEGE PLAYERS ASSOCIATION, Sep. 13, 2011. Similarly, Jeff Philips and Tyler Williams estimate the average football player across all 120 teams in FBS to be worth \$137,000 more than they currently receive in scholarships, with the ACC at something close to that average. Jeff Philips & Tyler Williams *What Should College Football Players Be Paid? 137K*, ESPN THE MAGAZINE ESPN, Jun. 25, 2012, at 103.

⁴⁴ One critical difference between college athletes and reserve era baseball players is Title IX. Though Title IX is often mischaracterized as making it illegal or impossible to pay male players, it is more fair to say that Title IX

Pac-12 figures are similar, with an average reported (public school) scholarship value of \$32,732 in 2010-11 equal to 7.3% of the average Pac-12 revenues school's football and basketball revenues.⁴⁵ Thus, using the analogy to the reserve era in baseball, the estimated gap between the market rate for athletes and their current indentureship would be approximately \$130,000 per athlete.⁴⁶ Moreover, as conference realignment has allowed the major conferences to renegotiate lucrative television deals, the disparity between the revenue-per-athlete and the school's cost for that student-athlete will increase even further. The Pac-12's new \$3 billion dollar, 12 year deal with Fox and ESPN will grow each school's average broadcast revenue by nearly \$16 million.⁴⁷ All else equal, this will increase the gap between the collusive terms the athletes are currently offered and the estimated market rate by approximately \$50,000⁴⁸ per scholarship athlete in football and basketball.⁴⁹ But as it stands, the athletes can expect more or less zero of that added revenue to reach them.

Although the lack of reliable data makes it difficult to determine the relative economic impact an indentured servant had on his master's business, doing so for modern day college athletes in revenue producing sports is less complicated. In the absence of direct economic competition for athletes, schools compete for the best recruiters, i.e. coaches, as an indirect way of attracting talent.⁵⁰ In 2009-10, the University of Texas valued the total grants-in-aid to football players at \$3.1 million, less than half of the \$6.5 million in total compensation earned by Texas's

might dampen the economic benefits that flow to male football and basketball players in a competitive market. How much depends on a host of factors but under the set of assumptions that maximize the impact of Title IX, the law could potentially cut the competitive male rate in half-- \$62,500 rather than \$125,000 per player per year. A 50% impact likely overstates things – no school in the ACC, public or private, gives women an equal amount of financial aid as men, and on average 42 cents of each financial aid dollar goes to women. Also note that the portion funneled off to women would not necessarily be paid out directly to players – the average ACC women's scholarship only covers 63% of a full scholarship, so the first \$8 million of these Title IX diverted revenues could go to better fund existing women's scholarships and the next \$35 million could fund scholarships for existing walk-ons rather than to cash payments to women. For a more detailed discussion see Andy Schwarz, *Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes*, 1 SANTA CLARA SPORTS L. SYMP. PROC. 46 (2011).

⁴⁵ Note that while these figures come from the 2010-11 season, which was the final year of the older Pac-10, both the scholarship numbers and the revenues include Colorado and Utah, which tends to increase the value of the scholarship relative to revenues, because these schools revenues are lower than most of the core Pac-10 schools, but scholarship costs are more comparable because of the NCAA agreement to limit compensation.

⁴⁶ Again, Title IX could result is as much as half of this, or \$65,000, being diverted to increased women's financial aid.

⁴⁷ The annual television revenues are estimated to increase from a reported \$59.5 million to \$250 million, which equates to a \$15.8 million increase for each of the conference's twelve member schools.

⁴⁸ This calculation assumes that on the margin, Pac-12 athletes would get 5x6.3% of the \$15.8 million revenue increase, or \$50,345 for each of the 100 scholarship athletes at each of the twelve schools.

⁴⁹ Of which, again, half might flow to the male athletes and half to women's financial aid.

⁵⁰ "In significant part, coaches are paid for the value produced by others, most notably the athletes they recruit. That is, the marginal revenue product of the star players accrues largely to the head coach, rather than to the players themselves. The value produced from recruiting—whose success relies on many factors, such as assistant coaches, the school's conference, its reputation and facilities—is attributed to the head coach." Andrew Zimbalist, *CEOs with Headsets*, HARVARD BUS. REV. 22-23 (Sep. 2010).

head coach Mack Brown. An even greater disparity can be seen in the school's men's basketball program, with head coach Rick Barnes earning \$3.9 million, 762% more than the entire value (approximately \$460,000) placed on the scholarships of the athletes he coached.⁵¹ Of course, those numbers do not include the millions in salary paid to assistant coaches or the million dollar salary of Texas athletic director Deloss Dodds.⁵² This phenomenon is not limited to Texas; from 1986-2007, college head football coaches' pay increased approximately 500 percent while head men's basketball coaches pay grew at 400 percent.⁵³

How does college coaches' compensation (relative to their teams' "payroll") compare to that of coaches for professional sports franchises? During the same season that Brown and Barnes earned far more than their entire team, New England Patriots head coach Bill Belichick's received approximately 7% (\$7.5 million) of his team's estimated \$115 million payroll. Similarly, the Boston Celtics paid head coach Doc Rivers a comparable 7% (\$5.5 million) of his team's estimated \$83 million payroll that year. The ability of NFL and NBA players to bargain via their unions ensures that the players in those leagues earn a fair share of the revenues they help to produce, and as a result NFL and NBA coaches earn their own competitive salary, but not the value that would otherwise flow to their players without a free market for their labor.

John Rose knew that Charleston was perfectly positioned to become a major player. The beautiful South Carolina weather coupled with an exciting city, almost unlimited resources and easy centralized access in the South would allow him to build a powerhouse. Rose knew that recruiting top talent would be the foundation for success, yet a once fertile talent pool had begun to dry up. His only solution was a major investment to build something so great that it would serve as a recruiting tool the likes of which rivals had never seen.

One could mistake John Rose for any major college athletics director today. Rose was not an AD, but rather a South Carolina businessman hoping to become a successful commodities trader. Using what money he had, he invested into the construction of the 180-ton merchant ship "*Heart of Oak*," which would become one of the greatest commercial trading vessels built in North America since its colonization. The *Heart of Oak* was assembled at great cost and eventually valued at some £16,000,⁵⁴ a fortune in the 18th century and worth more than a million

⁵¹ Schwarz, *supra* note 44, at 46.

⁵² *Athletics Director Salary Database for 2011*, USA.TODAY.COM (Oct. 6, 2011), available at <http://usatoday.com/sports/college/story/2011-athletics-director-salaries-database/50669958/1>.

⁵³ As a point of comparison, tenured professor pay grew 30% in the same time period. Michael Sanserino, *College Coaches Salaries Continue to Soar*, PITTSBURG POST-GAZETTE (Mar. 29, 2012), available at <http://www.post-gazette.com/stories/sports/pitt-big-east/college-coaches-salaries-continue-to-soar-281942/?p=0>.

⁵⁴ See Lynn Harris, *Shipyards and European Shipbuilders in South Carolina (Late 1600s to 1800)*, OCCASIONAL MARITIME RESEARCH PAPERS, http://artsandsciences.sc.edu/sciaa/mrd/documents/sc_shipbuilding.pdf.

dollars in today's money.⁵⁵ Knowing that continued profits from shipbuilding would require skilled labor at cheap costs, he traveled to England with his greatest recruiting tool, the *Heart of Oak* herself, to sell shipwrights on coming to work for him in Charleston as indentured servants.

He failed.

By the late 18th century, the market for indentured servants had almost dried up south of the Chesapeake, due in large part to the proliferation of a far more sinister concept, slavery.⁵⁶ With cheap unskilled labor available cheaply via slavery and opportunities in Europe for skilled laborers growing more lucrative, most Europeans no longer were willing to offer sufficient years of servitude necessary to compete with slaves and cover the increasing costs of cross-Atlantic travel.⁵⁷ Unlike college athletes, for whom choosing forgo a scholarship to stay at home is often a guarantee of poverty (and for whom going to Europe is a rare exception⁵⁸), 18th century European laborers had the real choice to stay home and continue to earn a living. Not even John Rose and the *Heart of Oak* could convince the shipwrights, carpenters, silk workers, and other skilled workers to come to America when faced with indentured terms set in competition with the price of acquiring, housing and feeding a slave.

As social commentators have grappled with proper analogies for the current collusive market for college athletes, they often reach for metaphors of slavery. Civil rights historian Taylor Branch famously wrote that the NCAA has “an unmistakable whiff of the plantation.”⁵⁹ But while it is easy to see inequity in the level of control that a school exerts over its athletes and the unequal division of the value of their labor, the comparison to slavery breaks down because of the obvious and stark difference between athletes who choose to attend college (however onerous the terms) versus slaves brought involuntarily to this continent and coerced through violence and oppression into unwilling labor.

Acknowledging that college athletes are not enslaved by the NCAA is a far cry from concluding they are exercising free choice in an open market. Instead what

⁵⁵ See *Historic Inflation Calculator: How the Value of Money has Changed Since 1900*, THISISMONEY, <http://www.thisismoney.co.uk/money/bills/article-1633409/Historic-inflation-calculator-value-money-changed-1900.html>.

⁵⁶ The first incidence of one person enslaving another in the colonies that became the United States has been attributed to Anthony Johnson, who himself was a freed indentured servant. See *From Indentured Servitude to Racial Slavery*, PBS, <http://www.pbs.org/wgbh/aia/part1/1narr3.html>.

⁵⁷ See Farley Grubb, *Redemptioner Immigration to Pennsylvania: Evidence on Contract Choice and Profitability*, 46 J. ECON. HISTORY 200 (1986).

⁵⁸ Over the period 2007-2011, out of all 3-, 4-, and 5-star college basketball prospects (as ranked by rivals.com), only three athletes have elected to forgo the opportunity to play college basketball to play professionally in Europe: Jeremy Tyler, Yvan Nigarabakunzi, and Brandon Jennings. Until such an option becomes available for the bulk of college athletes, Europe will not serve to break the NCAA monopoly on college athletes' opportunities. See RIVAL.COM, <http://www.rivals.com>.

⁵⁹ Taylor Branch, *The Shame of College Sports*, THE ATLANTIC.COM, http://www.theatlantic.com/magazine/archive/1969/12/the-shame-of-college-sports/8643/?single_page=true.

they face is Hobson's Choice – the offer of a monopolist cartel where the only choice is “whether you will have this or none.”⁶⁰ Economic competition is the great protector of the disadvantaged, so powerful that it allowed the most vulnerable colonial laborers to preserve as much as 70% of their value, even under extreme conditions of economic hardship that led them to sell themselves into four years of bondage without control of their own movement.

Though not enslaved, college athletes have been denied access to a true market because of the NCAA's nationwide agreement on maximum compensation to athletes. As the NCAA puts it, because “[i]n economic terms the supply-of-labor function is essentially limitless or unresponsive to price,” college athletes will “will always play sports regardless of compensation.”⁶¹ In other words, because college athletes face few other lucrative opportunities, as long as colleges collude to ensure their offers to athletes are not competitive, there is little risk of the athlete going elsewhere.⁶²

Left unsaid is what would happen if schools did not collude to fix prices, but instead had to compete for talent, much as farmers and merchants had to compete for the contracts of the indentured servants they sought to employ. As shown above, this collusion likely costs college football and basketball athletes tens or hundreds of thousands of dollars per year. And predictions that the sport is too fragile to survive the hurly burly of competition seem as likely to prove true as those who predicted baseball's demise in the wake of free agency or of those who told us the Olympics would never survive without the pure amateur ideal.⁶³ Those predictions proved as true as those who claimed that American civilization itself could not survive without slavery.⁶⁴

Who has benefited from an economic situation that makes indentured servants look relatively well off? That money has flowed to all of the people who provide

⁶⁰ For a discussion of the origins of the term Hobson's Choice and its meaning as “no choice at all, you take what you're given and you like it.” see Dave Wilton, *Hobson's Choice* (July 3, 2006), available at [http://www.wordorigins.org/index.php/site/hobsons choice/](http://www.wordorigins.org/index.php/site/hobsons%20choice/) (citing Samuel Fisher, *The Rustick's Alarm to the Rabbies* (1660)).

⁶¹ Remy, *supra* note 15.

⁶² As discussed above, unlike indentured servants who as the 18th century drew to a close found the option to practice their craft in Europe to be lucrative, to date, less than a handful of U.S. high school seniors have gone directly to Europe to play basketball professionally without first playing college basketball. Milton Kent, *Why Should Basketball Players Have to Go to College?*, NBC NEWS (July 2, 2009), <http://theorio.com/2009/07/02/what-do-moses-malone-kevin/>.

⁶³ The amateur ideal of sportsmanship, fair play and the pursuit of excellence for its own sake is both a noble and a sound one. Whether this ideal depends for its existence on the amateur rules quoted above is quite another question. [Then International Olympic Committee President Avery] Brundage and his supporters believe with religious fervor that it does. “If we water down the rules now,” one of his staunchest backers told me, “the Games will be destroyed within eight years.” Charles W. Thayer, *A Question Of The Soul*, SPORTS ILLUSTRATED (Aug. 15, 1960), available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1134696/2/index.htm>.

⁶⁴ See, e.g., William Harper, *Southern Justification of Slavery*, US HISTORY, <http://www.u-s-history.com/pages/h244.html> (“... the institution of slavery is a principal cause of civilization. Perhaps nothing can be more evident than that it is the sole cause. ... Without it, there can be no accumulation of property, no providence for the future, no tastes for comfort or elegancies, which are the characteristics and essentials of civilization.”).

the indirect tools schools use to compete for talent – to coaches, to administrators, to the construction firms that build the practice facilities and weight rooms used in recruiting – anywhere where there is economic competition for assets that help bring in talent. Ironically, all of these individuals have seen their compensation rise significantly over the last two decades because they have access to the system college athletes are denied, free-market capitalism. Because all other markets in college sports are competitive, those with the talent and work ethic are able to earn their worth, as well as some portion of the players' value, while college athletes face sub-market rate indentures.

As the history of indentured servants has shown, with economic competition there is economic justice, even for those choosing short-term bondage. As the history of sports such as baseball and college athletics has shown, without economic competition, there is not.

Paying Student-Athletes for their Images

Cash Interference: Why the NCAA should be Flagged for Prohibiting Student-Athletes from Capitalizing on Their Image Rights

By: Tim English¹

I. Introduction

The National Collegiate Athletic Association's stated mission is, "to maintain intercollegiate athletics as an integral part of the educational program," but also to "retain a *clear line* of demarcation between intercollegiate athletics and professional sports."² One of the essential differences between intercollegiate/amateur sports and professional sports is the ability to retain a monetary benefit based upon one's performance on the field, court, or ice. Often, this philosophy and exercise in line drawing can be characterized by the ultimate goal of the sports organization. In determining its goal, a key question to consider is whether the organization is a for-profit institution or if the ultimate goal of the organization is to educate its athletes, with part of that mission being accomplished by athletics. At the inception of the NCAA, a stark line could be drawn between the educational and the business sides of the association. That *line* is now blurred at best and may no longer exist.

This article will examine the modern day right of publicity as it applies to student-athletes and the evolution of the NCAA as a national governing body and its amateurism policies. Furthermore, once a proper foundation has been established, this article will propose a new system of amateurism that will be mutually beneficial to both the NCAA and its individual student-athletes. Part II will highlight a number of the problems that the current amateur system imposes on student-athletes, fans, and buyers of college-athletics – focusing on the hypocrisy and the inequality of the NCAA regulation as it sits. Part III of this article will examine the history of right of publicity and its application into the collegiate sports world. Specifically, groundwork will be laid detailing how the right of publicity came to be and why student-athletes have been denied a substantial property right. Part IV will analyze the founding and evolution of the NCAA as a non-profit entity, with the focus of the discussion being on the defining aspects of "amateurism" and the effects of this standard. Part V tackles broadly the issues student-athletes face that tend to bar or impede their entry into the college realm without reliance on collegiate sports. This section will also establish the dependence student-athletes have on member institutions and the NCAA at large once they begin playing for a Division I team. In part VI and VII, this Article shifts its focus from the past to the future and proposes some possible reforms to the current NCAA amateur requirements. Part VII, specifically, will go in depth into the regulation of the proposed system regarding the approval,

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² NCAA CONST. art. 1, § 1.3.1 (emphasis added).

monetary restrictions, distribution of funds, and guarantees that are to be considered along with the general proposal.

II. Problems Created by the Current Amateur System

With the explosion of popularity in college athletics (particularly Division I football and basketball³) numerous changes have occurred over the years in the way that games are perceived⁴ and marketed;⁵ not likely comprehended by the founders of the NCAA. “For 2010-11, the most recent year for which audited numbers are available, NCAA revenue was \$845.9 million, most of which came from the rights agreement with Turner/CBS Sports.”⁶ With the advent of the nationally televised game, school-owned sports cable networks,⁷ video games devoted to recreating games played by student-athletes,⁸ and millions of dollars exchanging hands in contractual obligations for the rights to these media avenues,⁹ there is no question that collegiate sports have become big business.

When looking at the current landscape of college sports, it is hard to believe that there was a time when college sports were not shown on television, that tailgating before watching a college football game only occurred at your college’s (or your rival college’s) stadium and the only way to see the Final Four was to actually travel to the city where it was held. Remarking on what a free-market approach to television rights would do to college sports and the NCAA, Justice White, in his dissenting opinion in the *NCAA v. Regents of Oklahoma* insisted that, “restraints upon . . . colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, educational achievement.”¹⁰ Justice White (a former All-American halfback with the University Colorado, Boulder and former NFL star¹¹) contended that a free-market economy for the competition of television and other media rights would corrupt college athletics, turning its focus from educating young adults to something akin to the focus of a large corporation – competing against other institutions for revenues stemming from player talent, television exposure, and sponsorship agreements.

³ See Darren Rovell, *Behind The Numbers: College Football Business Grows Exponentially*, CNBC (Mar. 30, 2011 9:00 AM),

http://www.cnb.com/id/42340628/Behind_The_Numbers_College_Football_Business_Grows_Exponentially.

⁴ See Joe Nocera, *Here’s How to Pay Up Now*, N.Y. TIMES, Jan. 1, 2012 at MM30.

⁵ *Id.*

⁶ See *Finances: Revenue*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Revenue> (last visited April 5, 2012, 1:52PM).

⁷ See *Long Horn Network*, ESPN.COM, <http://espn.go.com/longhornnetwork/> (last visited Mar. 16, 2012, 2:43PM).

⁸ *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

⁹ See *Turner, CBS to Air All of NCAA Tourney*, NCAA.COM (Feb. 23, 2011),

<http://www.ncaa.com/news/basketball-men/2011-02-10/turner-cbs-air-all-ncaa-tourney>.

¹⁰ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 135 (1984) (White, J. dissenting) (quoting *Bd. of Regents of Univ. of Okla. v. Nat’l Collegiate Athletic Ass’n*, 707 F.2d 1147, 1167 (10th Cir. 1983)).

¹¹ See Alfred Wright, *A Modest All-American Who Sits on the Highest Bench*, SI.COM (Dec. 10, 1962),

<http://sportsillustrated.cnn.com/vault/article/magazine/MAG1135166/index.htm>.

Justice White, most likely, could not have possibly contemplated that corporate endorsements would become commonplace in the collegiate sport landscape when writing his 1984 dissent. This, however, is exactly where the NCAA now focuses its revenue-seeking exploits. It is impossible for a Division I athletic department to compete at the highest level without accepting endorsement dollars from major corporation.¹² This has irked fans over the years, as most feel that college athletics are about the love of the game and not the love of increased revenue streams.¹³ However, the NCAA has been steadfast with its comments on sponsorships.

“Some fans believe institutional relationships with corporate entities somehow tarnish the amateur status of those who play the games. However, the NCAA maintains that “amateur” describes intercollegiate athletics participants, not the enterprise.”¹⁴

In recent years, the NCAA and its member organizations have expanded its search for institutional revenue outside the realms of television contracts,¹⁵ corporate sponsorships,¹⁶ and alumni contributions. With the eruption of media outposts, markedly in the fields of electronic entertainment (video games, fantasy sports, social media platforms, etc.), the ability to control the media rights of its student-athletes, whether in virtual or physical form, has become ever more important to the NCAA as a profit-bearing venture. Last year alone, along with television rights, the marketing rights of NCAA athletes’ images brought in 81% of the NCAA total revenue.¹⁷ Of course the college athletes must be receiving some financial gain from this hefty sum. After all, if any other person in any other personal endeavor were to say, make a public appearance, do a television or radio interview, or have their likeness captured in any medium, it would be presumed that that person would be compensated in some way.

College athletes receive nothing for the use of their image or likeness when used for any commercial purpose. In fact, bylaw 12.5.2.1 of the NCAA Handbook states that, “[a]fter becoming a student-athlete, an individual shall (violate NCAA rules) if . . . [he or she] [a]ccepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind.”¹⁸ This bylaw, in effect, prohibits student-athletes from reaping any financial gain for the use of their name or likeness while at a member institution. Furthermore, bylaw 12.1.2 generally

¹² See NCAA, THE COCA-COLA COMPANY.COM, http://www.thecoca-colacompany.com/heritage/sponsorships_ncaa.html (last visited Jan. 21, 2012, 11:19AM); see also Michael Smith, *NCAA Adding Kraft, Capitol One*, SPORTS BUSINESS JOURNAL, Mar. 8, 2010, available at <http://www.sportsbusinessdaily.com/Journal/Issues/2010/03/20100308/This-Weeks-News/NCAA-Adding-Kraft-Capital-One.aspx>.

¹³ *Issues: Commercialism*, NCAA.ORG,

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Commercialism/> (last visited Jan. 23, 2012).

¹⁴ *Id.*

¹⁵ *Turner, CBS to Air All of NCAA Tourney*, *supra* note 8.

¹⁶ *Issues: Commercialism*, *supra* note 12.

¹⁷ *Finances: Revenue*, *supra* note 5.

¹⁸ NCAA DIVISION I RULES MANUAL § 12.5.2.1 (2011-12).

forbids financial gain by the student-athletes for their accomplishments while at their university by prohibiting the “[u]se (of) his or her athletics skill (directly or indirectly) for pay in any form in [his or her] sport [or] [a]ccept[ing] a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation.”¹⁹

If athletes are prohibited from marketing their image rights, how is it possible that the NCAA can use the name and likeness of a player in conjunction with a commercial product? How is it that EA Sports’ football video game “NCAA Football 13” can include images of 2012 Heisman winner Robert Griffin III and other athletes like him?²⁰ To be frank, they can’t, at least according to their own bylaws. “NCAA regulations state that . . . the NCAA, a conference or an institution cannot grant the use of a student-athlete’s name or likeness to endorse a product.”²¹ And “[i]f an institution, without the student-athlete’s knowledge or consent, uses or permits the use of the student-athlete’s name or picture in any manner contrary to bylaw 12.5.2.1, the (use) shall be considered a . . . violation.”²²

According to NCAA rules and guidelines, the NCAA is in violation of its own rules! However, from a legal and/or business perspective, the NCAA has obtained the licensing rights of all of its student-athletes’ images by requiring them to sign a form known as 11-3a.²³ Most closely resembling a release agreement, 11-3a forces the athlete to, “authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use [their] name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”²⁴ Essentially, student-athletes are required to sign away their imaging and media rights to the NCAA before they ever step foot into a locker room, much less a field of play. This allows the NCAA to have exclusive monopoly power over its student-athletes’ media rights while those rights are worthless and can freely capitalize on the stand-out athletes after **the athlete** has obtained national acclaim.

At this point in our history, college athletics, like all other disciplines taught at universities, provide potential job training for the next level in a young athlete’s

¹⁹ NCAA DIVISION I RULES MANUAL § 12.1.2.

²⁰ See Image of Robert Griffin III on the cover of EA Sports NCAA 2013, available at https://www.encrypted-tbn2.google.com/images?q=tbn:ANd9GcQ8LqIpApbRHBAYtQ4uTdUTn9BKHjA8PXxH-xo_MEse69nMYHD8onp7kc9zIw (last visited Apr. 3, 2012, 2:32PM).

²¹ *Issues: Commercialism – Likeness Issue*, NCAA.ORG, <http://ncaa.org/wps/wcm/connect/public/NCAA/Issues/Commercialism/Likeness+Issue> (last visited June 29, 2012).

²² NCAA DIVISION I MANUAL § 12.5.2.1.2.

²³ See *Form 11-3a, Student-Athletes Statement – NCAA Division I*, NCAA.ORG, http://ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Form%2011-3a.pdf (last visited Mar. 7, 2012, 7:15PM).

An earlier version of this form was known as 08-3a. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. C 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010).

²⁴ *Id.*

life. It is true, most athletes will go on to, “major in something other than sports”²⁵ but just because most student-athletes will not become professionals in their sport, it does not require that we deny college athletes the benefits that athletics could bring them today. Just like all other career paths, some athletes participate in collegiate sports because it is the only forum for professional training. We do not diminish an engineer’s earning potential while in school just because he might become an entrepreneur after he leaves his university and we certainly do not expect accountants to crunch numbers in college classes solely for the love of balancing a book.

College athletes work just as hard, dedicate as much time, and often, more blood, sweat, and tears, than any other student on their campus. They fight tooth and nail just to have an opportunity to compete at the highest level of their sport. Their personal achievements are no less deserved and their accomplishments are no less meaningful simply because they were achieved in the context of sports. If this is true, then there is no rational reason to prohibit college athletes from reaping benefits that they could be accruing now because of their personal fame and glory.

Contrary to the opinions of some sports professionals, this paper does not advocate student-athletes being allowed to “sell out”, becoming millionaires tomorrow if they so choose. Nor does this paper advocate that a revamped NCAA system should substantially affect the student-athlete relationship with the NCAA – blurring the line between student and professional. However, there is no reason why the NCAA must strip these young adults of legal rights that are enjoyed by all other students not playing a college sport. It seems only logical that these students derive some benefit from the use of their image and persona by the NCAA. By lessening the restraints on amateurism in the NCAA, giving student-athletes the choice to market their persona (with certain restrictions), the NCAA will foster better relationships with their student-athletes. A more open but monitored amateur policy will create a greater sense of fair play and just compensation warranted by student-athletes and fans alike by providing the necessary financial means for typical college expenditures, rewarding student-athletes justly for their accomplishments on and off the field, and will lessen the number of scandals caused by Amateurism Regulations.

III. History of the Right of Publicity

The right of publicity originated as an offshoot of the right of privacy.²⁶ Privacy law, concerned with the protection of the private person, has been the subject of numerous scholarly articles. The most famous of these articles are Louis Brandeis’s 1890 Harvard Law review article and Dean William Prosser’s treatise

²⁵ The now famous quote from a student-athletes commencement address to the rest of her student body which the NCAA had been using for its “student first” student-athlete marketing campaign which seeks to de-emphasize the athlete in student-athlete. See DJ Gallo, *An Athlete’s Commencement Address*, ESPN PAGE 2 (May 17, 2011), http://sports.espn.go.com/espn/page2/story?page=gallo/110517_NCAA_commement.

²⁶ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

on torts. Upon these sources, the right of publicity was born and the right of the modern day student-athlete was created.

Brandeis, along with Samuel D. Warren, writing for the *Harvard Law Review*, penned the article, “The Right to Privacy: (The right to be let alone)” in 1890.²⁷ Brandeis and his partner argued that the same protections that are extended to, “thoughts, sentiments, and emotions . . . (are) merely an instance of the enforcement of the more general right of the individual to be let alone.”²⁸ The difference, however, between speech and non-speech, Brandeis argues, is its ability to be converted into property.²⁹ This is in contrast to Dean Prosser’s writings, which identify two of the four torts against privacy which have implicit personal property concerns. According to Prosser, property interests touch the second, “appropriation of the other’s name or likeness”, and to some extent, the fourth, “publicity that unreasonably places the other in a false light before the public”, privacy torts because of the potential for a pecuniary loss of the violated party and the unjust enrichment of another.³⁰

Haelan Laboratories, a tortious interference of contracts case, considered whether a proprietary interest existed in one’s name or likeness when examining the rights to the images of a number of major league baseball players.³¹ Topps Chewing Gum, the defendant, was accused of soliciting the image rights for a number of famous baseball players who were already under contract with Haelan Lab for the purported “exclusive use” of their image.³² Topps argued that the right of one’s image was a personal right that was not assignable; therefore, the ballplayers could only grant a license to use their image to Haelan and could not confer upon Haelan the exclusive right to their likeness.³³ The court, however, disagreed.

Citing the New York right of privacy statute, the majority stated that, “a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross,’ i.e., without an accompanying transfer of a business³⁴ or of anything else.”³⁵ In finding that an individual has a property interest in the dissemination of his name or likeness, the Court in *Haelan* was the first to

²⁷Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²⁸*Id.* at 205.

²⁹*Id.* at 213.

³⁰RESTATEMENT (SECOND) OF TORTS § 652A&C (1977).

³¹*See generally Haelan Labs*, 202 F.2d 866.

³²*Id.*

³³*Id.* at 868.

³⁴ Prior to this decision, the only way to assign the rights of one’s image was through the incorporated trademark of an organization or business. Celebrities were able to “attach” their likeness (and therefore, their commercial value as a celebrity) to an entity of their choosing for the purpose of exploitation and preservation of their persona. By combining the rights of the individual with a corporation, an individual was able to “capture” their likeness in a fixed medium and could transfer the rights to their image with a grant or sale of the corporation, which was near impossible without such a mechanism. *See Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 819 (1979).

³⁵ *Haelan Labs*, 202 F.2d at 868.

establish what is now known as the *Right of Publicity*, wholly separate from the right of privacy.³⁶

Unfortunately, for the athletes and celebrities alike, the debate still rages on concerning whether there is a protectable property right known as the right of publicity within the right of privacy. This is because, as of today, only 19 states have recognized a state or common law right of publicity.³⁷ What is clear, however, is that where the right of publicity has been recognized, a special cause of action has been carved out to adjudicate the misappropriation of a celebrity's or athlete's name or likeness.

IV. History of the NCAA and Amateurism

The NCAA, a non-profit organization, was founded in 1906 and formed with the intention to, "protect young people (playing college sports) from the dangerous and exploitive athletics practices of the time."³⁸ Originally founded to regulate student-run football programs from around the country, the NCAA grew into the national regulatory commission for every varsity sport at almost every major college³⁹ across the United States.⁴⁰

During this era, football was plagued by, "mass formations and gang tackling, result[ing] in numerous injuries and deaths" causing the nation to call for the reformation or abolition of college football.⁴¹ Led by then President Theodore Roosevelt, a commission was formed to set the parameters for safe and equitable rules that would govern the individual college sports and college athletics as a whole.⁴²

Today, you will find the NCAA core message posted throughout its website and promotional materials. The NCAA vehemently contends that it is their core purpose to, "govern competition in a fair, safe, equitable and sportsmanlike manner . . . while . . . integrat[ing] intercollegiate athletics into higher education so that the educational experience of the student-athlete is (prioritized)."⁴³ In

³⁶ *Id.*

³⁷ *See Statutes*, RIGHTOFPUBLICITY.COM, <http://www.rightofpublicity.com/statutes> (last visited Apr. 6, 2012, 4:13PM).

³⁸ *About the NCAA: History*, NCAA.ORG, <http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history> (last visited June 29, 2012).

³⁹ *See Id.*

⁴⁰ There are other smaller organizations that perform a similar regulatory function for smaller pockets of schools with collegiate athletics. The most powerful of these smaller organizations is the NAIA: National Association of Intercollegiate Athletics. *See About the NAIA*, NAIA.ORG, http://www.naia.org/ViewArticle.dbml?DB_OEM_ID=27900&ATCLID=205323019 (last visited Dec. 3, 2011, 3:24PM).

⁴¹ *About the NCAA: History*, *supra* note 37.

⁴² *Id.*

⁴³ *Eye on the Money*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Eye+on+the+Money> (last visited July 2, 2012).

attempts to further their core purpose, the NCAA compiles a yearly rule manual, containing approximately 450 pages, which forms the basis for all regulations the student-athlete, school, boosters, and all other interested parties must abide.⁴⁴ One of the more hotly debated sections of this rulebook, section twelve, along with parts of section two, defines what the NCAA holds to be one of the most sacred aspects of the student-athletes – the requirements and regulations concerning amateurism and amateur status.⁴⁵

A. *What is Amateurism?*

Section 2.9 of the NCAA Rule Manual defines generally the requirements of amateurism, which are then thrust upon all student-athletes as they enter college:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an *avocation* (this phrase becomes important later), and student-athletes should be protected from exploitation by professional and commercial enterprises.⁴⁶

Like most NCAA regulations, there are a number of murky statements made by this provision. How do you define primary motivation and where should that line be drawn? How does one quantify what exploitation of a student looks like? Should it be left up to the students and require the NCAA to step in only when a student has been exploited? Does this comport with the NCAA core principle, meaning, does requiring all student-athletes to be amateurs in their sport further fair, safe, equitable, and sportsmanlike competition?

The NCAA's amateurism requirement, though illogical to the current time, derived from a justifiable root. It would be unfair to allow bigger, stronger, faster, and especially, more experienced, "professional" athletes to enter the college arena and compete against eighteen and nineteen year olds fresh out of high school.⁴⁷ Their mission to further the safety and equitable nature of the game is furthered by preventing the older and more experienced players from entering college to crush younger and smaller teams.⁴⁸ However, it is likely that student-athletes could be amateurs in the important sense of the word (where it promotes fair and equitable on field competition) yet could act in certain "professional" ways that would still permit the NCAA's core principle to be furthered.

⁴⁴ NCAA DIVISION I RULES MANUAL (2011-12).

⁴⁵ NCAA DIVISION I RULES MANUAL §§ 2.9, 12.1-12.5.

⁴⁶ NCAA DIVISION I MANUAL § 2.9 (emphasis added).

⁴⁷ See Greg Bianchi, *Age Requirements in Professional Sports*, THE SPORTS JOURNAL (2006), available at <http://www.thesportjournal.org/article/age-requirement-professional-sport>.

⁴⁸ *Id.*

As the regulations currently sit, when taken as a whole, a student-athlete at an NCAA member institution is prohibited from acting in any manner that even appears to have a professional connotation.⁴⁹ Whether in a civil suit or a criminal proceeding, rarely will a conclusion be reached in law without some degree of certainty of the underlying facts. However, for the NCAA, the discovery of one piece of evidence has tremendous effect on the eligibility of the student-athlete. For example, the retention of a professional sports representative⁵⁰, who is hired to help the student-athlete determine what avenues are best for them in the sports realm (like many Americans hire a tax professional to ensure an accurate return) has nothing to do with, “fair, safe, equitable, and sportsmanlike competition.”

One thing is painstakingly clear. On balance, amateur regulations in today’s age benefit the NCAA and its member institutions much more than they protect the student-athletes. By denying student-athletes outside resources, the NCAA capitalizes on student-athlete becoming dependent on the NCAA and its member institutions while in school.

B. *Benefits Retained & Restrictions Imposed by the NCAA*

Through the use of amateur regulations and form 11-3a,⁵¹ the NCAA and its member institutions retain a monopoly on the imaging rights of their student-athletes while providing no additional compensation to the student-athletes for these rights. The NCAA requires the student-athletes to assign to the NCAA their media rights which act as a barrier to entry into college sports,⁵² creating a stream of free income for the NCAA at the expense of the student-athlete. The NCAA does this under the guise of amateurism and the protection of student-athletes. However, when the NCAA turns around and sells these rights to entities like Turner/CBS Sports,⁵³ ABC,⁵⁴ EA Sports,⁵⁵ and the American populous as a whole, no interests of amateurism or athlete protection are furthered.

⁴⁹ See NCAA DIVISION I RULES MANUAL §§ 2.9, 12.1-12.5.

⁵⁰ See NCAA DIVISION I RULES MANUAL § 12.3.

⁵¹ *Form 11-3a*, *supra* note 22.

⁵² The NCAA does not compete with any other entity in the relevant market for the display of amateur collegiate sports to the American public. “It inexorably follows that if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA’s complete control over those broadcasts provides a solid basis for the District Court’s conclusion that the NCAA possesses market power with respect to those broadcasts. When a product is controlled by one interest, without substitutes available in the market, there is monopoly power.” *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 112, 104 (1984). Therefore, the NCAA regulatory actions have a substantial effect on the American public, and, specifically, the student-athletes who they are televising.

⁵³ See Richard Sandomir, *NBC still likes its Notre Dame Strategy*, N.Y. TIMES, Dec., 11, 2009, <http://www.nytimes.com/2009/12/11/sports/ncaafotball/11sandomir.html>; see also *Finances: Revenue*, *supra* note 5.

⁵⁴ See *‘ESPN on ABC’ to Debut During College Football Season*, ESPN.COM (Aug. 10, 2006), <http://sports.espn.go.com/espn/news/story?id=2545817>.

⁵⁵ See *Keller v. Elec. Arts, Inc.*, Co. C 09-1967 CW, 2010 WL 530108, at 1 (N.D. Cal. Feb. 8, 2010).

