

# PAY THE PIPER, AND ALSO THE PUNTER: AN ANALYSIS OF THE COLLEGE-ATHLETE COMPENSATION MOVEMENT

JOSHUA B. OPILA

## I. INTRODUCTION

The fans all pile into the stadium on a crisp fall day on campus. The overjoyed patrons, from alumni to youngsters, root on their university team for four long quarters of football against the rival team from down the road. On the last play of the game, the home-team's star running back rushes across the goal line, being tackled into the end-zone for the game-winning touchdown. On that play, he sustains an injury that ruins his chances of playing professional football. Years of high-paying salary, fame, and opportunities for lucrative endorsement deals evaporate before his eyes. Meanwhile, his jersey is sold to fans in the bookstore and right outside the stadium. His talent drew tens of thousands of fans to the stadium that day, each paying hundreds of dollars for their tickets. The logo on his jersey and cleats brings in millions of dollars each year for the university. While the school rakes in the cash, the player does not see a dime. All the while, he risks his own body—which is often the source of his future livelihood—to earn high revenues for the university.

Proponents of paying college athletes often refer to the above scenario. This has been a hot topic for years, and recent changes in the legal landscape have brought it to the forefront once again. This Note will address those changes and analyze the arguments for and against paying college athletes. Part I of this Note will examine the history of the debate on paying college athletes. Part II will then move on to the most recent changes. Finally, Part III will conclude with an analysis of the pros and cons of paying college athletes and propose a framework for how they could be compensated going forward.

## II. HISTORY ON THE ISSUE

### A. THE NCAA CONCEPT OF “AMATEURISM,” AND A BRIEF OVERVIEW OF THE CASE LAW HISTORY CONCERNING COLLEGE ATHLETE COMPENSATION

#### 1. The NCAA Uses Amateurism as a Shield to Avoid Paying Student-Athletes

The debate on paying college athletes has always centered around one arbitrary and loosely defined concept: amateurism.<sup>1</sup> This concept has long been used by the National Collegiate Athletic Association (“NCAA”) to defend their reasoning for why college athletes should not be compensated.<sup>2</sup> Judge Claudia Wilken even noted in her 2014 opinion in the case of *O’Bannon v. NCAA*, “[t]he association’s current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism.”<sup>3</sup> The NCAA uses certain terms of art, such as “student-athlete,” to disguise the underlying fact that these individuals are essentially full-time employees.<sup>4</sup> Such terms have a long history in the legal context, dating back as far as 1957. For example, in *State Compensation Insurance Fund v. Industrial Commission*, the Colorado Supreme Court found that a widow was not eligible for workers’ compensation via an employer-employee relationship after her husband had been killed playing football for his university.<sup>5</sup> The court reasoned that the university “was not in the football business and received no benefit from this field of recreation.”<sup>6</sup>

#### 2. There Are Emerging Inconsistencies Between Amateurism and the Modern College-Athletics Industry

While such reasoning, faulty as it is, may have survived at a smaller state school in the 1950s, the same reasoning surely could not apply in the modern college athletics industry. Today, the top twenty most profitable college football programs each generate over twenty-five million dollars in annual profit, with the top seven programs taking home fifty million dollars or more each year.<sup>7</sup> College football coaches also rake in astronomical salaries at the highest level, with the twenty-five highest-paid coaches each making four million dollars or more per year guaranteed, and several coaches each making anywhere from six to nine million dollars per year guaranteed.<sup>8</sup>

---

<sup>1</sup> Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes>.

<sup>2</sup> *See id.*

<sup>3</sup> *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014), *aff’d in part, rev’d in part*, 802 F.3d 1049 (9th Cir. 2015).

<sup>4</sup> Solomon, *supra* note 1.

<sup>5</sup> *State Comp. Ins. Fund v. Indus. Comm’n*, 314 P.2d 288, 289 (Colo. 1957).

<sup>6</sup> *Id.* at 290.

<sup>7</sup> *Top 20 Most Profitable College Football Programs*, ATHNET, <https://www.athleticscholarships.net/profitable-college-football-programs.htm> (last visited Nov. 25, 2019).

<sup>8</sup> James Crabtree-Hannigan, *Dabo Swinney, Nick Saban and the 10 Highest-Paid College Football Coaches in 2019*, SPORTINGNEWS (Jan. 13, 2020), <https://www.sportingnews.com/us/ncaa-football/news/highest-paid-college-football-coaches-2019-dabo-swinney-nick-saban/1tm0hym5dtina1ms02d4davsfp>.

These figures merely represent the coaches' base salaries. In addition, coaches have incentive-based compensation for winning, for example, conference championships and national championships.<sup>9</sup> These bonuses are quite substantial as well, reaching heights of one million dollars for winning the football national championship in 2018.<sup>10</sup> Moreover, although college football is far and away the poster child of the money-making college sports, men's college basketball, the runner-up, is also wildly successful.<sup>11</sup> Much like college football, the top twenty-five men's college basketball programs each bring in eight-figure profits each year.<sup>12</sup> With these kinds of astronomical profits, it is much harder to say today that the universities with top-notch football programs are "not in the football business," and impossible to argue that they have "received no benefit from this field of recreation."<sup>13</sup> Rather, college athletics have consistently proven to be a major revenue stream for the universities whose programs compete at the highest level, and there is no reason to believe that this trend will slow down or change direction anytime soon.<sup>14</sup>

### 3. Case Law Precedent Suggests That the Amateurism Shield Prevents College Athletes from Being Classified As Employees

Another seminal case in the development of college athlete compensation, or lack thereof, is *Waldrep v. Texas Employers Insurance Association*, in which a Texas Christian University ("TCU") football player was paralyzed in a 1974 football game.<sup>15</sup> The player, Kent Waldrep, relied on charity to pay for his medical bills for years after TCU pulled his insurance coverage a mere nine months after the injury.<sup>16</sup> Years later, in 1991, Waldrep sued TCU and won under the theory that he was an employee of TCU, and therefore he was covered under workers' compensation laws.<sup>17</sup> However, on appeal, the judgment was reversed on the finding that TCU "intended that Waldrep participate at TCU as a student, not as an employee."<sup>18</sup> The court cited the NCAA's formal definition of an amateur "student-athlete" to support its conclusion that Waldrep could not be classified as an employee.<sup>19</sup> The formal definition provides that "an amateur student-athlete is one who engages in athletics for the education[al], physical, mental and social benefits he derives therefrom, and to whom athletics is an avocation."<sup>20</sup> This crafted

<sup>9</sup> Jesse Washington, *#PayThatMan: Four Proposals for Compensating College Athletes*, UNDEFEATED (Jan. 9, 2018), <https://theundefeated.com/features/college-football-championship-pay-that-man-four-proposals-for-compensating-college-athletes>.

<sup>10</sup> *See id.*

<sup>11</sup> *See* Cork Gaines & Mike Nudelman, *The Average College Football Team Makes More Money than the Next 35 College Sports Combined*, BUS. INSIDER (Oct. 5, 2017, 12:36 PM), <https://www.businessinsider.com/college-sports-football-revenue-2017-10>.

<sup>12</sup> Brandon Wiggins, *The 25 Schools that Make the Most Money in College Basketball*, BUS. INSIDER (Mar. 31, 2018, 4:18 PM), <https://www.businessinsider.com/louisville-was-college-basketballs-biggest-money-maker-in-2016-2018-2>.

<sup>13</sup> *State Comp. Ins. Fund v. Indus. Comm'n*, 314 P.2d 288, 290 (Colo. 1957).

<sup>14</sup> *Revenue of the NCAA by Segment from 2012 to 2019 (in Million U.S. Dollars)*, STATISTA, <https://www.statista.com/statistics/219605/ncaa-revenue-breakdown/> (last visited Feb. 18, 2021).

<sup>15</sup> Solomon, *supra* note 1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Waldrep v. Texas Emps. Ins. Ass'n*, 21 S.W.3d 692, 701 (Tex. App. 2000) (emphasis removed).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (citation omitted).

definition implies that college athletes' primary objective is to be students at the university, and their secondary objective is to engage in athletics in pursuit of the various non-monetary benefits.

