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The Big Business of College Game Day

LOFTUS C. CARSON, II* AND MICHELLE A. RINEHART**

In July of 1859, two colleges came together on a field in Massachusetts to play a game of baseball that is now recognized as the first intercollegiate sporting event in the United States.[1] While the one-sided score of 73-32 may not have made for a hotly contested battle,[2] it did radically alter higher education and what we know as the collegiate experience.[3] For over two centuries prior to that game, American colleges and universities focused on educating young men (and women for a century prior) to be learned and engaged citizens.[4] The emphasis was on the development of their character and their minds.[5] Unfortunately, what is played out on the fields of college athletics 142 years later has nothing to do with the character and minds of our students, but has everything to do with high-stakes entertainment. Gone are the days of the well-rounded student-athlete.[6] Instead, we have modern-day gladiatorial games that sacrifice the student-athletes for the sake of the audience's enjoyment.

THE DISAPPEARANCE OF THE STUDENT-ATHLETE

In the early days of college athletics, the emphasis was on the student as an athlete.[7] The game of sport was a way to complement the ideals and values of the academy. The

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The authors wish to thank Dr. Robert Zemsky of the University of Pennsylvania, for helpful comments on an earlier version, and Adam C. Harden, Esq. for research assistance.

1. AMHERST COLLEGE ATHLETICS, *Amherst and Williams to Celebrate 150th Anniversary of First College Baseball Game*, https://www.amherst.edu/athletics/teams/spring/baseball/articles/2009/0427_150th (last visited Jan. 23, 2010).

2. *Id.*

3. MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 45 (2000).

4. *See generally* JOHN S. BRUBACHER & WILLIS RUDY, HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES 3-100 (2004) (providing an early history of American higher education).

5. *Id.* at 23.

6. *See, e.g.*, PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS 394 (2004). It was found at trial that, despite four years of playing football at the University of Arkansas, Gary Anderson had not learned to read; that was one reason he could not understand the various documents he had been signing as an NFL and USFL football player. *But see* Pete Thamel, *Myron Rolle Awarded Rhodes Scholarship*, THE QUAD: THE N.. TIMES C. SPORTS BLOG (Nov. 22, 2008), http://thequad.blogs.nytimes.com/2008/11/22/myron-rolle-wins-rhodes-scholarship/.

7. *See* BRUBACHER & RUDY, *supra* note 4, at 131 (discussing the informal nature of early American college

benefit to the students was clear: a sound body would lead to a sound mind.[8] Athletics also provided the opportunity to learn life's lessons. All students on campus were able to use athletics to learn the value of hard work, dedication, perseverance, sacrifice, and discipline.[9] Students also gained valuable collaborative and leadership skills.[10] All the while, the focus remained on the student.[11]

This changed, however, as colleges and universities began to embrace the many institutional benefits of athletics. Saturday game day was a time when the college community could put its hard work of the week behind it and focus on how best to beat the "other guy."[12] Students and faculty alike banded together in a sense of institutional camaraderie to prove that they were better than the college down the street.[13] It also became an opportunity to bind alumni to their college regardless of their geographic location.[14] With the advent of modern technologies (the radio, television, and now the internet), it was even easier to connect alumni to the campus. What was once a regional activity soon became a national phenomenon.[15] With its size and scale, it was only a matter of time before college athletics evolved into an entirely distinct financial enterprise, which has led college athletics to the pursuit of the almighty dollar (directly through ticket sales, the sale of broadcasting rights, merchandising, and conference tournament shares; indirectly through alumni giving).[16] College sports are now big business and are operated as such. The bigger, the better. In today's world of tighter state funding, this opportunity for increased revenue is simply too good to ignore, no matter what the cost to the institution.

The growing power of the media to influence college athletics has bound it to another big business – the entertainment industry.[17] Athletes and movie stars are the royalty of America.[18] Athletics as entertainment has permeated American society to such an extent that we have an overblown sports culture that goes from five-year-old pee-wee leagues to professional athletics.[19] All you have to do is watch the Olympics to see how we exalt athletes above all others as exemplars of a nation's might and power.

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physical exercise).

8. Donald Siegel, *Athletics and Education: The Union of Athletics with Educational Institutions*, Course materials for Sport: In Search of the American Dream, SMITH COLLEGE, http://www.science.smith.edu/exer_sci/ESS200/Ed/ed04/athletic.htm.

9. *Id.*

10. *Id.*

11. *Id.*

12. JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY 74 (2000).

13. *Id.*

14. *Id.*

15. TV BY THE NUMBERS, , *Florida Oklahoma Title Bout Concludes FOX's Most Watched BCS Game Ever* (Jan. 9, 2009), http://tvbythenumbers.zap2it.com/2009/01/09/florida-oklahoma-title-bout-delivers-foxs-most-watched-bcs-game-ever/10553. The 2009 BCS National Championship game drew a record 26.8 million viewers.

16. Melissa McNamara, *March Madness is Big Business*, CBS EVENING NEWS (Mar. 19, 2007), http://www.cbsnews.com/stories/2007/03/19/eveningnews/main2585960.shtml. The article states that CBS paid $6 billion to the NCAA for broadcasting to college basketball's "March Madness."

17. *Id.* McNamara's article also states that over 130 million viewers tuned in to watch the 2006 NCAA college basketball tournament.

18. *See, e.g.*, Adam Jones, *Star Receiver Accepts Seat on UA senate*, TUSCALOOSA NEWS, Mar. 9, 2009, http://www.tuscaloosanews.com/article/20090309/NEWS/903081944. Alabama Crimson Tide freshman wide receiver Julio Jones was elected as a student body senator despite not running or campaigning for write-in votes. The previous year, Jones finished third in voting for Alabama's student body president despite not being enrolled at the University due to the fact Jones was still a senior in high school.

19. *See, e.g.*, *Youth Coach Charged with Attacking Player*, USA TODAY, Sep. 6, 2006, http://www.usatoday.com/sports/preps/2006-09-06-youth-coach-charges_x.htm.

On college campuses, this mix of finances and entertainment has proved to be a toxic potion. Athletics on campus is no longer an extracurricular for all students, but rather is a commodity and its players are merely a labor force.[20] Just as in professional sports, the allegiance is to the bottom line. The average College Joe isn't even able to walk on the football field, much less learn the life's lessons to be gained from participating in college athletics. Even the late Myles Brand, former head of the NCAA, recognized that this shift toward professionalism will lead to a diminished value to the institution.[21]

The commodification of student-athletes has fundamentally changed their role on campus. Where student-athletes once walked, we now see athletes parading as students.[22] College sports are no longer in the service of the academy.[23] Instead, they are ruled by the professional sports enterprise in the United States.[24] For football and basketball, the premier college sports, college teams have essentially turned into farm or feeder programs for professional athletics, all under the guise of the higher ideals of the academic institution.[25]

THE "ONE-AND-DONE" PHENOMENON

In 2006, the National Basketball Association implemented new rules that prevent teams from drafting a player until a full year has passed after his high school graduation and he reaches 19 years of age.[26] The result is what has become known as "one and done"[27]—promising players attend university for one year, play for one season, and then drop out

20. *See* Mike Freeman, *N.C.A.A. Tournament – East; For One, a Laugh and an Ax to Grind*, N.Y. TIMES, Mar. 26, 1993, http://www.nytimes.com/1993/03/26/sports/college-basketball-ncaa-tournament-east-for-one-a-laugh-and-an-ax-to-grind.html. University of Cincinnati senior forward Terry Nelson stated, "College players are glorified slaves. The NCAA is nothing more than a system of institutionalized slavery. . . . It's sick." *Id.*

21. News Release, NCAA President Myles Brand, NCAA Response to the House Committee on Ways and Means concerning the NCAA's tax-exempt status 5, (Nov. 15, 2006) (on file with author) ("'Professional sports' sole purposes are to entertain the public and make a profit for team owners. The purpose of the collegiate model is to enhance the education development of student-athletes.").

22. *See* Pete Thamel, *Coaches Don't Go by Book When It Comes to N.C.A.A*, THE QUAD: THE N.Y. TIMES C. SPORTS BLOG (May. 28, 2009), http://www.nytimes.com/2009/05/29/sports/ncaabasketball/29memphis.html (pointing out that fixed transcripts for athletes are as much a part of college basketball as exciting finishes); Chip Brown, *Still Deep in Texas: Young's Return to Classes Causes Quite the Stir on Campus*, DALL. MORNING NEWS, Feb. 19, 2008, at 8C. Upon returning to class, Vince Young received a standing ovation from classmates for his on-field performance in the Rose Bowl game.

23. *See* Andy Katz, *One-and-Dones Have Low Academic Requirements Too*, ESPN.COM, May 13, 2008, http://sports.espn.go.com/ncb/columns/story?columnist=katz_andy&id=3393470 (interviewing faculty members at various institutions who expressed their feelings about the negative academic implications of the NBA's age requirement).

24. *See* Tim Griffin, *NFL Snub Inspires Kindle in his Changing Role*, ESPN.COM, Mar. 2, 2009, http://espn.go.com/blog/big12/post/_/id/1646/nfl-snub-inspires-kindle-in-his-changing-role. This is a prime example of a professional enterprise dictating what should happen to college athletes. As a junior and without loss of his amateur status, a college football player may ask the NFL for an evaluation from NFL scouts and a projected draft grade. If the NFL scouts wish for the player to leave college early, they will give him a glowing report and a high draft projection. If the NFL scouts, for whatever reason, do not want the player to become a professional, they will lowball his draft projection, which will almost always lead the player to return to college.

25. Major League Baseball and the National Hockey League have well-established, multi-tiered minor league systems and are therefore not as susceptible to this phenomenon.

26. Eric Brady & Steve Wieberg, *Merits of One-and-Done rule in NBA Face Fresh Scrutiny*, USA TODAY, May 15, 2008, http://www.usatoday.com/sports/college/mensbasketball/2008-05-14-nbadraft-freshmen_N.htm.

27. *Id.*

after entering the draft.[28] Because of these restrictions, high school phenom players have no choice but to play college basketball in order to be drafted into the professional ranks.[29] Freshman players are required to pass only six credit hours in the fall semester, and could, in theory, miss all classes during the spring and still be eligible to declare for the NBA draft at the conclusion of the season.[30] After the season-ending tournament, they drop out of their spring classes, leave campus, and bide their time until they can start in the NBA.[31] As a result, more often than not, colleges attract athletes who are less interested in education than they are in following the only true path to professional sports.[32] Colleges and universities are able to lure talented young athletes to their campuses with the promise of a lucrative career as a professional athlete combined (occasionally) with a good education,[33] when the reality is that most Division I-A athletes rarely achieve either.[34] There has been a cry from some in the athletics community to change the NBA eligibility rule to a "two-and-done" system, in order to give student-athletes the extra time to develop physically and mentally before heading to the professional leagues.[35] Proponents argue that such a change would serve both the athletes, few of whom are emotionally or even physically ready to embark on a professional career at age 19,[36] and the professional teams, who would get an extra season to evaluate the potential of draft candidates.[37] While a two-and-done system might benefit teams because they would receive players with an additional year of training and preparation, and perhaps some extra height and muscle, the question remains whether an extra year of college would make a palpable difference in the emotional maturity of a student-athlete. This also fails to address the underlying problem of placing athletic involvement above the student's educational experience in the university.

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28. Marlen Garcia, *One-and-Done Players Leave Behind a Mess; Scandals Shake Schools, Spur Call for NBA Age-Limit repeal,* USA TODAY, June 5, 2009, http://www.usatoday.com/sports/college/mensbasketball/2009-06-05-freshmen-cover_N.htm.

29. *See id.*

30. Dana O'Neil, *College Basketball Doesn't Pass the Test,* ESPN.COM (May 21, 2010), http://sports.espn.go.com/ncb/columns/story?columnist=oneil_dana&id=5206806.

31. *See id.*

32. *See* Scott Bernarde, *Brice Butler: 3 Years at USC, then NFL,* ATLANTA J.CONST., Feb. 6, 2008, http://www.ajc.com/sports/content/shared-blogs/ajc/cfbrecruit/entries/2008/02/06/brice_butler_3.html. At the high school senior's signing day press conference, Brice Butler announced his intentions for his collegiate career: "Three good season [sic] and then to the NFL Draft." *Id.* Note that in order to be eligible for the NFL draft, an athlete must be three years removed from high school, so three seasons is the bare minimum. NFL COLLECTIVE BARGAINING AGREEMENT art. XVI, § 2(b).

33. *Id.*

34. *See* Letter from Bill Thomas House Ways and Means Committee Chairman, to Myles Brand, NCAA President (Oct. 5, 2006), *available at* http://www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm. Rep. Thomas noted that, at the Division I-A level, only 55 % of football players and only 38 % of basketball players graduate – compared to 64 % of the general student body. Rep. Thomas specifically noted that the then-defending nation champion in football only graduated 29 % of its players as compared to 74 % of the university's student body for the class of 1998.

35. Garcia, *supra* note 29; Jon Saraceno, *Debate is One for the Ages: 'One-and-Done' Rule has Plenty of Detractors,* USA TODAY, Jun. 12, 2009, at 8C; Marc Stein, *NBA Should Impose 'Two-and-Done' Limit,* ESPN.COM, (Jun. 23, 2009), http://sports.espn.co.com/nba/columns/sotry?columnist=stein_marc&page=AgeLimit090622.

36. University of Memphis Coach John Calipari has commented on the physical and emotional preparedness of student-athletes in their late teenage years. *See* Dana O'Neil, *One-and-Done not Expected to be as Prevalent in 2009,* ESPN.COM (May 23, 2008), http://sports.espn.go.com/ncb/columns/story?columnist=oneil_dana&id=3405089.

37. Stein, *supra* note 36.

ATHLETICS AND THE ACADEMY

This shift in focus from academics to athletics has not gone unnoticed by those in the academic community, but many are conflicted about the implications of the "one-and-done" system. While college athletics may offer a number of students the opportunity to attend a university that they otherwise would not have, some faculty have expressed concern about the quality of education that these student-athletes are getting.[38] Ostensibly, the NCAA monitors the academic performance of each team through the Academic Progress Rate (APR). [39] The APR is a two-point system, with one point awarded each term for each scholarship student-athlete who meets the NCAA's academic-eligibility standards, and an additional point for each student-athlete that remains in school.[40] The APR equals the team's total points at any given time, divided by the total points possible;[41] the cutoff score is 925, which represents a 60 % graduation rate.[42] While the APR system rewards teams if their players stay at the university past their first year, it has clearly not deterred student-athletes from quitting without finishing their freshman year.[43]

The commodification of college sports has also led to the exploitation of our student-athletes. While it can be argued that student-athletes of every creed and color have been exploited by the "college sports as entertainment" complex, we contend that the exploitation of African-American athletes is by far the most troubling and signals how far we have fallen from the higher ideals of the academy. Today, African-American athletes dominate the college playing fields in the premier sports of football and basketball.[44] On average, nine out of ten of the first and second All-American basketball teams of the past two decades have been African-American. Given the extent of the domination of African-American athletes on college campuses, their exploitation is particularly egregious.[45]

The 1950s and 60s were a time of experimental integration on our campuses. Discovering the rich talent pool found in the African-American community, colleges and universities began recruiting black athletes.[46] At the time, it was seen as a win-win situation: the colleges showed their socially progressive attitudes by "integrating" their

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38. Ohio State University faculty representative John Bruno, who holds positions in both the psychology and athletic departments, has voiced such concern to ESPN.com. *See* Katz, *supra* note 24 ("We understand the opportunity that athletics brought some of these kids with respect to the opportunity to go to college when they may never have gone to college before . . . but on the other hand you sort of shudder. You're frustrated because you know that there is a real good chance that this person isn't going to take full advantage of this opportunity.").

39. *How is the Academic Progress Rate Calculated?*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Academics/Division+I/How+is+APR+calculated (last visited June 15, 2010).

40. *Id.*

41. *Id.*

42. *Id.*

43. Garcia, *supra* note 29. Bruno admitted to advising one of his students, Ohio State University freshman B.J. Mullens, not to enroll for the third quarter once Mullens decided to enter the draft, saying that he did not want the school to "take another APR hit. . . . 'The academic in me feels very conflicted,' Bruno says. But the advice, he adds, 'is totally defensible and sensible."

44. Richard Lapchick, *The Buck Stops Here: Assessing Diversity Among Campus and Conference Leaders for Division I-A Schools in 2007-08*, DeVos Sport Business Management Program, Oct. 24, 2007. The Institute for Diversity and Ethics in Sports (TIDES) reported that 50.4 % of the football student-athletes who played Division I-A football during 2007 were African-Americans.

45. C. RICHARD KING & CHARLES FREUHLING SPRINGWOOD, BEYOND THE CHEERS: RACE AS SPECTACLE IN COLLEGE SPORT 10 (2001).

46. CHARLES K. ROSS, RACE AND SPORT: THE STRUGGLE FOR EQUALITY ON AND OFF THE FIELD 127 (2004).

campuses and black athletes were given the rare opportunity to receive a quality and "equal" education. The broad acceptance of the African-American athlete in intercollegiate athletics followed a sustained effort that initially was a pitched battle for access.[47] It was thought that intercollegiate sports would present the same opportunities for individual African-Americans that whites, who were cheering for "our blacks," received in other sectors.[48] At the time, it was regarded as progress in race relations and was celebrated in *Ebony* magazine, the barometer of the prosperous and elite African-American community.[49] But what may have had the most honest of intentions at its inception has now become a caricature of its former self. Desperate for success on the playing field, colleges and universities have tossed aside their values and their moral compasses to recruit talented African-American athletes irrespective of the cost.[50]

Preferential treatment in the admissions process,[51] especially for African-American athletes, has virtually eliminated any requirements for academic rigor on the part of a talented athlete.[52] In today's hot recruitment market, it seems that little in an athlete's background disqualifies him from admission as a student-athlete,[53] especially if his vertical leap is over thirty-eight inches or his forty-yard time is 4.6 seconds or under. Admittedly, the University of Miami football program has reputedly stopped recruiting any players with a "rap sheet" longer than two pages, though it is also interesting to note that the practice has coincided with a decline in the team's success on the playing field.[54] Once enrolled, the low hurdle in the admissions process is replaced by even lower hurdles for the student-athlete, such as phantom courses, ghost writers, and inflated grades.[55] Too many of our black athletes are enrolled in a menu of courses designed to keep them eligible to play but provide little in terms of a broad knowledge base or application to a profession.[56] They select

47. *Id.* at 199.

48. *See* DUDERSTADT, *supra* note 12, at 213.

49. RICHARD E. LAPCHICK, FRACTURED FOCUS: SPORT AS A REFLECTION OF SOCIETY 82-83 (1986).

50. *Id.* at 1. Dr. Lapchick writes that Walter Byers, former president of the NCAA, stated that "many good college players are making up to $20,000 a year" and that "the nation's best 'big men' were said to receive $100,000 when they signed with certain universities." Lapchick also notes instances at Tulane and Texas Christian Universities where players were paid substantial amounts to attend those institutions.

51. DUDERSTADT, *supra* note 12, at 193.

52. LAPCHICK, *supra* note 50, at 2. North Carolina State University admitted Chris Washburn, a star basketball player, with a combined 475 College Board score when the average student there has achieved a 950. Tulane University experienced a similar situation when "Hot Rod" Williams was admitted with close to the minimum score.

53. *See, e.g.*, Ray Brewer, *Gorman Athlete's Ex-Girlfriend was Granted Restraining Order,* LAS VEGAS SUN, Mar. 27, 2009, http://www.lasvegassun.com/news/2009/mar/27/gorman-seniors-ex-girlfriend-was-granted-restraini/. This article details a recent incident involving Justin Chaisson, one of the nation's top defensive ends, from national powerhouse Las Vegas Bishop Gorman. Chaisson had committed to play football for the University of Oklahoma before allegedly kidnapping his girlfriend, driving her to the desert, and holding a screwdriver to her throat while threatening to kill her. This incident happened one day after his girlfriend had a restraining order placed against him. Chaisson was arrested and charged with multiple felonies, but, after pleading down to misdemeanor charges, Chaisson's scholarship was honored by Oklahoma football coach Bob Stoops. Chaisson is currently enrolled in summer classes and listed on the 2009 Oklahoma Sooner depth chart.

54. Football Archives, UNIVERSITY OF MIAMI ATHLETICS (Oct. 30, 2010, 1:15 PM), http://hurricanesports.cstv.com/sports/m-footbl/archive/mifl-m-footbl-archive.html.

55. *See, e.g*, Bill Kaczor, *Nearly 2 Dozen Florida State Athletes Accused of Cheating,* USA TODAY, Sep. 26, 2007, http://www.usatoday.com/sports/college/2007-09-26-floridast-cheating_N.htm. An investigation revealed that a tutor had typed papers for five FSU athletes and provided answers for an online exam to 23 FSU athletes.

56. WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 315 (1992). Mr. Byers, the former president of the NCAA, states, "[b]elieve me, there is a course, a grade, and a degree out there for everybody," in reference to the ease of the curriculum for some NCAA student-athletes.

majors that do not challenge them or provide the skills necessary to earn a living once their athletic careers are over.[57] This is, of course, provided that they graduate at all.[58] Granted, a few do have lucrative professional careers, but those opportunities are few and far between.[59]

Schools exploit African-American athletes in many ways. Perhaps the most obvious, and therefore most troubling, is that black athletes are heavily recruited as a way to create instant diversity on campus.[60] Unfortunately, the nature of high-stakes athletics never allows these black athletes, especially those in the premier sports, to become integrated into everyday college life.[61] While they are segregated from the general student population by living in jock dorms, eating with jocks, and taking fluff courses,[62] their images are plastered across university viewbooks and admissions materials, giving prospective students, parents, and society-at-large the impression that the college is more diverse than it actually is.[63] But once this dirty little secret is exposed, the hypocrisy of the academy is in full view and its professed commitment to fair-play and non-discrimination is undermined.

While African-American student-athletes make up approximately 50 % of college football's foremost division, known as the Football Bowl Subdivision (FBS), formerly known as Division I-A, African-American coaches and front office administrators are virtually nonexistent, especially at the upper echelon of the group.[64] According to a 2007 study conducted by the University of Oregon, there were only 15 African-American athletic directors among the 119 NCAA member schools in Division I-A—or 12.6 % —and only twelve of those schools compete in Division I-A football.[65] Conversely, 102 of the 119

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57. Jill Lieber-Steeg, Jodi Upton, Patrick Bohn & Steve Berkowitz, *College Athletes Studies Guided Toward 'Major in Eligibility'*, USA TODAY, Nov. 19, 2008, at 1A. Former Boise State safety Marty Tadman admitted to taking the easiest classes when he was in school. "You're going to school so you can stay in sports," Tadman said in this article. "You're not going for a degree. . . . It's a joke."

58. Lapchick, *supra* note 45, at 1. Dr. Lapchick cites that the nationwide graduation rate for the 1985 NCAA basketball season was 27 %. Dr. Lapchick also notes that the graduation rate for Final Four participant Memphis State University was a shocking 6 %.

59. KING & SPRINGWOOD, *supra* note 46, at 10; WILFORD S. BAILEY & TAYLOR D. LITTLETON, ATHLETICS AND ACADEME: AN ANATOMY OF ABUSES AND A PRESCRIPTION FOR REFORM 84 (1991). It is estimated that only 64 out of the roughly 150,000, or one out of every 2,344, senior participants in high school basketball will make professional teams.

60. Pete Thamel, *Myron Rolle Awarded Rhodes Scholarship*, THE QUAD: THE N.Y. TIMES COLLEGE SPORTS BLOG (Nov. 22, 2008), http://thequad.blogs.nytimes.com/2008/11/22/myron-rolle-wins-rhodes-scholarship/. Thayer Evans, *Twist in the Scott Recruiting Story*, THE QUAD: THE N.Y. TIMES COLLEGE SPORTS BLOG (Feb. 7, 2008), http://thequad.blogs.nytimes.com/2008/02/07/twist-in-the-scott-recruiting-story/. This article states that the mother of Darrell Scott, the top running back recruit in the nation for the class of 2008, was alleged to have received a job at a bank in Colorado in exchange for her son signing with the University of Colorado. *See also* Thayer Evans, *Ending a Recruiting Battle*, N.Y. TIMES, Dec. 25, 2008, http://www.nytimes.com/2008/12/26/sports/ncaafootball/26recruit.html. This article states that the mother of Jamarkus McFarland, one of the nation's top defensive tackles, claims to have been offered interest free loans if her son would sign with a particular university. Additionally, Jamarkus claims to have attended recruiting parties on college campuses where recruiting hostesses were "sitting on the laps of all the players, . . . drugs were prevalent with no price attached," girls were "taking off their tops and pulling down their pants," and other girls "were also romancing each other." *See also* KING & SPRINGWOOD, *supra* note 46, at 10.

61. Robert Samuels, *The Black Line: Black Athletes Struggle to Juggle Sports, Social Demands*, THE DAILY NORTHWESTERN, Mar. 4, 2004, http://www.dailynorthwestern.com/2.13921/the-black-line-1.1982647.

62. *Id.*

63. *See* KING & SPRINGWOOD, *supra* note 46, at 10.

64. Richard Lapchick, *The Buck Stops Here: Assessing Diversity Among Campus and Conference Leaders for Division I-A Schools in 2008-09*, DeVos Sport Business Management Program, Nov. 6, 2008.

65. Lapchick, *supra* note 45, at 1.

schools, or 86 %, employed white persons as their Athletic Directors[66] during the 2007-08 academic school year. The study also found that, out of the 119 head coaching positions available in the FBS, only five—or 4.2 %—were occupied by African-American head coaches.[67] The marked incongruity between the amount of African-American football players (50%) and the amount of African-American head coaches (4.2%) serves to showcase the disparate treatment that African-Americans have seen in the realm of collegiate sports.

A CALL FOR CHANGE

College sports, as we know them, no longer provide the promise of opportunity to exploited black athletes.[68] In fact, they are equally harmful to individual African-Americans and to the African-American community in general by helping to perpetuate the idea of the African-American as "other," that is, substantially different in biology from whites.[69] This concept of "otherness" is echoed on college campuses, where African-American athletes are exploited, treated like second-class citizens, and segregated from the rest of the academic community.[70] These behaviors are easily replicated off-campus. The academy should not take comfort in the example that it has set and that others have quickly followed.

Here we find a double-edged sword: we uphold the system of college athletics because of the revenue and media exposure that we receive,[71] while at the same time bemoaning our drift from the core values of the academy. We are perfectly willing to turn a blind eye and let our athletics programs exist as entities unto themselves, pretending all the while that they are acting in the best interest of the academy. This is far easier than acknowledging the hypocritical situation in which we are mired.

The purpose of the academy is not to entertain the American public with athletic prowess, nor is it to line the pockets of over-paid coaches and merchandising executives.[72] The priorities of the academy should serve a greater good to society – educating future citizens and addressing the larger problems of society such as health care, war and peace, and the environment.[73] It would be difficult, at best, to claim that our college sports programs serve any greater good. Colleges and universities should advance programs (academic, athletic, and otherwise) that support the ideals and values of the academy.

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66. *Id.*

67. *Id.* However, with the termination of Washington's Tyrone Willingham and the resignation of Kansas State's Ron Prince, that number has since decreased to three.

68. KING & SPRINGWOOD, *supra* note 46, at 31.

69. JOHN HOBERMAN, DARWIN'S ATHLETES: HOW SPORT HAS DAMAGED BLACK AMERICA AND PRESERVED THE MYTH OF RACE 4 (1997). Hoberman argues that the outcome of the illusion in African American communities that social acceptance and monetary success will come through athletic achievement has created an unrealistic perception of reality and cultivates a focus on athleticism that directs young people away from advancement in education and academic achievement and has helped propagate stereotypes about racial differences in physical and mental ability.

70. Samuels, *supra* note 62; DUDERSTADT, *supra* note 12, at 205.

71. *See* Richard Sandomir, *CBS Will Pay $6 Billion for Men's N.C.A.A. Tournament*, N.Y TIMES, Nov. 19, 1999, http://www.nytimes.com/1999/11/19/sports/college-basketball-cbs-will-pay-6-billion-for-men-s-ncaa-tournament.html. The NCAA signed an 11-year, $6-billion contract with CBS in which CBS gets broadcast rights to the NCAA college basketball tournament.

72. Steve Wieberg & Jodi Upton, *College Football Coaches Calling Lucrative Plays*, USA TODAY, Dec. 5, 2007.

73. *See* DUDERSTADT, *supra* note 12, at 107 (discussing how collegiate athletics, as currently run, are based on values that are antithetical to the academy and its academic mission).

Colleges and universities are expected to convey knowledge to students through teaching, to develop knowledge, and to serve society by applying the fruits of their efforts. American higher education needs to get out of the sports entertainment business, whether that product is currently showcased on a large stage (Division I-A) or on a smaller one (Division III). Our institutions of higher education should focus on harnessing our intellectual capital, a task to which they are uniquely suited. As a society we cannot continue to allow the substantial diversion of colleges and universities away from their mission and professed ideals.

Is it possible to de-commercialize and de-commodify college sports now that the horse is out of the gate? The only way to accomplish this is to dismantle the "college sports as entertainment" complex. Athletics must be realigned with the ideals of the academy. We need to see a return of the student-athlete, where a student's achievement is lauded over athletic prowess. One potential solution is to eliminate freshman eligibility so that our student-athletes are able to enjoy a year to integrate into the life of the college as well as develop their intellectual abilities.[74] Additionally, colleges must focus on the welfare of the student-athlete by reducing the time commitment required to participate in athletics and by eliminating the performance anxiety that can result when scholarships are based on the ability to perform on the field. Admissions preferences for athletes must be eliminated to place emphasis, first and foremost, on an applicant's academic ability and not his or her skills on the field.

Colleges must also distance their sports programs from professional athletics.[75] The college farm system that now acts as a gateway to the professional ranks for the premier sports must be eliminated. Compensation for coaching should be restructured to be on par with salaries in the academy rather than that of their professional counterparts. Media contracts and other financial incentives for college sports similar to what is seen in professional athletics must be rejected. This entails eliminating the major "college sports as entertainment" events, such as the Bowl Championship Series (BCS) and the Final Four Tournament.

None of these recommendations will be easy to implement. The ultimate question is who can fix it? Certainly not the NCAA or others working within the college athletics system.[76] They are too financially and professionally invested in the system.[77] Maintaining the status quo continues their livelihood – why bite the hand that feeds you?[78] Professional athletics will not address the problem. Its members are far too reliant on colleges and universities to provide them with what are, in effect, professional athletes straight out of college who need no additional training or investment from their new team and who can be

74. *Id.* at 201. Duderstadt argues, "there is no better example of the conflict between educational and competitive values than the issue of whether first-year students should be eligible to compete at the varsity level." For the majority of the 1900s, freshmen were not allowed to compete on the varsity level. However, this rule was lifted in the 1970s, when football coaches needed the additional athletes to keep up with the contemporary movement to not have players start on both offense and defense.

75. *Id.* at 302.

76. *See id.* at 202. Duderstadt states, "[i]n 1999 the NCAA commission concerned with reforming college basketball floated a trial balloon of freshman ineligibility, only to find that 74% of university presidents, coaches, and athletic directors opposed the change."

77. BYERS, *supra* note 57, at 369. Byers, a former NCAA president, wrote, "[t]he rewards of success have become so huge that the beneficiaries – the colleges and their staffs – simply will not deny themselves even part of current or future spoils."

78. *Id.*

moneymakers from their very first game.[79] Society at large will not call for change. It prefers the latest fantasy football league or winning the office's Final Four pool to recognizing the higher purpose of the academy.

Looking inside the academy, it is clear that faculty are not likely candidates to change the "college sports as entertainment" complex. Despite expressing their outrage at how athletics undermine the values of the institution, they are simply too interested in their own research or the politics of their own department to effect any change.[80] They complain that athletes are given preferential treatment in admissions and then have lax course requirements.[81] They also claim that the sports machine on campus distracts the student body as a whole, which helps to lower overall academic performance.[82] Ultimately, however, they do nothing but turn a blind eye to the situation in what may be a "Devil's Bargain" with the administration—you let us do our own thing and we will let you keep your sports programs and their revenues. This represents a much deeper, and far more problematic, shift in faculty priorities from the education of students to the advancement of their own research and careers.

While we assert that higher education itself must take an active role in any athletics reform movement, we also recognize that change cannot come purely from within the academy. This issue has been debated for far too long at the highest levels of American colleges and universities, and reform still has not come. In 2003, there was a movement to address the relationship between athletics and the academy. Led by Scott Cowen of Tulane University and James Duderstadt, President Emeritus of the University of Michigan,[83] it culminated in the National Symposium on Athletics Reform.[84] This was a step in the right direction, but it was simply not enough.

TACKLING THE GIANT IN COURT

One avenue that shows promise is to change the legal framework surrounding college sports. Existing statutes and regulations, as well as the common law, can be interpreted in a manner that supports the dismantling of the "college sports as entertainment" complex. The NCAA, along with joint athletic activities of colleges and universities, could be more harshly subjected to the existing antitrust laws for anticompetitive collusion. Several key cases support this legal approach. In *Bob Jones University v. United States*,[85] the Supreme Court determined that the IRS could revoke a university's tax-exempt status if its actions are contrary to broader public policy.[86] Courts have also held that an institution may be held accountable by student-athletes who were promised an education and were subject to misguided education advice constituting education malpractice.[87]

79. Kevin Durant's Statistics, NBA.COM (Oct. 30, 2010, 04:30 PM), http://www.nba.com/playerfile/kevin_durant/career_stats.html.

80. *See generally* DUDERSTADT, *supra* note 12, at 305-18 (detailing the current state of discontent among faculty towards celebrity coaches, the potential power they wield, and their limited action).

81. *Id.*

82. *Id.*

83. *Id.*

84. National Symposium on Athletics Reform, *Symposium Transcript and Photos* (last visited Oct. 30, 2010, 4:15 PM), http://symposium.tulane.edu.

85. Bob Jones Univ. v. U.S., 461 U.S. 574 (1983).

86. *Id.* at 605.

87. *See, e.g.,* Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992), in which plaintiff Ross, a Creighton basketball player from 1978 – 1982, left the University with the overall language skills of a fourth grader and the

While the Court has not always held the NCAA to be anticompetitive, it has done so on occasion. In the second set of cases we find *United States v. Brown University*,[88] in which the federal government alleged that MIT and eight Ivy League institutions violated the Sherman Antitrust Act in their financial aid policies.[89] The Supreme Court has also held the NCAA to be under §1 of the Sherman Antitrust Act in the landmark case *NCAA v. Board of Regents of the University of Oklahoma.*[90] In this case, the Court held that a television agreement between the NCAA and two broadcasting networks had "significant potential for anticompetitive effects" because the NCAA was effectively creating a pricing regime that was unresponsive to consumer demands and unrelated to any price that a competitive market would support.[91] Thus, the agreement violated the Act by imposing an unreasonable restraint on trade. It is important to note, however, that the Court in dicta acknowledged that the nature of collegiate sports under the purview of the NCAA is such that "horizontal restraints on competition are essential if the product is to be available at all."[92] Further, the Court stated that the NCAA "plays a vital role in enabling college football to preserve its character, and as a result a product to be marketed which might otherwise be unavailable . . . and hence be seen as precompetitive."[93] The Court goes on to note that "most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore precompetitive because they enhance public interest in intercollegiate athletics." [94] Thus, although the Court found the NCAA's behavior to be in violation of current antitrust law in this instance, the overarching judicial attitude nevertheless remains one in which the NCAA is given immense latitude in its self-regulation and organization in spite of what seem to be anticompetitive practices. This extended leeway is highlighted in *Gaines v. NCAA*,[95] in which the petitioner Gaines alleged that the "no-draft" rule allowed the NCAA to engage in an unlawful exercise of monopoly power in violation of §2 of the Sherman Antitrust Act. The *Gaines* court was unconvinced that the NCAA's "no-draft" rule was unreasonably anticompetitive and reasoned that the NCAA eligibility rules have "primarily precompetitive effects in that they promote the integrity and quality of college football and preserve the distinct 'product' of major college football as an amateur sport."[96] The court went on to state that the NCAA rules, as a whole, "benefit both players and the public by regulating college football so as to preserve its amateur appeal . . . [and] in fact makes a better 'product' available by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs."[97]

While there is precedent to hold the NCAA under the Sherman Antitrust Act umbrella, the Courts have failed to do so on several recent occasions.[98] The Courts' citing of the student-athlete paradigm is both naïve and farcical as evidenced by the "one-and-

reading skills of a seventh grader.

88. U.S. v. Brown Univ. in Providence in St. of R.I., 5 F.3d 658 (3d Cir. 1993).

89. *Id.* at 661.

90. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984)

91. *Id.* at 105-06.

92. *Id.* at 101.

93. *Id.* at 102.

94. *Id.* at 117.

95. Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990).

96. *Id.* at 746.

97. *Id.* at 745.

98. *See, e.g.*, Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992).

done" phenomenon[99] and the multiple incidents the Courts have seen where student-athletes have been made to or allowed to sacrifice education in favor of athletics.[100] Moreover, it is our contention that the Courts should not be so solicitous to the NCAA and its member institutions in light of the reality that big-time college sports are indeed a business. Ultimately, these cases provide sufficient precedent for examining intercollegiate athletics through a legal lens and holding the NCAA accountable in the legal forum. Doing so, or, perhaps, even having the requisite ability to do so, might well provide greater leverage to college and university presidents for athletics reform.

CONCLUSION

What is needed here is a strong, concerted movement by university and college presidents to reaffirm the values and ideals of the academy in tandem with a reexamination of the legal issues surrounding college sports. However, it will take an especially aggressive stance by a sitting president of a high-profile, big-time sports university for any reform to take root. He or she must stand up and say "enough is enough." Until a major Division I-A institution steps up to the plate and re-affirms its commitment to the academy as a whole, and the student-athlete in particular, we will continue with sports being "business as usual."