The courts have addressed the questionable business practices employed by the “non-profit” NCAA in a number of key cases over the last 40 years. We have already discussed Justice White’s correct prediction of corruption as an effect of free-market TV contracting by the NCAA in *Regents of Oklahoma v. NCAA*.⁵⁶ However, the NCAA’s attempts to restrain those involved with college sports reached beyond regulation of any institution as a whole. In *Law v. NCAA*, a number of college assistant coaches asserted that the NCAA was eviscerating the Sherman Act by restricting the amount of money a college coach could be paid in a particular year to \$12,000 plus a possible \$4,000 in summer months.⁵⁷ The Court of Appeals upheld the lower court’s decision that capping the salary of any individual coach (or coaches in general) was an unjustified restraint of trade under the Sherman Act.⁵⁸ It could be argued that this same rationale could be applied to the cap currently placed on the dollar figure of scholarships that schools may offer their student-athletes.

Furthermore, a look into the NCAA’s revenue streams and compensation for its top executives tend to show an even more cynical side to the NCAA. According to an article written by Libby Sander for *The Chronicle*, an online publication concerning the affairs of higher education, the salaries for the top fourteen NCAA executives in 2009 totaled almost six million dollars, with the former president of the NCAA, Miles Brand, taking home a paycheck of just over one-million dollars.⁵⁹

The NCAA’s website confirms these figures⁶⁰ (though their website breaks the distribution of their revenue down in a less provocative way). The NCAA publicizes that 19% of their \$850 million dollars in revenue goes back to the NCAA office for expenditures and salaries of their employees and 60% of their revenue goes directly to Division I member organizations.⁶¹ Again, how much of this money goes directly to the individuals who generate these lofty profits? Exactly zero dollars and zero cents. The fact that the NCAA claims to be a non-profit organization with its core principle being the, “fair, safe, and equitable” treatment of their student-athletes when it is the sole beneficiary of a revenue derived directly from the student-athletes success on the field of play is nothing short of absurdity.

⁵⁶ *Bd. Of Regents*, 468 U.S. 85 at 112.

⁵⁷ *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1015 (10th Cir. 1998).

⁵⁸ *Id.* at 1022.

⁵⁹ Libby Sander, *Pay for Top 14 NCAA Executives Totaled Nearly \$6-Million Last Year*, THE CHRONICLE (September 9, 2010), <http://www.chronicle.com/article/Pay-for-Top-14-NCAA-Executives/124358/>.

⁶⁰ *See Answers: Where Does the Money Go*, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider_one (lasted visited June 30, 2012).

⁶¹ *Id.*

C. *Burdens and Restrictions Imposed on Student-Athletes:*

While the NCAA and its member institutions appear to be the winners of amateurism regulations, the student-athletes, individually, are the undeniable losers. Yes, as a collective, the lack of professional players participating in college athletics benefits the athletes for reasons previously discussed⁶² (competitive balance, safety of play, etc.). This, however, is where amateurism ceases to benefit the student-athlete. By the NCAA restricting all professional ventures student-athletes could have otherwise engaged in during their time at their universities, the NCAA removes a large “chunk-of-change” from collective pockets of the student-athletes.

In recent years, former student-athletes have challenged the use of their image cropping up in video games and advertisements as a result of their fame during their collegiate time.⁶³ These former student-athletes contend that the NCAA inhibited their ability to capitalize on their persona while playing college athletics and that the NCAA continues to stymie their rights, even though they are no longer under the thumb of NCAA regulations.⁶⁴ This collective of former student-athletes argue that because they, “competed pursuant to the NCAA’s rules and regulations,” which required them to sign one or more release forms, their ability to capitalize on their image now is hampered by the NCAA, which has established itself as the sole marketer of student-athlete images in the relevant market.⁶⁵

Not only are student-athletes unable to capitalize on their image during their stay at their university but these regulations and forms have rendered the value of the former student-athletes’ persona at zero.⁶⁶ *O’Bannon* and *Keller*, the leading cases concerning former student-athletes challenging the use of their image by the NCAA, complain that the amateurism rules and mandated releases, “require student-athletes to ‘relinquish all rights in perpetuity to the commercial use of their images, including after they graduate and are no longer subject to NCAA regulations.’”⁶⁷

The problem becomes that, where the NCAA has grown and established relationships with the major buyers of media rights (news outfits, cable providers, video game makers, etc.) and can package the media rights of all student-athletes together, there is no incentive for these same companies to approach the individual athlete and compensate them for the use of their image. With only one supplier of the rights, there is a severe barrier to entry for any former athletes looking to capitalize on their persona. By signing away the ability to market their image to the NCAA in college while not being paid for it while its commercial

⁶² *Age Requirements in Professional Sports*, *supra* note 46.

⁶³ *In re NCAA Student-Athlete Name & Likeness Litig.*, C 09-1967 CW, 2011 WL 1642256 (N.D. Cal. May 2, 2011).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, C 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010).

value was at its highest (presumably during the height of their respective college careers), all student-athletes who “go on to major in something other than sports” have essentially been denied the opportunity to ever make a financial gain off their triumphs in collegiate sports.

V. Financial Barriers to Collegiate Competition

This problem is complicated further by some student-athletes having a parental-like dependence on the NCAA and its member institution while playing college sports. Many student-athletes come from poor, uneducated backgrounds and their only escape to a potentially better life is through athletics.⁶⁸ The NCAA and its member institutions, though charged with protecting student-athletes and knowing their dependence on college sports, have created a system that requires the student-athlete to comply with its regulation or lose their eligibility and any hopes at a better life through sports.⁶⁹ For some student-athletes, the only attribute that placed them into the school of their choice was their athletic prowess.⁷⁰ These student-athletes likely would not risk losing a free education that will hopefully lead to a better life for themselves, and even their family. However, in no way can it be characterized that these student-athletes receive a completely free education.

On its face, it would appear that when a member institution offers a student-athlete a “full-ride” scholarship, that scholarship covers all of the student-athletes’ expenses while in college. Per NCAA Rules, member institutions at the Division I and II level are allowed to offer athletic-based scholarships, known as Grant-In-Aid or GIA scholarships, which cover, “tuition and fees, room, board and required course-related books.”⁷¹ Reflect back on your own college experience. Were these your *only* college expenditures? Did you sit in your dorm room for four years, do nothing but study, and eat only at the school sponsored cafeterias? Of course not! Even if this is what the student-athletes’ life should look like, which would be excruciatingly painful, what’s missing? How does the student pay for school materials (backpack, binders, notebooks, calculators, pens, pencils), new clothes, needed transportation, etc. Even assuming that we budget nothing for a student’s social life (an important aspect of college life) how does a student-athlete coming from an impoverished background even afford the bare essentials to be a successful student, the first part of student-athlete (the part the NCAA claims to be concerned).

Recognizing this problem, the National College Players Association (NCPA) and the Ithaca College Graduate Program in Sport Management conducted a joint study to determine what the average student-athlete on a purported “full-ride”

⁶⁸ Paula Lavigne, *Top Football Talent Shifts to the South*, ESPN OUTSIDE THE LINES (Feb. 1, 2012), http://espn.go.com/espn/otl/story/_/id/7512012/top-college-football-talent-comes-south-shift-more-even-distribution-decades-ago.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *National Letter of Intent*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/nli/nli/document+library/athletic+scholarship> (last visited July 3, 2012).

scholarship would need to borrow in loans to sustain normal levels of livability in college.⁷² Their study revealed that, “in 2009, student-athletes in Division I receiving a so-called ‘full scholarship’ were left with an average shortfall of \$2951/year, or \$14,755 over five years.”⁷³ This means that to have the normal college experience, a “full-ride” student-athlete will have to pay the university (or the loan provider) nearly \$15,000 after their time at school (not to mention the accrued interest).

One may argue that any student faced with this situation should be expected to remedy their financial burden by getting a part-time job. The problem is that the student-athlete is not like any other student. Their schedule is already committed to similar time constraints that a part-time job would impose. The student-athletes’ sport is their part-time job. To expect athletes to balance schoolwork, athletics, and to work to alleviate the financial gap left by these supposed “full-ride” scholarships seems to cut against the core mission of the NCAA of “equity and fair play.”

The capping of GIA scholarships was challenged recently, much like the cap on NCAA coaches’ salaries discussed above. In *White*, the plaintiffs contended that, the NCAA and its members had violated Section 1 of the Sherman Act, “through a horizontal agreement (which) capped the amount of athletic-based financial aid any student-athlete [could] receive” at his or her institution – a number that was far lower than the full cost of attendance at their respective schools.⁷⁴ Furthermore, the plaintiffs in *White* urged that this was a concerted action that affected all past, current, and future student-athletes, which threatened the NCAA for damages in the billions if not trillions of dollars.⁷⁵ Though the case resulted in a settlement and not a final judgment, it appears that the NCAA recognizes that the system currently in place is inequitable. In comparing the relative earnings of the NCAA through the use of the student-athletes images compared with the deficit that student-athletes, even those on full ride, must take on by the end of school, it is apparent that something is out of balance.

VI. Proposed Changes to the Amateurism Rules

Recently, the NCAA approved a proposal to provide an unrestricted “stipend” of \$2,000 to all “head count” (“full-ride” GIA scholarship recipients) athletes on Division I teams.⁷⁶ “The board approved a measure allowing conferences to vote on providing up to \$2,000 in spending money, or what the NCAA calls the full

⁷² See *Study Shows “Full” Scholarships Leaves Athletes with Almost \$15,000 in Expenses*, NCPA (Oct. 26, 2010), http://www.ncpanow.org/releases_advisories?id=0012.

⁷³ *Id.*

⁷⁴ Stipulation and Agreement of Settlement Between Pls. and Def. NCAA at 3, *White v. NCAA*, No. CV06-0999 VBF(MANx) 2008 WL 890625 (C.D. Cal. Jan. 29, 2008).

⁷⁵ *Id.*

⁷⁶ See *NCAA Approves \$2,000 Stipend*, THE SEATTLE TIMES, Oct. 27, 2011, available at http://seattletimes.nwsources.com/html/collegesports/2016627273_ncaa28.html.

cost-of-attendance.”⁷⁷ Though a step in the right direction, this newly minted stipend system does not alleviate all of the current financial problems that current student-athletes face. Though a fine solution for headcount athletes, this program does nothing to address the problems faced by student-athletes not covered under the “head count” rule, which is the majority of the student-athletes at NCAA member institutions. What is needed is some sort of initiative that would touch all student-athletes in the NCAA while still preserving most of the important aspects of amateurism that the NCAA and its member organizations cling to so dearly. Hopefully, this Article has that answer, or, at the least, will spark the neurons of someone who will ultimately find the answer.

First, and foremost, the current 11-3a waiver⁷⁸ must be reformed to reflect a more equitable distribution of the student-athletes imaging rights. One way this could be done would be to grant control of the student-athletes’ imaging rights to the member institution and, in return, the member institution would be required to grant a license back to the student-athlete to use his or her likeness for certain school-sponsored ventures. This would allow student-athletes to retain some financial benefit for his/her successes in their sports while still putting the onus on the NCAA and its member organizations to protect their student-athletes.

Next, the NCAA should be compelled to guarantee, under contract, adequate compensation to all student-athletes for the use of their images by the university after they leave college. As it currently stands, it would be near impossible to force a culture shift in the image licensing market to require the individual buyers of media rights to approach each former student-athlete to negotiate a contract for the use of their image. Therefore, it seems most prudent to allow the NCAA to retain the imaging rights of their former student-athletes for NCAA licensed merchandise (e.g., video games, posters, t-shirts, etc.) so long as they are compelled to compensate the former and future-former student-athletes.

To avoid having the NCAA negotiate the price of use with each individual, the NCAA should be required to adopt a plan much like the one at the center of *Parrish, et. al. v. National Football League Players Inc.*⁷⁹ Here, the NFLPA and Players Inc.,⁸⁰ in return for the acquisition of the retired players imaging rights agreed to pay the retired players a varying flat fee for the use of their image in certain mediums (jerseys, video games, NFL films, etc.)⁸¹ The failing of this plan, unfortunately, was that the NFLPA never paid out on these contracts. However, a

⁷⁷ *Id.*

⁷⁸ *Form 11-3a, supra* note 22.

⁷⁹ *Parrish v. Nat'l Football League Players Inc.*, No. C 07-00943 WHA, 2007 WL 1624601 (N.D. Cal. June 4, 2007).

⁸⁰ “The NFLPA promotes a ‘Retired Players Group Licensing Program’ through which it solicits retired players to grant to the NFLPA a group license, giving it the ;non-exclusive right to market the retired player’s name, number, likeness, voice . . . in the NFLPA Retired Group Licensing Program.’ The NFLPA has solicited Adderley (and other retired NFL members) to provide their name and image rights to the NFLPA pursuant to this form of GLA.” *See* Third Amended Complaint at 5, *Parrish v. Nat'l Football League Player’s Ass’n*, 534 F. Supp. 2d 1081, 2007 WL 5157108 (N.D.Cal. Nov. 27, 2007) (internal citation omitted).

⁸¹ *Id.* at 5-6.

validly created and enforceable contract between the NCAA and its student-athletes, signed with all other documents student-athletes are required to sign upon entry into collegiate sports, would shift the balance between the NCAA and its student-athletes back in favor of fairness and the equitable distribution of revenues made as a result of the student-athletes image.

VII. Regulating the Student-Athlete's Right to Market their Persona⁸²

With regard to the first reform, the biggest obstacle to implementing such a program would seem to be the regulation of student-athletes marketing activities. Ensuring that student-athletes are taking part only in school sponsored ventures and not opening their service up to the highest bidder will be no easy task, but is paramount to the proposals success. Without a means of regulating the conduct of the student-athletes, there is a real fear that the pendulum will swing too far back in the direction of the student-athlete; causing high profile college sports games to be no more than NFL or NBA light. What follows is a proposed scheme for regulating this lofty culture shift.

A. Approval:

From the NCAA's standpoint, the quintessential problem that amateurism addresses is the prevention of moral and financial corruption on the part of the student-athlete.⁸³ Though this is a compelling concern, to borrow language from the Supreme Court, is this the least restrictive means to accomplish this goal? Hardly. Though complete abolition is easy to regulate, it is morally and financially unjust for the student-athlete. However, imposing any kind of broad sweeping rule stating which corporations or types of businesses could be the target of student-athlete sponsorship would immediately invoke an antitrust suit from the individual schools and/or companies. Furthermore, any broad-sweeping

⁸² *The Plan for Regulation*

A. Approval:

- 1) Profits could only be made from school approved ventures
- 2) Only a limited number of activities in a year could be sponsored

B. Monetary Restriction:

- 3) A cap of \$500,000 would be placed on any particular athletes earning power
- 4) All money gained by any athlete in excess of \$5,000 would be disbursed evenly to all other collegiate athlete at that university (being capped at \$5,000 per any athlete)

C. Distribution of Funds:

- 5) Once all athletes have reached their cap, any remaining money will be allotted (by a council of selected student-athletes) to any department on campus, any charity, or any other part of the university that the council chooses (with a qualified restriction that it cannot be donated to the athletic department)

D. Choices and Guarantees:

- 6) All athletes would have the option to opt out of any payment owed to them and their share would be distributed back accordingly
- 7) All schools would have the option to opt out of this program unless a ¾ vote of the student body overturns their decision
- 8) All of this money would be guaranteed to the athletes, regardless of injury or playing time, unless the athlete disqualifies themselves academically, behaviorally, or by transferring to another university.

⁸³ See NCAA DIVISION I RULES MANUAL § 2.9 (2011-12).

rule would be overbroad yet under-inclusive simultaneously. One would assume that what is morally justifiable marketing in California could be considered hedonistic in Georgia. Furthermore, what seems like a perfectly legitimate business venture in UC Berkeley's eyes may actually be reprehensible by Stanford's standards. For these reasons, the institution should be allowed to set their standard to determine what type(s) of sponsorship programs are within the best interest of their student-athletes. This should give the schools the flexibility needed to be able to encompass any type of sponsorship program that the school determines to be within the best interest of their schools' overall message.

However, allowing the member-institutions the regulatory and veto power of which type(s) and how many sponsorships can be allowed in a school year exposes the schools to as much potential corruption as a student-athlete situated in an unregulated sponsorship market. To save the schools from themselves, the number of organizations that can be sponsored by the school's student-athletes should be limited to a relatively low number. Furthermore, it should be a requirement that the schools publish and report to the NCAA, and the public at large, which organizations they have chosen to align themselves with for the given school year. This will impact the schools in two ways that will further an overall positive message. First, this will force the schools to be selective when choosing organizations that their student-athletes can be associated with (with the market-theory balancing out what can be deemed a reputable marketing program). Second, by requiring the display for the public of which organizations are in cooperation with the schools, the school will be incentivized to choose only respectable organizations.

B. Monetary Restriction:

The most important aspect of this proposal is the regulation of the dollar figure that any one student-athlete can realize as the result of a sponsorship agreement. It is likely that the NCAA will not be receptive to **any** plan that provides the student-athlete with the ability to become a millionaire based upon his/her athletic prowess in college.⁸⁴ Though no other profession, as analogized above, is capped in their earning potential, to create a policy and a culture shift in the NCAA, a cap on student-athletes earning potential is the only viable solution.

Though exact figures are hard to estimate, and an economist would be able to determine the market-value of an athlete's persona vs. a rising scale based on the projected inflation of the dollar vs. millions of other factors, this proposal will begin by capping the compensation specified in an endorsement contract that an athlete can receive at \$500,000. Though that appears to be a relatively large figure, it would also be proposed that a student-athlete would only be able to retain a \$5,000 financial benefit during any calendar year (capping the figure at \$2,500 for incoming freshmen who have only completed one semester by the end of the calendar year). These two caps in dollar figures would accomplish two

⁸⁴ See NCAA DIVISION I RULES MANUAL §§ 2.9, 12.1-12.5.

objectives; dis-incentivizing advertising for advertising's sake and would spread the wealth and the benefits of commercially valuable image rights from the major sports programs at a university down through all other programs.

In providing these two caps, the hope would be that the students focus foremost on their studies, then their sports, and lastly on obtaining sponsorship agreements. By diverting all funds earned over \$5,000 to the general fund, and eventually, to the rest of the student-athlete body, in theory, there should be plenty of "allowance money" to go around based upon schools having marquee programs and marquee athletes participating in the sponsorship of approved organizations. Though any student-athlete would be allowed to market their persona in an approved fashion, not all would need to, and, therefore, the hopes would be that the student-athletes' core concern remains in the student part of the title.

Furthermore, as this proposal is based upon equity, the ability for all student-athletes to have the needed funds to cover previously uncovered expenses should not be granted to only a certain part of the student-athlete body (head count athletes) or to the athletes in major sports (Division 1 Football and Basketball). By capping the "return" that a student-athlete can make on the "investment" of their persona at \$5,000 and distributing the rest to a general fund that benefits all student-athletes, it will be a relatively short time until all student-athletes at a university are covered, and, essentially, this program subsidizes the extra costs student-athletes incur without any real effort to generate that capital.

For example, in 2010, UC Berkeley had approximately 800 student-athletes⁸⁵ on their campus. If just one athlete, say Aaron Rogers back in 2003, had received a sponsorship agreement from Intel Corporation (recently found to be one of the world most ethical corporations⁸⁶) to be in an ad campaign and was contracted to receive the maximum payment allowed under this regulation, \$500,000, then he would have contributed \$495,000 to the general fund. This would then cover ninety-nine of his fellow student-athletes, or 1/8th of the approximate student-athlete population. Then, let suppose that DeSean Jackson had played a few years earlier at Cal with Aaron Rogers (that would have been a sight to see) and had also received a sponsorship agreement from Intel for \$250,000. His residual fund would cover an addition forty-nine of his fellow student-athletes. From the action of two student-athletes, 150 student-athletes from the potential student-athlete body of UC Berkeley would receive their \$5,000 payment.

Though an argument could be made that this plan disfavors the student-athlete that could have retained the full amount of their agreement, it is unrealistic to think, based upon current NCAA regulations and official comments on

⁸⁵ See *Chancellor Announces New Plan for Cal Athletes' Future*, UC BERKELEY NEWS CENTER (Sept. 28, 2010), <http://www.newscenter.berkeley.edu/2010/09/28/athletics/>.

⁸⁶ See *WME Honorees: 2012 World's Most Ethical Companies*, ETHISPHERE, <http://www.ethisphere.com/wme/> (last visited Feb. 12, 2012 10:23AM).

amateurism,⁸⁷ that the NCAA would ever allow its student-athletes to make thousands if not millions of dollars while playing college sports. Furthermore, unless the cap on the fund is fully reached (every athlete retaining a \$5,000 benefit) this plan is most advantageous to those who actually put in the time and effort to market their persona for a school sponsored organization, because the excess money is distributed to the student-athlete body evenly (e.g. if the fund is “half full” then students who have not capitalized or could not capitalize on their persona will only receive \$2,500). Finally, as stated above, the NCAA would never consider a plan that allows its student-athletes to make an enormous amount of money during his or her collegiate career. Therefore, allowing a student-athlete to earn some financial gain at the expense of some free riding is still more beneficial than disallowing all student-athletes to market their persona.

C. Distribution of Funds:

A hopefully vibrant and self-sufficient program does, however, pose the question as to what protocols should be followed once all student-athletes have reached their cap. As this entire plan revolves around securing new rights and benefits deserved, but not previously held, by student-athletes, it seems only fair that a student-athlete population that has successfully generated a vibrant general fund which meets the needs of all student-athletes should be given the choice of what to do with these extra funds. Though some restriction should be placed upon this choice, a council of student-athletes, elected by their peers, should be allowed to bequeath these extra funds to other deserving organizations as a charitable donation. Either in one bulk donation, or in separate smaller donations, this council should be allowed to choose between donating their extra funds to any department on campus (excluding the athletic department because the council would essentially be donating money to themselves) any local or national charity or other non-profit organization or back to any other part of the school (like to a dorm or classroom renovation, but, again, not to an athletic facility renovation). In doing so, the student-athletes, from a very young age, will learn the benefits and rewards of philanthropic work.

D. Choices and Guarantees:

Another key facet to shake out of this proposal is whether or not such a plan becomes compulsory. In this context, the only prudent way to affect change, it seems, would be through blanket mandating of a plan such as this or through the free market of potential student-athletes and all potential students who may attend any particular university.

Starting with the student-athlete, it seems ludicrous to force a monetary benefit on someone who is morally horrified by or otherwise opposed to the idea of deriving a cash benefit from a sponsorship endorsement. If such a student-athlete resided on a particular campus, then he or she should be able to refuse this additional

⁸⁷ See NCAA DIVISION I RULES MANUAL.

“allowance” without substantially affecting the rest of the student-athlete population or causing a rift between himself or herself and his or her fellow teammates. Two protocols should be followed when a student-athlete refuses to take this additional stipend to their scholarship money. First, the funds refused should be diverted directly back to the general fund so it can be redistributed to the rest of the student-athlete population. This would prevent the student-athlete population as a whole from suffering monetarily because a colleague of theirs disagrees with the implementation of this program. Second, this refusal should be a personal and private choice. The most prudent way to complete this task would be to include it with the above mentioned forms (releases, along with the new licensing agreement previously discussed) that all student-athletes must sign on a yearly basis. Once all forms have been collected, then funds can be distributed evenly to all student-athletes participating in the program, saving anonymity and guaranteeing the most efficient and equitable division of funds.

Next, the individual schools should be able to choose whether or not this type of program would comport with the overall mission of their school. Private colleges and universities across the United States that are NCAA member institutions may also have very religious or otherwise strict moral guidelines about money and sponsorships.⁸⁸ Like current NCAA regulations on scholarships,⁸⁹ the NCAA, in this area, should regulate the ceiling but not the floor with regards to whether or not a school grants any kind of monetary benefit to their student-athletes. However, if left to the individual schools, this change would not likely come into effect anywhere throughout the collegiate world. Therefore, to balance this interest, a provision should be added to any opt-out clause that, in effect, could overturn the school’s decision not to sponsor this plan by a vote of the entire student population, requiring some type of super majority to overturn the school’s decision.

Finally, some guarantees and some limits must be placed upon the athletes and this general fund that will either protect or jeopardize the payment of their “allowance.” Though the beating of this same drum must be getting tiresome for you the reader, it cannot be over-stressed that this plan is for the benefit of all student-athletes, regardless of talent, sport played, or position on the team. Student-athletes who are either injured or have reduced or even no playing time during the season, should still retain the right to collect on their “allowance”. Conversely, a student-athlete should have their “allowance” stripped if they do not meet the academic or behavioral standards of the member institution or the NCAA. Also, transferring student-athletes should be disqualified from receiving money from the general fund from the school that they are leaving because, as a

⁸⁸ Famously, Ivy League schools have never condoned athletic based scholarships because of their heightened standards for admission. Since all scholarships are distributed at the discretion of the college, there is precedent to conclude that schools should have the choice of whether or not to adopt a plan such as the one this Article proposes, with some limitations on that choice. See Michael Shapiro, *A Call for Ivy League Athletic Scholarships*, COLUMBIA SPECTATOR (Oct. 4, 2010), <http://www.columbiaspectator.com/2010/10/04/sports-column>.

⁸⁹ NCAA DIVISION I RULES MANUAL §§ 15.2, 15.2.1-15.2.6.

community-based program, no one individual should be able to benefit off of the community with the ability to walk away from the community after immediately receiving the benefit. These requirements and regulations would provide another incentive for student-athletes to act accordingly with academic and behavioral guidelines, as well as securing the faith of the entire student-athlete body that only those deserving will benefit from the general fund.

VIII. Conclusion

The above proposal is not all encompassing nor is it perfect. Furthermore, a careful reader, most likely, should be able to find one discernible flaw or another. However, at the very least, this proposal is a jumping off point for the discussion that must happen in the near future. We must address and decide how best to move the needle back to a fairer middle ground between the NCAA and its member institutions retaining millions of dollars from the use of the collective image of the national student-athlete body, which realizes no benefit from this same use.

Ever since Justice White's dissent in *Regents of Oklahoma v. NCAA*, the NCAA and its member institutions have become richer at the expense of their student-athletes without a second thought about realigning the amateurism system. What started as a novel idea in 1906, the NCAA, whose founding mission was based upon protecting their student-athletes interest, has now evolved into an organization that now condones and even profits off of the destruction of a right which causes more damage to any student-athlete than anything did during the dangerous days of 1906 – the student-athlete potential livelihood based upon their successes in collegiate athletics.

At this point in our history, starting with Joe Nocera's Op-Ed column in the New York Times exposé on the functions of the NCAA,⁹⁰ many "experts" and the public at large have realized that a change is imminent to the NCAA Rule Manual in order to reset the balance of power. The above proposal is one idea. Other ideas have been suggested. Who knows when or where the final solution will actually emerge. However, if one thing is certain it is this: as they currently stand, the Amateurism Rules protect the NCAA and the member institutions primarily, and the student-athletes secondarily or, in some cases, not at all.

If the NCAA were to lessen its regulations on amateurism, giving student-athletes the choice of whether or not to market their persona (with certain restrictions), the NCAA would develop a better and more equitable relationship with its student-athletes. A more open but regulated amateur policy will create a greater sense of fair play and just compensation warranted by student-athletes and fans alike by

⁹⁰ See, e.g., Joe Nocera, *Living in Fear of the NCAA*, N.Y. TIMES, Jan. 23, 21012, <http://www.nytimes.com/2012/01/24/opinion/nocera-living-in-fear-of-the-ncaa.html?ref=joenocera>; Joe Nocera, *The College Sports Cartel*, N.Y. TIMES, Dec. 31, 2011, <http://www.nytimes.com/2011/12/31/opinion/nocera-the-college-sports-cartel.html?ref=joenocer>.

providing the necessary financial means for typical college expenditures, rewarding student-athletes justly for their accomplishments on and off the field, and will lessen the number of scandals that break out every year because of amateurism. Attempting to do anything less would be the furtherance of unfairness against student-athletes of the past, present, and future.

America's Dumbest Right of Publicity Cases¹

By: Kevin Greene

I am not a big fan of reality TV, but one show not to be missed is “America’s Dumbest Criminals.” A reality TV-themed title is also perfectly appropriate for that inelegant step-child of intellectual property (“IP”), the right of publicity. Once a humble throw-in claim to trademark infringement lawsuits, the right of publicity has, like reality television, moved from the “back of the bus” to front and center of entertainment industry disputes. Whether its music, film, TV or video games, the right of publicity rears its ugly analytical head, coiled to strike at studios, advertisers, record labels and toy companies.

This essay explores the increasing frequency in which ROP cases cross the line from legitimate claim to dumb and abusive litigation. Right of publicity cases can be dumb for purposes of this essay in two ways. One, ROP cases are dumb when plaintiff’s overreach, using the doctrine as a way to increase celebrity wealth at the expense of any loss revenue. Secondly, ROP cases can be dumb when defendants appropriate images under circumstances that indicate overreaching free-riding.

ROP Abuse in the Larger Context of IP Expansion

The last twenty years have witnessed an ever-expanding array of IP laws, from patents and copyrights to trademarks and trade secrets. At the same time, the ways in which IP can be appropriated have also exploded with the advent of technology and the internet, leading to the rise of an anti-IP “remix” culture. With expansion has come abuse, a topic I have written about in both the trademark and the ROP context. The mentality of rights holders, whether in copyright, patent or trademark is that more protection is better, and all value attaching to IP belongs to the rights holder. We have seen extension of copyright terms, and greater damages, as well as potent weapons like the DMCA to combat on-line copyright infringement. The patent world, once thought of as the bastion of sobriety and propriety, has witnessed abusive patent lawsuits by the likes of companies such as Monsanto, who sues family farmers for patent infringement merely because its patented seeds blow on farms and sprout there.

Abusive trademark litigation-dumb trademark suits have been legion, whether a tractor company suing a film for use of tractors in *George of the Jungle II*, or Bill O’Reilly and Fox suing a book author for use of O’Reilly’s image on a book entitled “Lies and the Lying Liars Who Tell Them.” The hallmark of such litigation is BLAH BLAH BLAH (Greene).

¹ This article was previously published in Volume 2 of *Counseling Clients in the Entertainment Industry* 2012. Kevin Greene, *America’s Dumbest and Most Abusive Right of Publicity Cases*, COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY, vol. 2, 2012 at 497 (2012).

The right of publicity has always been the ugly step-child of IP, or IP's Cinderella, depending on one's perspective. The same studios, networks and record labels that so assiduously pursue IP infringement claims against all comers, and lobby for greater IP protection historically have opposed expansive publicity rights. However, the right of publicity has steadily expanded, protecting celebrities in California with the same ridiculously long term that protects copyrights, protecting dead celebrities, and protecting remote indicia of personality and in contexts that go beyond advertising. As a result, celebrities and celebrity "wanabe's" "have focused on developing and exploiting their rights of publicity across other fields and media [and] ...vigilant protection against the unauthorized invasion of publicity rights is important to the success of this strategy."² Lawyers representing celebrities stress the comedy value of image, urging stars to "seek out and exploit opportunities for monetization [and perhaps more importantly] protect against unauthorized uses that erode their overall celebrity value."³

We thus see the rise of publicity rights as perhaps the fastest-growing area of IP expansion, with troubling implications for both free speech and creative expression. Justice Scalia was fearful that plaintiffs would use the hammer of trademark law under the guise of misappropriation in the artistic realm and create a "mutant species of copyright law" under the guise of trademark. Could it be we already close to there not with trademark, but the right of publicity?

How the cases arise: Clearance failures and Ego Failures—Taster's Choice and Spike TV

Right of publicity cases arises from both clearance failures (defendants) and ego failures (plaintiffs). In the right of publicity context, clearance consists of securing needed rights to image, and avoiding liability for infringing uses. Clearance failures arise when soon-to-be-defendants either do not secure rights that must be secured, or overlook liability for infringement. A classic case of failing to secure needed rights occurred in case like the Taster's Choice taste, where Nestle failed to secure rights to use a model's likeness on coffee jars, resulting in an initial verdict of \$15 million. Plaintiff Christoff was a high school teacher who was paid \$250 for the photo session, but the contract limited the use of his likeness to Canada. Nestle ended up using the photo worldwide to sell Taster's Choice, and Christoff won a \$15 million verdict at trial, later reversed by the California Supreme Court. The lesson however is that failure to secure rights in image can result in significant litigation and damages.

On the other side, failure to seek potential liability where rights have not been secured can also lead to legal liability under the right of publicity. A salient

² See David Leichtman, Yakub Hazzard, David Martinez, and Jordan S. Paul, Transformative Use Comes of Age in Right of Publicity Litigation, *Landslide*, Vol. 4, No. 1, September/October 2011.

³ *Id*

example here would be the case of Spike Lee versus Viacom's "Spike TV."⁴ When Viacom decided the launch the new channel to great fanfare in 2003, it failed to account for the fact that a very famous film director, Spike Lee, might have a problem with a channel using his namesake. Worse yet, the president of Viacom stated in interviews "that Spike Lee was one of his major inspirations for his choosing the name 'Spike TV.'"⁵

Spike Lee sued for publicity rights violations under Section 50 and 51 of the New York Civil Rights law. Despite the fact that there are other "Spike's" including Spike Jonze, the satirist, and Spike, the vampire from Buffy the Vampire slayer, the court granted a preliminary injunction to Lee, forbidding Viacom from "utilizing the name "Spike", in connection with any television network."⁶ The court rejected the notion that the Spike TV case was a result of ego failure on the part of Spike Lee, caustically noting that "what appears, at first blush, to be an exercise in egocentricity, becomes on closer review, an earnest attempt by a prominent personality to limit what he regards as the commercial exploitation of his public persona."⁷

Viacom reportedly was hemorrhaging money due the delay caused by the litigation, alleging it had "wasted \$17 million in promotional expenses as a result of the litigation."⁸ When the court boosted Lee's initial preliminary injunction bond from \$500,000 to \$2 million, the parties quickly settled the case. It is the kind of disaster that makes one wonder: "what were Viacom's lawyers thinking?" Not for the last time!

Dumb Cases: Plaintiff's Side

The Vanna White Case: "Domo Arigato, Mrs. Blonde Roboto"

Celebrities today jealously guard against any appropriation of identity that they can find. Use in advertising will typically trigger ROP liability, and the genesis of this is the Vanna White case. In White, plaintiff objected to the use of a robot in a blond wig next to a Wheel of Fortune type board. The basis of White's suit was trademark infringement under section 43(a) of the Lanham Trademark Act. The claim here would be that consumers would likely be confused by Samsung's ad that White sponsored, endorsed or was affiliated with Samsung when she was not.

The right of publicity of course is not based on consumer confusion, but rather on an economic rationale. Take away compensation from stars for endorsements and other uses of personality, and you take away their incentive to become famous. The utter ridiculous of this rationale is apparent to anyone who ever dreamt of

⁴ The case was Spike Lee v. Viacom, Inc., N.Y. Sup. Ct. Index No. 110080/2003 (June 12, 2003).

⁵ See Julie Hilden, Spike Lee v. Spike TV: Testing the Limits of Trademark and "Right of Publicity Claims", www.writ.news.findlaw.com/hilden/20030609.html.

⁶ Id

⁷ Complaint, at 1.

⁸ See The Trademark Blog, Requests for Comments Re: Spike Lee v. Spike TV, www.schwimmerlegal.com/2003/06/request-for-comments-re-spike-lee-v-spike-tv

being a rock star or a star stud athlete. What, you mean I get millions in fees or salary, adoring fans of the opposite sex, and fame worldwide? OK, but I won't go for it unless I also get endorsement deals and money whenever my name, likeness and what not is used."

From Vanna White's perspective, the case was not dumb, because she did after all prevail, and according the website of her attorney, won a settlement verdict of \$404,000. It also could be said not to be dumb choice by the defendant Samsung to run the ad, which after all did not feature White or even anything that looked like White. We are talking a blonde robot in jewelry here. Of course, Samsung (or its lawyers) must have known that the ad was designed to evoke White. But mere "evocation" had never been an explicit part of publicity law before White.

What makes the case dumb is that provides liability for mere evoking indicia of celebrity persona. Had White been restricted purely to the commercial advertising context, it might have been an easier case to live with. This restriction of course was not to be, and as a result today we have the ludicrous situation where lawyers for Justin Bieber threaten a non-profit organization called "Fight for the Future" for launching a campaign against overreaching IP legislation that says "Free Justin Bieber." Fight for the Future in opposition to the draconian proposed legislation, SOPA invoked Bieber's name to show that under the legislation, "Justin Bieber could have been guilty of committing a felony with his early videos that he put up on You Tube."⁹ Merely invoking Bieber's name in a totally non-commercial context is enough today to trigger an asinine cease-and-desist letter from Bieber's army of lawyers. For this we have the Vanna White case to thank.