## B. HISTORICAL ANALYSIS CONCERNING THE PERCEIVED LEGITIMACY OF THE NCAA'S "AMATEURISM SHIELD" AGAINST MOVEMENTS TO COMPENSATE COLLEGE ATHLETES

### 1. The Recurrence of "One-And-Dones" in College Basketball Contradicts the NCAA's Definition of Amateurism

One need not look far in order to contradict the NCAA's definition of amateurism. The advent of the "one-and-done" athlete is perhaps the best example of why this definition of student first, athlete second is often not the case. The term "one-and-done" came about to describe National Basketball Association ("NBA") prospects who, because of a 2006 NBA rule change, go to college for only one year to be eligible for the NBA draft, which requires prospects to be "at least 19 years old and [one] year removed from high school," and then drop out of college and declare for the draft.<sup>21</sup> The incidence of such players going to college for one year and systematically declaring for the NBA draft thereafter indicates that their true intention from the start was never to be a student, but instead to gain access to the NBA.<sup>22</sup> Years of open outrage at the effects of this rule will likely lead to its extinguishment,<sup>23</sup> but the "one-and-done" players nonetheless stand as an example of why the definition of student-athletes offered by the NCAA is a farce in certain instances.

### 2. College Football Players Prioritize Future Professional Prospects over Playing for Their Universities

Moreover, in college football, there is also ample evidence that highly touted prospects seek nothing more from their time at their respective universities than to become eligible to play in the National Football League ("NFL"). For instance, Ohio State University quarterback Cardale Jones received backlash from the media in 2012 for tweeting, "[w]e ain't come to play school, classes are pointless."<sup>24</sup> Jones's statement reflects a subtle truth about star players at universities with elite football programs, several of

---

<sup>21</sup> Aaron Dodson, *All the NBA Draft's One-and-Done Lottery Picks: A Scorecard*, UNDEFEATED (June 22, 2017), <https://theundefeated.com/features/all-the-nba-drafts-one-and-done-lottery-picks-a-scorecard>.

<sup>22</sup> Christine Ravold, *The Road to Athletic Glory Crumbles at the Gates of the Ivory Tower*, AM. COUNCIL TR. & ALUMNI (Mar. 5, 2018), [https://www.goacta.org/the\\_forum/the-road-to-athletic-glory-crumbs-at-the-gates-of-the-ivory-tower](https://www.goacta.org/the_forum/the-road-to-athletic-glory-crumbs-at-the-gates-of-the-ivory-tower).

<sup>23</sup> See Paul Woody, *Woody: College Basketball Going from One-and-Dones to None-and-Dones to Bidding Wars for Players*, RICH. TIMES-DISPATCH (Apr. 23, 2019), [https://www.richmond.com/sports/college/woody-college-basketball-going-from-one-and-dones-to-none/article\\_e4539e68-b424-55sec-bf46-e48423cb1329.html](https://www.richmond.com/sports/college/woody-college-basketball-going-from-one-and-dones-to-none/article_e4539e68-b424-55sec-bf46-e48423cb1329.html).

<sup>24</sup> *Ohio State Quarterback Thinks Student-Athletes Shouldn't Have to Go to Class, Says 'We Ain't Come to Play School'*, NEW ENG. SPORTS NETWORK (Oct. 5, 2012, 2:01 PM), <https://nesn.com/2012/10/ohio-state-quarterback-thinks-student-athletes-shouldnt-have-to-go-to-class-says-we-aint-come-to-pla>.

whom leave school before graduating to pursue careers in the NFL.<sup>25</sup> Even more recently, it has become a common practice for college football stars to sit out from their bowl games at the end of the year in order to avoid injuries that could jeopardize their ability to be drafted highly in the NFL.<sup>26</sup> The evidence clearly suggests that these players are making a business decision about playing or not playing a college football game in order to protect their financial interests.<sup>27</sup> The fact that these players are turning their backs on their universities for the biggest game of the year in order to protect their own financial interests further contradicts the NCAA's definition of student first, athlete second. Actions like these suggest that these athletes are protecting the financial interests born from their athletic talent first, and only caring secondarily about their university and the experience of being a college athlete at the highest level.

### 3. Universities Systematically Implement Ways for College Athletes to Bypass Their Educational Requirements in Order to Allow the Athletes to Focus on Their Sports

Furthermore, recent activity by a handful of universities with Division I sports programs have exposed the student first, athlete second farce. For example, the University of North Carolina ("UNC"), known for its highly successful college basketball program, was recently found to offer "fake classes that enabled dozens of athletes to gain and maintain their eligibility."<sup>28</sup> The NCAA defended UNC during the scandal by pointing out that the university broke no NCAA rules because the classes were open to non-athlete students as well.<sup>29</sup> However, "[a]n independent report commissioned by North Carolina found that of the 3,100 students who took the fake classes over 18 years, 47.4 percent were athletes."<sup>30</sup> Given that UNC is one of a handful of schools who have had several "one-and-done" players,<sup>31</sup> it would make perfect sense if these classes were invented with athletes in mind. If that were the case, then surely the student first, athlete second definition would be inapplicable at UNC.

---

<sup>25</sup> See *What Percentage of NFL Players Are College Graduates?*, REFERENCE, <https://www.reference.com/sports-active-lifestyle/percentage-nfl-players-college-graduates-1cb66d290f53d545> (last updated Mar. 31, 2020).

<sup>26</sup> Morgan Moriarty, *Why Are So Many College Football Players Sitting Out Bowls? Just Look at the Numbers*, SBNATION (Dec. 22, 2018, 2:33 PM), <https://www.sbnation.com/college-football/2018/12/22/18127862/skipping-bowl-games-contracts>.

<sup>27</sup> *Id.*

<sup>28</sup> Solomon, *supra* note 1.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Quintin Schwab, *UNC Basketball: The Five Carolina One-and-Dones*, SBNATION: TAR HEEL BLOG (Apr. 22, 2019, 3:00 PM), <https://www.tarheelblog.com/2019/4/22/18310422/unc-tar-heels-mens-basketball-one-and-done-nba-coby-white-nassir-little-marvin-williams-tony-bradley>.

#### 4. The NCAA Has Made Concessions in the Area of Athlete Compensation While Standing Strong on Their Amateurism Shield

More recently, the NCAA has made a handful of rule changes that allow new benefits for college athletes, including stipends to cover the full cost of attendance, unlimited meals, and in some conferences, extended medical coverage for college athletes who get injured in-game.<sup>32</sup> These changes, while surely signs of progress, were more of a response to complaints from athletes about hardship than a movement towards offering the athletes what many feel they deserve.<sup>33</sup> Moreover, the stipends are applicable to the lucrative sports of football and men's basketball, as well as to the "non-revenue" sports, which further supports the notion that they are not intended to be seen as athletes getting a piece of the pie.<sup>34</sup>

#### 5. Recent Court Decisions Suggest the Movement Towards Athlete Compensation May Be Gaining Legal Support

The 1984 United States Supreme Court case *National Collegiate Athletic Ass'n v. Board of Regents* provided some law in this area, all stemming from five words in Justice John Paul Stevens's majority opinion: "[A]thletes must not be paid."<sup>35</sup> The case itself dealt with television contracts for college football, but in his opinion, Justice Stevens happened to drop in those five words, which the NCAA grasped onto to defend itself against athlete compensation challenges for decades.<sup>36</sup> Twenty-one years later, in the 2015 case *O'Bannon v. NCAA*, the Ninth Circuit revisited the aforementioned case and concluded that while *Board of Regents* stands for the proposition that the NCAA must be allowed to preserve amateurism in college sports,<sup>37</sup> it does not stand for the proposition that athletes must be completely prohibited from being compensated for commercial "use of their names, images, and likenesses."<sup>38</sup> Many commentators saw the *O'Bannon* decision as a major step in the direction of athlete compensation.<sup>39</sup> The case is a compelling instance in which the NCAA's long tradition of hiding under the student-athlete guise was jeopardized, and in which a court started to seriously question the legitimacy of the NCAA's ability to outright prohibit college athletes from being compensated.<sup>40</sup> More recent developments, discussed next, may not have happened if not for *O'Bannon*.

---

<sup>32</sup> Solomon, *supra* note 1.

<sup>33</sup> See Chris Isidore, *College Athletes Finally Getting Some Cash*, CNN (Sept. 4, 2015, 1:43 PM), <https://money.cnn.com/2015/09/04/news/companies/extra-cash-college-athletes/index.html>.

