

EXPLORING STUDENT-ATHLETE COMPENSATION: WHY THE NCAA CANNOT AFFORD TO LEAVE ATHLETES UNCOMPENSATED

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INTRODUCTION

The core purpose of the National Collegiate Athletic Association (“NCAA”), founded in 1906, is to regulate competition among the more than one thousand colleges and universities who voluntarily submit to its authority¹ and to “integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount.”² Therefore, according to its mission statement, the NCAA is, foremost and fundamentally, a guardian of the educational experience of the students who attend its member institutions and choose to participate in intercollegiate athletics. To guard against the trappings of professionalism, which presumably would adversely impact this educational experience, the NCAA requires its athletes to remain amateurs in order to participate in collegiate sports.³ The NCAA defines an amateur athlete as “one who participates in physical sports only for the pleasure and the physical, mental,

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1. NCAA, 2006 NCAA MEMBERSHIP REPORT 24 (2006), available at http://www.ncaa.org/library/membership/membership_report/2006/2006_ncaa_membership_report.pdf [hereinafter MEMBERSHIP REPORT].

2. NCAA, Our Mission, <http://www.ncaa.org/wps/portal> (follow the “About the NCAA” hyperlink; then follow the “Overview” hyperlink; then follow the “Our Mission” hyperlink) (last visited Feb. 16, 2008).

3. NCAA, 2006–2007 NCAA DIVISION I MANUAL § 2.9 (2006), available at http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf [hereinafter NCAA MANUAL]; see also Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS, Jan. 3, 2000. However, in 1974 the NCAA modified its rules to allow student-athletes to compete as a professional in one sport while retaining their amateur status in another. *Id.*

moral and social benefits directly derived therefrom.”⁴ This definition of the collegiate athlete was written in 1916 and, to be sure, is both noble and honorable—safeguarding our students’ educational experience, protecting them from exploitation, insuring that their pleasurable and beneficial athletic endeavors are unsullied by crass commercialism and profit motives—purposes that should be lauded and treasured. Yet, today’s NCAA has become the very thing from which it originally sought to protect student-athletes—a profit-driven institution sanctioning a win-at-all-cost mentality that undermines the educational experience of its student-athletes.⁵ Indeed, the NCAA places greater restrictions on student-athletes’ conduct and greater demands on their time than are imposed on the rest of the student body while simultaneously exploiting their talents to reap an ever-increasing economic windfall.

The purpose of this Essay is to, in effect, call the NCAA back to its roots—to exhort it to protect the best interests of its student-athletes and, more specifically, to raise the maximum allowable athletic scholarship for student-athletes to a level which covers the actual costs of attending college. In order to accomplish these goals, Part I will look at the economic reality of the present system, Part II will explain the demands and restraints placed on a modern-day student-athlete, Part III will explore the argument for maintaining the status quo and set forth the reasons why change is a necessary and just result, and Part IV will advocate a workable solution.

I. THE ECONOMIC REALITY OF MODERN COLLEGE ATHLETICS

The world of intercollegiate athletics has changed dramatically since the founding of the NCAA. Early athletes presumably never envisioned stadiums filled with over 100,000 fans, coaches making four million dollars a year, athletes spending as many as fifty hours a week in sport-related activities, and media outlets devoted solely to the coverage of the endeavors of these athletes who the public is told participate in their sports simply for the pleasure and health benefits of the activity.⁶ But ninety-one years later, this is our reality—pleasure and health of the athlete have been replaced by televised games, filled luxury boxes, alumni who express their satisfaction in cash donations, and the hope of future professional fortunes as the approved motivations for playing college and university sports.⁷ The NCAA, instead of functioning as the protector of its

4. Hawes, *supra* note 3.

5. See Frank P. Tiscione, *College Athletics and Workers’ Compensation: Why the Courts Get It Wrong in Denying Student-Athletes Workers’ Compensation Benefits When They Get Injured*, 14 SPORTS LAW. J. 137 (2007).

6. See Michael McCarthy, *ESPN to Ride College Football Wave with Daily ‘Live’ Show*, USA TODAY, Feb. 26, 2007, at 5C; see also *Polar Frog Digital Inks Deal for College Sports Programming*, BUS. WIRE, July 19, 2007, <http://www.tmcnet.com/usubmit/2007/07/19/2796507.htm>; Press Release, NCAA, Presidential Task Force Calls for Moderation of Budget Growth Rate, Integrating Athletics Within Academics (Oct. 30, 2006), available at http://www2.ncaa.org/portal/media_and_events/press_room/2006/october/20061030_presidential_task_force_rls.html.