50 Cent: Shoot the Rapper (Who Was Shot Nine Times--Maybe) Internet Ad

50 Cent's first commercial album, "Get Rich or Die Trying" was an unqualified smash, the kind of hit that even if you did not want to you were likely to hear blasting from some white suburban college kid's car stereo while stuck in traffic on the 5 Freeway. "Fity" as he is affectionately known to his fans, was smart enough to foresee that success in the music business today is fleeting, and parlayed his rap skills to extremely profitable business ventures in film and advertising. Most famously, Fity inked an endorsement deal with Vitamin Water that netted him according to reports, over \$100 million dollars when Glaceau, which makes Vitamin Water, was sold to Coca-Cola.¹⁰ It is telling and instructive to future music artist that the bulk of 50's wealth is not accruing from his music, but his ad deals. In other words, artists today make more money from their rights of publicity than from record sales.

⁹ See Mike Masnick, Techdirt, "Justin Bieber Sends Cease and Desist to Free Bieber Campaign", www.techdirt.com/blog/?tag=publicity+rights October 28th, 2011.

¹⁰ See Austin Carr, "50 Cent's New Vitamin Water: 3-D Sunglasses", www.fastcompany.com/1710080/50-cent-next-vitamin-water-investment-3d-sunglasses (Dec. 16, 2010)

50 aggressively protects his brand—including his name and likeness from all interlopers, and in this way he is no different from any corporation—or other celebrities quick to file suit on infringement of likeness. Thanks to the Vanna White case, he has a legal leg to stand upon in the “shoot the rapper” ad case.¹¹

A company called Traffix, Inc. decided it might be funny to run an internet ad where a cartoon character African-American “thug”, clad in a white “wife-beater” t-shirt could be shot at. The legend of 50 Cent has it that the rapper was shot nine times in a “gansta” attack in May, 2000 in Queens, New York (although the NYPD police report in the case apparently stated that Fity was shot a mere three times). So the ad here was clearly a pun that referenced the infamous assault on 50.

The complaint filed by the artist had claims for right of publicity violations under sections 50 (no pun intended) and 51 of the New York Civil Rights Act, which provides for both civil and criminal (misdemeanor) penalties for commercial appropriation of name, likeness, portrait, picture, signature or voice of a plaintiff. The fourth cause of action against Traffix was for defamation. The other claims were among the weakest claims in the legal arsenal—intentional infliction of emotional distress, and negligent infliction of emotional distress. If claims were drinks, these would be Shirley Temples.

If the complaint is to be believed, 50 Cent, the notorious tough guy from the ‘hood, caused Fity “severe emotional distress, particularly in light of his well-known persona history as the survivor of a near-fatal shooting.”¹²

Artistic Expression to the Back of the Bus: Parks v. Laface Records

The Vanna White case dealt with commercial advertising, where publicity rights should be at their zenith, although they arguably add nothing over Lanham Act claims that most celebrities also bring in conjunction with publicity claims. Outside of the commercial advertising context, and especially in the artistic context, publicity rights can wreak havoc on artistic expression, a First Amendment value that is at the bedrock of “democratic civil society.” A case demonstrating this potential for havoc was the Rosa Parks case.¹³

In Parks, civil rights icon sued the record label of the rap group “Outkast” for a song they recorded entitled “Rosa Parks.” The catchy tune mentioned Mrs. Parks nowhere but in the title, and the only reference in the lyrics to Parks is the chorus “Everybody move to the back of the bus.” Clearly, Outkast was using Mrs. Parks as a metaphor indicating their rap competition should all move to the “back of the bus” in comparison to Outkast. But Mrs. Parks was not amused (some say it was not she, but her publicists or other representatives who were offended). The song

¹¹ Curtis James Jackson, III v. Traffix, Inc., N.Y. Sup. Ct Index No. _____, July 20th, 2007.

¹² Id

¹³ Parks v. LaFace Records

does use the “N” word, as every rap song must, and perhaps that is what offended the Parks people.

In any event, Parks filed suit in 1999, alleging trademark infringement and right of publicity violations. Her suit was dismissed on summary judgment, and Outkast themselves were removed from the case. She re-filed the suit in 2004, bringing in BMG, Arista Records and LaFace Records, and seeking a whopping \$5 billion in damages.¹⁴ Reports indicated that Parks suffered from dementia since 2002, and a number of her relatives questioned the actions of her representatives in going forward with this lawsuit.¹⁵

As much I revere Rosa Parks for her pivotal role in the civil rights movement, the Parks case is both dumb and abusive. If the real point were to protect her legacy, there had to be a better way than to institute a right of publicity law suit, which at its heart should always be about commercial appropriation of likeness. Use of someone’s name in a song will rarely, if ever, constitute a commercial use akin to advertising. In the wake of Rosa Parks, artist will be less likely to take risks in choosing titles, and the lawyers will become even more cautious, counseling against uses that artists have every right to undertake under the banner of artistic freedom.

We also have to put up with a straight face other silly cases involving titles, such as Lindsay Lohan’s absurd claim that a song by the rapper Pit Bull that references her name is a violation of publicity rights.

Dumbest Cases: Defendants

Not all dumb cases are filed by plaintiffs. Defendants in right of publicity cases too leave commentators scratching their heads.

The Woody Allen Case and American Apparel’s Folly

As an entertainment lawyer in the 90’s in New York, I learned that some cases in the field are so famous; we simply refer to them by name, such as the “Biz Markie case”, or “the human cannball case”. One such case was the “Woody Allen” case, which established that under New York law, right of publicity liability could accrue not just from using a celebrities’ likeness, but also employing a “look-alike” to the celebrity.

American Apparel apparently did not get the memo, deciding to plaster Allen’s face on a billboard that appeared in Manhattan. Predictably, Allen sued, and after realizing it had no defense, American Apparel settled. Even critics of publicity

¹⁴ See USA Today, March 4, 2005, “Rosa Parks, Rap Duo OutKast Settle Lawsuit”.

¹⁵ See Nolan Strong and David Lopez, “ Family of Rosa Parks Issues Statement Supporting OutKast, Lawyer Responds to Allegations”, www.allhiphop.com/2004/10/29/family-of-rosa-parks-issues-statement-supporting-outkast, October 29th, 2004.

rights recognize that a pure case of commercial appropriation in advertising should be actionable. In the case of someone like Woody Allen, the case all the stronger because he does not license his image, and therefore unlike some plaintiffs, is not merely looking for a handout via a legal hijacking, or protecting “turf” despite no real harm being done. Here I am thinking of Jennifer Lopez’s absurd suit against Silvercross, manufacturer of baby carriages. J.L o and then spouse Mark Anthony did a promotional photo shoot with their twin infants and the Silvercross carriage as props.

Silvercross later used the photos on its website to promote the carriages, which seems reasonable, since the Lopez/Anthony’s had raved about how nice the carriages were. Lopez/Anthony filed suit, demanding \$30 million, in clear case of legal extortion, using the right of publicity as a hammer.

In this sense, Woody Allen is the anti-J.Lo, and his settlement with American Apparel for \$5 million is clearly less than he likely would have been awarded at trial. American Apparel either needs new or better clearance lawyers to avoid fiascoes such as this.

The Price of Poverty in Big Time College Sport

By: Ramogi Huma and Ellen Staurowsky,

The authors would like to thank the following people for their important contributions to this report:

Rob Henry, Purdue football
Jeff Locke, UCLA football
Denzel McCoy, Georgia Tech football
Lily Mladenova, Grad Student, Ithica College
Anthony Mosely, Kentucky football
Richardo Young, Virginia Tech football

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Executive Summary

Since the mid-1950s, the NCAA has promoted a mythology that college athletes on “full” scholarship receive a “free ride” in terms of their college educations. As has repeatedly come to light, athletes in the revenue-producing sports of football and men’s college basketball are less likely to receive their diplomas than any other group of athletes while also bearing the burden of financing a college sport enterprise that had resulted in highly lucrative compensation packages for high profile coaches, athletics administrators, conference commissioners, and football bowl executives.

During the summer of 2011, there has been lively debate and discussion regarding the question of whether college athletes should be paid or compensated more fairly for the work they do resulting in the generation of billions of dollars in revenue for stakeholders in the college sport corporate complex. For anyone following the economics and business practices of the industry during the past six decades, this moment has been coming for a long time. The suppression of wages of an unnamed labor force artfully referred to as “student-athletes,” a term the NCAA admittedly created to deflect attention away from the fact that awarding a scholarship for athletic prowess constituted a pay for play system, has been in operation since the adoption of the four year athletic scholarship award in the 1950s.¹ This report is particularly timely because of the string of recent controversies that have raised serious questions about the moral underpinnings of the college sport enterprise and its practices.²

In an attempt to explore the implications of this mythology and provide perspective about the impact this has on the lives of big-time college football and men’s basketball players, this study documents the shortfall that exists between what a “full” scholarship covers and what the full cost of attending college is compared to the federal poverty guideline, an estimation of players’ fair market value, and offers perspective on the disproportional levels of compensation to which college sport officials have access compared to the limits imposed on revenue-generating athletes who serve as the talent and inspire the financial investment in the product of college sport.

This study, a collaborative effort between the National College Players Association and Drexel University Sports Management Program, reveals that

¹ See WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES (1997). See also ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA’S AMATEUR MYTH (1998); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006); Ellen J. Staurowsky & Allen L. Sack, *Reconsidering the Use of the Term Student-Athlete in Academic Research*, 19 JOURNAL OF SPORTS MANAGEMENT 103 (Apr. 2005).

² See Tom Farrey & Justine Gubar, *Terrell Pryor Signings Netted Thousands*, ESPN.COM (June 8, 2011, 10:49 AM), <http://sports.espn.go.com/ncf/news/story?id=6637444>. See also Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO SPORTS (Aug. 16, 2011), http://sports.yahoo.com/investigations/news?slug=cr-renegade_miami_booster_details_illicit_benefits_081611.

National Collegiate Athletic Association (NCAA) rules force players to pay for thousands in educational-related expenses while working in a culture that underestimates their contributions to a multi-billion dollar industry.³ The range of out-of-pocket expenses for a “full” scholarship student-athlete in the Football Bowl Subdivision (FBS) is \$952/year to \$6,127/year depending on the college. Further, the study estimates the fair market value of big time football and men’s basketball players to be in the hundreds of thousands of dollars annually while the NCAA restricts the value of the full scholarship to a level of compensation that is at or below the poverty level for the vast majority of athletes. This report offers an examination of the paradox of “amateur” revenue-producing college athletes who are paid to play, the power of propaganda associated with the NCAA’s self-serving concept of amateurism, the predicament of athletic scholarships being viewed as ample compensation, the scandals related to the big earnings for athletics officials and poverty wages for revenue-producing athletes, college presidents’ inability to initiate reform, and the call for federal intervention.

Major Findings

1. College athletes on full scholarship do not receive a “free ride.” For the 2009-2010 academic year, the average annual scholarship shortfall (out of pocket expenses) for Football Bowl Series (FBS) “full” scholarship athletes was \$3,222.
2. The compensation FBS athletes who are on “full scholarship” receive for living expenses (room and board, other expenses) situates the vast majority at or below the poverty level.
3. The percentage of FBS schools whose “full” athletic scholarships leave their players in poverty is 85% for those athletes who live on campus; 86% for athletes who live off campus.
4. The average FBS “full” scholarship athlete earns less than the federal poverty line by \$1874 on campus and \$1794 off campus.
5. If allowed to access the fair market like the pros, the average FBS football and basketball player would be worth approximately \$121,048 and \$265,027 respectively (not counting individual commercial endorsement deals).
6. Football players with the top 10 highest estimated fair market values are worth between \$345k-\$514k in 2009-10. The top spot was held by University of Texas football players. While 100% of these players received scholarships that left them living below the federal poverty line and with an average scholarship shortfall of \$2841 in 2010-11, their coaches were paid an average of over \$3.5 million each in 2010 excluding bonuses.⁴

³ Ramogi Huma & Ellen J. Staurowsky, (2011). The Price of Poverty in Big-Time College Sport: An NCPA/Drexel University Collaborative Study

⁴ See Table 1 below.

7. Basketball players with the top 10 highest estimated fair market values are worth between \$620k-\$1 million in 2009-10. The top spot was held by Duke basketball players. While 80% of these players received scholarships that left them living below the federal poverty and with an average scholarship shortfall of \$3098 in 2010-11, their coaches were paid an average of over \$2.5 million in 2010 excluding bonuses.⁵

8. The poorest football and basketball players generated combined FB and BB revenues of \$30 million or more in 2009-10, yet live in the poorest bottom 1.3 of all the players in the study live between \$3,000-\$5,000 below the poverty line.⁶

9. Despite record revenues, salaries and capital expenditures and prohibitions on countless sources of income for athletes, the NCAA explicitly allows tax payers to fund food stamps and welfare benefits for college athletes.

10. FBS schools could provide more equitable financial terms for their revenue-producing athletes without eliminating any non-revenue generating sports or reducing scholarships forms athletes from non-revenue generating sports. The second attachment⁷ points to lavish spending in by FBS schools in non-revenue sports. We've compared non-revenue sports expenditures between FBS schools and Football Championship Subdivision (FCS) schools because all of their non-revenue sports compete against each other in Division I. We focused on this to find out what it costs to run a competitive Division I non-revenue generating team which is demonstrated by the FCS numbers. The FBS non-revenue team expenses show that these schools spend far more than what's necessary to field these teams. BCS schools spend an average of about \$350m000 more on each non-revenue team when compared to FCS schools. FBS schools average 18 non-revenue generating teams per campus, which means they spend an average of about \$6.3 million/year more than FCS schools on non-revenue generating sports.

Recommendations

Congress should act immediately to deregulate the NCAA with the provisions detailed below:

#1. Support legislation that will allow universities to fully fund their athletes' educational opportunities with scholarships that fully cover the full cost of attendance. The average \$3222 increase per player would be enough to free many from poverty and reduce their vulnerability to breaking NCAA rules to make ends meet. This can be funded with the new TV revenue streams that are surging throughout NCAA sports.

⁵ See Table 2 below.

⁶ See Table 3 below for further details.

⁷ 2 tables with data

A \$3222 scholarship increase would cost approximately \$32.8 million for 85 scholarship players from each of the 120 FBS football teams, and \$14.2 million to do the same for 13 scholarship players on each of the 338 Division I basketball teams that offer scholarships. The total would be about \$47 million annually. Should Title IX compliance require that provisions be made for female athletes to receive a similar benefit, that amount can be doubled for a total of \$94 million annually.

To put this in perspective relative to the new revenues that are available throughout NCAA sports, the new PAC-12 TV contract alone will bring in \$150 million in new revenues each year. The year-old NCAA TV contract with CBS will average about \$270 million in new revenues above and beyond its previous TV deal with CBS. These new revenues could fund coverage of the scholarship shortfall gap.

#2. Lift restrictions on all college athletes' commercial opportunities by adopting the Olympic amateur model. The Olympics' international definition of amateurism permits amateur athlete access to the commercial free market. They are free to secure endorsement deals, get paid for signing autographs, etc. The NCAA's version of amateurism is impractical and is an unjust financial arrangement imposed on college athletes. The NCAA's attempt to eliminate the commercial free market creates a black market in which universities, coaches, agents, financial advisors, runners, and players will continuously violate the rules. Alternatively, if the Olympics model were allowed, virtually all of the high profile violations over the last year would not have been deemed violations. Selling a championship ring and even accepting a free television would not have been "scandalous," much less an NCAA violation.

#3. Promote the adoption of legislation that will allow revenue-producing athletes to receive a portion of new revenues that can be placed in an educational lockbox, a trust fund to be accessed to assist in or upon the completion of their college degree. Many athletes in these sports need educational assistance beyond the duration of their eligibility in order to make up for the significant time demands associated with their sport. About 45% and 52% of football and basketball players DO NOT graduate, while their athletic programs receive 100% of revenues produced by these athletes regardless of their programs' graduation rates.

#4. Colleges should be free to provide multiple year scholarships in all sports if they so choose. The NCAA's one-year cap on the duration of a scholarship undermines its purported educational mission, and puts in jeopardy the educational opportunities for every college athlete. High school recruits deserve to know which colleges are willing to prioritize their education so that they can make an informed decision.

#5. To the extent that Title IX requires universities to provide female athletes with accommodations similar to those stated in the reforms mentioned above, athletic programs should use new TV revenues to do so.

#6. Although this study focuses primarily on financial aspects of reform, Congress should examine all aspects of college sports in order to implement comprehensive reform that college presidents admittedly are unable to bring forth.

Introduction & Background

A study conducted by the National College Players Association and the Drexel University Sport Management Program reveals that National Collegiate Athletic Association (NCAA) rules force players to pay for thousands in educational-related expenses while working in a culture that unfairly underestimates their contributions to a multi-billion dollar industry. This report is particularly timely because of the string of recent controversies that have raised serious questions about the moral underpinnings of the college sport enterprises and its practices.⁸ The range of out-of-pocket expenses for a “full” scholarship student-athlete in the Football Subdivision (FBS) is \$952/year to \$6,127/year depending on the college. Further, the study estimates the fair market value of big time football and basketball players to be in the hundreds of thousands of dollars annually while the NCAA restricts the value of the full scholarship to a level of compensation that is at or below the poverty level for the vast majority of athletes. To follow is an examination of the paradox of “amateur” revenue-producing college athletes who are paid to play, the power of propaganda associated with the NCAA’s self-serving concept of amateurism, the predicament of athletic scholarships being viewed as ample compensation, and the scandals related to the big earnings for athletics officials and poverty wages for revenue-producing athletes.

The Spin Move: The “Student-Athlete” and “Amateurism”

The colleges are already paying their athletes. The colleges, acting through the NCAA in the name of “amateurism,” installed their own pay system called the athletics grant-in-aid or athletics scholarship...we crafted the term ‘student-athlete’...We told college publicists to speak of “college teams,” not football or basketball “clubs,” a word common to the pros.

- Former NCAA President Walter Byers recounts how the NCAA implemented its own pay-for-play system while selling it as amateurism⁹

Summer time and the living is not so easy in big-time college sport circles at the moment as the heat rises on questions of whether college athletes should be paid or compensated more fairly for the work they do resulting in the generation of billions of dollars in revenue for stakeholders in the college sport corporate complex. For anyone following the economics and business practices of the

⁸ See Farrey & Gubar, *supra* note 2. See also Robinson, *supra* note 2.

⁹ Byers & Hammer, *supra* note 1.

industry during the past six decades, this moment has been coming for a long time. The suppression of wages of an unnamed labor force artfully referred to as “student-athletes,” a term the NCAA admittedly created to deflect attention away from the fact that awarding a scholarship for athletic prowess constituted a pay for play system, has been in operation since the adoption of the four year athletic scholarship award in the 1950s.¹⁰

In that same year, the NCAA reorganized into a federated structure leading to the creation of Divisions I, II, and III and the crafting of separate philosophy statements of each division. To understand this is important because it provides insight into the strategic decisions made by college sport administrators and higher education officials in growing the commercial college sport enterprise, built almost exclusively as it is on the ability of football and basketball (primarily men’s basketball) to generate income. This is not accidental but intentional as evidences in the expectation, as stated in the Division I philosophy statement and absent in the other two, that schools in that division “Sponsor(s) at the highest feasible level of intercollegiate competition one or both of the traditional spectator oriented, income-producing sports of football and basketball.”¹¹

The “Student-Athlete”

Over the years, the NCAA has done much to undermine its own idea of the student-athlete, including when it changed the four-year athletic scholarship award to a one-year renewable scholarship in 1973.¹² The average sports fan, and even scholarship athletes themselves often fail to realize that the one-year scholarship is subject to renewal at the discretion of coaches, an arrangement that effectively renders athletes silent or substantially voiceless when it comes to their own welfare by exerting pressure on them to remain compliant if they wish to achieve their goals of either remaining in college or developing their athletic talent in pursuit of professional careers.

Contrary to the assertion by the NCAA that “student-athletes” are to be “considered an integral part of the student body,” football and basketball players in the nation’s elite programs shoulder a burden that no other students share. They perform in lucrative media spectacles organized and brokered by their institutions through layers of associational relationships (NCAA, conferences) that employ regulations that govern nearly every aspect of their lives. In turn, while scholarship athletes in the so-called “equity” sports of football and men’s basketball are generally required to be academically eligible in order to play at their respective institutions, their financial fate is dictated by their performance on

¹⁰ See *id.* See also McCormick & McCormick, *supra* note 1; Sack & Staurowsky, *supra* note 1; Staurowsky & Sack, *supra* note 1.

¹¹ *NCAA Division I Manual*, at 338 (2010-2011), available at <http://www.ncaapublications.com/productdownloads/D111.pdf>.

¹² See Sack & Staurowsky, *supra* note 1. See also RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* (2011).

the field and their value as athletic commodities. If a revenue-producing athlete does not perform as well as expected athletically or is permanently injured, his coach can choose not to renew the scholarship without consideration for the athlete's academic performance or future.

As a case in point, Durrell Chamorro was a highly sought after kicker from California who received scholarship offers from Arizona State, Oregon State, and the University of Washington. According to Chamorro, he eventually signed a national letter of intent with Colorado State with an understanding that he would retain his scholarship for four or five years if he maintained a minimum grade point average of 2.0 and abided by the rules. After a redshirt season and a season as a backup kicker, despite achieving a 3.5 grade point average, Chamorro was informed by Coach Sonny Lubick that he had lost his scholarship. The year before Chamorro lost his scholarship, Coach Lubick reportedly told him, "You've got to get better. You have one more year."¹³ Meanwhile, Colorado State and all other NCAA institutions are free to renew scholarships of players that are academically ineligible, which highlights the fact that the athletic scholarship hinges primarily on athletic performance rather than academic performance.

Interviews with athletes who competed on NCAA Division I football and men's basketball teams provide further evidence that there is an understanding among athletes that they have to produce on the field in order to remain in college programs.¹⁴ As Calvin, one of the interviewed athletes explained, "...they tell you, you a student first and an athlete next, but really you an athlete first and a student second. There is more emphasis on making your practices and meetings. They hit you with the go to class and all that stuff, but they don't care. As long as they get them four years out of you they could care less if you get a degree or not...I think they have to (care about athletes getting degrees) cuz they job depends somewhat on it, but personally, I don't think they care."¹⁵

It is common knowledge that athletes must attend mandatory athletic obligations such as workouts, practices and games if they are to keep their scholarships. It is also mandatory for many players to *miss* classes because of games and/or athletics-related travel. Meanwhile, a player who chooses to miss a practice or game to attend a class would immediately put his scholarship in jeopardy.

Even an institution known for having found a way to balance academics and athletics, Duke University, offers testament to the struggle that exists for revenue-producing athletes. In a 2008 strategic report for athletics entitled *Unrivaled Ambition*, the pressures associated with athletes competing in highly

¹³ Kelly Whiteside, *Rules Fail to Curb Schools from Oversigning Football Players*, USA TODAY (Feb. 1, 2011, 9:46 AM), http://www.usatoday.com/sports/college/football/2011-01-31-recruiting-schools-oversigning_N.htm.

¹⁴ Krystal K. Beamon, "Used Goods": *Former African-American College Student-Athletes' Perception of Exploitation by Division I Universities*, 77 J. NEGRO EDUC. 352 (2008).

¹⁵ *Id.* at 356.

commercialized sport were identified as threats to the University's ability to maintain a connection to academics. The report notes:

We no longer determine at what time we will play our games, because they are scheduled by TV executives. This is particularly troubling for basketball, which may be required to play weeknight games away from home at 9:00pm. The potential impact on academic work is obvious, as students are required to board a flight at 2:00am, arriving back at their dorms at 4:00 or 5:00 a.m., and then are expected to go to class, study, and otherwise act as if it were a normal school-day. In return for large television contracts, we have surrendered control over a function that can profoundly influence the experience of our students. Similarly, the revenue from advertisers and corporate sponsors has become a very important supplement to long established revenue streams but that means that each year our amateur student-athletes take the field with a corporate logo displayed on their uniform beside "Duke."¹⁶

In addition to the direct link between athletes' talents and commercial revenue, the Duke report connects the dots between the harmful effects that time demands required for athletics have on players' academic work.¹⁷ In June of 2011, Penn State assistant football coach Jay Paterno touched on college athletes' time demands when he wrote a guest column in the *NCAA News*.¹⁸ He was responding to recent proposals that revenue-producing college athletes should receive additional compensation to cover the gap between what a full scholarship covers and the cost of attendance, a gap that averages approximately \$15,000 over the course of an athlete's career.¹⁹ Arguing against these proposals, Paterno pointed out that in his estimation, athletes on full scholarship were required to participate in their sport no more than 604 hours in a given year.²⁰ His calculations were based on the NCAA limits on the amount of time athletes can devote to their sport which are set at 20 hours per week with a guaranteed day off for 21 weeks in-season (420 hours) and no more than 8 hours per week during the 23 weeks out-of-season (184 hours) with an additional eight weeks off.²¹ Paterno attempted to calculate athletes' hourly rate, which we will address later.

Even for a well-intentioned college sport insider like Paterno, the fallacies that serve as the foundation for his position become all too clear upon closer examination. While the NCAA "4 and 20 rule" restricts, in theory, the work day of a college athlete to 4 hours per day and no more than 20 hours per week, athletes themselves report time demands far in excess of what the rule requires.

¹⁶ DUKE UNIVERSITY, UNRIVALED AMBITION: A STRATEGIC PLAN FOR DUKE ATHLETICS 11 (2008), *available at* <http://today.duke.edu/showcase/reports/athleticsstrategyfinal.pdf>.

¹⁷ *Id.*

¹⁸ Jay Paterno, *Pay Student-Athletes? They're Already Getting a Great Deal*, NCAA NEWS (June 2, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/June/Jay+Paterno+Pay+Student-Athletes+Theyre+Already+Getting+a+Great+Deal>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

According to data gathered by the NCAA for the 2009-2010 academic year in the Growth, Opportunities, Aspirations, and Learning of Students in College (GOALS) Study, FBS athletes reported spending 43.3 hours per week on athletic activities in-season; and Division I men's basketball players reported spending 39.2 hours per week on athletic activities in-season.²² The breakdown in the average number of hours these athletes reported being engaged in both athletic and academic activities amounted to 81.3 for those in FBS programs, 79.8 for those in FCS, and 76.5 for those Division I men's basketball programs.²³

When examining the time demands of college athletes, it is important to look at a couple of different factors. First, the fine print to be found in the *NCAA Manual* reveals that demands on player time and attention is not as clear cut as the rules would suggest at first glance. For example, the 4 and 20 rule (Bylaw 17.1.6.1), otherwise known as Daily and Weekly Hour Limitations, states the following, "A student-athlete's participation in countable athletic activities... shall be limited to a maximum of four hours per day and 20 hours per week."²⁴ Further, as indicated in Bylaw 17.1.6.4 Required Day Off-Playing Season, "During the playing season, all countable athletically related activities... shall be prohibited during one calendar day per week..."²⁵

As it turns out, one hour is not always one hour under an exception in Bylaw 17.1.6.3.2, which reads, "All competition and any associated athletically related activities in the day of the competition shall count as three hours regardless of the actual duration of these activities."²⁶ What this means is that while the time demands of game days would routinely violate the rule that an athlete cannot engage in athletically related activities more than four hours a day, this stipulation collapses those excess hours into a manageable number so as to offer the appearance of compliance to the 4 and 20 rule. And in the case of pre-season practices, the daily and weekly hour restrictions are not in effect. For football players in major programs, "They must participate in three arduous full-contact practices every two days."²⁷

Further, the concept of a "day off" is equally hazy. On one hand, according to Bylaw 17.1.6.4, athletes are to be afforded one calendar day off a week when they are in season.²⁸ On the other, due to the definition of a "travel day" (Bylaw 17.1.6.4.1), "A travel day related to athletics participation may be considered a day off, provided no countable athletically related activities... occur during that

²² NCAA Division I Board of Directors, *Legislative Action Requested Regarding NCAA Division I Athletics Certification Program*, NCAA.ORG (April 2011), http://fs.ncaa.org/Docs/DI_MC_BOD/DI_BOD/2011/April/ACP.pdf.

²³ *Id.*

²⁴ *NCAA Division I Manual*, *supra* note 10, at 241.

²⁵ *Id.*

²⁶ *Id.* at 244.

²⁷ McCormick & McCormick, *supra* note 1, at 103.

²⁸ *NCAA Division I Manual*, *supra* note 11, at 245.

day.”²⁹ As a consequence, while an athlete may not be competing on a designated travel day, their time is not their own but subject to the demands of the program.

And while regulations specify that athletes out-of-season are to participate no more than eight hours per week in athletic activities, in point of fact, that requirement does not take into account the “voluntary” workouts athletes engage in. Notably, the NCAA GOALS Study does not venture to ask athletes about their engagement in “voluntary” workouts and how much time they may be spending, a practice that even within the *NCAA Manual* is put in quotation marks³⁰. As evidenced in coaches’ comments following allegations that the University of Michigan had placed pressure on athletes to work out beyond the required eight hour limit in the off-season, the rules may say one thing but the expectation is different. As Nebraska head football coach Bo Pelini commented in the aftermath of the Michigan investigation,

“If you want to play football, if you want to be prepared for a season, the NCAA limits the amount of time the players can be with the coaches, you are limited in some other aspects...If you want to be prepared as a football player, you have to spend some time, you have to be in shape when you get into camp. That’s all voluntary stuff, but at the end of the day, as a player you’d better take it upon yourself to put the time in or you are not going to be prepared for what is a 12-game season. That’s been created by the rules.”³¹

The assertion on the part of the NCAA that the athletic pursuits of revenue-generating football and men’s basketball players on scholarship are “avocational,” meaning that they are done for recreational purposes and free of pressure to participate is as contradictory as the notion that “voluntary” workouts are really “voluntary.” As interviews with big-time college basketball players demonstrate, the players do not believe they have a choice. As one player described it, “It is ‘understood’ that an athlete will practice on his own and lift weights, and that his failure to do so may result in him being ‘replaced.’”³²

One might ask why there are so many loopholes in the 4 and 20 rule and why not calculate “voluntary” workouts when accounting for the time athletes spend on their sport? Given the fact that, through numerous public statements by coaches and athletes in its own study, the NCAA is fully aware that the number of hours athletes are expected to devote to their athletic activities is well above that of the official maximum, why does it continue to limit the number of hours engaged in athletic work per week to 20? An argument can be made that the 4 and 20 rule is in place primarily to give the appearance that athletes are students first, an

²⁹ *Id.*

³⁰ *Id.*

³¹ Terrance Harris, *Nothing Voluntary About Workouts, Says Former College Players*, AOL NEWS.COM (Sept. 4, 2009, 11:30 AM), <http://www.aolnews.com/2009/09/04/are-voluntary-workouts-really-voluntary-in-major-collegefootball/>.

³² McCormick & McCormick, *supra* note 1, at 108.

impression the NCAA desperately needs the public to believe if it is to continue to maximize profits.

The NCAA assertion that “student-athletes” will not be paid because they are students first and athletes second (NCAA Staff, n.d.) does not withstand a basic test of logic. It is well known that athletes with lower presenting academic credentials are given preferential treatment in the admission process.³³ It is also well known that there is an inverse relationship between the degree to which athletes graduate and their sports, with revenue producing male athletes in major programs annually graduating at lower levels than other college athlete groups and the general student body overall.³⁴

The implications of this are summarized by Maggie Severns who wrote, “Giving a kid a football scholarship is only worthwhile if he leaves college with a meaningful degree. Otherwise, the college is exploiting him for commercial profit and leaving him dangerously unprepared for the workforce.”³⁵

“Amateurism”

An athlete is not exploited when he is fairly compensated in a business transaction outside of the institution. To the contrary, one could more persuasively argue that an athlete is exploited when he is expressly disallowed from realizing his value while his reputation and skill are being used to realize a profit for others.

- Jay Bilas (2010), former Duke and pro basketball player, current ESPN and CBS sports analyst

According to the NCAA, its version of amateurism is all that is needed to prevent the commercial exploitation of college athletes. The protectionist rationale for its concept of amateurism that has served as the foundation for the NCAA’s position

³³ See Mike Knobler, *AJC Investigation: Many Athletes Lag Far Behind on SAT Scores*, ATLANTA JOURNAL-CONSTITUTION (Dec. 28, 2008), http://www.ajc.com/sports/content/sports/stories//2008/12/28/acadmain_1228_3DOT.html?cxntlid=homepage_tab_newstab. See also, Doug Lederman, *The Admissions Gap for Big-Time Athletes*, INSIDE HIGHER EDUCATION (Dec. 29, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/12/29/admit>.

³⁴ See Dr. Richard Lapchick, Keith Harrison, & Fitz Hill, *Keeping Score When it Counts: Academic Progress/Graduation Success Rate Study of NCAA Women’s and Men’s Division I Basketball Tournament Teams*, UNIV. OF CENTRAL FLORIDA (Mar. 15, 2011), http://www.tidesport.org/Grad%20Rates/2011_Womens_Bball_Study_FINAL.pdf. See also, Maggie Severns, *Fourth Annual Academic Bowl Series Championship Rankings*, HIGHER ED WATCH (Dec. 14, 2010), http://higherwatch.newamerica.net/blogposts/2010/fourth_annual_academic_bowl_championship_series_rankings-41517; Dr. Richard M. Southall, *Adjusted Graduation Gap: NCAA Division-I Men’s and Women’s Basketball*, COLLEGE SPORT RESEARCH INSTITUTE AT THE UNIVERSITY OF NORTH CAROLINA (Nov. 16, 2010), http://www.unc.edu/depts/exercise/csri/PDF/CSRI_2010%20Adjusted%20Graduation%2520Gap_NCAA_D-I%20Men's%20and%20Women's%20Basketball.pdf; The Bootleg Staff, *The Bootleg’s 2010 Graduation Rate Analysis*, THE BOOTLEG (Mar. 9, 2010), <http://stanford.scout.com/2/952555.html>; Steve Wieberg, *NCAA Football Graduation Rates at All Time High, but Top Schools Falter*, USA TODAY (Oct. 27, 2010, 6:42 PM), http://www.usatoday.com/sports/college/2010-10-27-ncaa-graduation-rates-study_N.htm.

³⁵ Severns, *supra* note 34.

on issues related to revenue-generating player compensation is imbedded in the notion that the NCAA is attempting to, in their words, “maintain a clear line of demarcation between collegiate athletics and professional sports” so as to prevent the undue exploitation of college athletes.³⁶ Note the linguistic nuance, as if simply labeling “collegiate athletics” as being distinctive from “professional sports” would be a sufficient barricade to the commercial interests that now include, in modest estimation, a 14 year, \$10.8 billion contract to broadcast NCAA Division I men’s college basketball annually with CBS and Turner Sports;³⁷ a 15-year \$2.25 billion deal between the Southeast Conference (SEC) and ESPN estimated in value at \$2.25 billion,³⁸ the \$2.8 billion expected to be generated over the next 25 years by the Big Ten Network,³⁹ and the newly inked Pac 12 TV deal that will generate \$3 billion over the next 12 years.⁴⁰ Individual campus deals, such as the Longhorn Network developed between the University of Texas and ESPN, has a projected income profile of \$300 million over the span of the next 20 years.⁴¹

Sport historians, such as Penn State’s Ron Smith in his recent book *Pay for Play*, have argued for years that the line of demarcation between college and professional sport is mythic despite NCAA protestations to the contrary. If not the billions of dollars in commercial revenues that the NCAA and colleges generate off of athletes’ talents, certainly the business partnerships that NCAA Division I athletic programs and the NCAA itself form with organizations such as IMG College, considered to be the leading collegiate multimedia, marketing, and brand management company representing more than 200 collegiate properties, would affirm Smith’s perspective.

As sports properties go, college sport competes extremely well with the pros. Attendance at college sport events far surpasses that of the professional leagues, with an excess of 100 million people attending at least one college sport event in 2008. For the 2010 season, the 120 teams in the Football Bowl Subdivision (FBS) drew 34,663,732 in aggregate home attendance, averaging nearly 46,000 per

³⁶ See *NCAA Division I Manual*, *supra* note 11, at 1.

³⁷ Mark Schlabach, *NCAA: Where Does the Money Go?*, ESPN.COM (July 12, 2011), http://espn.go.com/college-sports/story/_/id/6756472/following-ncaa-money.

³⁸ Michael Smith & John Ourand, *ESPN Pays \$2.25B for SEC Rights*, STREET & SMITH’S SPORTSBUSINESS JOURNAL (Aug. 25, 2008), [http://www.sportsbusinessdaily.com/Journal/Issues/2008/08/20080825/This-Weeks-News/ESPN-Pays-\\$225B-For-SEC-Rights.aspx](http://www.sportsbusinessdaily.com/Journal/Issues/2008/08/20080825/This-Weeks-News/ESPN-Pays-$225B-For-SEC-Rights.aspx).