<sup>34</sup> *Id.*

<sup>35</sup> Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 102 (1984).

<sup>36</sup> Solomon, *supra* note 1.

<sup>37</sup> *O'Bannon v. NCAA*, 802 F.3d 1049, 1062 (9th Cir. 2015).

<sup>38</sup> *Id.* at 1082 (Thomas, C.J., concurring in part, dissenting in part).

<sup>39</sup> Solomon, *supra* note 1.

<sup>40</sup> *See id.*

### III. ONGOING CHANGES IN NCAA ATHLETE COMPENSATION

#### A. THE “FAIR PAY TO PLAY ACT” REIGNITES THE MOVEMENT TO COMPENSATE COLLEGE ATHLETES

##### 1. The California Act Requires Universities to Allow Their Athletes to Receive Income from Outside Sources and Prohibits Retaliatory Measures

In February 2019, California State Senator Nancy Skinner spurred the largest development in the athlete compensation movement since *O’Bannon* when she introduced the “Fair Pay to Play Act.”<sup>41</sup> The Act, which has since been through the amendment process, passed by the California State Senate, and signed by California Governor Gavin Newsom, “make[s] it illegal for California universities to revoke an athlete’s scholarship or eligibility for taking money.”<sup>42</sup> The Act, signed in late September of 2019, is set to go into effect in January of 2023, provided it survives any legal challenges looming on the horizon.<sup>43</sup> Under the Act, California athletes would be allowed to “earn compensation for the use of their likeness, sign endorsement deals and hire agents to represent them.”<sup>44</sup> This would not necessarily mean that the universities would pay the athletes directly. Instead, it would essentially allow the athletes to make money off the field, in much the same way that more famous professional athletes do.<sup>45</sup>

##### 2. Notable Athletic Figures Endorse the “Fair Pay to Play Act”

This bill received tremendous support from professional athletes such as LeBron James, who hosted Governor Newsom on his talk show for the signing of the bill.<sup>46</sup> James, drafted in 2003, was one of the last players to avoid playing in college, having graduated high school before the NCAA rule changes that prompted the “one-and-done” movement took effect.<sup>47</sup> James has nonetheless been critical of the NCAA in the past, as he believes players are forced to waste time in college while universities make millions off of their talent.<sup>48</sup> James is one of several famous professional athletes who are strongly in favor of the bill.<sup>49</sup> Draymond Green, a three-time all-star NBA

<sup>41</sup> Jenna West, *What Is the Proposed Calif. Bill to Pay NCAA Athletes? Fair Pay to Play Act Explained*, SPORTS ILLUSTRATED (Sept. 10, 2019), <https://www.si.com/college/2019/09/10/fair-pay-play-act-california-bill-ncaa-background-explainer>.

<sup>42</sup> *Id.*; Colin Dwyer, *California Governor Signs Bill Allowing College Athletes to Profit from Endorsements*, NAT’L PUB. RADIO (Sept. 30, 2019, 11:13 AM), <https://www.npr.org/2019/09/30/765700141/california-governor-signs-bill-allowing-college-athletes-to-profit-from-endorsem>.

<sup>43</sup> West, *supra* note 41.

<sup>44</sup> Dwyer, *supra* note 42.

<sup>45</sup> See West, *supra* note 41.

<sup>46</sup> Josh Schrock, *Gavin Newsom Signs ‘Fair Pay to Play’ Act with LeBron James on ‘The Shop’*, NBC SPORTS (Sept. 30, 2019), <https://www.nbcsports.com/bayarea/ncaa/gavin-newsom-signs-fair-pay-play-act-lebron-james-shop>.

<sup>47</sup> See *2003 NBA Draft*, BASKETBALL-REFERENCE, [https://www.basketball-reference.com/draft/NBA\\_2003.html](https://www.basketball-reference.com/draft/NBA_2003.html) (last visited Nov. 25, 2019).

<sup>48</sup> See Dave McMenamin, *LeBron James Calls NCAA ‘Corrupt’ in Wake of Scandals*, ESPN (Feb. 27, 2018), [https://www.espn.com/nba/story/\\_/id/22596036/lebron-james-calls-ncaa-corrupt-says-nba-give-alternative](https://www.espn.com/nba/story/_/id/22596036/lebron-james-calls-ncaa-corrupt-says-nba-give-alternative).

<sup>49</sup> Jenni Fink, *LeBron James, Richard Sherman, Herschel Walker React to California’s Law Allowing NCAA Athletes to Sign Endorsements*, NEWSWEEK (Oct. 1, 2019, 12:15 PM), <https://www.newsweek.com/ncaa-california-law-student-athletes-lebron-james-herschel-walker-1462385>.

player, has also publicly supported the bill, claiming he believes it would help bring “equality” to college athletics.<sup>50</sup> Green, unlike James, did play in college, and played both basketball and football during his time at Michigan State University.<sup>51</sup> Some athletes, like professional football player Richard Sherman, go even further, suggesting the NCAA takes advantage of college athletes and supporting the bill in hopes that it “destroys” the NCAA.<sup>52</sup> However, while the opinions of the pros are relevant in popular culture, the real test will be whether any prominent legal challenge can be mounted against the bill.

### 3. The NCAA Initially Resists the Act, but Later Backs Down to the Movement’s Newfound Momentum

The NCAA was initially stout in responding to the California bill, as they threatened to disqualify California universities from competing for national championships in the event that the bill was passed.<sup>53</sup> Almost immediately after the California bill passed, and before the NCAA had time to come up with a formal response, several other states began crafting legislation similar to that which passed in California.<sup>54</sup> Most of the proposed legislation centered around ideas similar to those found in the California bill.<sup>55</sup> However, some states, like New York, suggested changes that would have the NCAA compensating college athletes directly.<sup>56</sup>

In late October 2019, in what was likely a response to the aforementioned slew of legislative movement across the states, the NCAA announced that its board of governors had voted to allow athletes to “benefit from the use of their name, image and likeness.”<sup>57</sup> NCAA President Mark Emmert said in a statement on the day of the vote that the NCAA is “uniquely positioned to modify its rules to ensure fairness and a level playing field for student-athletes,” and that “[t]he board’s action today creates a path to enhance opportunities for student-athletes while ensuring they compete against students and not professionals.”<sup>58</sup> While Emmert sounded enthusiastic about the direction of the NCAA, in all reality, this move was likely forced out of the NCAA’s hand by the mounting legislative pressure.<sup>59</sup>

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Jeremy Bauer-Wolf, *New Bill May Allow Athlete Compensation*, INSIDE HIGHER ED (June 26, 2019), <https://www.insidehighered.com/news/2019/06/26/ncaa-may-not-allow-participation-championship-games-if-california-bill-passes>.

<sup>54</sup> See generally Charlotte Carroll, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS ILLUSTRATED (Oct. 2, 2019), <https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws>.

<sup>55</sup> See generally *id.*

<sup>56</sup> Jabari Young, *Florida and NY Push Bills to Compete with California’s NCAA ‘Pay to Play’ Law*, CNBC (Oct. 24, 2019, 2:29 PM), <https://www.cnbc.com/2019/10/24/florida-and-ny-push-bills-to-compete-with-californias-ncaa-pay-to-play-law.html>.

<sup>57</sup> *NCAA Votes to Allow College Athletes to Make Money from Their Fame*, GUARDIAN (Oct. 29, 2019, 2:18 PM), <https://www.theguardian.com/sport/2019/oct/29/ncaa-votes-college-athletes-benefit-fame-name-image-likeness>.

<sup>58</sup> Clarissa-Jan Lim, *The NCAA Will Let Student-Athletes Make Money off Their Names and Images*, BUZZFEED NEWS (Oct. 29, 2019, 3:51 PM), <https://www.buzzfeednews.com/article/clarissajanim/ncaa-student-athletes-profit-endorsement>.