7. W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate*

student-athletes, more often than not appears to be most concerned with protecting the highly marketable image of college and university athletics.⁸

And so, even as discussions of the Bowl Championship Series (“BCS”)⁹ ratings system dominate water-coolers around the country and “March Madness” draws over 100 million viewers each year,¹⁰ even as NCAA athletics has become a multi-billion dollar industry that pulses with corporate sponsorship, luxury boxes, and merchandising riches, even as the NCAA operates at a \$35 million surplus, the players—the product on the backs of which this entire industry rests—are held by the NCAA to the strictures of “amateurism.”¹¹ In fact, a typical Division I football player at a BCS school is permitted to receive less financial aid for his athletic gift than a gifted musician or chemist may receive from his school.¹² This reality leads to a rather curious result: even as schools use the success of these players to reap giant donations from boosters which greatly impact the economic viability of the entire college or university, student-athletes are still forced to pay for basic needs out of their own pockets in order to protect their “amateur” status—irrespective of whether an increase in their stipend would enhance their educational experience by increasing their quality of life and reducing the financial stress that many of them bear.¹³

Current NCAA guidelines mandate that the maximum allowable scholarship grant available to a student-athlete, called a “grant-in-aid,” amounts to no more than tuition and fees, room and board, and required course-related books.¹⁴ In comparison, a student who excels in another discipline within the general student body is allowed to receive scholarships up to the actual cost of attendance. The difference between the two packages is estimated to be around \$2000 per school year.¹⁵ Although this seems facially inequitable, NCAA President Myles Brand “could not be more opposed” to any change in the system.¹⁶ He points to the

Athletic Association, 8 VAND. J. ENT. & TECH. L. 211, 276 (2006).

8. *Id.*; see also Eric Thieme, *You Can't Win 'Em All: How the NCAA's Dominance of the College Basketball Postseason Reveals There Will Never Be an NCAA Football Playoff*, 40 IND. L. REV. 453, 471 (2007).

9. Bowl Championship Series, <http://www.bcsfootball.org/bcs/football> (last visited Feb. 17, 2008).

10. Stacy Sterna, *March Madness Gets Contagious*, THE DAILY TITAN, Mar. 23, 2006, available at <http://media.www.dailytitan.com/media/storage/paper861/news/2006/03/23/Sports/March.Madness.Gets.Contagious-1714759.shtml>.

11. *Dollars, Dunks and Diplomas* (PBS television broadcast July 9, 2001) (transcript available at http://www.pbs.org/newshour/bb/education/july-dec01/ncaa_07-09.html); see also Chris Isidore, *College Sports' Fuzzy Math*, CNNMONEY.COM, Nov. 10, 2006, <http://money.cnn.com/2006/11/10/commentary/sportsbiz/index.htm>.

12. Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should be Paid*, 3 VA. SPORTS & ENT. L.J. 226, 236 (2004).

13. Michael Aguirre, *From Locker Rooms to Legislatures: Student-Athletes Turn Outside the Game to Improve the Score*, 36 ARIZ. ST. L.J. 1441, 1458 (2004).

14. NCAA MANUAL, *supra* note 3, § 15.02.5.

15. Aguirre, *supra* note 13, at 1458.

16. Dr. Myles Brand, *Sustaining the Collegiate Model of Athletics*, NCAA, Dec. 10, 2003, <http://www.ncaa.org/releases/MylesBrand/20031210sportsbus.html>.

amateurism of the student-athlete as the primary source of his resistance.¹⁷

The NCAA claims parity and education as the dual goals of amateurism rules, but their impact runs much deeper.¹⁸ In fact, Dr. Brand credits amateurism as the “defining difference between the collegiate and professional models of sports.”¹⁹ One of the purposes of the NCAA is to “retain a clear line of demarcation between intercollegiate athletics and professional sports,”²⁰ and this demarcation is important because “student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”²¹ It is difficult to imagine a more ironic statement from the President of an organization whose operating budget in fiscal year 2006 was over \$525 million.²² Yet, Dr. Brand fails to see the irony. Instead, he attempts to reconcile the largess of the NCAA’s revenue with the rigidity of his stance towards increasing the compensation available to student-athletes by neatly partitioning the two issues: “Amateurism has never been about the size of budgets or salaries. It isn’t about facility expansion, or skyboxes or commercialism. Amateurism is about why student-athletes play sports. And that, we should never change.”²³

Dr. Brand fails to address, however, why raising the athletic scholarship available to a student-athlete to cover actual costs of attending college or university would undermine the integrity of “why student-athletes play sports.” Certainly this omission seems callous in the face of the robust economic reality of NCAA member institutions. At a time when college and university sports generate \$60 billion a year²⁴ and individual athletes can generate millions of dollars for their schools through television revenues and merchandise sales,²⁵ Dr. Brand’s comments seem, at best, hollow and aloof. College and university coaches routinely make over \$1 million per year;²⁶ bowl games will pay participating schools \$2.2 billion over the next decade;²⁷ media outlets like CBS and ESPN make huge advertising profits during college and university athletic events;²⁸

17. *Id.*

18. Christian Dennie, *Amateurism Stifles a Student-Athlete’s Dream*, 12 SPORTS LAW. J. 221, 243 (2005).

19. Dr. Myles Brand, President, NCAA, State of the Association Speech (Jan. 8, 2005) (transcript available at http://www2.ncaa.org/portal/media_and_events/press_room/2005/january/20050108_soa_speech.html).