³⁹ John Ourand & Michael Smith, *Big Ten Could Reap \$2.8B From Network Deal*, STREET & SMITH’S SPORTSBUSINESS JOURNAL (Mar. 3, 2008), [http://www.sportsbusinessdaily.com/Journal/Issues/2008/03/20080303/This-Weeks-News/Big-Ten-Could-Reap-\\$28B-From-Network-Deal.aspx](http://www.sportsbusinessdaily.com/Journal/Issues/2008/03/20080303/This-Weeks-News/Big-Ten-Could-Reap-$28B-From-Network-Deal.aspx).

⁴⁰ David Ubben *Did The Pac-12 Upstage the Big 12’s TV Deal?*, ESPN.COM (May 4, 2011, 6:00 AM), http://espn.go.com/blog/big12/post/_/id/28432/did-the-pac-12-upstage-the-big-12s-tv-deal.

⁴¹ Ralph K.M Haurwitz, , UT, *ESPN Reach 20-year, \$300 Million Deal*, THE STATESMAN (January 19, 2011, 7:38 AM). http://www.statesman.com/blogs/content/shared-gen/blogs/austin/highereducation/entries/2011/01/19/ut_espn_reach_20year_300_milli.html.

home contest.⁴² According to Turner Sports, CBS Sports, and the NCAA, March Madness on Demand in 2011 realized a 47% increase in total visits across multiple platforms for the men's Division I basketball tournament.⁴³

Top college sport events, meaning conference football and basketball championship games, compete favorably with professional leagues for Nielsen ratings. At a national level, college football broadcasts draw an aggregated viewing audience of over 615 million.⁴⁴ And, in 2009, the NCAA men's basketball tournament yielded an audience of nearly 137 million television viewers. According to *Nielsen's Year in Sports 2010 Report*,⁴⁵ the BCS National Championship and the NCAA Men's Basketball Championship ranked among the top four sporting events for viewers with income levels above \$100,000. The other events in the top 10 included Super Bowl XLIV, Kentucky Derby, U.S. Open Men's Final, The Masters, Stanley Cup, NBA Finals, World Series, and World Cup.⁴⁶

In promoting its services to college sport departments, IMG College touts its 50/50 partnership with Legends Hospitality Management, a company owned by the Dallas Cowboys, the New York Yankees, and Goldman Sachs for its capacity to provide premium seat sales, suite and ticket sales, concession operations and merchandising. In turn, athletic departments are now turning to organizations such as the Aspire Group to aggressively sell tickets in ways previously not done for the college game.⁴⁷ This hardly seems to constitute a definitive line between college athletics and professional sports.

With the current economic climate, the NCAA has had a tough time convincing the public to accept that college athletes are simply amateurs. At time, even the NCAA have become confused as to the rationale for its version of amateurism. Below is an excerpt from an interview that took place between former NCAA President Myles Brand and *Sports Illustrated* columnist Michael Rosenberg:

“They can't be paid.”
“Why?”
“Because they're amateurs.”
“What makes them amateurs?”

⁴² Gary K. Johnson, *NCAA Football Attendance Reaches New Heights*, NCAA.ORG (Feb. 4, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/February/NCAA+football+attendance+reaches+new+heights>.

⁴³ Robert Seidman, *2011 NCAA March Madness on Demand Sees 47% Increase in Total Visits Across Multiple Platforms*, TV BY THE NUMBERS (Mar. 21, 2011), <http://tvbythenumbers.zap2it.com/2011/03/21/2011-ncaa-march-madness-on-demand-sees-47-increase-in-total-visits-across-multiple-platforms/86495/>.

⁴⁴ Stephen Master, *NIELSEN'S STATE OF THE MEDIA: YEAR IN SPORTS 2010 1* (2011), available at <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2011-Reports/Nielsen-Year-In-Sports-2010.pdf>

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Steve Berkowitz, *Marketers Reshape How College Teams Sell Tickets*, USA TODAY (Aug. 5, 2011, 6:56 PM), available at http://www.usatoday.com/sports/college/2011-08-05-college-outsourcing-sports-ticket-sales_n.htm.

“Well, they can’t be paid.”
“Why not?”
“Because they’re amateurs”
“Who decided they are amateurs?”
“We did.”
“Why?”
“Because we don’t pay them.”⁴⁸

At the core of every position taken by the NCAA regarding athlete compensation is its principle of amateurism as outlined in the *2010-2011 NCAA Division I Manual*. Despite the central role that amateurism plays as a foundational principle on which the college sport enterprise is built, the manual itself is silent on the question of what an amateur is. Instead, the Principle of Amateurism states the following:

“Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”⁴⁹

If read as a separate statement, the NCAA’s characterization appears to be benevolent, casting athletes in roles as potential victims to a corporate structure that might take advantage of them. As Staurowsky notes, according to this definition,

“Corporate America is where the exploitative practices of professional and commercialism take root. Corporate America is where people are paid a real wage for performing serious work, not where student-athletes receive scholarships for playing inconsequential games. Corporate America is where people with real jobs, vocations as it were, devote their time, not where college athletes with avocational preferences wile away their youth. Corporate America is where professional sport is housed, not where sport that teaches life’s lessons is fostered. Corporate America is where profit motives, not educational motives, have primacy. In summary, Corporate America is no place for amateurs...Or so it seems.”⁵⁰

However, what if the NCAA is itself part of Corporate America rather than the educational association it purports to be, simply protected by the veil of amateurism?⁵¹ If the principle of amateurism is important to the beating heart of

⁴⁸ Michael Rosenberg, *Change is Long Overdue: College Football Players Should be Paid*, SPORTS ILLUSTRATED (Aug. 26, 2010, 9:43 AM), http://sportsillustrated.cnn.com/2010/writers/michael_rosenberg/08/26/pay.college/index.html.

⁴⁹ *NCAA Division I Manual*, *supra* note 11, at 4.

⁵⁰ Ellen J. Staurowsky, *Piercing the Veil of Amateurism: Commercialisation, Corruption, and U. S. College Sport*, in THE COMMERCIALISATION OF SPORT 143, 147 (Trevor Slack ed., Routledge 2004).

⁵¹ See Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting The Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008). See also Staurowsky, *supra* note 47.

the NCAA, then why no definition of amateur? As McCormick and McCormick point out, as the NCAA persists in, and insists on, weaving a cloak of legal fictions designed to perpetuate the myth that the scholarship system is not a pay for play system, the spectre of college presidents being too fearful to question the lie evokes the image of the Emperor parading in his skivvies before the masses while being conned into thinking that he is wearing a new suit of clothes.⁵² The weavers get rich, the masses are not served, and the rulers look both foolish and corrupt.

The fictions themselves are not hard to find. The first full time executive of the director of the NCAA, Walter Byers, wrote in his memoir that the term “student-athlete” was a tool of propaganda, designed to deflect attention away from the pay for play system created by the adoption of the athletic scholarship (otherwise known as “grant-in-aid”) in the 1950s. Given his background in media, this is no small admission from the officer in charge of the Association at the time the term is created. A former sportswriter, Byers understood the power of shaping a message and communicating it to the masses.⁵³ It is also under his watch that the burgeoning field of sports information took hold. Through memoranda, sports information directors were instructed to replace terms such as “players” and “athletes” with the term “student-athlete” until it was effectively embedded in the language and culture of college sport. As Byers admitted, “We told college publicists to speak of ‘college teams,’ not football or basketball ‘clubs,’ a word common to the pros.”⁵⁴

Notably, the NCAA actually never takes an outright position against either professionalism or pay. Rather, in by-law 12.02.3, a “professional athlete” is “one who receives any kind of payment, directly or indirectly, for athletics participation except [emphasis added] as permitted by *the governing legislation of the Association.*”⁵⁵ Similarly, “pay” is defined in bylaw 12.02.2, as “receipt of funds, awards or benefits *not permitted* by the governing legislation of the Association for participating in athletics.”⁵⁶ In effect, the NCAA is not opposed to paying athletes. It is opposed to paying athletes under terms and conditions that it cannot control.⁵⁷

It is this lack of opposition to pay under controlled circumstances that has resulted in the creation of what the NCAA calls “student-athlete welfare” funds, or what might be thought of as the “Student-Athlete Welfare State.”⁵⁸ In the aftermath of the first NCAA billion dollar television deal in the last 1980s, pools of dollars were carved out of the NCAA budget to afford athletes limited benefits.

⁵² Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of College Athletes*, 11 FLA. COASTAL L. REV. 639 (2010).

⁵³ See Staurowsky & Sack, *supra* note 1.

⁵⁴ Byers & Hammer, *supra* note 1, at 69.

⁵⁵ *NCAA Division I Manual*, *supra* note 11, at 65.

⁵⁶ *Id.*

⁵⁷ See Staurowsky, *supra* note 50 at 61.

⁵⁸ *Id.*

According to the *2009-2010 NCAA Membership Report*, financial benefits available to athletes at the Division I level are distributed through the Special Assistance Fund (SAF) and the Student-Athlete Opportunity Fund (SAOF). Eligibility for these funds varies by stated purpose, but these funds further demonstrate the NCAA's willingness to pay its players so long as it controls the details.

The SAF was established to offer financial support to those athletes who are eligible for the Federal Pell Grant or have demonstrated financial need and would not otherwise be able to afford basic necessities such as clothing, classroom supplies, funding to go home for family emergencies or medical care not covered by other programs. The more general SAOF is used at the discretion of conference offices and universities may provide "direct benefits" to athletes. However, many basic necessities such as meals cannot be paid for by this fund. Also colleges, can choose how to use the funds, and there is no mandate that these funds be used to provide direct benefits to athletes. Further, who benefits from the funds remains a mystery.

The NCAA settled a 2006 class action lawsuit led by Jason White and several former revenue-producing Division I football and men's basketball players, which alleged that the NCAA had created an improper cap on athletic scholarships that denied athletes full cost of attendance. As part of the settlement, the NCAA combined its Academic Enhancement Fund and the SAF into the SAOF while offering no public accountability to determine how many current or former athletes may have accessed the funds. While limited efforts are made to inform athletes that these funds exist, there are many revenue-producing athletes on full scholarship who either are unaware that they are eligible for these benefits or simply don't know that they are available. The few athletes who are aware of the fund must go hat in hand to petition for the benefit they had, in theory, already earned. In addition, the university is under no obligation to use the funds in ways that might best serve athletes in need. For instance, some universities use the funds for expenses such as purchasing equipment to expand their computer labs, which arguably helps the athletic program produce more impressive recruiting presentations rather than directly assisting an athlete in need of basic necessities.

This exchange among a group of athletes from a website called letsrun.com demonstrates the frustration among athletes trying to access these funds for purposes of acquiring basic necessities.⁵⁹ One athlete has just been awarded \$500 from the SAF by the laments in his message that the funding is restricted only to clothing purchases at a particular store. He writes that he doesn't need clothing but other items, like shampoo. In an exercise in how to survive the system, other athletes chime in, offering advise on how to work the problem. One poster writes, "buy the clothes, take them back, use the cash to get useful stuff." The athlete with the problem writes back, noting the NCAA compliance officer wants receipts

⁵⁹ *NCAA Special Assistance Fund*, LETSRUN.COM, http://www.letsrun.com/forum/flat_read.php?thread=2258488 (last visited Aug. 12, 2012).

right after the purchase receipts right after the purchase is made.” The poster again offers a suggestion, “That’s not a problem. Buy them, then ask for a gift receipt. Give the normal receipt to the compliance rep. Take the clothes back with the gift receipt. Easy enough.”

This candid online conversation offers insight into how athletes experience the system and the logical twists and turns they employ in order to make it work in some reasonable sense for them. Keep in mind that this athlete does not have money to buy shampoo, an athlete who is surrounded by coaches who receive bonuses for winning games.

Despite shortcomings in some of its pay-for-play operations, the NCAA has clearly allowed and initiated payment mechanisms for its athletes in addition to the grant-in-aid payment. While the NCAA argues that the denial of pay for athletic talent under conditions they are unwilling to sanction is required in order to maintain the amateur ideal central to the existence of college, even within the NCAA, definitions of amateurism vary from one division to the other.⁶⁰

Because definitions of amateurism around the world vary and sometimes conflict with those established by the NCAA, member institutions in the 1990s were having a difficult time certifying the eligibility of athletes coming from countries outside of the United States. What followed was an amateurism deregulation movement within the NCAA. Interestingly, Divisions II and III voted to liberalize amateurism standards, thus allowing international athletes who may have received pay and/or competed professionally in their home countries to redeem their amateur standing. While opening the door for athletes to participate in professional drafts and accept prize money, Division I summarily rejected proposals that would have granted eligibility to athletes who had previously signed professional contracts and accepted compensation for competing as a professional.

Currently, an athlete who was drafted by a professional team, competed professionally, and received pay can become eligible under the amateurism rules in Division II but not in Division I. According to Pierce et al., “Division I rejected legislation that would have permitted former professionals from competing in order to avoid negative public relations and legal consequences that may have resulted in the acceptance of those proposals.”⁶¹ Rather than dealing with the issue outright, Division I officials opted instead for a backdoor approach to international athlete eligibility, relying on the mechanism of athlete reinstatement to confer amateur standing.

⁶⁰ See, David A. Pierce, Anastasios Kaburakis & Lawrence Fielding, *The New Amateurs: The National Collegiate Athletic Association’s Application of Amateurism in a Global Sports Arena*, 11 INT’L J. SPORT MGMT. 304, 304-327 (2009).

⁶¹ *Id.* at 315.

Importantly, former NCAA President Walter Byers offers insights as to why the definition of amateurism varies within the NCAA itself. He states, “Amateurism is not a moral issue; it is an economic camouflage for monopoly practice.”⁶² This admission likely explains why Divisions II & III are much more willing to operate with a less regulated definition of amateurism. There is very little revenue generated in these divisions to be “monopolized” compared to Division I. In contrast, if amateurism is used as a tool to monopolize the ample revenues generated in Division I, then the Division I membership must fight any deregulation of its definition of amateurism.

Purpose of the Study

The overarching purpose of this study is to provide perspective regarding the compensation levels for those most directly involved in the production of revenue-producing college sport spectacle, namely the athletes and the coaches. These specific questions guided our inquiry:

- What is the value of a “full” athletic scholarship compared to the cost of attendance?
- How does the value of a “full” athletic scholarship compare to head coach compensation for football and men’s basketball?
- How does the value of a “full” athletic scholarship compare to established federal poverty guidelines?
- How would the value of revenue-producing college football and men’s basketball players be affected if revenue-sharing formulas used in labor negotiations for NFL and NBA were applied?

Method

A data file for each school designated as an NCAA FBS institution was created in an excel file with categories of expenses for “room and board,” and “other” expenses along with information regarding coach salaries and revenues produced by each team. Four separate analyses were conducted using this information.

Data for this report was drawn from several public sources. The United States Department of Education National Center for Education Statistics (NCES) College Navigator was used to locate information for the 2010-2011 academic year regarding room and board expenses included in a “full” athletic scholarship as well as “other” expenses, which cannot be covered by a full athletic scholarship per NCAA rules. Salary databases compiled by *USA Today* were used to gather information about FBS head football coach and head men’s basketball coaches whose teams competed in the NCAA men’s basketball tournament in 2010. The statistic used in the evaluating revenue-producing college athlete compensation in the form of a “full” scholarship in relationship to federal poverty guidelines was

⁶²Byers & Hammer, *supra* note 1 at 376

drawn from 2011 standards as developed by the U.S. Department of Health and Human Services. The revenue sharing percentages to determine fair market value are based on the minimum percentage of revenue guaranteed to NFL players (46.5%) in recently signed NFL collective bargaining agreement, and publicly available reports of the NBA owners' goal of providing a 50-50 revenue sharing agreement in the next NBA collective bargaining agreement.

Analysis # 1. Scholarship Shortfall Calculation

By NCAA definition, a “full grant-in-aid,” otherwise known as a “full” athletic scholarship “consists of tuition and fees, room and board, and required course-related books.”⁶³ The estimated scholarship shortfall represents the sum of expenses included in the cost of attendance (COA) that cannot be covered by a full grant in aid scholarship per NCAA bylaw 15.02.2, which reads as follows: Cost of Attendance. The “cost of attendance” is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution. (Adopted 1/11/94)⁶⁴

There is a gap between how the full grant in aid is calculated and the overall cost of attendance, as calculated by the institution and reported in the “other” category.

Analysis #2. Team Scholarship Shortfalls Compared to Coach Compensation

Team scholarship shortfalls for football and basketball are calculated by multiplying the scholarship shortfall at each school and multiplying the shortfall by the maximum number of scholarships that the NCAA allows for each team. The NCAA allows no more than 13 and 85 scholarships in men's basketball and football, respectively.

Analysis #3. Scholarship Compensation Compared to U.S. Federal Poverty Guidelines

According to the U.S. Department of Health and Human Services, the guideline for a single individual earning \$10,890 or less is an indicator of living at or below the poverty line. The value of each athletic scholarship's room and board component was compared to the poverty guideline for a single individual. Despite the tuition, fees, and books provisions in a “full” athletic scholarship, these parts of the scholarship are not included since they do not affect a college athlete's ability to pay for basic necessities such as food, shelter, utilities, etc.

⁶³ *NCAA Division I Manual*, *supra* note 21, at 195 (2011-2012).

⁶⁴ *Id.* at 194.

Analysis #4. College Athlete Market Value

At present, there is no formula to determine the fair market value of a revenue-producing college athlete in the sports of football and men’s basketball. In an attempt to experiment with such a model, we theorized that the revenue-sharing models that exist in the National Football League (NFL) and the National Basketball Association (NBA), which have been arrived at through a collective bargaining process and with the aid of player representation, would provide a starting point on an estimation of what the value of revenue-producing college athletes in their programs. In 2011, the NFL reached an agreement with players that they would share at least 46.5% of the revenue generated by the league. The NBA owners, while currently in negotiations with players, have publicly stated their goal of establishing a 50% revenue-sharing standard. Those standards were applied to the revenue reported by colleges’ and universities’ football and basketball revenues to better gauge the value of the college players that participate in these sports.

Findings

1. Average annual scholarship shortfall (out of pocket expenses) for FBS “full” scholarship athletes: \$3222
2. Percentage of FBS schools whose “full” athletic scholarships leave their players in poverty: 85% on campus, 86% off campus
3. Average FBS “full” scholarship athlete earns less than the federal poverty line by \$1874 on campus and \$1794 off campus.
4. If allowed access to the fair market like the pros, the average FBS football and basketball player would be worth approximately \$121,048 and \$265,027 respectively (not counting individual commercial endorsement deals).
5. Football players with the top 10 highest estimated fair market values are worth between \$345k-\$514k in 2009-10. The top spot was held by University of Texas football players. While 100% of these players received scholarships that left them living below the poverty line and with an average scholarship shortfall of \$2841 in 2010-11, their coaches were paid an average of over \$3.5 million each in 2010 excluding bonuses.

Table 1. Rank	School	Fair Market Value Football Player 45% Revenue Split	In Poverty? (On-Campus)	Scholarship Shortfall (On-Campus 2010-2011)	Team Scholarship Shortfall (On-Campus 2010-2011)	FB Coach Annual Pay
1	Texas	\$513,922	-\$778	-\$3,624	-\$308,040	\$5,161,500
2	Alabama	\$393,251	-\$684	-\$2,475	-\$210,375	\$5,997,349
3	Georgia	\$387,528	-\$2,430	-\$1,510	-\$128,350	\$2,937,740
4	Penn State	\$384,082	-\$1,836	-\$3,924	-\$333,540	\$1,109,977
5	LSU	\$376,485	-\$2,680	-\$2,870	-\$243,950	\$3,905,000
6	Florida	\$375,916	-\$2,250	-\$3,190	-\$271,150	\$4,010,000

7	Auburn	\$361,949	-\$1,260	-\$2,510	-\$213,350	\$2,103,500
8	Notre Dame	\$351,010	-\$20	-\$1,500	-\$127,500	N/A
9	Ohio State	\$348,750	-\$726	-\$4,716	-\$400,860	\$3,888,389
10	Michigan	\$345,683	-\$1,698	-\$2,090	-\$177,650	\$2,525,280

6. Basketball players with the top 10 highest estimated fair values are worth between \$620k-\$1 million in 2009-10. The top spot was held by Duke basketball players. While 80% of players received scholarships that left them living below the federal poverty and with an average scholarship shortfall of \$3098 in 2010-11, their coaches were paid an average of over \$2.5 million in 2010 excluding bonuses.

7. The poorest football and basketball players from the richest teams (generated combined FB & BB revenues of \$30 million or more in 2009-10, yet live in the poorest bottom 1/3 of all the players in the study – on-campus and/or off-campus) are from the schools in Table 3 below. These players live between \$3000-\$5000 below the poverty line.

Table 3.

School	In Poverty? (On Campus)	In Poverty? (Off Campus)	2009-2010
Florida	-\$2,250	-\$2,250	\$78,899,886
Tennessee	-\$3,090	N/A	\$69,895,525
South Carolina	-\$3,126	N/A	\$67,456,953
Oklahoma	-\$3,064	N/A	\$66,922,135
Arkansas	-\$2,848	-\$2,848	\$64,040,074
Michigan State	-\$3,070	-\$3,070	\$60,600,826
Wisconsin			\$56,329,282
	\$3,455	\$2,400	
Nebraska	-\$3,230	-\$3,122	\$55,950,436
Iowa	-\$2,559	-\$2,559	\$54,651,304
Texas A&M	-\$2,882	-\$2,882	\$50,768,753
Minnesota			\$46,056,004
	-\$3,314	-\$3,314	
Oklahoma State			\$44,872,804
	\$2,890	N/A	
West Virginia	-\$3,022	-\$3,573	\$42,774,266
Louisville			\$41,427,279
	\$4,288	\$4,288	
Virginia Tech	-\$3,890	-\$3,890	\$40,408,163
Indiana			\$38,353,343
	\$2,972	N/A	
Arizona State	-\$1,184	-\$2,274	\$38,178,657
Clemson			\$38,049,194
	-\$3,856	N/A	
Kansas	-\$3,820	-\$3,820	\$34,001,678
North Carolina State			\$32,372,895
	-\$2,736	-\$2,736	
Texas Tech	-\$2,924	-\$8,344	\$31,293,930
<u>Average</u>	<u>-\$3,070</u>	<u>-\$4,967</u>	

8. Despite record revenues, salaries, and capital expenditures as well as prohibitions on countless sources of income for athletes, the NCAA explicitly allows tax payers to fund food stamps and welfare benefits for college athletes.⁶⁵

⁶⁵ See NCAA Division I Manual, *supra* note 21, at 204 (2011-2012).

9. FBS schools could provide more equitable financial terms for their revenue-producing athletes without eliminating any non-revenue generating sports or reducing scholarships from athletes from non-revenue generating sports. The second attachment (2 tables with data) points to lavish spending in by FBS schools in non-revenue sports. We've compared non-revenue sports expenditures between FBS schools and Football Championship Subdivision (FCS) schools because all of their non-revenue sports compete against each other in Division I. We focused on this to find out what it costs to run a competitive Division I non-revenue generating team which is demonstrated by the FCS numbers. The FBS non-revenue team expenses show that these schools spend far more than what's necessary to field these teams. BCS schools spend an average of about \$350,000 more on each non-revenue team when compared to FCS schools. FBS schools average 18 non-revenue generating teams per campus, which means they spend an average of about \$6.3 million/year more than FCS schools on non-revenue generating sports. Schools often question where they would find the money to increase athletic scholarships. But to put this in perspective, if those excess expenditures were evenly divided among 85 scholarship football players and 13 scholarship basketball players, each player would receive about \$64,000 without reducing any non-revenue generating players' scholarships or their teams.

Discussion

Priceless Poverty

The NCAA's stance on paying players – or not paying them – seems unfair to me, with the preposterous amounts of money being made by the schools, television, coaches, and the like. And the players?⁶⁶

- Tim Tebow (2011), former Florida football player, Heisman trophy winner, current NFL player.

The NCAA's definition of amateurism has proven to be priceless to obscenely paid coaches, athletics administrators, and colleges but has inflicted poverty on college athletes. The primary beneficiaries of revenue-producing athletes' talents are head football and men's basketball coaches, athletic directors, commissioners in the major conferences, and bowl directors. Earning for these groups illustrate the conditions of the market for college sport.

Head men's basketball coaches whose teams competed during March Madness in 2010 earned, on average, approximately \$1.4 million with average head football coach compensation in major programs amounting to \$1.3 million.⁶⁷ The top paid 60 FBS football coaches averaged more than \$2 million in total compensation with Alabama's Nick Saban and Texas' Mack Brown earning approximately \$6 million and \$5.1 million, respectively. The top 25 highest paid basketball coaches

⁶⁶ Tim Tebow & Nathan Whitaker, THROUGH MY EYES 203 (Matt Harper ed., Harper Collins, 2011).

⁶⁷ See, Berkowitz et. al., *Salary Analysis of 2010 Football Bowl Subdivision Coaches*, USA TODAY (Dec. 26, 2010, 6:21 PM), <http://www.usatoday.com/sports/college/football/2010-coaches-contracts-database.htm>.

whose team played in the 2011 NCAA tournament averaged about \$2.4 million with Louisville's Rick Pitino earning \$7.5 million in total compensation.

The connection between coach earnings and the compensation of revenue-producing athletes was not lost on University of South Carolina football coach Steve Spurrier⁶⁸ who developed a proposal to provide a stipend to players on a per game basis that garnered support from Alabama's Nick Saban, Florida's Will Muschamp, LSU's Les Miles, Mississippi's Houston Nutt, Mississippi State's Dan Mullen and Tennessee's Derek Dooley. In explaining the rationale for the proposal, Spurrier said, "A bunch of us coaches felt so strongly about it that we would be willing to pay it – 70 guys, 300 bucks a game," Spurrier said.⁶⁹ "That's only \$21,000 a game. I doubt it will get passed but as coaches in the SEC, we will make all the money – as do universities, television – and we need to get more to our players."⁷⁰ Spurrier went on to say that "People don't realize that most football players come from underprivileged homes. My plan was meant to show that I believe our players deserve more expense money to be more like the average college student."⁷¹

According to tax records for the year 2009, four of the six commissioners in the major football player conferences earn more than \$1 million per year with the Big 10's Jim Delaney receiving about \$1.7 million.⁷² During the 2008-09 school year, SEC Commissioner Mike Slive was given a \$1 million bonus.⁷³ BCS Bowl game directors for the top four bowl games averaged approximately \$468,000 for organizing only one game in 2008.⁷⁴ The mid-range salary for executive directors of events that comprise the college bowl system was \$300,000.⁷⁵ Athletic directors are also paid handsomely averaging \$481,159 in the ACC, \$500,743 in the Big Ten and the \$543,049 in the Big 12 in 2009-10.⁷⁶

NCAA Presidents have little to complain about in terms of the heir compensation. NCAA President Mark Emmert refused to publicly state his NCAA salary, but public records show that Myles Brand, the previous NCAA President, earned \$1.7 million prior to Emmert's arrival. When asked by Frontline's Lowell Bergman if

⁶⁸ Al Neuharth, *Is Spurrier Right? Should We Pay College Athletes?*, USA TODAY (June 6, 2011, 4:11 PM), http://www.usatoday.com/news/opinion/forum/2011-06-10-Should-we-pay-college-athletes_n.htm.

⁶⁹ Mark Long, *Steve Spurrier, Other Football Coaches Propose Plan to Pay Players*, HUFFINGTON POST (June 1, 2011, 6:31 PM), http://www.huffingtonpost.com/2011/06/02/steve-spurrier-paying-players_n_870501.html.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Associated Press, *Mike Slive proposes athletics reforms*, ESPN.COM (July 21, 2011, 3:29 AM), http://espn.go.com/college-football/story/_id/6787539/mike-slive-sec-proposes-reforms-college-sports.

⁷³ *Id.* See also, K. Veazey, *SEC's success, TV deal lead to \$1 million bonus for Slive*, Mississippi State Sports (May, 24, 2010), <http://blogs.clarionledger.com/msu/2010/05/24/secs-success-tv-deal-leads-to-1-million-bonus-for-slive/>.

⁷⁴ *Bowl Directors' Pay*, USA TODAY, April 7, 2011, at 4C, available at http://www.usatoday.com/printedition/sports/20110107/bcsissue07_tb.art.htm.

⁷⁵ Sean Gregory, *Bowl Game CEOs: College Football's Big Winners*, TIME (Dec. 30, 2010), <http://www.time.com/time/magazine/article/0,9171,2040202,00.html>.

⁷⁶ Ken Tysiac, *AD Salaries Mirror Rising College Costs*, NEW OBSERVER (May 22, 2010, 12:29 AM), <http://www.newsobserver.com/2010/05/22/494547/ad-salaries-mirror-rising-college.html>.

he say any contradiction between the six and seven figure salaries for coaches and athletic administrators compared to what college athletes receive, Emmert stated, “No, I don’t find that contradictory at all.”⁷⁷

While there are no limits to what coaches and administrators can make, the NCAA’s definition of amateurism caps “full” athletic scholarships below the cost of attendance, or the price tag that each school reports to the U.S. Department of Education. The athletic scholarship is the compensation that athletes receive for their contributions to the college, and every full athletic scholarship in the nation leaves them with out-of-pocket educational related expenses. Using the cost of attendance figures that colleges report to the Department of Education each year, our study found that the average scholarship shortfall for a full scholarship athlete at a FBS school was \$3222 in 2010-11. These same colleges are free to give full *academic* scholarships that fully cover the cost of attendance while their “full” *athletic* scholarships must fall short of the cost of attendance due to the NCAA’s definition of amateurism. College athletes have been promised by their colleges and coaches that their educational pursuits will be fully supported with a “full” scholarship, but despite record revenues, they have never fully funded this promise. This leaves most players and their families unprepared for the financial demands that they must address.

The inequities in this system can be gauged from several vantage points. In our report, we found that when head coaches salaries are compared with the scholarship shortfall of entire football teams based on 85 scholarships (using in-state tuition calculations only), the gap is striking. While team shortfalls in 2010-2011 ranged from \$80,920 to over \$520,795, some coaches bonuses alone were greater than those shortfalls. University of Florida head coach Urban Meyer could have financed the total scholarship shortfall for his entire team, \$271,150, with only *half* of his \$575,000 maximum bonus that year, leaving his \$4 million salary completely intact. Similarly, University of Oklahoma head coach Bob Stoops’ contract provided for a maximum bonus of \$819,500 while his football team’s total scholarship shortfall was \$338,980. Among the college with the top 10 football revenues, the sum of team scholarship shortfalls was approximately \$2.5 million while the maximum bonuses these head football coaches could earn was \$5.4 million. Although some argue that the financial state of college athletics does not have the resources to remedy the scholarship shortfall problem, dollars allocated to the incentives built into coach contracts to win conference games, achieve a certain winning percentage, be selected for a non-BCS or BCS bowl, be named coach of the year by a conference or national association, or to simply stay at an institution, incentives that hinge on the performance of athletes who generate the money to pay those incentives, would certainly be a budget area to be examined.

⁷⁷ Interview by Lowell Bergman with Mark Emmert, President, NCAA (transcript available at *Frontline: Money & March Madness*, PBS (Mar. 29, 2011), <http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/etc/transcript.html>).

Not only does the NCAA-mandated scholarship shortfall leave players with thousands of dollars in out of pocket expenses, it leaves most living below the federal poverty line. Our study compared the 2010-11 room and board portion of each school's full athletic scholarship to the 2011 federal poverty line and found that the average scholarship left 85% of on campus athletes and 86% of off-campus athletes below the federal poverty line. On campus athletes lived at about \$1874 below the poverty line while players living off-campus lived at \$1794 below the poverty line.

Many are aware that college athletes are much more valuable than what they receive in the form of a full scholarship, but our study also estimates the fair market value for big time college football and basketball players receive. As previously stated, Coach Jay Paterno used his flawed estimation of athletes' time demands in an attempt to calculate the market value of a full scholarship player. He mistakenly suggested that a scholarship athlete at Penn State earned \$56.25 per hour if they came from the state of Pennsylvania and \$83.25 per hour for out of state athletes who are charged higher rates of tuition. To better gauge the fair market value for a college football and basketball player, we applied the revenue sharing provisions in the NFL and NBA collective bargaining agreements (CBAs) to the football and basketball revenues reported by FBS schools. The current NFL CBA guarantees players at least 46.5% of total revenues. At the time of this writing, the NBA does not have a current CBA, so we applied a 50% revenue split for college basketball revenues, which is the percentage that the NBA owners publicly stated as their desired goal in the new CBA.

After applying the revenue-sharing percentages, we found that during the 2009-10 school year, the average FBS football and basketball player's fair market value was \$121,048 and \$265,027, respectively. In 2009-10, the University of Texas fielded football players with the highest fair market value at \$513,922 per player while Duke basketball players were each worth \$1,025,656, the highest value in college basketball. Florida football and basketball players were the poorest athletes among the richest colleges. While generating combined revenues of about \$79 million for their universities, their scholarships left them living at \$2,250 *below* the federal poverty line.

The NCAA's Black Market

As long as you have a prohibition you're going to have bootleggers.
Josh Luchs, former NCAA rule-violating sports agent turned NCAA reformer

With the countless scandals that have occurred over the last year, this may be the most appropriate time to point out that the NCAA's version of amateurism is not only at the root of the problem, it is impossible to uphold. Through the NCAA, college presidents mandate impoverished conditions for young, valuable players and through money around to all other college sports stakeholders when those players perform well, a formula that drives the powerful black market that thrives

at so many universities nationwide. To be sure, *Inside Higher Education* reported that 53 of 120 FBS schools were caught violating NCAA rules between 2001-10.⁷⁸ To see such rampant disregard for the rules makes one wonder how many violations take place without the NCAA taking notice?

Despite the NCAA's predictable punitive actions on athletic programs and individuals, violations have consistently occurred from the inception of the NCAA sports. Player advocate and author of *Money Players* Marc Isenberg pointed out what should be clear to everyone, "In reality, the NCAA does not have an agent problem, it has an amateur problem."⁷⁹ Rules that prohibit players from accepting benefits above and beyond their scholarships set athletic programs and their players up for failure.

Many programs take measures to inform their players about NCAA rules, but players have been both knowingly and unknowing violating NCAA rules for years. Some succumb to financial pressures, others feel that it's not a big deal because they are part of a system that generates so much money for everyone else, and there are even those who break NCAA rules without knowing it.

For example, former University of Southern California receiver, R. Jay Soward confirmed to *Sports Illustrated* last fall that he had accepted benefits from former sports agent Josh Luchs because his scholarship didn't provide enough money for rent or food. In explaining his perspective, he said "I would do it again. I have four sons, and if somebody offered my son money in college and it meant he didn't have to be hungry, I would tell him to take it."

Former NBA star and current basketball analyst Charles Barkley agrees in principle with Soward. In September of 2010, Barkley admitted to breaking NCAA rules while playing for Auburn,

"I got money from agents when I was in college and I went in the '80s. A bunch of players - - most of the players I know - - borrowed money from agents. The colleges didn't give us anything. If they give us a pair of sneakers, they get in trouble. Why can't an agent lend me some money and I'll pay him back when I graduate? 'These agents are well, well known. They've been giving college kids money for 30 years,' Barkley said. 'And I've got no problem with it. I want to visit my family, I want to go see a movie. How in the world can they call it amateur if they pay \$11 million to broadcast the NCAA Tournament?'"⁸⁰

⁷⁸ Doug Lederman, *The Admissions Gap for Big-Time Athletes*, INSIDER HIGHER ED (Dec. 29, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/12/29/admit>.

⁷⁹ Marc Isenberg, *NCAA Must Accept Reality If It is Serious About Reform*, SPORTS BUSINESS DAILY, Aug. 29, 2011, <http://www.sportsbusinessdaily.com/Journal/Issues/2011/08/29/Opinion/Marc-Isenberg.aspx>.

⁸⁰ Doug Segrest, *Barkley Admits He Took Money From Agents In College*, AL.COM (Sept. 21, 2010, 7:50 AM), http://www.al.com/sports/index.ssf/2010/09/barkley_admits_he_took_money_f.html.

Former UCLA and NFL football player Donnie Edwards was suspended for unknowingly breaking NCAA rules when he placed in his refrigerator about \$150 in groceries that were left anonymously on his doorstep on two separate occasions. “One of the occasion was shortly after I did a radio interview and talked about how hard it is for a student-athletes to buy enough food under the current scholarship system...”⁸¹

Other former scholarship athletes have shared similar stories. As interviews conducted by researcher Krystal Beamon demonstrate, the scholarship shortfall is a legitimate concern for athletes.⁸² As one former athlete commented, “I’m not gone to say we should get paid, but our monthly income that they give the students is definitely not enough to live.”⁸³

In addition to players who have broken NCAA rules, players that have not broken NCAA rules have voiced frustration with the financial disparity and hypocrisy. Tim Tebow, arguably the most iconic football player to ever play in NCAA sports, voiced his opinion on his topic in his recently published book *Through My Eyes*.⁸⁴ Tebow reflects on his coach’s million-dollar bonus at a time when he pulled the weeds in his mom’s chicken coup as a Christmas present for he because that was all he could afford. In his book, he questions the morality of the NCAA rules that impose this double-standard.⁸⁵

Tebow is known for his strong personal and moral convictions, which is what likely helped him refrain from accepting extra benefits and violating NCAA rules. But many can question what the average, high profile, cash-strapped 19-year-old college athlete would do if offered benefits what the NCAA prohibits. Tebow was frustrated enough with the NCAA rules that he criticized its rules in his book.⁸⁶ Many other players choose to go a step further.