<sup>59</sup> See *id.*



The move is set to be implemented in 2021, subject to the NCAA's three major divisions finding a way to craft rules that allow for athletes to profit while still maintaining rules regarding amateurism.<sup>60</sup> NCAA board chair Michael V. Drake emphasized that "change must be consistent with the values of college sports and higher education and not turn student-athletes into employees of institutions."<sup>61</sup> While the NCAA's vote is reassuring, it does not necessarily signal victory for college athletes just yet.<sup>62</sup> Some believe it is likely that the NCAA's vote was more of an effort to control the course of the compensation movement than a progressive change of heart in favor of the athletes.<sup>63</sup> It remains to be seen how steadfast the NCAA will be in implementing the changes that it has promised and how much the athletes will benefit in the end from any changes that are made.<sup>64</sup>

#### 4. The United States Congress Is Currently Looking into Legislative Responses to the Recent Movement Seen in State Legislatures

In the wake of California's Fair Pay to Play Act, several states around the country have been considering similar legislation.<sup>65</sup> Seeing this, the United States Congress jumped into action.<sup>66</sup> In a Senate hearing in February 2020, NCAA President Mark Emmert went on record, asking Congress to implement restrictions on college athletes' ability to earn compensation.<sup>67</sup> The NCAA's position is that federal regulation is necessary because, as it stands now, some states have pursued legislation in this area, while others have yet to do so.<sup>68</sup> This could lead to a problem with college recruiting, where athletes will be financially swayed to choose programs in states with favorable laws, leaving universities in the other states at a disadvantage.<sup>69</sup> While this concern is entirely legitimate, there is significant doubt as to the NCAA's intentions with this federal push. It seems entirely plausible that the NCAA knows their back is against the wall with the recent movement by state legislatures and is attempting to have Congress come down against any college athletes in any state being paid. Time will tell what the result of this federal push will be, but in the meantime, the pressure remains highly concentrated on the NCAA.

---

<sup>60</sup> *NCAA Votes to Allow College Athletes to Make Money from Their Fame*, *supra* note 57.

<sup>61</sup> *Id.*

<sup>62</sup> Roxanne Jones, *The NCAA Blinked, and It's About Time*, CNN (Oct. 30, 2019, 10:44 AM), <https://www.cnn.com/2019/10/30/opinions/ncaa-athlete-compensation-fair-pay-to-play-act-jones/index.html>.

<sup>63</sup> *Id.*; see Steve Almsy, *Here's What Some Athletes Think About the NCAA Move to Let College Players Get Paid*, CNN (Oct. 30, 2019, 7:21 AM), <https://www.cnn.com/2019/10/29/us/ncaa-athletes-compensation-reactions/index.html>.

<sup>64</sup> See Jones, *supra* note 62.

<sup>65</sup> Ben Nuckols, *NCAA President Presses U.S. Senate for 'Guardrails' on Athlete Pay*, HARTFORD COURANT (Feb. 11, 2020), <https://www.courant.com/sports/college/hc-sp-mark-emmert-senate-hearing-ncaa-pay-20200211-20200211-clr3ohfrs5ckppbhiicxf7mca-story.html>.

<sup>66</sup> See *id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

B. THE NCAA HAS LEGITIMATE REASONS TO BE CONCERNED ABOUT  
THE MOVEMENT TO COMPENSATE COLLEGE ATHLETES

1. The NCAA Is at Least Partially Motivated by the Federal Income Tax  
Implications of Paying College Athletes

Perhaps the greatest concern for the NCAA and its member universities regarding this movement towards compensating college athletes is Sam reaching further into their pockets. College sports programs currently enjoy 501(c)(3) nonprofit organization status.<sup>70</sup> However, there is some concern that paying a salary to college athletes would risk forfeiting this status, since education must be a “charitable activity” in order to qualify for 501(c)(3) tax treatment.<sup>71</sup> Even if the universities were to not pay the athletes directly, but instead allow them to profit off of their own likeness from outside sources, there is no definitive guidance or precedent that confirms that the 501(c)(3) tax status would be maintained.<sup>72</sup> Additionally, universities are not required to pay payroll taxes on the dollar amount of the *scholarship* they offer to student athletes, but they would have to pay payroll taxes to the federal government on the dollar amount of *salary* they would pay those same athletes.<sup>73</sup> The NCAA and its member universities have a substantial financial interest in maintaining the amateur status of college athletes in order to avoid this tax liability. This helps explain why the NCAA has stressed that the divisions must come up with rule changes that are “consistent with the values of college sports and higher education.”<sup>74</sup> The NCAA’s goals could have less to do with preserving the spirit of college athletics and more to do with protecting their profit from the hands of the federal government.

IV. ANALYSIS ON COLLEGE ATHLETE COMPENSATION GOING  
FORWARD

It appears that, going forward, college athletes will begin to see at least some form of compensation for their talents and their performance. It is unclear exactly how much and to what extent they will be compensated and how this will affect the popularity and sanctity of college sports. The following is an analysis of the pros and cons of the movement, including a proposed resolution for compensating college athletes going forward.

---

<sup>70</sup> John Thelin, *Paying College Athletes*, INSIDE HIGHER ED (Feb. 12, 2018), <https://www.insidehighered.com/views/2018/02/12/impact-college-sports-programs-if-athletes-are-paid-opinion>.

<sup>71</sup> *Id.* (emphasis removed).

<sup>72</sup> *See id.*

<sup>73</sup> *Id.*

<sup>74</sup> *NCAA Votes to Allow College Athletes to Make Money from Their Fame*, *supra* note 57.

A. THE “FAIR PAY TO PLAY ACT” IS A STEP IN THE RIGHT DIRECTION,  
BUT DOES NOT GO FAR ENOUGH IN PROTECTING THE FINANCIAL  
INTERESTS OF COLLEGE ATHLETES

1. The Act Should Also Include a Provision That Allows Universities to  
Directly Compensate Their Athletes

The California State Legislature and Governor Newsom had the right idea in mind when drafting the Fair Pay to Play Act. Denying college athletes the ability to earn money on their likeness and image is an arbitrary and pointless rule that should have never been put into effect. However, the Act does not fulfill its full potential. The NCAA should also be prohibited from disallowing the direct compensation of college athletes by their universities. Both the fairness argument and the anti-corruption argument are more than compelling enough to justify such a change, and the result would almost certainly create a more even playing field in the top-grossing college sports. It is almost universally accepted that college athletes are already paid under the table by universities in the recruiting process to sway the athletes to attend one school instead of another. Allowing them to instead be paid according to a set of well-designed, clearly-written, and strictly-enforced rules could increase transparency and reduce corruption.

B. ALLOWING COLLEGE ATHLETES TO RECEIVE INCOME HAS FAR MORE  
BENEFITS THAN DRAWBACKS

1. Allowing College Athletes to Receive Income Would Lessen the  
Tremendous Burden These Individuals Face in Balancing School and Their  
Sports

Allowing college athletes to be compensated would eliminate, or at least reduce, many financial concerns for the athletes while they are in college. A large percentage of college athletes come from underprivileged families and communities and do not have the resources to be supported or support themselves for several years while they are in college.<sup>75</sup> As a result, many college athletes are forced to work low-paying jobs on the side or take extra loans to cover basic expenses.<sup>76</sup> Balancing school, athletics, and a job can subject college athletes to far more stress than the average adult deals with on a daily basis.<sup>77</sup> The athletes must dedicate a certain number of hours to their sports each week, and often the school makes money, just as an employer would. Greater effort exerted by an athlete at practice and more hours spent mastering their craft tend to lead to performance at a higher level, which can in turn lead to championship appearances, meaning more airtime and revenue for the university. Thus, athletes should be allowed to earn

---

<sup>75</sup> Armstrong Williams, *Williams: The Exploitation of College Athletes*, WASH. TIMES (Apr. 6, 2014), <https://www.washingtontimes.com/news/2014/apr/6/williams-the-exploitation-of-college-athletes>.

<sup>76</sup> *Id.*

<sup>77</sup> See Ann Kearns Davoren & Seunghyun Hwang, *Mind, Body and Sport: Depression and Anxiety Prevalence in Student-Athletes*, NCAA SPORT SCI. INST. (Oct. 8, 2014, 10:09 AM), <http://www.ncaa.org/sport-science-institute/mind-body-and-sport-depression-and-anxiety-prevalence-student-athletes>.

compensation in return for their time committed to their sports, just as an employee is compensated when their activities make money for the employer. Moreover, allowing players to be compensated could increase the likelihood that they stay in school long enough to earn their degrees. Now more than ever, college athletes at the highest levels leave school early to pursue a career in a professional league for their sport.<sup>78</sup>

## 2. Allowing College Athletes to Receive Income Would Lead to Greater Rates of Graduation and Academic Achievement Among College Athletes

Moreover, many college athletes quit their collegiate athletics career due to the overwhelming stress that comes from balancing school and athletics, which can have grave financial consequences, such as loss of scholarship.<sup>79</sup> Universities have good reason to adopt any changes that could make life more manageable for their student athletes. On a related note, the vast majority of college athletes do not become professionals, so earning their degree should be of utmost importance, and any incentive to do so should be pursued. Furthermore, the average professional football player's career is less than four years,<sup>80</sup> and the average professional basketball player's career is less than five years.<sup>81</sup> Therefore, incentivizing college athletes to stay in school long enough to earn their degrees could also be highly beneficial for those who do become professional athletes by providing them with broader opportunities after their short stint in professional sports is over. If the NCAA truly has furthering their athletes' education as their primary focus, then increasing the chances that an athlete graduates from college should be a no-brainer.