20. NCAA MANUAL, *supra* note 3, § 1.3.1.

21. *Id.* § 2.9.

22. MEMBERSHIP REPORT, *supra* note 1, at 33.

23. Brand, *supra* note 19.

24. *See* Hawes, *supra* note 3.

25. Tim Sullivan, *That Appearance of Impropriety*, UNION-TRIB. (San Diego), Apr. 25, 2006, at D1.

26. Of the 119 Division I college football coaches in the country, 42 of them make over \$1 million per year. Jodi Upton & Steve Wieberg, *Million Dollar Coaches Move Into Mainstream*, USA TODAY, Nov. 16, 2006, at 1A.

27. Outback Bowl, *College Bowl Games... Where Everybody Wins*, <http://www.outbackbowl.com/facts/collegegames.html> (last visited Apr. 12, 2008).

28. CBS earned between \$9 million and \$10 million from online advertising alone during the 2007 NCAA Men’s College Basketball Tournament. Stuart Elliott, *A CBS Take on the YouTube Madness*, N.Y. TIMES, Feb. 28, 2007, at C4.

Division I-A member schools bring in an average of \$1.2 million in profit;²⁹ and the NCAA brought in \$560 million in revenue during the 2005–2006 fiscal year.³⁰ Thus, given the flourishing economic engine that is NCAA athletics, a troubling reality emerges: when the NCAA tries to reconcile its stated goals of maintaining amateurism and academic integrity with the economic and entrepreneurial activities of college and university sports, the players bear the burden.³¹

II. DEMANDS AND RESTRAINTS PLACED ON STUDENT-ATHLETES

Student-athletes' lack of compensation does not stem from a lack of commitment—involvement in a college and university sport entails enormous sacrifice. Although the NCAA presumably limits intercollegiate sports to twenty hours of athletically-related activity per week during the playing season, a player's time commitment is often much higher.³² For example, during the fourteen weeks of the football season players consistently spend more than fifty hours a week on football related activities.³³ Away games necessitate an entire weekend of activities; and outside of practice, there is game film to watch and injuries to treat.³⁴ On top of this, players must take a full academic schedule (a twelve credit minimum), attend class, and devote at least ten hours per week of mandatory study hall time.³⁵

The sacrifice demanded of football players extends into the off-season as well.³⁶ Coaches are able to get around time restrictions by imposing “optional” workout sessions and player-initiated practices.³⁷ Realistically then, the off-season entails several required workouts per week in addition to regular individual workouts. Also, the players must attend team meetings each day and engage in six weeks of grueling spring practice.³⁸ Most Division I programs require their players to remain on campus during the summer and early morning weightlifting sessions are

29. Press Release, NCAA, College Sports: Profits or Losses? (Nov. 19, 1996), available at <http://www.ncaa.org/releases/miscellaneous/1996/1996111901ms.htm>. It is important to note, however, that the athletic department profit cited includes institutional support. If this support is removed from the budget, the result is a \$237,000 deficit.

30. MEMBERSHIP REPORT, *supra* note 1, at 30.

31. Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 31 (1996).

32. NCAA MANUAL, *supra* note 3, § 17.1.5; see also Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 835 (2006) (estimating that the average Division I college football player invests 40-50 hours per week in football related activities).

33. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 99 (2006).

34. *Id.* at 100.

35. *Id.* at 101.

36. NCAA MANUAL, *supra* note 3, § 17.1.5.2(a) (limiting student-athletes to eight hours per week of athletically related activities during the “non-playing season,” with no mandatory events during the summer).

37. McCormick & McCormick, *supra* note 33, at 100.

38. *Id.* at 102.

not uncommon.³⁹ During the two weeks of preseason camp, players are effectively on duty from 6:30 a.m. until 10:00 p.m. for six days a week.⁴⁰ Unquestionably, student-athletes contribute a significant amount of time to their respective sports.

Student-athletes sacrifice financially as well. In addition to limiting institutional funding, the NCAA greatly restricts the ability of student-athletes to earn money from other sources.⁴¹ An individual's likeness can only be used for charitable or educational activities, and it cannot promote commercial ventures of any nonprofit organization, no commercial agency can be significantly involved, and the student may only receive the "actual and necessary" expenses, such as travel and food, required for the agency to receive their likeness.⁴²

Also, a student-athlete is not allowed to accept any remuneration or permit the use of his name or picture to advertise, recommend, or promote directly the sale or use of a commercial product or service of any kind.⁴³ In fact, even if a student's name or picture is used to promote commercial items without his knowledge or consent, the student-athlete is required to take affirmative steps to stop such activity in order to retain his eligibility.⁴⁴ Interestingly, the NCAA does not allow this concern with noncommercialism and unjust exposure to affect its own interests—the name or picture of an enrolled student-athlete can be used to promote NCAA championships, as well as other NCAA events, activities, and programs, even though the NCAA profits financially from these ventures.⁴⁵

Additional NCAA regulations further highlight the tension inherent in protecting athletes while promoting NCAA interests. A student-athlete is allowed to appear at media programs throughout the season, thereby promoting his team and college or university, but he is not allowed to receive remuneration and can only receive expenses.⁴⁶ A student-athlete's apparel during competition cannot bear anything except the manufacturer's normal label or trademark, which cannot exceed 2 ¼ square inches in area, even though college and university arenas are routinely filled with corporate advertisements and sponsors.⁴⁷ Alumni and donors are strictly prohibited from buying gifts or even meals for players, but coaches' salaries and benefits are provided in large part by donations from these same boosters.⁴⁸ Seemingly, the only time the NCAA lacks enthusiasm for the purity and amateurism of college and university sports is when their member institutions, but not the players, stand to profit.