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99. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

100. Freeman *supra*, note 20;, Lieber-Steeg, Upton, Bohn & Berkowitz, *supra* note 58.

Major College Sports: A Modern Apartheid

ROBERT A. MCCORMICK* AND AMY CHRISTIAN MCCORMICK**

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*Well, it's our n*****s against their n*****s . . .*[1]

INTRODUCTION

Major college sports in the United States flourish on the basis of an apartheid system[2] so plain that although it may be (and is) ignored, it cannot be denied. This system, made up of numerous NCAA rules, effectively sanctions the exploitation of mostly African-American young men[3] for the enormous pecuniary gain of mostly European Americans associated with major universities, athletic organizations, and corporations, as well as for the great entertainment of millions of mostly European Americans.[4]

The central principle upon which this system rests is "amateurism,"[5] and it is upon the amateur ideal that U.S. universities, through the NCAA, seek to justify this regime. Major college sports, however, are amateur only in the pernicious sense that the very persons who are most responsible for creating this product are denied all but a sliver of the great wealth they create.[6] In every other way, major college sports have become a sophisticated, visible, and highly lucrative commercial enterprise.[7] Put differently, although college football and men's basketball players, who are disproportionately African American,[8] generate fantastic sums of money for a wide array of others, they themselves are forbidden from sharing in those riches. Instead, while NCAA rules obligate players to live by a code of amateurism that forecloses any real opportunity to earn compensation for their labor,[9] that precept does not apply to university officers, coaches, athletic directors, conference commissioners, corporations, or NCAA officials, who are predominantly of European descent,[10] and who alone may enjoy the bounteous wealth created in substantial part by the players.[11]

The regime that keeps a young athlete in this modern form of servitude has several legal components and begins even before he enrolls in college.[12] A football or men's

1. Overheard in the crowd immediately before kickoff at an NCAA football game.

2. *See infra* notes 99–114 and accompanying text.

3. *See infra* notes 188–235 and accompanying text. The terms "African-American" and "black" are used interchangeably in this article as are the terms "European-American" and "white." While we prefer the more formal descriptions, the U.S. Department of Education data we examine, employs the more familiar.

4. *See infra* notes 174–187 and accompanying text; *see also* Bill King, *Tightening Up Your Message,* STREET & SMITH'S SPORTS BUS. J., Apr. 30 to May 6, 2007, at 20 (estimating that only approximately ten percent of college basketball fans and nine percent of college football fans are African American).

5. *See infra* notes 119–126 and accompanying text.

6. *See infra* notes 119126 and accompanying text.

7. *See generally* Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008) (examining the richly commercial facets of college sports).

8. *See infra* notes 188–235 and accompanying text.

9. *See infra* notes 119–126 and accompanying text.

10. *See infra* notes 174–187 and accompanying text.

11. Corporations, of course, are not European Americans but are predominantly owned and operated by European Americans and include broadcast companies and other sponsoring corporate "partners." See McCormick & McCormick, *supra* note 7, at 536–39 for a description of the proliferation of corporate sponsorships for NCAA games and tournaments as well as other ways corporations seek to become associated with college sports.

12. NCAA rules apply to "student-athletes." A student-athlete is defined as "a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program." NCAA, 2009-10 NCAA DIVISION I MANUAL, art. 12.02.5 (2009) [hereinafter DIV. I MANUAL].

basketball player who has signed a National Letter of Intent and matriculated at an NCAA institution may not transfer to another school except under conditions not imposed upon any other university student.[13] Then, once enrolled, the amount of financial aid he may earn, or even receive by way of gift,[14] is limited to tuition, room, board and books.[15] At the same time, he is forbidden from receiving compensation for the only things that could likely bring him real value—his athletic skill and fame.[16] His scholarship may be granted only on a semester-to-semester or a year-to-year basis,[17] and its renewal may be denied at the sole discretion of the coach.[18] Indeed, unlike any other person at the university, he may not even hire a lawyer to help him navigate a future career.[19] These rules, like Gulliver's restraints,[20] effectively hold these young men in economic servitude to their universities.

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13. If a football or men's basketball player transfers, he loses one of his four years of NCAA eligibility. DIV. I MANUAL, *supra* note 12, arts. 14.5.1, 14.5.5.1, 14.5.5.2.10 (requiring a football or men's basketball athlete to complete one full academic year of residency at the new institution before becoming eligible to compete); *id.* art. 14.2.1 (noting that an athlete has five years during which he can compete once he enrolls in a full-time course of study); NCAA, 2004–05 TRANSFER GUIDE: DIVISION I/II/III 25 (2004) (indicating that once an athlete begins competing, the five-year clock for using four eligibility years does not pause). These two sets of rules function together to cause the transferring athlete to lose one of his four years of eligibility completely. *See* DIV. I MANUAL, *supra* note 12, art. 14.2. Moreover, if a new player transfers without permission from his university after having signed a National Letter of Intent, he loses two of his four years of eligibility. *See* NCAA NATIONAL LETTER OF INTENT, *Basic Provisions*, para. 4, http://www.ncaa.org/wps/wcm/connect/nli/NLI/NLI+Provisions/Basic+Penalty (last visited Feb. 19, 2010) (charging an athlete who transfers before completing one year with a year of eligibility at his subsequent institution, which is in addition to the year lost under NCAA rules).

14. NCAA rules forbid players from accepting cash or other gifts from non-family members. DIV. I MANUAL, *supra* note 12, arts. 12.01.1, 15.01.2, 15.01.3 (rendering ineligible for athletic competition any athlete who receives financial aid from sources other than those permitted under NCAA rules); *id.* art. 15.2.6.1 (allowing athletes to receive "financial aid from anyone upon whom the . . . athlete is naturally or legally dependent."). Even gifts from family and guardians are limited to an amount which, when combined with any grant-in-aid, covers only the cost of attendance. *Id.* arts. 15.01.2, 15.1, 15.2.6.1.

15. *Id.* art. 15.1; *see also infra* note 90 (discussing the fact that even the minimal compensation coming to the athlete must be returned to his university in the form of payments for tuition, room, board, and books, thereby replicating the historical "company store" phenomenon).

16. DIV. I MANUAL, *supra* note 12, arts. 12.1.2, 12.4.1.1 (rendering an athlete ineligible for competition if he uses his athletic skill directly or indirectly for pay and prohibiting him from receiving compensation on the basis of his "reputation, fame, or personal following").

17. *Id.* art. 15.02.7 (limiting the period of an athletic scholarship award to a maximum of one year); WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 103 (1995) ("Both parties understand the grant-in-aid is given on a year-to-year basis, sometimes semester-to-semester.").

18. BYERS, *supra* note 17, at 103 ("The coaches, in fact, control the renewals [of athletic scholarships]. . . . [I]f the player does not conform to the demanding college practice and game schedule, his or her grant-in-aid is not renewed and can be terminated [early] for disciplinary reasons."); *see also* Murray Sperber, *The NCAA's Last Chance to Reform College Sports: An Open Letter to the Next President of the National Collegiate Athletic Association*, CHRON. HIGHER EDUC., Apr. 19, 2002, at B12 (asserting that one-year scholarships are often not renewed due to unsatisfactory athletic performance).

19. DIV. I MANUAL, *supra* note 12, art. 12.1.2(g) (prohibiting an athlete from "[e]nter[ing] . . . into an agreement with an agent."). Furthermore, the professional leagues to which the athlete aspires prevent even the most talented from earning compensation through rules that restrict their eligibility to apply for employment until they have attained a prescribed age or until a prescribed number of years have elapsed since their graduation from high school. *See* Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004) (upholding the NFL's draft eligibility rule against an antitrust challenge).

20.

> I attempted to rise, but was not able to stir: for as I happened to lie on my back, I found my arms and legs were strongly fastened on each side to the ground; and my hair, which was long and thick, tied down in the same manner. I likewise felt several slender ligatures across my body, from my arm-pits to my thighs. I could only look upwards; the sun began to grow hot, and the light offended my eyes.

JONATHAN SWIFT, GULLIVER'S TRAVELS: THE TALE OF A TUB AND THE BATTLE OF THE BOOKS 20 (OXFORD ED.,

By restricting athletes' compensation to the cost of attending a university, the NCAA has enabled its members to sharply restrict the cost of this particular, yet essential, labor. And while the NCAA, its member universities, and many others reap billions of dollars in revenues from college sports, the average "student-athlete" earns less than the federal minimum wage[21] and many live below the poverty line.[22] Simultaneously, an array of others harvests the fruits of these athletes' labor from a variety of sources including the sale of television rights, ticket and apparel sales, and advertising revenues from corporate sponsors or "partners."[23] Indeed, the revenue generated in substantial part by the labor of college football and men's basketball players has grown fantastically, so that NCAA sports has become a $60 billion dollar industry.[24]

While it scarcely requires documentation, the facts easily demonstrate that the population of persons to whom these rules apply is overwhelmingly disproportionately African American[25] and that the universe of persons profiting from their enforcement is vastly disproportionately European American.[26] In short, a matrix of NCAA rules keeps these mostly African-American young men generating vast sums of money for the benefit of predominantly European Americans thereby enshrining an apartheid system in which racial minorities are held in legal servitude for the profit and entertainment of the racial majority.[27]

OXFORD UNIVERSITY PRESS 1919) (1726).

21. "When the value of their scholarships are [sic] computed on an hourly basis, the result is that the average student athlete does not even make minimum wage." Orion Riggs, Note, *The Façade of Amateurism: The Inequities of Major-College Athletics*, KAN. J.L. & PUB. POL'Y, Spring 1996, at 137, 143 (citing DICK DEVENZIO, RIP-OFF U. 160 (1986)); *see also* Bryan Jurewicz, *Opinions: Pay-for-Play*, NCAA NEWS, Jan. 6, 1997 (computing value received at the University of Wisconsin at $1.35 per hour for 20 hours a week of mandatory workouts).

22. CBS, *60 Minutes: College 'Sweatshops'?*, (Jan. 3, 2002), www.cbsnews.com/stories/2002/01/03/60minutes/main323042.shtml; *see 60 Minutes: Where's Ours?* (CBS television broadcast Jan. 6, 2002), transcript at 15 (quoting Ramogi Huma, former UCLA linebacker). Some athletes have so few resources they sometimes lack money for food. *See* Ken Peters, *UCLA Football Players Hope to Spur NCAA Reforms*, ASSOCIATED PRESS, Jan. 18, 2001 (describing players who must "scrimp on food" and "pay attention to those cheeseburger deal days at McDonald's" because of financial constraints); *60 Minutes: Where's Ours*, *supra*, transcript at 16 (describing case of Donnie Edwards, former UCLA football player who was suspended by the NCAA after accepting groceries from an anonymous donor); *id.* (describing NCAA admission "that a scholarship falls $2,000 a year short of what it really costs to get by").

23. *See generally* McCormick & McCormick, *supra* note 7, at 509–23, 527–44 (describing the wide range of sources, phenomenally high levels, and numerous beneficiaries of college athletic revenues). For example, under an agreement beginning in 2003, CBS will pay the NCAA six billion dollars over eleven years for the right to broadcast March Madness, the NCAA's men's basketball tournament. Welch Suggs, *CBS to Pay $6-Billion for TV Rights to NCAA Basketball Championships*, CHRON. HIGHER EDUC., Dec. 3, 1999, at A54. In fall 2009, more than 3.8 million fans attended football games at the top-five-attended schools. NCAA, *2009 National College Football Attendance*, http://web1.ncaa.org/web_files/stats/football_records/Attendance/2009.pdf (last visited Feb. 27, 2010). The University of Michigan enjoyed the largest per game attendance with an average of 108,933 fans. *Id.* It has been estimated that annual sales of licensed college merchandise reap $2.5 billion, generating $100 million annually for universities. D. Stanley Eitzen, *Slaves of Big-Time College Sports*, USA TODAY, Sept. 1, 2000, (Magazine), at 27. In 2004, Comcast Cable agreed to pay the University of Maryland $25 million for naming rights to the school's basketball arena. Editorial, *Student-Athletes*, BALT. SUN, May 5, 2004, at 18A. Ohio State University has a similar arrangement with Value City. *See* Tim Martin, *Corporate Sponsorships Net Millions for Ohio St.*, LANSING ST. J., Dec. 16, 2001, at 6A.

24. *The NewsHour with Jim Lehrer: Dollars, Dunks, and Diplomas* (PBS television broadcast July 9, 2001), *available at* http://www.pbs.org/newshour/bb/education/july-dec01/ncaa_07-09.html.

25. *See infra* notes 188–235 and accompanying text. Of course, given the historical exclusion of African Americans from many U.S. universities, we commend the integration of all races in higher education, including in intercollegiate athletics.

26. *See infra* notes 174–87 and accompanying text.

27. This effect is only magnified by professional league eligibility rules that prevent even the most gifted of these athletes from earning compensation through employment in the NFL and NBA. Under these eligibility restrictions, players are foreclosed for a period of years from applying to be drafted and are essentially forced to

These are sharp words, but the facts are indisputable. Our purpose here is to examine the racial implications of certain NCAA rules which, in their application, economically restrain and burden mostly African-American young men.[28] By these rules, such athletes are treated separately and differently from coaches, administrators, corporations, and all others involved in the college sports industry.[29] In this way, like the separation policies of the former South African system, NCAA rules maintain an apartheid regime which applies different rules to different classes of people, thereby allowing a favored race to capture the wealth created by a disfavored one.[30]

We do not allege that these NCAA rules are facially discriminatory or that they were created for a racist purpose. Instead, while neutral on their face, these rules have been established by U.S. universities through their association—the NCAA—to advance a façade of amateurism in major college sports, allowing them to retain for themselves the pecuniary rewards of dazzlingly successful commercialization. These facially neutral rules, however, have an overwhelmingly disparate economic impact in their application upon a distinct racial minority,[31] and under sound principles of U.S. law, neutral rules, even among private parties, that disproportionately burden racial minorities in significant economic ways require a legitimizing purpose.[32] In this instance, the only justification for the rules that forbid these young men from reaping the fruits of their labor is "amateurism," and as we will show, that justification is illusory and demonstrably false.[33]

Neither do we deny that there is much good in college sports nor that college sports enable many African-American, and other young people to receive the benefit of attending a university without financial cost. Moreover, we are well aware that participation in athletics may provide critical lessons in discipline, teamwork, dedication to purpose, and other virtues for many.[34] At the same time, however, we seek to reveal that the NCAA system of rules, as a whole, creates a modern apartheid system whereby racial minorities are bound by rules that have them serve and create profits they may not receive themselves, but that are reaped by others. That being the case, unless our universities reform this regime by sharing the wealth of this product with its athletes in much more significant ways, they must suffer history's condemnation.

Part I of this article will show how this modern form of apartheid has roots in ancient civilization as well as in colonial and pre-Civil War America[35] and that the "amateurism" distinctions mouthed by the NCAA today grew out of nineteenth century British class

play in college without monetary compensation. *See supra* note 19.

28. *See infra* notes 188–235 and accompanying text.

29. *See infra* notes 173–87 and accompanying text; *see also* McCormick & McCormick, *supra* note 7.

30. *See infra* notes 99–114 and accompanying text.

31. Scholars have examined the disparate impact of facially neutral rules on racial minorities in a number of different legal contexts. *See, e.g.*, Susan Bisom-Rapp, *Contextualizing the Debate: How Feminists and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law*, 44 J. LEGAL EDUC. 366 (1994); Arthur L. Burnett, Sr., *Permeation of Race, National Origin and Gender Issues from Initial Law Enforcement Contact through Sentencing: The Need for Sensitivity, Equalitarianism and Vigilance in the Criminal Justice System*, 31 AM. CRIM. L. REV. 1153 (1994); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 2006 WIS. L. REV. 751.

32. *See infra* notes 236–84 and accompanying text.

33. *See infra* notes 119–26 and accompanying text.

34. *See* Jackie Hyman & Matthew Van Jura, *Elite Collegiate Athletics and the Academy: Criticisms, Benefits and the Role of Student Affairs*, 30 VT CONNECTION 42 (2009), *available at* http://www.uvm.edu/~vtconn/v30/Hyman_VanJura.pdf.

35. *See infra* Parts I.A – B.

distinctions.[36] It will also describe the employment rules of the South African apartheid system and demonstrate how those economic policies reserved the wealth created by black laborers for the benefit of the white population.[37] Part II will describe the rules by which the NCAA and its members ensure that the profits earned by athletes are reserved for those institutional members, while foreclosing any opportunity for the athletes' meaningful economic advancement and simultaneously indenturing athletes to their respective institutions.[38] Part III will describe the remarkable riches that these NCAA rules preserve for the many actors in the college sports enterprise other than the athletes—the NCAA, its member universities, the athletic conferences, coaches, administrators, and the corporations that sponsor NCAA sports.[39] Part III will also illustrate that which is already obvious—that major college sports flourishes on the shoulders of predominantly African-American young men who provide entertainment and produce vast wealth for the enjoyment and economic betterment of European Americans in a modern form of apartheid.[40]

As described in Part IV, settled principles of U.S. law establish that when economic actors and governmental entities enforce facially neutral rules that economically burden racial minorities in grossly disproportionate ways, they must justify those rules as manifestly related to a legitimate purpose.[41] In this instance, the NCAA justifies its rules on the grounds that they promote college sports as amateur activities. Amateurism, however, plainly fails as a legitimizing factor because, of course, major college sports are anything but amateur. The young men whose labor substantially creates the product are not college students who happen to play football and basketball for pleasure after class. They are highly skilled athletes whose labor creates a fantastically lucrative commercial product for everyone but themselves. And thus, until the members of the NCAA—our U.S. universities—acknowledge the commercial nature of the college sports industry and lift the ban on payment for athletic services for these young men,[42] their shameful legacy will be the knowing maintenance of a modern system of apartheid.

I. EXPLOITATION FOR PROFIT AND ENTERTAINMENT: HISTORICAL PRECURSORS TO AMATEURISM

The phenomenon we describe—the exploitation of one race or people for the profit and entertainment of another—is hardly new. Indeed, societies have sanctioned such activity for millennia.

A. ANCIENT ROME

36. *See infra* Part I.C.
37. *See infra* Part I.D.
38. *See infra* Part II.
39. *See infra* Parts III.A-B.
40. *See infra* Parts III.A-C.
41. *See infra* Part IV.
42. *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006) (arguing that football and men's basketball athletes at Division I universities are "employees" within the meaning of the National Labor Relations Act, and, consequently should receive all the rights that designation carries).

Ancient Rome was a society in which slaves were exploited for entertainment and profit. Because the Romans "frowned on a citizen making a public spectacle of himself,"[43] they required slaves to serve as performers.[44] By approximately 100 B.C., Roman armies had conquered most of the countries of the Mediterranean[45] and enslaved prisoners of war from modern-day Israel, Greece, Italy, France, Spain, Palestine, North Africa and Asia Minor.[46] Slaves conscripted during these campaigns, in turn, provided much Roman entertainment as actors, musicians, artists, and athletes.[47] At the same time, Roman leaders considered entertainment for the masses to be critical to the maintenance of a cohesive state and accordingly financially supported such events so citizens could attend the arena, theatre, or circus without charge, or for a small fee.[48]

The primary circus event for Romans was chariot racing.[49] Private chariot-racing companies sponsored races throughout the Empire[50] and "owned the horses, the chariots, the stables, other equipment, and even the drivers, most of whom were slaves."[51] All classes of society enjoyed the spectacles, especially their dangerous aspects, and Romans anticipated seeing "crashes and the broken, mangled bodies of drivers and horses."[52] "Chariot racing was a spectator sport . . . designed to make a profit for its organizers."[53] Owners, not drivers, enjoyed a handsome profit if their slaves won a chariot race.[54]

Of course, the most dramatic form of Roman entertainment were the gladiatorial contests which began as private events and became publicly sponsored entertainment by 42 B.C.[55] Most gladiators were slaves selected from the ranks of captured military personnel.[56] In these contests, gladiators were rented out by their owners to fight animals or each other in an arena or coliseum before large crowds.[57] Meals were often arranged by wealthy Romans for themselves and their guests to enjoy during the events.[58] The Roman experience was an

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43. JO-ANN SHELTON, AS THE ROMANS DID 335 (2d ed. 1998).

44. *Id.*

45. MILTON MELTZER, SLAVERY: A WORLD HISTORY 101 (1993).

46. *See id.* at 106–10.

47. SHELTON, *supra* note 43, at 335. By enslaving its enemies, the Romans imposed ongoing degradation on them. "To enslave an enemy rather than to slay him was a device to reap his labour, but it was also a way of enjoying a perpetual triumph over him; it was at once a humiliation to him and a punishment for his presumption in taking up arms." R.H. BARROW, SLAVERY IN THE ROMAN EMPIRE 2 (1928).

48. *See* SHELTON, *supra* note 43, at 330, 336; MAGNUS WISTRAND, ENTERTAINMENT AND VIOLENCE IN ANCIENT ROME 62 (1992).

49. SHELTON, *supra* note 43, at 337 ("Chariot racing was the oldest and most enduring of the public entertainments. According to Roman legend, the first public entertainment was a day of chariot racing planned by Romulus shortly after he founded Rome in 753 B.C.").

50. *Id.* at 337-38.

51. *Id.* at 338.

52. *Id.*; *see also id.* at 339 (describing a fatal chariot race).

53. *Id.* at 337.

54. *Id.* at 339 n.204.

55. *Id.* at 330 & n.154.

56. *Id.* at 350.

57. *Id.*

58. FIK MEIJER, THE GLADIATORS: HISTORY'S MOST DEADLY SPORT 13–14 (2004).

> The Romans organised performances by gladiators, a habit they had acquired from the Etruscans, not only at festivals and in the theatres but also at feasts. That is to say, certain people would frequently invite their friends for a meal and other pleasant pastimes, but in addition there might be two or three pairs of gladiators. When everyone had had plenty to eat and drink, they called for the gladiators. The moment anyone's throat was cut, they clapped their hands with pleasure.

Id.

early example of the exploitation of subjugated young men for others' entertainment and profit.

B. EARLY AMERICA

In colonial America, so-called "quarter racing"[59] became our nation's "first form of mass entertainment,"[60] and the Virginia-North Carolina border, where most jockeys were slaves, became the "Race Horse Region" for this sport.[61] Gambling on these races was common, with owners sometimes wagering tobacco crops on the outcome.[62] Not surprisingly, slaves who helped turn their masters' stables into profitable businesses were favored,[63] while those who failed faced the threat of punishment.[64] Many masters also organized parties for their slaves on Saturday nights,[65] and some used these events "for self-amusement by arranging to have the blacks fight each other in gladiator style."[66] Other owners used slaves for entertainment as musicians and singers,[67] sometimes hiring out their services at exhibitions or fairs.[68]

Literature is often a reflection of society, and perhaps the most eloquent depiction of the abuse of African Americans for entertainment in all of American literature may be found in Ralph Ellison's classic, *Invisible Man.* In this book, the narrator, a black high school student, recalls his grandfather who had been a slave and was, "a quiet old man who never made any trouble"[69] declaring on his death bed that "our life is a war, and I have been a traitor all my born days. . . ."[70] Deeply troubled by the old man's last words, and despite his own doubts, he nevertheless delivers his high school graduation address in which "I showed that humility was the secret, indeed, the very essence of progress."[71] His speech "was a great success. Everyone praised me and I was invited to give the speech at a gathering of the town's leading white citizens. It was a triumph for our whole community."[72]

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59. The "quarter race" was an American invention. When the first English settlers arrived to the North American continent in 1607, the eastern seaboard was too heavily wooded to create mile-long race courses as had been the custom in England. Instead, the new Americans built shorter race courses, "always a quarter of a mile long, so that performances in different races could be compared." EDWARD HOTALING, THE GREAT BLACK JOCKEYS: THE LIVES AND TIMES OF THE MEN WHO DOMINATED AMERICA'S FIRST NATIONAL SPORT 11 (1999). The new sport was called quarter racing. *Id.*

60. *Id.*

61. *Id.* at 11–12.

62. *Id.* at 14.

63. *Id.* at 12, 18 (explaining that some even received cash stipends from their masters for their success).

64. *Id.* at 20 (discussing that this punishment has been characterized as sometimes having been severe).

65. EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 569 (1974).

66. *Id.*

67. LESLIE HOWARD OWENS, THIS SPECIES OF PROPERTY: SLAVE LIFE AND CULTURE IN THE OLD SOUTH 167 (1976).

68. *Id.* at 168.

> The ranks of slave musicians and songsters were never thin. Bondsmen saw that vocal and instrumental ability captured the fancy of both whites and blacks. At some slave and planter parties, musicians played competitively, catering to the whims of those in attendance. Members of the audience called out tunes for them to perform. The slave who played the best at white parties received additional money for his few hours' work plus his share of appreciative glances.

Id. at 167.

69. RALPH ELLISON, INVISIBLE MAN 16 (Random House 2d ed. 1995) (1947).

70. *Id.*

71. *Id.* at 17.

72. *Id.*

> The gathering was in the main ballroom of the leading hotel. When I got there I discovered that it was on the occasion of a smoker, and I was told that since I was to be there anyway I might as well take part in the battle royal to be fought by some of my schoolmates as part of the entertainment. The battle royal came first.[73]

Each of the nine boys was issued a pair of boxing gloves. "It was foggy with cigar smoke. And already the whiskey was taking effect. I was shocked to see some of the most important men of the town quite tipsy. They were all there—bankers, lawyers, judges, doctors, fire chiefs, teachers, merchants. Even one of the more fashionable pastors."[74] Soon, a nude blonde woman appeared and danced sensually. Some men "threatened us if we looked and others if we did not."[75] Mayhem swiftly ensued, the men grabbing and tossing her "as college boys are tossed at a hazing, and above her red, fixed-smiling lips I saw the terror and disgust in her eyes, almost like my own terror and that which I saw in some of the other boys."[76]

The boys were then blindfolded and forced to fight one another.[77] In elegant and excruciating detail, the narrator describes the chaotic, horrifying battle. "Everyone fought hysterically. It was complete anarchy"[78] while the men berated them. "Slug him, black boy! Knock his guts out!"[79] When the fight ended, the boys were told to "come on up . . . and get your money"[80] and were led to a rug "covered with coins of all dimensions and a few crumpled bills."[81] "Boys, it's all yours,"[82] the master of ceremonies said. "You get all you grab."[83] But when he touched a coin, the narrator recalls, "[a] hot, violent force tore through my body, shaking me like a wet rat. The rug was electrified."[84] "The men roared above us as we struggled. 'Pick it up, goddamnit, pick it up!' someone called like a bass-voiced parrot. 'Go on, get it!'"[85]

When the men were finally sated and the festivities drew nigh, he was directed to repeat his speech praising assimilation—to the catcalls and derision of the besotted audience.[86] At its conclusion, the master of ceremonies announced, "Gentlemen, you see that I did not overpraise this boy. He makes a good speech and some day he'll lead his people in the proper paths,"[87] whereupon he was handed a briefcase containing "an official-looking document"[88]—"a scholarship to the state college for Negroes."[89] This painful passage depicts a social dynamic hauntingly echoed today—where the prize awarded for the violent physical use of young black men for entertainment is a college scholarship.

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73. *Id.*
74. *Id.* at 18.
75. *Id.* at 19-20.
76. *Id.* at 20.
77. *Id.* at 21.
78. *Id.* at 23.
79. *Id.*
80. *Id.* at 26.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 27.
85. *Id.*
86 *Id.* at 29.
87. *Id.* at 32.
88. *Id.*
89. *Id.*

Organized societies have long sanctioned the exploitation of racial minorities through rules that place them in physical, often dangerous, contests for the entertainment and profit of the majority. So it is in America today, where mostly European-American university officials arrange for mostly African-American young men to provide dangerous and highly lucrative entertainment. In major U.S. college sports, the justification offered for the rules that tether young athletes to their institutions to labor while their compensation is limited to a form of scrip[90] is the amateur ideal. Put differently, U.S. universities, through the NCAA, defend the numerous rules that keep these college athletes in this modern form of servitude on the ground that they preserve "amateurism."[91]

C. GREAT BRITAIN AND AMATEURISM

The roots of amateurism in modern American sports may be traced to nineteenth century Great Britain where the idea served that society's rigid class divisions.[92] Amateurism requirements limited participation in athletic events to members of the upper classes—those who could afford to compete for enjoyment only, rather than to earn a living.[93] This amateur requirement precluded the working classes from competing in athletic contests, reserving that privilege for the wealthy and thereby reinforcing the British system of segregation and separation of the classes.[94]

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90. Scrip was part of the "company store"—a classic form of labor exploitation used during the industrial revolution in America. The "company store" was usually part of a "company town" where employees were required as a condition of employment to live in company-owned housing and to purchase company-provided goods and services at grossly inflated prices. THOMAS R. BROOKS, TOIL AND TROUBLE: A HISTORY OF AMERICAN LABOR 92–93 (1964). Under that regime, employers paid employees with draft, known as "scrip," which was redeemable only at the employer's outlets. GEORGE S. MCGOVERN & LEONARD F. GUTTRIDGE, THE GREAT COALFIELD WAR 23 (1972). Athletic scholarships are a form of scrip because they cannot be traded for goods and services from any source, but can be redeemed only by the university provider.

91. Although the NCAA defends its prohibition against paying players market wages with the justification of preserving "amateurism," "amateurism" means nothing other than not paying players for their services. So when it defends its current policy of not paying players by asserting the desire to preserve no pay for athletes, the NCAA engages in fallacious and circular reasoning that still begs the question why athletes should not be paid for their work. The NCAA's amateurism defense is circular, and therefore, offers no real justification for its no-pay position.

92. Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules,* 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 676 (2003); Rick Telander, *Something Must Be Done*, SPORTS ILLUSTRATED, Oct. 2, 1989, at 94, 95, *reprinted in* RICK TELANDER, THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT (1989).

93. Freedman, *supra* note 92, at 676 (citing Kay Hawes, *Debate on Amateurism Has Evolved Over Time,* NCAA NEWS, Jan. 3, 2000, *available at* http://www.ncaa.org/news/2000/20000103/active/3701n03.html (last visited Mar. 31, 2005) (on file with author)); Telander, *supra* note 92, at 96.

94. Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, ANTITRUST, Spring 2000, at 46; Seth Davis, *A Loan at the Top: The NCAA's New Proposal on Cash for Athletes Benefits Only the Elite*, SPORTS ILLUSTRATED, Apr. 30, 2001, at 25 (quoting NCAA subcommittee chair Christine Grant's discussion of historical purpose of amateurism being "to create class distinctions"). The Amateur Athletic Club of England first defined the term "amateur" in 1866 as "a gentleman who never takes part in public competitions, neither for money nor for awards, or in competitions where entrance tickets are sold, who during no period in his life treats sport as a source of maintenance, who is neither a mechanic, nor a craftsman nor a worker." Barbara Krawczyk, *The Social Origin and Ambivalent Character of the Ideology of Amateur Sport*, 12 INT'L REV. FOR THE SOC. OF SPORT 44 (1977), *available at* http://irs.sagepub.com/cgi/content/abstract/12/3/35. This definition shows that the concept of amateur sport was created to establish a clear delineation separating the aristocracy from the working class. *Id.*

Ironically, amateur standing was never a requirement for Olympic competition in ancient Greece.

> The whole concept of amateurism would have been incomprehensible to the ancient Greeks. You had to be a professional to compete in the Olympics, which meant that you had to prove you were a full-time

Amateurism requirements continue to reinforce class and race differences in America, not by excluding working class athletes as in Great Britain, but by applying only to the players and not to any of the many other participants in the lucrative college sports enterprise.[95] Thus, the ideal of "amateurism" prevents athletes from sharing in the profits they help create, and reserves those profits for universities and their officials. In this way, amateurism requirements separate players from the managers of college athletics, forming a separation, or apartheid, system.[96] As we have noted, by these rules, major universities, corporate sponsors, television networks, coaches, conference commissioners, and others reap a surfeit of riches, without bearing the cost of the players' labor, while the athletes themselves, many of whom come from impoverished backgrounds, work for substandard compensation,[97] and with extremely little likelihood of ever playing professionally.[98] In this vein, the same principle of amateurism that reinforced class distinctions in Great Britain for generations continues to do so today through the systematic differentiation between NCAA athletes and all other parties in the college sports enterprise, exacting labor from the former and reserving economic benefit for the latter.

D. SOUTH AFRICA AND APARTHEID

In South Africa, the term "apartheid" meant segregation, apartness, or separation of the races.[99] It was accomplished as social policy through the physical separation of races into distinct, geographically defined areas[100] and was made effective in the late 1940's and the

athlete and that you had been doing nothing but training for three months prior to the Games.

Telander, *supra* note 92, at 95 (quoting Olympic historian, Andrew Strenk); *accord* DAVID C. YOUNG, THE OLYMPIC MYTH OF GREEK AMATEUR ATHLETICS 7 (1985) (noting the ancient Greeks had no word for the concept of amateurism); Shropshire, *supra*, at 47-48.

95. *See infra* notes 119–126 and accompanying text.

96. *See infra* notes 99–1114 and accompanying text.

97. *See supra* notes 21–22 and accompanying text.

98. The NCAA reports that only 1.2% of NCAA men's basketball players will become professional and that only 1.7% of college football players will do so. NCAA, *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, *available at* http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Academics+and+Athletes/Education+and+Research/Probability+of+Competing/Methodology+-+Prob+of+Competing (last visited Feb. 11, 2011).

99. Elizabeth S. Landis, *South African Apartheid Legislation I: Fundamental Structure*, 71 YALE L.J. 1, 1–2 (1961) (explaining the legal institution of apartheid and demonstrating its method and effect in South Africa); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 98 (3d ed. 1986) (defining apartheid as "separateness, . . . racial segregation, . . . [and] a policy of segregation and political and economic discrimination against non-European groups in the Republic of So. Africa.").

100. Landis, *supra* note 99, at 16–29. South African law and custom recognized four racial categories: "white, black, yellow, and coloured." *Id.* at 4. "Whites" were comprised of Afrikaners (descendants of early Dutch and Huguenot settlers who were often farmers) and English (descendants of 19th century colonists who dwelled mostly in cities and controlled most of South Africa's commercial interests). They were generally referred to as "European" or "blankes." *Id.* "Black" people "consisted primarily of the Bantus, racially mixed descendants of Northeast African Hamitic peoples and Negroid people," *id.*, as well as "yellow-skinned Bushmen and the Hottentots, . . . the region's only aboriginal inhabitants." *Id.* at 5. The terms "Native," "Bantu," and "African" were all used to refer to "black" South Africans. "Coloured" people were mixed-race descendants of unions between Cape Malays (descendants of East Indians) or Europeans on the one hand and Hottentots or Bantus on the other and were generally assimilated into the European culture. *Id.* "Yellow" people were generally individuals of Indian, Pakistani, or Chinese descent. *Id.* In the portions of this article in which we analyze the system of apartheid, we will use the term "white" to refer to Afrikaners and English who were also known as Europeans. We will use the term "black" to refer to those individuals who were known as "Natives," "Bantu," and "African."

1950's through a "complex of statutes . . . developed to ensure—and increase—the separation of the 'races.'"[101] These rules had the effect, among other things, of requiring blacks to labor for little economic benefit, thereby reserving the wealth created from their efforts for whites.[102]

A variety of South African laws reduced or eliminated any bargaining power black workers might otherwise have enjoyed, consequently reducing their earning potential. By law, for example, it was a crime for a black employee to strike,[103] and while unions composed of white employees enjoyed legal protection, those for black employees did not.[104] Of course, these and other laws created conditions under which black South Africans would earn significantly less than their white counterparts.

Moreover, another class of apartheid-era laws explicitly mandated lower wages for blacks than for whites, just as the NCAA's amateurism rules now explicitly limit compensation for players but not for athletic managers and administrators.[105] First, under the Wage Act of 1957, white South African government officials set the wages and hours for many blacks,[106] while whites' wages were determined by market forces.[107] Of course, this model is strikingly parallel to ours, where predominantly white university administrators enact NCAA legislation limiting the compensation of predominantly African-American players to the level of the athletic scholarship, while leaving athletic administrators free to reap the benefits of the unfettered marketplace. Second, under a variety of South African social welfare acts, financial benefits were often reduced or eliminated altogether for black workers.[108] Third, South Africa enacted a formal system of job reservation whereby certain desirable high-paying jobs were reserved for white workers while other low-paying or dangerous jobs were reserved only for black workers.[109]

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101. *Id.* at 1.

102. *See* Elizabeth S. Landis, *South African Apartheid Legislation II: Extension, Enforcement and Perpetuation*, 71 YALE L.J. 437, 437–47 (1962) (describing economic legislation enacted in the 1940's and 1950's designed to enrich white South Africans at the expense of blacks).

103. *Id.* at 437–38, 440 (citing the Native Labour (Settlement of Disputes) Act, Act No. 48 of 1953, § 18(1), superseded by Act No. 59 of 1955, § 1). The penalty for violating this law was £500 or three years in prison or both. *Id.* at 440 (citing Act No. 48 of 1953, § 18(2), superseded by Act No. 59 of 1955, § 1).

104. *Id.* at 438–39 (citing the Industrial Conciliation Act, Act No. 28 of 1956, § 1(xi) and (xxxviii)).

105. *See* McCormick & McCormick, *supra* note 7.

106. Landis, *supra* note 102, at 441–42 (citing Act No. 5 of 1957, §§ 3(1), (4), (11), 8(1), 13, 14, 15, 16, 17, 19(1)) (describing how white boards recommended wages and hours for black laborers to the white Minister of Labor who could set them conclusively and who could ignore input from blacks whose role was only advisory).

107. *See id.* at 446 (describing market forces, such as potential competition from black workers, which affected whites' wages).

108. *Id.* at 444. For example, the Workmen's Compensation Act excluded from its benefits a range of jobs employing the majority of blacks in the country. *Id.* (citing Act No. 30 of 1941, §§ 3(2) (f), (g), (j)). Similarly, the Unemployment Insurance Act excluded specified jobs typically held by black workers. *Id.* (citing Act No. 53 of 1946, §§ 2(2) (b), (c), (i)). And "[i]n 1953 the UN Commission on the Racial Situation in South Africa stated that social welfare expenditures appear[ed] to be in the proportion of three for whites, two for coloreds, and one for Africans [or blacks], . . . [with] many instances . . . [of greater] discrepancies . . . ." *Id.* In parallel fashion, NCAA athletes are likewise not entitled to workers' compensation, unemployment compensation, other social welfare benefits, or other legal rights enjoyed by employees generally. *See, e.g.*, Rensing v. Ind. State Univ. Bd. Trs., 444 N.E.2d 1170, 1173-75 (Ind. 1983) (holding that college athletes are not employees under state workers' compensation laws because they are students and not employees, and therefore are not entitled to workers' compensation for athletics-related injuries); Coleman v. W. Mich. Univ., 336 N.W.2d 224, 226–28 (Mich. Ct. App. 1983) (same).