## 3. Allowing College Athletes to Receive Income Would Reduce the Frequency of Scandals Surrounding NCAA Rules Violations by Allowing for More Transparency and Efficiency

Allowing college athletes to be compensated would also eliminate, or at least reduce, the scandals surrounding NCAA rules violations at NCAA member universities. From the "Fab Five" in the 1990s<sup>82</sup> to the recent controversy around Brian Bowen, a basketball recruit for the University of Louisville,<sup>83</sup> college sports have had several scandals about players and

---

<sup>78</sup> See Blake Williams, *The Numbers Behind the Record 107 College Football Players Leaving for The NFL*, FORBES (Jan. 22, 2016, 2:20 PM), <https://www.forbes.com/sites/blakewilliams3012/2016/01/22/the-numbers-behind-the-record-107-college-players-leaving-early-for-the-nfl/#37fe69040c0>.

<sup>79</sup> Griffin Rubin, *Why Athletes Drop Their Sport*, LRT-SPORTS (May 9, 2019), <https://www.lrtsports.com/blog/why-athletes-drop-their-sport>.

<sup>80</sup> Christina Gough, *Average Playing Career Length in the National Football League*, STATISTA (Sept. 10, 2019), <https://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league>.

<sup>81</sup> Aaron J. Lopez, *Life After NBA Comes Sooner Than Many Players Think*, NBA: DENVER NUGGETS (June 10, 2010), [https://www.nba.com/nuggets/features/junior\\_bridgeman\\_20100610.html](https://www.nba.com/nuggets/features/junior_bridgeman_20100610.html).

<sup>82</sup> The "Fab Five" is a commonly used moniker for a group of five highly-touted University of Michigan basketball players that were compensated by University of Michigan boosters in violation of NCAA athlete compensation rules. See *Michigan Forfeits Victories from Five Seasons*, ESPN (Nov. 11, 2002, 10:04 AM), <https://www.espn.com/ncb/news/2002/1107/1457316.html>.

<sup>83</sup> Brian Bowen is known as the central figure in a more recent NCAA basketball scandal in which several universities were found to have either directly or indirectly bribed sought-after basketball recruits

recruits being paid to attend a certain university in violation of NCAA rules. It is almost universally acknowledged today that a black market exists for paying college athletes to attend a certain university.<sup>84</sup> However, the NCAA still punishes the athletes who get caught accepting bribes by revoking their scholarships or eligibility to play.<sup>85</sup> Whether one comes out in favor of or against paying college athletes, all of the athletes should be subject to the same rules. Thus, if the NCAA cannot come up with a way to effectively stop college athletes from being compensated, they should allow it to happen. It is a basic tenet of any respected legal system that all people should be treated equally under the law. The NCAA, being the enforcer here, has the responsibility to administer justice by holding all parties guilty of violating their rules accountable. Since we have ample reason to believe that they have failed to do so effectively,<sup>86</sup> it would seem fairer to allow the players to be compensated, instead of acknowledging that it universally happens and then arbitrarily choosing which parties to punish based on who gets caught. At least if it is allowed, it can be better monitored and regulated, which is a step in the right direction from the black-market dealings that occur now.<sup>87</sup>

#### 4. Allowing College Athletes to Receive Income Would Lead to Increased Competition and Overall Improvement for College Athletics

Critics of the movement to compensate college athletes often suggest that allowing college athletes to be paid would result in concentration towards the top, where the most elite programs would out-bid all of the other schools, resulting in super teams that no other school could ever dream of competing with. We already see this to a large extent in college sports, namely in football,<sup>88</sup> due to the aforementioned under-the-table money funneled to players. As mentioned earlier, this problem could be mitigated with strict policies allowing, but monitoring, player compensation. However, contrary to the critics' position, allowing college athletes to be compensated, if done correctly, could lead to far greater levels of competition among schools with much less concentration at the top. To determine this process, one need look no further than the world of professional sports. Professional leagues like the NFL, NBA, National Hockey League ("NHL"), and Major League Baseball ("MLB") all achieve great levels of competition, meaning that the playing field is quite even and all teams have the potential for success. In professional sports, teams go from being in the bottom tier to

---

to play basketball at their university over others in violation of NCAA athlete compensation and recruiting rules. Ricky O'Donnell, *Brian Bowen's FBI Scandal Shows the Many Ways a College Basketball Recruit Can Get Paid*, SBNATION (Oct. 5, 2018, 1:21 PM), <https://www.sbnation.com/college-basketball/2018/10/5/17941060/brian-bowen-fbi-scandal-offers-creighton-texas-arizona-louisville-nike-adidas>.

<sup>84</sup> Andy Staples, *What Has the NCAA—or Anyone—Learned from the College Basketball Black Market's Time on Trial?*, SPORTS ILLUSTRATED (May 9, 2019), <https://www.si.com/college/2019/05/09/ncaa-trial-fbi-bribery-corruption-mark-emmert>.

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., Jim Vertuno, *Bribery Scandal Exposes Sports Side Door to Admissions*, AP NEWS (Mar. 12, 2019), <https://apnews.com/f49d69167aea4ec6aa5fe3b7d678e3f5>.

<sup>87</sup> *Id.*

<sup>88</sup> See, e.g., *2021 Football Team Rankings*, 247SPORTS, <https://247sports.com/Season/2021-Football/CompositeTeamRankings/> (last updated Apr. 18, 2021, 3:00 PM); *2021 Basketball Team Rankings*, 247SPORTS, <https://247sports.com/Season/2021-Basketball/CompositeTeamRankings/> (last updated Apr. 19, 2021, 12:30 PM).

winning championships in rather short spans of time on a regular basis.<sup>89</sup> One of the main reasons why this occurs more often in professional sports is the free market system. Players have the ability to enter free agency and receive offers to play for various teams before ultimately signing in one place.<sup>90</sup> Of course, on occasion this does lead to clear instances of players making their decisions based on a desire to win championships, rather than a desire to receive the best return on their talents.<sup>91</sup> These instances can have a devastating effect on the competitive atmosphere of a league. For example, Kevin Durant's 2016 move to join the Golden State Warriors, a team who the year prior had just set the NBA record for most wins in a season, was universally acknowledged as "soft," and many believe it ruined the league's competitive atmosphere for years to come because the Warriors essentially became unbeatable.<sup>92</sup> Nonetheless, these instances remain the exception to the general rule that free market systems improve competitive levels.

Additionally, college sports could institute salary caps as most professional leagues do.<sup>93</sup> Salary caps would even the playing field in college athletics, as teams would not be able to secure all of the good recruits each year because the recruits would demand to be paid more than the salary cap would allow.<sup>94</sup> This would go a long way towards leveling out the top-heavy playing field we are currently seeing. For example, in college football recruiting for the high school class of 2021, there were thirty-four recruits that earned a "five-star" designation as prospects for playing college football in the next year.<sup>95</sup> However, the top five teams, out of well over one hundred division one programs, signed twenty-one of those recruits.<sup>96</sup> That is almost two-thirds of the top-level talent going to only five programs. If salary caps were instituted, these problems would be alleviated because elite programs like Alabama would not be able to pay multiple "five-star" recruits in every recruiting class, so those recruits would go elsewhere, and the talent would spread more evenly.<sup>97</sup> A well-implemented free market system in college football would lead to an increased level of competition in college athletics, which in the long run would be good for the players, the fans, and the NCAA and their affiliate members.

