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Amateurism vs. Capitalism:

A Practical Approach to Paying College Athletes

Dalton Thacker

I. INTRODUCTION

On April 7, 2014, the University of Connecticut (UCONN) men's basketball team was poised to reach its goal of winning a national championship. The AT&T Stadium was packed with 79,000 fans who paid an average of \$500 to watch the Final Four games.¹ CBS cameras were setting up on the sidelines; the network paid approximately \$800,000,000 per year for the media rights to show the National Collegiate Athletic Association (NCAA) tournament on its platform.² UCONN's point guard Shabazz Napier was preparing for the biggest night of his entire career when a reporter inquired into the topic of paying collegiate athletes. Napier seized the opportunity and responded, "we as student athletes are utilized for what we do so well, and we're definitely blessed to get a scholarship to our universities. But, at the end of the day, that doesn't cover everything."³ Napier is one of many student athletes who struggle to make ends meet while being exploited for his hard labor.

Like Napier, many college athletes are thrust into the national spotlight, while their university reaps the financial rewards of the players' athletic talents. Collegiate athletes endure athletic schedules like those of

¹ *Prices For 2014 Final Four Tickets Dropping With Semis Just Two Days Away*, CBS DFV (Apr. 3, 2014, 3:42 PM), <http://dfw.cbslocal.com/2014/04/03/prices-for-2014-final-four-tickets-dropping-with-semis-just-two-days-away/>.

² Thomas O'Toole, *NCAA Reaches 14-year Deal With CBS/Turner for Men's Basketball Tournament, Which Expands to 68 Teams for Now*, USA TODAY (Apr. 22, 2010), <http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbturner/1#.WBzzQi0rJD9>.

³ Mike Singer, *Connecticut's Shabazz Napier: 'We do have hungry nights'*, CBS SPORTS (April 07, 2014, 4:09 PM), <http://www.cbssports.com/college-basketball/news/connecticuts-shabazz-napier-we-do-have-hungry-nights/>.

professional athletes;⁴ however, college athletes are also burdened with the additional pressure of maintaining passing grades in order to remain eligible and earn a degree. “It used to be the case that in the off-season you could go out and get a job. Now, playing a Division I sport is a full-time job that demands each athlete offer a full year commitment.”⁵ Despite this commitment, only 44 of the 18,684 NCAA men’s basketball players are drafted into the National Basketball Association, and only 251 of the 73,660 NCAA football players are drafted into the National Football League.⁶

Without an income, many athletes are unable to buy food, gas, and other essentials. Napier continued, “sometimes, there are hungry nights where I’m not able to eat. Sometimes money is needed [and] we don’t have enough money to get food.”⁷ Not only must these individuals attend practice, film sessions, team meetings, weight trainings, and physical therapy, but they also must attend a full class schedule and maintain stellar grades.⁸ Seattle Seahawks cornerback and Stanford alumnus Richard Sherman was asked before Super Bowl XLIX about his thoughts on the schedule of a college athlete. Sherman said, “show me how you’re going to get all your work done when you get out of practice at 7:30 p.m., you’ve got a test the next day, you’re dead tired from practice, and you still must study just as hard as everybody else.”⁹ The hectic schedule that Sherman articulated illustrates some of the difficulties that athletes face after coming home from a late practice, studying for class, and then still trying to make time for a social life. Napier concluded his interview before the National

⁴ Peter Jacobs, *Here’s the Insane Amount of Time Student-Athletes Spend on Practice*, BUS. INSIDER (Jan. 27, 2015, 11:44 AM), www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1.

⁵ Interview with Anonymous, Head Basketball Coach, Anonymous Div. I College, September 14, 2016, [hereinafter Interview].

⁶ NCAA (Mar. 10, 2017), <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics>.

⁷ Roger Sherman, *Shabazz Napier: ‘There’s hungry nights where I’m not able to eat,’* SB NATION (April 7, 2014, 7:23 PM), <http://www.sbnation.com/college-basketball/2014/4/7/5591774/shabazz-napier-uconn-basketball-hungry-nights>.

⁸ Steve Wieberg, *Study: College Athletes Are Full-Time Workers*, USA TODAY (Jan. 13, 2008), http://usatoday30.usatoday.com/sports/college/2008-01-12-athletes-full-time-work-study_N.htm.

⁹ SI Wire, *Richard Sherman Discusses College Athletes’ Time Constraints*, SPORTS ILLUSTRATED, (Jan. 29, 2015), <https://www.si.com/nfl/2015/01/29/richard-sherman-seahawks-ncaa-seattle>.

Championship game, and stated that “sometimes, there’s hungry nights where I’m not able to eat, but I still have to play up to my capabilities.”¹⁰ Despite the struggles that these athletes face, they are aware that their schools and the NCAA are making billions of dollars off their hard work. Napier concluded, “when you see your jersey getting sold . . . you feel like you deserve something in return.”¹¹ Athletes like Napier are not wrong for feeling this way. The NCAA’s exploitation of college athletes is a social injustice, and a change is overdue.

Napier, along with countless other collegiate athletes, generate billions of dollars in revenue for their teams and schools. Yet the only compensation they see is in the form of academic scholarships.¹² Athletes at all levels deserve compensation because of the benefits that they offer to their schools, the time commitment that they must maintain, and the sacrifices that are required to succeed; however, the NCAA’s amateurism regulation exploits collegiate athletes and violates antitrust laws, specifically the Sherman Act. Therefore, the NCAA should be forced, through a two-prong Congressional bill, to amend its amateurism regulation. This bill should require the NCAA member schools to allow their athletes to be paid royalties through endorsements, merchandise, and media that use their name, image, or likeness (NIL), and all qualifying college athletes should be labeled as employees for purposes of the United States Department of Education’s Federal Work-Study program (FWS).

This article will begin by addressing the background of the NCAA’s amateurism regulation and the current financial state of the NCAA. Next, the article addresses the threshold argument regarding whether college athletes deserve compensation in addition to athletic scholarships. After answering this question in the affirmative, the article addresses some of the leading counterarguments to this theory. Once it establishes that athletes deserve pay, the article details the best solution to this problem, which comes in the form of a two prong Congressional bill.

¹⁰ *Id.*

¹¹ *Id.*

¹² Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), <http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills> (all 2004 figures are adjusted for inflation).

II. BACKGROUND

From its inception, the focus of the NCAA has been on education first and athletics second. The NCAA prides itself on its history of promoting the importance of the typical collegiate experience: attending school, playing for your school's sports team, and graduating with a degree.¹³ However, the NCAA of the past likely would have never foreseen the multimillion dollar market that it currently governs. This new world of collegiate athletics offers a system that sometimes helps pay for the education of athletes who, in turn, generate billions of dollars for the NCAA.¹⁴ This system is outdated. As the NCAA continues to maintain its monopoly,¹⁵ young athletes are being taken advantage of and overworked to receive compensation in the form of academic scholarship that only is available if they complete the difficult requirements needed to earn a college degree. This is an unfair system and it is time for Congress to require the NCAA to amend its amateurism regulation so that college athletes can begin to receive compensation for their hard work.

The *Washington Post* reviewed thousands of pages of financial records from 48 public universities in the five wealthiest collegiate conferences.¹⁶ From 2004 to 2014, the combined income of the forty-eight athletic departments nearly doubled, from \$2.67 billion to \$4.49 billion.¹⁷ The median department saw earnings jump from \$52.9 million to \$93.1 million.¹⁸ These numbers may seem staggering; however, they do not come close to the sums that the NCAA generates. In the 2015 fiscal year, the NCAA alone generated \$989 million, according to an audited financial statement cited by *USA Today*.¹⁹

¹³ *Amateurism*, NCAA, <http://www.ncaa.org/amateurism>.

¹⁴ Hobson, *supra* note 12.

¹⁵ Bloomberg Businessweek, *The Best Little Monopoly in America* (Dec. 8, 2002), <https://www.bloomberg.com/news/articles/2002-12-08/the-best-little-monopoly-in-america>.

¹⁶ Hobson, *supra* note 12.

¹⁷ Hobson, *supra* note 12.

¹⁸ Hobson, *supra* note 12.