109. *Id.* at 444–47. For example, The Native Building Workers Act of 1951 made it a crime for a black person to perform skilled labor in an urban or European area. *Id.* at 445 (citing Act No. 27 of 1951 § 15 (1), superseded by Act No. 60 of 1955 § 2, and Act No. 27 of 1951 § 15 (3), superseded by Act No. 60 of 1955, § 2). Limits were also imposed on the number of blacks who could become registered (a requirement) to undertake

Not surprisingly, the financial results of apartheid economic legislation left the average black worker impoverished in contrast to the whites of that society. "The average earnings of Non-Europeans in most occupations . . . [were] insufficient to support a family and [fell] . . . below the Poverty Datum Line."[110] White industrial workers were paid about five times the amount that black industrial workers earned.[111] Similarly, white domestic servants on farms earned about five times the wage of the average black domestic farm servant,[112] but white farm workers working in the fields were paid twelve to fifteen times the amount that black farm workers were paid.[113] In general, "[t]he ratio of whites' earnings to nonwhites' earnings remained 4 to 1 over a long period."[114]

By applying solely to athletes, the NCAA's amateurism rules function like the economic regime of South African apartheid. Through their labor, mostly African-American players generate great economic value, but the NCAA rules of amateurism deny them the fruits of that labor, reserving that bounty instead for the largely European-American managers of college sports.[115]

The NCAA seeks to preserve amateurism today through numerous rules created to distinguish those who use their athletic skill for pecuniary gain from those who do so for educational or other benefit.[116] As we will show, however, these rules also serve to press predominantly African-American young men into contractual and economic relationships

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certain skilled jobs. *Id.* at 446 (citing the Native Building Workers Act of 1951, Act No. 27 of 1951, §§ 10(2), 11(1), (2) and (4), and 14(1)(b)). The Minister of Labor was later given broad, general powers to reserve jobs for particular races. *Id.* at 446 (citing Act No. 28 of 1956, § 77, 77(6)(a), (6)(b), (7)(a)). As a result, it became illegal in Capetown, for example, to hire a black person to be a traffic policeman, ambulance driver, or fireman. *Id.* at 447.

Other laws also mandated higher remuneration for white South Africans than for their black counterparts. For example, white mineworkers were greatly favored over black miners.

> European workers got a great many improvements in their conditions of employment during . . . [World War II], none of which went to the African mine-workers. They got extended holidays with pay, they got benefit societies, and . . . a cost-of-living allowance which the Native mineworkers never got, while cost of living was rising. Every other section of the industrial field got a statutory cost-of-living allowance, but the African mineworkers did not get it.

Id. at 443 (citing H.A, DEB., Apr. 16, 1959, col. 3636 (Mrs. Ballinger, African representative)).

110. *Id.* at 442 (quoting HANDBOOK ON RACE RELATIONS IN SOUTH AFRICA 144, 309, 345 (Hellmann ed. 1949).

111. *Id.* at 443.

112. *Id.*

113. *Id.*

114. *Id.* at 446. Of course, nonwhites included categories of mixed-race individuals and people of Asian heritage who were generally paid more than blacks but less than whites. *See generally* Landis, *supra* note 99, at 4-16 (describing the complexity of the different racial categories created under South African law).

115. *See infra* notes 119–126.

116. *See* DIV. I MANUAL, *supra* note 12, arts. 1.3.1 ("A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."), 2.9 ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."). The NCAA's assertion that it seeks to protect athletes from exploitation is ironic in the extreme given its own ongoing exploitation of these athletes for commercial profit. Rather, its professed concern is, in our view, more accurately a means by which the NCAA seeks to exclude outside economic actors who might otherwise dilute the NCAA's financial interests by competing for a share of the college sports dollar. By asserting it protects athletes from exploitation by commercial interests, the NCAA is simply, in effect, eliminating potential competitors and reserving for itself the great financial rewards of college sports.

with their universities in which their arduous and often dangerous,[117] but richly valuable, labor is essentially given away.

II. THE RULES OF THE GAME

The *NCAA Division I Manual* consists of 419 pages of detailed rules governing, *inter alia*, the athlete[118] and his relationship to his university. Several of those rules, ostensibly designed to preserve "amateurism" in college sports, also establish an array of ties that bind him to his institution and guarantee that his institution and others, not he, will reap the pecuniary fruits of his labor.

First, NCAA rules arbitrarily limit the amount of compensation a university may pay an athlete to the cost of attending the university[119] and render him ineligible to participate in his sport if he receives financial aid from his university in excess of that cost.[120] These rules, thus, ensure that any economic advantage the athlete creates in excess of the cost of his attendance benefits only his university. At the same time, other NCAA rules forbid him from earning, in any form, compensation for his abilities or his reputation as an athlete.[121] And

117. College football is an especially dangerous activity. From 1977 through 2007, thirty-three college football players suffered cervical cord injuries, and from 1984 through 2004, eleven suffered permanent cerebral injuries. NAT'L CTR. FOR CATASTROPHIC SPORT INJURY RESEARCH, DATA TABLES, ANNUAL SURVEY OF CATASTROPHIC FOOTBALL INJURIES 1977–2007, http://www.unc.edu/depts/nccsi/CataFootballData.htm (last visited Feb. 21, 2010). From 1931 through 2007, eighty-six college football players died from direct injuries sustained from playing or practicing football, and another 107 died from indirect injuries. NAT'L CTR. FOR CATASTROPHIC SPORT INJURY RESEARCH, DATA TABLES, ANNUAL SURVEY OF FOOTBALL INJURY RESEARCH: 1931-2007, http://www.unc.edu/depts/nccsi/FootballInjuryData.htm#TABLE%201 (last visited Feb. 21, 2010) (defining direct injuries as those resulting directly from participation in the skills of the sport and indirect ones as those caused by systemic failure resulting from exertion or by a complication secondary to a non-fatal injury).

118. We use the term "athlete" to mean a student on athletic scholarship at an NCAA institution. We purposely do not use the term "student-athlete"—a term coined by the NCAA in 1953 as a direct result of a finding by the Colorado Supreme Court that a university football athlete was, in fact, an employee for purposes of workers' compensation law, and that consequently, the university had to provide workers' compensation for his football injuries. *See* University of Denver v. Nemeth, 257 P.2d 423, 429-30 (Colo. 1953). Stunned by the *Nemeth* ruling, the NCAA swiftly coined the term "student-athlete" and mandated its exclusive use to emphasize the idea that athletes were "students," and simultaneously to diminish any tendency to view them as "employees." *See* BYERS, *supra* note 17, at 69; McCormick & McCormick, *supra* note 42, at 83–86 (examining the NCAA's use of terminology to manipulate public opinion regarding the status of college athletes). As then-NCAA Executive Director Walter Byers later wrote:

> [The] threat was the dreaded notion that NCAA athletes could be identified as *employees* by state industrial commissions and the courts.
>
> [To address that threat, w]e crafted the term *student-athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes.

BYERS, *supra* note 17, at 69 (emphasis in original).

119. DIV. I MANUAL, *supra* note 12, arts. 15.01.6 ("Maximum Institutional Financial Aid to Individual. An institution shall not award financial aid to a student-athlete that exceeds the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution."), 15.02.2 ("Cost of Attendance. The 'cost of attendance' is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.").

120. *Id.*, art. 15.1 ("Maximum Limit on Financial Aid – Individual. A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance as defined in Bylaw 15.02.2.").

121. *Id.*, arts. 12.1.2 ("An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport. . . ."), 12.4.1.1 (prohibiting pay based on an athlete's reputation).

while he may undertake other kinds of work in the unlikely event he has time and energy to do so,[122] he can receive no more than the prevailing wage for actual services rendered,[123] and his athletic reputation must have no bearing on his compensation.[124] That is, he may receive no remuneration for the use of his name or reputation as an athlete to promote the sale of any commercial product or service.[125] Together, these rules extinguish any possibility for an athlete to profit from his athletic skill or reputation—almost certainly his most valuable assets—and thereby deprive him of any meaningful opportunity for personal economic advancement. By contrast, the NCAA and its member universities profit from these athletes' fame through royalties they receive from videogame makers who use individual players' likenesses in their products.[126] So while athletes are not permitted to profit even from their own likenesses or fame, these valuable resources are reserved for the economic benefit of others.

In addition to being subject to the above "amateurism" rules, the college athlete is also restricted by other NCAA mandates. For example, he is tied to his initial college choice in ways not required of any other university student through rules that restrict his ability to transfer to another NCAA institution. By NCAA rule, an athlete who transfers must complete a full academic year at his new institution before becoming eligible to play his sport.[127] Tellingly, however, athletes in every sport *other* than the revenue generating sports enjoy a one-time exception to this rule,[128] the effect being that football and men's basketball

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122. *See generally* McCormick & McCormick, *supra* note 42, at 97–108 (documenting in detail the demanding daily obligations imposed on Division I college football and men's basketball players which extend throughout most of the calendar year and exceed the obligations imposed on any other university employee).

123. DIV. I MANUAL, *supra* note 12, art. 12.4.1 ("Criteria Governing Compensation to Student-Athletes. Compensation may be paid to a student-athlete: (a) Only for work actually performed; and (b) At a rate commensurate with the going rate in that locality for similar services.").

124. *Id.* art. 12.4.1.1 ("Athletics Reputation. Such compensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.").

125. *Id.*

126. Universities have long profited from the sale of jerseys bearing star players' numbers. Of late, they have begun earning substantial fees from licensing athletes' images to videogame manufacturers who, in turn, use them in their highly popular products. *See* Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227, 239–44 (2001) (describing realistic features of computerized videogames); Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting on the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 83 (2004) (describing NCAA practice of allowing videogame creators to use schools' fight songs and uniforms as well as jersey numbers, but not the names, of athletes). Because individual athletes can be identified by number and from facial features, however, reviews of videogames refer to athletes by name. *See* Matzkin, *supra*, at 240–41. It was recently estimated that EA Sports, for example, would generate $180 million in gross revenues from its "NCAA Football 2008" videogame. Ryan Finley, *They're in the Game: Popular Sports Titles Put Fans under Center, Cash in School Coffers*, ARIZ. DAILY STAR, Aug. 12, 2007. Videogame manufacturers, in turn, pay royalties to the NCAA, which distributes those funds to its member universities on the basis of many factors, including each university's recent athletic performance. *See* Andy Latack, *Quarterback Sneak: With Its College Football Video Game, EA Sports is Making an End Run Around the NCAA's Rules*, LEGAL AFF., Feb. 2006, at 69; Rachel Bachman, *A Piece of the Pixels*, OREGONIAN, July 20, 2007 at E1. Two recent cases are testing players' rights to receive royalties for the use of their images. *See* O'Bannon, et al. v. Nat'l Collegiate Athletic Ass'n, No. C 09-3329 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010) (rejecting NCAA's motion to dismiss lawsuit in which a college athlete asserts that NCAA earnings from videogames properly belong to athletes); Keller, et al. v. Electronic Arts, Inc., et al., No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010) (same).

127. DIV. I MANUAL, *supra* note 12, art. 14.5.1 ("A student who transfers . . . from any collegiate institution is required to complete one full academic year of residence . . . before being eligible to compete . . ., unless the student satisfies . . . an exception as set forth in this bylaw.").

128. *Id.* art. 14.5.5.2.10(a) ("[An athlete is eligible to compete immediately upon transferring if, inter alia,

players,[129] but not volleyball players, for example, lose a full year out of their four years of eligibility upon transferring.[130] By contrast, other students, including those with academic scholarships, face no bar to transferring to another university where they can be eligible for academic scholarships, as well as the full range of university programs, without delay.[131] By forbidding *only* athletes in revenue-generating sports from competing on another institution's athletic team for a full year after transferring, NCAA universities have revealed their unmistakable purpose—to discourage only income-producing athletes from transferring to other institutions. By this mechanism, universities have unabashedly combined to protect their significant economic interest in valuable athletic assets.

While these NCAA rules burden certain athletes in ways not experienced by any other university student, additional rules also ensure that athletes' economic security remains uncertain and fragile. For example, NCAA rules forbid member institutions from awarding financial aid to an athlete for more than one year at a time,[132] grant them authority to refuse to renew the scholarship for a subsequent term,[133] and even allow them, for cause, to withdraw the aid during the term of the grant.[134] Moreover, under NCAA rules, coaches, not faculty, determine whether financial aid will be renewed.[135] Under this system, an athlete's ability to retain his scholarship depends in substantial part upon his athletic performance.[136] By mandating athletes' economic insecurity, the universities collectively guarantee the

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he] is a participant in a sport other than baseball, basketball, bowl subdivision football or men's ice hockey at the institution to which the student is transferring.").

129. The transfer penalty also applies to baseball and men's hockey players—the other athletes who could potentially generate revenue for universities. *See id.*

130. *See supra* note 13 and accompanying text.

131. *See supra* note 128.

132. DIV. I MANUAL, *supra* note 12, arts. 15.02.7 ("An athletics grant-in-aid shall not be awarded in excess of one academic year."), 15.3.3.1 ("If a student's athletics ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period in excess of one academic year nor for a period less than one academic year.").

It was not always the case that athletic scholarships were limited to a year. Early NCAA rules safeguarded athletes, allowing an athletic grant-in-aid to be awarded for up to four full years, guaranteeing a gifted athlete four years of education regardless of his athletic performance. BYERS, *supra* note 17, at 72; Allen L. Sack, *Big-Time Athletics vs. Academic Values: It's a Rout*, CHRON. HIGHER EDUC., Jan. 26, 2001, at B7.

133. BYERS, *supra* note 17, at 103.

134. DIV. I MANUAL, *supra* note 12, art. 15.3.4.2 ("Institutional financial aid based in any degree on athletics ability may be reduced or canceled during the period of the award if the recipient [makes himself ineligible to compete, fraudulently misrepresents information, engages in serious misconduct, or voluntarily withdraws from the sport].").

135. BYERS, *supra* note 17, at 76, 164. Under prior NCAA legislation, university committees composed of faculty members, not athletic administrators, made this determination. *Id.*

136. *Id.* at 164–66; Sperber, *supra* note 18, at B12 (asserting that one-year scholarships are often not renewed due to unsatisfactory athletic performance).

players' complete dedication to their sports, often at the expense of their education[137] and health.[138]

The rules by which NCAA universities regulate athletes ensure that the institutions, not the athletes whose skill and labor generate great economic value, reap the rich financial rewards[139] of major college sports. Simultaneously, those rules extinguish any real opportunity for athletes to advance themselves and their families economically and, in order to protect universities' valuable economic interests, indenture them to their institutions in ways alien to any other student.

III. THE STAKES OF THE GAME AND ITS PLAYERS

The economic and other wealth generated by major college sports is the subject of daily news reports, and its magnitude is immense.[140] Indeed, the sums of money created in the college sports industry are so fantastic as to have become mind-boggling. And while athletes' remuneration is limited in both amount and character[141] by NCAA rule, every other actor in the enterprise enjoys huge financial benefit.[142]

Unfortunately, European Americans "still dominate key positions"[143] in the industry and hold the vast majority of all NCAA university presidencies, athletics and associate athletics directorships, head coaching positions, faculty athletics representative positions, and sports information directorships.[144] More startlingly, European Americans hold one hundred percent of the conference commissioner positions in Division I.[145] In sharp contrast,

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137. Many aspects of athletes' college experience are at odds with academic pursuits. For example, extensive practice and playing schedule obligations monopolize their lives. *See* Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy to College Basketball,* 12 MARQ. SPORTS L. REV. 595, 629 (2002) (recommending restrictions on travel to permit athletes more time as students); McCormick & McCormick, *supra* note 42, at 97–108 (detailing daily athletic commitments imposed on athletes which make meaningful academic pursuits unlikely); Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete,* 26 LOY. L.A. L. REV. 1213, 1240 (1993) (characterizing heavy athletic schedules as unrealistic for students and as promoting commercial purposes); Welch Suggs, *How Gears Turn at a Sports Factory: Running Ohio State's $79-Million Athletics Program is a Major Endeavor, with Huge Payoffs and Costs,* CHRON. HIGHER EDUC., Nov. 29, 2002, at A32 (describing how coaches do not permit athletes to enroll in classes that conflict with practice, travel to away games, or tournaments).

138. *See supra* note 117 (regarding injury statistics in football).

139. Not only do revenues arise from the sale of television broadcasting rights and from ticket and apparel sales, but universities also benefit from increases in admissions applications and alumni donations following periods of athletic success. *See, e.g.*, McCormick & McCormick, *supra* note 7, at 524–27 (2008).

140. Anthony Jerrod, *Are College Athletes Being Pimped by Agents and the NCAA?*, THE ATLANTA POST (Sept. 15, 2010), http://atlantapost.com/2010/09/15/are-college-athletes-being-pimped-by-agents-and-the-ncaa; David Ramsey, *Air Force and Brigham Young Going Opposite Directions*, STANDARD-EXAMINER (Sept. 13, 2010), http://www.standard.net/topics/sports/2010/09/13/air-force-and-brigham-young-going-opposite-directions.

141. *See supra* notes 119–26 and accompanying text (on NCAA amateurism rules), note 90 and accompanying text (describing how NCAA rules preclude any form of compensation other than the athletic scholarship which may be redeemed only by the university provider and which is reminiscent of the "company store" phenomenon).

142. McCormick & McCormick, *supra* note 7, at 509–44 (documenting the extraordinary revenues generated in college sports and their distribution).

143. RICHARD LAPCHICK ET AL., THE 2008 RACIAL AND GENDER REPORT CARD: COLLEGE SPORT 1 (2009), *available at* http://web.bus.ucf.edu/documents/sport/2008_college_sport_rgrc.pdf.

144. *See id.* (estimating that between eighty-eight and ninety-seven percent of these positions are held by European Americans throughout Divisions I, II, and III).

145. *Id.* (excluding historically black colleges and universities).

as we will show, the young men whose labor creates the product are vastly disproportionately African American.[146] The product they create—major college sports—is fantastically popular and generates billions of dollars annually, virtually all of which go to the other actors in the game, including the NCAA, athletic conferences, universities, coaches, and administrators.

A. THE NCAA AND THE ATHLETIC CONFERENCES

The NCAA receives enormous income annually from intercollegiate athletics, as a cursory review of its annual report reveals. It most recently reported revenues of $636 million, up from $622 million in 2007, and $558 million in 2006,[147] notwithstanding the sharpest economic downturn in recent U.S. history. More than eighty-five percent of NCAA income—nearly $550 million—was derived from selling rights to televise games, especially its annual NCAA men's basketball tournament,[148] and most of that income was allocated among NCAA member institutions.[149] In 2007-08, the NCAA distributed nearly $360 million to Division I universities.[150]

The NCAA, however, also pays its own officers and staff handsomely. Myles Brand, the late-President of the NCAA, was paid more than $1.7 million in salary and benefits in 2007-08,[151] and the other principal officers of the association were each paid between $450,000 and $587,000.[152] In addition, the five highest paid employees other than officers earned between $313,000 and $423,000,[153] numerous independent contractors were paid between $980,000 and $4.3 million,[154] and more than five hundred other employees and independent contractors were paid more than $50,000 each.[155]

At the same time, in 2008 eighty-three percent of officers at the senior levels of the NCAA were European American while only seventeen percent were African American.[156] Of the sixty-eight NCAA Chief Aides and Directors, seventy-six percent were white and

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146. *See infra* notes 188–235 and accompanying text.

147. NCAA, 2008 NCAA MEMBERSHIP REPORT, *available at* http://web1.ncaa.org/web_video/membership_report/2008/ [hereinafter MEMBERSHIP REPORT] (Revenue chart summarizing annual revenues from 2003–04 through 2007–08). Notably, 2008 revenues increased despite a more than $4 million loss in investment earnings. *See id.* (2007–08 Revenue Sources).

148. *Id.* (2007–08 Revenue Sources and pie chart). Beginning with the 2003 men's basketball tournament, the NCAA began enjoying the fruits of its fantastically lucrative broadcasting-rights contract with CBS television. *See* Tim Martin, *Cash Up for Grabs*, LANSING ST. J., Mar. 9, 2003, at A1. Under that agreement, CBS is paying the NCAA $6 billion over eleven years for the right to broadcast March Madness, the NCAA men's basketball tournament. Suggs, *supra* note 23, at A54.

149. *See* MEMBERSHIP REPORT, *supra* note 147.

150. *Id.* (2007–08 Expenses chart, describing distributions of over $359 million to Division I members). To be sure, NCAA costs are also substantial. For example, costs associated with running NCAA championship tournaments exceeded $110 million, while other Association-wide expenses exceeded $100 million. *Id.* In the end, however, the NCAA itself was highly profitable, having earned approximately $23 million of revenues in excess of total expenses. *See id.* (comparing total revenues with total expenses). The NCAA normally enjoys a multimillion-dollar surplus each year. BYERS, *supra* note 17, at 370.

151. National Collegiate Athletic Association, IRS Form 990, EIN 44-0567264, FYE Aug. 31, 2008 (on file with author).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. LAPCHICK ET AL., *supra* note 143, at 27 (Appendix 1).

only sixteen percent were African American.[157] Of the 195 administrators, seventy-seven percent were European American and some nineteen percent were African American.[158] Even among NCAA support staff, a full eighty percent were European American and, once again, just sixteen percent were African American.[159]

The conferences into which universities group themselves, originally representing regional ties and historic rivalries, also profit greatly from college sports. Like the NCAA, conferences also sell rights to broadcast their members' football and basketball games, thereby harvesting significant wealth.[160] For example, in the year ending August 31, 2008, the Southeastern Conference (SEC) received $161.5 million and distributed more than $135 million to its twelve member universities, an average of $11.25 million per member.[161] Salaries for SEC employees, including pension and benefit contributions, exceeded $2.6 million, with the Commissioner alone earning $650,000.[162] The Big Ten Conference received almost $218 million in income that year and distributed nearly $207 million to its eleven members, about $18.8 million each.[163] Salaries for those conference employees exceeded $1.9 million including pension and other benefits, and the Commissioner alone earned $1.2 million in salary and benefits.[164] The Atlantic Coast Conference (ACC), for its part, enjoyed revenues of nearly $163 million and distributed $141 million to its twelve member schools, for an average of almost $11.8 million each.[165] Like the others, the Atlantic Coast Conference also compensated its employees well, paying them more than $3.6 million in salaries and benefits and $888,000 to the Commissioner alone.[166] The Big Twelve Conference, in turn, received revenues of nearly $130 million, distributed $103 million to its twelve member universities, and paid its Commissioner more than $713,000 in salary and benefits as well as salaries and benefits for other employees totaling $2.2 million.[167] As these figures show, the major athletic conferences are powerful commercial entities that receive and distribute hundreds of millions of dollars annually and, like the NCAA, are important economic actors in the college sports business.

Astonishingly, however, not one of the thirty conference commissioners in Division I was African American in 2008.[168] Put differently, "100 percent of the 11 Football Bowl Subdivision (FBS) . . . conference commissioners were white men,"[169] and "[i]n all of Division I, . . . all 30 (100 percent) of Division I conference commissioners were white."[170]

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157. *Id.* at 28.

158. *Id.* at 29.

159. *Id.* at 30.

160. *See* McCormick & McCormick, *supra* note 7, at 511–13 (describing function of conferences, their revenues, and member distributions).

161. Southeastern Conference, IRS Form 990, EIN 63-0377461, FYE Aug. 31, 2008 (on file with author).

162. *Id.*

163. The Big Ten Conference, Inc., IRS Form 990, EIN 36-3640583, FYE June 30, 2008 (on file with author).

164. *Id.*

165. Atlantic Coast Conference, IRS Form 990, EIN 56-0599082, FYE June 30, 2008 (on file with author).

166. *Id.*

167. Big Twelve Conference, Inc., IRS Form 990, EIN 75-2604555, FYE June 30, 2008 (on file with author).

168. LAPCHICK ET AL., *supra* note 143, at 1, 3, 31. This statistic does not take into account conference commissioners of historically black conferences. *Id.*

169. *Id.* at 3. Football Bowl Subdivision universities are those formerly known as Division I-A schools. *Id.*

170. *Id.* "Being a conference commissioner is a powerful position and those that head BCS Conferences are considered to be among the most powerful and influential people in college sport." *Id.* at 10.

Moreover, 88.3% of the 103 associate conference commissioners were European American and only 8.7% were African American.[171]

The NCAA has made public efforts to increase the presence of African Americans at its senior staff levels with some success,[172] but, as these statistics show, NCAA officials remain predominantly European American. The conferences, however, appear to have done little to address the regime over which they preside, in which people of a minority race provide wealth and entertainment for the majority race, while laboring under rules that prevent their own economic advancement.

B. UNIVERSITY PRESIDENTS, COACHES, AND ATHLETIC DIRECTORS

While the compensation of university presidents is only tangentially related to the performance of their universities' athletic teams, that performance is nevertheless of substantial significance to the institutions and to their presidents.[173] Thus, it is noteworthy that more than 92.5% of university presidents at Football Bowl Subdivision institutions were European American in 2007-08 while only 2.5% were African American.[174]

The most obvious beneficiaries of the college sports business, of course, are football and men's basketball coaches, many of whose salaries and benefits lead the front pages of the nation's sports sections.[175] Other beneficiaries, however, include assistant coaches, athletic directors, and other athletic department personnel. As regards coaches generally, European Americans "dominate the head coaching ranks on men's teams,"[176] holding nearly ninety percent of all head coaching positions in Division I, while African Americans hold only seven percent.[177] The representation of African-American head coaches was greatest among the ranks of men's Division I head basketball coaches, where nearly twenty-three percent were African American.[178] Of the head coaches for the current top twenty-five-ranked men's basketball teams, however, only sixteen percent are African American.[179]

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171. *Id.* at 10.

172. *See id.* at 8–9.

173. *See, e.g.*, Frank G. Splitt, *The Economics of College Sports*, CHRON. HIGHER EDUC. 3 (Oct. 22, 2004) *available at* http://www.thedrakegroup.org/Splitt_Essays.pdf.

174. LAPCHICK ET AL., *supra* note 143, at 3.

175. Data regarding the extraordinary levels of compensation paid to head football and men's basketball coaches have been so thoroughly chronicled that we provide only a few examples here. The most recent instance of this salary escalation is that of Mack Brown, the head football coach at the University of Texas, whose salary was recently increased to $5 million annually, despite severe budgetary shortfalls in the university's core programs. Sean Braswell, Op-Ed., *How A Tiny Russian Nesting Doll Affects UT's Greater Mission*, AUSTIN AM.-STATESMAN, Jan. 22, 2010, *available at* http://www.statesman.com/opinion/braswell-how-a-tiny-russian-nesting-doll-affects-191672.html; *see generally* McCormick & McCormick, *supra* note 7, at 527–32 (detailing compensation packages for many high-profile head coaches); *Compensation for Division I Men's Basketball Coaches: What the Coaches Earn at the 65 Schools that Played in the 2006 NCAA Tournament*, USA TODAY, Mar. 8, 2007, at C8.

176. LAPCHICK ET AL., *supra* note 143, at 4.

177. *Id.*

178. *Id.* at 14. Although in 2008, there was a decline in the percentage of African-American men's basketball coaches in Division I, that sport "continues to be the best representation of diversity at all levels and across all sports." *Id.* "There are no other . . . sports that even came close to being as diverse as Division I men's basketball." *Id.*

179. *See infra* notes 187, 220–222 and accompanying text (providing information about the racial composition of the top twenty-five ranked men's basketball teams according to the ESPN/USA Today poll from January 2010. The racial composition of head coaches from those teams was examined with a finding that twenty-one of the coaches were European American and the other four, or sixteen percent, were African American).

In marked contrast to the record in men's basketball, during 2008, only six of the 120 head football coaches at FBS universities were African Americans—a mere five percent.[180] Of the head coaches for the top twenty-five ranked football teams at the end of the 2009 season, only one was African American.[181] Additionally, some eighty-five percent of offensive and defensive coordinators at all FBS schools were of European-American descent, while only twelve percent were of African-American ancestry.[182] Moreover, European Americans held ninety percent of the athletic director positions in Division I during that period, while African Americans held just seven percent.[183] In fact, these percentages were almost exactly replicated in the associate and assistant athletic director positions at Division I universities as well.[184]

Our recent review of current top college football and men's basketball teams permitted an assessment of the racial composition of top administrators at each of the respective universities.[185] We reviewed photographs of the university president or chancellor, the athletic director, and the head football or men's basketball coach for each institution, and determined the racial composition of those individuals. For the top twenty-five football teams, only three of the seventy-five surveyed administrators—four percent—were African American.[186] For the top twenty-five men's basketball teams, only six of the seventy-five surveyed administrators—eight percent—were African American.[187]

To be sure, there are a great many persons, institutions, and corporations that profit from major college sports and we examine only a few, but those we do examine—the NCAA, conferences, and universities—have created and now maintain the college sports industry, an industry of enormous economic power. That power translates to billions of dollars annually which generously benefits the NCAA, conferences, universities, coaches, and other administrators. At the same time, those individuals are predominantly, and sometimes exclusively, European American.

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180. LAPCHICK ET AL., *supra* note 143, at 5, 14, 37. To his credit, Mr. Brand conceded that the underrepresentation of African-American head football coaches is an embarrassment in college athletics and that "the talent pool exists and it contains men who are ready and able to successfully lead these teams . . . ." *Id.* at 8 (quoting Miles Brand, former Executive Director for the NCAA).

181. *See infra* notes 186, 210–212 and accompanying text (providing information about the racial composition of the top twenty-five ranked football teams according to the final 2009 BCS standings. The racial composition of head coaches from those teams was examined with a finding that only one – four percent – was African American).

182. LAPCHICK ET AL., *supra* note 143, at 15.

183. *Id.* at 6.

184. *Id.* At the associate athletic director position, European Americans held eighty-nine percent of the Division I positions, and African Americans held seven percent. *Id.*

185. As described below, we identified elite programs by referring to the ESPN/USA Today poll for the top-twenty-five men's basketball teams as of January, 2010, ESPN/USA Today, *2010 NCAA Men's Basketball Rankings - Week 9 (Jan. 11)*, ESPN/USA TODAY COACHES POLL, http://espn.go.com/mens-college-basketball/rankings/_/year/2010/week/10/seasontype/2 (last visited Oct. 13, 2010) (showing ranked basketball teams) (on file with author) [hereinafter January 2010 Basketball Poll], and to the final 2009 BCS standings for the top-twenty-five football teams. ESPN, *BCS Standings - December 6, 2009*, http://espn.go.com/college-football/bcs (last visited Oct. 13, 2010) (showing ranked football teams) (on file with author) [hereinafter January 2010 Football Standings].

186. Seventy were European American, one was Hispanic, and one was Asian.

187. Sixty-six were European American, two were Hispanic, and one was Asian.

C. THE ATHLETES

In sharp relief to the racial composition of those who receive compensation for their work in the college sports industry, the laborers most immediately responsible for this important entertainment product—the athletes themselves—are forbidden from benefiting economically from the wealth their efforts create except to a limited degree. And these athletes are overwhelmingly disproportionately African American. While African-American males make up sixty percent of men's basketball players and forty-six percent of football players in all of Division I,[188] these statistics only begin to describe the concentration of African Americans producing major college sports revenue. Indeed, the data show that African Americans not only populate the class of persons producing college sports revenue at astonishingly high rates, they have been doing so for some time, and will likely continue to do so for the foreseeable future.[189]

To determine the racial composition of NCAA football and men's basketball players at the elite levels of the sport—where the revenues generated are the greatest[190]—we first examined the races of the young men populating the starting lineups of the top twenty-five NCAA football and men's basketball teams in 2004-05.[191] Using U.S. Department of Education data, we also recorded the racial composition of the undergraduate student bodies at those same institutions to determine whether the racial disparities between the football and men's basketball players and their fellow students mirrored those between the athletes and the managers of the enterprise. If they did, we decided, then a logical conclusion one could draw is that the African-American athletes are on campus for a special purpose—to provide high-level athletic entertainment to the rest of the predominantly European-American university community, and not to further their own intellectual development. In 2009-10 we expanded our review to examine the racial composition of the university

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188. LAPCHICK ET AL., *supra* note 143, at 12 ("The percentage of Division I African-American male student-athletes in basketball reached 60.4 percent in this reporting period. The percentage for African-American football players was up slightly to 45.9 percent.").

189. *See infra,* notes 191–235 and accompanying text.

190. Winning athletic programs generate the greatest revenue because athletics success is rewarded financially. For example, football teams earn revenue for their conferences by winning, or even attending, a BCS Bowl Game. *See* Bowl Championship Series, *The BCS Is...*, BCSFOOTBALL.ORG, http://www.bcsfootball.org/news/story?id=4809716 (last visited Feb. 22, 2010) (on file with author). "Each conference whose team qualifies automatically for the BCS receives approximately $18 million in net revenue. A second team qualifying brings an additional $4.5 million to its conference." *Id.* Moreover, men's basketball teams generate payments for their conferences for each game they play in the March Madness men's basketball tournament. *See* MEMBERSHIP REPORT, *supra* note 147, at 14 ("For Division I members, the plan consists of basketball fund distribution based on historical performance in the Division I Men's Basketball Championship..."). "In 2007–08, each basketball unit was approximately $191,000 . . . [and i]n 2008–09, each basketball unit will be approximately $206,020 . . . ." NCAA, 2008–09 REVENUE DISTRIBUTION PLAN 8 (2009) (on file with author). Thus, in 2009 for each game won in the men's basketball tournament, the team earned its conference approximately $206,020. Conferences, in turn, distribute their revenues, in large part, to their member universities. *See, e.g.*, Big Twelve Conference, Inc., IRS Form 990, EIN 75-2604555, FYE June 30, 2008 (on file with author). The more athletic success a team enjoys, the more revenue is generated for its conference, and thus, for the conference members.

191. The top twenty-five teams for 2004 were identified by referring to the preseason ESPN/USA Today Coaches polls for college football and for men's basketball in the fall of 2004. *See* ESPN, *2004 NCAA Football Rankings - Preseason: USA Today Poll*, http://espn.go.com/college-football/rankings/_/year/2004/week/1 (last visited Oct. 13, 2010) (revealing top twenty-five football teams in 2004) [hereinafter 2004 Football Poll]; ESPN, *2005 NCAA Men's Basketball Rankings – Preseason: ESPN/USA Today Coaches Poll*, http://espn.go.com/mens-college-basketball/rankings/_/year/2005/week/1/seasontype/2 (last visited Oct. 13, 2010) (revealing top twenty-five basketball teams in 2004) [hereinafter 2004 Basketball Poll]. The starting lineups for each team were revealed on each university's website.

president or chancellor, head coach, and athletic director at each of the top twenty-five schools[192] to compare the racial makeup of those central managerial figures with those of their athletes. To complete our review and to gain a glimpse of the future, we then examined the racial composition of the top high school football and men's basketball athletes[193]—the young men who will become the major college laborers for the next four or five years.

Ours is not a longitudinal study. That is, we did not examine precisely the same data over time.[194] In 2004-05, for example, we examined the racial composition of the starting lineups for each of the top twenty-five football and men's basketball teams,[195] while in 2009-10 we reviewed the racial composition of each entire basketball team. For football, we continued to examine only the starting lineup. And as we have noted, in 2009 we also expanded our investigation to include the race of three principal administrators—the head coach, the athletic director, and the university president or chancellor—at each institution. Our purpose in these varied approaches was to review the data in several ways to learn whether it supported our thesis in each of those ways. Here are our findings.

1. THE PAST – 2004-05

a. FOOTBALL

The 2004-05 USA Today/ESPN Coaches Top 25 preseason college football poll[196] ranked the following NCAA universities in order of their predicted finish in the ensuing football season. We examined photographs available on each of those teams' websites to determine the race of each player in the starting lineup.[197] Accompanying that USA

192. For 2009-10, the top twenty-five college football teams were identified by referring to the 2009 BCS Final Standings as of January 2010. January 2010 Football Standings, *supra* note 185. The top twenty-five men's basketball teams were identified by referring to a January 2010 ESPN/USA Today Coaches poll. January 2010 Basketball Poll, *supra* note 185.

193. The 2010 high school athlete rankings were derived from the Rivals.com Prospect Ranking Rivals 250 for the class of 2010. Rivals.com, *Prospect Ranking Rivals 250 for Class of 2010*, RIVALS.YAHOO.COM, http://rivals100.rivals.com/viewrank.asp?SID=880&Year=2010&ra_key=2303 [hereinafter Rivals football rankings] (last visited Feb. 24, 2010) (providing top 250 ranked football players from the high school class of 2010); Rivals.com, *Prospect Ranking Rivals 150 for Class of 2010*, RIVALS.YAHOO.COM, http://basketballrecruiting.rivals.com/viewrank.asp?SID=910&Year=2010&ra_key=1909 [hereinafter Rivals basketball rankings] (last visited Feb. 24, 2010) (providing top 150 ranked basketball players from the high school class of 2010).

194. For this reason, we draw no judgments as to potential trends in the data.

195. In basketball, this data included the first substitute, or "sixth man." In football, this data included the starting eleven players on offense and on defense. Occasionally, the university listed a twelfth player as a starter.

196. 2004 Football Poll, *supra* note 191.

197. Of course, race is a social construct, rather than a scientifically objective phenomenon, and is, therefore, not always readily determinable or, in fact, definable. *See* Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. J. 7, 14–21 (1997) (describing scientists' difficulties in objectively confronting race, a concept with no scientific reality). Consequently, labeling a player one race or another is sometimes challenging and may not even be a meaningful exercise except that many individuals in the United States and elsewhere regularly make racial distinctions, and those distinctions have had monumental social consequences. That is, despite the lack of biological objectivity, race does have a "powerful social reality and is very instrumental in shaping our individual and collective identities." John A. Powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. J. 99, 99 (1997); *see* Omi, *supra*, at 21.

The most valid way to classify players racially might be to ask each what race or races he considers himself to be, but information regarding individual players' racial self-identification is not publicly available and is confidential under the Buckley Amendment. *See* Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A.

Today/ESPN ranking below is a description of the number and percentage of African Americans and European Americans, as well as the number of players of other racial heritage (or whose race could not be determined) on each starting lineup. The percentages of African Americans and European Americans in the undergraduate student body at each respective institution are also shown.