---

<sup>89</sup> Nick Dimengo, *Biggest 1-Season Team Turnarounds Ever*, BLEACHER REP. (Aug. 20, 2015), <https://bleacherreport.com/articles/2539382-biggest-one-season-team-turnarounds-ever>.

<sup>90</sup> Joel Umanzor, *Off the Record: Sports Mentality Shifts as Free Market Thrives*, ADVOCATE (Feb. 13, 2019), <https://cccadvocate.com/10379/sports/off-the-record-sports-mentality-shifts-as-free-market-thrives>.

<sup>91</sup> See Marc J. Spears, *'Strength in Numbers' Convinced Kevin Durant to Join Warriors*, UNDEFEATED (July 4, 2016), <https://theundefeated.com/features/strength-in-numbers-convinced-kevin-durant-to-join-warriors>.

<sup>92</sup> Shaun Holkko, *Opinion: Kevin Durant's Selfishness Has Ruined the NBA*, STATE HORNET (June 9, 2018), <https://statehornet.com/2018/06/opinion-kevin-durants-selfishness-has-ruined-the-nba>.

<sup>93</sup> Washington, *supra* note 9.

<sup>94</sup> See *id.*

<sup>95</sup> *2021 Top Football Recruits*, 247SPORTS, <https://247sports.com/Season/2021-Football/CompositeRecruitRankings/?InstitutionGroup=HighSchool> (last visited Apr. 19, 2021).

<sup>96</sup> *2021 Football Team Rankings*, *supra* note 88.

<sup>97</sup> See *id.*

## 5. Allowing College Athletes to Receive Income Would Potentially Save College Athletics from the Rise of Alternative Leagues

A notable trend has emerged lately in which high school athletes are bypassing the college athletics industry as a whole by choosing alternative leagues. For instance, some high school basketball players with professional league prospects have been spending their one year out of high school, as required by NCAA rule, in European professional basketball leagues.<sup>98</sup> These young men approach this strategy with hopes of going to the NBA after a year or two of playing overseas.<sup>99</sup> However, in the overseas leagues, they are already paid professionals, and they avoid the harsh rules and risk of scandal inherent in the college basketball system.<sup>100</sup> This is a relatively new phenomenon, but time will tell how large of a risk it may pose to the NCAA if they do not change their rules soon. Furthermore, there has even been talk amongst historically black colleges and universities of starting a professional league for young men to play basketball in between high school and potentially joining the NBA.<sup>101</sup> These leagues would offer only modest compensation to athletes, and there is no guarantee that fans would follow them, but they nonetheless may serve their purpose of forcing the NCAA into action.<sup>102</sup>

Another interesting development in this area surrounds the brand new XFL, an alternative professional football league that made its first debut in early 2000 and second debut in 2020. The NFL requires players to be removed from high school for three years before becoming eligible to play.<sup>103</sup> However, the XFL has no such requirements.<sup>104</sup> It is uncertain whether players would be comfortable making the jump straight from high school to the XFL. There appears to be some concern about high school players' ability to adapt to the fast pace of the XFL.<sup>105</sup> Furthermore, there would be risk involved in going directly to the XFL, because this would compromise a player's ability to go back into college football in the future, as they would forfeit their amateur status.<sup>106</sup> Moreover, given that the XFL is a brand-new league, there is uncertainty about how popular and successful it will be, and therefore how much exposure the players can get to show their skills in order to one day transition to the NFL.<sup>107</sup> It is worth noting that the XFL was forced to shut down midway through its 2020 season due to the COVID-19 pandemic and filed for bankruptcy shortly thereafter.<sup>108</sup> However, the league was acquired by an investor group in the summer of 2020 and plans to return

---

<sup>98</sup> Kevin Flaherty, *Top Prospects Who Decided to Go Straight Overseas*, 247SPORTS (May 28, 2019), <https://247sports.com/Article/Top-recruits-to-play-overseas-RJ-Hampton-New-Zealand-NBL-132375603>.

<sup>99</sup> *Id.*

<sup>100</sup> *See id.*

<sup>101</sup> Washington, *supra* note 9.

<sup>102</sup> *Id.*

<sup>103</sup> David Kenyon, *Can the XFL Be a Viable Alternative for College Football Players*, BLEACHER REP. (Feb. 28, 2020), <https://bleacherreport.com/articles/2878259-can-the-xfl-be-a-viable-alternative-for-college-football-players>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Dade Hayes, *XFL Will Skip 2021 Season Before Returning In 2022*, DEADLINE (Oct. 1, 2020, 10:23 AM), <https://deadline.com/2020/10/xfl-will-skip-2021-season-returning-2022-1234589516>.

in 2022.<sup>109</sup> Despite this uncertainty, the XFL being a threat to college football is an interesting line of thought, and one that the NCAA should definitely pay attention to.

#### 6. Allowing College Athletes to Receive Income Would Be More Consistent with the Overall Concept of Fairness

Several proponents of paying college athletes like to allude to a greater concept of fairness in crafting their arguments. Such proponents point to the astonishing profits that the top college football and basketball programs bring in and argue that the college athletes who are fundamentally responsible for these profits are entitled to a share.<sup>110</sup> Not only do the current rules prohibit college athletes from sharing in the profits of their university, but they also prevent them from earning money from outside sources. For instance, athletes like Katelyn Ohashi, a former University of California, Los Angeles (“UCLA”) gymnast, are prohibited from earning advertising money when videos of their sports go viral on YouTube.<sup>111</sup> Many college athletes play sports for love of the game alone, but still others have the primary goal in mind of moving on to the next level after college and earning a living off of their talents in sports. From a fairness standpoint, it is compelling to argue that these college athletes should be allowed to demand a slice of the pie that the universities bring in. They are largely responsible for the revenue from tickets, licensed clothing, and the like. It is a fundamental American ideal that someone with a talent or skill in a given trade should be able to monetize that talent or skill if a market exists. However, the NCAA has barred college athletes from doing this very thing for decades. A Yahoo poll from 2017 found that forty percent of people agree that college athletes are being exploited for their talents.<sup>112</sup> Just two years later, a 2019 poll found that fifty-two percent of people agree that college athletes at the highest levels should be allowed to earn money from their talents.<sup>113</sup> After the issue began receiving more mainstream coverage throughout the latter half of 2019, an early 2020 study showed that two-thirds of people polled were in favor of allowing college athletes to earn compensation from outside sources, and half were in favor of universities compensating the athletes directly.<sup>114</sup> As the college athletics industry continues to grow, more and more people are buying into the fairness argument and taking on the opinion that college athletes deserve compensation. Chairman of the NCAA board Michael V. Drake even referred to the association’s recent announcement of coming changes to allow college

---

<sup>109</sup> *Id.*

<sup>110</sup> Spencer Bokot-Lindell, *Should College Athletes Be Allowed to Get Paid?*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/opinion/california-student-athletes-paid.html>.

<sup>111</sup> *Id.*

<sup>112</sup> Daniel Roberts, *Poll: More People than Ever Believe College Athletes Should Be Paid*, YAHOO! FIN. (Mar. 24, 2017), <https://finance.yahoo.com/news/poll-more-people-than-ever-believe-college-athletes-should-be-paid-172810243.html>.

<sup>113</sup> Scott Rasmussen, *52 Percent of Voters: Pay Top College Athletes*, NEWSMAX (Mar. 27, 2019, 4:26 PM), <https://www.newsmax.com/scottrasmussen/merchandise-players-royalties/2019/03/27/id/909006>.

<sup>114</sup> Michael T. Nietzel, *Americans Now Overwhelmingly Support College Athletes Earning Endorsement and Sponsorship Money*, FORBES (Feb. 11, 2020, 8:43 AM), <https://www.forbes.com/sites/michaelt Nietzel/2020/02/11/americans-now-overwhelmingly-support-college-athletes-earning-endorsement-and-sponsorship-money/#39feb40648e2>.



athletes to profit off of likeness as “embrac[ing] change.”<sup>115</sup> Given that the NCAA itself even acknowledges its weight, the fairness argument is strong on this issue.