¹⁹ Maxwell Strachan, *The NCAA Just Misses \$1 Billion in Annual Revenue*, HUFFINGTON POST (Mar. 11, 2015, 8:56 PM), http://www.huffingtonpost.com/2015/03/11/ncaa-revenue-2014_n_6851286.html.
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Nonetheless, many of the athletes that are responsible for this revenue live in tremendous poverty. In fact, 86 percent of college athletes live below the poverty line.²⁰ Many young athletes aspire to one day escape their dangerous or poor neighborhoods, and the NCAA offers a viable conduit to propel them into professional sports; it may even offer a life of fame and fortune. However, the likelihood of college athletes reaching this dream is minimal. Of the 18,684 NCAA men's basketball players, only 44 are drafted into the National Basketball Association; of the 73,660 NCAA football players, only 251 are drafted into the National Football League.²¹ The NCAA takes advantage of these statistics, preys on the dreams of young athletes coming out of unfortunate situations, exploits their athletic prowess, and reaps the benefits of multibillion dollar television deals.²²

The income that schools generate may seem absurd, but the NCAA and its member schools have large expenses and often are in debt.²³ However, the NCAA is a nonprofit institution and is incentivized to spend all its earnings.²⁴ Rather than directing the financial surplus to luxurious coaches' salaries—like Jim Harbaugh with an annual salary of \$9,004,000²⁵—its

²⁰ Matt Hayes, *Report Concludes 86 Percent of Student Athletes Live in Poverty*, SPORTING NEWS (Jan. 15, 2013), <http://www.sportingnews.com/ncaa-football/news/4465460-student-athletes-poverty-paid-scholarships-ncaa-texas-duke>.

²¹ *Estimated Probability of Competing in Professional Athletics*, NCAA (Mar. 10, 2017), <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics>.

²² Rodger Sherman, *The NCAA's New March Madness TV Deal Will Make Them a Billion Dollars a Year*, SB NATION (Apr. 12, 2016, 5:06 PM), <https://www.sbnation.com/college-basketball/2016/4/12/11415764/ncaa-tournament-tv-broadcast-rights-money-payout-cbs-turner>.

²³ Brian Burnsed, *Athletics Departments That Make More Than They Spend Still a Minority*, NCAA (Sept. 18, 2015, 9:30 AM), <http://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority>.

²⁴ Tax-exempt nonprofits often make money because of their activities and use it to cover expenses. If a nonprofit's activities are associated with the nonprofit's purpose, any profit made from them isn't taxable. However, nonprofits make money in ways that aren't related to their nonprofit purposes. While nonprofits can usually earn unrelated business income without jeopardizing their nonprofit status, they must pay corporate income taxes on it, under both state and federal corporate tax rules. *See* <https://www.nolo.com/legal-encyclopedia/taxes-nonprofit-corporation-earnings-30284.html>.

²⁵ *The 25 Highest-Paid College Coaches of 2017*, Best Schools, <https://thebestschools.org/features/highest-paid-college-coaches/>.

focus should be on the athletes that are predominantly responsible for the income. The money is available; however, Congress needs to force the NCAA to prioritize the athletes ahead of the desires of the schools and coaches.

III. ISSUE ONE: SHOULD COLLEGE ATHLETES BE PAID?

The initial question that must be answered is whether college athletes deserve monetary compensation in the first place. Many critics believe that scholarships are an adequate form of compensation, and that to take the next step into monetary compensation would have negative effects on the NCAA and its players.²⁶ However, the arguments in favor of paying the athletes are more compelling due to the workload and schedule that athletes endure, as well as the social justice and antitrust issues that surround the topic.

A. Athletes' Workloads Demand Payment

I played collegiate basketball for an NAIA Division II school. I earned a good career that included Conference Freshman of the Year, Player of the Year, and All-American Honorable Mention. During a typical day, I would wake up around 6:00 a.m., go to the gym for an individual workout, go to classes, study film, go to the gym again, workout in the weight room, stretch and take an ice bath, then head home for dinner and study for a 16-credit course load. Additionally, I worked 20 hours a week to help minimize the amount of student loans that I had to take out for rent, food, and other expenses.

Non-athletes are often unable to sympathize with an athlete's schedule and workload because much of the athlete's work is done out of the public spotlight. According to a survey of 21,000 NCAA football players, the average player puts 44.8 hours into their sport a week, even more than most full-time employees.²⁷ College athletes that work 44.8 hours a week for their sport and maintain the study schedule needed to maintain a passing

²⁶ Jeffrey Dorfman, *Pay College Athletes? They're Already Paid Up To \$125,000 Per Year*, FORBES (Aug. 29, 2013, 8:00 AM), <https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#24c8281d2b82>.

²⁷ Amber Smokowski, *Why NCAA Athletes Deserve to be Paid*, ODYSSEY ONLINE (June 29, 2015), <https://www.theodysseyonline.com/ncaa-athletes-deserve-paid>.

GPA cannot be expected to work. College basketball today is a full-time, year-round job.²⁸ Athletes that compete at this level must commit to their program through the season and into the off-season. This year-long commitment makes it difficult for athletes to obtain any form of employment. Further, many athletes come from poverty,²⁹ and the current NCAA system perpetuates the athlete's poverty by keeping them financially oppressed.

B. Athletes Often Come from Poverty

In 2011, the NCAA suspended Baylor basketball star Perry Jones as punishment when his mother accepting financial help from Jones' past Amateur Athletic Union coach to help pay for housing.³⁰ Jones was unaware that his loans had accumulated over \$1,000 and his mother paid back the money in full.³¹ The bank had foreclosed on the Jones' family home.³² The family was struggling to make ends meet while paying off Jones' mother's medical bills as she battled a severe heart condition.³³ When asked about his situation, Jones said, "basically, I got suspended because we were struggling, and my mom didn't want us to live on the streets," Jones told ESPN in 2012.³⁴ "We were down to nothing and someone helped us out. I always ask people, 'if you were in that situation, and you didn't have a place to stay, would you ask someone you'd known since the sixth grade for a little help?' Everyone knows they would."³⁵ Unfortunately for Jones, accepting gifts related to playing athletics is

²⁸ Interview, *supra* note 5.

²⁹ Interview, *supra* note 5.

³⁰ Mark Viera & Pete Thamel, *Baylor Star, A Top N.B.A. Prospect, Is Suspended*, N.Y. TIMES (Mar. 9, 2011), <http://www.nytimes.com/2011/03/10/sports/ncaabasketball/10hoops.html>.

³¹ Viera, *supra* note 30.

³² Kami Mattioli, *The Most Ridiculous NCAA Violations in College Basketball*, SPORTING NEWS (Sept. 5, 2014), <http://www.sportingnews.com/ncaa-basketball/news/most-ridiculous-silly-insane-ncaa-violations-college-basketball/d9btfffwi4zy1e28c86oap2k>.

³³ *Id.*

³⁴ *Id.*

³⁵ Mattioli, *supra* note 32.

strictly prohibited by the NCAA.³⁶ Like Jones, many athletes that reach the NCAA come from families that are struggling to make ends meet.³⁷ For many of these athletes, sports are their way out of poverty. This burden places tremendous amounts of pressure on these athletes to help provide for and support their families. Beyond the concern of supporting their families, many athletes struggle to make ends meet once they get to college.

The National College Players Association released a report on the price of poverty in college sports.³⁸ The report concluded that eighty-six percent of college athletes live below the poverty line.³⁹ In addition, the average out-of-pocket expenses for each full scholarship athlete⁴⁰ was approximately \$3,222 per year during the 2010-11 school year.⁴¹ However, the fair market value of the average Football Bowl Subdivision (formerly Division I) football or basketball player was \$121,048 and \$265,027, respectively.⁴² These numbers make it no surprise that some of the top college athletes accept illegal handouts from agents or school boosters just to help make ends meet.

Jamar Samuels is another example of a college athlete being punished for accepting some much-needed help. In 2012, Samuels, a basketball player for Kansas State, was suspended for accepting a \$200 wire transfer from his summer-league coach.⁴³ Curtis Malone, Samuels' summer league coach, stated that he was unaware of the rule that he was not able to give money to one of his former players.⁴⁴ Malone said, "the kid's family doesn't have anything and he called me for money to eat."⁴⁵ Samuels, who received the

³⁶ *NCAA Regulations*, U. N.C., 47-54, http://grfx.cstv.com/photos/schools/unc/genrel/auto_pdf/handbook-ncaa-regulations-10.pdf.

³⁷ See Hayes, *supra* note 20.

³⁸ See Hayes, *supra* note 20.

³⁹ See Hayes, *supra* note 20.

⁴⁰ (there are partial scholarships awarded in many NCAA sports)

⁴¹ *Id.*

⁴² *Id.*

⁴³ Jeff Goodman, *Kansas State's Samuels Suspended for \$200 Wire from Summer-League Coach*, CBS SPORTS (Mar. 17, 2012), <http://www.cbssports.com/college-basketball/news/kansas-states-samuels-suspended-for-200-wire-from-summer-league-coach/>.