2004/05 USA TODAY / ESPN COACHES POLL – TOP 25 COLLEGE FOOTBALL TEAMS STARTING LINEUPS[198]

School	Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans	Overall Undergraduate Racial Composition	
						Percent African-Americans [199]	Percent European-Americans [200]
USC	11	6	5	65%[201]	35%[202]	6.7%	47.5%
University of Oklahoma	18	4	1	82%	18%	5.9%	74.4%
LSU	18	4	0	82%	18%	9.5%	80.1%
Georgia	15	7	0	68%	32%	4.8%	88.2%
Miami	18	3	1	86%	14%	9.6%	50.0%
Florida State	19	3	0	86%	14%	11.9%	73.2%
Michigan	12	9	1	57%	43%	8.0%	63.8%
Texas	18	4	0	82%	18%	3.6%	60.6%
Ohio State	9	13	0	41%	59%	8.1%	78.0%
Florida	18	4	0	82%	18%	8.5%	70.0%
West Virginia	15	8	0	65%	35%	4.0%	90.6%
Iowa	13	9	0	59%	41%	2.1%	86.1%

§ 1232(g) (1990 & Supp. 1995). Therefore, we made assessments of race by examining player photographs. Because a person's treatment is often affected by others' visual perceptions of his race, whether accurate or not, an assessment based on photographic information seemed relevant to our inquiry. Nonetheless, instances arose in which we could not determine probable race by examining photographs, and in those cases, as well as for players of racial origins other than European American or African American, we excluded the player from our computations. Thus, if a team had twenty-one African-American players and one whose race we could not determine, we treated the team as being composed of twenty-one African Americans out of twenty-one total players, not twenty-one African Americans out of twenty-two players. In this manner, the unclassified player would not be presumed to be one race or another.

198. Study, including photographs, on file with author.

199. NATIONAL CENTER FOR EDUCATION STATISTICS, Search for Schools, Colleges, and Libraries, U.S. DEPT. OF EDUC. [hereinafter U.S. DEPT. OF EDUC.], http://nces.ed.gov/globallocator (search for each college by checking the "Colleges" box under "Institutions," by choosing to sort by "Name," by entering college name in name field, and by clicking on search) (searches performed on Apr. 3, 2005) (showing percent of undergraduate enrollment by race/ethnicity upon search for each university).

200. *Id.*

201. Computed as follows: 11 / 17 = 65%.

202. Computed as follows: 6 / 17 = 35%.

School	Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans	Overall Undergraduate Racial Composition	
						Percent African-Americans [199]	Percent European-Americans [200]
Kansas State	11	9	1	55%	45%	2.9%	88.5%
Tennessee	17	1	4	94%	6%	7.3%	86.6%
California	10	10	2	50%	50%	4.0%	30.0%
Clemson	18	4	0	82%	18%	7.5%	82.8%
Missouri	16	6	0	73%	27%	5.6%	84.3%
Auburn	18	5	0	78%	22%	7.3%	87.8%
Virginia	16	5	0	76%	24%	8.5%	67.2%
Maryland	16	7	0	70%	30%	12.3%	59.1%
Utah	4	10	8	29%	71%	0.6%	80.2%
Wisconsin	12	8	1	60%	40%	2.4%	86.0%
Minnesota	14	9	0	61%	39%	4.3%	76.5%
Purdue	13	8	1	62%	38%	3.4%	82.9%
Oregon	11	7	4	61%	39%	1.7%	74.7%

These figures show that in 2004-05 African Americans comprised between twenty-nine and ninety-four percent of the starting lineups of these top teams, while European Americans constituted between six and seventy-one percent. On average, sixty-eight percent of those athletes were African American while only thirty-two percent were European American. By contrast, as a percentage of the overall student body, African Americans constituted an average of only 6.0% of the student population, while European Americans constituted 74.0%.

As an initial matter, it is noteworthy that on average, over two-thirds of these starting football players are of African-American descent. This is an indication that African Americans are, to a large measure, responsible for creating the product of college football entertainment. Moreover, the concentration of African Americans on these football teams greatly exceeds that in the student body overall, and while football unquestionably creates an opportunity for some African Americans to experience some elements of college life, these data at least suggest that universities are using African Americans for an athletic purpose, not solely to educate them. Unless the athletes reap benefits proportional to those enjoyed by the university, this situation could well be viewed as exploitation. And given the contrasting racial compositions of athletes on the one hand, and university and athletic administrators on the other, such exploitation could fairly be said to be racial in character.

b. MEN'S BASKETBALL

Like its football counterpart, the 2004-05 USA Today/ESPN Coaches Top 25 preseason college basketball poll[203] ranked the following NCAA universities in order of their predicted finish in the ensuing basketball season. Again, we made racial classifications by examining athletes' photographs. Accompanying that USA Today/ESPN Coaches ranking is a description of the number and percentage of African Americans and European Americans on each starting lineup, as well as the number of players of other racial heritage (or whose racial identity could not be determined). The percentages of African Americans and European Americans in the undergraduate student body at each institution are also provided.

2004/05 USA TODAY / ESPN COACHES POLL – TOP 25 COLLEGE BASKETBALL TEAMS STARTING LINEUPS[204]

School	Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans	Overall Undergraduate Racial Composition	
						Percent African-Americans[205]	Percent European-Americans[206]
Kansas	5	1	0	83%[207]	17%[208]	3.2%	83.8%
Wake Forest	5	1	0	83%	17%	6.7%	86.8%
North Carolina	6	0	0	100%	0%	11.1%	75.7%
Georgia Tech	5	1	0	83%	17%	7.5%	69.3%
Illinois	4	2	0	67%	33%	7.3%	66.2%
Syracuse	4	2	0	67%	33%	6.1%	68.1%
Connecticut	6	0	0	100%	0%	4.8%	74.2%
Oklahoma State	4	2	0	67%	33%	3.5%	79.1%
Kentucky	5	1	0	83%	17%	5.4%	88.8%
Michigan State	4	2	0	67%	33%	8.7%	78.7%
Arizona	6	0	0	100%	0%	3.0%	66.3%

203. 2004 Basketball Poll, *supra* note 191.

204. Study, including photographs, on file with author.

205. U.S. DEPT. OF EDUC., *supra* note 199 (showing percent of undergraduate enrollment by race/ethnicity upon search for each university).

206. *Id.*

207. Computed as follows: 5 / 6 = 83%.

208. Computed as follows: 1 / 6 = 17%.

School	Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans	Overall Undergraduate Racial Composition	
						Percent African-Americans [205]	Percent European-Americans [206]
Duke	4	2	0	67%	33%	10.2%	59.5%
Louisville	5	0	1	100%	0%	13.5%	79.9%
Mississippi State	4	2	0	67%	33%	19.4%	77.1%
Texas	4	2	0	67%	33%	3.6%	60.6%
Maryland	5	1	0	83%	17%	12.3%	59.1%
Pittsburgh	6	0	0	100%	0%	9.3%	81.8%
Alabama	6	0	0	100%	0%	13.7%	81.7%
North Carolina State	4	1	0	80%	20%	10.2%	80.6%
Wisconsin	2	3	0	40%	60%	2.4%	86.0%
Notre Dame	4	1	0	80%	20%	3.6%	79.5%
Florida	2	3	0	40%	60%	8.5%	70.0%
Memphis	6	0	0	100%	0%	35.6%	58.5%
Washington	5	1	0	83%	17%	2.6%	52.9%
Stanford	2	3	0	40%	60%	9.7%	44.0%

These figures show that African Americans comprised between forty and one hundred percent of the starting lineups of these top basketball teams, while European Americans constituted between zero and sixty percent. On average, seventy-eight percent of these athletes were African American while only twenty-two percent were European American. Simultaneously, African Americans constituted an average of 8.5% of students in the undergraduate student body at those universities, while European Americans constituted 65.5%.

Again, the predominance of African Americans on the starting lineups of the top basketball teams indicates that African Americans are greatly responsible for creating this popular and lucrative entertainment product. Moreover, their strikingly greater concentration on the teams than in the overall student body populations at least suggests that universities are using African Americans for athletic, and, therefore, commercial, purposes, rather than to provide them with an education. As we noted above regarding football players, unless athletes receive a benefit proportional to that which universities enjoy, their treatment could be said to be exploitative. And given the dramatic contrast between the races of the athletes and the managers, such exploitation has obvious racial implications.

2. THE PRESENT – 2009-10

a. FOOTBALL

In 2009-10 we examined the actual outcome of the NCAA football season rather than the preseason predictions, as we had done in 2004-05. For this purpose, we reviewed the rosters of the final Bowl Championship Series (BCS) top twenty-five teams.[209] As before, we looked at photographs of the starting lineups of each team to determine the number of African Americans and European Americans, as well as the number of players of other racial heritage (or whose racial identity could not be determined). Again, we also recorded the percentages of African Americans and European Americans in the undergraduate student body on each campus, but unlike 2004-05, we also noted the racial composition of key university administrators—the president or chancellor, the head coach, and the athletic director at each university.[210]

FINAL 2009 BCS STANDINGS - TOP 25 FOOTBALL TEAMS STARTING LINEUPS[211]

School	Number of African-American Players	Number of European-American Players	Number of Players of Other or Unknown Racial Origin	Percentage of African-American Players	Percentage of European-American Players	Overall Undergraduate Racial Composition		Racial Composition of Top Administrators [212]
						Percent African-Americans [213]	Percent European-Americans [214]	
Alabama	14	8	0	64%[215]	36%[216]	11.2%	83.7%	100% white
Texas	14	8	0	64%	36%	4.8%	54.7%	100% white
Cincinnati	13	9	0	59%	41%	11.3%	76.9%	100% white
TCU	15	7	0	68%	32%	5.4%	74.1%	100% white
Florida	19	2	1	90%	10%	10.1%	62.7%	100% white
Boise St.	12	10	0	55%	45%	1.5%	80.4%	100% white
Oregon	9	10	3	47%	53%	1.8%	74.9%	100% white
Ohio St.	12	10	0	55%	45%	6.7%	79.2%	67% white
Georgia Tech	16	6	0	73%	27%	6.8%	65.0%	100% white
Iowa	8	12	2	40%	60%	2.2%	83.9%	100% white
Virginia Tech	16	5	1	76%	24%	3.9%	73.8%	100% white
LSU	17	5	0	77%	23%	9.0%	79.8%	100% white

209. January 2010 Football Standings, *supra* note 185.

210. Obviously, these three top administrators are not the only persons who benefit from college athletic revenues. Ultimately, however, no one is more important than these three figures in determining intercollegiate athletic policy.

211. Study, including photographs, on file with author.

212. For this category, we considered the three posts of university president or chancellor, the athletic director, and the head coach for each school. Again, if someone's race was unknown, he or she was not included in the computation.

213. U.S. DEPT. OF EDUC., *supra* note 199 (searches performed on Feb. 2, 2010) (showing percent of undergraduate enrollment by race/ethnicity upon search for each university).

214. *Id.*

215. Computed as follows: 14 / 22 = 64%.

216. Computed as follows: 8 / 22 = 36%.

School	Number of African-American Players	Number of European-American Players	Number of Players of Other or Unknown Racial Origin	Percentage of African-American Players	Percentage of European-American Players	Overall Undergraduate Racial Composition		Racial Composition of Top Administrators [212]
						Percent African-Americans [213]	Percent European-Americans [214]	
Penn St.	14	8	0	64%	36%	4.1%	83.2%	100% white
Brigham Young	3	16	3	16%	84%	0.5%	86.7%	100% white
Miami (FL)	17	4'	1	81%	19%	8.0%	45.2%	50% white[217]
West Va.	14	8	0	64%	36%	3.3%	89.4%	100% white
Pittsburgh	12	10	0	55%	45%	8.4%	79.8%	100% white
Oregon St.	9	9	4	50%	50%	1.6%	71.4%	100% white
Okla St.	16	6	0	73%	27%	4.2%	76.8%	100% white
Arizona	13	6	3	68%	32%	3.1%	64.3%	100% white
Stanford	7	14	1	33%	67%	9.9%	38.2%	100% white
Nebraska	12	9	1	57%	43%	2.4%	83.2%	100% white
Utah	10	6	6	63%	38%	1.1%	78.0%	100% white
USC	16	4	2	80%	20%	5.4%	46.6%	67% white
Wisconsin	12	10	0	55%	45%	2.8%	78.1%	100% white[218]

These data show that African Americans comprise between sixteen and ninety percent of the starting lineups of these top football teams, while European Americans constitute between ten and eighty-four percent. On average, however, sixty-one percent of these athletes are African American while thirty-nine percent are European American. Simultaneously, African Americans constitute an average of only five percent of students in the undergraduate student body at these universities, while European Americans constitute seventy-two percent, at least suggesting again that universities are enrolling these African Americans for the special, commercial purpose of fielding successful athletic teams.

As noted above, only three of the seventy-five surveyed administrators from these schools, four percent, were African Americans.[219] Of those, two were university athletic directors and one was a head football coach, but not one university president at these twenty-five schools was African American. The fact that three-fifths of the football athletes, but only one in twenty-five administrators, are African American, reveals the pattern we describe—that predominantly African American athletes are creating wealth for European Americans.

b. MEN'S BASKETBALL

217. University of Miami President Donna Shalala, an Asian, was not included in this computation because we contrast only African Americans and European Americans in our examination. Therefore, because there was one African American, one European American, and one Asian at this institution, fifty percent of those we examined, or one of two, were counted as white, and fifty percent were recorded as black.

218. In this circumstance, the athletic director was Hispanic and was not included in the computation. Because the university president and the head coach were both white, we recorded this statistic as having been 100% white, or two out of two individuals.

219. *See supra* note 186 and accompanying text.

To complete our examination of present conditions, we undertook a mid-season review of the top twenty-five NCAA Division I basketball teams as ranked by ESPN/USA Today in January 2010.[220] This time, however, we did not limit our examination to each university's starting team. Rather, to address potential concerns regarding the breadth of our sample, we extended our review to include each team's entire roster. The following chart reveals our findings:

ESPN / USA TODAY POLL, 2009-10 SEASON TOP 25 BASKETBALL TEAMS

ENTIRE ROSTER[221]

School	Number of African-American Players	Number of European-American Players	Number of Players of Other or Unknown Racial Origin	Percentage of African-American Players	Percentage of European-American Players	Overall Undergraduate Racial Composition		Racial Composition of Top Administrators[222]
						Percent African-Americans[223]	Percent European-Americans[224]	
Texas	11	5	0	69%[225]	31%[226]	4.8%	54.7%	100% white
Kentucky	10	3	0	77%	23%	6.5%	86.2%	100% white
Kansas	10	7	0	59%	41%	3.7%	80.6%	67% white
Villanova	10	1	1	91%	9%	4.8%	76.2%	100% white
Syracuse	10	5	0	67%	33%	7.4%	57.8%	67% white
Purdue	6	11	0	35%	65%	3.4%	80.6%	100% white
Duke	4	10	0	29%	71%	9.7%	50.7%	100% white
Michigan State	8	6	0	57%	43%	8.0%	75.9%	100% white
W. Virginia	9	7	0	56%	44%	3.3%	89.4%	100% white
Tennessee	11	4	0	73%	27%	8.1%	85.0%	100% white
Georgetown	9	2	0	82%	18%	6.5%	64.7%	67% white
Kansas St.	11	0	2	100%	0%	3.5%	84.6%	100% white
North Carolina	10	6	0	63%	38%	10.9%	70.6%	100% white
Gonzaga	7	7	1	50%	50%	1.4%	76.8%	100% white
Connecticut	11	3	0	79%	21%	5.1%	64.3%	100% white
Wisconsin	5	10	0	33%	67%	2.8%	78.1%	100% white
BYU	4	8	1	33%	67%	0.5%	86.7%	100% white
Georgia Tech	12	4	0	75%	25%	6.8%	65.0%	67% white
Clemson	11	4	0	73%	27%	7.2%	81.9%	67% white
Pittsburgh	14	1	0	93%	7%	8.4%	79.8%	100% white

220. January 2010 Basketball Poll, *supra* note 185.

221. Study, including photographs, on file with author.

222. We include the university president or chancellor, the head coach, and the athletic director. Again, if an individual's race was unknown, he or she was not included in the computation.

223. U.S. DEPT. OF EDUC., *supra* note 199 (searches performed on Jan. 28, 2010) (showing percent of undergraduate enrollment by race/ethnicity upon search for each university).

224. *Id.*

225. Computed as follows: 11 / 16 = 69%.

226. Computed as follows: 5 / 16 = 31%.

School	Number of African-American Players	Number of European-American Players	Number of Players of Other or Unknown Racial Origin	Percentage of African-American Players	Percentage of European-American Players	Overall Undergraduate Racial Composition		Racial Composition of Top Administrators [222]
						Percent African-Americans [223]	Percent European-Americans [224]	
Temple	10	3	2	77%	23%	16.9%	57.6%	100% white
Butler	6	9	0	40%	60%	3.7%	84.5%	100% white
Mississippi	11	2	0	85%	15%	13.3%	79.0%	100% white
Baylor	11	2	0	85%	15%	7.5%	70.8%	100% white
Florida St.	9	5	0	64%	36%	10.6%	72.0%	67% white

These figures show that African Americans comprise between thirty-three and one hundred percent of the entire basketball teams at these universities, while European Americans constitute between seven and seventy-one percent of those rosters. Overall, however, African Americans currently comprise an average of sixty-six percent of those athletes, while European Americans constitute just thirty-four percent. Because African Americans comprise such a large proportion of the players on these top basketball teams, it can be said that elite college basketball, like college football, is, to a large degree, a product of African-American labor. At the same time, however, African-American students constitute an average of just seven percent of the undergraduate student bodies at these universities, while European Americans comprise seventy-four percent. Of course, these data give rise to the same concerns about racial exploitation by universities that we have observed above with regard to both football and basketball programs in 2004-05 as well as for football players today.

It bears remembering that in contrast to the players' demographics, only six of the seventy-five surveyed administrators—or eight percent—from these top basketball schools were African Americans,[227] and only one African American served as a university president or chancellor. Thus, what is true for football is also true for basketball—African-American labor is generating wealth for a class of mostly European-American individuals. This would not necessarily be objectionable if those laborers were being compensated proportionately, but university-supported NCAA amateurism rules purposefully prohibit this very outcome, thereby preserving this modern form of apartheid.[228]

3. THE FUTURE

The racial composition of future NCAA football and men's basketball players can best be gauged by examining the races of the young men who will enter the college sports business in the near future. Rivals.com (Rivals) ranks prospective college football and basketball players, and its rankings are closely followed by millions.[229] Each year, Rivals ranks the top 250 high school senior football players and top 150 basketball players. Each young man on these lists is a highly coveted athlete with an opportunity to attend the NCAA

227. *See supra* note 187 and accompanying text.

228. *See supra* notes 119126 and accompanying text.

229. *See* Rivals.com, *About Us*, RIVALS.COM, http://www.rivals.com/content.asp?CID=36178.

institution of his choice.[230] Most, if not all, will attend major Division I universities with elite football and basketball programs for the next four or five years, and together they will form the foundation for successful college teams. In a sense, they will soon become the driving force behind major NCAA sports, and it will be their labor that will generate the enormous projected profits for that enterprise. For this reason, an examination of the races of these future athletes not only can provide clear evidence of the probable racial composition of NCAA football and basketball programs in the next five years, but also, if past is prologue, may show that the current pattern will continue in which African Americans disproportionately create, but are denied, the vast revenue of college sports.

The following charts depict the racial composition of the leading high school senior football and men's basketball prospects in the United States as ranked and published by Rivals.[231] We created this chart by examining the Rivals rankings and the associated biographies of each ranked athlete. The biographies generally included players' photographs. By examining these available photographs, we made a determination as to the race of each young man.[232] When race was ambiguous or a photograph was not available, we did not attempt to determine the individual's race, and instead included him in the charts below as "unknown."

RIVALS.COM - TOP 250 HIGH SCHOOL SENIOR FOOTBALL PROSPECTS

Class of 2010[233]

Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans
198	44	8	81.8	18.2

RIVALS.COM - TOP 150 HIGH SCHOOL SENIOR BASKETBALL PROSPECTS

Class of 2010[234]

Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans
131	17	2	88.5	11.5

These figures[235] demonstrate unmistakably that the future laborers in the college sports vineyards will be, as they have been, vastly disproportionately African-American

230. *See id.*

231. *See* Rivals football rankings, *supra* note 193; Rivals basketball rankings, *supra* note 193.

232. When the Rivals ranking did not include a photograph, we were sometimes able to find photographs from alternative media sources.

233. Study, including photographs, on file with author.

234. Study, including photographs, on file with author.

235. In determining the percentage of African Americans and European Americans for these two tables, we excluded from the computation the players whose race was unknown. Thus, for the top 250 football player

young men. And there is little to suggest that the managers of college sports will differ from what they are today, disproportionately European American. When amateurism rules apply only to athletes, and not to managers and other beneficiaries, those rules will continue to burden African Americans disproportionately and to reserve the wealth they create largely for the benefit of European Americans.

IV. THE END GAME – ADVERSE IMPACT THEORY

The college sports industry has flourished fantastically in recent decades, and the NCAA's amateurism rules have enabled it to grow, in substantial part, from the labor and sacrifice of the athletes whose economic power is sharply limited, and whose lives are otherwise controlled, by NCAA rule.[236] These amateurism rules prevent athletes from benefitting economically from their skill, effort, or even their reputation, and reserve all but a fraction of that bounty for others.[237] Coincidentally, as we have shown, the beneficiaries of this regime are predominantly European American, while the athletes whose work creates the product are vastly disproportionately African American.[238]

We do not claim that universities, through the NCAA, either created or have fostered this system to burden African Americans purposely, but that has unquestionably become one of its effects, and U.S. justice properly looks skeptically upon rules that, while neutral on their face, systematically burden racial minorities in grossly disproportionate ways.[239] This skepticism, borne of our nation's catastrophic experiment with slavery and its struggles to deal with the vestiges of that regime, has given rise to the adverse or disparate impact theory of employment discrimination which prohibits an employer from using facially neutral rules that have an unjustified adverse impact upon the members of a protected class.[240] Put

ranking, there were 198 African Americans out of a total of 242 players whose race was known, or 81.8%, and forty-four European Americans out of 242, or 18.2%. In determining the percentage of African Americans and European Americans for the top 150 basketball player ranking, there were 131 African Americans out of 148 players whose race could be determined, or 88.5%, and seventeen European Americans out of 148, or 11.5%. Were it possible to identify the race of each ranked player precisely, the percentages in each table could be slightly higher or lower than reflected here.

236. *See supra* notes 119–26 and accompanying text.

237. *See supra* notes 119–26 and accompanying text.

238. *See supra* Part III.B-C.

239. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (condemning practices that are facially neutral but burden one class more than others); Smith v. City of Jackson, 544 U.S. 228 (2005) (officers receiving lesser raises were entitled to relief under disparate impact theory of recovery).

240. *See generally* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 356–90 (1988) (describing adverse impact law generally); CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION 140–244 (1988) (same).

We have argued elsewhere that NCAA athletes in revenue-generating sports should, in fact, be viewed as "employees" under the National Labor Relations Act. *See* McCormick & McCormick, *supra* note 42, at 71–157. Were they to be found "employees" under Title VII of the Civil Rights Act of 1964 as well, then a disparate impact theory would likely be available to challenge universities' and the NCAA's compensation system in which amateurism rules apply only to labor positions held predominantly by African Americans, but not to those managerial posts held overwhelmingly by European Americans. It bears remembering, moreover, that disparate impact analysis, as described below, operates in many areas in addition to employment law. *See infra* notes 282–284 and accompanying text. Therefore, even if athletes were not viewed as "employees" under the law, they might

somewhat differently, the adverse impact theory outlaws the use of employment rules or practices that do not appear on their face to be discriminatory, but are so in their application or effect unless the employer can justify those rules as manifestly related to job duties.[241] The Supreme Court has crisply described the doctrine as condemning "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[242]

The adverse impact theory was initially articulated by the Supreme Court in its 1971 *Griggs v. Duke Power Co.* decision.[243] Prior to the passage of the Civil Rights Act of 1964,[244] Title VII of which prohibited discrimination in employment on the basis of race, Duke Power Company had employed African Americans only in the labor department, one of five departments at a North Carolina power generating facility.[245] At the same time, the company required a high school diploma for employment in the other, all-white, departments.[246] After 1965, the company ceased excluding African Americans from the formerly all-white departments, but required all prospective employees in those departments not only to have a high school diploma but also to pass two standardized general intelligence tests.[247] These preconditions—a high school diploma and passage of the two tests—had the effect of excluding African Americans from employment in those departments at significantly higher rates than European Americans.[248]

Despite the fact that the standards had not been shown to be substantially related to job performance in those positions,[249] the lower courts found the company's employment criteria to be legitimate business tools adopted to help it hire the best qualified applicants and not for a racially discriminatory purpose.[250] The Supreme Court, however, reversed the lower courts, and gave birth to the adverse impact theory of employment discrimination.[251] In *Griggs* and similar cases, the Court reasoned, proof of discriminatory motive is not required because Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[252] As the Court famously put it, the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability."[253] To justify such rules, the Court wrote, an employer must show that "any given requirement . . . [has] a manifest relationship to the employment in question."[254] "The touchstone is business necessity,"[255] the Court announced. "If an

still be able to prevail in a disparate impact challenge to NCAA amateurism rules.

241. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

242. *Teamsters*, 431 U.S. at 335 n.15.

243. *Griggs*, 401 U.S. at 432.

244. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

245. *Griggs*, 401 U.S. at 427.

246. *Id.*

247. *See id.* at 427–28 (describing company's introduction of the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test as new conditions for employment in the previously all-white departments).

248. *See id.* at 430 n.6 (stating that only twelve percent of African Americans in North Carolina had high school degrees in contrast to thirty-four percent of whites and that some fifty-eight percent of whites passed the test compared with six percent of blacks).

249. *See id.* at 431–32 (noting that employees hired before the standards were imposed had performed satisfactorily in those positions).

250. *See id.* at 429.

251. *See Griggs*, 401 U.S. at 431.

252. *Id.*

253. *Id.* at 432.

254. *Id.*

255. *Id.* at 431.

employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[256]

In *Griggs*, African Americans had suffered under North Carolina's segregated educational system, leaving them less educated and, therefore, at an obvious disadvantage in educational achievement.[257] The Supreme Court has made it plain, however, that adverse impact theory has broader application and is not limited solely to circumstances in which racial minorities have been victimized by societal discrimination. In *Dothard v. Rawlinson*, for example, the Court invoked adverse impact doctrine to strike down a state's use of height and weight minima in selecting prison guards when their effect was to create a barrier to employment opportunity for women and where other, less discriminatory, testing mechanisms were available.[258] The Court has also signaled a sharp distrust of testing mechanisms that disproportionately burden minorities, even when an employer's "bottom line" hiring statistics showed minorities had not been disproportionately excluded.[259] Thus, in *Connecticut v. Teal* the Court struck down Connecticut's multi-tiered employee selection mechanism when only the initial screening stage had an adverse impact on African Americans, and despite the fact that African Americans who passed the initial test were hired at a much higher rate than European Americans who also passed the test.[260]

In fact, when the Court has seen fit to limit the adverse impact doctrine, Congress has reacted by restoring its authority in employment discrimination law. In *Ward's Cove Packing v. Atonio*, for example, the Supreme Court reviewed the business necessity defense and held, *inter alia*, that although an employer whose employment practices disproportionately burdened racial minorities was required to set forth a legitimate business reason for their use, the plaintiff, nevertheless, continued to bear the burden of establishing that he or she had been denied an employment opportunity on the basis of race or other protected consideration.[261] As regards the business necessity defense, the Court in *Ward's Cove* rejected the "necessity" requirement, stating "there is no requirement that the challenged practice be 'essential' or 'indispensible' to the employer's business for it to pass muster."[262] On the contrary, the decision required only that the challenged practice serve "in a significant way, the legitimate . . . goals of the employer."[263]

Ward's Cove was roundly criticized as unduly limiting disparate impact theory,[264] and two years later, Congress passed the Civil Rights Act of 1991,[265] which reversed the Court's holding that the burden of persuasion remains with the employee at all times. It also confirmed that once a plaintiff has shown a challenged employment practice to have caused a significant disparate impact upon a protected group, the employer must prove, not merely

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256. *Id.*

257. *Griggs*, 401 U.S. at 430–31.

258. Dothard v. Rawlinson, 433 U.S. 321, 329–32 (1977) (using disparate impact analysis to strike down as a violation of Title VII an Alabama statute requiring applicants for prison guard positions to be at least 5'2" tall and to weigh at least 120 pounds).

259. Connecticut v. Teal, 457 U.S. 440, 440 (1982).

260. *Id.* at 442–51.

261. Ward's Cove Packing v. Atonio, 490 U.S. 642, 658-59 (1989).

262. *Id.* at 659.

263. *Id.*

264. *See, e.g.*, Michael H. Gottesman, *Twelve Topics to Consider Before Opting for Racial Quotas*, 79 GEO. L.J. 1737, 1750–51 & n.41 (1991) (criticizing *Ward's Cove*); Reginald Alleyne, *Smoking Guns Are Hard to Find*, L.A. TIMES, Jun. 12, 1989, at 5 (stating that the Supreme Court's "underlying dislike" for Title VII "is openly revealed by the illogic of the reasoning" in *Ward's Cove*).

265. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991).

articulate, the validity of its business justification for the practice.[266] The Act also reaffirmed the significance of the availability of less discriminatory alternatives by declaring unlawful an employment practice that disproportionately burdens a protected group when there is an alternative employment practice which produces a less discriminatory impact that the employer has refused to adopt.[267]

Early adverse impact cases like *Griggs* frequently scrutinized employer-imposed rules which had the effect of disproportionately excluding minorities from eligibility for employment in particular jobs. Title VII, however, also prohibits illegal employment discrimination in other matters, including wage levels,[268] as we assert is the case in college sports, and the Supreme Court has approved the application of disparate impact analysis in such circumstances. In *Smith v. City of Jackson*, for example, the Court held that a pay plan which operated to discriminate against older workers could be struck down using disparate impact analysis under the Age Discrimination in Employment Act (ADEA)[269] if the plaintiffs identified a "specific test, requirement, or practice within the pay plan that ha[d] an adverse impact on older workers."[270] Significantly, that Court also made it clear that disparate impact theory should be applied even more broadly under Title VII than under the ADEA.[271] Thus, compensation plans, as well as employment eligibility rules, may be challenged using disparate impact theory under Title VII.[272] Here, the NCAA's amateurism rules have an adverse racial impact objectionable under Title VII because they tend to restrict the compensation of African Americans while tending not to limit earnings for European Americans.

The adverse impact theory has likewise been adopted in the application of numerous employment statutes other than Title VII. So, for example, the 1967 ADEA is identical to Title VII in its description of unlawful discrimination, and the Court has held that decisions under one statute are controlling for similar cases under the other.[273] As noted above, the Supreme Court has recently confirmed in *Smith v. City of Jackson* that the adverse impact model announced in *Griggs* applies under the ADEA.[274] In addition, the Rehabilitation Act

266. 42 U.S.C. § 2000e(m) (2000) ("The term 'demonstrates' means meets the burdens of production and persuasion."); 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (outlawing employment practices with an adverse impact on a protected class unless the employer can "*demonstrate* that the challenged practice is job related . . . and consistent with business necessity") (emphasis added).

267. 42 U.S.C. § 2000e-2(k)(1)(C) (2006).

268. 42 U.S.C. § 2000e-2(a) (2010) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual's race.").

269. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621 et seq. (2006)).

270. Smith v. City of Jackson, 544 U.S. 228, 241 (2005).

271. *Id.* at 228, 240. The Court determined disparate impact analysis to be broader under Title VII than under the ADEA because Congress's overruling of *Ward's Cove* through the Civil Rights Act of 1991 had broadened the scope of adverse impact theory under Title VII without addressing the ADEA, *id.* at 228-29, 240, and because the ADEA was narrower than Title VII due to an exception to that law which did not exist under Title VII. *Id.* at 233, 240. Therefore, under Title VII even a generalized showing, without reference to a particular "test, requirement, or practice," *id.* at 229, 241, that a pay plan adversely impacted African Americans could be a cognizable claim.

272. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385 (1986) (involving race-based disparate impact claim under Title VII against public employer's wage system).

273. *See, e.g.*, *Smith*, 544 U.S. at 233; Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 412 (1985) (both finding that because the operative language of the ADEA was modeled upon Title VII, merely substituting "age" for the term "race" from Title VII, the identical terms of the two statutes should be construed in a parallel fashion).

274. *See Smith*, 544 U.S. at 228, 236–40; *see also* EEOC v. Borden's Inc., 724 F.2d 1390, 1394 (9th Cir. 1984); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 690 (8th Cir. 1983); Allison v. W. Union Tel. Co., 680 F.2d 1318, 1321 (11th Cir. 1982); Geller v. Markham, 635 F.2d 1027, 1030 (2d Cir. 1980).

of 1973,[275] passed to "promote and expand employment opportunities . . . for handicapped individuals"[276] protects such persons from discrimination in employment because of their handicap. Additionally, in *Alexander v. Choate*, the Supreme Court specifically held adverse impact analysis to be applicable under that act.[277] "Discrimination against the handicapped," the Court wrote, "was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[278] Finally, in the Americans with Disabilities Act of 1990 (ADA),[279] Congress specifically adopted disparate impact theory. Under the ADA, a plaintiff need not demonstrate improper motive and can prevail upon a mere showing that the defendant uses:

> qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria . . . is shown to be job related for the position in question and is consistent with business necessity.[280]

Under this language, neutral employment practices that result in differing treatment of persons with and without disabilities are unlawful unless justified by business necessity.[281] In this, Congress specifically adopted the *Griggs* adverse impact model of employment discrimination in the interpretation of the ADA.

Finally, the idea that facially neutral rules that disproportionately burden racial minorities require justification appears not only in employment law, but in other areas where African Americans have been disproportionately burdened by apparently neutral rules. For example, in *Gaston County v. United States* the Supreme Court rejected the argument that a facially neutral literacy test for voting was valid when Gaston County had "systematically deprived its black citizens of the educational opportunities it granted to its white citizens"[282] and declared that "'[i]mpartial' administration of the literacy test . . . would serve only to perpetuate these inequities in a different form."[283] Lower courts have also used disparate impact analysis to find unlawful discrimination in housing under Title VIII.[284]

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275. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. § 794 et seq. (2006)).

276. *Id.* at § 2(8), 87 Stat. at 357.

277. Alexander v. Choate, 469 U.S. 287, 294–99 (1985).

278. *Id.* at 295.

279. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101 et seq. (2006)).

280. *Id.* at § 12112(b)(6).

281. *See, e.g.*, JAMES G. FRIERSON, EMPLOYER'S GUIDE TO THE AMERICANS WITH DISABILITIES ACT 405 (2d ed. 1995).

282. Gaston Cnty. v. United States, 395 U.S. 285, 297 (1969).

283. *Id.*

284. In United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), for example, the court wrote,

> [t]he burden of proof in Title VIII cases is governed by the concept of the 'prima facie case.' To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because '. . . whatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.'

Id. (citations omitted)

Adverse impact theory is an indispensible part of U.S. law because slavery, its aftermath, and other forms of invidious discrimination, have wisely cautioned us to question rules that disproportionately burden African Americans, even when those rules were not created for a racist purpose. As applied to college sports, the fact that NCAA rules were created for other, facially neutral, reasons has no bearing on whether, given their grossly disproportionate impact on African Americans, they may be justified. The fact remains that NCAA amateurism rules operate to burden African Americans in grossly disproportionate ways while reserving the wealth their labor produces for others.

CONCLUSION

We do not ask for what cannot be given, says John Kumalo. We ask only for our share of what is produced by our labour. New gold has been found, and South Africa is rich again. We ask only for our share of it.

. . . .

. . . *It is only our share that we ask, enough to keep our wives and our families from starvation.* . . .

. . . .

. . . *We ask only for those things that laboring men fight for in every country in the world, the right to sell our labour for what it is worth.* . . .

They say that higher wages will cause the mines to close down. . . . *They say it makes the country rich, but what do we see of these riches? Is it we that must be kept poor so that others may stay rich?*

. . . .

. . . *This industry is powerless without our labour.* . . .

. . . .

. . . *I tell you we have labour to sell, and it is a man's freedom to sell his labour for what it is worth.*[285]

Given the foregoing, the question becomes whether NCAA amateurism rules for athletes, ostensibly designed to shield college sports from professionalism, but that also have the effect of financially exploiting mostly African-American young men, are justified by notions of amateurism. In our view, the answer is plainly no. These rules have not preserved college sports as an amateur enterprise. Quite to the contrary, major college sports has become a thoroughly commercial enterprise and carries only the façade of amateurism by maintaining a system of rules that, like apartheid systems throughout history, have separated races and classes from each other and assigned the burden to one, while reserving the financial rewards for the other. Whether the dynamic we describe is the product of "thoughtlessness[,] . . . indifference[,] . . . [or] benign neglect,"[286] if the NCAA and its

285. ALAN PATON, CRY, THE BELOVED COUNTRY 217–20 (Scribner Paperback Fiction 1987) (1948) (condemning the former system of racial apartheid in South Africa through the words of a fictional black mine worker). The economic pattern present in South Africa whereby blacks created wealth but were not permitted fair payment for their labor so it could be reserved for the profit of whites is equally present in college revenue-generating sports.

286. Alexander v. Choate, 469 U.S. 287, 295 (1985); *see also City of Black Jack*, 508 F.2d at 1185 (warning

member universities now insist upon maintaining their current regime, binding predominantly African-American athletes while confiscating the fruits of their labor, then they must concede that this modern form of apartheid is acceptable and leave it for history to judge.

that the "arbitrary quality of thoughtlessness can be . . . disastrous . . . to private rights and the public interest.").

"I'm His Coach, Not His Father." A Title IX Analysis of Sexual Harassment in College Sports

CAITLIN M. CULLITAN

"I've heard some of the horror stories out there. It's astonishing what people can get by with. The policy was in the plan to look at down the road but maybe we need to look at it sooner," stated the former director of the NCAA's education department, Janet Justus, in 1999.[1] Unfortunately for the victims of sexual harassment within the sports sphere "sooner" has yet to materialize more than a decade later.[2]

Sexual harassment within athletics is not a new phenomenon.[3] Some suggest that the very nature of competitive male sports makes student-athletes more aggressive.[4] Studies have estimated that, while male athletes only constitute a small percentage of the college community, they are responsible for nearly one-third of the sexual abuse crimes.[5] Further, some scholars suggest that sexual harassment is more of a problem in "'institutions characterized by hierarchical distributions of power,' structures which are common in intercollegiate sport environments."[6] The athletic field thus may be a breeding ground for sexual harassment.[7] Regrettably, the Supreme Court has analyzed only three sexual

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1. Robin Finn, *Out of Bounds: Growth in Women's Sports Stirs Harassment Issue*, N.Y. TIMES, Mar. 7, 1999, § 1, at 1.

2. *Id.*; *see also* Jesse Mendelson, *Sexual Harassment in Intercollegiate Athletics By Male Coaches of Female Athletes: What It Is, What It Means for the Future, and What the NCAA Should Do*, 9 CARDOZO WOMEN'S L.J. 597 (2003).