The NCAA creates an environment that too often make college athletes easy targets for coaches, agents, advisors, and runners that have significant potential financial rewards associated with securing talented players. Former sports agent Josh Luchs, who admitted to routinely violating NCAA rules, has recently embarked on an effort to minimize widespread NCAA rules violations. He pointed out in a California Senate hearing that, in terms of NCAA violations, “As

⁸¹ Steve Springer, *Edwards Suspended for One Game: UCLA: Linebacker ordered to pay restitution for \$150 worth of groceries left at his apartment, allegedly by agent.*, L.A. TIMES, Oct. 15, 1995, http://articles.latimes.com/print/1995-10-13/sports/sp-56618_1_edwards-suspended.

⁸² See Krystal K. Beamon, *Used goods: African-American student-athletes: Perception of Exploitation by Division I Universities*, 77-4 J. NEGRO EDUC., 352, 355 (2008) available at JSTOR, <http://www.jstor.org/stable/25608704?origin=JSTOR-pdf>.

⁸³ *Id.* at 359.

⁸⁴ See Tebow & Whittaker, *supra* note 66.

⁸⁵ *Id.*

⁸⁶ *Id.*

long as you have a prohibition you're going to have bootleggers.”⁸⁷ Luchs went on to testify about the degree to which NCAA rules can be violated, detailing how coaches, trainers, teammates, and family members are all potential runners for sports agents and advisors.

The strain of a system that has been suppressing the fair market value of its athletes for far too long is becoming ever more apparent as the commercial interests and the line of demarcation between college athletics and professional sports ever more indistinguishable and porous. The embarrassments of the supposed scandals in premier athletic powerhouse programs of late have proven to be liberal fodder for the sport tabloids. The retirement of Ohio's native son, Jim Tressel, head football coach at that state's flagship institution following revelations that members of the championship Buckeye team including quarterback Terrell Pryor had traded on their celebrity for benefits from a local merchant in Columbus in June of 2011 captured headlines nationwide. Not to be outdone, the University of Miami exposed when former booster Nevin Shapiro admitted to violating NCAA rules by providing extra benefits to Miami players from 2002-2010. In addition, Shapiro implicated university coaches and leaders in this scandal, offering an interesting punctuation mark to a year that witnessed one Heisman Trophy winner (Reggie Bush) making the unprecedented move of giving his award back because he accepted benefits not sanctioned by the NCAA and the media pursuit of a Heisman Trophy candidate (Cam Newton, Auburn) believed to have had his athletic talents brokered to the highest bidder by his father.⁸⁸

The NCAA's response to violating is usually to punish entire programs despite the fact that the majority of players and athletic staff from these programs typically do not commit any violations. For example, former USC running back and Heisman trophy winner received extra benefits estimated at \$200,000 from a prospective agent that had no ties to USC. In response, the NCAA took away 30 scholarships and banned the USC football team from post-season play and the inaugural PAC 12 championship game. In response, USC athletic director Pat Haden stated, “I fell badly for our seniors who had two years of [postseason bowl bans], even though they had nothing to do with what went on...”⁸⁹ The NCAA imposed these penalties after Bush had already departed to the NFL.

At times, the NCAA seems to launch investigations more akin to fruitless witch-hunts, which themselves can initiate NCAA rules violations and punishments. For example, the NCAA launched an investigation due to \$312, in clothes that the NCAA suspected was given to a Georgia Tech football player in violation of its extra benefits rule for amateur athletes. Though the NCAA found no evidence of a

⁸⁷ Gary Klein, *State Lawmakers Take a Long Look at College Athletes and Agents*, L.A. TIMES, May 12, 2011, <http://articles.latimes.com/2011/may/12/sports/la-sp-0513-sports-agents-20110513>.

⁸⁸ See Dick Weiss, *Miami Football Scandal Trumps Reggie Bush, Cam Newton, Jim Tressel and Needs NCAA Death Penalty*, N.Y. DAILY NEWS (Aug. 18, 2011), http://articles.nydailynews.com/2011-08-18/sports/29916551_1_al-golden-jim-tressel-death-penalty.

⁸⁹ Seth Rubenroit, *NCAA denies USC's appeal of penalties*, DAILY TROJAN (May 26, 2011, 1:03 PM), <http://dailytrojan.com/2011/05/26/ncaa-denies-uscs-appeal-of-penalties/>.

violation, it punished Georgia Tech because the athletic director informed its coach and some of their players that an investigation was underway, which the NCAA does not allow. In response, the NCAA stripped the football team of its 2009 ACC Championship and put the program on probation. Former Georgia Tech player Sean Bedford who played on the 2009 responded to the punishments in an open letter to the NCAA,

While I realize that all violations merit some kind of punishment, I have a hard time grasping the notion that one of the proudest moments in my life (and the lives of every other individual that was a part of the team and program in 2009) is apparently worth \$312 in your eyes. If that truly is the case, I'd be happy to provide you with that same amount of money (cash or check, your choice) in exchange for the reinstatement of the title my teammates and I earned through our blood, sweat and tears.⁹⁰

In mid-August, allegations surfaced that 72 current and former members of the University of Miami football team had received improper benefits in the form of cash, cars, and gifts from Nevin Shapiro, a booster serving time in federal prison for his involvement in a \$640 million Ponzi scheme.⁹¹ Ten coaches no longer working at the University were also implicated along with one men's basketball player. It was further revealed that Shapiro was co-owner of a sports agency for nearly the entire time he was a Hurricane booster.

For the various rules violations committed at the University of Miami, NCAA President Mark Emmert is currently contemplating giving the University of Miami the "Death Penalty," a punitive action whereby a school is not allowed to compete in a sport for at least a year. While many University of Miami players have been implicated in NCAA rules violations, precedents will likely reveal that the majority of players from that program committed no violations at all. Yet, the NCAA's enforcement mechanism gives little consideration to the innocent players.

Southern Methodist University (SMU) was the only school to ever receive the Death Penalty which, by all accounts, transformed their football program from a national powerhouse to a mediocre program at best. Former SMU player Mike Romo spoke of the multiple knee surgeries he suffered during the years immediately following the NCAA's actions, "I have a couple, the effect of having a thinned-out team from the death penalty." He went on to question the NCAA's method of enforcing its rules, "Let me ask you this: If you could rob a bank and they arrest the next guy who walks in, who wouldn't do that? We were the next guy who walked in the bank."⁹²

⁹⁰ Mike Morris, *Tech Player To NCAA: Pry Ring From My 'Cold, Dead Finger'*, ATL. J. CONST. (July 15, 2011, 1:38 PM), <http://www.ajc.com/sports/georgia-tech/tech-player-to-ncaa-1018244.html>.

⁹¹ Robinson, *supra* note 2.

⁹² Jen Floyd Engle, *'Death Penalty' Not Right; Ask Ex-SMUer*, FOX SPORTS (Sept. 9, 2011, 7:44 PM), <http://msn.foxsports.com/collegefootball/story/NCAA-death-penalty-just-doesnt-work-090511>.

The NCAA issues penalties in an attempt to impose justice to enforce its unjust system and to prevent actions that are unpreventable. In effect, while the market in one way or another offers examples that athletes are economically undervalued, they are punished, held up for ridicule, and accused or wrongdoing for engaging in modest explorations of what their real value is worth. Innocent athletes suffering NCAA punishments are collateral damage. Meanwhile, the NCAA remains free to exploit its athletes for every commercial dollar that it can while simultaneously pretending to protect them from such exploitation.

As such controversies involving revenue-producing athletes have become more frequent, the calls for some kind of “reform” echo across the landscape. In the spring of 2011, James Delaney, Commissioner of the Big Ten Conference, floated the idea that it was time to begin to consider addressing the financial gap between what a full athletic scholarship covers compared to expenses associated with the cost of attending an institution. Because NCAA regulations limit the athletic scholarship to tuition, room, board and fees, the shortfall amounts to approximately \$12,00 to \$20,000 in expenses that athletes believed to be receiving a “free ride” pay for attending their academic institutions over the span for four years (a gap that translates into \$3,000 to \$5,000 on average each year).

This topic was included in the much anticipated NCAA Division I Presidential Retreat in August 2011. While mapping out a course for the future, NCAA President Mark Emmert stated. “It’s time for creative solutions to the significant issues facing intercollegiate athletics. In order to protect student-athlete success, the collegiate model, amateurism and competitive equity, there must be substantive change to the enterprise.” One of the “creative” solutions may be closing the scholarship shortfall, an action that the National College Players Associated has pressured the NCAA to do for over 10 years. The NCAA has kicked around this idea before but has passed on this and other reforms. This leave an important question, “Can the NCAA reform itself?”

The NCAA and Colleges Presidents Admit Inability to Reform; The Need for Federal Intervention

In sum, presidents would like serious change by don't see themselves as the force for the changes needed, nor have they identified an alternative force they believe they could be effective. – The Knight Commission's 2009 Report

While higher education officials and athletics administrators have worked to keep a lid on Pandora's Box, the past twelve months in college sport have been record breaking in terms of an ever lengthening list of cases that raise questions about the integrity of the system and the ability of those running college sport to control it.

In the immediate aftermath of the Miami scandal, some argued that President Donna Shalala should lose her job for failure to provide the necessary oversight to

avert a problem of this magnitude. According to Board of Trustees chair Leonard Abess, Shalala will ride out this storm and lead the university through the process of its own internal investigation and inevitable NCAA infractions review. While her position seems secure, at least as of this writing, whether she or any college president can exert the type of leadership necessary to ensure that such an incident will not happen on his or her watch is very much open for consideration. Is it realistic to expect Shalala, or any other college president, to prevent a booster from giving a player a \$100 handshake ten miles from campus?

In October 2009, the Knight Commission on Intercollegiate Athletics released a report based on interviews with 95 of 119 FBS presidents seeking their thoughts and perspectives on college sport reform, the probability of creating a more sustainable financial model for college athletics, and how they say their role in reform efforts.⁹³ As reported by the Knight Commission,

While the quantitative research revealed strong presidential support for studies of policy changes regarding a number of concerns, such as the number of coaches and athletic contests, the qualitative research revealed a sense of powerlessness to effect a kind of change that is needed at the conference and national levels to contain the athletics arms race and address critical issues regarding sustainability, such as rapidly escalating coaches' salaries. The quantitative research also shows that a high percentage of presidents who believe that sustainability is problematic for their own institution or for their conference or the FBS as a whole believe that sweeping change is necessary across the FBS.⁹⁴

The problems with college sports oversight on individual campuses seem to have manifested in the broader regulatory systems within the NCAA. The contradictions that the entire college sport regulatory system have encountered of late have become so great that the work of the NCAA's Committee on Athletic Certification (CAC), the central purpose of which is "...to validate the fundamental integrity of member institutions' athletics programs through a verified and evaluated institutional self-study,"⁹⁵ was abruptly put on hold by the NCAA Board of Directors in April of 2011. In calling for a moratorium on program certification, the Board justified its action on the basis of cost-saving and reducing the administrative burden associated with the self-study process. The Board charged the CAC with devising a new program review that has the capability of establishing benchmark data on academics, student-athlete experience, financial and diversity/inclusion.

⁹³ See *Knight Commission on Intercollegiate Athletics*, ART & SCI. GRP., Oct. 2009, http://www.knightcommissionmedia.org/images/President_Survey_FINAL.pdf.

⁹⁴ *Id.* at 7.

⁹⁵ NCAA Research Staff, *Trends in Graduation Success Rates and Federal Graduation Rates at NCAA Division I Institutions*, NCAA (Oct. 2011), http://www.ncaa.org/wps/wcm/connect/e9eb8a0048d2623fb424ffb1fe52de76/GSR+and+Fed+Trends+2011+-+Final+10_20_11.pdf?MOD=AJPERES&CACHEID=e9eb8a0048d2623fb424ffb1fe52de76.

What the Board failed to comment about may illuminate the import of the decision to cease the certification process mid-stream when schools were already going through the cycle. While the Board offered some plausible explanations on the value of revising the program review process, it did not explain the sudden necessity to do so nor the fact that they narrowed the standards of review, leaving off the standards that address “institutional control, presidential authority and shared responsibility” and “commitment to rules compliance.”⁹⁶ This is a significant omission in light of the timing of the decision. In the months immediately preceding the Board’s decision, allegations of NCAA amateur code violations surfaced at schools that had all been certified by the NCAA and had been touted as winning while being in compliance with NCAA rules, specifically the University of Connecticut, University of Southern California, the Ohio State University, George Institute of Technology, and the University of Oregon. For a process that purportedly cost \$300,000 per institution to execute and required an average of 400 hours of employee time to complete, a more powerful justification for pulling the plug on the certification process may have been the questions to be raised about a process that found routine rule violators to have sufficient presidential control and commitment to rules compliance when that was clearly not the case. In effect, the very checks and balances system put in place to ensure program integrity has been found to be fundamentally ineffective and/or corrupt.

Thus, calling a halt to the process before outside investigators probed too deeply into this problem probably seemed to be the only prudent thing to do, allowing time for those who might be implicated at their respective institutions to quietly move on perhaps and gain some distance from whatever scandal may be brewing on their own campus. Evidence of NCAA members’ hesitation of looking too deeply into this problem came to light during a recent California Senate hearing held at the Los Angeles Coliseum on May 12, 2011. David Roberts, USC’s vice president of athletic compliance admitted that universities are hesitant to go after unscrupulous agents because it may open Pandora’s Box and reveal many other violations within their programs.⁹⁷

While college presidents have admitted their inability to bring forth comprehensive reform, one may inquire about the inability of the NCAA and/or conference commissioners to solve the problems plaguing college sports. Unfortunately, both groups are controlled by college presidents who lack both the strength and direction to do so. Every NCAA rule that exists was installed by the collective will of the college presidents, and every conference commissioner is hired through a collective action of the universities that are led by college presidents.

⁹⁶ NCAA Board of Directors, *April 2011 Legislative Action Requested Regarding NCAA Division I Athletics Certification Program*, NCAA (Apr. 15, 2011), http://fs.ncaa.org/Docs/DI_MC_BOD/DI_BOD/2011/April/ACP.pdf.

⁹⁷ See Klein, *supra* note 87.

In all college sports matters, the buck stops with college presidents. Current NCAA President Mark Emmert highlighted this fact when responding to a US Department of Justice Inquiry related to the antitrust implications of the BCS system. Emmert stated that change “would not happen unless the leaders of the institutions with teams in the Football Bowl Subdivision want to make such a change.”⁹⁸ College presidents have clearly failed in their roles as stewards of NCAA sports and the protectors of college athletes.

With this key revelation, the only other entity powerful enough to bring forth comprehensive reform is the federal government. Former NCAA President Walter Byers acknowledges this in his book published almost 15 years before the Knight Commission’s report,

The presidential reform movement took hold in the mid-1980s and squandered an opportunity to transform the industry. Significant change will not come from that source...I believe the record now clearly shows the major hope for reform lies outside the collegiate structure. What the colleges will not do voluntarily should be done for them...Congress should enact and the president should sign a comprehensive College Athletes’ Bill of Rights...the federal government should require deregulation of a monopoly financial returns. The Justice Department has chosen not to act. The Congress should.⁹⁹

At the time Byers wrote this, the US Department of Justice (DOJ) chose not to address the numerous antitrust violations that many have accused the NCAA of committing. Today, the DOJ has made inquiries about potential antitrust violations associated with the BCS post-season arrangement that prevents a playoff in big time college football, and is currently investigating the NCAA for antitrust implications associated with its one-year cap on athletic scholarships. These are important steps for the DOJ but, to date, it has not addressed some of the most glaring examples of NCAA monopoly practices that are addressed in this study. It has a clear role to play in reforming NCAA sports, but it has not yet accepted the full responsibility of bringing justice for college athletes.

While the DOJ should clearly become heavily involved in addressing the NCAA antitrust violations, the United States Congress is a vehicle that can bring forth comprehensive reform. It has jurisdiction over both higher education and interstate commerce and can implement uniform legislation nationwide. States cannot implement reforms such as multiple year scholarships and athletic grant-in-aid scholarships that equal the cost of attendance without risking the exclusion of their athletic programs from NCAA competition. The NCAA threatened pro-reform states such as California and Nebraska of the loss of NCAA membership and revenue that would accompany the implementation of these types of

⁹⁸ Letter from Mark Emmert, NCAA, President, to Christine Varney, Associate Attorney General, U.S. Department of Justice (May 18 2011) (on file with author), *available at* <http://www.usatoday.com/sports/college/football/2011-05-18-ncaa-letter.pdf>.

⁹⁹ Byers & Hammer, *supra* note 1.

changes.¹⁰⁰ Ultimately, the NCAA's monopoly power renders state governments impotent in their quest for reform. In addition, college athletes lack the leverage to negotiated directly with the NCAA since the NCAA strategically used its "amateurism" and "student-athlete" propaganda to prevent them from acquiring the employee rights that would allow them to organize and negotiate. Without an act of Congress and support from the DOJ, universities, athletic programs, coaches, and players will continue to spiral embarrassingly into the abyss that has been on full display over the past 12 months and beyond. College athletes will also continue to drift as a group of Americans harmed by the NCAA's un-American, monopolistic arrangements.

Recommendations

The US Department of Justice should be aggressively and whole-heartedly pursue antitrust suits against the NCAA to prevent further harm to college athletes, and Congress should act immediately to deregulate the NCAA with the provisions detailed below:

#1. Support legislation that will allow universities to fully fund their athletes' educational opportunities with scholarships that fully cover the full cost of attendance. The average \$3222 increase per player would be enough to free many from poverty and reduce their vulnerability to breaking NCAA rules to make ends meet. This can be funded with the new TV revenue streams that are surging throughout NCAA sports.

A \$3222 scholarship increase would cost approximately \$32.8 million for 85 scholarship players from each of the 120 FBS football teams, and \$14.2 million to do the same for 13 scholarship players on each of the 338 Division I basketball teams that offer scholarships. The total would be about \$47 million annually. Should Title IX compliance require that provisions be made for female athletes receive a similar benefit, that amount can be doubled for a total of \$94 million annually. To put this in perspective relative to the new revenues that are available throughout NCAA sports, the new Pac-12 TV contract alone will bring in \$150 million in new revenues each year. The year-old NCAA TV contract with CBA will average about \$270 million in new revenues above and beyond its previous TV deal with CBS. New revenues could be distributed so that schools would not have to come directly out of pocket for the increase.

#2. Lift restrictions on all college athletes' commercial opportunities by allowing the Olympic amateur model. The Olympics' international definition of amateurism permits amateur athletes access to the commercial free market. They are free to secure endorsement deals, get paid for signing autographs, etc. The

¹⁰⁰ Joan Ryan, *Student Athletes Cry Afoul*, SFGATE, (Oct. 31, 2003, 4:00AM), <http://www.sfgate.com/sports/article/Student-athletes-cry-foul-2579989.php>; SportsLine.com Wire Reports, *Nebraska Legislature Passes Bill for Paying Players*, CBSSPORTS.COM (Apr. 11, 2003), <http://www.cbssports.com/collegefootball/story/6309962>.

NCAA's version of amateurism is impractical and is unjust financial arrangement imposed upon college athletes. Former Duke and pro basketball player and high regarded ESPN and CBS analyst, Jay Bilas has been a strong advocate for such reforms.

The NCAA's attempt to eliminate the commercial free market creates a black market in which universities, coaches, agents, financial advisors, runners, and players will continuously violate the rules. Alternatively, if the Olympics model were allowed, virtually all of the high profile violations over the last year would not have been deemed violations. Selling a championship ring and even accepting a free television would not have been "scandalous" much less an NCAA violation.

In addition, since the NCAA and its member institutions have abandoned the idea that "student-athletes should be protected from exploitation by professional and commercial enterprises" and are actually using players to maximize their own commercial coffers; college athletes should be allowed to pursue their own commercial endeavors.

Some may point to competitive equity as a reason not to adopt the Olympic model. What if boosters would arrange attractive endorsement opportunities for recruits or some schools would have a recruiting advantage because they reside in geographic locations with better endorsement opportunities than other schools? Perhaps the current commissioner of the Southeastern Conference, Mike Slive, has the best counter argument:

It's time to push the reset button on the regulatory rules on recruiting in order to move away from the idea that recruiting rules are designed to create a level playing field," Slive said. "There are significant differences between institutions in resources, climate, tradition, history, stadiums and fan interest and many other things that make the idea of a level playing field an illusion.¹⁰¹

Former NCAA Walter Byers concurs,

Despite its reliance on the competitive-equity defense when it comes to controlling players, the NCAA does not prohibit the colleges' open bidding for winning coaches... The NCAA level-playing field rules do not apply here... All of this is legal under NCAA rules, although it tilts the playing field and gives the rich and consistent college winner a continuing advantage. When there is the possibility that the money will go to the student-athlete, however, the NCAA becomes adamant: There shall be uniform compensation for the players in the form of one-year contracts. No outside money!¹⁰²

¹⁰¹ Associated Press, *supra* note 72.

¹⁰² Byers & Hammer, *supra* note 1, at 377-387.

Andy Schwarz, economist and frequent contributor to ESPN, backs up Slive and Byers with numbers. While agreeing that competitive equity does not exist under the current rules, Schwarz states,

“Today there are haves and have-nots. Haves recruit great players and consistently win. Have-nots get the leftovers and occasionally luck into hidden gems who gel as seniors and win. Over the last 10 years, more than 99 percent of the top 100 high school prospects chose BCS AQs... The results on the field and court reflect this disparity in recruiting: Since 1985, 91 percent of all top 20 and top 25 football teams and 92 percent of all Final Four basketball teams have come from the six “have” conferences.”¹⁰³

In addition, there are plenty of free agents in the professional sports world who consider whether or not one team affords better endorsement opportunities compared to others, and those leagues arguably have similar or more competitive equity than the NCAA, as Schwarz reveals with the numbers above. The bottom line is that the Olympic model is a practical, ethical model that will not significantly alter current levels of competitive equity or the lack thereof in NCAA sports. Finally, portions of athletes’ commercial income could be put away in an educational lockbox as described in recommendation #3 below.

#3. Promote the adoption of legislation that will allow revenue-producing athletes to receive a portion of new revenues that can be placed in an educational lockbox, a trust fund to be accessed to assist in or upon the completion of their college degree. Many athletes in these sports need educational assistance beyond the duration of their eligibility in order to make up for the significant time demands associated with their sport. About 45% and 52% of football and basketball players DO NOT graduate, while their athletic programs receive 100% of revenues produced by these athletes regardless of their programs’ graduation rates.¹⁰⁴

The NCAA has already set a precedent for such a measure when, as a condition of settling the White v. NCAA lawsuit, the NCAA established a \$10 million fund for continuing education assistance for football and basketball players. While some may question whether or not the educational lockbox would affect the current notion of amateurism, unlike the NCAA’s one-year athletic scholarship arrangement that depends primarily on athletic performance, this fund would only be accessed for educational pursuits and achievement. In addition to increasing graduation rates, compliance with NCAA rules can be improved dramatically with funds imposed on these trust funds if and when violations occur.

#4. Colleges should be free to provide multiple year scholarships in all sports if they so choose. The NCAA’s one-year cap on the duration of a scholarship undermines its purported educational mission, and puts in jeopardy the

¹⁰³ Andy Schwarz, *Pay-for-play – the Truth Behind the Myths*, ESPN.COM (July 15, 2011), available at <http://sports.espn.go.com/ncaa/news/story?id=6735469>

¹⁰⁴ NCAA Research Staff, *supra* note 84.

educational opportunities for every college athlete. High school recruits deserve to know which colleges are willing to prioritize their education so that they can make an informed decision.

#5. To the extent that Title IX requires universities to provide female athletes with accommodations similar to those stated in the reforms mentioned above, athletic programs should use new TV revenues to do so.

#6. Although this study focuses primarily on financial aspects of reform, Congress should examine all aspects of college sports in order to implement comprehensive reform that the college presidents admittedly are unable to bring forth.

Courts, Sports And Video games: What's In A Game?

By: Ronald S. Katz, Manatt Phelps & Phillips LLP¹

Although one of the clearest legal thinkers, Louis Brandeis, conceived the modern right of publicity,² "unclear" would be an adjective all lawyers would apply to the current state of right of publicity law, regardless of which side of the issue they usually argue. Indeed, although the right of publicity concept was further developed by another very clear legal thinker, William Prosser,³ he himself alluded to it as the concept "that launched a thousand lawsuits,"⁴ few of which can be reconciled with one another.

The most extreme recent example of this lack of clarity is that two courts on opposite sides of the country have rendered diametrically opposed decisions on the rights of football players whose avatars appear in the same video game,⁵ leaving lawyers in a difficult position when advising their clients on rights of publicity in the very active video game space. This contradiction is not surprising: U.S. courts have used at least eight different tests to balance the individual's right to control his or her own image against the First Amendment.⁶

One reason for the lack of clarity is that courts have tended to make overbroad statements rather than focusing on the facts of the particular case before them. Even the U.S. Supreme Court has categorized all video games similarly,⁷ despite there being a material difference between video games that are expressive and those that focus on physical dexterity.

This article makes a modest proposal about one subject very prevalent in video games, athletic performance. The premise is that because athletic performance in an athletic contest per se is not expressive, such performance is not protected by the First Amendment in a video game. If scoring a touchdown in a football game, for example, is not protected by the First Amendment, then the simulation of that act in a video game that is itself just a simulation of the game of football does not have the protection of the First Amendment.

¹ Ron Katz is a partner in Manatt Phelps' Palo Alto, Calif., office, where he heads the firm's sports law practice group. He is currently representing NFL Hall-of-Famer Jim Brown in an appeal that is not mentioned in this article but which deals with many of the issues raised in this article, which initially appeared in *Law 360* on January 4, 2012.

² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

⁴ *Id.* at 423.

⁵ Compare *Hart v. Elec. Arts Inc.*, 808 F. Supp. 2d 757 (D.N.J. 2011) with *Keller v. Elec. Arts Inc.*, No. C09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

⁶ *Hart*, 808 F. Supp. 2d, at 771 n. 13.

⁷ *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011).

For good reason, there are no cases providing First Amendment protection to athletic feats per se in an athletic competition. No court has held that such acts are expressive.

Perhaps that will change when the recently filed complaint about mixed martial arts (MMA, also known as cage fighting) is decided.⁸ Paragraph 112 of that complaint, which challenges New York's banning of live cage fighting, alleges, "Regulating MMA because of its supposedly violent message is unconstitutional, as the Supreme Court made clear this past term in *Brown*."⁹

Until the day, however, when a punch in the mouth in a cage fight garners First Amendment protection, it is a modest proposal to say that the simulation of an athletic performance in a video game is no more than a game and not at all expressive. Therefore, such a video game is not deserving of First Amendment protection.

Right of Publicity Law Regarding Athletic Performance Is Unclear Because Courts Have Made Overbroad Statements Regarding Concepts Crucial To A First Amendment Analysis

Overbroad Definition Of Expressive Video Games

The 2011 U.S. Supreme Court case cited in the introduction, *Brown v. Entertainment Merchants Association*, contains a prime example of overbroad judicial statements leading to confusion and bad results. The case does not concern sports but rather a California statute attempting to protect minors from extremely violent video games, which the Supreme Court held could not be done consistent with the First Amendment. In the course of making this ruling, Justice Antonin Scalia made the following statement about video games:

Like the protected books, plays, and movies that preceded them, video games communicate ideas - and even social messages - through many familiar literary devices (such as characters, dialogue, plot and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.¹⁰

Justice Scalia's sweeping references to character, plot and social messages are completely irrelevant to such video games as Pong, where the only object is getting a moving dot past a moving line. Pong expresses nothing. It is just a game and, as such, has no claim to First Amendment protection.

⁸ Complaint, *Jones v. Schneiderman*, No. 11 Civ. 8215 (S.D.N.Y. Nov. 15, 2011), 2011 WL 5590530.

⁹ *Id.* at 17.

¹⁰ *Brown*, 131 S. Ct. at 2733.

As would be expected, however, Justice Scalia's overbroad statement was quickly picked up in a federal district court case, *Hart v. Electronic Arts Inc.*,¹¹ one of the recently decided diametrically opposed cases referenced in the introduction. That case involved video game maker Electronic Arts' game entitled NCAA Football, which portrayed actual players without their names (which could easily be inserted by the video game player) but in ways that were easily recognizable from their teams, positions, height, weight, athletic ability, accessories (like wrist bands) and hometowns.

The *Hart* court ruled that Electronic Arts' First Amendment rights trumped the right of publicity of Ryan Hart, the quarterback for Rutgers University, because, citing Justice Scalia above,¹² video games receive as much protection as books, movies and other entertainment. The fact that Hart did nothing in the game but perform non-expressive athletic feats like scoring a touchdown did not figure into the court's opinion.

That fact, however, was crucial in the diametrically opposed opinion in which the right of publicity of the player, Sam Keller, the quarterback for Arizona State University, trumped Electronic Arts' First Amendment rights.¹³

[Plaintiff Keller] is represented as what he was: the starting quarterback for Arizona State University ... the game's setting is identical to where the public found Plaintiff during his collegiate career: on the football field. EA [Electronic Arts] enables the consumer to assume the identity of various student athletes and compete in simulated college football matches.

Because no court has ever decided that athletic performance in an athletic competition, such as scoring a touchdown, is an expressive act, in both *Hart* and *Keller* the players' right of publicity should have trumped the video game manufacturer's First Amendment rights. Because only non-expressive athletic acts were performed in the video game NCAA Football, there were no expressive acts protected by the First Amendment against which to balance the right of publicity.

Overbroad Judicial Statements Regarding Transformativeness

One of the key issues in right of publicity cases is transformativeness. Basically, the more an individual has been transformed (e.g., turning well-known musician brothers into creatures that are half man and half worm¹⁴), the more likely it is that the First Amendment rights of the creator of an expressive work will prevail

¹¹ See 808 F. Supp. 2d 757, 768 (D.N.J. 2011).

¹² *Id.*

¹³ Keller v. Elec. Arts Inc., No. C09-1967 CW, 2010 WL 530108, at *5, *6 (N.D. Cal. Feb 8, 2010).

¹⁴ See Winter v. DC Comics, 30 Cal. 4th 881, 890 (2003) ("Although the fictional characters Johnny and Edgar Antumn are less than subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally. Instead, plaintiffs are merely part of the new materials from which the comic books were synthesized.").

and vice versa. Although in the abstract this generally makes sense, it can become confusing when courts create balancing tests from overbroad statements.

The California Supreme Court has not been immune to overbreadth when analyzing transformativeness, which is the test that court uses to balance rights of publicity with freedom of speech. In its first case on that subject, which has been very influential,¹⁵ the court decided that lifelike charcoal drawings of the Three Stooges were not sufficiently transformative to merit First Amendment protection.

In so doing, the court defined transformativeness so broadly as to make it completely subjective. On the one hand, the court said that when

artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.¹⁶

In contrast, the court also stated:

Another way of stating the inquiry is whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work.¹⁷

Not surprisingly, the diametrically opposed *Hart* and *Keller* courts referenced above used these quotes in diametrically opposed ways. The *Hart* court, where the First Amendment triumphed, focused not on the individual but on the work as a whole:

while the player image may not be fanciful . . . it is one of the "raw materials" from which an original work is synthesized [and] the depiction or imitation of the celebrity is [not] the very sum and substance of the work in question.¹⁸

The *Keller* court, on the other hand, focused on the individual, citing precedents, including the half-man, half-worm *Winter*,¹⁹ that "show that this Court's focus must be on the depiction of Plaintiff in 'NCAA Football,' not the game's other elements."²⁰ Using these different guideposts from the Three Stooges case, *Comedy III*, it is not at all surprising that the *Keller* and *Hart* courts completely disagreed with one another.

¹⁵ See *Comedy III Prods. Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001).

¹⁶ *Id.* at 405.

¹⁷ *Id.* at 406.

¹⁸ *Hart v. Elec. Arts Inc.*, 808 F. Supp. 2d 757, 787 (D.N.J. 2011).

¹⁹ See *Keller v. Elec. Arts Inc.*, No. C09-1967 CW, 2010 WL 530108, at *5 ("In *Winter* the court focused on the depictions of the plaintiffs, not the content of the other portions of the comic book.").

²⁰ *Id.*

Overbroad Judicial Statements Regarding First Amendment Protection For Entertainment

The courts were surprisingly late in conferring First Amendment rights on entertainment. It was not until 1952 that movies received First Amendment protection from the Supreme Court:

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. This may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters v. People of State of New York*, 1948, 333 U.S. 510, 68 S. Ct. 665, 667, 92 L. Ed.: ‘The line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine.’²¹

Perhaps because of their lateness in recognizing that expressive entertainment merits First Amendment protection, the courts may be overprotective of entertainment now. But entertainment or non-entertainment is not where the line should be drawn. Expressive or non-expressive should be the only boundary line relevant for First Amendment protection. As entertainment, some video games can, as noted above, merit First Amendment protection if they are expressive. That, however, does not mean that, as entertainment, all video games must receive such protection.

Some entertainment (e.g., athletic contests and video games like Pong) is not expressive in any way and therefore merits no First Amendment protection. In short, although expressive video games (e.g., Grand Theft Auto, which has a complicated story line about the Los Angeles underworld)²² merit First Amendment protection, non-expressive games, like Pong or like those that merely simulate athletic contests have no claim to such protection.

The game NCAA Football, as an example, is not about Sam Keller or Ryan Hart expressing anything. It is about a videogame player "being" those players for the purpose of scoring points to win a game. Like all athletic competition, which the video game is simulating, NCAA Football is non-expressive entertainment.

Conclusion

The genius of the common law is the incremental formulation of rules through case-by-case analysis in order to cover the infinite variety of human behavior. As Brandeis said in his seminal article on the right of publicity, that genius "in its

²¹ *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

²² *See E.S.S. Entm't 2000 Inc. v. Rock Star Videos Inc.*, 547 F.3d 1095 (9th Cir. 2008).

eternal youth, grows to meet the demands of society."²³ That genius is blunted when, as in the case of video games simulating athletic events, overly broad rules are applied.

Scoring a touchdown, for example, can be many things: thrilling, skillful, ingenious, etc. It is not, however, expressive. It simply is a way of scoring six points by crossing a line. No style points are given, regardless of the artfulness of the score.

Therefore, courts should not confer First Amendment protection on non-expressive athletic acts in an athletic competition or in the simulation of one. Although in some cases it is not an easy task, our courts should not shrink from distinguishing non-expressive from expressive video games.

With all due respect to the cage fighting complaint referenced in the introduction, cage fighting is not expressive in any way that is protected by the First Amendment. For any court to hold otherwise trivializes that amendment.

²³ Warren & Brandeis, *supra* n. 2, at 193.

Protecting the Rights of Amateur Athletes: Transforming the Judicial Tests for Balancing Publicity Rights and the First Amendment

By: Lateef Mtima © 2012¹

The tension between intellectual property rights and the First Amendment has been a source of law and policy conflict since the framing of the Constitution. In each field of IP protection, the courts have developed doctrinal mechanisms to balance these sometimes competing social utilities. In copyright the balance is achieved through the idea/expression dichotomy and the Fair Use doctrine. In trademark, nominative, descriptive and non-source designation uses of marks are permitted under the law. The tension between First Amendment expression and rights holder property interests can be particularly acute where the right of publicity is at issue. The courts have yet to devise, however, a uniform, socially efficacious test for balancing First Amendment interests as against publicity rights.

Two pending cases, *Keller v. Electronic Arts, Inc.*² and *Hart v. Electronic Arts, Inc.*³ illustrate the problem in the context of protecting the rights and interests of college athletes. Confronted with virtually identical facts and legal claims, these two courts reached completely opposite results. In an effort to develop a uniform and socially balanced approach to right of publicity/First Amendment disputes in this and other contexts, it is helpful to revisit the social objectives of the right of publicity and to analyze the leading judicial test employed by courts to resolve such conflicts.

The Social Utility Function of the Right of Publicity

The right of publicity provides individuals control over the commercial exploitation of their images or personas.

The right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity. . . . [It] is a creature of state law and its violation gives rise to a cause of action for the commercial tort of unfair competition.⁴

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² 94 U.S.P.Q.2d 1130 (N.D. Cal. 2010).

³ 808 F. Supp. 2d 757 (D.N.J. 2011).

⁴ *ETW Corp. v. Jireh Pub., Inc.*, 332 F. 3d 915, 928 (6th Cir. 2003). *See also* *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980) (“[T]he famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality.”).