⁴⁴ *Id.*

⁴⁵ *Id.*

transfer on Monday, was informed of the decision on Saturday morning and was not permitted to play in the team's loss to Syracuse.⁴⁶ "The kid didn't do anything wrong," Malone said. "To be honest, I didn't think I did anything wrong, either. If a kid who plays for me needs money to eat, I'm going to help them."⁴⁷

C. Athletes Are Often Exploited

The NCAA produces a massive industry that has been formed off the hardworking backs of young athletes. Many people argue that these athletes are only worth what they are given in scholarships;⁴⁸ however, they are worth so much more. Another study conducted by the National College Players Association revealed that Texas football players were valued at \$513,922 and Duke basketball players were valued at \$1,025,656.⁴⁹ However, the yearly tuition at The University of Texas for an in-state resident is \$4,813.⁵⁰ With these numbers in mind, it seems to be a frivolous argument that free tuition is fair compensation for athletes. Rather, it seems clear that many of these athletes are being exploited beyond anything this nation has seen in decades. Michael Bennett, defensive lineman for the Seattle Seahawks and Texas A&M alumnus is an outspoken proponent to paying college athletes. In an interview with ESPN's E:60, Bennett was asked about the subject and responded, "college players should get paid. [The] NCAA gets paid.⁵¹ [The] Rose Bowl gets paid. Everybody gets paid except the people making the product. In some countries, they call that slavery."⁵²

People who oppose paying college athletes may argue that the scholarships that athletes receive are generous compensation, but as a percentage of the total revenue that they generate, their value is paltry. In the Atlantic Coast Conference and the Pac-12 Conference, the total reported scholarship costs averaged only 5.6 percent and 7.3 percent of the school's

⁴⁶ *Id.*

⁴⁷ Goodman, *supra* note 43.

⁴⁸ Dorfman, *supra* note 25.

⁴⁹ Hayes, *supra* note 20.

⁵⁰ *Tuition 2017-18*, U. Tex, <http://admissions.utexas.edu/tuition>.

⁵¹ Andrew McCarty, *Seahawks' Michel Bennet Compares NCAA to Slavery*, SPUN (Oct. 11, 2016), <http://thespun.com/news/michael-bennett-compares-ncaa-to-slavery>.

⁵² *Id.*

football and basketball revenues.⁵³ In “Indentured: The Inside Story of the Rebellion Against the NCAA,” Joe Nocera and Ben Strauss quote a wide range of economists and attorneys who agree that the NCAA functions as an economic cartel by colluding to artificially suppress wages for workers.⁵⁴ To illustrate this point, in 2014, football players at Northwestern University organized a strike to illuminate the fact that they regularly worked more than 50 hours per week for their school’s athletic department.⁵⁵ A shocking economic analysis estimates that if the NCAA were to move to a free-market competitive structure, men’s football and basketball players would be valued in natural wages between \$100,000 and \$300,000 per year.⁵⁶

Civil rights author Taylor Branch notes that the “real scandal is not that players are getting illegally paid or recruited,” it is that the NCAA’s amateurism and student-athlete principles are “legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes.”⁵⁷ It is hypocritical for the NCAA to claim that its focus is on protecting the players when those same players do not receive a penny for their efforts and lack fundamental rights that should be included in the NCAA’s bylaws.⁵⁸ In turn, the universities the athletes represent on the field receive millions of dollars in revenue based solely on the talents of the athletes.⁵⁹ This exploitation is contrary to what the NCAA claims is its purpose, and young athletes across the nation that are suffering from this injustice need help.

⁵³ Nick Romeo, *Does the NCAA Exploit Student-Athletes?*, BOSTON GLOBE (Feb. 22, 2016), <https://www.bostonglobe.com/arts/books/2016/02/21/does-ncaa-exploit-student-athletes/OnIF5KDFbt6oYACJIBBsSP/story.html>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

⁵⁸ Mary Grace Miller, *The NCAA and the Student-Athlete: Reform is on the Horizon*, 46 U. RICH. L. REV. 1141 (2012).

⁵⁹ Steve Berkowitz & Jodi Upton, *Money Flows to College Sports; Spending Up Amid Schools’ Right Times*, USA TODAY, June 16, 2011, at A1 (noting that “[m]ore than \$470 million in new money poured into major college athletic programs” in 2010).

IV. JUDICIAL DEVELOPMENT

Professor John Kirkwood, a leading antitrust expert, explained that the judicial system in the United States was first exposed to this issue in 1984.⁶⁰ The Supreme Court analyzed a television broadcast license agreement that the NCAA made in the case *Board of Regents v. NCAA*.⁶¹ The University of Georgia and Oklahoma University argued that the deal the NCAA struck prohibited individual schools from licensing the TV rights to their own games.⁶² The contracts capped the total number of games that could be broadcast and the number of times that any school, like Oklahoma or Georgia, could be televised.⁶³ By doing this, the NCAA granted itself exclusive bargaining power.⁶⁴ Generally, antitrust law attempts to limit this type of monopoly or anti-competitive action and instead pursue the goal of competition in the marketplace to protect the interests of consumers.⁶⁵ The Court ruled that the restrictions raised prices, reduced output, and curtailed consumer choice, and therefore violate the Sherman Act.⁶⁶ However, the Court did not hold any of them illegal per se.⁶⁷ Rather, the Court decided that they had to be evaluated under the Rule of Reason.⁶⁸ The Rule of Reason test looks at whether the conduct had anticompetitive effects by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.⁶⁹ The Court supported this idea because it reasoned that a sports league cannot operate without rules and in order to offer games that consumers enjoy, the NCAA must regulate: on the field play, the balance between teams, and the qualifications of players.⁷⁰ Therefore, no NCAA rule could be condemned without asking why it was

⁶⁰ Interview with John B. Kirkwood, Antitrust Professor, Seattle University School of Law, February 9, 2017, [hereinafter Kirkwood].

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

⁷⁰ Kirkwood, *supra* note 60.

passed and whether it makes the sport more attractive to consumers.⁷¹ This case set the stage for more cases to address the need to pay college athletes.

In 2013, Ed O'Bannon, previous NCAA basketball All-American, brought a class action suit against the NCAA and argued that the NCAA's rules illegally prevent schools from compensating athletes for the use of their NIL.⁷² In August of 2014, Judge Claudia Wilken agreed with O'Bannon and ruled that the NCAA violated antitrust law by prohibiting athletes from profiting from their names and images in TV broadcasts and video games.⁷³ A major distinction between *Board* and *O'Bannon* is that *Board* focused on the effect on consumers whereas *O'Bannon* focused on the athletes.⁷⁴ O'Bannon argued that athletic scholarships were capped at an amount that was several thousand dollars *less* than the full cost of tuition and players could receive *nothing* for the use of their NIL in video games, TV broadcasts, etc.⁷⁵ Because of these restrictions, college athletes receive less than a competitive market would provide, which supports the argument that the NCAA's actions are anticompetitive.⁷⁶

However, the major question posed in any antitrust analysis is whether these anticompetitive rules harm consumers. The NCAA argued that the amateur nature of college sports is what attracts consumers in the first place.⁷⁷ The Ninth Circuit agreed that amateurism was a legitimate and important procompetitive effect, but it would not hold that any limit on athlete compensation was automatically lawful, as the NCAA attempted to argue.⁷⁸ The court's reasoning was that "[A] restraint that serves a procompetitive purpose can still be invalid . . . if a substantially less restrictive rule would further the same objectives equally well."⁷⁹ This meant that if the NCAA could promote amateurism just as effectively in some other way, a way that would be less harmful to athletes, then its

⁷¹ Kirkwood, *supra* note 60.

⁷² O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

⁷³ In re: Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., Nos. 14-MD-2541 CW, 2016 WL 4154855 (N.D. Cal. filed Aug. 5, 2016).

⁷⁴ See *O'Bannon*, 802 F.3d (2015).

⁷⁵ *Id.*

⁷⁶ Kirkwood, *supra* note 60.

⁷⁷ See *O'Bannon*, 802 F.3d (2015).

⁷⁸ *Id.*

⁷⁹ *O'Bannon*, 802 F.3d at 1064.

existing restraints could not stand. This became the focus in the *O'Bannon* case and the court had to determine whether any alternatives would achieve the same objectives.