3. Todd W. Crosset et al., *Male Student-Athletes Reported For Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices*, 19 J. SPORT & SOC. ISSUES 126, 128 (1995). Note that sexual harassment on campus is not limited to the sports sphere; in fact, a recent poll suggests that almost two-thirds of college students believe they have been subject to a form of sexual harassment. Michael E. Buchwald, *Sexual Harassment in Education and Student Athletics: A Case for Why Title IX Sexual Harassment Jurisprudence Should Develop Independently of Title VII*, 67 MD. L. REV. 672 (2008).

4. Crosset et al., *supra* note 3, at 128.

5. Some scholars believe "that a potent mix of alcohol, arrogance, and ignorance, as well as an inherent propensity towards violence, makes the male athlete a particularly dangerous creature." Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 636 (2003) (citing CAROL BOHNER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 22-23 (1993)).

6. Deanna DeFrancesco, Jennings v. Institution of North Carolina at Chapel Hill*: Title IX, Intercollegiate Athletics, and Sexual Harassment*, 15 J.L. & POL'Y 1271 (2007) (citing Karin Volkwein-Caplan et al., *Sexual Harassment of Women in Athletics vs. Academia*, SEXUAL HARASSMENT AND ABUSE IN SPORT: INTERNATIONAL RESEARCH AND POLICY PERSPECTIVES 91, 93 (Celia Brackendridge & Kari Fasting eds., 2002)).

7. *Id.* at 1271; *see also* Kimberly M. Trebon, *There is No "I" in Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes*, 4 DEPAUL J. SPORTS L. CONTEMP. PROBS. 65, 76-78 (2007) (detailing various incidents where college athletes raped female students; a few examples include four Duquesne University basketball players accused of raping a woman in their dorm (1985), five West Virginia University basketball players accused of raping a woman in a campus dorm (1986), and five Southwestern Michigan College

harassment suits brought under Title IX, none of which addressed intercollegiate institutions or athletics.[8]

The phrase "sexual harassment" is noticeably absent from the statutory language of Title IX, which states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[9]

Nonetheless, the Supreme Court has held that sexual harassment is a form of sex discrimination and is therefore implicitly prohibited under Title IX of the Education Amendments (Title IX) of 1972.[10] One circuit court proffered that Title IX encompasses sexual harassment because sexual harassment is a "deprivation of 'educational' benefits," and "[t]he Statute recognizes that loss of educational benefits is a significant injury, redressable by law."[11]

Title IX's express enforcement schema is limited to the authority of the Department of Education's Office for Civil Rights (OCR)[12] to revoke federal funding from institutions not in accordance with the statute.[13]

In an attempt to guide institutions' application and adherence to Title IX, the OCR promulgated specific sexual harassment policies in 1997 and again in 2001.[14] The OCR has never revoked funding from an institution for non-compliance.[15]

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basketball team players charged with rape (1992)).

8. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60 (1992); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998). *See* Buchwald, *supra* note 3.

9. 20 U.S.C. § 1681 (2003); *see also* Grove City Coll. v. Bell, 465 U.S. 573, 573-74 (1984). In response to this case, Congress enacted the Civil Rights Restoration Act of 1987, which expanded the restrictive reading of "program" to make the institution as a whole subject to Title IX if any program (including athletics) within the institution receives federal funds.

10 *Davis*, 526 U.S. at 649-50; *see also* 20 U.S.C. § 1681 (2003); Parent, *supra* note 5, at 625 ("In passing Title IX, Congress sought to address the void in civil rights legislation concerning federal education programs." (citing 118 CONG. REC. 5803 (1972))).

11. Alexander v. Yale Univ., 631 F.2d 178, 184 (1980). In addition, one scholar noted that "[s]exual harassment threatens the educational missions because of its potentially devastating effects on a student's ability and willingness to learn." Buchwald, *supra* note 3, at 673. Repercussions include: "shock, humiliation, anxiety depression, substance abuse, suicidal thoughts, loss of self-esteem, social isolation, anger, distrust of others, fear of AIDS, guilt, and sexual dysfunction. Rana Sampson, *Acquaintance Rape of College Students*, *in* U.S. DEP'T OF JUSTICE, PROBLEM-ORIENTED GUIDES FOR POLICE, No. 17, at 8 (2006), *available at* http://www.cops.usdoj.gov/files/ric/Publications/e07063411.pdf.

12. *See* Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement,* 32 COLUM. J.L. & SOC. PROBS. 331, 333 (1999) ("OCR was designed to be an inexpensive, efficient, and effective method of correcting Title IX violations."). If the OCR determines the complaint to be valid, an OCR investigation will ensue. They will assess the situation from an objective perspective, and design a compliance plan with the institution for the institution to follow. While this appears to be an efficient, ideal theory, some scholars have argued that the OCR has not fulfilled its potential. *Id.*; *see also* Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education,* 77 TUL. L. REV. 387, 409 (2002) ("Private damages actions are what really give Title IX some teeth . . . .").

13. 20 U.S.C. § 1682 (2003).

14. U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), *available at* www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf. In its 2001 Revised Guidance, the Office of Civil Rights (OCR) defined sexual harassment as "unwelcome conduct of a sexual nature." The guidance dictates—and the OCR policies suggest—that institutions are required to implement grievance procedures that respond to alleged violations of Title IX. *Id.* at 2.

15. Many scholars argue this is so because revoking funding is such a draconian measure. Setty, *supra* note 12, at 411; *see also* THE NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC., COALITION REPORT ON TITLE IX (2007), *available at* http://www.womenssportsfoundation.org/Content/Articles/Issues/Equity-Issues/N/NCWGE-Coalition-

While revocation of funding is the statutory remedy for a violation of Title IX, the Supreme Court has implied a private right of action for individual victims.[16] In the absence of statutory standards, the courts have looked to Title VI, Title VII, and the OCR policies[17] for guidance.[18]

The conflation of Title IX jurisprudence, sexual harassment, and intercollegiate athletics has effectively constructed a unique paradigm for courts and educational institutions, and, arguably, the NCAA.[19] This article will delineate sexual harassment claims brought under Title IX, specifically focusing on student-athletes as the sexual harassers. The limited number of cases brought to the courts is significant; often the cases are handled internally, and the majority include secrecy provisions in their settlement agreements.[20]

Part I of this article will explain the impetus of a student's private right to bring a sexual harassment claim under Title IX and lay the foundation for the elements necessary to establish a *prima facie* case. Part II will focus on sexual harassment cases involving NCAA athletes as the alleged harassers.[21] All of these cases involve the most severe form of sexual harassment—rape.[22] The Ninth Circuit Court of Appeals has stated that "[r]ape is unquestionably among the most severe forms of sexual harassment . . . being raped is, at a minimum, an act of discrimination based on sex."[23] I will examine three recent cases: *Williams v. Board. of Regents of University System of Georgia,*[24] *J.K. v .Board of Regents of Arizona State,* [25] and *Simpson v. University of Colorado Boulder.*[26] These harassment suits can have a devastating impact on the universities' reputation and result in universities settling out of court at a heavy price.[27]

Report-on-Title-IX.aspx.

16. *Alexander*, 631 F.2d at 180 (citing 45 C.F.R. § 86.8(b)); Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979) ("We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination."). *See also* Setty, *supra* note 12, at 336-37.

17. *See* Setty, *supra* note 12, at 336-37.

18. A main goal of Title VI is to eliminate racial discrimination through a "prohibition against exclusion in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin." 42 U.S.C. § 2000d (2003). It was not until 1991 that under Title VII one could recover monetary damages that were limited to the proportion of the size of the employer. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998); *see also* § 2000e-2. For a thorough inquiry into the history of Title VII, see DeFrancesco, *supra* note 6 (citing MARGARET A. CROUCH, THINKING ABOUT SEXUAL HARASSMENT: A GUIDE FOR THE PERPLEXED (Oxford Univ. Press 2000); CATHERINE MACKINNON, WOMEN'S LIVES, MEN'S LAWS 162-83 (Belknap Press 2005); Reva B. Siegel, *A Short History of Sexual Harassment in* DIRECTIONS IN SEXUAL HARASSMENT 1, 1-26 (Catherine MacKinnon & Reva B. Siegel eds., 2004)).

19. Diane L. Rosenfeld, *Changing Social Norms? Title IX and Legal Activism: Concluding Remarks*, 31 HARV. J.L. & GENDER 407, 408 (2008).

20. *See generally* Jesse Mendelson, *supra* note 2. Most of the jurisprudence in this area concerns middle and high school students. *Id.* at 598. Reasons why these types of suits may not be brought to court include: fear, lack of courage, and not understanding what sexual harassment is.*Id.* at 600. Thus, it is very important to recognize the limitations of research concerning sexual harassment within the sports sphere. *See id.* at 601.

21. This article will focus on male-to-female sexual harassment, as there are no intercollegiate cases alleging same-sex sexual harassment. *See id.* at 598 n.11. This paper will also only focus on football and basketball players.

22. Jenni E. Spies, *Winning at All Costs: An Analysis of an Institution's Potential Liability for Sexual Assaults Committed by Its Student-Athletes*, 16 MARQ. SPORTS L. REV. 429, 430 (2006).

23. Little v. Windermere Relocation, Inc., 301 F.3d 958, 967-77 (9th Cir. 2001).

24. 477 F.3d 1282 (11th Cir. 2007).

25. No. CV-06-916-PHX-MHM, 2008 U.S. Dist. WL 4446712 (D. Ariz. Sept. 30, 2008).

26. 500 F.3d 1170 (10th Cir. 2007).

27. Barbara Osborne & Clare Duffy, *Title IX, Sexual Harassment, and Policies at NCAA Division IA*

Part III will suggest that Title IX jurisprudence is moving in a direction whereby the prior misconduct of a harasser gives an institution actual knowledge that an environment detrimental to students' educations could exist. Part III will propose that the NCAA should include a provision in its recruiting bylaws requiring all institutions to implement background checks for admitted student-athletes, which some institutions have already imposed within their athletic programs.[28] I will argue that background checks should give substantial evidence that an institution had "actual knowledge" of sexual harassment and that an institution's reaction and handling of a student who has a known criminal record speaks to the reasonableness of a university's response as a basis for imposing institutional liability.

I. SEXUAL HARASSMENT LAW UNDER TITLE IX

A. THE PRIVATE RIGHT OF ACTION

Title IX, prohibiting sex discrimination, was passed pursuant to Congress's legislative authority under the Constitution's Spending Clause;[29] thus, the recipients of federal funding must be provided with unambiguous notice of the conditions to which they are agreeing when accepting the funding.[30] The statutory language establishes an administrative enforcement scheme in which an individual can file a complaint with the Department of Education, who then has the authority to investigate.[31] Although Title IX did not explicitly authorize a private cause of action, the Supreme Court found an implicit right of private action for an individual under the protection of Title IX in *Cannon v. the University of Chicago*.[32] The Court further determined that a plaintiff does not have to exhaust administrative remedies prior to filing a private cause of action.[33] More than a decade after its decision in *Cannon*, the Supreme Court considered its first sexual harassment case under

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Athletics Departments, 15 J. LEGAL ASPECTS OF SPORT 59, 60 (2005) (discussing $300,000 and $45,000 settlements paid by the University of Tennessee and the University of Rhode Island, respectively). It is important to remember that while these universities had to pay a large sum of money, it is difficult to put a price on what sexual harassment victims endure.

28. *See generally* Lindsay Potrafke, *Checking Up on Student-Athletes: A NCAA Regulation Requiring Background Checks*, 17 MARQ. SPORTS L. REV. 427 (2006). The Idaho state legislature and individual universities have instituted policies such as these. *Id.* at 432. In Idaho, the legislature adopted a policy that barred admission for potential athletes if they were former felons without special approval from the college's president. *Id.* The University of Oklahoma has implemented a required background check policy for all transfer-athletes. *Id.* at 433.

29. U.S. CONST. art. 1, § 8. Pursuant to its spending power, Congress generates legislation contractual in nature, so the actor agrees to comply with the federally imposed conditions in return for the receipt of funds. This explains why an institution must be given notice before funding is removed. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); *see also* Litman v. George Mason Univ.., 186 F.3d 544, 551 (4th Cir. 1999) ("[Title IX] also conditions these funds on the recipient state's consent to be sued in federal court for an alleged breach of the promise not to discriminate.").

30. *Halderman*, 451 U.S. at 17.

31. Anne-Marie Harris & Kenneth Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Education Amendments of 1972 for Student and Faculty Sexual Harassment*, 8 AM. U.J. GENDER SOC. POL'Y & L. 575 (2000). While individuals have an implied right of private action to sue for sexual harassment under Title IX, individuals have no standing to enforce the termination of funding to an institution. 20 U.S.C. § 1682 (2003).

32. Cannon v. Univ. of Chi., 441 U.S. 677, 685 (1979).

33. *Id.* It is not necessary for a victim to exhaust administrative remedies (i.e. seek adjudication from the OCI) before filing a private claim. *Id.* at 688 n.8 (stating that the Department of Education (then Health, Education, and Welfare) "has apparently never taken the position that exhaustion [of administrative remedies] is required in every case").

Title IX in *Franklin v. Gwinnett County Schools*. In this case, a high school student alleged she was the victim of continuous sexual harassment by a coach/teacher at school who asked her sexually-charged questions, coerced her into intercourse, and called her at home. The school administrators knew about it but took no action. The Court determined that it was not the intent of Congress to limit the available remedies in a suit under Title IX and that the availability of all remedies is presumed unless Congress denotes otherwise.[34]

B. THE STANDARDS ESTABLISHING A SEXUAL HARASSMENT CLAIM UNDER TITLE IX

Since establishing a private right of action for sexual harassment claims in *Franklin*, the Supreme Court has decided two additional harassment cases under Title IX. In *Gebser v. Lago Vista Independent School District*[35] and *Davis v. Monroe County Board of Education*,[36] the Court focused specifically on the issue of institutional liability. It is helpful to analyze these two decisions in tandem.

1. GEBSER V. LAGO VISTA INDEPENDENT SCHOOL DISTRICT

During the 1991-1992 academic year, Frank Waldrop was Alida Gebser's ninth grade English teacher at Lago Vista High School.[37] Waldrop initiated sexual conduct with Gebser in the spring of 1992 when he visited her at her home, knowing she was alone.[38] The two engaged in a sexual relationship that lasted until January 1993 when a police officer caught them having intercourse.[39] Gebser never reported this relationship, and she did not dispute the fact that there was no evidence that a school official knew of Waldrop's sexual exploitation.[40] Gebser filed a Title IX suit against Lago Vista School District in 1995.[41] The district court granted summary judgment in favor of Lago Vista, which the Fifth Circuit Court of Appeals affirmed based on the Court's application of agency theory, strict liability, and constructive notice.[42]

2. DAVIS V. MONROE COUNTY BOARD OF EDUCATION

Lashonda Davis was a fifth grader in Monroe County, Georgia during the 1992-1993 school year.[43] In December 1992, a classmate (G.F.) allegedly harassed Davis by attempting

34. Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 66 (1992).

35. 524 U.S. 274 (1998).

36. 526 U.S. 629 (1999).

37. *Gebser*, 524 U.S. at 298.

38. *Id.* at 277.

39. *Id.* at 288. Waldrop was fired from his job, and he was arrested. *Id.* at 278.

40. *Id.* at 279.

41. Doe v. Waldrop, No. A-95-CA-126-SS, 1995 U.S. Dist. LEXIS 21947, at *1-4 (W.D. Tex. 1995).

42. Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1224-26 (5th Cir. 1997). It is important to note that these are not the same standards the Supreme Court applied to determine whether or not an institution may be held liable for sexual harassment under Title IX.

43. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999). This was the most recent Supreme Court case analyzing a sexual harassment claim brought under Title IX. In January 2009, the Supreme Court decided a sexual harassment case involving peer-to-peer harassment in elementary school. Fitzgerald v. Barnstable Sch. Comm.,

to grab her breasts and genital area and making vulgar statements to Davis, such as "I want to get in bed with you."[44] Davis told her mother and her teacher after each incident, and the teacher informed Davis's mother that the principal was aware of the incident.[45] The teacher did not move G.F from his seat next to Davis until after three months of Davis's consistent complaints.[46] Davis's mother filed a lawsuit alleging a violation of Title IX against the school board, the district superintendent, and the principal.[47] Her suit was dismissed for failure to state a claim upon which relief could be granted.[48] The court determined that relief could be granted only when a plaintiff was subjected to discrimination under "any education program or activity receiving Federal financial assistance."[49] The court found that the behavior of a fifth grader was not part of a school activity, and thus the institution could not have proximately caused her stress.[50] The Eleventh Circuit Court of Appeals reinstated her claim, finding that Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, while Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.[51]

3. THE SUPREME COURT ANALYSIS OF INSTITUTIONAL LIABILITY

The Supreme Court granted certiorari in *Gebser* and *Davis*, establishing the circumstances where a school can be held liable for the sexual harassment of a student by a teacher or another student.[52] In *Gebser*, the Court determined that the contractual nature of Title IX was modeled after Title VI's framework, not after Title VII's.[53] The Court reasoned that Congress would have limited the availability of damages under Title IX had it addressed employer liability and constricted the statutory language of Title VII and Title IX.[54] As a

129 S. Ct. 788, 792 (2009). In this case, the parents of a female student brought claims that her skirt was lifted up whenever she wore one; the lower courts found for the school, determining that the school did not have actual knowledge and responded reasonably when it learned of the harassment. *Id.* at 793. The Supreme Court found however that the student could still bring suit under 42 U.S.C. § 1983. *Id.* at 797.

44. *Davis*, 526 U.S. at 634.

45. *Id.* at 633-34.

46. After this continued harassment, Lashonda's grades began to drop, and her father found a suicide note. *Id.* at 634-35.

47. Aurelia D. v. Monroe Cnty. Bd. of Educ., 862 F. Supp. 363 (M.D. Ga. 1994).

48. *Id.* at 367.

49. *Id.*

50. *Id.*

51. Davis v. Monroe Cnty. Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996), *aff'd en banc*, 120 F.3d 1390 (11th Cir. 1997).

52. *See generally* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999).

53. *Gebser*, 524 U.S. at 285-86. ("It would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, i.e. without actual notice to a school district official.") The Court also determined the construction of the Title VII and Title IX statutes are different.*See id.* at 275. The main purpose of Title VII was to make the victim whole *after the fact* while the purpose of Title IX is to *protect students* from being subject to sexual harassment. *See id.* at 286; *see also* Buchwald, *supra* note 3, at 678.

54. *See generally Gebser*, 524 U.S. 274. The Court clarified that it only compared *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992) (Title IX claim) to *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), (Title VII sexual harassment claim) to explain that sexual harassment can constitute discrimination in violation of Title IX. *Gebser*, 524 U.S. at 282. This is very different from how the First Circuit in *Lipsett* v. *University of Puerto Rico* interpreted Title IX's relation to Title VII. 864 F.2d 881, 897 (1988) (finding that the

result, the Court concluded that the agency principle explicitly addressed in Title VII was not applicable to Title IX because "Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles."[55]

The Court, confirming the principle that Title IX is contractual in nature, concluded that a damages remedy will not be available for a sexual harassment lawsuit under Title IX unless (1) the institution is a federal funding recipient; (2) the sexual discrimination is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities;"[56] (3) an "official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination and fails adequately to respond;"[57] and (4) the institution's response amounts to "deliberate indifference,"[58] which "causes students to undergo harassment or make them liable or vulnerable to it."[59]

These standards created a framework for students to recover monetary damages from an institution whose students or teachers were sexually harassing students, thereby depriving them of an educational benefit.[60] While the circumstances amounting to institutional liability seem rather standardized, in reality, lower courts have interpreted *Gebser* and *Davis* inconsistently.[61] The most inconsistently interpreted elements that a victim must satisfy are "actual knowledge," and "deliberate indifference.".[62] In the cases discussed Part II, each court analyzes these prongs in a slightly different manner on appeal from summary judgment for the defendant. Ultimately, each court determines that a reasonable trier of fact could find for the plaintiff and thus remands the cases to the lower courts for trial.

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legislative history "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII" (citing H.R. REP. NO. 92-554 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2462)).

55. *Gebser*, 524 U.S. at 278. Thus, Gebser had no claim of action under Title IX because she could not demonstrate that a school official had "actual knowledge." *Id.* at 291-92. The fact that Waldrop was an "agent" of the institution who knew of the harassment (because he was the harasser) was insufficient. *Id.* at 292.

56. *Davis*, 526 U.S. at 631 (citing *Meritor*, 477 U.S. at 67).

57. *Gebser*, 524 U.S. at 290.

58. *Davis*, 526 U.S. at 645. Of these requirements, the Court stated in *Gebser* "[u]nder a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions." 524 U.S. at 290-91. *See also* Doe A. v. Green, 298 F. Supp. 2d 1025, 1035 (D. Nev. 2004) ("If . . . an institution either fails to act, or acts in a way which could not have reasonably been expected to remedy the violation, then the institution is liable for what amounts to an official decision not to end discrimination.").

59. In *Gebser*, the Supreme Court upheld the lower court's dismissal because Gebser did not demonstrate that a school official had actual knowledge. 524 U.S. at 277. In *Davis*, the Supreme Court remanded the case because there was a material issue of fact as to whether the institution had actual knowledge and that not moving Davis for three months after continuous complaints amounted to deliberate indifference. 526 U.S. at 633.

60. *See* Parent, *supra* note 5, at 627.

61. The lower courts have derived from *Gebser* and *Davis* several different formulations of the elements necessary to establish a prima facie Title IX case. *See* S.S. v. Univ. of Wash., 177 P.3d 724 (Wash. Ct. App. 2008) (comparing interpretations of *Gebser* and *Davis* by the Fourth, Sixth, and Eleventh Circuit Courts of Appeals and the Northern District Court of California).

62. Scholars have argued that this is an insurmountable standard for relief to be granted, and that many students are not getting relief because they cannot overcome this heavy burden. *See* Rosenfield, *supra* note 19, at 408.

II. RECENT CIRCUIT COURT CASES IN THE INTERCOLLEGIATE SPORTS SPHERE APPLYING DAVIS

A. INTERCOLLEGIATE ATHLETES AS SEXUAL HARASSERS[63]

Statistics suggest that male athletes are more likely than the average male college student to commit a crime.[64] A Federal Bureau of Investigation (FBI) report stated that the likelihood of a college athlete—primarily football and basketball players—committing a sexual assault is thirty-eight percent higher than that of an average male college student.[65] *Williams v. Board of Regents of the University System of Georgia* and *J.K. v Arizona Board of Regents*, decided in recent years, appear to represent a new trajectory for the "actual knowledge" inquiry under Title IX. Both embrace the theory that accepting a student into an institution that has a history of abuse may create an issue of material fact as to whether the institution had actual knowledge that this student could commit sexual harassment.[66] *Simpson v. University of Colorado Boulder* represents the dangers and risks of not reporting sexual crimes to the proper authorities, and demonstrates how the failure of personnel to respond to sexual harassment claims may establish a policy of deliberate indifference.[67]

1. WILLIAMS V. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA: A PLAYER WITH "PROCLIVITY" TO HARASS[68]

On January 14, 2002, Tiffany Williams, a student at the University of Georgia (UGA), went to the room of Tony Cole, a UGA basketball player, in the main dormitory for athletes.[69] After engaging in consensual sex with Williams, Cole went to the bathroom,

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63. The cases I have chosen to elaborate on are by no means an exhaustive list of athletes committing sexual abuse. Similar incidents have occurred at universities nationwide. At the University of Alabama at Birmingham, a fifteen-year-old student stated she became a "play thing" for about twenty football and basketball players. Benefield v. Bd. of Trs. of the Univ. of Ala. at Birmingham, 214 F. Supp. 2d 1212, 1214 (N.D. Ala. 2002). The University asked the girl two times if she was engaging in sexual intercourse with football players, and she told them no. *Id.* at 1223. The court held that the University did not have actual knowledge because she would not disclose to them what was happening, and that their response was not deliberate indifference because they did try to investigate the rumors. *Id.* at 1226. The court therefore dismissed the case for failure to state a claim, *id.* at 1228, but the parties settled before an appeal was filed. *UAB Settles Sexual Abuse Lawsuit*, ESPN.COM (May 28, 2003), http://a.espncdn.com/ncf/news/2003/0528/1559961.html.

64. I want to preemptively caution that there could be valid reasoning why this number is so high, such as that athletes are the "targets of unfounded claims." *See* Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against* Women, 31 COLUM. J.L. & SOC. PROBS. 167, 174 (1998). However, there are feasible reasons why male athletes might have committed unreported crimes: fearof reporting, lack of action taken by the school, etc..

65. *E.g.*, BOHMER & PARROT, *supra* note 5, at 21; Thomas N. Sweeney, *Closing the Campus Gates—Keeping Criminals Away from the Institution—The Story of Student-Athlete Violence and Avoiding Institutional Liability for the Good of All*, 9 SETON HALL J. SPORT L. 226, 230 (1999); *see also* R. Jake Locklear, *Policy Alone is Not a Deterrent to Violence*, NCAA NEWS (May 26, 2003), http://fs.ncaa.org/Docs/NCAANewsArchive/2003/Editorial/policy+alone+is+not+a+deterrent+to+violence+-+5-26-03.html (citing the 1993 Benedict-Crossett study where out of 107 sexual assaults, male athletes accounted for one-third of the perpetrators).

66. *See infra* notes 91, 119 and accompanying text.

67. *See generally* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007).

68. Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1304 (11th Cir. 2007).

69. The Eleventh Circuit accepted all of Williams' accusations as true because the district court granted the defendants' motion to dismiss and reviewed this case de novo. *Id.* at 1287 n.2 (citing Covad Commc'n Co. v. BellSouth Corp., 299 F.3d 1272, 1276 n.2 (11th Cir. 2002)).

slamming the door behind him.[70] Brandon Williams, a UGA football player who had been hiding naked in the closet, entered the room and began sexually assaulting Williams.[71] While this was occurring, Cole called another basketball player and a football player, Steven Thomas and Charles Grant, telling them they were "running a train on"[72] Williams.[73] Once Thomas arrived, Cole allowed him to enter, and Thomas then assaulted and raped Williams. After the assault was over, Williams returned to her dorm room.

The following day, after requesting that police reports be processed against Cole, (Brandon) Williams, and Thomas, (Tiffany) Williams withdrew from UGA.[74] The police submitted a report to the University Judicial Board approximately three months later, including interviews with the alleged harassers,[75] yet the institution delayed an additional five months before holding a hearing and did not sanction Cole, (Brandon) Williams, or Thomas.[76]

Williams brought a sexual harassment suit under Title IX against the Board of Regents and the UGA Athletic Association in June 2004.[77] Williams alleged that the head basketball coach at the time, James Harrick, was aware of Cole's past disciplinary and criminal problems.[78] For instance, Cole was dismissed from the Community College of Rhode Island, a college that Coach Harrick had assisted Cole in gaining admission to following allegations that he sexually assaulted and threatened two women.[79] In addition to knowing of Cole's alleged previous sexual harassment, the coaches made special accommodations for him because he did not meet the academic standards required to gain admission at UGA.[80] Coach Harrick contacted the President of the University, who had the sole discretion to admit him, and Cole was given a full scholarship.[81]

Williams further alleged that other student-athletes suggested to UGA coaches that the coaches should inform their student-athletes about the sexual harassment policy applicable

70. *Id.* at 1288.

71. *Id.*

72. "Running a train" means gang rape. *Id.* at n.3.

73. *See id.* at 1288 (noting that Thomas came over, but not Grant).

74. *Id.* The Fourth Circuit has urged that withdrawing from a program (i.e. an athletic team) is not necessary to demonstrate that the harassment was severe and pervasive because then courts are, effectively, punishing survivors. *See, e.g.*, Jennings v. Univ. of N.C., 482 F.3d 686, 707 (4th Cir. 2007). However, other federal courts have stated that if one remains on a team, then the environment is not severe enough to deny her of any educational opportunities. *See, e.g.*, Drews v. Joint Sch. Dist. No. 393, No. CV04-388-N-EJL, 2006 WL 851118, at *9 (D. Idaho Mar. 29, 2006).

75. A grand jury indicted them in early April 2002. *Williams*, 477 F.3d at 1289. A jury acquitted Brandon Williams, and the prosecutor dismissed charges against Cole and Thomas. *Id.*

76. *Id.* at 1296-97. By that time, two of the assailants were no longer attending the institution. *Id.* at 1289. The court rejected UGA's arguments that the Judicial Board within UGA chose to wait for the results of the pending criminal trials against the assailants because it did not interfere with UGA's ability to implement its own procedures, the criminal charges would not prevent future attacks, and the disciplinary proceedings were not initiated until four months after the acquittal and dismissal of charges. *Id.* at 1287. The three also faced criminal charges, but a jury acquitted Brandon Williams, and the prosecutor dismissed the charges against Cole and Thomas. *Id.* at 1289.

77. *Id.* at 1290. She also brought 42 U.S.C. § 1983 claims against the head basketball coach, the athletic director, the university president, and the Board of Regents of UGA, but these claims were properly dismissed by the District Court, according tothe Eleventh Circuit Court of Appeals. *Id.* at 1299-1302.

78. *Id.* at 1290.

79. Cole was later dismissed from Wabash Valley College for disciplinary problems. *Id.* at 1290. Cole pleaded "no contest" to the criminal charges associated with the alleged assaults. *Id.*

80. *Id.* at 1290.

81. *Id.*

to them.[82] She also alleged that despite UGA's responsibility to ensure that student-athletes comply with UGA policy, no one informed student-athletes of such policy, and that the University also failed to enforce the policy against football and basketball players.[83]

The trial court dismissed Williams's Title IX claim[84] because the court determined that the institution did not act with deliberate indifference upon receiving knowledge of the alleged harassment.[85] The Eleventh Circuit Court of Appeals reviewed the case de novo, thus accepting all Williams's alleged facts as true.[86] The court first concluded there was no dispute as to whether UGA was a federal funds recipient.[87] Although the alleged incident occurred just one time, the court determined that the incident, coupled with the institution's response to the harassment, constituted a "pervasive" and "severe" environment.[88] This environment "effectively bar[red] [her] access to an educational opportunity or benefit."[89] The court next determined that the athletic director, Vincent Dooley, and president of the institution, Michael Adams, were both "appropriate persons," who had "actual knowledge" of the discrimination Williams faced, including (1) the recruitment of Tony Cole despite his criminal and disciplinary record; (2) the alleged rape; and (3) the discrimination Williams further endured as a result of UGA's failure to respond to her allegations.[90]

In determining whether or not Williams had alleged facts sufficient to establish deliberate indifference, the court compared deliberate indifference in a Title IX context to deliberate indifference in the municipal liability context.[91] The court stated that in the municipal liability context, deliberate indifference can be proven by showing that "the municipality knew of a need to . . . supervise in a particular area and the municipality made a deliberate choice not to take any action."[92] The court determined that deliberate

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82. *Id.* at 1296.

83. *Id.* at 1290. This analysis is limited to student-athletes, and the responsibility that coaches and athletic departments have for student-athletes as compared to the general student body.

84. Williams v. Bd. of Regents of the Univ. Sys. of Ga., No. Civ-A-103-CV-2531-CAP, U.S. Dist. 2004 WL 5545037 (N.D. Ga. June 30, 2004).

85. *Id.* The court noted that she voluntarily withdrew after the incident. *Id.* at 6. ("[I]t is probable that she withdrew before action could be taken against her assailants. Moreover, the plaintiff further indicates that none of the three assailants is currently a student within the State of Georgia. Because none of three assailants currently attends the University of Georgia and because the plaintiff herself no longer attends the University, prospective relief affords her no remedy at all.")

86. *Williams*, 477 F.3d at 1291.

87. *Id.* at 1294. The court relied on *Communities for Equity v. Michigan High School Athletic Association,* 80 F. Supp. 2d 729, 733-34 (W.D. Mich. 2000), which held that an athletic department was a federal funding recipient and warning that if athletic departments were not included with the institution, then they could get away with sexual discrimination.

88. *Williams*, 477 F.3d. at 1297(noting that in *Davis*, the Supreme Court said that an institution might not be responsible to maintain the same level of control over its students as a primary or secondary school, but finding that UGA exercised little to no control (citing Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999))).

89. *Id.* at 1298 (quoting *Davis*, 526 U.S. at 633).

90. *Id.* at 1297.

91. *Id.* at 1295. Prior to *Gebser*, the Court adopted the deliberate indifference standard when determining a municipality's liability "for claims under § 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation." Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291 (1998). In adopting the deliberate indifference standard in Title IX cases that do not involve allegations of discrimination resulting from the Title IX recipient's official policy, the *Gebser* Court noted that "comparable considerations"—namely, to impose liability only for official decisions by the defendant not to remedy the violation and not for the independent actions of employees—supported the use of the deliberate indifference standard in both Title IX and § 1983 municipal liability cases. *Id.*

92. *Williams*, 477 F.3d at 1295 (quoting Gold v. City of Miami, 151 F.3d 1346, 1350-51 (11th Cir. 1998)).

indifference included two components: it "cause[s] [students] to undergo harassment,"[93] and occurs in response to the discrimination faced.[94]

Viewing the evidence in the light most favorable to Williams, the court determined that UGA admitted Cole with knowledge of his "proclivities," failing to inform the student-athletes about the sexual harassment policies, and that its failure to implement safeguards against these particular students amounted to deliberate indifference under the *municipal liability standard*.[95] This court, however, stated that deliberate indifference under Title IX required more than failure to implement safeguards. The court went on to note that the institution's response to the rape did nothing to "assuage" Williams's fears.[96] Thus, the failure to take action in response to the incident, *in addition to satisfying the municipal liability standard*, amounted to deliberate indifference.[97] The court held Williams alleged sufficient facts to withstand a motion to dismiss and reinstated her claim.[98]

2. J.K. V. ARIZONA BOARD OF REGENTS: DELIBERATE INDIFFERENCE IS A QUESTION FOR THE JURY[99]

J.K. alleged that Darnel Henderson, a football player at Arizona State University (ASU), raped her while she was unconscious in her dormitory room on March 12, 2004.[100] J.K told her roommate about the incident, who informed her resident assistant the following day.[101] The resident assistant informed both the Department of Public Safety, who immediately dispatched an officer, and the head of ASU Student Life and Judicial Affairs, Dr. Sullivan, who enforced the ASU Student Code of Conduct.[102]

Nearly a month later, on April 4, 2005, Dr. Sullivan issued Henderson a written notice of charges, indicating that there was probable cause that Henderson had raped J.K.[103] Henderson was told to move out of the dormitory and was suspended from the football program on the day he received the written notice. On May 10, 2004, Henderson was notified that he had been expelled from the institution.[104] The Department of Public Safety also concluded that Henderson had non-consensual intercourse with J.K., and the university did not deny that this incident occurred.[105]

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93. *Id.* at 1296 (quoting *Davis*, 526 U.S. at 633).

94. *Id.* at 1295 (quoting *Davis*, 526 U.S. at 633).

95. *Id.* at 1292-96.

96. *Id.* at 1298.

97. *Id.* at 1296. The court stated that the alleged harassers could have been removed from student housing or suspended, or the university could have implemented a more protective harassment policy following the alleged incident. *Id.* at 1297. Because the institution failed to do any of this, it was certainly reasonable and understandable why Williams no longer attended UGA. *See id.*

98. *Id.* at 1296.

99. J.K. v. Ariz. Bd. Of Regents, No. CV-06-916-PHX-MHM, 2008 U.S. Dist. WL 4446712, at *8-9 (D. Ariz. Sept. 30, 2008).

100. *Id.* at *2. The evidence did not state the reason that she was unconscious nor did they state whether or not she woke up during the alleged rape. *See id.* at *1-3.

101. *Id.* at *2.

102. *Id.*

103. *Id.* at *3.

104. *Id.*

105. *Id.* The court opinion did not state when the Department of Public Safety made its final determination, nor did it state whether Henderson was subject to criminal charges as well. *See id.* at *2-3.

J.K. filed the complaint on March 10, 2006, alleging that ASU was in violation of Title IX for subjecting her to discrimination.[106] Because this was a motion for summary judgment, the court accepted J.K's facts as true. J.K. alleged that between June 18 and July 17, 2003, during the ASU Bridge Program,[107] Henderson physically intimidated, made threatening remarks to, exposed his genitalia to, and inappropriately grabbed females on campus.[108] This behavior was severe enough to make several female staff members fearful that Henderson might physically or sexually assault them. As a result, at least one staff member quit and a female moved out of the dormitory where Henderson resided.[109]

The Director of Academic Success and Director of the Summer Bridge Program, Steve Rippon, whom the court found to be an "appropriate authority," spoke with Henderson about his inappropriate conduct.[110] Henderson remarked that he wanted "to show [women] their place." Rippon consequently expelled Henderson from the program but failed to report him to Student Judicial Affairs.[111] On the day Henderson was expelled from the Summer Bridge Program, Jean Boyd, the assistant athletic director, sent an e-mail to Coach Koetter detailing the reasons for Henderson's expulsion from the program.[112]

In August 2003 Henderson was allowed to return to ASU, play football, and live in the same dormitory as he had during the summer program.[113] Jean Boyd reported that Henderson was "the highest risk individual in the group [of freshman football players] both socially and academically."[114] Henderson's joining the football program was supposed to be contingent on "a 'three strikes' or 'zero tolerance' plan, designed by Koetter, and recognized as necessary by the football program."[115] That plan never came to fruition.[116]

Both parties agree that the harassment deprived J.K. of educational benefits.[117] Despite the fact that he had never harassed J.K. until this incident, the court found that ASU had knowledge of Henderson's harassment over the summer and the authority to redress the misconduct. This was enough to satisfy the actual knowledge prong.[118] In addition, Coach Koetter knew of the behavior and had the authority to implement corrective measures, further establishing the existence of actual knowledge.[119] The defendants asserted they did not have actual knowledge of the harassment since Henderson's prior conduct was not directed towards J.K., but:

> [t]he Davis court did not limit Title IX liability to a federal education funding recipient's knowledge of, and deliberate indifference to, the alleged harassment of *a particular individual,* but instead contemplated that Title IX claims could be

106. *Id.* at *3.

107. The ASU Summer Bridge Program is a program intended to help high school students transfer from high school to college. *Id.* at *1. Henderson and J.K. had not met until the night he allegedly raped her. *Id.* at *2.

108. *Id.* at *1.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at *2.