39. *Id.*

40. *Id.*

41. *See generally* NCAA MANUAL, *supra* note 3, §§ 12.5.1–12.5.7.

42. *Id.* § 12.5.1.1.1.

43. *Id.* § 12.5.2.1.

44. *Id.* § 12.5.2.2.

45. *Id.* § 12.5.1.1.1.

46. *Id.* § 12.5.3.

47. *Id.* § 12.5.4.

48. Ian Lind, *UH May Be Breaking State Ethics Laws*, STAR-BULLETIN (Honolulu), May 21, 1997, available at <http://starbulletin.com/97/05/21/news/story2.html>.

III. THE ARGUMENT FOR MAINTAINING THE STATUS QUO AND THE REASON THAT CHANGE IS NECESSARY AND JUST

Those in favor of the current financial landscape of intercollegiate athletics advance several justifications for their position. The first concerns equitable distribution within the general student body. With athletes already receiving an increasingly expensive education for free, how can they possibly seek more money? After all, the vast majority of students receive less aid than a point guard on the basketball team who rarely plays, and some people find this fundamentally unfair. Yet, the inequitable axe cuts both ways—in the words of a California state senator, “If you get a drama scholarship or a music scholarship or any other art scholarship, there’s no limit to the amount of money that they could potentially give you. Why should the NCAA limit what the school wants to offer for athletes . . . ?”⁴⁹ The relevant comparison for looking at equitable distribution is between student-athletes and other students with special talents, rather than the general student body. Intuitively, gifted students should be afforded equal opportunities regardless of their department, but student-athletes are restricted in a way that student-musicians or student-intellectuals are not.

Additionally, it seems duplicitous for the NCAA to allow tens of thousands of dollars to be spent on a student-athlete while simultaneously claiming that a couple more thousand would cross some invisible line between the purity of amateurism and the stain of professionalism. Realistically, no such bright-line can be drawn, and it seems highly unlikely that spending \$2,500 more on a student-athlete who is already attending school for free would destroy the fabric of college or university sports. To maintain that a grant-in-aid scholarship does not constitute payment but that an additional stipend to cover the actual cost of higher education crosses the line is merely playing semantics.⁵⁰ This is so, in particular, given that the NCAA amended its bylaws in 2004 to allow student-athletes to receive scholarships or grants that are unrelated to athletic ability which may be added to the basic grant-in-aid based on athletic ability to total the actual cost of attending a college or university.⁵¹ Thus, the NCAA seems to have no problem with athletes receiving funding to cover the actual cost of attending a college or university, provided that the athletic departments that they represent do not have to foot the bill.

Critics also point out that student-athletes are allowed to work during the off-season of their respective sports, provided that they are compensated only for work actually performed and that compensation is distributed at a level commensurate with the going rate in that locality for similar services.⁵² Attacking additional compensation on necessity grounds, critics assert that student-athletes should be able to save enough money during the course of their off-season to cover their school-year expenses. However, this claim ignores the reality of the athletics

49. Parent, *supra* note 12, at 236 (quoting a telephone interview with Senator Murray of California).

50. *Id.* at 248.

51. NCAA MANUAL, *supra* note 3, § 15.1.

52. *Id.* § 15.2.7.

business. As noted earlier, athletes at major colleges or universities simply do not have off-seasons; rather they are routinely required to remain on-campus even during the summer to sharpen their skills.⁵³

Certainly, at the heart of any justification for maintaining the status quo is that student-athletes already receive the most important compensation of all: a free education. This, of course, is a very valid point, and it certainly demonstrates a concern for that with which the NCAA is supposed to be concerned—the student-athlete’s educational experience. Yet this argument does not alter the fact that many student-athletes generate great income for their colleges and universities while being denied the right to receive a scholarship package based on their athletic ability that includes the actual cost of attending their college or university. In effect, the NCAA’s restrictions on aid leave many student-athletes paying money to make money for their colleges and universities. Moreover, the NCAA’s commitment to student-athlete education must be questioned considering the atrociously low graduation rates for major athletic programs⁵⁴ and, perhaps more troubling, the fact that the NCAA demands that athletic scholarships be offered only on a year-to-year basis and may be terminated based on lack of athletic performance.⁵⁵