The court concluded that the NCAA could pay athletes the full cost of tuition therefore removing the cap that had been previously in place.⁸⁰ *O'Bannon* also asked the court to implement a deferred compensation program of \$5,000 for the use of athletes' NIL, but the Court did not accept this proposal.⁸¹ Unlike in *Board*, the key issue in *O'Bannon* became whether compensation beyond a scholarship crossed an important line and would reduce consumer interest in college sports.⁸² Ultimately, the court held that the NCAA had violated the Sherman Act by capping athletic scholarships below the full cost of tuition, but had not violated the Act by banning all compensation beyond educational expenses.⁸³

However, neither *Board* nor *O'Bannon* present an insurmountable hurdle for future litigation or congressional action. The *O'Bannon* case did not implement an outright ban of compensation beyond a full scholarship, and it misapplied the Rule of Reason balancing test.⁸⁴ Although the Supreme Court has not accepted an appeal, this case would neither prohibit a future ruling in favor of an amendment to the NCAA's amateurism regulation, nor would it place any burden on Congress should Congress decide to implement a bill that amended the regulation.⁸⁵

Case analysis is important because it illustrates not only the push back from athletes, but also the propensity for change. When college athletes have demanded payment, the NCAA's contended that if athletes were to be paid, it would cause consumers to lose interest in college athletics.⁸⁶ However, what is so compelling about college athletics is not that they are playing for free—it is the camaraderie, the focus on teamwork rather than individual talent, the youth of the players, and the skill that these players present despite their youth. Further, it may be the case that consumers are

⁸⁰ *Id.* at 1076.

⁸¹ *Id.* at 1078.

⁸² Kirkwood, *supra* note 60.

⁸³ *O'Bannon*, 802 F.3d at 1078.

⁸⁴ *Id.*

⁸⁵ Kirkwood, *supra* note 60.

⁸⁶ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 at 117, 104 S. Ct. 2948, 82 L. Ed. 2d 70, (1984).

drawn to college sports because many consumers can identify with their alma mater and feel a part of the success of the athletic departments of their past universities. Ultimately, however, the level and nature of the play can be considered as the attractive features to sports fans, not the compensation structure of the athletes. Rewarding college athletes for the constant use of their NIL would have no effect on any of the factors that make college athletics the multi-billion-dollar industry that it has become.

V. COUNTER ARGUMENTS

A. Amateurism Is Important and Promotes Education

Although there are strong arguments in favor of doing away with the amateurism regulation in order to compensate student athletes, there are also arguments in favor of maintaining the current system. The NCAA argues that amateur competition is the bedrock principle of college athletics and the NCAA.⁸⁷ The NCAA bylaws state, “Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the priority. In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second.”⁸⁸ Specifically, amateurism requirements do not allow: contracts with professional teams, salary for participating in athletics, prize money above actual and necessary expenses, play with professionals, tryouts, practice or competition with a professional team, benefits from an agent or prospective agent, agreement to be represented by an agent, or delayed initial full-time collegiate enrollment to participate in organized sports competition.⁸⁹ In practice, this restricts players from signing endorsement deals or accepting money that is related in any way to their participation in sports.⁹⁰ The NCAA bylaws also prohibit players from receiving any portion of the revenue produced by the televised games.⁹¹ Thus, the revenue

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Amateurism, *supra* note 13.

generated by collegiate athletes goes to the NCAA, conferences, schools, and coaches.⁹²

The NCAA contends that participating in college sports is rooted in a basic, deeply American concept: work hard, make sacrifices, and be rewarded with an education.⁹³ Additionally, some contend that a reward in the form of an education at an American university is not only sufficient, but should be cherished.⁹⁴ Non-athletic college students acquire thousands of dollars in student loan debt to pay for tuition, room, and board. Everyone's career ends at some point, and because of the education that college athletes receive, most will be able to enter the world with a degree and be able to attain prestigious, sought-after jobs.⁹⁵ A very small number of these athletes become professional athletes,⁹⁶ which leaves most of these athletes with a degree from a university and skills that will enable them to succeed in the professional workplace outside of the classroom, field, or gymnasium.

The idea that scholarships are adequate compensation sounds good in theory; however, the reality is that amateurism no longer promotes education as it did in previous years. Or, it has been discovered as a facade to cover the capitalist agenda of the NCAA. College players are not blind to the impact that they have on the nation and the revenue that their athletic exploits generate. Scholarships are inadequate to fully compensate and reward these athletes for the service that they are providing to their schools and the money they generate. Paying players will not act as an educational deterrent; it will promote education by providing impoverished athletes with much needed compensation to financially survive a full college experience. Rather than leaving college early to pursue employment or a professional athletic career, many athletes would have an incentive to remain in college and earn their degree. Therefore, scholarships are no longer an adequate form of compensation and a change is overdue.

⁹² Bd. of Regents of Univ. of Oklahoma, S. Ct. 2948, 82 L. Ed. 2d 70, xxx (1984) at 117.

⁹³ Ben Sutton, *A Case for Amateurism in College Sports*, SPORTS BUS. J. (Apr. 21, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/04/21/Opinion/Ben-Sutton.aspx>.

⁹⁴ *Id.*

⁹⁵ Interview, *supra* note 5.

⁹⁶ *Estimated Probability of Competing in Professional Athletics*, *supra* note 21.

B. Schools Cannot Afford It

Most NCAA Division I schools operate in debt.⁹⁷ In 2014, the expenses generated by the athletic programs of Football Bowl Subdivision schools continued to exceed the revenue that the programs produce.⁹⁸ During the 2014 fiscal year, the NCAA made \$982 million in total revenue.⁹⁹ However, twenty-four Football Bowl Subdivision schools spent more revenue than they generated in 2014, per the NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report.¹⁰⁰ In an interview with Colin Roberts, contract advisor and legal counsel with Reign Sports Management, Colin said that he liked the idea of amateurism but it's pretty clear that the business of the NCAA and college athletes is far from amateurism.¹⁰¹ Colin noted that there are a small number of schools in the country that actually make money from their athletic programs, while the clear majority operate in the negative (even though revenues are rapidly increasing).¹⁰² Because many college athletic programs operate in debt, the solution must involve payment coming from a source other than the individual athletic departments. Many athletic programs are mismanaged, and the money that they generate is often used for unnecessary expenses.¹⁰³ Therefore, the schools themselves are not the ideal sources to derive the funds to begin to pay athletes.

⁹⁷ Dashiell Bennett, *Only 22 of 120 Division I Athletic Programs Made Money Last Year*, BUS. INSIDER (June 15, 2011), <http://www.businessinsider.com/ncaa-revenue-expense-report-2011-6>.

⁹⁸ *Id.*

⁹⁹ Chris Bonti, *O'Bannon v. National Collegiate Athletic Association and the Current State of Antitrust Jurisprudence Concerning Intercollegiate Athletics*, 27 U. FLA. J.L. & PUB. POL'Y 237, 238 (2016).

¹⁰⁰ *Athletics Departments That Make More Than They Spend Still a Minority*, NCAA (Sept. 18, 2015), <http://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority>.

¹⁰¹ Interview with Collin Roberts, Contract Advisor & Legal Counsel, Reign Sports Mgmt.

¹⁰² *Id.*

¹⁰³ Sally Jenkins, *College Athletic Departments Are Paying Themselves to Lose Money*, WASH. POST (Nov. 25, 2015), https://www.washingtonpost.com/sports/colleges/flagrant-foul-college-sports-bosses-cry-poor-while-spending-lavishly/2015/11/25/f2d6d130-937d-11e5-b5e4-279b4501e8a6_story.html?utm_term=.24b5c13726ea.

For some of the major college athletic programs, a leading reason for debt is the extravagant salaries paid to the coaches.¹⁰⁴ The average annual salary for head coaches at major schools is \$1.64 million.¹⁰⁵ This is just one example of the many expenses that college athletic departments are paying to remain competitive. The costs of running a successful college program continue to increase and collegiate athletic directors will continue to struggle to keep their heads above water while running a competitive program.¹⁰⁶ Those that oppose paying college athletes often argue that if schools were forced to pay their athletes, many programs would be forced to shut down out of financial necessity. This would lead to an erosion of the collegiate athletic system that has achieved such a high level of success.