Although the right of publicity is now widely recognized,⁵ identifying its parameters continues to be difficult. This is partly due to varying regional privacy customs and values, but it is also due to the fact that publicity rights often seem to conflict with First Amendment interests, which of course are among our most cherished and respected legal and social mores. American society has a revered interest in promoting the accurate discourse of historic and public events, including the roles of public and private individuals in such events. If private individuals were to possess an absolute right to determine when their images or personas could be used or referenced by others, they could effectively censor public discussion and even historical accounts of actual events.⁶

Nonetheless, courts have recognized that the right of publicity also serves important social utility functions. The United States Supreme Court has observed that the right of publicity provides incentive to individuals to invest effort and resources in the development and stylization of personal attributes and innovations, and to pursue activities and accomplishments of public and popular interest, with the possibility of celebrity, public renown, and attendant commercial reward.⁷

[T]he State's interest in permitting a right of publicity is in protecting a proprietary interest of the individual in his act to encourage such entertainment. . . [T]he State's interest is closely analogous to patent or copyright law, focusing on the right of the individual to reap the reward of his endeavors⁸

Consequently the Supreme Court has held that right of publicity social utility should be afforded the same respect as that granted to other forms of intellectual property.

[A state's] decision to protect [a performer's] right of publicity . . . rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court.⁹

⁵ See J. THOMAS, THE RIGHTS OF PUBLICITY AND PRIVACY 2D § 6:3; see also Gregory L. Curtner, Atleen Kaur, & Suzanne L. Wahl, *Show and Tell: Misappropriation of the Right of Publicity*, COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 2011, 263.

⁶ *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Mason v. Jews for Jesus*, No. 06 Civ. 6433(RMB), 2006 WL 3230279 (S.D.N.Y. Nov. 8, 2006); *Nussenzweig v. diCorcia*, 832 N.Y.S.2d 510 (N.Y. App. Div. 1st Dept. 2007), *aff'd*, 878 N.E.2d 589 (N.Y. 2007); *Arrington v. New York Times Co.*, 434 N.E.2d 1319 (N.Y. 1982).

⁷ See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573-76 (1977).

⁸ *Id.* at 573.

⁹ *Id.* at 576; see also Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1330 (2002) (“[C]elebrities ‘create’ their valuable personas in much the same way that a novelist creates a work of fiction or an inventor a new device. Thus, giving the famous individual a property right in this form of intellectual property has been explained as an incentive to promote future creativity, as a reward for a valuable service to the public, or as a means of preventing unjust

Accordingly, publicity rights are not automatically subordinate to First Amendment interests, especially where an individual's publicity interest would be completely eviscerated by a purported First Amendment use.

Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the *First* and *Fourteenth Amendments* do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner¹⁰

Where First Amendment and publicity rights conflict, courts must therefore undertake an appropriate balancing of the relevant social utilities to resolve the dispute.¹¹

Keller and Hart: One Road, Two Paths

In *Keller v. Electronic Arts, Inc.*,¹² plaintiff was a former starting quarterback for the Arizona State University and University of Nebraska football teams.¹³

enrichment.”); Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 74 (1994) (“As a society, we can suffer two general types of harms from the toleration of unauthorized uses of an individual's persona. One type of harm focuses on the increased potential for consumer deception, and the other focuses on the increased potential for diminished incentives.”).

¹⁰ *Zacchini*, 433 U.S. at 574-75.

¹¹ Particularly in so far as celebrities are concerned, the right to control use and exploitation of one's image or persona can also be asserted under the Lanham Act, through the cause of false endorsement. False endorsement occurs where a person's image or persona is used in association with a product in a way that is likely to mislead the consuming public as to that person's sponsorship or approval of the product. “A false endorsement claim based on the unauthorized use of a celebrity's identity is a type of false association claim, for it alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff's sponsorship or approval of the product.” *Waits v. Frito Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992). “When... a celebrity brings a false endorsement suit under Section 43(a), his ‘celebrity persona’ functions as the ‘mark.’” *Brown v. Electronic Arts, Inc.*, Case No. 2:09-cv-01598-FMC-RZx at pp. 4-5 (C.D. Ca. 2009); *see also* *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399-1400 (9th Cir. 1992). Likelihood of confusion is generally the controlling issue. *See Oil Co. v. Thomas*, 839 F.2d 1183 (6th Cir. 1988) (enumerating an eight factor false endorsement likelihood of confusion test: (1) the level of recognition that the plaintiff has among the segment of the society for whom the defendant's product is intended; (2) the relatedness of the fame or success of the plaintiff to the defendant's product; (3) the similarity of the likeness used by the defendant to the actual plaintiff; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant's intent in selecting the plaintiff; and (8) likelihood of expansion of the product lines). Because right of publicity and false endorsement claims are often raised simultaneously and substantively overlap, the disposition of the one is often difficult to segregate from the resolution of the other. Nonetheless, the principal distinctions between false endorsement and right of publicity claims are (i) “trademark status” for the plaintiff's persona and (ii) the requirement of a likelihood of confusion of the public as to the plaintiff's endorsement of the defendant's product.

¹² 94 U.S.P.Q.2d 1130 (N.D. Cal. 2010).

¹³ *Id.* at 1132.

Defendant Electronic Arts produces the “NCAA Football” video game series,¹⁴ in which game players can simulate matches between college and university teams. Plaintiff alleged that Electronic Arts designs the virtual players in “NCAA Football” to replicate their real-life counter parts, such that “these virtual players are nearly identical to their real-life counterparts: they share the same jersey numbers, have similar physical characteristics and come from the same home state.”¹⁵ Accordingly plaintiff alleged that the “NCAA Football” series commercially exploited his persona without his authorization and thus constituted an infringement upon his publicity rights.¹⁶

In moving to dismiss plaintiff’s publicity claims, Electronic Arts did not deny plaintiff’s allegations of unauthorized use but instead argued that it has a First Amendment right to utilize plaintiff’s persona in an expressive work.¹⁷ In essence, defendant claimed that its unauthorized work “is ‘protected by the First Amendment inasmuch as it contains significant transformative elements [and/]or that the value of the work does not derive primarily from the [plaintiff’s] fame.’”¹⁸

The court observed that under California law, the issue turns on the application of the balancing test set forth in *Comedy III Prods., Inc. v. Saderup*.¹⁹ In *Comedy III*, the plaintiffs brought suit for infringement of the publicity rights of the Three Stooges when their exact likenesses were reproduced on T-shirts without authorization.²⁰ In finding for the plaintiffs, the court enunciated the transformation test, which it derived from the copyright Fair Use Doctrine.²¹ Under the transformation test, the unauthorized use of an individual’s image or persona without any transformative contributions or alterations on the part of the user is not afforded First Amendment protection.²²

This inquiry into whether a work is ‘transformative’ appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment.... When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.²³

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1134.

¹⁸ *Id.*

¹⁹ 25 Cal. 4th 387 (2001).

²⁰ *Id.* at 393.

²¹ *Id.* at 405-06.

²² *Id.* at 404-05.

²³ *Id.*

In applying the *Comedy III* transformation test to “NCAA Football”, the *Keller* court held that the unauthorized use was also one not shielded by the First Amendment:

EA’s depiction of Plaintiff in ‘NCAA Football’ is not sufficiently transformative to bar his California right of publicity claims as a matter of law. In the game, the quarterback for Arizona State University shares many of Plaintiff’s characteristics. For example, the virtual player wears the same jersey number, is the same height and weight and hails from the same state. EA’s depiction of Plaintiff is far from the transmogrification [in prior cases]. EA does not depict Plaintiff in a different form; he is represented as he what he was: the starting quarterback for Arizona State University. Further . . . the game’s setting is identical to where the public found Plaintiff during his collegiate career: on the football field.²⁴

Although Electronic Arts urged the court to broaden its *Comedy III* expressive use assessment to include the expressive elements of the entire video game (as opposed to limiting its assessment to the expressive contributions to the depiction of the plaintiff in the game) the court correctly declined:

EA asserts that the video game, taken as a whole, contains transformative elements. However, the broad view EA asks the Court to take is not supported by precedent. In *Winter*, the court focused on the depictions of the plaintiffs, not the content of the other portions of the comic book. The court in *Kirby* did the same: it compared Ulala with the plaintiff; its analysis did not extend beyond the game’s elements unrelated to Ulala. These cases show that this Court’s focus must be on the depiction of Plaintiff in ‘NCAA Football,’ not the game’s other elements.²⁵

In *Hart v. Electronic Arts, Inc.*,²⁶ the New Jersey District Court was confronted with virtually identical facts and allegations once again involving the “NCAA Football” video game series. This time in connection with a motion for summary judgment, Electronic Arts again did not dispute plaintiff’s allegation of unauthorized use and argued instead that the First Amendment protected its activities.²⁷

In a largely well-reasoned opinion the New Jersey District Court also applied the *Comedy III* transformation test in evaluating Electronic Arts’ First Amendment defense.²⁸ However, the New Jersey court reached the completely opposite result:

²⁴ *Keller v. Electronic Arts, Inc.*, 94 U.S.P.Q.2d 1130, 1135 (N.D. Cal. 2010).

²⁵ *Id.*

²⁶ 808 F. Supp. 2d 757 (D.N.J. 2011).

²⁷ *Id.* at 760.

²⁸ The court also explored another leading test for balancing right of publicity and First Amendment interests, the test set forth in *Rogers vs. Grimaldi*, 875 F. 2d 994 (2d Cir. 1989). In *Rogers*, the unauthorized use consisted of a reference to movie star Ginger Rogers in the title of the film “Ginger and Fred”. In deciding the case, the court of Appeals for the Second Circuit promulgated what has since become known as the *Rogers* test, through which a court

it held that “NCAA Football” does contain sufficient expressive contributions by Electronic Arts so as to warrant First Amendment protection.²⁹

Viewed as a whole, there are sufficient elements of EA’s own expression found in the game that justify the conclusion that its use of Hart’s image is transformative and, therefore, entitled to First Amendment protection.... the *NCAA Football* game contains ‘virtual stadiums, athletes, coaches, fans, sound effects, music, and commentary, all of which are created or compiled by the games’ designers.’³⁰

The pivotal difference in the respective courts’ analyses is the fact that unlike the *Keller* court, the *Hart* court extended its *Comedy III* transformation assessment to Electronic Arts’ expressive contributions to the video game as a whole, including the fact that games users can alter the plaintiff’s image using “add-ons” designed by the defendant.³¹ Interestingly, the court acknowledged that the fact that the plaintiff is presented unaltered and in his usual professional/celebrity setting (i.e., on the football field) is “problematic” for a finding of “transformation”, and moreover, “[i]t seems ludicrous to question whether video game consumers enjoy and, as a result, purchase more EA-produced video games as a result of the heightened realism associated with actual players.”³² Nonetheless, considering Electronic Arts’ total expressive contributions, particularly the “add-ons” which players can use to alter plaintiff’s image, the court concluded that its use of plaintiff’s image in the game was a transformative use overall and entitled to First Amendment protection.³³

What matters for [the court’s] analysis of EA’s First Amendment right is that EA created the mechanism by which the virtual player may be altered, as well as the multiple permutations available for each virtual player image. Since the game permits the user to alter the virtual player’s physical characteristics, including the player’s height, weight, hairstyle, face shape, body size, muscle size, and complexion... it follows that EA’s artists created

determines whether the use of a persona in the title of a work is merely a disguised advertisement or has some expressive relevance to the work itself. The court determined that relevance of Ginger Rogers’ persona to the expressive work at issue was akin to that of parody: the film was about two fictional and unglamorous Italian dancer contemporaries of the famous Rogers and Astaire dancing team and was intended as a social commentary on Hollywood and television facades and hypocrisies. The *Hart* court ruled that as between the *Comedy III* and *Rogers* tests, the *Rogers* test is more appropriate for assessing the marketing use of a persona in the title of a work as opposed to the expressive use of a persona in the work itself, which of course was the matter before the court. “Courts have determined that application of the *Rogers* test makes sense ‘in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product.’” *Hart*, 808 F. Supp. 2d at 788. The *Hart* court did go on to also assess “NCAA Football” under *Rogers*, and determined in its view, the result would be the same under either the *Comedy III* or *Rogers*’ tests.

²⁹ *Hart*, 808 F. Supp. 2d at 784.

³⁰ *Id.*

³¹ *Id.* at 785.

³² *Id.* at 783 (quoting James Holmes & Kanika Corley, *Defining Liability for Likeness of Athlete Avatars in Video Games*, 34 LOS ANGELES LAWYER 17, 20 (2011)).

³³ *Hart*, 808 F. Supp. 2d at 784-86.

a host of physical characteristic options from which the user may choose.... In [the court's] view, the creation of these varied potential formulations of each virtual player alone makes the game a transformative use of Hart's image.³⁴

The Road Not Taken: Retracing the Analytical Path of *Hart*

Whether or not the copyright-based transformation test is the most appropriate mechanism for balancing publicity rights against First Amendment interests, *Keller* applies the *Comedy III* test properly. The purpose of the transformation test is just as its name explains: *to assess the extent of the transformation of the plaintiff's image or persona in the defendant's work*. Thus the test scrutinizes any expressive embellishments that the defendant has added to the plaintiff's image or persona in order to determine whether the final result is more defendant's expressive creation than it is merely a replication of the plaintiff. To extend the *Comedy III* expressive assessment to defendant's contributions to other parts of the work, however, defeats the purpose of the test. One can alter the depiction of Fred Astaire dancing with a cane or a broom to show him instead dancing with a vacuum cleaner or with a golf club; you could then place any of these depictions in a variety of settings, such as a home, a museum, or a desert. Unless the expressive contributions or "add-ons" disguise or alter Astaire's personal image, however, it will be Astaire's recognizable image that is being traded upon.

Recently in *No Doubt v. Activision Publishing, Inc.*,³⁵ the California Court of Appeals applied the *Comedy III* test to address the "recognizable plaintiff in variable settings" problem, once again involving the unauthorized use of a celebrity persona, the rock band No Doubt, in a video game.³⁶ Here again the court found that the video game simply depicted the band "doing what they do" (performing rock music) and thus there was no expressive transformation of the band's image:

In [the video game] *Band Hero*...no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a videogame that contains many other creative elements, does not transform the avatars into anything other

³⁴ *Id.* at 785.

³⁵ 192 Cal. Rptr. 3d 397 (2011).

³⁶ Although No Doubt had agreed that their likenesses could be used in the game, they complained that Activision went beyond the parties' agreement and used their likenesses in ways they did not and would never consent to. *Id.* at 400-02.

than exact depictions of No Doubt's members doing exactly what they do as celebrities.³⁷

Where the *Hart* analysis goes awry is that it redirects and expands the *Comedy III* transformation test from a focused assessment of the publicity claim (i.e., is the plaintiff's image recognizable and also the principal attraction to the work) and turns it instead toward evaluating the overall expressive value of the work (does the work contain expressive elements regardless of their connection to the plaintiff's image). This might be a legitimate application of the *Comedy III* test if its purpose is to determine whether a work contains sufficient expressive elements so as to render it copyrightable- indeed, expressiveness is a threshold prerequisite to copyright protection. The issue here, however, is not whether the defendant has made expressive, copyrightable contributions *in general* (or for that matter, whether the defendant provides users with the tools such that they might undertake expressive transformation of the plaintiff's image); rather the issue is the impact of defendant's expressive contributions upon the plaintiff's image and the viability of the plaintiff's right of publicity claim.

Cases such as *No Doubt*, *Keller*, and *Hart* pose a problem not present in (and perhaps not even contemplated by) *Comedy III*. *Comedy III* concerned the commercial use of unadorned images of the Three Stooges, in connection with which the court posited that if the images had been creatively altered (for example, by adding horns, wings, moustaches, beards, etc.) there could come a point at which the Three Stooges were no longer recognizable and/or the original images served as no more than the "raw material" used to create a new expression work. In contrast, *No Doubt*, *Keller*, and *Hart* present the problem of the use of *recognizable* depictions of individuals *superimposed* into expressive settings created by the defendant. At best, these kinds of cases present a mixed or blended use of the plaintiff's persona, one that is both promotional and expressive. Arguably the transformation test is inapt in these situations; no image transformation has taken place and the expressive contributions by defendant have little or no connection to the representation of the persona being used.

For mixed or blended promotional/expressive uses, the issue may be less one of the plaintiff's publicity interests being in conflict with a societal interest in free speech and more one of equitable allocation of the fruits of the commercial exploitation of the plaintiff's persona. In such cases, a socially balanced assessment of the competing interests necessitates that the court assess the case-specific social utilities at issue and then weigh the relevant equities as between the plaintiff and defendant in deciding whether the unauthorized use should be permitted without *any* remuneration to the plaintiff at all. With respect to college athletes, courts should be mindful of the fact that NCAA rules prohibit student athletes from commercially exploiting their personas, which makes them especially vulnerable to unfair and socially unproductive commercial exploitation by others. "For this reason, the Court appreciates the plight of college players who

³⁷ *Id.* at 410-11.

are prohibited by NCAA bylaws from entering into licensing agreements and other “commercial opportunities” during their playing years.”³⁸ Courts should also keep in mind that as the Supreme Court has directed in *Ebay vs. Mercexchange, LLC*,³⁹ the recognition of an intellectual property interest does not inevitably lead to the imposition of injunctive relief.⁴⁰ Consequently a portion of the revenues generated by the unauthorized use may be plaintiff’s appropriate remedy. Such an approach acknowledges the social importance of the right of publicity, and further, is commensurate with the Supreme Court’s admonitions regarding the preservation of the right of publicity development incentives and social benefits.

Conclusion

As the Supreme Court has noted, “No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.”⁴¹ The technological advances of the past century have made possible a wide variety of new commercial uses for individual personas and other IP rights, and “either/or” characterizations of such uses as publicity rights infringements or legitimate First Amendment expressions are increasingly unhelpful. The *Comedy III* transformation and other publicity balancing tests are in need of refinement to meet the evolving demands of the digital information age. In the interim, courts should give due deference to the social utility function of publicity rights, particularly where the interests of amateur athletes and similarly situated publicity rights holders are concerned. Only through a more nuanced balancing of the pertinent social utilities can a more equitable and socially productive intellectual property framework be developed.

³⁸ *Hart*, 808 F. Supp. 2d at 783. Given that the use of their personas in such cases is neither solicited nor authorized by the players, an order by the court that the defendant pay compensation to the players should not be considered a violation of the NCAA rules by student athletes. Interpretation and application of the NCAA rules, however, is not a matter for the courts and should not stand as an obstacle to the court’s obligation to do equity.

³⁹ 547 U.S. 388 (2006).

⁴⁰ *Id.* at 392-93.

⁴¹ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977) (citing Harry Kalven, *Privacy in Tort Law - Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 331 (1966)); see also J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS at 131. (“While some criticize the right of publicity as posing the danger of invading our free speech rights, in fact, for all practical purposes, the only kind of speech impacted by the right of publicity is commercial speech -- advertising. Not news, not stories, not entertainment and not entertainment satire and parody -- only advertising and similar commercial uses.”).

Disciplinary Issues in College Athletics

The Penn State Scandal: Lessons for Universities Confronted with a Public Relations Crisis

By: Terry Fahn

Introduction

On April 23, 2011, Graham Spanier, longtime president of Penn State University, met with representatives of the Fiesta Bowl to decide the fate of that iconic football bowl game. Spanier, in his role as Chairman of the Bowl Championship Series (BCS) Presidential Oversight Committee, was part of a task force charged with determining whether the Fiesta Bowl “should remain a BCS bowl game,”¹ due to a major scandal involving alleged crimes committed by Bowl executives and an attempted cover-up of those activities.

At the meeting, Fiesta Bowl representatives explained that they recognized they had one of two choices when confronting the scandal: engage in a “reveal and reform” strategy to get everything out in the open and to begin the process of reformation and rehabilitation, or attempt to “conceal and cover up” what occurred and continue misleading the public. Fiesta Bowl representatives made it very clear that they had fully embraced “reveal and reform,” and Spanier left the meeting stating he was impressed with the Fiesta Bowl’s efforts.²

Unknown to anyone at that meeting, except Spanier, Penn State itself was facing an even greater crisis related to crimes committed by Penn State’s former assistant football coach Jerry Sandusky. In contrast to the Fiesta Bowl’s “reveal and reform” efforts, Spanier chose to “conceal and cover up” his own brewing scandal at Penn State. That decision ultimately contributed to his downfall as president of Penn State and to the devastating penalties imposed on the school.

The “reveal and reform” strategy developed and employed by the Fiesta Bowl provided Spanier with a clear blueprint for how he and other Penn State leaders could have handled the issues confronting them. So why did Spanier choose to make the flawed decision to “conceal and cover up” Sandusky’s criminal activities and the subsequent Grand Jury investigation?

In July, 2012, the independently investigated *Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky* (more commonly

¹ Steward Mandel, *BCS Task Force to Meet with Fiesta Bowl Officials Saturday in Chicago*, SI.COM (Apr. 22, 2011), <http://sportsillustrated.cnn.com/2011/football/ncaa/04/22/fiesta-bowl-bcs/index.html>.

² Spanier stated, "Personally, I was very impressed with the depth of their presentation, the sincerity of their efforts and the transparency that they brought to this discussion." Craig Harris, *Fiesta Bowl Makes Strong Case to BCS Panel to Stay in Series*, ARIZONA REPUBLIC (Apr. 23, 2011), <http://www.azcentral.com/sports/colleges/articles/2011/04/23/20110423fiesta-bowl-chicago-brk.html>.

known as “The Freeh Report”) revealed that Spanier’s motivations were naively, tragically, simple: he wanted to avoid bad publicity.³

How could the simple desire to avoid bad publicity lead to such horrific consequences and what is the proper way to handle these difficult situations? This paper will seek to provide some answers.

Crisis Management 101

“If you don’t tell your story, someone else will tell it for you.”

- Michael Sitrick, founder of crisis communications firm Sitrick And Company and author of *Spin: How to Turn the Power of the Press to Your Advantage*

Dealing with a situation proactively instead of reactively can make a world of difference to its outcome. When faced with a crisis, certain actions can be employed to mitigate the damage. Identifying and understanding the issues related to a potential crisis, creating a team to address it and developing a plan are simple concepts, yet they are often overlooked when an organization such as Penn State is facing an impending crisis situation. The following case studies provide an outline for how to guide a crisis to a successful resolution.

Establishing a Crisis Response Team

Deciding how to respond to a potential crisis depends on a variety of factors, including the nature of the accusations, the amount of information available, and the complexity of the situation.

That said, when confronted with a crisis situation it is almost always the best strategy to form a crisis response team.⁴ This team should have the experience and knowledge to formulate a strategy that integrates the thoughts, concerns, and opinions of various constituencies to form a cohesive communications plan. The best crisis management campaigns are those that dovetail with legal, corporate, and political strategies, so that key elements of the message are echoed across the board in court documents, public statements, and internal messaging. The details, wording, and method of delivery should be tailored for each specific audience, but the overall strategy must present a cohesive message on all fronts.

Maintaining oversight and centralized control of communications is critical in response to a crisis; therefore the team should include a “field general” who can make executive decisions when team members disagree on how to proceed and appoint the proper spokespersons for particular issues. Although it seems to be a

³ FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY 16 (July 12, 2012), available at <http://thefreehreportonpsu.com/> [hereinafter FREEH REPORT].

⁴ See Chad Brooks, *How Penn State Can Start Rebuilding Its Reputation*, LIVE SCIENCE (July 23, 2012), <http://www.livescience.com/21780-penn-state-ncaa-brand.html>.

natural response, a university facing a crisis situation will usually have to contend with competing, if not outright conflicting interests from the parties involved.⁵ Parties connected to the crisis, which in Penn State's case might include administrators, coaches, and athletes, may have personal or even legal interests that diverge from the university. While these individuals will certainly play an important role in developing and implementing a crisis response plan, the team should also include attorneys and advisors who do not have any personal stake in the decision making process to prevent irreconcilable conflicts of interest.

Lawyers play a crucial role in properly developing a crisis management plan because they are usually the first to be called when a leader is confronted with a crisis situation. This can be a tricky proposition for an attorney. More often than not, a lawyer confronted with a major crisis will instinctively recommend that a client say and do nothing. This might be good advice from a legal standpoint, but from a public relations perspective it is often the worst possible advice. Indeed, not disclosing the issue or trying to cover it up can create additional and more severe problems, as is now evident in the case of Penn State.

Involving a board of directors or Board of Trustees in the decision making process during a crisis can also complicate matters. Although it is important to alert the Board of Trustees at some level, bringing an entire board "in the loop" can be impractical and fraught with danger as it can consist of dozens of individuals with separate allegiances, agendas and experiences. Aside from the logistics of discreetly calling board meetings on short notice, individual board members may leak information to the media. To be sure, in these days of social media and the 24-hour news cycle, it is easy for individual actors to "go rogue" and reach out to the media on their own.

Because of these potential problems, designating a board task force to oversee a crisis response is usually preferable to involving a full board.

At the Fiesta Bowl, for example, Chairman Duane Woods, upon receiving credible evidence of wrongdoing and a cover-up, worked with outside counsel and established a Special Committee of the Board of Directors to investigate the allegations of wrongdoing.⁶ The Fiesta Bowl board passed a resolution empowering the Special Committee, which consisted of two well-respected board members and a former Chief Justice of the Arizona Supreme Court, who served as an independent member of the committee, "to conduct and complete its own independent and separate investigation" into the matter.

The Special Committee subsequently hired separate counsel, notified employees they should preserve documents, suspended individuals suspected of wrongdoing, and informed employees about the retention of counsel and payment of attorney's

⁵ See Jeanette Mulvey, *Difficult Decisions: A Crisis Management Lesson from Penn State*, BUSINESS NEWS DAILY (July 23, 2012), <http://www.businessnewsdaily.com/2878-lessons-penn-state.html>.

⁶ ROBINS, KAPLAN, MILLER & CIRESI LLP, COUNSEL TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF THE FIESTA BOWL 11-12, 153-154 (Mar 21, 2011).

fees because of the many inherent conflicts of interest.⁷ The Fiesta Bowl Board thereafter hired its own separate counsel not affiliated with the Special Committee's counsel because its previous law firm was potentially implicated in the wrongdoing and cover-up. It also retained a crisis management firm to work with the board to develop and implement a crisis management plan to announce the results of the Special Committee investigation to the news media, sponsors, partners, employees and other constituents, and to tell the story of the Fiesta Bowl's "reveal and reform" efforts to the NCAA and the general public.

Understanding the Issues, Facts, Objectives and Audiences

A simple reality of crisis management is that you cannot know what to say unless you know what you are talking about. Much like an attorney prepares for litigation, a crisis management team must conduct its own discovery process. The "due diligence" phase should be done in coordination with the core communications team and other advisors and should include gathering and reviewing available facts. The information obtained should not be taken at face value — attempts should be made to independently verify what is learned. One of the best ways to conduct this type of due diligence is to approach the case the same way an investigative reporter might research a story: start asking tough questions, conduct independent research, and try to poke holes in the story being presented.

An organization confronted with a major crisis can take control of the situation by disclosing its problems and identifying the steps it is taking to remedy the situation. A crisis management plan based on the facts will be difficult to refute,⁸ and it will also help to both prevent potential future pitfalls and mitigate immediate challenges.⁹ Good crisis communications planning can provide an organization with a framework for shaping its narrative. By getting "ahead of the news," an institution or organization can maintain some semblance of control as the main, or even the only source, behind a breaking story. This is very important because the first major story "invariably sets the tone for the coverage that follows," presenting a set of "base facts," which are likely to be repeated in all subsequent stories.¹⁰ Not being responsive, which sometimes results in a "no comment" or other defensive posture, is usually not a good strategy because it allows the media (or the public, or mass hysteria) to provide the framework and set the tone for the crisis, instead of allowing the client to tell their own story.

⁸ Steve Lopez, *With Image Flat-lining, It's Time for Spin Doctor*, LA TIMES (Feb. 28, 2007), <http://articles.latimes.com/2007/feb/28/local/me-lopez28>.

⁹ David Weiner, *Crisis Communications: Managing Corporate Reputation in the Court of Public Opinion*, IVEY BUSINESS JOURNAL, (Mar./Apr. 2006) <http://www.iveybusinessjournal.com/topics/the-workplace/crisis-communications-managing-corporate-reputation-in-the-court-of-public-opinion>.

¹⁰ MICHAEL SITRICK & ALLAN MAYER, *SPIN: HOW TO TURN THE POWER OF THE PRESS TO YOUR ADVANTAGE* 107-108 (Washington, D.C.: Regnery 1998).

Determining the appropriate spokesperson — or persons — for a campaign, whether a board chairperson, a university official, a lawyer, or an athletic director or coach, is another important element of a crisis management strategy. The best spokespersons in a crisis situation are those who provide a clear and consistent voice that adds credibility to the story. Spokespersons can be designated to speak on particular issues, such as having an attorney speak about legal issues and having an administrator talk about larger issues, but it is important to designate as few spokespeople as possible.

The resignation of Ohio State University coach Jim Tressel provides a good example of how to communicate with various audiences. In May 2011, Tressel a much-beloved coach, known for his sincerity and politeness and praised for his "integrity,"¹¹ resigned under pressure after the NCAA investigation revealed he withheld information about at least six of his players, including quarterback Terrell Pryor, receiving cash and tattoos in exchange for autographed jerseys, rings and other memorabilia. The NCAA's investigation could have easily become a much worse public relations nightmare for Ohio State if it had not aggressively confronted the growing scandal.

Ohio State's first step in response to the allegations was a prompt, multifaceted response to their key audiences – the NCAA, fans, and the media. The day after Jim Tressel's announcement, Ohio State suspended Tressel for the first two games of the season and imposed a \$250,000 fine. These actions served to immediately acknowledge the problem and accept responsibility, "essentially a pre-emptive measure" acknowledging the NCAA's Committee on Infractions' right to impose sanctions.¹² Ohio State deployed administrators to maintain warm and open relationships with both national and local media outlets, from acknowledging their missteps in an interview with the Associated Press to providing commentary to *The Lantern*, Ohio State's student newspaper.¹³ At the same time, athletic director Gene Smith acknowledged loyal fans' concerns by expressing support for Tressel, saying "Wherever we end up at the end of the day, Jim Tressel is our football coach."¹⁴

Ohio State also communicated separately with key stakeholders, sending a letter from the president to the university's Board of Trustees¹⁵ and addressing the

¹¹ George Dohrmann, *SI Investigation Reveals Eight-year Pattern of Violations under Tressel*, SI.COM (May 30, 2011), <http://sportsillustrated.cnn.com/2011/magazine/05/30/jim.tressel/index.html>.

¹² Pete Thamel, *Ohio State Suspends Tressel for Two Games*, N.Y. TIMES (Mar. 9, 2011), <http://www.nytimes.com/2011/03/09/sports/ncaafootball/09tressel.html>.

¹³ Doug Lesmerises, *OSU AD Gene Smith Says Tressel Press Conference in March Was Poorly Handled, Lacked Apology*, CLEVELAND.COM (Apr. 19, 2011), http://www.cleveland.com/osu/index.ssf/2011/04/osu_ad_gene_smith_says_tressel.html.

¹⁴ Mark Schlabach, *Scandal Tarnishes Tressel, Ohio State*, ESPN.COM, (Mar. 8, 2011), http://sports.espn.go.com/nfc/columns/story?columnist=schlabach_mark&id=6195223.

¹⁵ *Jim Tressel Tenders resignation*, ESPN.COM, (May 31, 2011), <http://sports.espn.go.com/nfc/news/story?id=6606999>.

faculty to explain the situation and the university's plans for making amends.¹⁶ In addition, Ohio State carefully controlled their communications strategy with Tressel and respected spokespersons. University president E. Gordon Gee served as the primary spokesman, proclaiming OSU the "poster child for compliance,"¹⁷ but his message was broadcast across many platforms and echoed by other Ohio State representatives, including Gene Smith¹⁸ and Ohio State spokesman Dan Wallenberg.¹⁹

Despite occasional setbacks and misstatements, including Gordon Gee's unfortunate statement that he hoped Tressel didn't fire him,²⁰ OSU successfully distanced itself from the scandal by making the case that "the head coach is not the same thing as the institution,"²¹ yet it was also able to retain the goodwill of fans and the media by maintaining good terms with Tressel. In fact, Tressel's resignation statement was released by the university, and was followed promptly by a video from athletic director Gene Smith confirming that both parties agreed Tressel's resignation was "in the best interest of Ohio State."²² As a result, Ohio State was able to successfully "spin" their crisis while keeping the support of its fans and escaping with only a "slap on the wrist"²³ from the NCAA.

Interfacing with the News Media

While fans, stakeholders, and the NCAA are key audiences, properly managing the news media can be critical to the success of a crisis management strategy.

There are many ways to tell a story to the media, including a press conference which seems to be the standard approach employed by many schools facing a crisis. Although holding a press conference is a good way to gather a large group of reporters in one place at one time and tell a story, press conferences might not be the most strategic way to convey a story because they are hard to control and they allow the media to take a story in different directions. Another downside is that reporters attending press conferences can be influenced by other reporters in

¹⁶ Erick Smith, *E. Gordon Gee: Ohio State Is 'poster Child for Compliance'*, USA TODAY (Oct. 5, 2011), <http://content.usatoday.com/communities/campusrivalry/post/2011/10/e-gordon-gee-ohio-state-poster-child-for-compliance-gene-smith/1>.

¹⁷ Encarnacion Pyle, *Ohio State Football Violations: System Is Not Broken, Gee Says*, THE COLUMBUS DISPATCH (Oct. 5, 2011), <http://www.buckeyextra.com/content/stories/2011/10/05/system-is-not-broken-gee-says.html>.

¹⁸ *Ohio State Reports 46 Minor NCAA Violations across 21 Sports*, SI.COM (June 29, 2012), <http://sportsillustrated.cnn.com/2012/football/ncaa/05/18/OSU-ncaa-violations.ap/index.html>.

¹⁹ Rusty Miller, *Ohio State Reports 46 Minor NCAA Violations*, YAHOO! SPORTS (May 18, 2012), <http://sports.yahoo.com/news/ohio-state-reports-46-minor-183405497--spt.html>.

²⁰ Mark Schlabach, *Scandal Tarnishes Tressel, Ohio State*, ESPN.COM (Mar. 8, 2011), http://sports.espn.go.com/nfl/columns/story?columnist=schlabach_mark&id=6195223.

²¹ Jon Wilner, *Pac-12 Football: USC Sanctions, NCAA Logic (?) and Ohio State's Great Escape*, SAN JOSE MERCURY NEWS (July 25, 2011), <http://blogs.mercurynews.com/collegesports/2011/07/25/pac-12-football-usc-sanctions-ncaa-logic-and-ohio-states-great-escape/>.

²² *Jim Tressel Tenders resignation*, ESPN.COM (May 31, 2011), <http://sports.espn.go.com/nfl/news/story?id=6606999>.

²³ Ted Miller, *Ohio State? Nothing to See There, USC Fans!*, ESPN.COM (Dec. 30, 2011), http://espn.go.com/blog/nfnation/post/_/id/56115/ohio-state-nothing-to-see-there-usc-fans.

attendance and by the chaos that often ensues at press conferences, instead of being influenced by the person delivering the message and the story.

Dealing directly with selected reporters to break a story is usually preferable, because the story can be more controlled. The process of engaging a reporter is a complicated and sensitive endeavor. It usually begins with reaching out to a chosen reporter who has the right attributes – respect among peers, experience on a given topic, fairness and overall credibility – and ideally, a reporter who is already covering the issue. After making contact, it is important to establish a good working relationship and mutual trust. If the reporter does not trust what you are saying, it will be difficult, if not impossible, to obtain the desired outcome. Any media strategy must include the unbreakable rule that spokespersons absolutely never lie to a reporter.²⁴

Depending on the circumstances, experienced public relations executives can negotiate terms that dictate the timing and parameters of a given story, and then engage with a reporter. Even then, sometimes dealing directly with a situation is impractical or impossible. In these scenarios, stories can also be leaked to a reporter on a “not for attribution” or “off the record” basis. “Not for attribution” typically means that a story can use information provided by a source provided that it is not sourced to a particular person. For example, a story might state “according to a source familiar with the matter.” “Off the record” conversations are generally held with the understanding that reporter agrees not to quote, publish, or otherwise reveal the contents of the conversation. This provides the opportunity for a spokesperson to speak candidly, provide background information on an issue, and answer questions from a reporter without having to be concerned with their statements being printed or taken out of context later. This type of approach, however, is risky and should only be employed by seasoned experts.

Making sure coverage is accurate is another crucial step in the crisis management process. More than ever in this digital age, news moves quickly and, if left to others, can spin out of control within hours. So it is crucial to correct or explain anything that is wrong. Members of the crisis management team, sometimes affectionately described as a “truth squad,” should regularly review news coverage, blog postings and social media and, where possible, react quickly to correct false or misleading stories to stop the flow of bad information.