An impartial observer could easily evaluate the high profits of the NCAA and its member institutions, the low graduation rates of Division I student-athletes, and the NCAA’s reticence to share its record profits by loosening its restrictions to enable colleges and universities to provide scholarships that cover the actual cost of attending school and conclude that the NCAA enjoys having a very cheap labor force that is bound by the immutable law of amateurism. Moreover, one could conclude that the NCAA’s reluctance to increase funding for its student-athletes lies in some misplaced profit motive rather than a paramount concern for the “educational experience” of its constituents. If the NCAA were chiefly concerned with that educational experience, they would not allow scholarships to be pulled based on poor athletic performance.⁵⁶ This policy of allowing on-the-field performance to determine whether a student-athlete is able to complete his education seems to further support the claim that the NCAA has strayed from its core purpose and has become chiefly a corporate entity attempting to ensure a competitive and entertaining product rather than remaining a guardian of the educational experience of its student-athletes.⁵⁷

53. McCormick & McCormick, *supra* note 33, at 99.

54. Parent, *supra* note 12, at 250. Particularly troubling are the racial disparities in these graduation rates. According to a 2001 NCAA study, 36 of the 323 Division I colleges had a zero percent graduation rate among black college basketball players. Among these programs were powerhouses such as LSU, Cincinnati, Arkansas, and Georgia Tech. Richardson: *I’m Supposed to Make a Difference*, ESPN, Feb. 28, 2001, <http://espn.go.com/ncb/s/2002/0228/1342915.html>.

55. NCAA MANUAL, *supra* note 3, § 15.02.7.

56. See generally Presidential Task Force on the Future of Division I Athletics, <http://www.ncaa.org/wps/wcm/connect/NCAA/Legislation+and+Governance/Committees/Future+Task+Force/> (last visited Apr. 8, 2008) (providing Task Force subcommittee reports).

57. Parent, *supra* note 12, at 233.

IV. A WORKABLE SOLUTION

As stated in the introduction, the purpose of this Essay is to call the NCAA back to its roots of being, foremost and fundamentally, an organization dedicated to guarding the educational experience of its student athletes. The first four parts of this Essay illustrate how college and university athletics has evolved from an extracurricular activity whose chief purpose was health and recreation of student-athletes to a multi-billion dollar national obsession, on the back of which the economic future of institutions, both college and corporate, rise and fall. In light of this seismic shift in definition, it is foolish and naïve to expect the NCAA to refuse the corporate suitors who are lining up to write enormous checks to participate in its programs and events. However, it is neither foolish nor naïve to demand that the NCAA use the riches gained from the efforts of its student-athletes to, as a matter of first importance, ensure that the educational experience of its student-athletes be as complete as possible. To that end, the NCAA has a responsibility to ensure that its student-athletes know that their financial needs are taken care of while they are devoting themselves to their respective sports. In order to accomplish this purpose, the NCAA should amend its bylaws to allow student-athletes to receive from its member institutions an athletic scholarship package that covers the actual cost of attending a college or university. No longer should college and university athletes be forced to take out loans, receive Pell grants from the federal government or do without meager spending money when their efforts are creating massive profits for colleges and universities, coaches, networks, magazines, internet sites, sponsor corporations, and the NCAA itself. This change would demonstrate that the NCAA had recommitted to its noble purpose—to guard student-athletes from exploitation.

Across the country, reform of student-athlete compensation is on the horizon both in the courtroom and in the legislature. The NCAA's financial aid structure is currently being challenged as a violation of the Sherman Antitrust Act in *White v. NCAA*.⁵⁸ The lawsuit, filed in February 2006 as a class action on behalf of Division I-A football and basketball players, aims to raise the NCAA scholarship cap, allowing institutions to provide the actual cost of attendance, amounting to a \$2,500 annual increase over the standard grant-in-aid.⁵⁹ Some NCAA critics feel that an antitrust lawsuit is the best opportunity to change the system,⁶⁰ asserting that the NCAA and its member institutions collude to create a monopoly over the student-athlete's ability to share in profits created by college and university

58. Complaint, *White v. NCAA*, No. CV-06-0999 (C.D. Cal. Feb. 17, 2006), available at http://www.voluntarytrade.org/downloads/6P09_Complaint.pdf.

59. Tom Farrey, *NCAA Might Face Damages in Hundreds of Millions*, ESPN, Feb. 21, 2006, <http://sports.espn.go.com/ncaa/news/story?id=2337810>. After the district court partially granted the NCAA's motion to dismiss, the plaintiffs filed an amended complaint. On October 20, 2006, the court certified the class. *White v. NCAA*, No. CV-06-0999 (C.D. Cal. Oct. 19, 2006), available at http://www1.ncaa.org/eprise/main/administrator/white_v_ncaa/15.pdf.