114. *Id.*

115. *Id.* The court did not state that coming to the university was contingent to this plan—just the joining the football team. *See id.*

116. *Id.*

117. *Id.* at *12 (noting that rape "obviously qualified as being severe, pervasive, and objectively offensive sexual harassment that could deprive [the victim] of access to the educational opportunities provided by her school"(quoting Soper v. Hoben, 195 F.3d 845, 855 (6th Cir. 1999))).

118. *Id.*

119. *Id.*

based on the recipient's knowledge of, and deliberate indifference to, a *particular harasser's* conduct in general.[120]

Thus, because the defendants knew of a *substantial risk of abuse* to students based on Henderson's prior misconduct, the actual knowledge prong was satisfied.[121]

The court based its decision as to the deliberate indifference prong on whether the university's response to the rape was "clearly unreasonable" in light of known facts.[122] The *J.K.* court also looked to liability under the municipality standard when it noted that "'[d]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions."[123] Although the defendants kicked Henderson out of the Summer Program, they invited him back, did not implement any policy to monitor or guide him, and allowed him to live in the same residence hall that he had been kicked out of that summer.[124] The court, noting that the question of whether a defendant acted with deliberate indifference or not is best left to the jury, held that it could not be said the defendants' response was clearly reasonable in light of known circumstances.[125]

3. SIMPSON V. THE UNIVERSITY OF COLORADO BOULDER: A POLICY OF DELIBERATE INDIFFERENCE

The plaintiffs, then students at the University of Colorado Boulder (CU), alleged that they were sexually assaulted on December 7, 2001[126] by CU football players and high school recruits[127] in one of the plaintiff's apartments.[128] The plaintiffs asserted that a female

120. *Id.* at *14 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644-45 (1999)); *see also* Escue v. N. Okla. Coll., 450 F.3d 1146, 1153 (10th Cir. 2006) (stating that because "actual knowledge of discrimination in the recipient's program is sufficient . . . harassment of persons other than the plaintiff may provide the school with the requisite notice to impose liability under Title IX"); Delgado v. Stegall, 367 F.3d 668, 672 (7th Cir. 2004) (determining that "in *Davis* the Court required knowledge only of 'acts of sexual harassment' by the [harasser] . . . not of previous acts directed against the particular plaintiff" (citing *Davis*, 526 U.S. at 641, 653-54); Doe v. Green, 298 F. Supp. 2d 1025, 1033 (D. Nev. 2004) (stating that "actual knowledge of a substantial risk of abuse to students based on prior complaints by other students" (quoting Johnson v. Galen Health Insts., Inc., 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003))).

121. *J.K.*, 2008 U.S. Dist. WL 4446712, at *13-14 ("The Supreme Court made clear in *Davis* that the focus of Title IX liability lies on the conduct of the harasser, not the victim, and the funding recipient's knowledge of harassment and control over the harasser and the context in which the harassment occurs." (citing *Davis*, 526 U.S. at 645)); *see also Johnson*, 267 F. Supp. 2d at 688("[T]he actual notice standard is met when an appropriate official has actual knowledge of a substantial risk of abuse to students based on prior complaints by other students.").

122. *J.K.*, 2008 U.S. Dist. WL 4446712 at *14.

123. *Id.* at *8 (quoting Bryan Cnty. v. Brown, 520 U.S. 397, 410 (1997)).

124. *Id.* at *2. It is very important here to note here that the court did not require "something more" than satisfaction of liability under a municipality context as it did in Williams. *See id.* at *13-14. Here, it is arguable that after the alleged rape, the University's response was reasonable aside from the fact that Henderson was not removed from the dorm. *See id.* at *3. Thus it appears the *J.K.* court focused more on what happened before the rape in addition to the belief that "deliberate indifference" is a better question for a jury than what occurred after the alleged rape.

125. *Id.* at *16-17; *see also* Waugh v. Pearce, 954 F.2d 1470, 1478 (9th Cir. 1992) ("Whether a local government entity has displayed a policy of deliberate indifference is generally a question for the jury.").

126. CU had won the Big 12 Conference championship on December 1, 2001. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1180 (10th Cir. 2007).

127. Recruiting practices were an issue at a number of other schools during this time period, including the

tutor knew that they were having a "girls' night in" and asked if a few football players and recruits could come to the apartment.[129] Between sixteen and twenty players arrived at the apartment.[130] The facts were described by the district court as follows:

> Many of the players and recruits had been drinking and smoking marijuana . . . About 30 minutes later, some of the players and recruits decided to leave the apartment. Player #2 who was preparing to leave was approached by the tutor. The tutor told him that he should not leave because "it was about to go down." Player #2 understood her comment to mean that female students would provide sexual favors to the players and the recruits.[131]

Around this time, Simpson began to feel tired and went to her room. The next event she remembered was two recruits removing her clothes and the players and recruits standing around her bed while the recruits assaulted her.[132]

Simpson filed her complaint in federal district court on December 8, 2003.[133] The district court granted summary judgment in favor of the defendants on March 31, 2005, finding that no reasonable person could determine that "(1) CU had actual notice of sexual harassment of CU students by football players and recruits before the assaults or (2) that CU was deliberately indifferent to such harassment."[134]

The appellate court prefaced its analysis with the determination that the actual notice and deliberate indifference components of a prima facie case of harassment under Title IX established in *Davis* and *Gebser* did not translate to the context of the plaintiffs' case because the plaintiffs alleged that CU "sanctioned, supported, even funded a program (showing recruits a 'good time') that, without proper control, would encourage young men to engage in opprobrious acts."[135] The court drew from municipal liability standards, recognizing that under § 1983 municipal liability, the "deliberate indifference" standard changes when the claim implicates official policy, even when the underlying principle, that an institution can only be liable for its own acts, is maintained.[136] Applying these principles, the court started its analysis by determining that when an official policy causes a violation,

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University of Miami where Willie Williams, after a recruiting trip to Miami, had a warrant out for his arrest (among the ten charges was a battery). The University of Miami ultimately admitted Williams nonetheless. *Williams Is Admitted to Miami*, L.A. TIMES, July 28, 2004, at D8. Recruiting practices such as these influenced the NCAA to take action; in 2004, the NCAA created a task force to review recruiting practices and has thus implemented new recruiting rules. Mark Schlabach, *NCAA Cracks Down on Recruiting Practices: Division I Board of Directors Approves Rules Changes Banning Charter Flights, Extravagant Meals, Other Perks*, WASH. POST, Aug. 6, 2004, at D1.

128. *Simpson*, 500 F.3d at 1172-80.

129. *Id.* at 1180.

130. *Id.*

131. Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1232 (D. Colo. 2005), *rev'd*, 500 F.3d 1170 (10th Cir. 2007).

132. *Simpson*, 500 F.3dat 1180. Gilmore, the second plaintiff, alleged that three other women were sexually harassed by players in the apartment and a fourth was forced to engage in sexual intercourse with two players after leaving the apartment. *Id.*

133. *Id.* at 1173. Simpson withdrew from CU, and Gilmore, the second plaintiff, eventually left CU for one year. *Id.* at 1180.

134. *Id.* at 1174.

135. *Id.* at 1177.

136. *Id.* at 1176 (noting that this differed from the analysis in *Davis* and *Gebser* where institutions would not be held liable unless they intentionally subjected the student to the harassment and deliberately decided not to remedy the situation(citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 642 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998))).

the funding recipient can be held to have acted with deliberate indifference, and that the central question in the plaintiffs' case was whether the risk of such an assault was obvious.[137]

The court referenced the plaintiffs' allegations which included additional facts indicative of the program's lack of supervision.[138] In 1997, a fifteen year old girl was allegedly assaulted by CU recruits at a party hosted by a CU football player in 1997.[139] Following this incident, the local district attorney met with top CU officials, and advised them to develop practices to supervise their recruits.[140] However, they did little to change their policies.[141] Further, in 2000, the father of Katharine Hnida, a female player on the CU football team in 1999 told Coach Barnett and Athletic Director Richard Tharp "about multiple instances of sexual harassment of [his] daughter by CU football players, which the coaching staff had allowed to continue."[142] In 2001, a female student trainer reported that a football player had raped her. A football department staff member arranged for her to meet with Coach Barnett, who the student felt tried to pressure her out of pursuing criminal charges.[143] Coach Barnett responded by telling the student he was the player's coach and "not his father;" "thus, he would not punish him" and that he would "support the player."[144] Moreover, in 2001, Coach Barnett hired an assistant coach with a record of assaulting women, and had previously been banned from campus.[145]

After Simpson's assault was reported to police,[146] CU revoked spring semester scholarships for four football players allegedly involved in the assault.[147] However, Coach Barnett acknowledged that he urged admission of one of the recruits involved in the incident despite knowing that the evidence against that particular recruit was "overwhelming."[148]

Applying the municipal liability schema, the court found "(1) that CU had an official policy of showing high school football recruits a 'good time' on their visits to the CU campus," (2) that CU failed to adequately supervise and guide player-hosts whose priority was to show the football recruits a "good time," and (3) that the probability that such

137. *Id.* at 1178-81. ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible (quoting Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 694 (1978))). The court compared Coach Barnett to a police chief. *Id.* at 1184.

138. *Id.* at 1183.

139. *Id.* at 1173.

140. Mike Freeman, *Using Sex to Sell Recruits*, MILWAUKEE J. SENTINEL, Nov. 24, 2002, at 1C (quotingBoulder District Attorney Mary Keenan as saying "in no uncertain terms that if [CU] did not straighten out what happens at these recruiting parties, . . . we would take it very seriously if anything like this occurred again.").

141. *Id.*

142. *Simpson*, 500 F.3dat 1183. Barnett responded to a reporter's question by criticizing his former place-kicker's on-field performance: "It was obvious Katie was not very good. She was awful. You know what guys do? They respect your ability. You can be 90 years old, but if you can go out and play, they'll respect you. Katie was not only a girl, she was terrible. O.K.? There's no other way to say it." Bill Pennington, *College Football; Colorado Puts Football Coach on Leave,* N.Y. TIMES, Feb. 19, 2004, http://www.nytimes.com/2004/02/19/sports/college-football-colorado-puts-football-coach-on-leave.html. Coach Barnett was placed on paid administrative leave by CU President Elizabeth Hoffman following his comments. *Id.*

143. *Simpson*, 500 F.3d at 1183.

144. *Id.* at 1183.

145. *Id.* at 1184.

146. The opinion did not indicate the day she reported the incident. *Id.*

147. *Id.*

148. *Id.*

misconduct would occur was so obvious that it amounted to deliberate indifference.[149] The court thus determined that summary judgment was inappropriate and that Simpson's allegations should be submitted to a jury.[150]

III. NCAA REQUIRED BACKGROUND CHECKS AND IMPLICATION FOR TITLE IX JURISPRUDENCE

A. THE NCAA HAS THE AUTHORITY TO REQUIRE BACKGROUND CHECKS

The National Collegiate Athletic Association (NCAA) is an unincorporated voluntary association comprised of several hundred member colleges and universities.[151] A primary purpose of the NCAA is to "establish programs to govern, promote, and further the purposes and goals of intercollegiate athletics."[152] Its members select representatives to promulgate and pass the NCAA bylaws,[153] but the bylaws do not address or respond to violence committed by potential student-athletes.[154] As the authoritative body for its member institutions, the NCAA promulgates and amends any regulations necessary to accomplish its purposes, so long as Congress has not enacted legislation that effectively overturns the NCAA's regulations.[155]

In order to impose a new rule or regulation, an NCAA proposal to amend an existing bylaw or create a new bylaw must be submitted at a Division I member convention.[156] The proposal must clearly identify the legislative rule or regulation of the current NCAA manual that the member wishes to amend and explain the purpose of the proposal and its effects.[157] This proposal is then submitted to the appropriate NCAA committee, which makes a decision on the proposal.[158]

The NCAA has existing regulations that increase an institution's accountability for its student-athletes.[159] For instance, the NCAA implemented a policy requiring student-athletes to fulfill a satisfactory academic progress and graduation rate.[160] The NCAA requires a forty

149. *Id.* at 1173. After the Tenth Circuit Court of Appeals reversed the lower court, CU settled the case, paying $2.5 million to Simpson and $350,000 to the other plaintiff. Allison Sherry, *CU Settles Case Stemming From Recruiting Scandal*, DENVER POST, Dec. 6, 2007, http://www.denverpost.com/snowsports/ci_7645722?source=pkg.

150. *Simpson*, 500 F.3dat 1185. Coach Barnett left in 2005, with a $3 million buyout "based on a combination of factors." Keith Niebuhr, *The Mess Mounts For CU, Barnett*, ST. PETERSBURG TIMES, Dec. 13, 2005, at 3C; *see also Barnett Forced Out; Receives $3 Million Settlement*, ESPN.COM, Dec. 9, 2005, http://sports.espn.go.com/ncf/news/story?id=2252252.

151. *See* NCAA v. Califano, 622 F.2d 1382, 1385 (10th Cir. 1980). These members appoint representatives who promulgate and pass the NCAA bylaws. *NCAA Organizational Overview*, NCAA.ORG, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/Overview/index.html (last visited Oct. 31, 2010).

152. *Id.*

153. *See* NCAA, DIVISION I MANUAL art. 5.2.2, at 32 (2007-08) [hereinafter MANUAL]. The NCAA has bylaws on issues like recruiting and eligibility. *See id.* art. 13, at 77 (recruiting); *id.* art. 14, at 125 (eligibility).

154. *See id.* art. 2.3.2, at 4 ("The Association should not adopt legislation that would prevent member institutions from complying with applicable gender-equity laws, and should adopt legislation to enhance member institutions' compliance with applicable gender-equity laws.").

155. Potrafke, *supra* note 28, at 437.

156. MANUAL, *supra* note **159**, art. 5.3, at 33.

157. Potrafke, *supra* note 28, at 438.

158. *Id.* at 437-38.

159. *Id.* at 435.

160. *Id.*

percent completion of a degree by the end of a student-athlete's second year, sixty percent completion at the end of the third year, and eighty percent completion at the end of the fourth year.[161] Failure to comport with these regulations can result in sanctions to the institution, including scholarship reductions, limits on recruiting, and ineligibility for NCAA post-season competition.[162]

The NCAA also oversees member universities' recruitment practices.[163] The member institutions must design their own recruitment policies and get these policies approved by the president of their institution.[164] The policies must prohibit the use of alcohol, sex, and gambling and limit the amount of money spent on recruiting visits.[165] These recruitment bylaws are a preemptive safeguard to protect both the football recruits and students at NCAA member institutions.[166]

Background checks are another preemptive measure that the NCAA could implement in order to prevent student-athlete violence.[167] Like the recruitment and consent-to-drug-testing bylaws, background checks have similar underlying purposes: to reduce the incidence of violent crime among student-athletes and to create a safer environment for the athletes and the students of the member institutions.[168]

The NCAA is the ideal vehicle to implement these checks because it could codify a background check requirement bylaw to which all member institutions must conform, yet still permit an institution to enforce these bylaws and retain its autonomy.[169] That is, the NCAA could delineate guidelines to which a member institution must adhere when it designs its own policy. This is significant for a number of reasons. First, a uniform policy would not unfairly disadvantage a team who is "doing the right thing."[170] For instance, in the midst of the *Simpson* scandal, Coach Barnett was concerned that by reforming the recruitment policies, CU would lose its "competitive edge."[171] On the other hand, a few

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161. MANUAL, *supra* note **159**, art. 14.4.3.2, at 150.

162. Potrafke, *supra* note 28, at 436.

163. *See generally* MANUAL, *supra* note **159**, art. 13, at 77-124.

164. Potrafke, *supra* note 28, at 436; MANUAL, *supra* note **159**, art. 13.6.1, at 103.

165. Potrafke, *supra* note 28, at 436; *see also* Press Release, NCAA, Division I Management Council Endorses New Rules for Recruiting Student-Athletes (July 20, 2004), *available at* http://fs.ncaa.org/Docs/PressArchive/2004/Legislation/Division+I+Management+Council+Endorses+New+RuleS+for+Recruiting+Student+Athletes.html.

166. *See generally* Potrafke, *supra* note 28.

167. *Id.* Although outside the scope of this paper, I would also suggest that the NCAA require schools to implement a code of conduct, a tiered system based on what "level of offense" they have committed. Sanctions for students would be proportionate to the offense, such as seeing a counselor for lesser offenses or expulsion for greater offenses. The code of conduct should explicitly and broadly enumerate the types of behavior that are expected of each student-athlete, such as compliance with all state and federal lawsand the NCAA bylaws, and warn student-athletes that failure to comply with this code of conduct will result in disciplinary action. The NCAA should require that the institutions respond in a "reasonable period" of time. This might influence institutions to design procedures in response to complaints of crime by their athletes in the interest of avoiding sanctions from the NCAA. For a suggestion of what an NCAA code of conduct should look like, see Brandon Gutshall, *A New Uniform: NCAA Policy and Student-Athlete Misconduct*, 76 UMKC L. REV. 727 (2008).

168. *See* Potrafke, *supra* note 28, at 432.

169. *See id.* at 438.

170. I am not trying to assert that "doing the right thing" is rejecting a potential student-athlete because of his or her record. Coaches doing their homework and remaining vigilant when universities accept athletes with known records are, arguably, "doing the right thing."

171. Patrick O'Driscoll, *Colorado Allegedly Used Sex Parties to Lure Football Recruits*, USA TODAY, Jan. 30, 2004, http://www.usatoday.com/sports/college/football/big12/2004-01-29-recruits-sex_x.htm. In response to the scandals at CU and the University of Miami,, the NCAA formed a task group to research and implement

institutions and the Idaho state legislature, have already implemented background checks in an attempt to reduce student-athlete violence; if these institutions' teams have lost their competitive edges, establishing a standard bylaw will promote fairness.[172]

B. AN NCAA BYLAW REQUIRING A BACKGROUND CHECK IS CONSTITUTIONAL

Courts have reviewed NCAA bylaws in claims against both the NCAA and member institutions enforcing the NCAA bylaws.[173] Courts have also shown great deference to the NCAA bylaws and the institutions that implement them.[174] For example, the NCAA drug testing bylaw was held not be an invasion of the student-athlete's privacy in *Brennan v. Board of Trustees*.[175] The court upheld the bylaw, because student-athletes already have diminished expectations of privacy due to the nature of athletics, they are given notice of the testing and must consent to such testing, and because the NCAA had a legitimate goal of protecting the safety of student-athletes.[176] Students have also challenged NCAA bylaws claiming that they are arbitrary or capricious, and many courts have determined that, whether the bylaws are arbitrary or capricious depends on the rules being "fairly and honestly administered."[177] In *Bloom v. NCAA*,[178] the court found the NCAA was not

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recruitment policies. Neill Woelk, *NCAA Panel to Review Recruiting Regulations*, BOULDER DAILY CAMERA, Feb. 12, 2004, at A1.

172. Potrafke, *supra* note 28, at 431-32. The North Carolina University System, which includes sixteen colleges, began running background checks on certain students in 2006;since its inception, 101 students have been denied admission based on their records. Mary Beth Marklein, *Should College Applicants Get Background Checks?*, USA TODAY, Apr. 18, 2007, http://www.usatoday.com/news/nation/2007-04-17-blcover_N.htm. The Idaho Legislature adopted a state policy restricting public colleges and universities from recruiting felons absent a waiver granted by the University President. IDAHO STATE BD. OF EDUC., GOVERNING POLICIES AND PROCEDURES MANUAL (2007), http://www.boardofed.idaho.gov/policies/documents/policies/iii/iii_t_intercollegiate_athletics_06-07.pdf. The University of Oklahoma adopted a policy in 2005 to background check all of their incoming student-athletes. Marklein, *supra*. The athletic director, Joe Castiglione said: "It's due diligence, and we think it helps us create a better profile on the prospective student-athletes we're bringing in. We're not going to catch every single thing . . . but if we don't do this, someday someone else is going to walk in to my office and say 'Did you know about this? Did you check?'" Greg Auman, *Background Checks Vary; Schools Fear Surprises*, ST. PETERSBURG TIMES, Mar. 6, 2005, http://www.sptimes.com/2005/03/06/Sports/Background_checks_var.shtml. California State University, Fresno will not sign prospective student-athletes who have been convicted of a felony, and will only sign those who have been convicted of misdemeanors with the approval of the coaches and university personnel. CAL. STATE UNIV. FRESNO STUDENT ATHLETE RECRUITMENT CODE (2001), *available at* www.csufresno.edu/aps/documents/apm/410.pdf.

173. Potrafke, *supra* note 28, at 427. The Supreme Court has determined that the NCAA is not a state actor. *See* NCAA v. Tarkanian, 488 U.S. 179, 197 (1988). *But see* Brennan v. Bd. of Trs. for Univ. of La. Sys., 691 So. 2d 324, 329 (La. Ct. App. 1997) ("Without question, [a public university] is a state actor even when acting in compliance with NCAA rules and recommendations.).

174. *See, e.g.*, Cole v. NCAA, 120 F. Supp. 2d 1060, 1072 (N.D. Ga. 2000) ("[C]hallenges of student-athletes [against the NCAA] are entitled to considerable deference . . . ."); Jones v. NCAA, 679 So. 2d 381, 382 (La. 1996) ("[C]ourts should not interfere with internal affairs of private association except in cases when affairs and proceedings have not been conducted fairly and honestly, or in cases of fraud, lack of jurisdiction, the invasion of property or pecuniary rights, or when action complained of is capricious or arbitrary, or unjustly discriminatory.").

175. *Brennan*, 691 So. 2d at 329-30; *see also* Hill v. NCAA, 865 P.2d 633, 669 (Cal. 1994) (holding that while drug testing implicates privacy interests protected by the California constitution, the NCAA's countervailing interests outweighed plantiffs' reasonable expectation of privacy (citing CAL. CONST. art. I, § 1)).

176. *Brennan*, 691 So. 2d at 330.

177. La. State Bd. of Educ. v. NCAA, 273 So. 2d 912, 923 (La. Ct. App. 1973).

178. 93 P.3d 621 (Colo. App. 2004).

inconsistently applying its rules and bylaws regarding amateur status against the plaintiff, and thus was not acting arbitrarily or capriciously.[179]

In order for an NCAA bylaw requiring a background check to withstand judicial review, the NCAA should: (1) satisfy the three privacy interest criteria in *Brennan*; (2) apply the standard to all students consistently to avoid review for "arbitrarily and capriciously" enforcing the check; and (3) delineate guidelines to which an institution must adhere in creating policy.[180]

1. WITHSTANDING THE BRENNAN TEST

First, as to privacy interests, the NCAA has the authority to enforce a background check because, as the *Brennan* court said, athletes already have a reduced expectation of privacy.[181] Second, this expectation can be further diminished if the NCAA not only gives notice of the check, by amending Article 13 of its bylaws, but also requires written consent from all potential recruits.[182] Furthermore, the NCAA could provide notice by stating what type of criminal activity the background check is seeking and how the information is to be used by universities under Article 13.[183]

Third, the NCAA must narrowly tailor the background check to meet a legitimate interest.[184] The NCAA's interest in protecting an institution's student body from violence and preventing its member institutions from the public relations ordeal exemplified in *Simpson* outweighs the invasion of privacy of students, who already have a diminished expectation of privacy.[185] In addition, because of the wide variation of state laws regarding juvenile records, the NCAA could limit checks to convictions for violent crimes and misdemeanors.[186] Although there is diversity in the handling of juvenile criminal records among jurisdictions, many states have recently enacted laws that evidence intent to transfer certain juveniles into the adult criminal system, thereby making their records public.[187]

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179. *Id.* at 628; *see also* NCAA v. Lasege, 53 S.W.3d 77, 83 (Ky. 2001) ("[C]ases involving challenges to a voluntary athletic association's eligibility decisions involve difficult assessments of a plaintiff's probability of succeeding on his or her claim and complex balancing of competing interests." Relief will be granted when the athlete "can show a substantial probability that the athletic association's ruling was arbitrary and capricious.").

180. Potrafke, *supra* note 28, at 437.

181. *Id.*

182. *Id.* at 440.

183. *Id.* at 441.

184. *Id.*

185. *See* Brennan v. Bd. of Trs. for Univ. of La. Sys., 691 So. 2d 324, 329 (La. Ct. App. 1997) (discussing diminished expectations of privacy among student-athletes).

186. Potrafke, *supra* note 28, at 441-43 (citing 20 ILL. COMP. STAT. 2635/5 (2006); 705 ILL. COMP. STAT. 405/5-915(a)-(b) (2006); OHIO ADMIN. CODE ANN. § 109:5-1-1-01 (Anderson 2006); WIS. STAT. ANN. § 938.396(1) (West 2006)). The variance in these statutes is one of the main critiques of NCAA required background checks, as Florida State University's athletic director, Dave Hart, stated: "There's too many potential oddities . . . . You couldn't get any consistency in the process because of the different laws and ages of the youngsters." Auman, *supra* note **71**.

187. *See* Potrafke, *supra* note **28**, at 444 (citing U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, at 110-16 (2006), *available at* http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf). Over 250,000 juveniles are transferred each year. *Id.* (citing CAMPAIGN FOR YOUTH JUSTICE, YOUTH TRANSFERRED TO ADULT COURT: RACIAL DISPARITIES (2007), *available at* www.campaignforyouthjustice.org/documents/YouthTransferred.pdf).

2. UNIFORMLY ADMINISTERING BACKGROUND CHECKS

All student- athletes, both transfers and incoming freshman, would be subject to this background check requirement.[188] This would withstand judicial review under an arbitrary and capricious standard because the check is enforced upon *all* athletes.[189] Thus, the NCAA would consistently apply the background check bylaw to all student-athletes.

3. NCAA GUIDELINES TO ENFORCE BACKGROUND CHECKS

A neutral third party[190] should administer the background checks on every institution's potential student-athlete to achieve uniformity in the results and to standardize the methodology.[191] The relevant findings[192] from a background check should be submitted to the athletic director, forwarded to the coach, and, if necessary, reviewed by the president of the institution.[193] The rules should not require the background check to be entirely dispositive on the admittance of a student. Instead, the NCAA should allow the institutions that are willing to accept a student with prior criminal activity to afford the student-athlete the opportunity to explain his or her record to the athletic staff.[194] The NCAA should allow the coaches and member institutions to use their discretion in accepting the student-athlete despite knowledge of his or her conviction.[195] However, the NCAA should expressly forbid an institution to admit a felon absent express approval from the institution's president. This would allow institutions like Fresno State, which has already used its discretion to implement a background check provision that expressly denies any student-athlete with a felony conviction, to maintain their current policies.[196]

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188. This is preferable to singling out only transfer students because doing so subjects them to a regulation that other student-athletes are not subject to. *Id.* at 446.

189. *See supra* notes 184-85 and accompanying text.

190. Seeking a third party would benefit both the institution and a potential student-athlete. It could eliminate potential prejudices and biases, and, because the only information sought is violent felony convictions, the third party would send a report to the institution only containing that type of activity, thus limiting the scope of the privacy interest invaded. Potrafke, *supra* note 28, at 446-47.

191. Background checks are cheap, especially if the NCAA finds one third-party company to run the checks. *Id.* at 449. This cost should be absorbed by the institution. *Id.* It is an added expense, but is much cheaper than litigation, settlements, and public relations cleanup after a violent incident occurs on campus. *See id.*

192. The relevant findings standard should depend on what an institution decides to implement. For instance, the institution could impose a strict policy where any criminal activity is forwarded to the institution. Because such a thorough background check can potentially limit an institution's liability, it would be in the best interest of an institution to receive notice of all criminal activity (including misdemeanors and felonies) from the background checks.

193. This limits the scope of the privacy interest invaded. Potrafke, *supra* note 28, at 448.

194. This too would help safeguard against an arbitrary and capricious standard but also could limit liability for institutions if there is a valid explanation for a criminal record and the institution accepted the student.

195. Some scholars suggest that this will help avoid disparately impacting minorities, who are more likely to have been convicted of violent crimes than non-minorities. *See* Potrafke, *supra* note 28, at 448 (citing U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFENDERS DEMOGRAPHICS, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=942 (last visited Nov. 21, 2010)). As one professor stated, requiring the "athletic director and president to put their signatures on [questionable admissions]" requires them to claim accountability for the athletes they accept to represent its institution. *Id.* at 432 (citing Steve Weiberg, *Background Checks Becoming Part of Recruiting Process*, USA TODAY, Sept. 18, 1998, at 19C.).

196. *Id.* at 443 (citing Auman, *supra* note 171).

C. THE IMPLICATION OF BACKGROUND CHECKS ON TITLE IX JURISPRUDENCE

It is important to be cognizant that both the proposed background check requirement and Title IX are protective measures. A background check furthers the purpose of Title IX by providing preventative protection measures.

1. A CONSISTENT STANDARD FOR "ACTUAL KNOWLEDGE"

The Tenth and Eleventh Circuit Courts of Appeals and the Arizona Federal District Court have recognized that knowledge of a student's past sexual misconduct establishes "actual knowledge" under the *Davis* standards in an intercollegiate setting.[197] The courts' willingness to include this preexisting knowledge into its determination of Title IX institutional liability invites a required background check to fulfill the "actual knowledge" prong.[198]

Lower courts differ as to whether notice sufficient to trigger liability must include notice regarding current harassment to the current victim of the harassment, but many seem to be shifting towards the notion that actual notice does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student. The Southern District of Iowa has stated that, "[a]t some point . . . a supervisory school official knows . . . that a school employee is a substantial risk to sexually abuse children."[199]

In addition, in a recent secondary school case, a student was arrested for allegedly raping a female student ("Doe"), but was allowed to return to the same school as Doe after the arrest.[200] His friends harassed her, and the court determined that there was a triable issue of fact as to whether this arrest gave the school board "actual knowledge" of the harassment that followed the initial arrest, even though Doe did not tell the school board about that second instance of harassment.[201]

However, while many lower courts appear to be amenable to the concept that knowledge of a potential risk triggers "actual knowledge," the Fourth Circuit Court of Appeals continues to interpret this prong narrowly, requiring "a showing that school district officials possessed actual knowledge of the discriminatory conduct in question."[202] In

197. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007); Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1293 (11th Cir. 2007); J.K. v. Ariz. Bd. of Regents, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. WL 4446712 (D. Ariz. Sept. 30, 2008).

198. Required background checks for student-athletes are analogous to teachers, professors, coaches, or principals being subjected to background checks before they are hired.

199. Gordon *ex rel.* Gordon v. Ottumwa Cmty. Sch. Dist., 115 F. Supp. 2d 1077, 1082 (S.D. Iowa 2000).

200. Doe *ex rel.* Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438, 441 (D. Conn. 2006).

201. *Id.* at 446.

202. Baynard v. Malone, 268 F.3d 228, 241 (4th Cir. 2001) (stating that knowledge of "potential abuse" did not equal knowledge "in fact" that abuse was taking place and thus did not meet the court's interpretation of *Gebser* and *Davis*); *see also id.* at 242 ("For actual notice to exist, an agent of the school must be aware of facts that indicate a likelihood of discrimination." (quoting Massey v. Akron City Bd. of Educ., 82 F. Supp. 735, 744 (N.D. Ohio 2000)); Frederick v. Simpson Coll., 149 F. Supp. 2d 826, 838 (S.D. Iowa 2001) (actual notice requires "actual notice . . . that [the teacher] was at risk of sexually harassing a student."); Crandell v. N.Y. Coll. of Osteopathic Med., 87 F. Supp. 2d 304, 320 (S.D.N.Y. 2000) ("[T]he institution must have actual knowledge of at least some incidents of harassment in order for liability to attach . . . [and] must have possessed enough knowledge

Baynard v. Malone,[203] the middle school administration heard rumors that a teacher abused children and that school employees observed "excessive physical contact" with one student in particular, including the student sitting on the teacher's lap.[204] The Fourth Circuit Court of Appeals determined that this was not actual knowledge that the abuse was occurring, and thus the student had no Title IX claim.[205] This inconsistency demonstrates that while there appears to be a shift towards accepting knowledge that a harasser has the propensity to sexually harass as "actual knowledge," in some jurisdictions, the gap between what constitutes "actual knowledge" in many jurisdictions has further widened.

But a consistent approach must be followed.[206] The opportunity for the background check to create a uniformly applied standard is greatly beneficial in clarifying Title IX jurisprudence. If the courts were to determine that knowledge of any prior sexual misconduct satisfies the "actual knowledge" prong of the Title IX claim, then institutions would be encouraged to either reject athletes who have demonstrated such conduct or design policies to both inform the former harassers of the school's sexual harassment policies and check in with the student-athlete regularly.[207]

2. BACKGROUND CHECKS COULD BE EVIDENCE OF "DELIBERATE INDIFFERENCE"

The courts in *Williams*, *J.K.*, and *Simpson*—all different jurisdictions—articulated a standard of deliberate indifference based on a totality of the circumstances.[208] Each court looked not only at the responses of the institutions to the sexual harassment, but also at the failure to implement safeguards before the harassment even took place, based on the knowledge that this type of conduct could occur.[209] A background check, in this respect, is an efficient deterrent to admitting students with criminal records, which will aid in furthering the goal of Title IX to protect students from the potential risk of sexual discrimination.[210] Moreover, a preventative approach could safeguard an institution from liability even if it were to give a student a second chance.[211]

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of the harassment that it reasonably could have responded with remedial measures to address the kind of harassment . . . upon which plaintiff's legal claim is based.").

203. 268 F.3d 228.

204. *Id.* at 233.

205. *Id.* at 240.

206. In 2002, a scholar analyzed lower court cases where the courts were responsible for interpreting and applying sexual harassment claims brought under Title IX to the Supreme Court. *See* Davies, *supra* note 12. She found a marked inconsistency among district courts' application of the Supreme Court standards. *Id.* at 434.

207. This is just due diligence and helps insulate the institution from the deliberate indifference prong. I am not suggesting that the athletic institution reinstate *in loco parentis*. There is a happy medium between absolutely no supervision and *in loco parentis*. *See generally* Britton White, *Student Rights: From* In Loco Parentis *to* Sine Parentibus *and Back Again? Understanding the Family Educational Rights and Privacy Act in Higher Education*, 2007 BYU EDUC. & L.J. 321 (2007) (observing a trend back toward *in loco parentis* in recent amendments to FERPA, but arguing that specific existing exceptions, such as those involving disclosures of health and safety emergencies, obviate the need for further amendments).

208. *See supra* Part II.

209. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1173 (10th Cir. 2007); Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1292-96 (11th Cir. 2007); J.K. v. Ariz. Bd. of Regents, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. WL 4446712, at *12 (D. Ariz. Sept. 30, 2008); *see also* Rosenfeld, *supra* note 19, at 421 ("That the schools at CU and UGA did nothing to ameliorate the risk that a privileged male athlete with a history of sexual predation would present to female students was a key factor in the appellate court's opinion in each case.").

210. This is significant, especially in jurisdictions that have determined "the starting point for measuring the

A good model for the courts to consider is the municipal liability context discussed in both *Williams* and *Simpson*.[212] Under this analysis, "a plaintiff can show deliberate indifference by proving that 'the municipality knew of a need to . . . supervise in a particular area and the municipality made a deliberate choice not to take any action.'"[213] Borrowing from principles of municipal liability, an institution can insulate itself from Title IX liability if it implements and maintains a sexual harassment policy that enumerates what sexual harassment is, what the potential punishment for sexual harassment is, and what steps will be taken if a sexual harassment claim is brought against a student-athlete. In addition to having such a policy, the university would be responsible to ensure that its student-athletes are well-informed of the policy.[214] This deters institutions from turning a blind eye to the behavior of student-athletes and then claiming ignorance. If, for instance, Coach Koetter in *J.K.* had implemented a strict zero tolerance policy, impressed upon Henderson its importance, and monitored Henderson, then the court might not have found have found deliberate indifference.[215] This does not set a bright line rule, but the demarcation between deliberate indifference and an institution's attempts to proactively protect its students from being deprived of an education is a little clearer.[216]

CONCLUSION

Title IX was enacted as a preventative statute to protect students from sexual discrimination in an educational setting. An NCAA-required background check implements a precautionary, protective measure. A student who is harassed or assaulted by a student-

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adequacy of its response" is when the actual harassment is reported. *See, e.g.*, Doe *ex. rel* Doe v. Derby Bd. or Educ., 451 F. Supp. 2d 438, 446 (D. Conn. 2006). This application is not as favorable to the students and requires the student must endure some form of harassment before a university even has the responsibility to take action. *See generally id.*

211. Unfortunately, this could mean that admitting a student with a background record might always incur liability, but the point here is for the institution to implement measures. A court could find that the implemented measures were reasonable, and thus the institution would be safeguarded from liability.

212. *See supra* Part II. Obviously, a school would want to prevent this type of occurrence. Critics of campus judicial boards are divided as to whether this serves a greater benefit to a victim athlete, or whether it seeks neutrality. Dabbs, *supra* note 63, at 190. There is little evidence to support either claim, however, because of the closed nature of the agreements. *Id.*Many institutions support closed campus judicial boards as opposed to public trials because of the greater control over public relations. *Id.* at 192.

213. *Williams*, 477 F.3d at 1295 (quoting Gold v. City of Miami, 151 F.3d 1346, 1350-51 (11th Cir. 1998)). The municipality liability schema is not without its imperfections. In this type of schema, a "good faith response" by the institution is required. Some courts have determined that an institution confronting an alleged harasser *one time* is reasonable enough to safeguard the institution from liability. For example, the Fifth Circuit Court of Appeals recently upheld a district court's grant of summary judgment to a school district where a volleyball coach had a three-year relationship with a female athlete. King v. Conroe Indep. Sch. Dist., 289 F. App'x 1, 4 (5th Cir. 2007). Upon hearing rumors that the coach was engaging in sexual relations with the student, the principal and vice-principal met with the coach one time. *Id.* at 2. The court relied on the municipality context where a good faith response, even if not effective, does not rise to the level of deliberate indifference. *Id.* at 3. The court never applies the reasoning of *Davis* or *Gebser*, and only cites to *Gebser* as a footnote. *See* id. at 4 n.3.

214. This appears to be a protective measure—implementing a policy and abiding by it. Many lower courts are already basing "deliberate indifference" both on an institution's response before and after the harassment occurs, *see, e.g.*, *Williams*, 477 F.3d at 1296-97, so this would just be codifying the standard.

215. *See* J.K. v. Ariz. Bd. of Regents, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. WL 4446712 (D. Ariz. Sept. 30, 2008).