In the case of the Fiesta Bowl, investigative reporter Craig Harris of the Arizona Republic broke the news about issues related to improper campaign contributions being made by Fiesta Bowl executives. The Fiesta Bowl’s initial response, led by former CEO John Junker, was foolish; he and others affiliated with the bowl engaged in a series of steps that could reasonably be characterized as a cover-up.

²⁴ *Crisis Management Experts Say Painful Freeh Report Helps Penn State to Move On*, THE WASHINGTON POST (July 14, 2012), http://www.washingtonpost.com/business/industries/crisis-management-experts-say-painful-freeh-report-helps-penn-state-to-move-on/2012/07/14/gJQAYXnOkW_story.html.

Harris and others, including government investigators, were not persuaded and the investigation continued until Board Chairman Duane Woods was alerted to the wrongdoing and took control of the situation. Thereafter, the Fiesta Bowl Board of Directors, led by Woods, developed a plan to manage the ongoing crisis.

Interfacing with Harris, who was continuing to closely cover the story, was an important part of that crisis management plan. But the relationship needed to be rehabilitated because Harris, simply put, did not trust the Fiesta Bowl. The Fiesta Bowl and its advisors held off-the-record meetings with Harris and his editors to apologize for what had happened and to explain steps that were being taken to reveal the wrongdoing and reform the bowl moving forward, including the ongoing independent investigation by a special committee of the Fiesta Bowl board of directors. Following the meeting, which at times was very contentious, representatives of the Fiesta Bowl worked with Harris to help accurately tell the “reveal and reform” narrative.

Penn State’s Failed Attempt at Crisis Management

On June 22, 2012, former Penn State defensive coordinator Gerald "Jerry" Sandusky was convicted of sexually abusing 10 boys over a 15-year period in a scandal that “rocked the university's community.”²⁵ The following month, a scathing report by former FBI director Louis Freeh detailed Penn State’s repeated failures related to the Sandusky scandal. The Freeh Report provided substantial evidence that Penn State officials conspired to conceal Sandusky’s numerous crimes. Penn State leaders, led by former president Graham Spanier, according to the report, took these actions “in order to avoid the consequences of bad publicity.”²⁶

Instead of avoiding bad publicity, Penn State’s ill-conceived “strategy” led to a perceived cover-up and even worse publicity. It is obvious that the Penn State scandal could have been handled more effectively by employing basic crisis management principles. Even in seemingly extreme crises, other universities, institutions and organizations have taken the necessary steps to prevent a total disaster like what occurred at Penn State.²⁷ As noted in a July 2012 article in *Forbes*, Penn State followed an all-too-predictable pattern for failure.²⁸ All failed crises, the article noted, share “a common theme: significant breakdowns in leadership that create an environment where (1) ethical lapses and misconduct can

²⁵ Bill Chappell, *Penn State Abuse Scandal: A Guide And Timeline*, NPR.COM, (June 21, 2012), <http://www.npr.org/2011/11/08/142111804/penn-state-abuse-scandal-a-guide-and-timeline>.

²⁶ FREEH REPORT, *supra* note 3, at 16.

²⁷ *Penn State Scandal Is a Case Study in Bad Crisis Management*, THE DENVER POST (Nov. 9, 2011), <http://blogs.denverpost.com/colleges/2011/11/09/penn-state-scandal-is-a-case-study-in-bad-crisis-management/22043/>.

²⁸ Amy Conway-Hatcher, Alan Salpeter, & Greg Jaeger, *Why the Penn State Scandal Happened -- and How to Keep Other Scandals From Happening*, FORBES (July 20, 2012), <http://www.forbes.com/sites/frederickallen/2012/07/20/why-the-penn-state-scandal-happened-and-how-to-keep-scandals-from-happening/>.

occur, (2) red flags are ignored, and (3) problems, once they come to light, are mismanaged.”²⁹

Not preparing for problems

Although Penn State could not have predicted the severity and depravity of the crimes committed by Sandusky, it should have been prepared for the possibility that at some point school could be faced with a crisis. Athlete, coach, and administrator misconduct are all the sorts of general crisis situations a preventative crisis management plan can prepare for by establishing clear guidelines for reporting a potential scandal and appointing the proper authorities to deal with it. Yet, even without a contingency plan in place, former Penn State leaders had numerous opportunities to prepare and employ a crisis management strategy to minimize and mitigate potential damage to the school. A crisis response plan should have been implemented following a case involving Sandusky in 1998, and certainly following the 2001 incident where McQuerry witnessed crimes being committed.³⁰ It goes without saying that Spanier, who according to the *Freeh Report*, was already aware of the 1998 incident,³¹ could, and should have been more forceful in taking action against Sandusky. With that aside, the *Freeh Report* mentions many other points at which Spanier and other Penn State leaders, including former general counsel Cynthia Baldwin, could have begun developing a crisis management plan.³² Instead, the school’s leaders seemingly engaged in an attempt to cover-up the scandal even after they were made aware of a grand jury investigation.

As the *Freeh Report* makes clear, Penn State leaders not only refused to admit that there was a problem, even to the Penn State Board of Trustees,³³ but failed to have a clear plan or even an understanding of how to address the growing crisis. It was unclear “if any person responsible for Penn State’s risk management examined Sandusky’s conduct.”³⁴ Even once the scandal was publicized in 2011, the *Freeh report* notes, the board “did not take steps that might have protected the University, such as [...] preparing for the possibility that the results of the Grand Jury investigation could have a negative impact on the University,”³⁵ and that they were “unprepared to handle the crisis that occurred when Sandusky, Curley and Schultz were charged.”³⁶ Coach Joe Paterno told reporters he “didn’t know exactly how to handle” the situation after discovering Sandusky’s misconduct.³⁷ Even Spanier told one Trustee he was “not sure what one is permitted to say, if anything.”³⁸ If Penn State had clear guidelines in place to admit and address its

²⁹ *Id.*

³⁰ FREEH REPORT, *supra* note 3, at 23.

³¹ *Id.* at 20.

³² *See Id.*

³³ *Id.* at 85-89.

³⁴ *Id.* at 51.

³⁵ *Id.* at 80.

³⁶ *Id.* at 81.

³⁷ *Id.* at 16.

³⁸ *Id.* at 26.

problems, their efforts might not have been perceived as such an extensive cover-up.

Failure to Establish a Crisis Response Team

Penn State had numerous warnings that a storm was coming, and thus numerous opportunities to engage the necessary professionals and form a crisis response team. Instead, the *Freeh Report* concludes that Board's "overconfidence in Spanier's abilities to deal with the crisis" hindered the school from consulting respected counsel or communications experts.³⁹ When reporters contacted Spanier six months before the Sandusky story first broke in March 2011, Spanier did not direct their inquiries to an expert trained in dealing with the media,⁴⁰ nor did he inform the board or any sort of group about the brewing trouble.⁴¹ Rather, he took it upon himself to handle the matter with the assistance of a few trusted and loyal advisors who had little experience with handling a crisis of this magnitude.⁴²

Even after it appeared that Penn State senior administrative officials were going indicted as part of the growing scandal in October 2011, Spanier continued to dominate the communications strategy.⁴³ According to the *Freeh Report*, Spanier wanted to issue a statement offering the indicted officials "unconditional support."⁴⁴ A member of the Penn State Communications staff called the phrase "horrendous" but was overruled by Spanier, apparently because Spanier had been loyal to the school and other officials did not think it appropriate to "abandon [Spanier] merely because things did not turn out well."⁴⁵ The *Freeh Report* makes it clear that, whatever policies were theoretically in place, for many years at Penn State the effective crisis response strategy was Spanier's decision alone.

The Penn State Board of Trustees eventually terminated Spanier in an attempt to take control of the crisis, but they too struggled in their less than decisive approach, which seemed to further the public's impression that Penn State officials were somehow complicit in Sandusky's crimes. "It took days before the Board of Trustees issued responses and put a face to leadership," one media outlet observed.⁴⁶ Although under normal circumstances, taking a week for a decision might be prudent, in Penn State's case the silence was deafening. "With social media endlessly buzzing about it for months on end, and with the public curious

³⁹ *Id.* at 15.

⁴⁰ *Id.* at 25, 82.

⁴¹ *Id.* at 25, 80, 88.

⁴² *Id.* at 82-97.

⁴³ *Id.* at 89-90.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ David Meerman Scott, *Penn State University: Poor Crisis Management And Social Media Skills*, THE HUFFINGTON POST (June 23, 2012), http://www.huffingtonpost.com/david-meerman-scott/penn-state-poor-crisis-management_b_1620763.html.

to know the University's position, this decision to do nothing and to stay silent was the worst thing that Penn State could have chosen to do."⁴⁷

Although at least one Trustee "suggested an 'independent investigation' by outside counsel and retention of a crisis management firm," the decision was put off until the next day,⁴⁸ and then delayed another four days before appointing a task force and issuing its own statement.⁴⁹ In addition to clearly and desperately needing legal and media counsel, the Board should have considered adding a personnel counsel to its crisis response team to handle the firing of famed coach Joe Paterno. Instead, "the Board did not explore the range of personnel actions available to them regarding Paterno's role in the football program,"⁵⁰ resulting in Paterno's disastrous firing.

While Spanier's early role in the crisis highlights the importance of having a variety of individuals with different perspectives, included on a crisis response team, the Board's later failures demonstrate the need for a "field general" who can quickly achieve consensus and put a plan into effect. The coaches and administrators "on the ground" in the Penn State crisis could clearly have benefitted from an outside perspective and from a seasoned team that included legal communications and crisis management specialists who could have helped Penn State take swift, decisive actions to stem the tide of the growing Sandusky crisis.

Not Understanding the Issues, Facts, Objectives and Audiences

Another problem with Penn State's approach to the growing crisis was how unclear the facts and issues were to those involved in the scandal. Because they did not fully understand the facts and issues, Penn State was unable to clearly recognize the audiences and objectives it needed to target.

Without question, one of the biggest mistakes in the Penn State crisis was Spanier's complete failure to investigate Sandusky's actions. Spanier was "not concerned with criminality"⁵¹ and did not make an "effort to investigate the facts concerning Sandusky."⁵² The Penn State Board of Trustees also did not do any due diligence to clarify the facts of the situation, and thus was unsure whether "this was the third or fourth time a grand jury had investigated Sandusky," which they astoundingly took as "an indication that criminal charges were not likely" and that the Sandusky issue "was not an 'important' issue for the University and the investigation was not a cause for concern."⁵³ Penn State's approach to the

⁴⁷ Melissa Agnes, *5 Lessons From Penn State's Social Media Crisis Communications Fail*, BUSINESS 2 COMMUNITY (June 25, 2012), <http://www.business2community.com/social-media/5-lessons-from-penn-states-social-media-crisis-communications-fail-0202911>.

⁴⁸ FREEH REPORT, *supra* note 3, at 29.

⁴⁹ *Id.* at 94.

⁵⁰ *Id.* at 95.

⁵¹ *Id.* at 73.

⁵² *Id.* at 90.

⁵³ *Id.* at 88.

Sandusky crisis was the antithesis of good crisis management. Instead of ascertaining and analyzing the facts of the situation before addressing the media, Penn State responded to media inquiries by offering its “unconditional support” to two individuals who were indicted for lying about the sexual abuse of minors.⁵⁴ On top of this untenable position, because of their lack of knowledge about the facts of the matter, Penn State representatives were completely unable to clearly explain the circumstances surrounding the Grand Jury investigation.

Penn State not only misunderstood the facts of its case, it also misunderstood – or underestimated – the amount of media scrutiny that the Sandusky matter would merit, as well as the various opinions of its various constituents. For example, while Penn State attempted to address the demands of law enforcement and the media, it completely failed in its attempts to communicate with Penn State students, alumni, faculty and staff. This was evident when the Board made the decision to fire longtime Penn State football coach Joe Paterno.

When the Penn State scandal was first revealed, Paterno’s statements addressed only the concerns of law enforcement, claiming that he covered himself legally by reporting the incident to his superior.⁵⁵ But in reality, Paterno was informed of Sandusky’s shocking crimes by a coach who witnessed it first-hand.⁵⁶ Paterno did not go to the police because he felt that he was “legally covered” by informing his superiors at Penn State.⁵⁷ The media scrutinized the school for their morals and claimed Penn State was more interested in protecting its image, rather than the children.⁵⁸

In a scramble to placate the media, the Board of Trustees rushed headlong into another misguided decision when they fired Paterno via a late night telephone call without notice, completely overlooking other significant constituencies vital to the future of the university and the sports team.⁵⁹ There was a fierce debate over Paterno’s firing and the fact that the Board of Trustees “did not have a plan in place to notify Paterno of its decision.”⁶⁰ Some Trustees felt that the decision to fire Paterno was “rushed” and not well thought out.⁶¹

While this move may have pacified the media temporarily, it resulted in an “outpouring of criticism against the Trustees by students, alumni and other Penn

⁵⁴ *Id.* at 25.

⁵⁵ Matt Hayes, *University Culture Protected Paterno, Buried Penn State Deeper in Scandal*, SPORTING NEWS (Nov. 7, 2011), <http://aol.sportingnews.com/ncaa-football/feed/2011-11/penn-state-scandal/story/university-culture-protected-paterno-buried-penn-state-deeper-in-scandal>.

⁵⁶ FREEH REPORT, *supra* note 3, at 62-69.

⁵⁷ *Id.*

⁵⁸ Matt Hayes, *University Culture Protected Paterno, Buried Penn State Deeper in Scandal*, SPORTING NEWS (Nov. 7, 2011), <http://aol.sportingnews.com/ncaa-football/feed/2011-11/penn-state-scandal/story/university-culture-protected-paterno-buried-penn-state-deeper-in-scandal>.

⁵⁹ Will Bunch, *Penn State's Erickson Thinks 'This Is Not a Penn State Scandal.'* Seriously, PHILLY INQUIRER (Jan. 12, 2012), <http://www.philly.com/philly/blogs/attytood/137228388.html>.

⁶⁰ FREEH REPORT, *supra* note 3, at 95.

⁶¹ *Id.*

State supporters.”⁶² The move, which the Board recognizes was not handled properly,⁶³ was reactionary and poorly executed, resulting in school-wide protests that caused Penn State around \$200,000 in damages, along with even more unneeded bad press.⁶⁴ In the end, the Board’s actions left Penn State with a tarnished image and frayed relations with law enforcement, the media, the public, and even ardent Penn State fans and supporters, who were frustrated and disappointed with how poorly the situation had been handled.

Not Communicating Effectively

The Penn State outcome was not written in stone. Penn State could have changed the outcome if it had gained media support and public sympathy for the administration as it struggled to deal with the fallout of a clearly heinous and shocking series of crimes. Instead of explaining its side of the story in a clear, concise and unified way, Penn State, in an increasingly contentious struggle between the Board of Trustees and Spanier, issued three separate press releases in four days, each with a different message contradicting the last.⁶⁵ First, Spanier issued a press release expressing “unconditional support” for the accused coaches; then Spanier issued a press release stating that the accused had “voluntarily changed their employment status;” finally the Board issued a press release expressing “outrage” at the Grand Jury presentment and, one day later, it announced that Spanier had been fired.⁶⁶ The next day the Board of Trustees held a press conference to try to explain what had occurred.⁶⁷ These events, to an outside observer, gave the appearance of utter chaos and lack of control at Penn State – an appearance that was not far from the truth.

Once the Board of Trustees had wrested control from Spanier, it attempted to establish a more consistent communications strategy and approach, but again their efforts were ineffective. The Board appointed newly-inducted Penn State President Rodney Erickson as a spokesperson, but Erickson did not have the reputation or levels of trust established with the public and the media necessary to undo all the previous damage done to Penn State’s image in the press. In fact, Erickson only exacerbated the problem when he engaged in a “hamhanded rebranding effort,”⁶⁸ telling alumni, “This is not the Penn State Scandal. This is the Sandusky Scandal.”⁶⁹ This statement naturally sparked additional criticism from both the alumni and the media, including comments that Erickson embodied “a stunningly persistent sense of denial” and Penn State’s “communications [...]

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Anna Orso, *Penn State Student Involved in the Nov. 9 Riot Sentenced*, THE DAILY COLLEGIAN, (Mar. 28, 2012), http://www.collegian.psu.edu/archive/2012/03/28/psu_rioter_sentenced_.aspx.

⁶⁵ FREE REPORT, *supra* note 3, at 89-96.

⁶⁶ *Id.*

⁶⁷ *Id.* at 30.

⁶⁸ *Jerry Sandusky Scandal IS Penn State Scandal*, STAR-LEDGER EDITORIAL BOARD (Jan. 13, 2012), http://blog.nj.com/njv_editorial_page/2012/01/jerry_sandusky_scandal_is_penn.html.

⁶⁹ *Penn State President Blames Scandal on Sandusky*, CNN.COM (Jan. 13, 2012), http://articles.cnn.com/2012-01-13/us/us_penn-state-paterno_1_sexual-abuse-vice-chairman-john-surma-sandusky?_s=PM:US.

ignored the overwhelming failures of Penn State's leaders in the Sandusky case."⁷⁰

Mishandling the Media

There is no question that the media played an unprecedented and pivotal role in the Penn State crisis. The scandal began when Sarah Ganim, a crime reporter for *The Patriot-News* in Harrisburg, Pa., broke the story in March 2011 that Sandusky was the subject of a grand jury investigation for sexually abusing young boys.⁷¹ The media and the public pressured the NCAA to get involved and impose sanctions on Penn State.⁷² The NCAA initially refused to get involved, claiming Sandusky's crimes were a legal matter for law enforcement, not an issue of Association rules.⁷³ Yet eventually, the media gave the NCAA the excuse it needed to take action. After *CNN* reported a series of emails indicating that the NCAA rule of the "Right Hierarchy" may have been violated,⁷⁴ the NCAA launched its own investigation. In July 2012, the NCAA announced harsh sanctions for Penn State. Many commentators argued that intense pressure from the public and the media forced the NCAA to bypass "its normal procedure for investigating and sanctioning"⁷⁵ in favor of "providing a swift reaction in response to public outcry."⁷⁶

Any institution might be shaken after being hit with such brutal media fury. Yet Penn State had an advantage it didn't act on – it knew the media storm was coming. In September 2010, six months before Ganim published her story and over a year before the headlines made national news, a *Patriot-News* reporter contacted Spanier and exchanged emails about the Grand Jury investigation into Sandusky.⁷⁷ This tentative outreach from the media provided Spanier with the perfect opportunity to guide this breaking story, engaging with the media to ascertain where the story was headed and attempt to mitigate the negative coverage. Again a few days before the story broke, Spanier and Baldwin at Penn State were contacted by the *Patriot-News* that the paper would be running a story

⁷⁰ Will Bunch, *Penn State's Erickson Thinks 'This Is Not a Penn State Scandal.' Seriously*, *Penn State's Erickson Thinks 'this Is Not a Penn State Scandal.' Seriously*, PHILLY INQUIRER (Jan. 12, 2012), <http://www.philly.com/philly/blogs/attytood/137228388.html>.

⁷¹ Anna Luczkow, *Reporter Who Broke Sex Abuse Scandal Speaks at OU*, THE ATHENS NEWS (Apr. 15, 2012), <http://www.athensnews.com/ohio/article-36658-reporter-who-broke-s.html>.

⁷² Mike Chiari, *Jerry Sandusky Scandal: NCAA Needs to Make Example of Penn State with Sanctions Nittany Lions*, BLEACHER REPORT (Nov. 9, 2011), <http://bleacherreport.com/articles/932252-jerry-sandusky-scandal-ncaa-needs-to-make-example-of-penn-state-with-sanctions>.

⁷³ Erick Smith, *Mark Emmert: NCAA Will Wait until Penn State Probe Is over*, USA TODAY (Nov. 10, 2011), <http://content.usatoday.com/communities/campusrivalry/post/2011/11/ncaa-mark-emmert-penn-state-investigation-1>.

⁷⁴ Stephanie Loh, *Legal Experts: New Evidence of Cover-up Reflects Grim Future for Penn State Football*, THE PATRIOT NEWS (June 30, 2012), http://mobile.pennlive.com/advpenn/pm_111039/contentdetail.htm?contentguid=k5dKTrv9.

⁷⁵ Tommy Hick, *Penn State Deserves Punishment, but Will NCAA Overstep Its Bounds*, PRESS REGISTER (July 23, 2012), http://www.al.com/sports/index.ssf/2012/07/penn_state_deserves_punishment.html.

⁷⁶ *Id.*

⁷⁷ FREEH REPORT, *supra* note 3, at 25; *Id.* at 82.

about Sandusky.⁷⁸ This provided another opportunity to engage with the reporter and get in front of the story. Yet Penn State continue to evade the media. Even after the report was released in March 2011, multiple representatives from the university declined to comment.⁷⁹

Penn State Moving Forward

Over the past year Penn State has installed an almost entirely new administration – a new president, a new athletic director, and a new football coach – giving the school a chance at a fresh start with the media and an opportunity to rebuild a positive relationship on new ground. But has Penn State really learned a lesson from the Sandusky scandal?

Evidence indicates that Penn State may not be changing its ways. For example, in a June 2012 *New York Times* profile describing how “a Changed Penn State Is Moving On” after the Sandusky scandal, *none* of the new Penn State administration officials are quoted directly.⁸⁰

As the fallout from the scandal and the NCAA’s sanctions continue, Penn State should work to build and maintain good relationships with prominent media outlets, providing interviews and other opportunities to help reporters understand Penn State’s perspective and story. Because of the continuing media scrutiny, any steps undertaken by Penn State to rehabilitate its tattered image must be done carefully and with full transparency. Rebuilding the trust of the media is crucial, and any steps that could be interpreted as misleading or dishonest will likely create even more tension with the media. Penn State will also need to expand the focus of their messaging beyond the media, and create a more unified series of talking points to clearly portray their story. Since Penn State’s allegations broke, they have “not exactly put forward a single human being – leadership or spokesperson -- to answer questions from media and the public.”⁸¹

Conclusion

After such a prolonged series of disasters, missteps, and miscalculations, the NCAA’s harsh sanctions on Penn State in July 2012⁸² were not much of a surprise. What did come as a great surprise was how such a small, irrational fear – the fear of bad publicity – escalated into such a shocking and tragic crisis. Sadly,

⁷⁸*Id.* at 25, 82, 85.

⁷⁹ *Report: Jerry Sandusky investigated*, ESPN.COM (Mar. 31, 2011), <http://sports.espn.go.com/nfl/news/story?id=6276219>.

⁸⁰ Pete Thamel, *A Changed Penn State Moves On From Scandal*, N.Y. TIMES (June 23, 2012), <http://www.nytimes.com/2012/06/23/sports/ncaafootball/shaken-by-sandusky-scandal-a-changed-penn-state-moves-on.html>.

⁸¹ Steven Silvers, *Penn State’s Response to Scandal Underscores the Uselessness of Many Crisis Communications Plans*, STEVENSILVERS.COM (Nov. 9, 2011), <http://www.stevensilvers.com/2011/11/penn-states-response-to-scandal-underscores-the-uselessness-of-many-crisis-communications-plans.html>.

⁸² Rana L. Cash, *Penn State Penalties: NCAA Sanctions Include \$60 Million Fine, Four-year Bowl Ban, Scholarship Cuts*, SPORTING NEWS (July 23, 2012), <http://aol.sportingnews.com/ncaa-football/story/2012-07-23/penn-state-ncaa-penalties-sanctions-fine-bowl-ban-scholarships-joe-paterno>.

Penn State is neither the first nor the last institution that will make such mistakes. “History shows that fear of negative publicity, of loss of donations or business, of losing talented people, and of overall damage to reputation and destruction of the brand cause failures of leadership that often are more serious than the original sins.”⁸³

However, as the Fiesta Bowl, Ohio State, and other cases have shown, Penn State does not have to provide the mold for future universities needing crisis management. As the Penn State case so clearly demonstrates, trying to avoid bad publicity does not prevent it. Other universities facing situations similar to Penn State – or those prudent enough to prepare for a crisis whether or not a scandal is imminent – would do well to study Penn State closely as a guideline for what not to do and what dangers to avoid in a crisis. Universities must learn to face the facts, have resources on hand to manage a crisis before it veers out of control, and communicate with all their audiences effectively.

⁸³Amy Conway-Hatcher, Alan Salpeter, & Greg Jaeger, *Why the Penn State Scandal Happened -- and How to Keep Other Scandals From Happening*, FORBES (July 20, 2012), <http://www.forbes.com/sites/frederickallen/2012/07/20/why-the-penn-state-scandal-happened-and-how-to-keep-scandals-from-happening/>.

The Why (and Why Not) of NCAA Punishment

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INTRODUCTION

My focus in this presentation is to discuss core elements of the NCAA penalty structure and the requisites of institutional control and then to consider their application to the Penn State case in which findings reached in an investigative report it commissioned⁵⁰² led to the imposition of penalties against it. But first, for necessary context, some brief background comments about the NCAA and the timing of punishment.

The NCAA.

The NCAA is a private association. Its members are colleges and universities, not the people employed by them or the student-athletes enrolled at them. NCAA sanctions, no matter their other impacts, always are directed at a member institution. The NCAA has no direct authority over non-members; instead, member institutions enforce NCAA sanctions against their staffs, student-athletes, boosters, and others for whose conduct they are responsible.

Timing of Punishment.

Punishment often comes long after violations are committed. Perpetrators act to conceal wrongdoing, with the result that violations almost never are discovered in real time. Once discovered, violations need to be investigated. Perpetrators frequently do not confess wrongdoing or, if they do, may minimize its full scope. Evidence needs to be gathered and analyzed. After charges are brought, procedural fairness requires that those accused have adequate opportunity to respond. All this can, this takes time. As do adjudicatory hearings.

Most commentators noted the speed at which the NCAA Division I Board and President Mark Emmert imposed penalties on Penn State. Consider, however, the particular incidents cited in the Freeh Report occurred in 1998 and 2001. The investigation conducted by Louis Freeh took eight months, and that investigation was conducted with full resources and at full throttle. And there was no adjudicative hearing because Penn State agreed to the penalties.

⁵⁰² FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (July 12, 2012) [hereinafter The Freeh Report].

THE NCAA AND ITS CRITICS

Among the cacophony of complaints about NCAA action there are three I want to address briefly. The first two illustrate the core elements of NCAA punishment.

1. NCAA punishment hits the innocent while the true guilty parties move on.
2. NCAA enforcement is inconsistent – Cam Newton gets to play while USC is kept out of bowl games.
3. The NCAA is a closed game; student-athletes have no voice in processes that affect them.

1. NCAA Punishment Hits The Innocent While The True Guilty Parties Move On

Reggie Bush commits major violations at USC. Yet Reggie Bush is merrily competing for the Miami Dolphins while football players at USC are banned from post season for two years and USC loses 30 scholarships. “How is this fair?” is the cry. “How is this reasonable?”

Punishment always comes after the violation. That is obvious, of course. Your child plays hooky. You find out and ground him for the next two weeks. Someone commits a burglary. She is arrested, prosecuted, and convicted. Three years after the crime, she goes to prison.

In these cases the individual who is culpable is the individual who is punished. Whatever the time delay, the guilty party still gets her just due. The sun and moon are in alignment.

The same thing happens with the NCAA. Really it does. But it is much more difficult to see. Universities can only act through people. The University of Nebraska does not teach my Sports Law Class or direct traffic on campus or deliver the mail. Whenever I or the custodian or the mail deliverer commits a violation on the university’s dime, then so too does Nebraska.

What that means is that NCAA penalties always focus on a guilty party – the university. It does not matter whether it is a post season ban or limits on scholarships. It still is a penalty against the guilty party.

The crux of the problem is that NCAA penalties are both over- and under-inclusive. They frequently don’t catch the OTHER guilty parties – the Reggie Bushes who actually did the acts for which the university is responsible -- and they also regularly catch in the net those who are innocent of the violations and may not even have been at the school when the violations were committed. Certainly no fair-minded individual or association would impose penalties that

affect the innocent if there were another way to do it. And certainly no reasonable individual or association would structure things so that some of the guilty go unpunished if there were another way to do it. NCAA critics therefore arrive at the conclusion that the NCAA is neither fair-minded nor reasonable. The accurate answer, however, is that NCAA punishment reflects the fact that we operate in the real, fallible, world, and not Eden before the fall.

To be effective, penalties must reflect the gravity of violations and be so severe that they deter. For the NCAA, that means loss of scholarships and loss of competition opportunities, particular post-season opportunities, as these signal the seriousness of a case and are best calculated to offset competitive edge gained.⁵⁰³ Unfortunately, these also are the penalties with the most direct impact on innocent student-athletes and staff. As to the other culpable parties: it would be wonderful if we could devise a way to hit them in addition to the institution responsible for their conduct. [NOTE. I said in addition to, not instead of.] But the NCAA has little it can do if they are no longer employed or enrolled at a member institution.⁵⁰⁴ And even if it could exact meaningful penalties, penalizing the individuals directly responsible still would not account for competitive advantage gained by a team or program. And often it would not get at effective deterrence.

Some suggest that a money fine could be an effective penalty. My response: A big money booster at a major program (or a cohort of them) always would be available to ante up to cover a fine, no matter how large.⁵⁰⁵ The way you get at deterrence is to affect the program that propelled the violations. You keep it off TV or out of championships. You take away scholarships to reduce the team's competitive edge going forward. By so doing, you reduce the incentives to cheat in ways that fines do not (but, you also, unfortunately, also have impact on innocent others).

2. NCAA Enforcement Is Inconsistent – Cam Newton Gets To Play While USC Is Kept Out Of Bowl Games

An institution's responsibility for violations committed by its coaches, other staff members, student-athletes and boosters is handled by the Committee

⁵⁰³ NCAA BYLAWS art. 19.5.2. For coaches, what matters most is vacation of wins from their individual records⁵⁰³ and show cause orders that restrict their opportunities to coach in college.

⁵⁰⁴ There are a few things the NCAA can do once a coach or student-athlete is no longer at a member institution. Through a show cause order the Infractions Committee effectively can prevent another NCAA institution from hiring him. See NCAA BYLAWS art. 19.02.1; see also NCAA BYLAWS art. 19.5.2(k). But it can't prevent a pro team from hiring him. And the penalty has teeth inly if the coach seeks again to coach at the collegiate level. The Infractions Committee also can order an institution to "disassociate" former staff members and student-athletes from any connection with their athletics programs, but that sanction seems woefully inadequate when compared to the havoc visited on a program by their violations.

⁵⁰⁵ And it also may not even dent a university's endowment. Penn State, for example, is reported to have an endowment of more than \$1.8 billion. Barbara Goldberg, *Penn State Could Incur Steep Federal Penalty In Probe Of Unreported Crime*, REUTERS (July 19, 2012, 11:09 PM), <http://www.reuters.com/article/2012/07/20/us-usa-pennstate-cleryact-idUSBRE86I1N020120720>.

on Infractions. This Committee conducts adversarial administrative-type hearings and makes fact findings. Formal charges are brought by the enforcement staff. Institutions and coaches have time to make full written responses. This Committee handled the USC case involving Reggie Bush, the Ohio State case with Jim Tressel and the tattoos, and the recently decided North Carolina academic fraud and agent case.

A student-athlete's culpability for violations is handled by the Student-Athlete Reinstatement Committee. This Committee's only authority is to decide what it will take before a student-athlete is again eligible to compete.

A student athlete only has four years to compete and a five year window in which to do it.⁵⁰⁶ As a result, the Reinstatement Committee typically moves quickly. It tends to resolve doubt in favor of student-athlete eligibility. It does no independent fact finding. It hears no presentation adverse to that of an institution's. It bases its decision on an institution's rendition of what violations were committed, how and why. This Committee handled the reinstatement to eligibility of Cam Newton, and the eligibility decisions involving the Ohio State football players who got prohibited extra benefits in the form of free tattoos.

Because every student-athlete violation also is an institutional violation, every student-athlete reinstatement case also is an infractions case. Most of the infractions are secondary.⁵⁰⁷ But some are major, and these are heard by the Committee on Infractions. Examples of student-athlete reinstatement cases that also were heard by the Infractions Committee are the Ohio State case featuring Jim Tressel and the tattoos and the 2009 Florida State academic fraud case, the one that resulted in the vacation of 12 of head football coach Bobby Bowden's wins.

So, can there be inconsistent results when the same conduct not only is the basis for a student-athlete reinstatement case but also is part of a major infraction case? Not likely, but, yes, possible. Possible because different committees are involved, with different jurisdictions and processes. To avoid any possibility of an inconsistent result, the NCAA either would need to make a student-athlete wait for reinstatement for the one or two years that it takes before a full fact investigation and Committee on Infractions fact hearing or bind the Infractions Committee to a quick decision made on the base of an institutional submission, a submission that could be self-serving, deceptive, or simply inadequate because of the time pressure of getting it done or the lack of investigative savvy of those doing the report.

⁵⁰⁶ NCAA BYLAWS art. 14.2 (Seasons of Competition); NCAA BYLAWS art. 14.2.1 (Five-Year Rule).

⁵⁰⁷ NCAA BYLAWS art. 19.02.2.1 ("A secondary violation is a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant impermissible benefit . . .").

3. The NCAA Is A Closed Game; Student-Athletes Have No Voice In Processes That Affect Them

I have elsewhere written that constitutional law principles independent of the NCAA's status as a private actor give student-athletes no entrée as a constitutional matter in NCAA processes that affect them.⁵⁰⁸ While the law of private associations gives student-athletes an opportunity in court to argue that NCAA action is arbitrary or capricious or made in the absence of good faith,⁵⁰⁹ it does not give them entrée to NCAA committee processes to argue their case. Because student-athletes are not NCAA members, the NCAA is wary of giving them a formal voice in reinstatement cases as this risks adjusting the legal relationship between student-athletes and the NCAA and student-athletes and the universities at which they are enrolled.⁵¹⁰ Student-athlete participation also risks presentation of conflicting positions by them and their institutions, with the consequence that proceedings will be adversarial, more formal processes may have to be employed, the Reinstatement Committee may end by being a factfinder, and quick results will be unlikely.

As a matter of current practice, institutional submissions typically include a student-athletes' written explanation of what transpired. In addition, student-athlete claims for reinstatement may be said to be subsumed in that of the member institution's as both want the student-athlete to be eligible to compete, and as soon as possible. It is at least doubtful, therefore, that student-athletes speaking independently would do better than their institutions speaking on their behalves.

All that said, I think the NCAA should consider enlarging its reinstatement process to permit student-athletes to have some measure of an independent role, at least when an institution declines to petition for reinstatement or when student-athletes can show significant disagreement between them and their institutions as to the underlying facts or the degree of student-athlete culpability. Participation by student-athletes would, at the very least, enhance their satisfaction with their treatment⁵¹¹ as well as the perception of fairness of NCAA critics.

INSTITUTIONAL CONTROL

The NCAA Division I manual has lots of bylaws. Among other things, they prohibit academic fraud, gambling by student-athletes, and money paid to

⁵⁰⁸ Josephine Potuto, *The NCAA As State Actor Controversy: Much Ado About Nothing*, 23 MARQ. SPORTS L. REV. (forthcoming).

⁵⁰⁹ Josephine Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257 (2010).

⁵¹⁰ That said, the NCAA permits direct involvement of coaches before the Infractions Committee.

⁵¹¹ See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 273-74, 278 (2d ed. 2006); Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119, 135 (2003); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 132 (1988); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809, 827 (1994).

them by boosters and others. A fundamental responsibility of NCAA membership is to exercise institutional control over athletics programs.⁵¹² Lack of institutional control is a separate, and extremely significant violation that means either (1) an institution did not have systems in place adequately conceptualized to prevent the violations that occurred or expeditiously to uncover them, or (2) an institution had systems in place but failed to follow them.

INSTITUTIONAL CONTROL AND PENN STATE

The NCAA was formed to regulate the rules of competition for collegiate teams and to run championships. Its job is to assure a level playing field (or track or court or pool). But a level playing field can be tilted by events that occur off the field. As a result, NCAA bylaws extend beyond competition rules. Academic eligibility requirements are one obvious example. But other things also are covered. Were there no bylaws prohibiting payment to student-athletes,⁵¹³ for example, well-heeled institutions would have a decided recruiting advantage. Were there no bylaws restricting play and practice time,⁵¹⁴ as another example, coaches willing to require student-athletes to spend all waking hours in athletics-related activities would have a competitive edge.

Until July 22, 2012, and the action of NCAA President Emmert and the NCAA Division I Board, NCAA jurisdiction was restricted to substantive violations found in the NCAA manual. Until July 22, 2012, and the action of NCAA President Emmert and the NCAA Division I Board, institutional control meant the obligation of member institutions to administer athletics programs “in compliance with the rules and regulations of the Association.”⁵¹⁵ A failure of institutional control was triggered by underlying violations; it was not a free-floating violation.

There is no gainsaying that child sexual abuse is horrific. Taken in its best light, the failure of Penn State administrators to be “abuser-wise” and ask questions as information surfaced is incomprehensible. The consequences were tragic.