60. Parent, *supra* note 12, at 243; see also Ricardo J. Bascuas, *Cheaters, Not Criminals: Antitrust Invalidation of Statutes Outlawing Sports Agent Recruitment of Student Athletes*, 105 YALE L.J. 1603 (1996).

sports.⁶¹

The likelihood of the plaintiffs' success in this case is minimal, however, as the NCAA has historically prevailed against similar claims.⁶² In the past, the NCAA's accepted justification was preserving amateurism, although Professor Tibor Nagy points out that there has never been a comprehensive survey to suggest that the NCAA's amateurism rules are essential to the product of college and university football, as the NCAA asserts and courts assume.⁶³

The plaintiffs in *White* propose that because "football and basketball players are generating billions of dollars, they should be able to afford basic toilet paper, soap and deodorant. Most of these athletes are from low-income backgrounds, and it's a constant struggle."⁶⁴ Distributional fairness may be the most persuasive attack on NCAA policies. Given that student-athletes create the interest and revenue that colleges and universities capitalize and profit from, it stands to reason that the student-athletes themselves be entitled to at least a small portion of that profit. The NCAA claims that such redistribution would violate the principles of amateurism, but this concern has not prevented the NCAA from increasing corporate sponsorship to cover its own costs.⁶⁵

This case brings to the fore the tension between the NCAA, largely a wealthy establishment, and economically and educationally disadvantaged student-athletes who lack adequate financial support based on the NCAA's "ideals of amateurism."⁶⁶ Many student-athletes simply do not have the means to pay for incurred incidental expenses. Although they could take out loans (as other students admittedly do) or receive federal government aid, student-athletes that generate significant revenue for their institutions should not be required to go into debt to pay for their education nor should they receive grant money from the federal government which could go to other potential college and university students who do not create great wealth with their talents.

In Nebraska, State Senator Ernie Chambers sponsored Nebraska Legislative Bill 688, which calls for additional compensation for football players at the University of Nebraska and which was signed into law on April 16, 2003.⁶⁷ The bill's text

61. Parent, *supra* note 12, at 243.

62. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975).

63. Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 359 (2005). See Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 266 (1986); Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77 (2003); Thomas Scully, *NCAA v. The Board of Regents of the University of Oklahoma: The NCAA's Television Plan is Sacked by the Sherman Act*, 34 CATH. U. L. REV. 857 (1985) (providing further antitrust analysis regarding the NCAA).

64. Farrey, *supra* note 59 (quoting Ramogi Huma, former linebacker for the UCLA Bruins).

65. *Congress' Letter to the NCAA*, USA TODAY, Oct. 5, 2006, http://www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm; see also Steve Wieberg, *NCAA's Tax Status Questioned*, USA TODAY, Oct. 5, 2006, at 3C.

66. Parent, *supra* note 12, at 243.

67. NEB. REV. STAT. §§ 85-1, 131-37 (2003); see Greg Skidmore, *Payment for College Football Players in Nebraska*, 41 HARV. J. ON LEGIS. 319, 323 (2004).

outlines the problems inherent in college and university athletics and suggests that the substantial burdens placed on student-athletes by the University of Nebraska's emphasis on success should be balanced by increasing their financial aid, probably between \$200–\$400 per month.⁶⁸

The bill also provides an alternative to compensation: limiting the number of hours in which student-athletes can participate in a sport.⁶⁹ No specific limit is suggested, but it should be low enough so that student-athletes “can have a normal academic schedule, graduate in four years, participate in campus activities, and work an average of twelve hours per week.”⁷⁰ It would seem that the Nebraska legislature has, in some small way, taken up the mantle that the NCAA has willfully laid down—that of protecting the educational experience of the student-athlete. Yet, the only reason that a clash with the NCAA has thus far been avoided is because the legislation does not take effect until four other states with Big 12 schools pass similar legislation.⁷¹

Certainly the Nebraska proposal is too narrow in scope—only one school and one sport's athletes are covered. But the legislation does an excellent job of pointing out the inequalities of the current system. A proposal by two California state senators would go further than the Nebraska bill and establish a Student-Athletes' Bill of Rights.⁷² The bill's co-sponsor, Senator Kevin Murray, points out that the legislation would not require increased spending but merely allow schools to pay players more by exempting them from NCAA regulations.⁷³ Senator Chambers agrees, opining that “a fair rate of financial compensation would give players a choice when offered illicit inducements, compensation, or assistance.”⁷⁴

Both of these proposals advocate a free-market, laissez-faire approach to the funding problem.⁷⁵ The theory is simple: by removing restrictions and allowing high school athletes to market their services to the highest bidder, college and university athletics would function the same as other American industries.⁷⁶ The market would set the appropriate compensation level for these athletes' services, and college athletes would attend the colleges where their talents would be most useful and productive. Cheating and hypocrisy would be largely eliminated and increased educational regulation would ensure that these athletes could be distinguished from professionals.⁷⁷

Despite its reliance on “educational regulation,” the California proposal would eviscerate any notion of amateurism. In so doing, student-athletes would have neither safeguards against exploitation nor protection of their educational experience. Additionally, like other industries, colleges and universities would

68. Skidmore, *supra* note 67, at 324.

69. *Id.*

70. *Id.* at 325.

71. *Id.* at 326.

72. Parent, *supra* note 12, at 229.

73. *Id.* at 240.

74. *Id.* at 234.

75. *Id.* at 228.