C. COLLEGE ATHLETES SHOULD BE ALLOWED TO RECEIVE INCOME DIRECTLY FROM THEIR UNIVERSITIES, IN ADDITION TO BEING ALLOWED TO RECEIVE INCOME FROM OUTSIDE SOURCES

1. The Tax Implications of Such a Switch Cannot Be Ignored

Even if we are convinced that college athletes should be paid, one glaring question still remains: how would the NCAA go about implementing rules that allow the athletes to be directly compensated by their schools? This is a sticking point in the argument for allowing college athletes to be compensated. As mentioned earlier, allowing college athletes to be directly paid, like giving them a salary, could have huge tax implications for the universities. An unavoidable consequence of allowing schools to directly compensate college athletes would be the Medicare and Social Security taxes that would attach to such salaries.<sup>116</sup> While not trivial, these would amount to less than ten percent of what the athletes themselves would be paid, so it would be economically feasible for the schools to bite the bullet on such costs.<sup>117</sup> However, the less trivial factor is the risk of losing 501(c)(3) nonprofit status.<sup>118</sup> This could amount to millions of dollars in tax liability for athletic departments of universities that compete at the highest levels. However, tax scholars seriously doubt whether paying college athletes would actually result in forfeiture of this status.<sup>119</sup> Nonetheless, the risk of exposing the athletics program to that kind of tax liability remains the strongest counterargument against paying college athletes.

2. Universities Could Bear the Risk of Taxation by Simply Beginning to Pay Their Players and Waiting for a Court to Decide

There are a few strategies that universities could implement to deal with the risk of this tax liability. Unsurprisingly, the first would be to begin paying college athletes a salary and hope that no court hands down a decision destroying the athletic department’s 501(c)(3) nonprofit status or that the Internal Revenue Service does not issue guidance suggesting otherwise. Obviously, this is the riskiest possible strategy, but it also is the easiest for universities, and, according to tax scholars, there is good reason to believe that this strategy could be successful.

---

<sup>115</sup> *NCAA Votes to Allow Student Athletes to Get Paid*, TMZ SPORTS (Oct. 29, 2019, 12:27 PM), <https://www.tMZ.com/2019/10/29/ncaa-board-paying-college-athletes-vote>.

<sup>116</sup> Thelin, *supra* note 70.

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

### 3. Universities Could Attempt to Classify Athlete Compensation as a Stipend

Alternatively, the universities' athletics departments could try to classify payments to the athletes as some kind of stipend. College athletes have already been receiving cost-of-living stipends and the like since the 2015 NCAA rule change and no courts have taken issue with this to date.<sup>120</sup> Granted, these stipends have been for smaller amounts than what college athletes would likely be given for a salary. Moreover, such stipends are probably more easily justified when they are meant to be reimbursing the students for a cost they incur as part of attending the university and playing a sport there. Nonetheless, this strategy could work, and is probably more likely to work, than just classifying the compensation as a salary. Moreover, it also has the potential to avoid triggering Medicare and Social Security tax liability.

### 4. Universities Could Coordinate with Boosters to Have the Boosters Pay Their Athletes Directly

A third strategy, and likely the best one, would be for the NCAA to allow boosters to directly compensate college athletes. For those not familiar with the term, boosters are wealthy fans, and often alumni, who donate large sums of money to the athletics programs of their beloved alma maters.<sup>121</sup> This includes the wealthiest of the wealthy boosters who donate millions of dollars and are responsible for things like state-of-the-art training facilities,<sup>122</sup> as well as the average season ticket holder who donates a few hundred dollars here and there.<sup>123</sup> Currently, it is against NCAA rules for boosters to donate any amount of money or provide any direct benefit to college athletes or recruits.<sup>124</sup> It is widely accepted that these rules are regularly broken by universities with the most elite and competitive college athletics programs for sports like men's football and men's basketball.<sup>125</sup> FBI investigations are not a new phenomenon in college athletics, dating back to the University of Michigan's "Fab Five," and in all likelihood, even before that.<sup>126</sup> High-level college athletes are regularly caught with high-end items that raise suspicion and trigger investigations into booster activity in violation of NCAA rules. For example, during his time with the university's highly accomplished football program, former Clemson wide receiver Tee Higgins caught backlash for a social media post featuring him standing in front of a brand-new McLaren, which he somehow managed to afford while a full-time

---

<sup>120</sup> See Isidore, *supra* note 33.

<sup>121</sup> *Role of Boosters*, NCAA, <http://www.ncaa.org/enforcement/role-boosters> (last visited Nov. 25, 2019).

<sup>122</sup> Sam Brodey, *Meet the Big-Money Boosters Behind College Football's Top 25 Teams*, MOTHER JONES (Sept. 5, 2014), <https://www.motherjones.com/environment/2014/09/college-football-boosters-top-25>.

<sup>123</sup> *Role of Boosters*, *supra* note 121.

<sup>124</sup> *Id.*

<sup>125</sup> See Mitch Albom, *Why Paying College Athletes Is More Complex than California Law*, DET. FREE PRESS (Oct. 6, 2019, 12:00 AM), <https://www.freep.com/story/sports/columnists/mitch-albom/2019/10/06/mitch-albom-california-fair-pay/3880569002>.

<sup>126</sup> See *Michigan Forfeits Victories from Five Seasons*, *supra* note 82.

student athlete.<sup>127</sup> Despite the post clearly indicating that Higgins did purchase the car, the star wide receiver evaded persecution by claiming he had never actually purchased the car.<sup>128</sup> Players for the University of Alabama, a perennial powerhouse in college football, are even less secretive about their inexplicably luxurious vehicles, regularly posting pictures on social media of themselves standing in front of their premium cars.<sup>129</sup> Unsurprisingly, these two football programs are regularly ranked in the top five for their annual football player recruiting classes.<sup>130</sup> While one could feasibly subscribe to the notion that players being paid under the table is the exception to the rule, and not a systemic issue, these kinds of bribes and violations are much more commonplace than the NCAA would ever openly acknowledge.<sup>131</sup>

#### 5. Allowing Boosters to Compensate the Athletes Directly Would Likely Lead to Greater Fairness and Transparency in College-Athlete Compensation

Instead of allowing this underground system of player compensation to go on, the NCAA should change its rules to allow boosters to compensate college athletes. This way there would be greater transparency and overall fairness. Compensation limits could be set based on factors such as which athletic conference the university belongs to, what sport the player plays, and what position the player plays. The NCAA could set thorough guidelines for how the athletes can be compensated. To avoid the issue of boosters compensating beyond the set limits, the NCAA could implement and enforce strict disclosure and reporting guidelines for all payments made to players. They could even audit the athletes to ensure that no individual player is taking in too much money directly from the school. This should theoretically disincentivize under-the-table compensation and increase fairness throughout college athletics. Having the reporting guidelines and audits would disincentivize corruption because athletes would be less likely to take a bribe to sign with a certain school if they will be compensated either way. Moreover, boosters will be less likely to offer bribes if they know that an audit is possible. Athletes would be more likely to decide where to enroll based on the university itself, the training facilities, the coaches, and the overall fit for them, rather than going to the school that can funnel the most money to them under the table. This would likely even lead to a more competitive landscape in sports such as college football, instead of the current landscape where a handful of overly-talented teams with all of the best recruits win almost every year.<sup>132</sup> Allowing boosters to compensate

<sup>127</sup> Alex Kirshner, *Here's What Happens When a Star College Football Player Takes a Picture in Front of a Nice Car*, SBNATION (June 9, 2018, 4:43 PM), <https://www.sbnation.com/college-football/2018/6/9/17444878/tee-higgins-clemson-mclaren-picture>.

<sup>128</sup> *Id.*

<sup>129</sup> Dan Register, *Alabama Football Is the Best Car Dealership in the Country*, TOTALFRATMOVE, <https://archive.totalfratmove.com/alabama-football-is-the-best-car-dealership-in-the-country> (last visited Feb. 19, 2021).

<sup>130</sup> See, e.g., *2021 Football Team Rankings*, *supra* note 88.

<sup>131</sup> Albom, *supra* note 125.

<sup>132</sup> See, e.g., *College Football Championship History*, NCAA (Jan. 12, 2021), <https://www.ncaa.com/news/football/article/college-football-national-championship-history>; Chip Patterson, *College Football Recruiting: Schools with Best Class Rankings on Average Over the Past Five*

players in this way, in addition to removing the restrictions against players earning money from outside sources, would alleviate many of the aforementioned negatives in college sports and would likely do so without jeopardizing 501(c)(3) nonprofit status, among other concerns.