However, *The Huffington Post* asked five sports economists whether the NCAA and its member institutions could afford to pay student athletes and the response was a resounding yes.¹⁰⁷ The economists pointed out that the money is there, and that the schools are in the red because they are nonprofits.¹⁰⁸ Nonprofits are incentivized to spend all of their income.¹⁰⁹ Therefore, schools quite often move around or spend money to get rid of excess revenue, said Michael Leeds, a professor of economics at Temple University.¹¹⁰ Leeds continued to explain that the nonprofit nature of the NCAA is what leads to several coaches in the NCAA receiving huge salaries while players earn nothing.¹¹¹ The coaching salaries in the NCAA illustrate the ability of many schools to pay athletes. If schools were required to pay athletes, there would be a reallocation of expenditures, and coaches would no longer get multimillion dollar salaries. Instead, the money would be fairly distributed to the coaches and players.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Jenkins, *supra* note 103.

¹⁰⁷ Maxwell Strachan, *NCAA Schools Can Absolutely Afford to Pay College Athletes, Economists Say*, HUFFINGTON POST (Mar. 27, 2015),

http://www.huffingtonpost.com/2015/03/27/ncaa-pay-student-athletes_n_6940836.html.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

C. Scholarships Are Enough

Under the current scholarship method, a full athletic scholarship at an NCAA Division I university is about \$65,000 in total.¹¹² If the NCAA changes its scholarship model to give athletes a \$100,000 salary, this will be considered income and will be subjected to federal and state income taxes.¹¹³ Tuition and college expenses would not be deductible because the income level surpasses the IRS eligibility limit.¹¹⁴ Therefore, a student athlete in Seattle, Washington who is paid the \$100,000 annual salary would owe a total of \$35,498 in federal, state, payroll, and social security taxes. This leaves the college player with \$64,502 left from his annual salary. Assuming for this hypothetical that college bills come to \$65,000, the player now is \$498 in debt.¹¹⁵

Scholarships may be preferred to salaries because scholarships are not subject to taxation and provide each athlete with the ability to reduce his or her debt upon graduation. Seven in ten seniors who graduated from public and nonprofit schools in 2015 had student loan debt, with an average of \$30,100 per borrower.¹¹⁶ Many athletes may like the idea of receiving a \$100,000 salary for playing college sports. However, a full scholarship that helps the student athlete avoid the average of \$30,100 debt may be more valuable than a \$100,000 salary that is subject to federal and state taxation.¹¹⁷ Further, if the NCAA moved from the tuition system to a salary system, there would likely be players that choose schools in states with low income taxes. This could lead to an unfair advantage for schools that could offer the benefit of their state's tax breaks. The salary system may seem great in theory, but it would be the federal and state governments that benefit the most and the athletes would be left with little to no money.

Although the salary method is not ideal, scholarships still do not solve the issue of poverty in the NCAA because currently, eighty-six percent of

¹¹² John R. Thelin, *Here's Why We Shouldn't Pay College Athletes*, MONEY (Mar. 1, 2016), <http://time.com/money/4241077/why-we-shouldnt-pay-college-athletes/>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See <https://smartasset.com/taxes/washington-tax-calculator>

¹¹⁶ *State by State Data*, INST. FOR C. ACCESS & SUCCESS, <http://ticas.org/posd/map-state-data>.

¹¹⁷ Thelin, *supra* note 112.

college athletes are in poverty.¹¹⁸ These athletes are rarely able to acquire employment, and scholarships do not cover all costs of living.¹¹⁹ Further, only fifty-six percent of NCAA Division I athletes receive an athletic scholarship and only a small fraction of these are full rides.¹²⁰ These scholarships sometimes cover tuition, room, board, and at some schools, a stipend.¹²¹ However, this is a rarity, and the reality is that of these scholarship recipients, eighty-six percent of college athletes that are living in poverty are often unable to afford food or go to a movie with their friends.¹²² Although scholarships offer athletes an opportunity to avoid student debt, they are only a benefit if the student athletes can maintain a hectic schedule, pass all of their classes, and remain in school long enough to earn a college degree. In the booming market of college athletics, the scholarship method is not sufficient on its own.

D. There Is No Fair Solution

Those that oppose paying college athletes more than scholarships often support their argument with the idea that there is no fair payment method. There are multiple divisions of NCAA schools of all sizes.¹²³ There is also a wide variety of sports that these schools offer, and for each of these sports, there is a female counterpart.¹²⁴ These programs bring in substantially different sums of money. If the NCAA begins to pay one athlete, it would need to find a way to pay all the athletes so that there is no discrimination or unfair treatment towards athletes of smaller schools or different genders. There are countless ideas and potential solutions being offered, but up to this point none offer a proposal that addresses the issue of fairness.

¹¹⁸ Hayes, *supra* note 20.

¹¹⁹ Interview, *supra* note 5.

¹²⁰ *NCAA Recruiting Facts*, NCAA (July 2016), <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf>.

¹²¹ Interview, *supra* note 5.

¹²² Interview, *supra* note 5.

¹²³ *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification>.

¹²⁴ *Title IX Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> [hereinafter *Title IX*].

Therefore, scholarships are a tried and true method of compensating college athletes, at least until a viable alternative is produced.

A viable and fair solution would include Congressional action in the form of legislation that forces the NCAA to amend its amateurism regulation to allow players to be paid royalties from the use of their NIL, while also allowing qualifying athletes to participate in the FWS program as employees. This would result in the top players receiving the fair compensation that they are entitled to for the use of their NIL, while simultaneously enabling athletes, both male and female, to earn money for the time and work that they put in for their schools through the FWS program.

VI. ISSUE TWO: HOW TO SOLVE THE PROBLEM

A. *What Is the Issue*

Currently, under the NCAA bylaw 12.5.2, a student athlete is not permitted to use his or her name or picture to promote a business.¹²⁵ As such, a student athlete may not profit or receive royalties from his or her NCAA likeness as a student athlete, even after graduation.¹²⁶ The NCAA's purported traditions of placing academics and amateurism ahead of commercialism and professionalism are not the truth of the situation. The NCAA continues to cling to the notion that amateurism prohibits athletes from receiving payment in any form for their play, and that if this were to be changed, the public's interest in college athletics would plummet.¹²⁷ However, as intercollegiate athletic programs—especially football and basketball—generate billions of dollars in annual revenues for their academic institutions and the entertainment industry,¹²⁸ the idea that student athletes should not share more equally in the economic boom is beginning to fade. This is illustrated by the array of antitrust cases that the NCAA is

¹²⁵ 2015-16 NCAA Division I Manual, NCAA 1, 73 (2015), http://grfx.cstv.com/photos/schools/usc/genrel/auto_pdf/2015-16/misc_non_event/NCAA_Division_I_Manual.pdf.

¹²⁶ *O'Bannon*, 802 F.3d at XX (2015).

¹²⁷ <http://www.ncaa.org/amateurism>.

¹²⁸ See, e.g., Robert A. McCormick & Amy C. McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 74 n.11 (2006).

party to.¹²⁹ These cases pose an interesting balance of competing and often conflicting social, moral, and economic values, norms, and objectives.¹³⁰ As the NCAA continues to grow its annual revenue, it becomes increasingly clear that the athletes that are the major contributors to the income should be entitled to some of the reward.

The NCAA's current compensation structure is vastly inadequate and leads to the exploitation of more than 460,000 athletes participating in college sports.¹³¹ Based on a workload of 1,000 hours per year (which is a lower number than many college athletes log per year) and an average scholarship value, economist Richard Sheehan calculated the basic hourly wage of a college basketball player at \$6.82 and a football player at \$7.69.¹³² On the other hand, coaches' hourly wages ranged from \$250–\$647 per hour (depending on salary).¹³³ In a nation that values hard work, dedication, and commitment, the NCAA has been taking advantage of the youth that encompass these traits for years through the implementation of their amateurism regulation. This regulation prohibits college athletes from receiving any form of compensation stemming from their work as an athlete.¹³⁴ This includes the billions of dollars of revenue generated by the NCAA from profiting off the right to: televise games featuring college athletes; sell merchandise with the athletes' numbers on them; and portray the athlete's likeness in video games.¹³⁵ This is unfair and unjust because it is an exploitation by the NCAA of the hard work and talent of the college athletes who participate within the NCAA.

¹²⁹ See, e.g., Michael H. LeRoy, *Courts and the Future of "Athletic Labor" in College Sports*, 57 ARIZ. L. REV. 475, 477 n.8 (2015).

¹³⁰ Thomas J. Horton et al., *Addressing the Current Crisis in NCAA Intercollegiate Athletics: Where Is Congress?*, 26 MARQ. SPORTS L. REV. 363, 364 (2016) [hereinafter *Addressing*].