76. Schott, *supra* note 31, at 42.

77. *Id.* at 42.

become even more cutthroat and would no doubt exercise their right to terminate the services of the nonproductive student-athletes with even more regularity, thus further undermining the educational goals of the college or university.⁷⁸ Finally, smaller sports would be largely eliminated, collegiate athletics would turn into a quasi-minor league, and the competitive balance would suffer.

While none of the examples provided above fully and adequately address the problem, it is encouraging that the issue of student-athlete compensation is beginning to gain national attention. And by borrowing principles from each effort, it is possible to find a workable solution to this problem. The antitrust suit provides the scope of the first wave of reform: obtaining additional funding for Division I basketball players and Division I football players in the Bowl Division.⁷⁹ The Nebraska Bill provides the justification for starting with a particular group of Division I student-athletes—namely that the demands on their time and pressures associated with their sports go well beyond what other athletes face.⁸⁰ The California initiative explains that it is impractical for market forces to not be introduced into a multi-billion dollar industry.⁸¹ Each of these lessons are instructive as we explore the practical implementation of this proposal.

According to NCAA bylaws, each Division I football team in the Bowl Division may offer 85 scholarships.⁸² Given that there are 119 Division I football Bowl Division schools, there are a possible 10,115 scholarships available for student-athletes.⁸³ Thus, in order to offer additional scholarship money to cover the actual expenses of attending a college or university to every Division I Bowl Division scholarship athlete, schools would have to increase their athletic budgets by a collective \$25,287,500, or \$212,500 per school, per year. Also, according to NCAA bylaws, each Division I basketball program may offer 13 men's scholarships and 15 women's scholarships.⁸⁴ Given that there are 326 Division I basketball schools,⁸⁵ there are 4,238 men's basketball scholarships and 5,040 women's basketball scholarships that are possibly available for student-athletes. Thus, in order to offer additional scholarship money to cover the actual expense of going to college to every Division I men's and women's scholarship basketball player, schools would have to increase their athletic budgets by a collective \$23,194,999, or \$71,150 per school, per year. In short, a Division I school such as the University of Alabama could cover the actual costs of attending college for all of its scholarship football and basketball players for \$283,650 per year, or 7% of head football coach Nick Saban's annual salary.⁸⁶

78. *Id.* at 43.

79. *See supra* notes 58–66.

80. *See supra* notes 67–71.

81. *See supra* notes 72–78.

82. NCAA MANUAL, *supra* note 3, § 15.5.5.1.

83. NCAA, Composition and Sport Sponsorship of the NCAA (Sept. 1, 2007), available at http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html.

84. NCAA MANUAL, *supra* note 3, §§ 15.5.4.1–15.5.4.2.

85. Richard Lapchick, *The Blame Game for Graduation Rates*, ESPN, Mar. 15, 2006, <http://sports.espn.go.com/espn/news/story?id=2369630>.

86. Adam Jones & Cecil Hurt, *Saban's Contract a Done Deal*, DATELINE ALA., June 15,

Because of the overwhelming number of football scholarships available, the proposal will admittedly benefit a disproportionate number of men and thus implicate Title IX.⁸⁷ However, NCAA bylaws already make exceptions for football in their gender equity guidelines.⁸⁸ At least one scholar believes that a stipend, even if limited to only male athletes in basketball and football, would not offend any Title IX provisions.⁸⁹ But this proposal does not hinge on such a scenario.⁹⁰ Ultimately, the economic resources are available to benefit a significant number of women and men.

Moreover, by limiting the increase to Division I schools, the economic impact will be further limited to the schools that can withstand an increased athletic budget with the most ease. Division II and III programs generate insufficient revenue to justify this type of stipend and typically demand less of their players.⁹¹ Additionally, most schools in lower divisions very rarely award full scholarships, so an additional stipend would be largely irrelevant.⁹² Furthermore, there is nothing in the NCAA bylaws that requires schools to use all of their available scholarship money for a given sport. Thus, if the burden on a school's budget is simply too great to bear, a school may offer a smaller financial package to its student-athletes. In this way, free market forces are allowed to play a hand in the process. Obviously, this may result in the school recruiting a less talented team, but this seems like a terrible reason to deny a better, more financially secure educational experience to student-athletes who attend schools that can afford to offer an enhanced scholarship package. To do so would further reinforce the NCAA's image of being a corporate entity with the primary purpose of ensuring a competitive and entertaining product.

Thus, the proposal to raise athletic scholarships to an amount that covers the actual cost of higher education incorporates the benefits of the free-market system without many of its limitations. By allowing schools to compensate players but setting a moderate limit, the free-market can naturally match competitive schools with talented players, without creating a slippery slope leading to all-out bidding

2007, <http://www.tuscaloosaneews.com/apps/pbcs.dll/article?AID=/20070615/NEWS/706150345/1011/dateline&cachetime=3&template=dateline>.

87. Title IX of the Educational Amendments of 1972 prohibits sex discrimination against students and employees of educational institutions. 20 U.S.C. §§ 1681–1688 (2000).