D. CRITICS OF THE MOVEMENT TO COMPENSATE COLLEGE ATHLETES DO NOT PRESENT ARGUMENTS THAT OUTWEIGH THE AFOREMENTIONED POSITIVES OF PAYING COLLEGE ATHLETES

1. The “Sanctity of Sports” Argument is Unconvincing and Internally Inconsistent

Critics of the movement to compensate college athletes base their objections on a variety of loosely constructed arguments. The first and most popular objection involves protecting the “sanctity of college sports.”<sup>133</sup> This NCAA catchphrase is the apparent “special sauce” of college sports; it is what differentiates college football from the NFL, college basketball from the NBA, and so forth.<sup>134</sup> Tim Tebow, a legendary college football player from the University of Florida who now works for ESPN, has expressed fear that allowing college players to be compensated would turn college football into the NFL.<sup>135</sup> However, in actuality, college football is already a money-making giant, just like the NFL, so it is unclear exactly what Tebow is taking a stance against. In fact, the top twenty college football programs by revenue have profit figures that are almost identical to many of the middle-tier NFL franchises.<sup>136</sup> On the other hand, Tebow could have been alluding to the idea of playing “for the love of the game,” instead of for money. However, this argument still falls short because many of the highest-level college athletes are playing to increase their NFL draft prospects, which in turn will lead to more money. The only difference is that they have to wait to start earning money, which actually encourages them to leave college football earlier, making it no more than a stop on their journey. That does not seem like playing “for the love of the game.” Allowing these players to be compensated could keep them in college longer, as they would be less likely to run into financial issues that would force an early departure from their universities. Moreover, it will not change their motivation for playing, since their motivation was already money to begin with. In fact, it would likely increase their “love of the game,” because they could spend less time worrying about

---

*Years*, CBS SPORTS (Feb. 12, 2019, 12:22 PM), <https://www.cbssports.com/college-football/news/college-football-recruiting-schools-with-best-class-rankings-on-average-over-the-past-five-years>.

<sup>133</sup> John D. Hollis, *California Law Takes Paying College Athletes Out of the NCAA's Hands: Today's Talker*, USA TODAY (Oct. 2, 2019, 2:35 PM), <https://www.usatoday.com/story/opinion/2019/10/02/ncaa-california-student-athletes-pay-exploitation-talker/3841071002>.

<sup>134</sup> Bill Burton, *Author Joe Nocera on the NCAA and the Case for Paying Student Athletes*, WFPL (Apr. 13, 2016), <https://wfpl.org/author-joe-nocera-on-amateurism-the-ncaa-and-the-case-for-paying-student-athletes>.

<sup>135</sup> Jason Gay, *Pay College Athletes? Here's a Common Sense Way to Do it*, WALL ST. J. (Sept. 19, 2019, 10:36 AM), <https://www.wsj.com/articles/pay-college-athletes-heres-a-common-sense-way-to-do-it-11568902914>.

<sup>136</sup> Tyler Hakes, *NCAA Football Teams Made More Money than NFL Teams in 2015*, UCRIBS, <https://www.ucrubs.com/blog-post/ncaa-football-teams-made-more-money-than-many-nfl-teams-in-2015-infographic> (last visited Nov. 25, 2019).

how their play will affect their draft position, and more time focusing on playing the game they love and representing their university in the best way possible. At the same time, the less-highly-touted players will continue playing for the love of the game because while they may start to see some money, they are not the type of player that boosters will be forking over money to or the type of players who would see massive amounts of income from endorsement deals. Players without a realistic shot of going into professional leagues are already playing for the love of the game, and some money on the side to cover their expenses would not change that. For these reasons, Tebow's fears are misplaced, and should not be considered as a valid reason not to compensate college athletes.

## 2. The Scholarships and Perks That College Athletes Are Currently Receiving from Their Universities Should Not be Viewed as Compensation and Cannot be Held Against Them

Critics of the movement to compensate college athletes also often rely on the argument that college athletes are already compensated through scholarships and the perks that come along with being a collegiate athlete. This argument is flawed for several reasons. First, being a student is a prerequisite for being a college athlete, and for most professional leagues, being a college athlete is a prerequisite for having a professional career. To be eligible to be drafted in the NFL, players must have been out of high school for three years.<sup>137</sup> There is no direct requirement that players spend those three years playing college football, but there is an informal one. College football is the only league that exists where draft prospects can showcase their skills to give them a chance of making it to the NFL. As mentioned earlier, the XFL exists as a new alternative wherein athletes could receive compensation for their play, but this league is new, and it remains to be seen if it will be successful enough to get the players the exposure they need. The NBA has a similar rule, but players need only be out of high school for one year.<sup>138</sup> As discussed earlier, some players have been paving new roads by spending this one year in overseas professional basketball leagues rather than going to play in college. However, this is likewise a new strategy, and we do not yet know if it will prove to be a reliable pathway to the NBA. Thus, players who seek to make it into professional football and basketball leagues have no realistic choice but to become a college athlete. Thus, to call their education a perk, or even further, to call it compensation, is clearly a stretch given that they have no choice but to receive the education. Moreover, the highest tier athletes do not truly receive any benefit from their scholarships because they often leave school before completing their degree.<sup>139</sup> These same athletes also have no use for this education because they are going to be paid millions of dollars in the near future and retire thereafter, without ever using their degree. Thus, it is unfair to count these benefits against the athletes when it comes down to discussing the fairness of denying them the ability to earn compensation.

---

<sup>137</sup> *The Rules of the Draft*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/journey-to-the-nfl/the-nfl-draft/the-rules-of-the-draft> (last visited Feb. 19, 2021).

<sup>138</sup> *Id.*

<sup>139</sup> See *What Percentage of NFL Players Are College Graduates?*, *supra* note 25.

### 3. Many if Not All of the Perks That College Athletes Receive Serve More in the Interest of the University Than in the Interest of the Athletes Themselves

The additional perks that student athletes receive also should not be viewed as compensation because nearly all of them further the university's agenda rather than simply making the athlete better off. The NCAA allows universities to offer unlimited meals and complimentary nutritionists to college athletes.<sup>140</sup> Several universities spend seven figures each year to fund these kinds of perks for their college athletes.<sup>141</sup> Nonetheless, the university's focus in providing these benefits is, at least in part, to get the best performance on the field from their athletes. The NCAA also allows schools to cover the cost of a college athlete's travel to games.<sup>142</sup> However, road games are a necessary part of the schedule for most college sports, so this is a cost that universities should naturally incur, not one that should be viewed as a generous gift to the athletes. Moreover, the university receives many benefits from scheduling road games, including income from the game, national exposure, and a chance to impress rankings committees with quality wins, which further shows that covering the cost is in the university's interest and not in the athlete's.<sup>143</sup> Similarly, the NCAA allows universities to offer cost-of-living stipends.<sup>144</sup> However, this too is nothing more than offering something which the school should pay for regardless, since many players could not afford to live on their own due to limited resources and lack of income. Without proper living arrangements, the athletes could not perform at a high level and make incredible sums of money for their universities. For these reasons, the argument that players are already compensated through perks is weak.

## V. CONCLUSION

The movement towards college athlete compensation has picked up too much momentum to die out without causing significant changes. The NCAA will likely begin allowing students to profit from outside sources off of their likeness in revenue streams such as YouTube videos, commercials, or memorabilia sales. This is a step in the right direction, but for the aforementioned reasons, it is only a step, and still more must be done for student athletes. Eventually, demands for a free-market system will likely overwhelm the NCAA, and universities will begin paying college athletes directly. This will be a positive change for the NCAA, its member universities, its athletes, and its fans. It is only a matter of time.

---

<sup>140</sup> *How We Support College Athletes*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/how-we-support-college-athletes> (last visited Nov. 25, 2019).

<sup>141</sup> Brett Regan, *These 20 Colleges Spend \$40 Million Just to Feed Student-Athletes*, FANBUZZ (July 10, 2019, 11:12 AM), <https://fanbuzz.com/college-football/ncaa-student-athlete-dining>.

<sup>142</sup> *How We Support College Athletes*, *supra* note 140.

<sup>143</sup> See Tim Casey, *Travel Now, Win Later: For Smaller Programs, a Tough Road Schedule Has Benefits*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/sports/ncaabasketball/road-games-college-basketball-small-schools.html>.

<sup>144</sup> *How We Support College Athletes*, *supra* note 140.