¹³¹ *Student-Athletes*, NCAA, <http://www.ncaa.org/student-athletes>.

¹³² Dennis A. Johnson & John Acquaviva, *Point/Counterpoint: Paying College Athletes* (June 15, 2012), <http://thesportjournal.org/article/pointcounterpoint-paying-college-athletes/> (Based on a workload of 1,000 hours per year and an average scholarship value, economist Richard Sheehan calculated the basic hourly wage of a college basketball player at \$6.82 and a football player at \$7.69. Coaches' hourly wages, on the other hand, ranged from \$250–\$647 per hour).

¹³³ *Id.*

¹³⁴ *Amateurism*, *supra* note 13.

¹³⁵ Hobson & Rich, *supra* note 12.

Despite the issues plaguing the NCAA, college athletes lack a voice in the legislative process. The NCAA, on the other hand, spent \$180,000 on advocacy during 2013,¹³⁶ and in 2014 the NCAA reported its total Congressional lobbying expense for the year to be \$580,000.¹³⁷ Although not all of these expenditures were for the purpose of preserving amateurism, expenditures indicate that the NCAA's voice is forceful. College athletes may not have the capital to hire large lobbying firms like the NCAA.

However, there is an organization that advances the rights of college athletes.¹³⁸ Former UCLA linebacker Ramogi Huma left college in the late 1990s with \$6,000 in credit card debt.¹³⁹ His athletic scholarship paid for tuition, room and board and text books, but not other bills such as phone and travel expenses.¹⁴⁰ Huma came from a lower-income family, but he didn't qualify to receive Pell Grants or money from an NCAA special assistance fund.¹⁴¹ As a result, Huma was left unable to afford the high-interest credit card that his scholarship would not cover.¹⁴² Today, Huma is president of the National College Players Association (NCPA), a nonprofit organization headquartered in California that is the leading advocacy group for college athletes.¹⁴³ Huma said the association has about 14,000 members representing 150 Division I programs.¹⁴⁴ "We've found the only feasible source of leverage to change NCAA rules is public pressure through the media, going to court, or fighting for new laws," Huma said.¹⁴⁵ Sadly, about half of the 14,000 members of the NCPA are current college athletes.¹⁴⁶ For

¹³⁶ Megan R. Wilson, *NCAA Hires Lobbyists as Athletes Battle for Pay*, HILL (June 18, 2014), <http://thehill.com/business-a-lobbying/lobbying-hires/209767-ncaa-hires-lobbyists-for-the-first-time-as-athletes-battle>.

¹³⁷ Steve Berkowitz, *NCAA Drastically Increases Its Spending on Lobbying*, USA TODAY (Jan. 20, 2015), <https://www.usatoday.com/story/sports/college/2015/01/20/ncaa-lobbying-expenditures-congress-capitol-hill-washington/22078773/>.

¹³⁸ Jon Solomon, *College Athletes' Rights: Who Fights for the College Athlete?*, AL.COM (Apr. 3, 2011), http://www.al.com/sports/index.ssf/2011/04/college_athletes_rights_who_fi.html.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

real change to be made, citizens need to join the effort of the NCPA and lobby their respective Congressional representatives to pass a bill that forces the NCAA to adapt a new system that no longer takes advantage of hardworking student athletes. This solution can be achieved through a bill that forces the NCAA to amend its amateurism regulation. Citizens must do more than just agree with the idea that college athletes deserve to be paid. We need to continue the work of the NCPA and help give a voice to the thousands of college athletes who are being taken advantage of by the NCAA. Only once a strong force begins to voice the concerns and needs of college athletes can we raise Congress' awareness of these injustices. Then we can begin to make real progress made in the effort to treat college athletes with the fairness that they deserve.

B. Why the Leading Solutions Will Not Work

There are only a handful of athletes that generate large sums of revenue for the NCAA and its member schools.¹⁴⁷ An alternative is to force the NCAA to pay player salaries out of the large sums of revenue that these athletes generate. Although this solution may result in some of the top earning athletes receiving compensation,¹⁴⁸ it fails to address how the salaries would be split between schools and how each athlete's payment would be determined. This solution would place a large burden on the NCAA and schools to adapt payment models that are fair and equal between schools of different sizes and that include equal payment to female sports teams.¹⁴⁹ If the payments to athletes are made on a program-by-program basis, the problem becomes fairness.¹⁵⁰ Likely, the top athletes in field hockey and lacrosse would make less than the second-stringers on the football team simply because the football team generates more revenue.¹⁵¹ In most college programs, football and basketball programs typically

¹⁴⁷ Burnsed, *supra* note 23.

¹⁴⁸ Top earning meaning the athletes that play for schools that generate the largest revenue.

¹⁴⁹ *Title IX, supra* note 124.

¹⁵⁰ Travis Armideo, *What Would Paying College Athletes Actually Look Like?*, GLADIATOR CUSTOM MOUTH Guards (Feb. 25, 2016), http://www.gladiatorguards.com/_blog/our-blog/post/what-would-paying-college-athletes-actually-look-like/.

¹⁵¹ *Id.*

generate the money that supports the other, smaller athletic program's expenses.¹⁵² Therefore, the money that the larger programs allocate to player salaries would have a major impact on the athletic department's ability to support the smaller sports.¹⁵³

Whether the NCAA or the schools themselves are forced to pay the athletes out of their revenue, three major problems arise. First, the money is not there. If Congress forces the NCAA to pay these salaries, there may not be enough revenue to go around.¹⁵⁴ In the 2015 fiscal year the NCAA generated \$989 million, according to an audited financial statement cited by USA Today.¹⁵⁵ Because the NCAA had \$908.6 million in expenses, it ended with a nearly \$80.5 million surplus for the year.¹⁵⁶ These numbers indicate that the NCAA brings in substantial revenue each year. The question then becomes, where does this money go. The total rights payment (mostly tickets and merchandise) for 2011–12 was \$705 million, or eighty-one percent of the NCAA's revenue.¹⁵⁷ Most of the remaining eighteen percent of revenue came from championships, mostly ticket and merchandise sales.¹⁵⁸ While the amount of revenue is large, the NCAA national office does not retain much of the money.¹⁵⁹ About ninety-six percent is distributed directly to the Division I membership or to support championships and various programs.¹⁶⁰ The remaining four percent goes to central services, such as building operations and salaries unrelated to particular programs.¹⁶¹ These numbers support the assertion that the NCAA does not retain enough revenue to fairly pay salaries to all student athletes.

Schools have even more limited funds. From 2004 to 2014, the combined income of the forty-eight athletic departments of various schools nearly

¹⁵² Kristi Dosh, *Does Football Fund Other Sports at College Level?*, FORBES (May 5, 2011), <https://www.forbes.com/sites/sportsmoney/2011/05/05/does-football-fund-other-sports-at-college-level/#52da243371c2>.

¹⁵³ *Id.*

¹⁵⁴ Burnsed, *supra* note 22.

¹⁵⁵ Strachan, *supra* note 107.

¹⁵⁶ *Id.*

¹⁵⁷ *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue>.

¹⁵⁸ Strachan, *supra* note 107.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

doubled, from \$2.67 billion to \$4.49 billion.¹⁶² The median department saw earnings jump from \$52.9 million to \$93.1 million.¹⁶³ However, after a decade marked by surging income, twenty-five departments still ran a deficit in 2014.¹⁶⁴ Twelve schools, including Auburn University and Rutgers University, actually lost more money in 2014 than in 2004.¹⁶⁵ Athletic directors at money-losing schools defend their spending as essential to keeping pace with competition.¹⁶⁶ Since schools are unable to pay athletes, the athletic departments instead use the revenue they generate to fund extravagant athletic facilities as a recruitment tactic to give their school an edge.¹⁶⁷ Although some athletic departments overspend on facilities or coaching salaries, many more simply do not generate enough money to cover expenses as well as player salaries.¹⁶⁸ Therefore, schools are not in a financial position to pay their athletes any more than the NCAA.

Second, all other proposed solutions would result in unfair treatment of women athletes and smaller schools' sports programs. The NCAA cannot pay all college athletes equally because the money is not available.¹⁶⁹ Economic theory suggests that a viable pay structure would be to base the athlete's pay on their athletic program's perceived marginal revenue product.¹⁷⁰ This solution would give the NCAA schools the ability to take a percentage of their earnings and split them as they see fit between their players. These salaries would be allocated similarly to academic scholarships; the coaches would have the discretion to allocate pay to whichever players as they see fit. However, this would lead to Division I schools in the major conferences offering attractive payment packages while smaller schools would struggle to compete financially due to the lack

¹⁶² Hobson & Rich, *supra* note 12.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Aaron Torres, "These are the 20 lowest-paid coaches in college football," FOX SPORTS (Oct. 26, 2016), <http://www.foxsports.com/college-football/gallery/highest-paid-coaches-college-football-salaries-details-contracts-nick-saban-jim-harbaugh-102616>.