88. See generally NCAA, GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS (2007), available at http://www.ncaa.org/library/general/gender_equity/gender_equity_manual.pdf.

89. Schott, *supra* note 31, at 44; see also Jeffrey H. Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3 DUKE J. GENDER L. & POL'Y 131 (1996).

90. The Title IX issues raised here are quite complex. While they deserve full consideration, a meaningful attempt to address them would not fit within the constraints of this article. However, it is worth noting that if Title IX ultimately requires exact equality in scholarship funding, athletic budgets would have to increase \$25,287,500 annually a year to account for the increased football stipend, discussed above.

91. Donald Siegel, *The Union of Athletics With Education*, http://www.science.smith.edu/exer_sci/ESS200/Ed/Athletic.htm (last visited Feb. 17, 2008).

92. EducationPlanner.org, NCAA Scholarship Limits: 2007–2008 Total Annual Scholarship Limits, http://www.educationplanner.com/education_planner/paying_article.asp?sponsor=2859&articleName=NCAA_Scholarship_Limits (last visited Apr. 9, 2008).

wars.⁹³ Competitive balance under the system would be analogous to professional basketball, with the stipend limit serving as a rough “salary cap” limiting the extent to which “small market” universities like Xavier are forced to spend to keep up with Texas and USC.

One potential drawback to introducing a stipend would be the negative effect it might have on non-revenue sports. Distributional fairness does not necessarily require that these athletes receive a stipend, as basketball and football players tend to put in more time and produce more money for the school; in a sense, these athletes fund their own stipend. However, an adverse impact could occur as athletic departments raid the budgets of non-revenue sports in order to finance the increased budgets for basketball and football. To protect against this possibility, the NCAA should introduce supplemental legislation prohibiting the increase in athletic scholarship amounts for basketball and football from coming out of the general athletic budget.

Because the increase in athletic scholarships would be optional, the NCAA should require schools to administer it without taking money away from other programs. This could be accomplished by permitting colleges and universities to raise the additional scholarship money through the same private means that they use to pay the exorbitant salaries of their football and basketball coaches. Certainly if private foundations are allowed to subsidize a coach’s salary by millions of dollars per season, it would not violate any code of amateurism to allow these same foundations to provide an additional few hundred thousand dollars a year to ease the economic burden on a significant portion of the school’s student-athletes. By permitting private foundations to finance the increase in athletic budgets, in essence, the NCAA would be using the considerable corporate clout of its product to actually benefit the product itself—a decidedly noble use of market forces.

CONCLUSION

The NCAA was founded on the principle of insuring that the educational experience of its student-athletes would not get overwhelmed by powerful outside forces that took the game that they play for pleasure and health and turned it into a multi-billion dollar national obsession. Yet, one hundred years later, modern student-athletes are, indeed, overwhelmed. More troubling is the fact that the NCAA is the gatekeeper of their economic exploitation. This must change. The NCAA must reclaim the moral high ground by using its vast resources, first and foremost, as a means to protect and benefit its student-athletes. The first step is to ease the economic burden on its revenue-producing athletes by increasing the ceiling on athletic scholarships to cover the actual cost of attending a college or university. The change appropriately balances the NCAA’s concern with amateurism and academic integrity with notions of distributional fairness, equity, and competition, and, therefore, it should be adopted. This change will neither undermine the bedrock principle of amateurism nor create an economic burden on its member institutions. Conversely, this change will signify that the NCAA cares

93. Parent, *supra* note 12, at 236.

more about its individual student-athletes than it does about profits and its product. The NCAA states that a portion of its basic purpose is to “retain a clear line of demarcation between intercollegiate athletics and professional sports.”⁹⁴ Nothing would highlight the distinction more than the NCAA’s willingness to put the needs of its student-athletes ahead of the profit motives of its member institutions and its corporate sponsors.

APPENDIX A: A PROPOSED BYLAW FOR THE NCAA DIVISION I MANUAL

[Under the “Definitions” Section of Article 15 (Financial Aid)]

15.02 Full Grant-In-Aid. A full grant-in-aid is financial aid that consists of tuition and fees, room and board, and course-related books, as well as an allowance for supplies, transportation, and miscellaneous personal expenses not to exceed \$2,500 per year.

15.02.1. Disabled Student-Athletes. For a disabled student-athlete, an allowance for expenses reasonably incurred and related to the student’s disability, but not provided for by other agencies, is permitted.

15.02.2. Restitution. For violations of Bylaw 15.02 and its subsection in which the value of the benefit is \$100 or less, the eligibility of the individual shall not be affected conditioned on the individual repaying the value of the benefit to a charity of his or her choice. However, the individual shall remain ineligible from the time the institution has knowledge of receipt of the impermissible benefit until the individual repays the benefit. Violations of this bylaw remain institutional violations per Constitution 2.8.1, and documentation of the individual’s repayment shall be forwarded to the enforcement staff. (*Tracking Bylaw 12.4.2.5.*).

94. NCAA MANUAL, *supra* note 3, § 1.3.1.