216. However, creating a policy is not an automatic insulation. A court would find it unreasonable for institutions not to address the accused athletes. *See* Davies, *supra* note 12, at 428.

athlete with a criminal history can point to the background check to bolster the claim that the institution had "actual knowledge." Thus, with courts moving in the direction of accepting preexisting knowledge of a harasser's potential risk to students as actual knowledge, an institution will be encouraged to implement sexual harassment policies and impress upon its student-athletes the importance of compliance with such policies. Furthermore, the courts should be more amenable to applying the municipality standard, as it would encourage universities to implement and follow procedures before sexual harassment occurs. It is paradoxical for a student to endure sexual harassment and wait to see what the university's response is under Title IX's protective schema because "there is no 'one free rape rule'" in the context of Title IX.[217]

217. S.S. v. Alexander, 177 P.3d 724, 741 (Wash. Ct. App. 2008).

Two for One: How the NCAA Rules Do Not Adequately Address Package Deals and a Proposed Rule to Prohibit Them

LAUREN FERRANTE

INTRODUCTION

Colleges and universities face an increasing amount of pressure to attract the best student-athletes to their athletic programs.[1] In fact, websites such as Rivals.com and Scout.com rank top-rated high school athletes and closely monitor which colleges or universities sign them.[2] Pressure to attract great high school athletes can lead institutions to commit National Collegiate Athletic Association (NCAA) recruitment violations.[3] For instance, the University of Connecticut allegedly committed recruitment violations by providing lodging, transportation, restaurant meals, and representation while attempting to convince Nate Miles, a top-rated high school athlete in 2008, to play basketball for the school.[4]

Recruiting violations in men's basketball have been an ongoing concern, so in June 2008, the NCAA created a focus group devoted to monitoring them.[5] Specifically, the focus group investigated "package deals."[6] As of April 24, 2009, the focus group's findings and conclusions, if any, were not public.[7]

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1. Zach Crizer, Brandon Shipp, Garrett Busic & Ed Lupien, *In Recruiting, Tech Gets Bang for its Buck*, COLLEGIATE TIMES, Dec. 9, 2008, http://www.collegiatetimes.com/stories/12704. *See also* Aaron Brooks & David Davies, *Exploring Student-Athlete Compensation: Why the NCAA Cannot Afford to Leave Athletes Uncompensated*, 34 J.C. & U.L. 747, 748 (2008) (arguing that the NCAA is losing its roots of amateurism and is increasingly commercial); Andrew Zimbalist, *March Madness It Is, Economically*, WALL ST. J., Mar. 10, 2009, at D11 (indicating that March Madness generated $548 million from TV rights and $40 million from ticket sales and sponsorships in 2008). This article refers to "colleges and universities" as "institutions." Also for purposes of this article, an "institution" can refer to the institution itself or its representatives, such as the athletics personnel, the coaching staff, and the president/chancellor.

2. RIVALS, http://www.rivals.com (last visited Oct. 25, 2010); SCOUT, http://scouthoops.scout.com/ (last visited Oct. 25, 2010).

3. NAT'L COLLEGIATE ATHLETIC ASS'N, 2008–09 DIVISION I MANUAL art. 13 (2008), *available at* http://www.ncaapublications.com/productdownloads/D109.pdf [hereinafter Div. I Manual].

4. ESPN.com News Service, *Report: UConn Exceeded Call Limits*, ESPN (Mar. 25, 2009, 11:01 PM), http://sports.espn.go.com/ncb/news/story?id=4014188; Uconnfan.com, *Top 5 Shooting Guard in 2008 Commits to Connecticut*, SCOUT (Nov. 20, 2006), http://scouthoops.scout.com/a.z?s=75&p=9&c=2&cid=592660&nid=1745805 (indicating that Nate Miles was a "top 5 shooting guard in 2008"); Mike Anthony, *Miles Visits UConn, Makes Oral Commitment*, HARTFORD COURANT, Nov. 20, 2006, at C10 (indicating that Nate Miles was "one of the top-rated shooting guards in the 2008 recruiting class").

5. *ESPN Outside the Lines* (ESPN television broadcast Feb. 22, 2009) [hereinafter *ESPN OTL*].

6. *Id.*

7. Telephone interview with representative of the NCAA Academic & Membership Affairs Group in

LuAnn Humphrey, the NCAA Associate Director of Enforcement, defines "package deals" as "proposition[s] made, that in order for a recruit to sign with an institution or to subsequently enroll with an institution, that institution has to do something in return."[8] The "something in return" is an institution's hiring of someone with close ties to the recruit with the intent of getting him or her to commit to that institution.[9] This definition of a package deal envisions a situation in which a recruit signs or enrolls, and then the institution hires someone with close ties to that recruit, such a scenario will be referred to as a "type one package deal."[10] In addition to this definition, the Entertainment Sports Programming Network (ESPN) also suggests that package deals can occur when an institution hires someone with close ties to a recruit, and then that recruit subsequently commits to that institution; that scenario will be referred to as a "type two package deal."[11] Therefore for purposes of this article, "package deals" refer to both type one package deals and type two package deals.

This article explores package deals in men's basketball.[12] Part I discusses the format of the 2008-09 NCAA Division I Manual. Part I also discusses four specific contexts of package deals. Part II analyzes how the NCAA rules do not adequately address package deals and then examines why the NCAA should prohibit package deals. Part III recommends an NCAA rule defining and prohibiting package deals.

I. BACKGROUND: THE FORMAT OF THE 2008-09 DIVISION I MANUAL AND PACKAGE DEALS IN CONTEXT

A. THE FORMAT OF THE 2008-09 NCAA DIVISION I MANUAL

The NCAA is a voluntary unincorporated association that regulates intercollegiate amateur athletics among its approximately 1,280 members, including many public and private universities and four-year colleges.[13] In 1973, the NCAA membership adopted the current three-division structure of Division I, Division II, and Division III.[14] Each NCAA

Indianapolis, Ind. (Apr. 24, 2009) (indicating that the focus group's findings presently are not public because some institutions are under investigations that could have legal implications). The representative advised viewing ESPN OTL for the most updated information. *Id.*

8. *ESPN OTL*, *supra* note 5.

9. *Id.*

10. *See infra* Part I.B.1 (describing situations of Tyreke Evans and Mario Chalmers).

11. *ESPN OTL*, *supra* note 5. *See infra* Part I.B.2 (describing the situations of Michael Beasley and Daniel Hackett).

12. This article accepts that intercollegiate athletics are amateur. *See* DIV. I MANUAL, *supra* note 3, art. 2.9 (noting that student-athletes are amateurs in an intercollegiate sport). The assertion that intercollegiate athletics are amateur is inherent in Part II.B.2, which argues that package deals should be prohibited because they are antithetical to amateurism. *See infra* Part II.B.2. This article does not argue whether intercollegiate athletics actually are amateur, should be considered amateur, or both. *See* Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 497 (2008) (arguing that amateurism in college sports is merely a "myth" and the industry is commercial). As a result, college sports programs should be subject to laws that apply to other commercial activities, such as labor laws that characterize players as employees, entitling them to wages and various statutory protections. *Id.* A colorful argument can be made that package deals should be permitted because intercollegiate athletes should be compensated for their services, and package deals are compensation. However, this article does not address this argument.

13. Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 622 (Colo.App. 2004); Suja Thomas, Professor, Univ. of Ill., Address at Sports and the Law Class (Feb. 11, 2009).

14. Address by Thomas, *supra* note 14.

division has a manual containing its own set of rules.[15] The NCAA publishes these manuals prior to each academic year.[16] This article refers only to the 2008-09 NCAA Division I Manual.

The Division I Manual contains the constitution, operating bylaws, and administrative bylaws.[17] Articles one through six contain the constitution.[18] The constitution describes the NCAA's purposes, structure, legislative process information, and important principles "for the conduct of intercollegiate athletics."[19] Articles ten through twenty-three contain the operating bylaws.[20] The operating bylaws[21] are "legislation adopted by the membership to promote the principles enunciated in the constitution to achieve the . . . NCAA's purposes."[22] Articles thirty through thirty-three contain the administrative bylaws, which describe policies and procedures of legislative actions and the NCAA's championships, business, enforcement program, and athletics certification program.[23]

B. PACKAGE DEALS IN CONTEXT

Package deals are not a recent occurrence. In fact, over twenty-five years ago, University of Kansas (KU) coach Larry Brown hired Ed Manning as an assistant coach.[24] Two days later, Ed Manning's son, Danny Manning, committed to KU.[25] This article discusses four recent package deals that occurred in men's basketball.[26] Two are type one package deals, and two are type two package deals.

1. TYPE ONE PACKAGE DEALS

The first example of a type one package deal involves Tyreke Evans. Evans was a top-ranked recruit in 2008.[27] He scored over 3,300 points during his high school career.[28]

15. *See, e.g.*, DIV. I MANUAL, *supra* note 3.

16. *See generally* Conference Carolinas NCAA Division II Resource Page, http://www.conferencecarolinas.com/compliance/Compliance_Page_Links (last visited Jan. 23, 2011) (noting that the NCAA manual is published prior to each academic year). Because these manuals are published each year, the format this article describes is also the format of prior years' NCAA Division I Manuals.

17. DIV. I MANUAL, *supra* note 3, at viii.

18. *Id.*

19. *Id.*

20. *Id.*

21. The Div. I Manual uses the words "rule," "bylaw," and "legislation" interchangeably. *See id.* This article uses only the word "rule" to refer to a rule, bylaw, or legislation.

22. *Id.*

23. *Id.*

24. *ESPN OTL*, *supra* note 5.

25. *Id.*

26. Sporting News Staff Reports, *NCAA Looking into 'Package Deals,' Including USC*, SPORTING NEWS (Feb. 19, 2009, 4:13 PM), http://www.sportingnews.com/ncaa-basketball/story/2009-02-19/ncaa-looking-package-deals-including-usc.

27. Tyreke Evans Prospect Profile, RIVALS, http://rivalshoops.rivals.com/viewprospect.asp?Sport=2&pr_key=38381 (last visited May 6, 2009) [hereinafter Tyreke Evans]. Furthermore, the Sacramento Kings drafted Evans fourth in the 2009 NBA draft. NBA, 2009 NBA Draft, http://www.nba.com/draft2009/ (last visited Aug. 9, 2009).

28. Tyreke Evans Player Biography, UNIV. OF MEM. ATHLETIC DEP'T, http://www.gotigersgo.com/sports/m-

Evans signed a letter of intent and subsequently enrolled at the University of Memphis.[29] Less than five months later, head coach John Calipari hired Evans' former trainer, Lamont Peterson, as an administrative assistant.[30]

The second example of a type one package deal involves Mario Chalmers.[31] Mario was a top-ranked recruit.[32] He guided his high school to two state titles and was named the Alaska 4A Player of the Year three times.[33] Mario signed a letter of intent and subsequently enrolled at KU.[34] Shortly after, head coach Bill Self hired Chalmers' father, Ronnie Chalmers, as Director of Basketball Operations.[35]

2. TYPE TWO PACKAGE DEALS

The first example of a type two package deal involves Michael Beasley. In 2006, Beasley was one of the top recruits in the United States.[36] During his sophomore year of high school, Beasley committed to the University of North Carolina Charlotte (UNC Charlotte) to play basketball because his former Amateur Athletic Union (AAU) coach Dalonte Hill was an assistant coach at the school.[37] However, Hill then left UNC Charlotte and accepted a job at Kansas State University (KSU) under then head coach Bob Huggins.[38] Beasley followed Hill without ever visiting KSU.[39]

The second example of a type two package deal involves Daniel Hackett, who was once rated the sixth best high school basketball player in California.[40] In 2005, the University of Southern California (USC) hired Daniel's father, Rudy Hackett, as its strength and conditioning manager.[41] One year later, Daniel walked onto the USC basketball team.[42] Daniel was rated the sixth best high school basketball player in California.

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baskbl/mtt/evans_tyreke00.html (last visited May 6, 2009).

29. Tyreke Evans, *supra* note 29.

30. *ESPN OTL*, *supra* note 5.

31. Mario helped KU win the 2008 NCAA Championship by scoring a three-point basket that sent the game into overtime. STAT SHEET, http://statsheet.com/mcb/news/photo/200804072240816094519 (last visited May 6, 2009). Mario currently is a point guard for the Miami Heat. Mario Chalmers Player Profile, NBA, http://www.nba.com/heat/roster/HEAT_Player_2008_Mario_Chalmers-284873-36.html (last visited May 6, 2009).

32. Mario Chalmers Prospect Profile, RIVALS, http://collegebasketball.rivals.com/bviewplayer.asp?Player=61829 (last visited May 6, 2009) [hereinafter Mario Chalmers] (ranked the number twelve recruit in 2005).

33. Mario Chalmers Player Biography, UNIV. OF KAN. ATHLETIC DEP'T, http://www.kuathletics.com/sports/m-baskbl/mtt/chalmers_mario00.html (last visited May 6, 2009).

34. Mario Chalmers, *supra* note 34.

35. *ESPN OTL*, *supra* note 5; *Chalmers Named Director of Basketball Operations*, SCOUT, http://kansas.scout.com/2/391476.html (last visited May 6, 2009).

36. *ESPN OTL*, *supra* note 5. Beasley currently plays for the Miami Heat. Rivals.com, Michael Beasley Prospect Profile, RIVALS, http://rivals.yahoo.com/basketballrecruiting/basketball/recruiting/player-Michael-Beasley-23568 (last visited May 6, 2009).

37. *ESPN OTL*, *supra* note 5; *The Dalonte Hill Factor in Michael Beasley's Decision*, FANHOUSE, http://ncaabasketball.fanhouse.com/2007/04/06/the-dalonte-hill-factor-in-michael-beasleys-decision (last visited May 6, 2009).

38. *ESPN OTL*, *supra* note 5.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

II. ANALYSIS: HOW THE NCAA RULES DO NOT ADEQUATELY ADDRESS PACKAGE DEALS AND WHY THE NCAA SHOULD PROHIBIT THEM

A. RELEVANT NCAA RULES AND THEIR SHORTCOMINGS

1. COACHES' EMPLOYMENT CONTRACTS

Rule 11.4.1.1 regulates coaches' employment contracts, permitting the "institution to enter into a contractual agreement with a high school, preparatory school or two-year college coach for an employment opportunity . . . *provided that [the] employment contract . . . is not contingent upon the enrollment of a prospective student-athlete* (emphasis added)."[43] Thus the enrollment of a recruit is an improper quid pro quo to include in a coach's employment contract. However, the spirit of this rule suggests that no matter how it is agreed upon, an institution must not hire a coach to enroll a certain recruit.

To determine whether package deals violate the spirit of this rule, it may be helpful to analyze the institution's intent in hiring a coach. One factor indicative of this intent can be the coach's qualifications and experience. It is less likely that an institution hired a coach to acquire a certain recruit if that coach's qualifications and experience are relatively impressive. A second factor is the amount of time between a coach's hiring and the recruit's enrollment. The greater the amount of time between these two events, the less likely it is that the institution hired the coach to acquire the recruit. A third factor is what actions, if any, the institution took if the recruit does or does not enroll. For example, if an institution abruptly fires a coach without a valid reason following a certain recruit's decision not to enroll, then it appears more likely that the institution hired that coach to acquire that recruit.

Rule 11.4.1.1 has two weaknesses. It applies only to an employment contract entered into with a high school, preparatory school, or two-year college coach.[44] Also, it does not define what it means for an employment contract to be "contingent."[45]

An explicit clause stating that "the enrollment of a certain recruit is a condition of employment" in a coach's contract is a clear violation of rule 11.4.1.1. However, absent such an explicit clause, proving a contingency may be difficult or impossible. Type two package deals demonstrate this difficulty.[46]

If Beasley committed to UNC Charlotte because Hill was there, and KSU hired Hill, then arguably Beasley enrolled at KSU due to Hill's employment. Assume KSU knew Beasley committed to UNC Charlotte due to Hill's presence, and KSU hired Hill because it thought Beasley would follow him. Nonetheless, without an explicit contingency in Hill's contract with KSU, this situation does not plainly violate rule 11.4.1.1. However, this situation may violate the spirit of rule 11.4.1.1.

To determine whether the Beasley package deal violates the spirit of rule 11.4.1.1, it may be helpful to analyze KSU's intent in hiring Hill according to the aforementioned factors. First, Hill's coaching experience includes three seasons as an assistant coach at Charlotte, where he assisted that team to a record of 61-30 and three consecutive postseason

43. DIV. I MANUAL, *supra* note 3, § 11.4.1.1.

44. *Id.*

45. For example, what elements need to be proved, what constitutes proof, and how long between when the contract was entered into and when the recruit enrolls would be helpful in defining contingency.

46. This article assumes that Hill's employment contract with KSU did not explicitly state that Hill's employment is contingent on Beasley's enrollment.

appearances before going to KSU.[47] During his time at Charlotte, he coached two All-Americans, one C-USA Player of the Year, and seven all-conference players.[48] Before then, Hill was the head coach of the AAU's DC Assault.[49] Therefore, given Hill's relatively impressive qualifications and experience, KSU had reasonable justifications to hire Hill other than the potential enrollment of Beasley.

Second, Beasley enrolled at KSU shortly after Hill's hiring.[50] Therefore the amount of time between the two events is suspect. Third, Hill helped recruit Beasley in 2006.[51] In 2007-08, KSU paid Hill $400,000.[52] In 2008, Hill and KSU renegotiated Hill's compensation.[53] From 2008-2012, KSU promised to pay Hill $420,000 per year, making Hill the highest paid assistant coach at a college or university.[54] Although Hill's compensation increased beginning in 2008, it is not clear why it increased. It could be due to Beasley's enrollment, however such an assertion would be difficult to prove because Hill recruited five other top prospects from his former AAU team.[55]

It is prudent to consider the facts and circumstances in total when analyzing a package deal. In Beasley's case, the facts and circumstances are Hill's qualifications and experience, the relatively short amount of time between Hill's hiring and Beasley's enrollment, and KSU's actions regarding when it hired Hill and Hill's compensation. Therefore, a facts and circumstances analysis presents a relatively strong argument that KSU's purpose in hiring Hill was to acquire Beasley.

It may also be helpful to analyze the package deal from the recruit's perspective. Even if KSU admitted that it hired Hill only to acquire Beasley, Beasley ultimately decided which institution to attend. For example, at an interview during the 2007-08 season while a KSU forward, Beasley admitted that he would have attended the university to which Hill went: "If he would have stayed at Charlotte, I would have been in Charlotte . . . If he would have went somewhere else, I'd have been there with him."[56] Therefore, Beasley could have made an independent decision irrespective of KSU's intent in hiring Hill. However, because rule 11.4.1.1 concerns an institution's intent rather than a recruit's intent, the recruit's intent arguably is not a factor in deciding whether an institution violated the spirit of rule 11.4.1.1.

Notably, even if there was an explicit contingency in Hill's contract, this is not a violation of the text of rule 11.4.1.1. When Hill and KSU entered into the employment

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47. Dalonte Hill Biography, KAN. STATE UNIV. ATHLETICS, http://kstatesports.cstv.com/sports/m-baskbl/mtt/hill_dalonte00.html (last visited May 6, 2009).

48. *Id.*

49. *Id.*

50. *See* Dana O'Neil, *Beasley Teetering on the Precipice of Adulthood*, ESPN (Feb. 29, 2008), http://sports.espn.go.com/ncb/columns/story?columnist=oneil_dana&id=3269294 (detailing that Hill took a job at Kansas State while Bob Huggins was still the head coach, Huggins then left before Beasley committed; however, the combination of Hill and new head coach Frank Martin ultimately secured Beasley's commitment).

51. *See id.* (Hill recruited Beasley while he was still at Charlotte).

52. Bob McClellan, *Kansas State's Hill Earns Surprising Salary*, RIVALS (Oct. 14, 2008), http://collegebasketball.rivals.com/content.asp?CID=862660.

53. *Id.*

54. *Id.* (noting that Hill and KSU negotiated the $420,000 per year four year contract five months after Hill was arrested for an alleged driving under the influence charge). *ESPN OTL*, *supra* note 5 (noting that a salary of $420,000 per year is about twice the amount that the assistant coaches are paid at the University of North Carolina, the University of California Los Angeles, The University of Memphis, and the University of Kansas).

55. *ESPN OTL*, *supra* note 5.

56. *Id.*

contract, Hill was a coach at a four-year college.[57] Contracts entered into with four-year college coaches are not covered under rule 11.4.1.1.[58] Nonetheless, this fact does not negate the argument that KSU's hiring of Hill can violate the spirit of rule 11.4.1.1.

The second type two package deal involves Daniel Hackett and deserves examination under rule 11.4.1.1. This article assumes that no explicit contingency exists in Rudy's contract.[59] The following paragraph analyzes whether this package deal violates the spirit of rule 11.4.1.1 according to the aforementioned factors.

First, when USC hired Rudy, he was an assistant coach at a high school.[60] Before working as an assistant coach, he played professional basketball in the United States and Italy for fifteen years.[61] Rudy also coached basketball in Italy for five years.[62] Prior to his professional career, Rudy played basketball for Syracuse University.[63] Although Rudy has a substantial amount of experience playing professional basketball, his coaching experience is unremarkable. Additionally, the amount of time between Rudy's hiring and Daniel's enrollment is approximately one year. Finally, USC did not take any publicly-known action directed towards Rudy after Daniel walked on. Therefore, given Rudy's meager coaching experience and the time between his hire and Daniel's enrollment, it is likely that USC hired the father to get the son. Similar to Beasley, Daniel ultimately made his own decision regarding which institution to attend. However, this factor most likely is not relevant to determine USC's intent in hiring Rudy. Moreover, a unique aspect of this package deal involves the intersection of Daniel's status as a walk-on and Rudy's employment at USC. The children of USC employees receive free tuition.[64] Rudy is a university employee, and therefore Daniel receives free tuition.[65] Because Daniel is a walk-on player, he does not count against the team's scholarship limit of 13.[66] As USC's starting point guard, Daniel appears to be a great bargain.[67] By not using a scholarship on Daniel, a student-athlete to whom USC otherwise would have given a scholarship, USC has an opportunity to use a scholarship on one additional student-athlete. Other institutions may engage in this practice where they acquire two student-athletes for the price of one.[68]

Rule 11.4.1.1 arguably does not cover type one package deals. The contingency envisioned by rule 11.4.1.1 is one where the coach's employment is contingent on the

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57. *See* McClellan, *supra* note 54 (noting that Hill spent three years at the University of Charlotte, a four-year college).

58. This article's proposed solution in Part III defines coaches more broadly than Rule 11.4.1.1. *See infra* note 101.

59. Notably, if there was an explicit contingency in Rudy's contract, this would violate the text of Rule 11.4.1.1 because Rudy was a high school coach when he was hired. *But see* Part II.A.1 (noting that even if there was an explicit contingency in Hill's contract, this would not violate Rule 11.4.1.1 because Hill was not the type of coach covered by the rule).

60. Rudy Hackett Biography, UNIV. OF S. CAL. ATHLETICS, http://usctrojans.cstv.com/sports/m-baskbl/mtt/hackett_rudy00.html (last visited May 6, 2009).

61. *Id.*

62. *Id.*

63. *Id.*

64. Michael David Smith, *NCAA Investigating USC Over Daniel Hackett's Walk-On Status*, FANHOUSE (Feb. 19, 2009, 10:59 AM), http://ncaabasketball.fanhouse.com/2009/02/19/ncaa-investigating-usc-over-daniel-hacketts-walk-on-status.

65. *Id.*

66. *Id.*

67. *Id.*

68. Although USC did not use a scholarship on Daniel, USC compensated Rudy for his services. Arguably, Rudy's compensation is what Daniel's enrollment costs USC.

recruit's enrollment (i.e., first the coach is hired, and then the recruit enrolled). However, in type one package deals, the reverse occurs (i.e., first the recruit enrolled, and then the coach was hired). Therefore type one package deals cannot violate rule 11.4.1.1 because these package deals do not involve the contingency that rule 11.4.1.1 prohibits.[69] Therefore, rule 11.4.1.1 does not adequately address package deals absent an explicit contingency in a coach's contract.

2. SPECIAL/EXTRA BENEFITS OR TREATMENT

Rule 13.2.1 prohibits offering recruits special benefits.[70] Rule 13.2.1 states that: [a]n institution . . . shall not . . . offe[r] benefits to a prospective student-athlete [recruit] or his or her relatives or friends . . . [except if] . . . that same benefit is generally available to . . . the student body . . . on a basis unrelated to athletics ability.[71]

Rule 13.2.1.1(a) states that an employment arrangement for a recruit's relatives is specifically prohibited.[72]

Rule 13.2.1.1(a) may apply to type one package deals.[73] In the package deal involving Mario, KU hired Ronnie after Mario enrolled.[74] Once a recruit enrolls, he is no longer a recruit.[75] Therefore, because KU hired Ronnie when Mario was no longer a recruit, rule 13.2.1.1(a) does not apply. If Mario had been a recruit when KU hired Ronnie, rule 13.2.1.1(a) would apply because Ronnie is Mario's relative.

Similarly, in the package deal involving Evans, Memphis hired Peterson after Evans was no longer a recruit.[76] However, even if Memphis hired Peterson while Evans was a recruit, rule 13.2.1.1(a) would not apply because Peterson is not Evans' relative, and rule 13.2.1 covers only "relatives" and "friends." In both the Chalmers and Evans package deals, the aforementioned analyses designate the start of the employment contract, or the time at which the institution hires the person, as the time of "an employment arrangement." However, negotiations for employment can occur long before the institution hires the person. The NCAA may argue that if such negotiations occur while the student-athlete is still a recruit, then the "employment arrangement" occurred while he was a recruit. Therefore, assuming the employee is the recruit's relative, then a type one package deal may be a rule 13.2.1.1(a) violation. Because some negotiations are informal, the concept can be somewhat nebulous. Therefore, defining "employment arrangement" as negotiations can result in a vague contract that is administratively difficult to apply.

Rule 16.01.1 may close the "non-recruit" gap left by rule 13.2.1. Rule 16.01.1 states that "a student-athlete[77] shall not receive any extra benefit."[78] Rule 16.02.3 defines an "extra benefit" as:

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69. In fact, Self stated that "we [KU] didn't hire Ronnie to get Mario. We hired Ronnie after we got Mario." *ESPN OTL*, *supra* note 5.

70. DIV. I MANUAL, *supra* note 3, § 13.2.1.

71. *Id.*

72. *Id.* § 13.2.1.1(a).

73. *Id.* § 13.2.1.1 (This article will only apply Rule 13.2.1.1 to type one package deals because they concern what an institution offers a recruit; contrast that to type two package deals, which concern what an institution offers a coach.)

74. SCOUT, *supra* note 37.

75. DIV. I MANUAL, *supra* note 3, §§ 13.02.11–13.02.12.

76. *ESPN OTL*, *supra* note 5.

77. DIV. I MANUAL, *supra note* 3, § 12.01.3

78. *Id.* § 16.01.1.

> any special arrangement by . . . [the institution] . . . to provide a student-athlete or a student-athlete's relative or friend a benefit not expressly authorized by NCAA . . . [rules]. Receipt of the benefit by the student-athletes or their relatives or friends is not a violation of NCAA legislation if . . . the same benefit is generally available to the institution's students or their relatives or friends or to a particular segment of the student body . . . determined on a basis unrelated to athletics ability.[79]

The prohibition of "extra benefits" could apply to type one package deals. For instance, hiring Ronnie and Peterson could be an "extra benefit" to Mario and Evans, respectively. Hiring someone with close ties to a non-student-athlete may be uncommon and therefore not "generally available." Hiring someone with close ties to the average student-athlete may be uncommon as well, and therefore not "generally available."

Package deals are arguably "extra benefits" because they are "benefit[s] not expressly authorized by [the] NCAA [rules]."[80] However, institutions can counter that although hiring a relative or friend may benefit that student-athlete and their relative or friend, the individual was hired for his qualifications and experience. The strength of this counter-argument increases proportionately with the employee's qualifications and experience. For example, before being hired by KU, Ronnie put together an impressive resume. He was the head basketball coach of Bartlett High School for five seasons and guided the team to two state championships.[81] Prior to coaching at Bartlett High School, Ronnie coached basketball for approximately fifteen years for the Air Force, other high schools, and summer league teams.[82] Ronnie's experience makes him a more legitimate hire when viewed separately from his son's enrollment.

In our other example, Memphis hired Peterson, a personal trainer with years of experience training Evans and elite basketball players in Philadelphia.[83] As an administrative assistant at Memphis, Peterson's duties are "monitoring the receipt and distribution of equipment and serving as a liaison with the school's compliance office on things like phone logs and receipts for recruiting trips." [84] Notably, Memphis did not create this position for Peterson. [85] Coaching staff positions opened after Evans enrolled. [86]

Similar to rule 16.01.1, Rule 12.1.2.1.6 prohibits preferential treatment, benefits, or services due to "athletics reputation or skill or pay-back potential as a professional athlete."[87] Rule 12.1.2.1.6 applies to recruits and student-athletes.[88] This rule is vague because it does not define preferential treatment, benefits, or services. Without specific

79. DIV. I MANUAL, *supra note* 3, § 16.01.1. "[A]ny special arrangement by . . . [the institution] . . . to provide a student-athlete or a student-athlete's relative or friend a benefit not expressly authorized by NCAA . . . [rules]. Receipt of a benefit by the student-athletes or their relatives or friends is not a violation of NCAA legislation if . . . the same benefit is generally available to the institution's students or their relatives or friends or to a particular segment of the student body . . . determined on a basis unrelated to athletics ability."

80. *Id.*

81. *ESPN OTL*, *supra* note 5.

82. Ronnie Chalmers Biography, UNIV. OF KAN. ATHLETICS, http://www.kuathletics.com/sports/m-baskbl/mtt/chalmers_ronnie00.html (last visited Oct. 23, 2010).

83. Dan Wolken, *Freshman Tyreke Evans' Trainer to Join Tiger Basketball Staff*, COM. APPEAL (Aug. 26, 2008), http://www.commercialappeal.com/news/2008/aug/26/freshman-tyreke-evans-trainer-join-tiger-basketbal/.

84. *Id.*

85. *Id.*

86. *Id.* (noting that four members of the coaching staff left or took another position at a different institution and the other three were "lost").

87. DIV. I MANUAL, *supra* note 3, § 12.1.2.1.6.

88. *Id.*

definitions, this rule may be difficult to apply. Again, an institution can argue it hired a coach based on his qualifications and experience, and it is a coincidence that the hiring occurs simultaneously with a particular recruit's enrollment.

Therefore, due to the inadequacies regarding benefits and preferential treatment, the aforementioned rules do not sufficiently address package deals.

B. WHY PACKAGE DEALS SHOULD BE PROHIBITED

Package deals should be prohibited because they are antithetical to amateurism. The Division I Manual references "amateurism" several times.[89] Its first stated purpose is "'to promote and develop . . . athletics participation as a recreational pursuit,' while another is '[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of . . . amateurism.'"[90] One of the NCAA's fundamental policies is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a *clear line of demarcation* (emphasis added) between intercollegiate athletics and professional sports."[91] This is the foundation for the principle of amateurism which states that student athletes are amateurs, and "their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived . . . student-athletes should be protected from exploitation by professional and commercial enterprises."[92]

Given that amateurism attempts to draw a line between intercollegiate sports and professional sports conducted for financial gain, it seems reasonable to conclude that intercollegiate athletic programs prohibit all compensation. However, some forms of compensation are permitted, specifically "institutional financial aid," which encompasses "scholarships or educational grants-in-aid."[93] Financial aid is "funds provided to student-athletes from various sources to pay or assist in paying their cost of education."[94] The maximum financial aid a student-athlete can receive is "the cost of attendance that normally is incurred by students enrolled in a comparable program at the institution."[95] The "cost of attendance" includes "tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution."[96] If a student-athlete receives

89. The Div. I Manual lists as amateurism as one of its core principles. *Id.* § 2.9. The Div. I Manual also dedicates its entire article 12 to amateurism. *Id.* § 12.

90. DIV. I MANUAL, *supra* note 3, § 1.2(a), (c).

91. *Id.* §§ 1.3.1, 12.01.2.

92. *Id.* § 2.9. *See* Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities,* 8 VA. SPORTS & ENT. L.J. 71, 112 (2008) (noting that competing in intercollegiate athletics provides a valuable educational experience because competition has the potential to positively influence a student-athlete's academic, personal, and professional life and also provides opportunities to develop motivation, self-esteem, work ethic, and discipline).

93. DIV. I MANUAL, *supra* note 3, § 15.01.1. *See id.* § 15.02.4.1 (noting that scholarships, grants, tuition waivers, and aid from government or private sources are considered "financial aid"). *See also id.* § 15.02.5 (indicating that a "full grant-in-aid is financial aid that consists of tuition and fees, room and board, and required course-related books").

94. DIV. I MANUAL, *supra* note 3, § 15.02.4.

95. *Id.* § 15.01.6.

96. *Id.* § 15.02.2. *See* McCormick & McCormick, *supra* note 13, at 498 (noting that the "cost of attendance" limits student-athlete's compensation to tuition, books, room, and board). *See also* Brooks & Davies, *supra* note 1, at 750, 753 (arguing that the permitted financial aid does not cover the actual cost of attendance, which a student who excels in another discipline is permitted to receive. However, the NCAA bylaws do allow student-athletes to receive scholarships or grants unrelated to athletic ability which "may be added to the basic grant-in-aid based on

financial aid that exceeds the cost of attendance, she loses her amateur status and cannot participate in intercollegiate athletics.[97]

Additionally, rule 12.1.2.2 (a) and (b) state that a recruit or student-athlete loses his amateur status if he "[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport; [or] [a]ccepts a promise of pay."[98] The Division I Manual defines pay as "direct or indirect salary, gratuity or comparable compensation."[99]

Amateurism permits the receipt of educational, social, physical, and mental benefits deriving from participation in the sport itself.[100] Amateurism also permits the receipt of the "cost of attendance."[101] Receipt of anything more is difficult to reconcile with the principle of amateurism, and a package deal could be considered "pay." An institution's hiring of someone with close ties to a recruit/student-athlete is a benefit, or "gratuity," to that individual. Therefore, package deals should be prohibited because they are adverse to amateurism.

Nonetheless, institutions sometimes hire employees for reasons separate and distinct from a recruit's enrollment. In these cases, both the recruit and the institution are advantaged. To declare that such a case should be prohibited would restrict the ability of an institution to hire the best employeespossible. Such a restraint on trade is undesirable and may lead to antitrust issues.[102] Section 1 of the Sherman Act may be applicable to package deals.[103] Section 1 of the Sherman Act prohibits "unreasonable restraints of trade effected by a 'contract, [or] combination' . . . between separate entities."[104] Under this section "[c]ertain agreements, such as horizontal price fixing and market allocation," are per se illegal.[105] Other agreements are subjected to a rule of reason analysis, examining market power and market structure to evaluate actual effects.[106] A rule prohibiting an institution from hiring certain coaches may be per se illegal as unlawful market allocation. Additionally, such a rule may not survive a rule of reason analysis, because prohibitions on hiring coaches may be deemed anticompetitive as to "depriv[e] the marketplace of the independent centers of decisionmaking that competition assumes and demands."[107] Therefore, a blanket prohibition on package deals could defy Section 1 of the Sherman Act.

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athletic ability to total" the actual cost of attendance. Note that the athletic departments did not pay for financial aid unrelated to athletic ability).

97. DIV. I MANUAL, *supra* note 3, § 15.1.

98. *Id.* § 12.1.2 (a)–(b).

99. *Id.* § 12.1.2.1.1.

100. *Id.* § 2.9.

101. *Id.* § 15.02.2.

102. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1983) (indicating that Section 1 of the Sherman Act prohibits "unreasonable restraints of trade").

103. Section 2 of the Sherman Act governs the "conduct of a single firm . . . [which is] unlawful only when it threatens actual monopolization." *Id.* at 767; *see also* 15 U.S.C. § 2 (2008). Arguably, this section is not applicable to NCAA rules governing institutions' hiring practices because such rules do not involve the conduct of "a single firm," but rather the conduct of the NCAA and individual institutions. Indeed, the Supreme Court has concluded that the NCAA "is independent of any particular State" and an institution "retain[s] the authority to withdraw from the NCAA and establish its own standards." *See* Nat'l Collegiate Athletic Ass'n v. Jerry Tarkanian, 488 U.S. 179, 193-95 (1988).

104. *Copperweld Corp.*, 476 U.S. at 768. For the purposes of this article, the NCAA and individual institutions are "separate entities."

105. *Id.*

106. *Id.*

107. *Id.* at 768-69.

The following proposed rule addresses the tension between amateurism and antitrust issues by prohibiting some, but not all, package deals.

III. RECOMMENDATION: A THREE-PART TEST TO PROHIBIT PACKAGE DEALS

Given the inadequacy of NCAA rules and the need for regulation of package deals, this article proposes a new NCAA rule which defines and prohibits package deals using a three-part test.

The first part of the proposed test states that the rule applies only to situations involving recruits and student-athletes who have been enrolled for one academic year or less,[108] and the hiring of a coach for the sport for which the student-athlete was recruited.[109] Only package deals that meet all parts of this test are prohibited.

The second part of the test describes the two situations that trigger scrutiny under the third part specifically type one and type two package deals.[110] For someone to have "close ties to a recruit," that person must be a relative, former or current coach, or former or current athletic trainer. The rule defines a "relative" as someone within one generation of the recruit. The coach or trainer and recruit must have maintained a coach-player or trainer-player relationship for at least five consecutive or nonconsecutive months.[111] A reasonable, common-sense understanding determines such relationships, including, but not limited to, teaching and advising the recruit regarding athletic or non-athletic related purposes.

A case that satisfies the second part is then analyzed under the third part. The third part balances facts and circumstances to determine if a case is a prohibited package deal. This part examines factors including, but not limited to the following: a coach's qualifications and experience, the amount of time between a coach's hire and a recruit's enrollment, actions taken by the institution shortly after the recruit's enrollment, and whether it is reasonable for the institution to pursue the recruit's enrollment by offering a package deal.[112] This last factor examines how highly a recruit is rated.

The Division I Manual does not contain any such facts and circumstances test for any issue.[113] However, the lack of such tests does not mean that one cannot be instituted. Any

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108. *See supra* Part II.A.2. Suggesting that prohibiting activities only during recruitment can provide opportunities for gamesmanship. The application of the proposed rule to student-athletes enrolled for one academic year or less is intended to mitigate this gamesmanship.

109. "Coach" refers to anyone hired in a coaching capacity. Admittedly, narrowly defining the class of hires this way can allow for gamesmanship. For example, an institution may hire a recruit's relative to be the president or a janitor in hopes of securing the recruit's enrollment. Broadening this concept leads to other possibilities, such as offering the recruit's significant other a scholarship as well. However, the scope of this article is to analyze and offer a solution to the "traditional" package deal, or player/coach and coach/player combinations.