¹⁶⁹ Burnsed, *supra* note 23.

¹⁷⁰ Craig A. Depken, II & Dennis P. Wilson, *Labor Markets in the Classroom: Marginal Revenue Product in Major League Baseball*, J. Econ. & Finance Ed., (Summer 2004), <http://www.economics-finance.org/jefe/econ/depkinpaper.pdf>.

of funds generated by the smaller schools. Current powerhouses like Alabama University in football or Duke University in basketball would further strengthen their recruiting advantages. Therefore, rather than promoting competition, this solution would likely lead to large collegiate monopolies that dominate the sports world and ruin the competitive nature of college athletics that makes it such a successful market in the first place. Further, the athletes at smaller schools who put in similar amounts of work as those at larger revenue-generating schools would see no compensation for their hard work. Therefore, these previously proposed solutions fail to offer an economically feasible way to fairly compensate all college athletes for their work.

VII. WHAT IS THE SOLUTION?

The needed change should come in the form of a two-prong congressional bill: an amendment to the NCAA amateurism regulation to allow college athletes to receive compensation from the use of their NIL; and an amendment to the FWS program that explicitly includes qualifying college athletes at all levels as employees for their schools so that they can receive compensation through the FWS program. All other possible solutions would result in either an infeasible burden placed on the NCAA and schools, or female athletes and athletes at smaller schools being treated unfairly because of the revenue discrepancy in the different athletic departments. However, this two-pronged solution would not require the NCAA to provide any funds for athlete compensation. The schools would only be required to provide the percentage the FWS program sets. Participating schools are already providing this amount to other non-athlete students who participate in other forms of employment while attending school.

A. Allow Athletes to Earn Royalties When Using Their NIL

First, Congress should pass legislation that forces the NCAA to amend its amateurism requirement to allow players to earn royalties from the use of their NIL when used on TV, video games, merchandise sales, etc. Further, by allowing athletes to earn money for the use of their NIL, athletes will be permitted to begin accepting endorsements. This solution would allow the leading athletes in the nation to earn the money that is generated solely

because of the popularity of their image. This revenue has nothing to do with the work of the NCAA or the schools and is solely earned because of the name recognition of the athlete. Currently, the NCAA can profit off of the sale of television rights that portray the athletes on prime-time television; sales of the athlete's jersey (the names are not printed on the back but the number calls to mind the player's name); the use of the athlete's likeness on video games; and commercials that portray the players playing their sport.¹⁷¹ Not a single dollar of the revenue generated from these sales goes to the athletes that are responsible for the demand of these items. It is illogical to say that the NCAA or the schools are entitled to the funds that are generated solely from the reputation of these young athletes. Courts have unsuccessfully attempted to solve the injustices within the NCAA¹⁷²; however, it is time for Congress to resolve this matter from a legislative standpoint.

The NCAA bylaw provision 12.5.2 is the barrier that has been preventing athletes from receiving compensation related to their athletic work while still being able to play college athletics.¹⁷³ Implementing this first prong of the proposed solution would not do away with this requirement outright. The change would come in the form of an amendment that would allow players to first be entitled to the money generated from the use of their NIL. The first prong of the amendment to the NCAA's bylaws brought about by the action of Congress would only allow athletes to receive indirect payment in the form of royalties or endorsements that are earned when they are televised, portrayed in video games, have merchandise with their NIL sold on them, or sign promotional or endorsement deals with third parties. None of these changes would have any effect on the quality of play being performed by the athletes; therefore, the core purpose of the amateurism requirement that the NCAA has put forth will remain unscathed.

The implementation of this first prong could easily be accomplished through Congressional action requiring the NCAA to amend its bylaw provision 12.5.2 that allows college athletes to maintain amateur status

¹⁷¹ Jeremy Fowler, *In Big-Money Marriage of TV and College Football, Who Has Most Say?*, CBS SPORTS (July 4, 2013), <http://www.cbssports.com/college-football/news/in-big-money-marriage-of-tv-and-college-football-who-has-most-say/>.

¹⁷² See Kirkwood *supra* note 60.

¹⁷³ This is the amateurism regulation that prohibits contracts with professional teams and salary for participating in athletics.

while still receiving royalties and payments from the use of their NIL or through payments by third party endorsements.¹⁷⁴ This change will have no effect on the quality of play in the NCAA or the public's interest in college athletics. It is a necessary step to adapt to the growing popularity of college sports. As the NCAA continues to profit from the exploitation of the young athletes' hard work, there will continue to be an uproar within the athletic community and the community at large for a change that ends this exploitation. The first prong of this solution provides an avenue for this change without compromising the great qualities of college athletics that have made it so successful.

However, some may argue that paying college athletes for use of their NIL in the media is unfair to the players at smaller schools or to players who play less popular sports because their popularity and success may not generate revenue. Therefore, these athletes would not receive the large sums of money that other athletes do. Although this issue will be remedied in prong two, it is common in a capitalist society for those at the top of their respective field to receive more compensation than those at or near the bottom. For example, John Bonamego, the head football coach at Central Michigan University, makes \$545,940 per year.¹⁷⁵ Nick Saban, the head football coach at the University of Alabama, makes \$5.9 million per year.¹⁷⁶ So, paying the quarterback of the University of Alabama more than the quarterback at Central Michigan University is not unfair per se. College athletics should mirror our country's capitalist values, because the top athletes in the nation made it to where they through hard work, dedication, discipline, and commitment. These are traits and practices that deserve to be rewarded and are rewarded virtually everywhere else in this nation; yet the NCAA refuses to acknowledge the value of these traits and the true reality of the college athletic system.

B. Allow Athletes to Receive Compensation Through the FWS

Second, Congress should amend the NCAA's amateurism regulation to allow student athletes to receive compensation through the FWS program.

¹⁷⁴ See <http://www.ncaa.org/amateurism>.

¹⁷⁵ Torres, *supra* note 168.

¹⁷⁶ Michael Wilbon, *College Athletes Deserve to be paid*, ESPN (July 18, 2011), http://www.espn.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid.

The FWS provides funds for part-time employment to help needy students finance the costs of postsecondary education.¹⁷⁷ The FWS allows for students to work for the college institution they attend.¹⁷⁸ The program is need-based, so not all student athletes will qualify.¹⁷⁹ However, because of the NCAA amateurism regulation, college athletes, regardless of need, are prohibited from receiving compensation in any form other than scholarships for the work that they provide.¹⁸⁰ As illustrated above, college athletes often come from poverty, yet simply because they dedicate their time and energy to a sport rather than a job, the NCAA is able to prohibit them from receiving compensation. This can be changed through the FWS program.

The first prong of this solution will allow college athletes to receive compensation for the use of their NIL, yet less prominent athletes would receive nothing. Many players at smaller schools do not play on television, are not in video games, and do not sell merchandise that portray their likeness; however, many of these athletes struggle with poverty and work equally as hard as the top athletes in the nation.¹⁸¹ Yet, these athletes would receive no compensation for the work they provide to their school if the only change was the first prong of my solution. The first prong alone would resolve the unfairness of the exploitation of the players who are at the forefront of the media, but that solution neglects the athletes at smaller institutions.

To combat the issue of unfairness, the NCAA amateurism regulation should also be amended to allow student athletes to qualify for the FWS program, and the FWS should be amended to explicitly include athletes as qualified employees of their institutions. This change would enable the players who qualify based on need to receive payment regardless of the revenue they provide or the media exposure they generate. This solution would enable hard-working college athletes, male or female, playing at any level and at any sport, who face financial hardships to receive compensation for their hard work. Therefore, the combination of the two prongs would create a fair and equitable system that would enable college athletes at all

¹⁷⁷ *Federal Work-Study (FWS) Program*, U.S. DEPT. EDU., <http://www2.ed.gov/programs/fws/funding.html>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Amateurism*, *supra* note 13.

¹⁸¹ Hayes, *supra* note 20.

levels to receive adequate compensation for their hard work while also ending the exploitation by the NCAA through the current college athletic system. Further, this two-prong approach offers the simplest method of implementation when compared with any leading alternative.