The Freeh Report described what occurred as an intentional cover-up and traced the reasons to the “culture of reverence for the football program that is ingrained at all levels of the campus community,” a culture that subverted institutional processes and upended the core NCAA requirement that there must

⁵¹² NCAA CONST. art. 2.1 (The Principle of Institutional Control and Responsibility).

⁵¹³ NCAA BYLAWS art. 16.02.3 (Extra Benefit). An extra benefit is any special arrangement by which a student-athlete, relative, or friend gets a benefit not authorized in NCAA bylaws. *Id.* The extra benefit rule requires that student-athletes be treated in the same way that students not athletes are treated. *See Id.*

⁵¹⁴ See NCAA BYLAWS art. 17 for coverage of play/practice requirements. During the season, a student-athlete is limited to four hours per day and twenty hours per week of mandatory countable athletically related activities. NCAA BYLAWS art. 17.1.6.1 (Daily and Weekly Hour Limitations – Playing Season). For the definition of countable activities, see NCAA BYLAWS 17.02.1.

⁵¹⁵ NCAA CONST. art. 2.1 (The Principle of Institutional Control and Responsibility).

be institutional control of athletics programs.

The NCAA is an association of colleges and universities. Its members decide its rules; its members also can change them. That is a given. The clamor for the NCAA to act is understandable. But was it warranted? Advisable?

There are reasons why investigative and fact-finding processes wend their way slowly. There are reasons why procedural protections are provided to targets of investigation. In the wake of a lawsuit brought by Jerry Tarkanian, the former head men's basketball coach at the University of Nevada-Las Vegas,⁵¹⁶ the NCAA revised substantially its enforcement/infractions processes to enhance the procedural protections and overall fairness of its processes. If the Penn State case augurs more decisions outside the traditional processes, how will fair treatment be achieved?⁵¹⁷

In the Penn State case, the NCAA relied on an investigation and conclusions in a report commissioned by a university. The Freeh Report is an exceptionally well documented and careful assessment of available information. That lessens substantially the danger in the NCAA relying on a university's own investigation and conclusions, an investigation that could be deceptive, self-serving, incomplete, or flawed through lack of investigative savvy of those conducting it. But the NCAA still has a problem if another university presents its own investigative report and seeks to have its conclusions adopted and thereby bypass the enforcement/infractions process. How will it distinguish between the Freeh Report and another university report?

There also is risk in relying on a report, however well documented and carefully done, when all the evidence is not yet in. The Freeh Report was careful to point out that its conclusions were based on "the available witness statements and evidence." As the old child's game demonstrates, a story may change in tone and even content when passed from one person to another. People also mistakenly (but in good faith) seek compelling evidence before feeling they should report, draw adverse conclusions, or take action against co-workers and acquaintances. Non-lawyers mistakenly (but in good faith) often interpret a conclusion not to prosecute as a conclusion that there is no evidence. It may well be that no new information or explanation will undercut the conclusions in the Freeh Report. But we won't know until we hear it.

⁵¹⁶ Tarkanian v. NCAA, 488 U.S. 179, 196-97, 109 S. Ct. 454, 464-65 (1988).

⁵¹⁷ The Penn State case itself raises some of these issues. Although what he said was disputed by NCAA officials, Rodney Erickson, the current Penn State president explained the institution's acquiescence in the penalties to the threat that more serious penalties otherwise would have been imposed. Brent Schrottenboer, *Penn State president: Program faced multiyear shutdown*, USA TODAY (July 25, 2012), <http://www.usatoday.com/sports/college/football/bigten/story/2012-07-25/penn-state-made-deal-to-avoid-four-year-death-penalty/56491310/1>.

Even before July 22, when something happened on campus related in some way to athletics, there was a cacophony of voices urging NCAA action. Until July 22, the NCAA could respond that its jurisdiction was limited to substantive bylaw violations set forth in the NCAA manual. That no longer is an available response. The bright line of substantive bylaw jurisdiction is history. As I write this, the NCAA has announced it will examine "when and under what circumstances its senior leaders might take future disciplinary action outside of the traditional enforcement and infractions processes."⁵¹⁸ How the NCAA will cabin its Penn State approach remains to be seen.

⁵¹⁸ Brad Wolverton, *NCAA to Study Limits of Presidential Power in Future Disciplinary Cases*, THE CHRONICLE OF HIGHER EDUCATION (July 25, 2012), <http://chronicle.com/blogs/players/ncaa-to-study-limits-of-presidential-power-in-future-disciplinary-cases/30931>.

Transformational Developments at the Interface of Race, Sport, and the Collegiate Athletic Arms Race in the Age of Globalization¹

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This essay includes a survey and analysis of social, cultural and political factors and forces contouring and configuring the state and trajectory of African-American Sports involvement as we enter the second decade of the 21st Century, including; the circumstances and conditions of the traditional Black community; Black educational challenges; the issue of race, justice, and power; the “collegiate athletic arms race” in the age of globalization in sport and society.

In his classic work on American character, culture, and civic organization, *Democracy In America*, Alexis de Tocqueville wrote in part: “...as long as the majority is doubtful, one speaks [safely]; but when [the majority] has irrevocably pronounced [a consensus belief] everyone becomes silent and friends and enemies alike seem to hitch themselves together to its wagon... In America, the majority draws a formidable circle around thought. Inside those limits, the writer is free; but unhappiness awaits him if he leaves them...the power that dominates in the United States [manifest in majority opinion] does not intend to be made sport of... The slightest reproach wounds..., the least prickly truth alarms; and one must praise [the consensus] from the forms of its language to its most solid virtues... The majority, therefore, lives in perpetual adoration of itself; only foreigners and experience can make truths reach the ears of Americans.

I first came upon this passage from the writings of de Tocqueville in 1960 as a freshman scholarship athlete while studying for an American history class. For me, even then (I was seventeen at the time) it provoked thoughts – angry and analytical – concerning why blatantly racist and discriminatory contradictions that I saw so clearly and experienced so intensely in my college community and athletic department were so broadly viewed as beyond the bounds of polite popular discussion, of even academic debate – much less corrective intervention.

As a “foreigner”, as the “other”, as an “outsider”, as a black athlete and *very* serious sociology student on a predominantly white college campus at the onset of the 1960’s, I found what I believed to be an institution-wide reluctance to face and address uncomfortable and inconvenient human relations realities – particularly at the interface of sport, race, and community – to be deeply disturbing and increasingly intolerable. Eventually, it was this situation that compelled my role in the “revolt of the black athlete”, in the “Olympic Project for

¹ Previously presented at the National Collegiate Athletic Association Scholarly Colloquium on January 11-12, 2011 in San Antonio, Texas.

Human Rights”, in the establishment of college and professional sports “minority coaches outreach” programs, and other such efforts, along with my contributions in pioneering a new frame of critical research and analysis, the “Sociology of Sport”, focusing on the ever evolving state and dynamics of sport in society.

Today, there are crises born of contradictions at the interface of sport, race, and society that are no less stark and disturbing than those of the 1960’s. And there also has been a corresponding reluctance, both within and beyond the institution of sport, to acknowledge and address existing and emerging realities associated with these contradictions. In order to assess these crises and their trajectories going forward, it is necessary to understand the roots of their form and dynamics in the past.

Integration and Disintegration

Under the auspices of post-World War II Black and liberal White American protests and demands for an end to segregation in combination with the global challenges posed by communist states to Western capitalist interests and democracies (particularly relative to influence over resource-rich, largely non-white developing nations), beginning in 1946 America embarked upon a broad scale reversal of official laws and de facto policies mandating race-based segregation and discrimination. In sport, there was the additional – and I believe *determinant-business motivation* of gaining access to a largely untapped Black athlete talent pool in the wake of a White talent shortage following the War. This confluence of social and political pressure and business interests precipitated the re-integration of Black players into the National Football League in 1946 (marking the first time since 1934 that a Black player had taken the field as part of an N.F.L. team) and into Major League Baseball in 1947 and the National Basketball Association in 1950. Under the impetus of the 1954 *Brown v. Board of Education, Topeka, Kansas* Supreme Court edict mandating the desegregation of public schools, traditionally White high school and college athletic programs were also positioned to take advantage of the newly accessible Black athlete pool – *principally in the revenue producing sports of basketball and football*. Again, the major motivating forces here were business and politics – not brotherhood.

Two features of this integration process are of seminal importance here. First, in both sport and society integration was largely *one-way* and *selective*, meaning those Blacks “integrated” had to be on or at least within sight of the “mobility ladder” *out* of the Black community), as opposed to *two-way* and *structural* as had been envisioned by most in Black society, and most certainly by most people involved in what had developed under “separate but equal” policies into a paralleled Black sports institution. Negro League owners such as Rube Foster argued vociferously against the *method* of integration only to be castigated by pro-integration voices – including the Black press. But as became apparent, the fears and concerns of the “Rube Fosters” of the era were not unfounded.

Here we must understand that the forces driving this dialogue and debate were not just issues of conflicting politics and preferences. This development was as much a product of inter-group power dynamics as of design. Where change mandates emerge out of diverse circumstances and developments – as opposed to fundamental and functional intergroup power equality and exchange – regimens instituted on behalf of the subordinate group will inevitably trend toward the most parsimonious and least costly policy and action options relative to dominant group status quo interests. So while the racial integration of Major League Baseball was one-way (from the Negro Leagues) and selective (Black players only) the “integration” of the National Football League with the *equally powerful* American Football League was two-way and structural – which is to say that not only were AFL players integrated into the NFL, but entire AFL franchises merged under the NFL banner.

Furthermore, because the intergroup power imbalance that largely predisposed the method of integration is residual in the functioning of those integration remedies established, there has evolved a persisting “pressure” toward the erosion of subordinate gains. For such subordinate groups, the challenges posed by these circumstances are dynamic, diverse, and recurring; the struggle to sustain and advance change, therefore, is perpetual; and there can be no final victories in the absence of enduring power equality.

The *method of implementing integration* fostered the substantial *abandonment* of traditional Black communities and institutions by increasing numbers from among the more skilled and the upwardly mobile working and middle classes as they sought better competitive circumstances and greater advancement opportunities in and on the periphery of White society and its institutions. In the process, they took with them their visibility and family standing and stability; their entrepreneurial and organizational skills and capacities; their wealth; their civic, cultural, and political associations; their contacts and connections –however limited or tenuous – with outside mainstream interests and institutions; their “can-do” values, work ethic, aspirations, and hopes; and their more expansive world views – that capacity to dream broadly of a Black role and relevance beyond the confines of the Black community.

The second feature of this integration process of direct significance here is that it eventually gave rise to what I termed in 1967 a “plantation structure” of mainstream sports organization. As I stated at the time, “By *not* integrating Negro League owners, managers, and associated staffs, by not integrating Black collegiate athletic directors, head coaches, media directors, etc. *along with* “*blue chip*” Black athletes into mainstream traditionally White sports structures, most specifically in the revenue-producing sports of basketball and football, America has replaced *segregated sports* with a *plantation structure* of sports organization wherein Whites have exclusive control of decision-making and authority positions while Blacks are consigned to the *least* powerful, *most* exploited, and *most* expendable position – that of *athlete*. We have been relegated to the status of

“20th Century Gladiators” in the entertainment and money-making service of White institutions.” (2)

After observing the evolution of this “plantation structure” over subsequent years, I arrived at the corollary conclusion that “what happens to the subjugated racial minority in the nominally integrated and systematically exploitive system does not just happen to *them*; it just happens to them *first* and *worst*. Ultimately, it negatively influences the fate and fortunes of *all* who share a comparable *position* with that minority”.

It was therefore with some sense of validation that I read the sentiments of one of the staunchest critics of my use of the “plantation structure” analogy in the 1960’s, Mr. Walter Byers (N.C.A.A. President 1951-1988), who wrote in 1997: “Today the N.C.A.A. President’s Commission is preoccupied with tightening a few loose bolts in a worn machine, firmly committed to the *neo-plantation* belief that the enormous proceeds from College games belong to the overseers (administrators) and supervisors (coaches). The *plantation workers* performing in the arena may only receive those benefits authorized by the overseers.” (3)

Mr. Byers acknowledged virtually every argument that I’d put forth *thirty years* earlier – except that a disproportionate number of the workers, and the stars among them, who produce those “enormous proceeds” are *Black*.

When I first expressed these sentiments in 1967 they were, to say the least, not well received. Outside of the deep South, integration in *whatever* guise was simply not to be questioned – especially by a “Negro.” To apply segregation or a slavery-era analogy in describing *any* integration outcome was viewed as outrageous.

Both the out migration of the more affluent classes from the traditional Black community and the plantation structure of sports organization, in combination with emerging broader societal developments, have inevitably generated consequences barely hinted at before the onset of the last quarter of the 20th Century. Denied the leadership involvement and influence of its absent “integrated” classes, traditional Black communities began to *dis-integrate*. Left out of the mainstream integration process, these communities were soon left behind. Particularly in more densely populated urban areas, too often they fell into deepening institutional dysfunction, material deterioration, and civic disarray while the people historically dependent upon their viability spiraled into ever more crippling desperation and hopelessness. Due largely to the *method* – not the *fact* – of racial integration, access to both the American mainstream and the “American dream” loomed ever farther beyond the horizon of perceived possibility, more remote and seemingly unachievable than even before desegregation for millions relegated to these Black urban centers and neglected rural backwaters.

From Disintegration to Dysfunction

Today, there is no denying the ample evidence supporting negative assessments and perspectives relative to conditions in traditional Black communities. While from 2008 to the present America has been experiencing the most devastating economic conditions in almost 80 years, the economic circumstances of urban Black communities have approximated those conditions and worse at least since the recession of the 1980's. Since that time substantial numbers of people – particularly teenaged and young adult Black males - have been driven to ever greater reliance upon the underground and underworld economies. So the 16.1 percent Black unemployment rate reported in 2009 Department of Labor statistics (nearly twice the national unemployment rate), as disturbing as it is, in reality grossly underestimates the true scale of mainstream unemployment in these communities. In fact, in many urban areas, the real rate probably exceeds 30 percent, since so many people were either never in the work system, are were under-employed, or long ago gave up the search for mainstream employment. The impact of this situation on Black youths has been devastating.

With no vision or hope of inclusion in the economic mainstream beyond dreams of becoming rap artists, professional athletes, or taking some other high profile, low probability, ostensibly talent-based career path, too many black youths' value on education is severely diminished. This, in combination with poorly resourced, deteriorating urban educational infrastructures and environments has resulted in Black student drop-out rates that in 2008 were approaching 40 percent nationally according to Department of Education figures with many school districts experiencing even higher rates. (4)

This situation, of course, has precipitated not only greater mainstream entry-level unemployment among Black youths and long-term unemployability among Black young adults, but it has increased Black involvement in the criminal justice system as these groups have come to rely increasingly upon the underground and underworld economies to sustain themselves and meet their needs. Nationally, 43 percent of the 2.1 million people incarcerated in the United States are Black, mostly males, although Black males constitute less than 7 percent of the total U.S. population. (5) In California over a quarter of Black males aged 15-34 are under the control of the courts – either under suspicion and investigation, under indictment, under arrest, incarcerated, or out on bail, probation, or parole.

And California is not exceptional. In my home state of Illinois, over the first decade of the 21st Century Blacks have been 50 percent of youths arrested and 55 percent of youth incarcerated; for drug-related (underworld economy) crimes, 59 percent of youths arrested and 88 percent of youths sentenced to prison have been Black, while 85.5 percent of youths tried as adults have been Black. In Louisiana, where only a third of the state's youths are Black, Black youths have accounted for 78 percent of the young people confined in correctional facilities. (6) And with so many *young* Black people in particular entering and returning from prison, it

was only a matter of time before *prison cultural features* began to displace established cultural traditions in traditional Black communities. The misogynistic, vile, “gangsta” language, the tattoos, the dress styles, and other cultural accoutrements associated with the “hip hop” generation more often than not have their foundations not in the hip hop music culture but in prison culture.

Quite simply in the wake of integration and institutional deterioration in the Black community, traditional Black culture is being increasingly *highjacked* by prison culture.

And it is not just in the realms of education, employability, and cultural viability that the traditional Black community finds itself in the throes of crisis and decline.

Many of our urban centers exist in what only can be characterized as a state of *undeclared* urban warfare. Consider this situation in comparison to U.S. casualties over the first five years of the Iraq and Afghanistan wars. Defense Department statistics indicate that a combined total of just over 5,000 Americans of all races, ethnicities and genders died in combat from all methods and means of assault in these war zones. According to figures released by the Centers for Disease Control (C.D.C.) and published in the *New York Times*, based upon Black homicide rates *by gun fire alone* over that same five-year period over 27,000 Black males would have died, nearly 11,000 of them being 18-24 year olds. (7) And because the overwhelming majority of these deaths occurred at the hands of other Black males, there is a *double* lose to the Black community – to the cemetery and to the prison system. According to the latest C.D.C. statistics, homicide is the leading cause of death for 10-24 year-old African-Americans nationally (that is, the 5th grade through college athlete development and sports participation years). But in order to put a finer, more definitive point on the situation, consider the realities of just *one city* and its urban Black community – the city of Oakland, California. This is the city that produced Bill Russell, Frank Robinson, Rickey Henderson, Cito Gaston, Curt Flood, Gary Payton, Jason Kidd and other great athletes over the years. It is also a city where I was Director of Parks for three years from 2000 to 2003 and, so, I got to know its circumstances extremely well, up close and personal, so to speak. The front page headline of the Thursday, October 21, 2010 *Oakland Tribune* says it all:

“Living in a war-zone neighborhood: Some overseas combat areas aren’t as dangerous as violence-plagued communities in the U.S., study says” (8)

The article goes on to state that Black males in certain neighborhoods of Oakland are *16 times* more likely to die violently than their white peers. Further, over the last nine years more than 1000 people have been killed in Oakland, (over 96 percent of them young Black males). That bleak statistic is important in and of itself, but again, when juxtaposed against the fact that the toll of American combat deaths in the Afghanistan War over that *same* nine years as 996, it projects even more devastating implications. And in Oakland, it is not just that a

young Black male has as great a chance of being killed by gunfire on the streets of his own community as he would have of dying in a war-zone outside of Kabul. There are other forces equally rooted in past historical developments that reduce Black life choices and chances.

I have already spoken of the situation that schools so often face in traditionally black communities. In Oakland, not surprisingly, the areas hardest hit by violence are those where schools are in the most dire condition and where community centers and parks have either been closed due to budget considerations or are too crime-ridden and dangerous to use. Violence in these areas is pervasive and recurring, with perpetrators often using A-K 47s, the weapon of choice among guerrilla movements and insurgencies around the world.

And lest it be presumed that this violence is simply a West Coast phenomenon, consider the observations of Willie Randolph, the baseball great. When he goes back to Brooklyn, N.Y. where he grew up, he invariably has occasion to pass Betsy Head Park where he learned to play the game of baseball. According to an article written for the *New York Post*, what he sees sickens him.

“Crack addicts have taken over the park, and there’s no grass. We used to play baseball there, and now there’s just weeds and broken Whisky bottles. It’s too dangerous for kids to play there. It’s sad.” (9)

Deteriorating and violent circumstances afflict traditional Black communities nationwide, from coast to coast, with little expectation from residents that the situation will be remedied any time soon.

Hard economic times, of course, have exacerbated the devastation faced by Black communities from Oakland to Brooklyn. They become “food deserts”, where supermarkets, fresh vegetable and fruit outlets, and family-style restaurants have refused to locate. Even medical clinics, dental care establishments, legal offices, and other professional services enterprises have long since abandoned many such areas.

The price paid for such lack of services has been high. Where healthy food outlets have disappeared, fast food and junk food businesses have moved in. In a study of Alameda County where Oakland is located and is the principal residential area of its largest Black population, 30 percent of Black men are obese with another 25-35 percent seriously overweight; 32 percent have high blood pressure. Black men also have the county’s highest death rates due to lung cancer, diabetes, prostate cancer and A.I.D.S., largely due to *late* diagnosis. (10)

But as tragic as these data are, the evidence is that the health of Black men is getting worse. According to Michael Shaw, Director of the Urban Male Health Initiative, “As unemployment rates continue to go up, as our social safety nets become more and more fragmented, as more and more Black males are impacted

by undiagnosed post-traumatic symptoms of violent urban life styles, health issues like hyper-tension, obesity and diabetes will continue to rise.”

Again, these are not things that are easily discussed and almost never welcomed in “polite” popular conversation and discourse outside of the traditional Black community. As noted by Ronald Ferguson in his work “Parenting Practice, Teenage Lifestyles, and Academic Achievement Among African American Children”.

“Some of these facts, analyses, and conclusions are unflattering. Some readers [or listeners] may cite these findings to rationalize neglectful public policies...[Some] warn that a focus on ways that so many African Americans contribute to our own problems may diminish the degree to which the rest of society accepts responsibility for addressing more deeply rooted causes. [Some] believe that placing black communities and lifestyles near the center of an explanation for [Black ills] reinforces stigmas and stereotypes and may help solidify what is already an abdication of responsibility by national leaders”. (11)

And, he might have added, an abdication of responsibility by many among several generations of *Black leaders*. In any event, the point here is not to sort through the mix of neglect and Black culpability, but to portray Black circumstances and analyze their on-going and projected impact.

The possibility, even the high *probability* that the truth of circumstances in so many traditionally Black communities might reinforce or affirm broadly held stigmas and stereotypes is no more a reason to forgo speaking or writing that truth than it would be to fail to speak or write that truth which *contradicts* consensus beliefs (de Tocqueville’s concern). There is no illusion here that all of the circumstances acknowledged and faced can be changed; but *nothing* can be changed until it is acknowledged and faced.

Race and Sport: The Price of Dysfunctions

The current and yet escalating costs of circumstances in traditionally Black communities mandates that these causes be vigorously and honestly addressed. Their impact upon the quality of life and life chances in the Black community is clear. But how have this institutional deterioration and cruel disintegration impacted Black sport participation and involvement?

In the Fall, 1998 issue of *The Civil Rights Journal*, the cover was titled, “Race, Sports and Education: African American Athletes at a Crossroads.” Inside I published an article titled “An End of the Golden Age of Black Sports Participation?” While I did not choose the title, the point of the article was clear: because the Black community is in crisis and at a crossroads, Black mainstream sports involvement is also in jeopardy. When we look at professional sports, the

emerging pattern is evident: *the Black athlete talent pool is shrinking precipitously.*

For example, in the heavy-weight division of boxing, between 1960 and 1975 there were at least 15 legitimate champions and contenders for the heavyweight title: Floyd Patterson, Sonny Liston, Muhammad Ali, Joe Frazier, George Foreman, Ken Norton, Eddie Machen, Jimmy Ellis, Jimmy Young, Cleveland Williams, Earnie Shavers, Ernie Terrell, Archie Moore, Buster Mathis, and a sparring partner who couldn't break into the contender lineup by the name of Larry Holmes. Between 1975 and 1990, that number dropped to three: Larry Holmes, Evander Holifield and Mike Tyson. Between 1990 and 2005, there were still only three, none of whom apparently warranted the cachet or recognizability of past generations of Black heavyweight champions and contenders. So if the likes of James Toney, Chris Byrd, and Shannon Briggs do not immediately come to mind as recognizable faces and boxing figures, it is understandable.

Similarly, in 2010 only 8.2 to 9.0 (depending on the injury and active rosters) percent of Major League Baseball players were African-Americans (as distinguished from Black players of Latin descent). This is down from 23-27 percent over the decade of the 1970's. Even Jackie Robinson's former team, the Dodgers, reflected the trend. At one point, the Dodgers had the same number of African-American players as on the day that Jackie joined the team in 1947- *one!* As Jackie Robinson's widow, Rachel said as early as 1997- the 50th Anniversary of Robinson breaking the color line in Major League Baseball – "Jackie expected more. We're all disappointed that it has come to this."

Even the N.B.A. is feeling the crisis of the Black athlete. From a high of 82.4 percent African-American players in the mid-1980's to 73.2 percent in 2009, the N.B.A. like baseball is filling vacated Black slots with foreign-born athletes. While foreign-born players made up 40 percent of the signed talent pool in Major League Baseball and filled 26 percent of its roster spots in 2010, under contract the N.B.A. had the highest number and proportion of foreign-born players in its history -104 players out of approximately 418 athletes under contract.

And what of Black fortunes within the collegiate ranks? In 1987, the N.C.A.A. commissioned its first and still *only* study of the origins and experiences of Black football and male basketball players at Division I institutions. Published in 1989, it showed that Blacks, as expected, were over-represented as athletes in these two sports. As significantly, the study showed that these athletes came mostly from the lower social-economic strata (49 percent from the lowest economic quartile and over 70 percent at or below the second quartile, as opposed to 13 percent for whites) and that they arrived on campus less well prepared academically (58 percent at or below 752 on the S.A.T., compared to 19 percent of Whites and 61 percent with a B- g.p.a. or below as compared to 31 percent of Whites). It was also reported that Black football and basketball players on overwhelmingly White campuses reported feeling *different* from other students, existing in racial

isolation with little control over their lives. A third of these athletes reported at least six incidents of racial discrimination. (12) Clearly, as was the case in the 1960's, by the 1980's and to this day, Division I institutions have not figured out how to make a substantial portion of Black athletes part of the total university community or even how to make them feel like they belong on campus.

Under the circumstances, and particularly in light of deteriorating educational and cultural circumstances in the communities that have generated a disproportionately large number of these athletes, why has their overrepresentation on these traditionally White campuses persisted?

Black Male Athletes and the Collegiate Athletic Arms Race

In the Winter-Spring 1984 issue of the *Journal of Sport and Social Issues*, I published an article called "The Collegiate Athletic Arms Race: Origins and Implications of the 'rule 48' Controversy" (13) I began the article with the statement that "The passage of Rule 48 by the N.C.A.A. provoked the most heated racial debate within the organization since the onset of...integration. At the core of the controversy are concerns over the legislation's anticipated financial and academic consequences for those Division I institutions which have traditionally set less stringent academic standards for athlete admissions and sports participation" (14)

In short, by 1984 it was clear that the Black athlete had become a major component of the "Collegiate Athletic Arms Race", an arms race that included not only the athlete "big guns" and "aircraft carriers" needed to build winning programs, but the facilities, expanded coaching staffs, and support amenities to recruit and keep successive generations of such athletes.

At the time, I also made another statement: the "Collegiate athletic arms will prove to be ultimately *unmanageable*, absolutely *unsustainable*, and it will become increasingly *unconscionable* as deprived academic departments at Division I colleges and universities stand in ever more stark and disturbing contrast to the opulence of athletic programs and departments."

At the time this article was published, it was ridiculed as "radical rhetoric." Even when my good friend and former colleague, Ira Heyman, then Vice-Chancellor at the University of California, at Berkeley, presented an address warning of the devastating potential of the "Collegiate Athletic Arms Race" at the 1987 N.C.A.A. convention, he was met with "wide-spread skepticism and levity" (in the words of Murray Sperber, author of *College Sports, Inc.*).

Today, it would be hard to find anyone who believes the existence, challenges, or escalating costs of the collegiate athletic arms race to be matters of dubious or comical concern. The history of this arms race in its current guise goes back to the 1960's and the competition among institutions and conferences for media-

generated dollars. The separation of institutions into three divisions and then of Division I into I-A and I-AA; the creation of the College Football Association (C.F.A.) in the 1976; the Bowl Coalition in 1992; the Bowl alliance in 1995; the Bowl Championship Series in 1998; the split between “Major” football conferences and “Mid-Major” conferences; the multi-million dollar head coach contracts and expanded coaching staffs; the on-going expansion of conferences to include more institutions; and grossly expanding athletic budgets, facility debt service obligations, and financial burdens upon tuition and general fund resources are all manifestations of what are generally referred to today as “*arms race issues*.” And, notwithstanding all of the academic reform, support, and social-cultural adjustment efforts made to accommodate the needs, interests, and developmental challenges posed by the Black athlete, it has been the “arms race” efforts to recruit competitive basketball and football talent that has kept the Black athlete on Division I campuses in disproportionately high numbers. But his days of over representation, like those of so many among his professional counterparts, could be seriously threatened.

The Pressures to Unilaterally Disarm

First of all, increasing numbers of Division I institutions are likely to follow the lead of the University of California, Berkeley and begin to “unilaterally disarm” relative to athletic budgets. Though it was only a small step (what Walter Byers would undoubtedly have characterize as a “tightening a few bolts in a warn machine”) on September 28, 2010, U.C. Berkeley announced that it was reducing its athletic budget – which had required 14 million in subsidies per year – by scraping 163 athletic scholarships and eliminating five sports programs, including baseball, rugby, men’s and women’s gymnastics, and women’s Lacrosse. Most notably, neither basketball – men’s or women’s – nor football were on this “hit list”, though both departments preemptively suggested cuts that might be made in their budgets. Whether at U.C. Berkeley or elsewhere, without cuts to basketball and football and the debt service that their operations incur, no substantial reduction in the impact of “arms race issues” is likely to occur. In Football Bowl Subdivision (FBS) conferences, for example, median spending per student-athlete far out-strips spending per student in the general academic population, ranging from 4 to 11 times as much. To quote the *Knight Commission Report* “Restoring the Balance” (Fall 2010):

“At most institutions [athletic costs] require a redistribution of institutional resources...from general university funds, fees imposed on the entire student body, and/or state appropriations. This reliance upon institutional resources to underwrite athletic programs is reaching the point at which some institutions must choose between funding [academics] or the football and basketball teams...It is clear that the *spending race* that too often characterizes major football and basketball programs is creating unacceptable financial pressures on everyone...The current financial downturn should be a financial wake-up call for everyone. It has significantly refocused academic priorities and even forced some

institutions to ratchet back spending on sports – primarily by paring teams from lower-profile sports. *However, even with this new reality, top programs are expected to have athletic budgets exceeding 250 million dollars by 2020, athletic budgets serving an average of only 600 students.*” (15)

The Knight Commission goes on to recommend that not only so-called “minor sports”, but football and basketball costs must also eventually be pared back through such measures as *reducing athletic scholarships*, reducing the numbers of coaches and support staff, and reducing expenditures and debt service costs incurred through facility and program service up-grades and expansion.

In sum then, along with the tragedies of culturally derailing, academically under preparing, jailing and burying, our prospective Black athletes, we also must now add the growing unsustainability and tenuousness of a collegiate athletic arms race that has functioned to preserve an overrepresentation of Black athletes in the revenue-producing sports of collegiate basketball and football.

And there are two final influences that promise to hasten the pace of a diminution of the Black athlete’s presence in big-time collegiate sports programs: *globalization* and the continuing evolution and impact of the “sports-technology complex.”

The Sport-Technology Complex in the Age of Globalization

In my 1971 dissertation and textbook titled *The Sociology of Sport*, I presented what I ultimately termed the “First Principle” of the *Sociology of Sport*:

Sport inevitably and unavoidably recapitulates the structure, dynamics, and character of human and institutional relationships between and within societies and the ideological values and sentiments rationalizing and justifying those relationships.

It should come as no surprise in an era where globalization is a dominant feature in virtually every realm of human institutional endeavor that it is increasingly impacting sport as well. We have mentioned its obvious manifestations in professional baseball and basketball. Globalization is also becoming a major force in boxing where promoters and the entertainment media learned well before the end of the 20th Century that a DeLaHoya-Chavez fight marketed globally (and especially in Latin nations and certain states in the U.S.) could draw a larger paying audience than any Ali-Frazier or Tyson-Holifield fight ever did.

As globalization proceeds apace, not only will U.S. collegiate sports seek to access global markets and audiences but also global athlete talent pools.

The sports-technology complex will continue as a spur to globalization and, therefore, as a factor hastening a diminution in Black athlete participation in collegiate basketball and even football.

As was the case with the concept of the “collegiate athletic arms race”, I have adopted the concept of the “sports-technology complex” from military studies. When President Dwight D. Eisenhower warned of the challenges posed by the “Military-industrial complex”, what he was *really* warning us about was the military-*technology* complex, since industry devoid of technological development and evolution is *stagnant* and ultimately *impotent*. It is the capacity and potential to devise new *defense technology* that the military finds so seductive in its relationship with industry.

Similarly, sport has been impacted and driven by all manner of technological influences – medical and pharmaceutical technologies, nutritional technologies, transportation technologies, communications and information technologies from computers and the internet, to satellite technologies enabling the live real-time broadcast of sports events all over the world. Owing to pharmaceutical, nutritional, and training technologies, athletes are bigger, faster, trained more intensely from an earlier age, and recruited earlier over greater distances than at any other time in the history of modern collegiate sports. In 2007, I reported on a small study that I’d done for the Commissioner of the National Football League showing that offensive linemen listed among *Super Prep Magazine’s* top 100 California High School 17-19 year old college recruits that year would enter college on the average weighing only 15.7 pounds less than the average weight for the offensive line of the Super Bowl Champion Indianapolis Colts – 288.5 to the Colts’ 304.2 pounds. The thirty-four high school players listed by Rival.com as the top offensive linemen in the nation closed the gap even more, averaging 294.86 pounds – only 9.4 pounds less. In 2008 a 13 year-old was projected as “the leading basketball recruit” for the class of 2014 by another online recruiting service.

Medical technology is revealing consequences of sports participation, in football for example, that appear destined to force changes in the very way that the game is played. This, along with advances in player development and continuing “positional specialization” (one doesn’t have to be a football player, only a “rush end” or a “short yardage” or “third-down” running back) means that it is increasingly possible to “choreograph” the development of players with specific skills, and thereby make even so violent and quintessentially American a sport such as football more widely accessible and appealing to prospective participants.

All said, perhaps the situation of Black women in integrated collegiate sports provides the closest indicator of the direction Black males’ participation in big time collegiate sports might be headed. Women’s sports do not, of course, qualify as “revenue-producing” activities, and so, Black female athletes’ representation has not been as protected by way of arms race dynamics.

Since Title IX was applied to collegiate athletics in 1972, Black female participation on traditionally White campuses has risen by 955 percent – *but only in basketball and track*, the two premier sports of women’s athletics. *Nine out of every ten Black female college athletes participates in one or the other of these two sports*. Since the 1990’s however, there has been a precipitous decline in the *rate* of increase in this participation even as the Black population in general has increased. For example, between 1999 and 2005, the number of Black women participating in collegiate sports increased by only 336 athletes as compared with 2,666 athletes for White women. Since Black female athletes also tend to come from traditional Black communities and the lower two quartiles of the economic structure, it should not be surprising that the Black female athlete pool would be likewise diminishing. Similarly, under the auspices of globalization, it is also not surprising that even international female athletes surpassed Black women by gaining 1000 new positions - nearly three times as many slots. (16)

And finally, against the background of the analysis presented here, consider the following additional legacy of the past: in a 2001 “turn of the century” study by the children’s welfare advocate group *Children Now*, titled “Foul Play? Violence Gender and Race in Video Games”, it was found that of some 1500 video game characters surveyed, 288 were Black males and 83 percent of those Black males were portrayed as athletes. With stereotypical bulging biceps and chests, these cyber-characters tended to uphold, validate and reinforce an image of Blacks as superior body types more prone to aggressive physicality than cerebral cognition and contemplation. This, among a long list of other studies focused on popular culture perception and projections of Blacks, points toward one unavoidable conclusion: *Over the course of the 20th century - in the wake of Black athlete prominence - from Jack Johnson through Joe Louis, Jesse Owens, and Jackie Robinson to Muhammad Ali, Bill Russell, Jim Brown, Michael Jordan, Jerry Rice and Le Bron James – the image, place, and presumed productive potential of Black people has been inordinately defined and culturally configured by a focus upon the development and use of our bodies*. The development and use of our *minds and intellects* through a focus upon educational achievement, particularly since the onset of integration, has been substantially relegated to “Plan B” – especially in the traditionally Black community.

If present projections persist, over the course of the 21st century, it will be the development of our minds and intellects through educational achievement that will define and configure our image, place and productive potential as a people – and there will be no “Plan B”.

The Need for New Perspectives and Paradigms

Overall, this admittedly has been a dire and dismal portrait and projection regarding Black collegiate sports participation. But again, if there is any hope of

changing the state and trajectory of these developments, it must *start* with an honest and open acknowledgement and assessment of the situation.

Secondly, we must not make the mistake of looking at developments and realities at the interface of race, sport, and education through what well might be obsolete perspectives and analytical paradigms. Here I use as my guide the challenge of breaking the four minute barrier in the mile run. For generations this was seen as impossible. Four minutes was viewed as an *absolute* barrier and boundary of human performance. Yet, after Roger Bannister ran the first sub-four minute mile, in quick succession a number of other runners followed suit. There was clearly no precipitous evolutionary advance in the human physical capacity to run the mile distance. *What changed were human perspectives on the possible and commensurate practices.*

I find it extremely difficult to believe that a seemingly insurmountable physical barrier that had defied human efforts for decades would constitute a less formidable challenge than social-cultural obstacles to human achievement that are even more clearly of our own creation. In the end, the fate and future of the Black collegiate athlete in America – both male and female – will be determined not by the past history of events, *but by that history that we have the will, the courage and the wisdom to make going forward.*

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