C. Implementation

Other leading alternative solutions that are being cycled through the media predominantly consist of options that would require the NCAA or the schools themselves to provide the capital needed to compensate the players.¹⁸² However, despite the billions of dollars of revenue that the NCAA generates, many schools are spending more than they are taking in.¹⁸³ Further, the NCAA is a nonprofit organization that is constantly finding ways to spend all the revenue that they are taking in.¹⁸⁴ The current spending habits of the NCAA and the schools may need an overhaul; however, this process would likely face forceful resistance from the NCAA and would be difficult and time-consuming to implement.¹⁸⁵ Many proponents of paying college athletes are calling for an outright ban of the amateurism regulation and nothing more.¹⁸⁶ Although this would solve one problem, it would likely create many more. Schools would face countless obstacles if left to create their own payment methods. Therefore, the two-prong approach offers the easiest implementation process because it fixes the glaring amateurism problem while simultaneously providing guiding options to help facilitate the transition for the NCAA, the schools, and the U.S. Department of Education.

The implementation of the first prong would simply require Congress to pass a bill that requires the NCAA to amend its amateurism regulation to allow college athletes to be paid directly for the use of their NIL and through the FWS program if eligible. Once this is done, college athletes

¹⁸² Jon Solomon, *NCAA Critics Offer Ways to Pay College Players*, CBS SPORTS (June 4, 2014), <http://www.cbssports.com/college-football/news/ncaa-critics-offer-ways-to-pay-college-players/>.

¹⁸³ Burnsed, *supra* note 23.

¹⁸⁴ Strachan, *supra* note 107.

¹⁸⁵ See generally, Audery C. Sheetz, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOKLYN L. REV. 865, (2016).

¹⁸⁶ Strachan, *supra* note 107.

may receive royalty payments from television networks, video game companies, and from the sale of merchandise (which could then begin to have the names of the players on them). This would require no action on the part of the NCAA or the schools, and the only thing that they would lose would be the profits that the athletes have been entitled to from the start. Further, the proposed Congressional bill would allow athletes who qualify financially to begin to receive compensation through the FWS program. These athletes could sign up at their college, like all other students, and continue to work for the athletic department as players. The only difference now is that they would be compensated as service providers for all the hours of hard work that they provide to their school.

The implementation of prong two would be a much smoother transition. The FWS program provides part-time employment while a student is enrolled in school to help pay for education expenses.¹⁸⁷ To qualify, students must file the Free Application for Federal Student Aid. Participants must demonstrate financial need.¹⁸⁸ To qualify, athletes would need to file the Free Application for Federal Student Aid (FAFSA).¹⁸⁹ Their completed FAFSA application would determine their eligibility for federal financial aid programs, including the FWS program.¹⁹⁰ Unlike other financial aid programs, the FWS requires participants to obtain a job to earn their aid.¹⁹¹ Students who qualify can work on campus or off campus and are able to earn at least minimum wage.¹⁹² The FWS could be a tremendous way for young college athletes that are struggling with poverty to use their athletic talents to earn a wage that will help them maintain a more comfortable life while completing their higher education. Participating in college athletics already fosters many skills and characteristics that help individuals succeed

¹⁸⁷ *Glossary*, FEDERAL STUDENT AID,

https://studentaid.ed.gov/sa/glossary#Federal_Work-Study, (August 10, 2017).

¹⁸⁸ Susannah Snider, *Federal Work-Study: Frequently Asked Questions*, U.S. NEWS (June 24, 2015), <http://www.usnews.com/education/best-colleges/paying-for-college/articles/2015/06/24/federal-work-study-frequently-asked-questions>.

¹⁸⁹ *Learn about the Federal Work-Study Program*, SALLIEMAE (DATE last VISITED), <https://www.salliemae.com/college-planning/financial-aid/learn-about-work-study/>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Snider, *supra* note 188.

in the workforce after graduation,¹⁹³ skills like time management, work ethic, leadership, teamwork, dedication, commitment, self-discipline. The implementation of this change would allow athletes to be rewarded for the use of these skills through much needed paychecks.

Implementing the second prong would allow college athletes to accept FWS aid for playing on any of their school's athletic teams. Schools have been successfully participating in the FWS system since 1964.¹⁹⁴ During the 2010 fiscal year, nearly \$1.2 billion was awarded to over 750,000 students through the FWS program.¹⁹⁵ In 2009–10, there were approximately 167,000 Division I athletes, and if every athlete received the maximum award (\$7,000), that would require an additional FWS funding of \$1.17 billion each year, with more than \$876 million coming from the Federal government.¹⁹⁶ If need determines that the average award for the athletes is the same as other students (\$1,524, with some receiving more, some receiving less), the total cost of the program would be \$255 million each year, with the schools only responsible for \$63.6 million and the rest coming from the Federal government.¹⁹⁷ The Bowl Championship Series alone distributed more than \$174 million¹⁹⁸ for its five bowl games this season.

Not only do the numbers support the ease of the implementation of this change, but this change would also be a good investment for the NCAA. The \$63.6 million that the NCAA would be responsible for is likely greatly outweighed by the cost of the litigation that will continue to come from

¹⁹³ Melinda Katheran Scott, *The Effectiveness of Teaching Life Skills Through Sport-Based Interventions for At-Risk Youth*, DIGITAL COMMONS, S. GA. U. (May 2016), <http://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=2486&context=etd>.

¹⁹⁴ *A Brief History of the Federal Work-Study Program*, CAMPUS COMPACT (Dec. 23, 2017), <http://compact.org/earn-learn-and-serve-getting-the-most-from-community-service-federal-work-study/a-brief-history-of-the-federal-work-study-program/>.

¹⁹⁵ *FWS Program*, *supra* note 177.

¹⁹⁶ Cork Gaines, *NCAA: Paying College Athletes Would Cost \$200 Million Each Year*, BUS. INSIDER (Aug. 11, 2011), <http://www.businessinsider.com/paying-college-athletes-would-cost-200-million-each-year-2011-8>.

¹⁹⁷ *Id.*

¹⁹⁸ *SBJ: BCS Payouts Grow Along with Big Shares for Big Six Conferences*, SPORTING NEWS (Jan. 24, 2011), <http://www.sportingnews.com/ncaa-football/news/175895-sbj-bcs-payouts-grow-along-with-big-shares-for-big-six-conferences>.

athletes and those fighting for their rights. Aside from the clear financial incentive that the solution presents, this step would also be an important progression toward promoting equality and fighting poverty within the NCAA.

Lastly, the bill should include a provision that requires that the FWS program to deduct any earnings that an athlete makes off his/her NIL, endorsements, media, or merchandise from their potential FWS earnings. Many of the top athletes who would receive compensation in the form of royalties from the use of their NIL would also qualify for the FWS program. Although the earnings from FWS would likely not amount to much compared to the earnings they receive from royalties, these earnings should be deducted up to the full amount of FWS possible earnings. If an athlete is receiving substantial sums of money from endorsements and the like, then they would not require the additional FWS funds to compensate them for the financial deficit that they had coming into college because the royalties would already have removed this deficit. Therefore, the goal of promoting equality and ending the exploitation of these athletes would have already been accomplished. This provision would reduce the top athletes' FWS possible earnings to \$0 if their earnings from the use of their NIL equaled or exceeded the cap on the FWS, thereby allowing the schools to have more available funds to provide them to those athletes who are not earning the same royalties. For this reason, the two-prong solution is the most ideal option because it presents a fair and equitable solution that is both realistic and attainable.

VII. CONCLUSION

The NCAA's exploitation of college athletes and the rampant financial hardships that athletes across the nation face demands change. Change often takes time. However, the two-prong solution can be implemented without the need for drastic reform. Ultimately, college athletes and we as citizens need to unify to lobby Congress to amend the NCAA's amateurism regulation so that college athletes can begin to earn royalties for the use of their NIL and so that they can qualify for FWS. Unification can come in the form of joining the efforts of Ramogi Huma and the NCPA to lobby our Congressional representatives and other lawmakers for a fair transition. Congress must be enlightened to the issues that college athletes across the

nation face, and this can only begin when more citizens join the cause to advance the rights of those young, hardworking athletes who are currently being silenced by the power of the NCAA. There is no excuse for college athletes to be restricted from earning money from their NIL, or for the athletes to be denied compensation for their hard work. This change is long overdue, and this two-prong approach offers the ideal solution because it will end the exploitation of college athletes, it will combat poverty within the NCAA, and it will enable student athletes at all levels who struggle financially to be rewarded for their hard work and dedication.