110. *See supra* Introduction (noting the definitions of type one and type two package deals). This rule does not apply to "attempted" package deals. One example of an "attempted" package deal is when an institution hires someone with close ties to a recruit, and that recruit does not enroll.

111. Five months is somewhat arbitrary. Some coaches coach only a summer league, lasting approximately three months. A player who plays for a coach for two summers meets the five month requirement. A player who plays for a coach for only one summer may also meet the five month requirement. If a player and coach maintained a player-coach relationship for five months, then such a relationship presumably lasted longer than a summer. Maintaining a coach-player relationship after a coach's official coaching duties end can indicate the coach has close ties to the recruit.

112. *See supra* Part II.A.1. For a more detailed discussion of three of the four factors.

113. *But see* Press Release, NCAA, NCAA Division I Infractions Appeals Committee Upholds Records Penalty for University of Alabama, Tuscaloosa 5 (Mar. 23, 2010, 12:18:18 PM), http://media.al.com/alabama-

difficulty in applying the proposed rule would be outweighed by better and more satisfying outcomes.

CONCLUSION

The current NCAA rules do not adequately address package deals. The Division I Manual explicitly prohibits only the situation in which a coach's employment contract is contingent on a recruit's enrollment.[114] However, package deals can exist outside of a written contract.[115] Additionally, package deals can exist where a recruit's enrollment precedes a coach's hiring.[116] The NCAA rules regarding extra benefits and preferential treatment do not adequately address those package deals.

Many package deals should be prohibited because they are antithetical to amateurism. Yet, not all package deals should be prohibited because such a prohibition could run afoul of both antitrust laws and free market principles. Therefore, this article proposes a rule regulating package deals that seeks to preserve amateurism and conform to antitrust laws.

The proposed rule contains a three-part test to determine which package deals should be prohibited. The test defines package deals and indicates the circumstances in which they arise. The test also determines which package deals should be prohibited by examining various facts and circumstances.

This article presents the proposed rule as a solution to package deals in men's basketball and can offer guidance to the focus group investigating such package deals. Furthermore, the NCAA can apply this proposed rule to similar situations in other sports. The NCAA focus group has the opportunity to solve the package deal problem. Hopefully this article will illuminate some of the core issues and provide a springboard for crafting a fair and practical solution.

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sports/other/NCAA%20appeals%20final%20report.pdf (finding after a consideration of the facts and circumstances, The University of Alabama, Tuscaloosa's self-imposed penalties were not sufficient punishment for their NCAA violations). While the NCAA does not claim to do any facts and circumstances analysis this is one example where it has done so in the past.

114. DIV. I MANUAL, *supra* note 3, § 11.4.1.1.

115. *See infra* Part B.2. (the section on Type Two Package Deals).

116. *See infra* Part B.1. (the section on Type One Package Deals).

Foul Ball!
The Need to Alter Current Liability Standards for Spectator Injuries at Sporting Events

MOHIT KHARE

The issue of stadium or venue owner liability for spectator injuries has been of growing concern, affecting a variety of sports including baseball and hockey. In general, four elements must be met in order to successfully hold a negligence claim against a facility owner.[1] The spectator must prove that the landlord owed the spectator a duty of care under the circumstances, there was a breach of duty, an actual injury occurred, and the stadium owner's breach of duty was a proximate cause of the injury.[2] The complication in this analysis arises when determining the owner's duty and whether a breach has arisen.[3] Jurisdictions have employed a variety of analyses in assessing owner duty, with many courts utilizing the limited duty rule and assumption of risk standard, while other courts hold owners to a reasonable duty of care. The limited duty and assumption of risk standards, however, impose very little guidance as to the safety precautions stadium owners ought to apply and eliminate the legal duty to protect against risks inherent to sporting events.[4] The reasonable care standard combined with comparative fault, in contrast, holds stadium owners liable, thereby inducing them to take safety measures protecting their spectators and modernizing their venues to accommodate such precautions.[5] This article focuses on the need to apply the reasonable care standard in all jurisdictions instead of utilizing limited or primary assumption of risk liability rules, which effectively expose spectators to the possibility of serious injury without opportunity for redress. The history of the assorted liability standards that jurisdictions have applied to different sports will be analyzed first, followed by explanations of current modern day liability rules. An argument will then be made about the difficulties relating to many of these contemporary standards and their failures to relate to present-day sports. The utilization of a reasonable care standard and the positive effects such a norm would create for sporting events and arena safety will then be clarified. The discussion of reasonable care will also involve statutes and cases using the standard. In analyzing the variety of liability standards, the focal point will be on torts involving projectiles, which mainly occur in baseball and hockey.

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1. 20 CAUSES OF ACTION 2D 361, §§ 3–14 (2005).
2. *Id.*
3. *Id. at* § 26.
4. C. Peter Gopleurd III & Nicolas P. Terry, *Allocation of Risk Between Hockey Fans and Facilities: Tort Liability After the Puck Drops*, 38 TULSA L. REV. 445, 454 (2003).
5. *See* David Horton, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. REV. 339, 367 (2003) (discussing how reasonable care standard elevates the duty of stadium owners and causes them to explore applicable safety measure based on gathered data on fan injuries).

PART I – LIABILITY STANDARDS FOR BASEBALL AND HOCKEY

BASEBALL LIABILITY STANDARDS

Most liability rules concerning sports stem from baseball because it was one of the first major spectator-based sports in the United States.[6] Initially, during the early 1900s, it was generally understood that spectators assumed the risk of injury when they entered the ballpark.[7] Even in 1908, the Michigan Supreme Court in *Blakeley* held that visitors of a ballpark stadium assume the risk of injury because of the very nature of the game.[8] Similarly, in *Crane*, the court held that if a fan chooses to sit in a location prone to projectiles, the spectator has acted with contributory negligence and therefore the stadium owner owes him no duty.[9] However, the escalating amount of litigation in this area, due to an increase in foul balls and thrown bats hitting spectators, resulted in many courts adopting the Second Restatement of Torts, which equated the duty of landowners with that of stadium owners.[10] The attitude of courts favoring plaintiffs led to states shifting from primary assumption of risk to a comparative negligence system.[11] For instance, the Pennsylvania Supreme Court in *Jones* found that a defendant can be held negligent for an injury not common or frequent to a game, and therefore the no-duty rule only applies to expected risks.[12] This reasoning was borrowed from the *Ratcliff* decision, which found that a ballpark owner owes a duty of ordinary care to a spectator of the game, but when that spectator relocates to seating outside the protected area, he assumes the risk of being struck by a projectile.[13]

Liability in baseball has continued to evolve through the present day, where the trend has been for courts to favor the defendant and apply a primary assumption of risk or limited duty standard to baseball stadium owners.[14] The limited duty rule restricts tort liability of stadium owners, in regards to spectators struck by projectiles inherent to the game, by requiring that the owner offer sufficient protected seating to those who would seek it on an

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6. *See generally* HAROLD SEYMOUR, BASEBALL: THE EARLY YEARS (1989).

7. Wells v. Minneapolis Baseball & Athletic Ass'n, 142 N.W. 706, 708 (Mich. 1913) ("And if it had appeared clearly that plaintiff knew the dangers incurred by taking a seat in the open, it should be held that she assumed all risk of injury from balls thrown or batted in the game.").

8. Blakeley v. White Star Line, 118 N.W. 482, 483 (Minn. 1908) ("It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness . . . visitors standing in a position that may be reached by such balls... may be held to assume that risk.").

9. Crane v. Kansas City Baseball & Exhibition Co., 153 S.W. 1076, 1078 (Mo. Ct. App. 1913) ("So in the present case plaintiff, doubtless for the purpose of avoiding the annoyance of the slight obstruction to vision offered by the netting, voluntarily chose an unprotected seat, and thereby assumed the ordinary risks of such position.").

10. Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 454–55 (Tex. 1972).

11. *See generally* Lynne Reaves, *Eye on the Ball: Injured Spectator Wins*, 69 A.B.A. J. 1616 (1983).

12. Jones v. Three Rivers Mgmt. Corp., 394 A.2d 546, 551 (1978) ("The difference in the treatment of these two baseball spectators is explained by the fact that it is a matter of 'common knowledge' that fly balls are a common, frequent and expected occurrence in this well-known sport, and it is not a matter of 'common knowledge' that flying baseball bats are common, frequent or expected.").

13. Ratcliff v. San Diego Baseball Club of Pac. Coast League, 81 P.2d 625, 626 (Cal. Ct. App. 1938) ("The essence of these rules seems to be that those in charge of such games are not insurers of their patrons, that they are required to exercise ordinary care to protect their patrons from such injuries... It is well settled that one who voluntarily occupies a seat outside of the area thus protected assumes the natural and well-known risk of being struck by thrown or batted balls.").

14. *See, e.g.*, Lawson v. Salt Lake Trappers, Inc., 901 P.2d 1013 (Utah 1995); Bellezzo v. State, 851 P.2d 847 (Ariz. 1992); Arnold v. City of Cedar Rapids, 443 N.W.2d 332 (Iowa 1989).

ordinary basis and that the owner provide screening for the most dangerous sections of the stands.[15] The courts' frequent application of the limited duty rule to baseball eventually led to the primary assumption of risk standard, the "baseball rule."[16] This rule prohibits a spectator injured by a flying baseball from making a claim against the stadium owner or other responsible parties because he knowingly exposed himself to the inherent risks of the game.[17] Despite this stringent standard, ballpark owners are not totally released from liability, with many jurisdictions mandating that stadium owners provide a screen for certain seats that have a high probability of projectile danger, as required by the limited duty rule.[18] An example of this is the *Swagger* case, where the plaintiff alleged that not enough screened seats were provided to accommodate her.[19] The court ruled that a facility owner's duty ends when he provides patrons with the choice between screened and non-screened seats.[20] As evidenced by from the *Swagger* case, other than offering some screen protection, stadium owners are not reasonably expected to undertake additional safety precautions under the baseball rule.[21] Minnesota went on to extend the baseball rule's application in the *Alwin* case, where a spectator was injured by a foul ball while returning to his seat from the restroom.[22] The court found that current case law did not distinguish between spectators in the stands and those in the concession area, and therefore in both instances the spectators assumed the inherent risks of the game.[23]

The defining case on the subject of a facility owner's duty to sporting event patrons is *Akins*, in which the plaintiff was injured after a foul ball struck her in the eye as she stood behind the fence along the third base line.[24] The appellate court, when dismissing the plaintiff's complaint, found that the facility owner must only screen the most dangerous section of the field – the area behind home plate – and that the screening must be sufficient for those spectators who are reasonably anticipated to want protected seats on an ordinary occasion.[25] This minimum standard has unfortunately been utilized by courts, such as in *Erickson*, which held that screening behind home plate was sufficient to release the ballpark

15. Maisonave v. Newark Bears Prof'l Baseball Club Inc., 881 A2d 700, 703 (N.J. 2005)("[F]irst, the operator must provide protected seating 'sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion,' and second, the operator must provide protection for spectators in 'the most dangerous section' of the stands. The second component of this limited duty ordinarily may be satisfied by the operator providing screened seats behind home plate in baseball and behind the goals in hockey.").

16. *See* George D. Turner, *Allocating the Risk of Spectator Injuries between Basketball Fans and Facility Owners*, 6 VA. SPORTS & ENT. L.J. 156, 159–60 (2006). When discussing the baseball rule, "[m]ost courts have recognized primary assumption of risk as a valid defense in baseball premises liability cases on the presumption that the risk of being struck by a foul ball is common knowledge." *Id.* at 159.

17. Shain v. Racine Raiders Football Club, Inc., 726 N.W.2d 346, 350 (Wis. Ct. App. 2006).

18. Yates v. Chi. Nat'l League Ball Club, Inc., 595 N.E.2d 570, 578 (Ill. App. Ct. 1992) ("This duty is usually satisfied if the owner-occupier 'provide[s] screen for the most dangerous part of the grandstand and for those who may be reasonably anticipated to desire protected seats' for a typical game.").

19. *See* Swagger v. City of Crystal, 379 N.W.2d 183, 185 (Minn. Ct. App. 1985).

20. *Id.* at 185–86 ("[D]uty to protect its patrons from thrown or batted balls ceases when it offers the spectators a choice between screened-in or open seats unless some reason exists requiring a fuller explanation of the perils involved.").

21. *Id.*

22. Alwin v. St. Paul Saints Baseball Club, Inc., 672 N.W.2d 570, 571 (Minn. Ct. App. 2003).

23. *Id.* at 573 ("There is no Minnesota case law that distinguishes between Alwin's classification as a spectator in the stands versus in the concession area. In both areas, Alwin is a spectator or patron within the ballpark. As a spectator, Alwin primarily assumes the risk inherent to the game, which includes being hit by a foul ball.").

24. *See generally* Akins v. Glens Falls City Sch. Dist., 424 N.E.2d 531 (N.Y. 1981).

25. *Id.* at 533.

owner from liability, even if there were not enough protected seats to accommodate all spectators who would want them.[26] The Illinois Baseball Facility Act has essentially adopted what is now called the "Akins Rule," protecting ballpark owners from liability for injuries caused by bats or baseballs.[27] There has only been one attempt thus far to challenge the Illinois Baseball Facility Act, namely *Jasper*, in which the plaintiff was injured by a foul ball at a Chicago Cubs game.[28] In his argument, the plaintiff contended that baseball's characteristics were no more unique than any other sport's and that the Illinois Baseball Facility Act was passed solely in response to a string of Illinois cases upholding a reasonable care standard.[29] Regrettably, the court chose not to heavily scrutinize the issue, and found that baseball has enough unique characteristics to justify its specific legislation.[30] The harsh liability rules and statutes now in place for baseball have unfortunately influenced courts with regard to sports that commonly experience projectile-tort cases, such as hockey.

HOCKEY LIABILITY STANDARDS

The evolution of hockey took a much different route than that of baseball, with spectators initially able to recover for injuries caused by errant pucks.[31] The reasoning for this was founded on hockey's novelty, and therefore spectators did not necessarily have common knowledge of dangers that hockey entails and its fundamental differences from other sports.[32] Courts therefore rejected a primary assumption of risk defense and only allowed hockey arena owners to escape liability by successfully claiming a secondary assumption of risk when spectators had actual knowledge of the dangers of errant pucks.[33]

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26. Erickson v. Lexington Baseball Club, 65 S.E.2d 140, 141 (N.C. 1951). ("Nor is management required, in order to free itself from negligence, to provide protected seats for all who may possibly apply for them. It is enough to provide screened seats, in the areas back of home plate where the danger of sharp foul tips is greatest, in sufficient number to accommodate as many patrons as may reasonably be expected to call for them on ordinary occasions.").

27. Baseball Facility Liability Act, 745 Ill. Comp. Stat. Ann. 38/10 (West 2009) ("The owner or operator of a baseball facility shall not be liable for any injury to the person or property of any person as a result of that person being hit by a ball or bat unless: (1) the person is situated behind a screen, backstop, or similar device at a baseball facility and the screen, backstop, or similar device is defective (in a manner other than in width or height) because of the negligence of the owner or operator of the baseball facility; or (2) the injury is caused by willful and wanton conduct, in connection with the game of baseball, of the owner or operator or any baseball player, coach or manager employed by the owner or operator."); *see also Akins,supra* note 24.

28. Jasper v. Chi. Nat'l League Ball Club, Inc., 722 N.E.2d 731, 733 (Ill. App. Ct. 1999).

29. *Id.* at 735. ("Plaintiff suggests that the Baseball Act was a legislative response to [*Coronel*] and [*Yates*]. Both cases held that owners and operators of major league baseball parks owed a duty of reasonable care to protect spectators from injury caused by foul balls... baseball is the only sport the legislature has afforded 'almost complete immunity from negligence for injuries to spectators from objects used in the sport, while at the same time imposing no responsibility on [ballpark owners] for the safety of their paying customers.' Plaintiff contends that there is nothing so unique about baseball that its spectators should be treated differently than spectators of other sports.").

30. *Id.* ("We believe the sport of baseball does have unique characteristics that would reasonably prompt a legislature to enact limited liability legislation. The inherent danger of a sport may be reason enough to prompt the legislature to enact a limited liability statute.").

31. *See* Horton, *supra* note 5, at 348 (discussing where most jurisdictions in the past did not bar plaintiffs who had been injured by errant pucks).

32. *See* Uline Ice, Inc. v. Sullivan, 187 F.2d 82, 86 (D.C. Cir. 1950) (affirming the lower court jury verdict that the dangers inherent in sitting in an unscreened, ring-side seat at a hockey match were not common knowledge to the appellee).

33. *See id.* (refusing to apply the baseball rule/primary assumption of risk to hockey because the appellee "did not know that the puck could leave the playing area").

Such was the case in *Shanney*, in which the plaintiff alleged the defendant failed to warn her of dangers which were not obvious.[34] The court rejected the defendant's primary assumption of risk defense because there was no presumption that the plaintiff-spectator knew or appreciated the possible risk of injury.[35] This reasoning carried over to *Thurman*, in which the court posed the question of whether a spectator who voluntarily selects an unprotected seat in the rink assumes the risk of being struck by a puck.[36] The court determined that it was a question for the jury whether the defendant was negligent in not providing screens to protect spectators, and further contended that it was not common knowledge to spectators that a hockey puck may enter their seating section.[37] In *Lemoine*, the court had to decide the crucial issue of whether a spectator who had common knowledge that pucks do enter the stands could still hold the arena owner liable.[38] Considering the spectator's knowledge, the court held that the plaintiff should be able to rely on the defendant arena owner to exercise reasonable care in keeping spectators safe from errant pucks.[39] Regardless of the plaintiff's knowledge of the possibility of being struck by pucks, the court reasoned that a jury could still find that pucks entered the stands so frequently that the defendant's protections were inadequate and the plaintiff's reliance on such protections was proper.[40] Essentially, the court in *Lemoine* refused to limit arena owner liability on the basis of a fan's knowledge of hockey's possible dangers,[41] making it difficult to argue a secondary assumption of risk defense.

As hockey grew more popular and obviously dangerous to spectators, courts today have regrettably begun to hold that primary assumption of risk and limited duty standards are valid defenses.[42] As the court in *Nemarnik* commented when applying primary assumption of risk, "professional ice hockey has grown in popularity . . . ice hockey

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34. Shanney v. Boston Madison Square Garden Corp., 5 N.E.2d 1, 1 (Mass. 1936).

35. *Id.* at 2 (rejecting primary assumption of risk defense because "there must be many who are in attendance for the first time" without knowledge of the risks entailing the game).

36. Thurman v. Ice Palace, 97 P.2d 999, 1000 (Cal. Ct. App. 1939) ("Does a spectator at an ice hockey game, who voluntarily selects a seat, which is not protected by a screen, on the edge of the rink, as a matter of law assume the risk of being struck by a puck used in the game?").

37. *Id.* ("It is a question of fact to be determined by the jury from all the evidence whether the defendants were negligent in not providing either notices warnings patrons of danger from flying pucks or screens to protect the spectators in case a puck..." would leave the playing area.); *see also id.* at 1001 ("It is not common knowledge that pucks used in ice hockey games are liable to be batted into the sections occupied by spectators.").

38. Lemoine v. Springfield Hockey Ass'n, Inc., 29 N.E.2d 716, 718 (Mass. 1940) ("He had gone to hockey games in 1936 and once in a great while prior to 1936. He was familiar with the layout of the rink and the seats and with the nature of the game. He had seen the puck leave the rink and go into seats over the end zones on two occasions but he had never seen the puck go into the audience over the sides of the rink where there were no screens. One of his companions, who had seldom missed a game since 1926, testified that although he had seen the puck go over the end of the rink many times he had seen it go over the sides of the rink only once or twice and on those occasions it did not go into the promenade but landed in the first or second row of seats.").

39. *Id.* ("The plaintiff could to some extent rely upon the performance by the defendant of its duty to use reasonable care to keep the premises in a reasonably safe condition for the use of those who attended the games.").

40. *Id.* ("Upon the evidence, a jury might properly find that the puck had gone into the promenade with sufficient frequency to indicate to the defendant that, unless additional safeguards were employed or a warning given, it was reasonably probable that injury might result to a patron who, trusting to appearances, could properly infer that the two fences furnished adequate protection and that the absence of a screen on the side of the rink tended to show that it was unnecessary.").

41. *Id.* ("His knowledge as to the likelihood of a puck being driven to the promenade did not rest upon as extensive a basis as that of the defendant.").

42. Moulas v. PBC Prods., Inc., 570 N.W.2d 739, 745 (Wis. Ct. App. 1997) ("Hockey is played to such an extent... and its risk are so well known to the general public that... there is no difference in fact between hockey and baseball.").

spectators face a known risk of being hit by a flying puck."[43] In addressing whether a spectator's knowledge of risks are relevant when attending a hockey game, courts like the one in *Pestalozzi* have said that, "the risk of a spectator being struck by an errant puck . . . is common and reasonably foreseeable."[44] Therefore, the manner in which a hockey rink owner's duty can be satisfied in the modern era is illustrated in *Gilchrist*, where a minor was injured by an errant hockey puck.[45] The *Gilchrist* court held that the duty of a hockey arena owner is satisfied when two conditions are met: screening must be provided in the area of hockey goals due to the increased danger in those areas of being struck by an errant puck, and the screening must be enough protection while allowing spectators to view the game.[46] Such an approach follows the guidelines of limited duty, which were described by the *Schneider* court when explaining the limited duty arena owners have in providing screening for areas where there is a high risk of injury.[47] Some courts have extended the baseball rule to hockey, for example in *Moulas*, where the plaintiff was struck unconscious by an errant puck.[48] The appellate court upheld the trial court's application of the baseball rule because of the spectator's knowledge that objects, such as pucks, can be propelled into the stands and cause injury.[49]

PART II – DEFECTS WITH CURRENT LIABILITY STANDARDS

FLAWS WITH PRIMARY ASSUMPTION OF RISK

The chief defense for stadium owners against spectator injury liability is primary assumption of risk, which is commonly utilized in jurisdictions that apply contributory negligence.[50] Under primary assumption of risk, the defendant owes no duty to protect the plaintiff from risks inherent to the sport if such risks are common knowledge or open and obvious to a reasonable person.[51] Many jurisdictions combine comparative and contributory negligence with primary assumption of risk, barring recovery if the plaintiff is more than fifty percent at fault.[52] However this combination has proved futile to injured spectators as

43. Nemarnik v. L.A. Kings Hockey Club, L.P., 127 Cal. Rptr. 2d 10, 15 (Cal. Ct. App. 2002).

44. Pestalozzi v. Phila. Flyers Ltd., 576 A.2d 72, 74 (Pa. Super. Ct. 1990).

45. Gilchrist v. City of Troy, 113 A.D.2d 271, 273 (N.Y. App. Div. 1985).

46. *Id.* at 274 (concluding the owner must "provid[e] screening around the area behind hockey goals, where the danger of being struck by a puck is the greatest" and that the screening must be "of sufficient extent to provide adequate protection for as many spectators as may be reasonably expected to desire to view of the game from behind such screening").

47. Schneider v. Am. Hockey & Ice Skating Ctr., 777 A.2d 380, 382 (N.J. Super. Ct. App. Div. 2001) ("A hockey rink operator has a limited duty to provide a protected area for spectators who choose not to be exposed to the risk posed by flying pucks and to screen any spectator area that is subject to a high risk of injury from flying pucks.").

48. Moulas v. PBC Prods. Inc., 570 N.W.2d 739, 740 (Wis. Ct. App. 1997).

49. *Id.* at 744 ("We agree with the trial court that the baseball rule applies here. Essentially, the baseball rule prohibits a spectator who is injured by a flying baseball to make a claim against the team or other responsible parties... Here, Moulas does not deny that she was aware of the risk of an errant puck causing injury.").

50. Joshua E. Kastenberg, *A Three Dimensional Model of Stadium Owner Liability in Spectator Injury Cases*, 7 MARQ. SPORTS L.J. 187, 198 n. 73 (1996) ("Typically, these jurisdictions differentiate between invitees, licensees, and trespassers as well. The designation of a spectator is typically, but not always, an invitee. In these jurisdictions, the use of primary assumption of risk, even in a comparative negligence scheme, is important.").

51. *See* Turner, *supra* note 16, at 161.

52. *See* Kastenberg, *supra* note 50, at 197 ("However, most comparative fault jurisdictions employ a modified comparative fault/contributory negligence scheme. Under such a scheme, where the plaintiff's

demonstrated in *Sewell*, which held that as a matter of law spectators assume the risk of injury when attending sporting events and consequently are automatically barred from recovery.[53]

The basic premise of primary assumption of risk is that a spectator is precluded from recovering for an injury that is a consequence of a common feature of an event and the spectator had knowledge of this due to its obvious nature.[54] This illustrates how the limited duty rule and primary assumption of risk parallel each other, since both essentially preclude spectators from recovering for injuries stemming from risks inherent to the sporting event and injuries that occurred in unprotected areas.[55] Courts generally do not distinguish between the elements essential to primary assumption of risk and those of limited duty. As the Missouri Supreme Court in *Olson* stated, "primary assumption of risk is not so much an affirmative defense as an expression of the idea that the defendant owes a limited duty of care to the plaintiff with respect to the risk incident to their relationship."[56] Thus, despite alternatives such as limited duty and the baseball rule, primary assumption of risk has been the main standard applied to cases involving hockey, baseball and other sports.[57]

Although the primary assumption of risk rule appears black and white, difficulty arises from its "common feature of the sport" element, which generates a problematic industry standard in spectator injury cases.[58] To answer such a subjective question, counsel for both parties will be forced to scrutinize the injured party's knowledge of the sport to determine whether the plaintiff knew such a danger was common to the sport.[59] The common knowledge factor is further complicated when unforeseen scenarios unfold, as in *Lee*. In *Lee*, the court found that it is not common to expect to be knocked down by the force of game-patrons trying to catch a foul ball.[60] Although common knowledge may be applicable to other tort scenarios, sports litigation has been relatively reticent in this area, making it extremely difficult to decipher what may have been common knowledge to a spectator at a specific sporting event.[61]

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contributory negligence is greater than the defendant(s), the plaintiff will be barred from recovery.").

53. *See* Sewell v. Dixie Region Sports Car Club of Am., Inc., 451 S.E.2d 489, 491 (Ga. Ct. App. 1994) ("A person cannot undertake to do an obviously dangerous thing without himself being guilty of such lack of due care for his own safety as to bar him from recovery if he is injured.").

54. *See* Kastenberg, *supra* note 50, at 198 ("Generally, under this doctrine, spectators are unlikely to recover for injuries that result from the common feature of the event itself.").

55. *See* Turner, *supra* note 16, at 168–69 ("The limited duty rule and defense of primary assumption of risk produce the same result—both bar spectators seated in unprotected areas from recovering for injuries sustained as a result of risks inherent to the sport.").

56. Olson v. Hansen, 216 N.W.2d 124, 127 (Minn. 1974); *see also* Springrose v. Willmore, 192 N.W.2d 826, 827 (Minn. 1971) ("Primary assumption of risk . . . relates to the initial issue of whether a defendant was negligent at all—that is, whether the defendant had any duty to protect the plaintiff from a risk of harm.").

57. *See* Turner, *supra* note 16, at 161 ("Courts have applied the doctrine on one or both of these bases to varying degrees in sports other than baseball such as hockey, wrestling, and auto racing.").

58. *See* Kastenberg, *supra* note 50, at 201 (explaining how establishing a standard to which to judge a breach of duty, with the common feature element, can be difficult).

59. *See generally* Blakeley v. White Star Line, 118 N.W. 482, 483 (Minn. 1908).

60. Lee v. Nat'l League Baseball Club, 89 N.W.2d 811, 816 (Wis. 1958) ("As we view the issue of assumption of risk in this case, it boils down to the question of whether it is a matter of common knowledge that spectators at baseball games, who scramble for balls batted into the stands, are likely to forcibly knock other patrons out of their seats with such force as to injure them. This could not have been a matter of common knowledge on the part of patrons of the defendant in attendance at National League games up to the time of plaintiff's injury.").

61. *See generally supra* note 60.

Another problematic element in the primary assumption of risk standard is the open and obvious risk analysis for spectator injuries. It is increasingly difficult to characterize "obvious risks," implied accident avoidance, and which areas of a ballpark or hockey arena constitute areas of danger that are open and obvious.[62] The argument that a fan will avoid a high velocity puck or baseball because of the "obvious risk" is simply unsustainable.[63] The obvious risk element is premised largely on individual knowledge, yet is supposed to be applied uniformly to both the casual fan and the knowledgeable spectator of the game.[64] This flawed logic was used in *Benejam*, in which the court held that although the injured minor-spectator may have had limited knowledge of baseball, there was no reason to distinguish her from other spectators and she therefore knowingly accepted the open and obvious risks of the game.[65] The Restatement itself has evolved to reject any open and obvious arguments that defendants may claim by stating, "the possessor should anticipate the harm despite such knowledge of obviousness."[66] The open and obvious assumption comes under greater scrutiny with regard to recreational activities and entertainment at the game, when spectators may be in an area of obvious risk, but fail to realize this due to external distractions.[67]

Another defect of primary assumption of risk and limited duty is that the rules assume spectators are better suited to evade harm, when, in fact, the stadium owner can easily satisfy the duty of preventing harm to fans.[68] Thus, as a safety measure, a stadium owner could warn fans of possible injury or require supplementary safety precautions for spectators rather than have courts apply a harsh primary assumption of risk standard to the spectator.[69]

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62. *See* Goplerud & Terry, *supra* note 4, at 450 ("Equally lacking is any cogent argument consistent with the accident avoidance message implicit in the "obvious risk" characterization; the argument that even a knowledgeable hockey fan is as a matter of law better able to prevent injury from a hundred mile per hour puck than an adequate barrier is untenable.").

63. *See id.*

64. *See id.* (Discussing the lack of distinction in knowledge of the game between casual spectators and fans with superb knowledge of the sport).

65. *See* Benejam v. Detroit Tigers, Inc., 635 N.W.2d 219, 226 (Mich. Ct. App. 2001) (finding that the minor-spectator accepted the inherent and obvious risks of the game, and therefore the defendant was only subject to the limited duty rule).

66. RESTATEMENT (SECOND) OF TORTS § 343A(1) (2008).

67. *See* Goplerud and Terry, *supra* note 4, at 451 ("[H]owever, in light of the increasing number of literal distractions, such as the diversions and entertainments featured 'live' or on video screens in most stadiums, this argument may have increasing effectiveness.").

68. *See* Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience With "New" Torts*, 49 DEPAUL L. REV. 455, 458–59 (1999). When citing tort scholar Guido Calabresi, "[o]ne should rather ask whether, in general, for the type of injury involved, defendants or plaintiffs are more likely to be best positioned to know about the risks and to take precautions designed to avoid the accident . . . " *Id.* at 458. The Calabresi analysis led the courts to "hold defendants responsible for injuries suffered either on the defendants' properties or from use of the defendants' properties." *Id.* at 459.

69. City of Milton v. Broxson, 514 So. 2d 1116, 1118 (Fla. Dist. Ct. App. 1987). In discussing a duty a stadium owner owes to it spectators, "[w]here an invitee's knowledge of a dangerous condition will adequately protect him from harm, an owner's duty with regard to the condition is limited to giving proper warning, where required. The invitee can be expected to protect himself against such risks. However, where the danger is of such a nature that the owner should reasonably anticipate that it creates an unreasonable risk of harm to an invitee notwithstanding a warning or the invitee's knowledge of the danger, then reasonable care may require that additional precautions be taken for the safety of the invitee." *Id.*

DILEMMAS CONCERNING LIMITED DUTY AND THE AKINS RULE

Although the limited duty rule and Akins Rule share all the flaws of primary assumption of risk for spectator injuries, a few other defects of the standards should be noted. As the rules dictate, screening ought to be applied behind home plate for baseball and the area behind goals for hockey, traditionally the most dangerous areas during these sporting events.[70] However, this fails to account for the fact that as sports have evolved, the prices on premium seats have increased dramatically.[71] Seats behind home plate, for instance, have become the most expensive seating area at a baseball game and as acknowledged in case law, are almost never readily available to consumers unless they are season ticket holders who are given first priority.[72] Case law has established that a patron cannot usually recover for damages if he chooses to sit in an unprotected area, therefore placing a heavy financial burden on consumers to purchase seating that will provide adequate protection, such as near a hockey goal or behind home plate.[73]

Spectators are further disadvantaged by the ticket-purchasing process because they are not able to easily evaluate their seating choices.[74] In essence, the rules provide no mechanism as to how potential spectators are to determine which seats are screened and how many of those seats are available for purchase.[75] For instance, when consumers purchase tickets through avenues such as Ticketmaster online, the illustrations of the arenas provide no indication of the protected seats and only allow consumers to purchase tickets based on price categories.[76] The same problem occurs when an individual attempts to purchase tickets in-person at the box office, where consumers are usually only allowed to select tickets based on price level and are unable to search for seats that provide protective screening, even

70. Lynch v. Bd. of Educ. for Oceanside Sch. Dist., 225 A.D.2d 741, 741–42 (N.Y. App. Div. 1996) ("Where, as here, a proprietor of a ballpark furnishes screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest, and that screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, the proprietor fulfills the duty of care imposed by law and, therefore, cannot be liable in negligence."); *see also* Schneider v. Am. Hockey & Ice Skating Ctr., *supra* note 47, at 384 ("[T]he operator must provide protection for spectators 'in the most dangerous section' of the stands. The second component of this limited duty ordinarily may be satisfied by the operator providing screened seats behind home plate in baseball and behind the goals in hockey.").

71. *See* Turner, *supra* note 16, at 161. *See also* Lorino v. New Orleans Baseball & Amusement Co., 133 So. 408, 409 (La. Ct. App. 1931) (affirming a judgment in favor of the owner of a ballpark in an action by a spectator who had chosen a seat in the bleachers instead of the higher priced protected seats available in the grandstand).

72. *See Lorino*, 133 So. at 408–09; *see also* Rudnick v. Golden W. Broadcasters, 202 Cal. Rptr. 900, n. 5 (Cal. Ct. App. 1984) ("It is doubtful any seats behind the screen are ever available from the box office for a single . . . game.").

73. Gil Fried, *Plaintiffs in the Stands*, ENT. & SPORTS LAW, Spring/Summer 2002, at 8, 11 ("Thus, while a facility is supposed to have enough screened seats for those that might reasonably be expected to request them, especially in the most dangerous areas, the individuals who might want such protection might have a hard time in fact obtaining such a seat without paying a significantly higher price. The type of seat made available can also produce a liability concern.").

74. Brett Celedonia, *Flying Objects: Arena Liability for Fan Injuries in Hockey and Other Sports*, 15 SPORTS LAW. J. 115, 135 (2008) ("When individuals purchase tickets to sporting events they are not put in the position to evaluate their seating choices.").

75. *See* Neinstein v. L.A. Dodgers, Inc., 229 Cal. Rptr. 612, n. 2 (Cal. Ct. App. 1986) (stating that the defendant had "no information as to how many of the screened seats were left unsold for the game at which the plaintiff was injured").

76. Various arena illustrations are available at http://www.ticketmaster.com.

when there is a live representative to discuss the matter with.[77] The abstract nature of the limited duty rule and the Akins Rule also fail to create an incentive for owners to provide proper screening for the most dangerous part of the stadium.[78] In addition, although the most dangerous part of the ballpark has been assumed by courts to be behind home plate,[79] evidence now demonstrates that the most unsafe areas are along the first and third baselines, which are significantly past home plate.[80]

In the end, limited duty and the Akins Rule place very little incentive on stadium owners to provide more safety precautions than the minimum necessary, effectively leading to an increase in injuries as stadium owners attempt bring fans closer to the game.[81] Unfortunately, although the standards are an attempt to reduce litigation and potential costs for stadium owners, they are ultimately unrealistic. Fans will almost never actively seek seats that are screened, but will rather choose seats that will get them as close to the game as possible and are within their price range.[82]

SECONDARY ASSUMPTION OF RISK

Another defense to note, which a small number of jurisdictions apply, is secondary assumption of risk, which refers to instances where the defendant has deliberately breached a duty, but the spectator knowingly encounters the risk.[83] This defense is applied in comparative fault jurisdictions, and thus the jury apportions the percentage of fault among both parties involved.[84] Despite the comparative fault application, most courts still go on to find the plaintiff-spectator mostly or completely at fault if he chose to sit in an unprotected area, leaving very little liability for the facility owner to account for.[85] The comparative fault

77. *See* Celedonia, *supra* note 74, at 135–36 ("I specifically asked the box office for seats behind the protective netting and was told they could not search for tickets with those parameters and they could only search for tickets by price level. Although I was trying to purchase tickets that were protected, I ultimately ended up with seats that were not protected.").

78. *See* Gil Fried & Robin Ammon, *Baseball Spectators' Assumption of Risk: Is it 'Fair' or 'Foul'?*, 13 MARQ. SPORTS L. REV. 39, 60 (2002) ("However, some fields also run the net three to five feet above the dugout and then end all their screening. The lack of insufficient screening was identified in one case . . . ").

79. Erickson v. Lexington Baseball Club, 65 S.E.2d 140, 141 (N.C. 1951) ("It is enough to provide screened seats, in the areas back of home plate where the danger of sharp foul tips is greatest, in sufficient number to accommodate as many patrons as may reasonably be expected to call for them on ordinary occasions.").

80. *See* Fried & Ammon, *supra* note 78, at 60 ("Some fields place their nets in a position where the protection ends at a spot where the first and third base lines would, if possible, extend into the stands. This location scheme was highlighted in a major expose, but the article and diagrams went on to show that this area was not the most dangerous. Rather, the most dangerous areas were down the first and third baselines for a significant distance past the dugouts."); *see also generally* Tom Verducci, *Safety Squeeze*, SPORTS ILLUSTRATED, Apr. 1, 2002, at 64.

81. *See* Horton, *supra* note 5, at 367 (discussing how the evolution of tort law has given arena owners little motivation to reexamine their safety guidelines and explaining how thirteen newly built stadium have brought fans dangerously close to the playing field).

82. *See* Horton, *supra* note 5, at 366 ("[F]urther reinforcing the artificiality of the baseball rule's assumption that fans who want to avoid foul balls will seek screened seats . . . "); *see also* Lorino v. New Orleans Baseball & Amusement Co., Inc., 133 So. 408 (La. Ct. App. 1931).

83. *See* VICTOR SCHWARTZ, COMPARATIVE NEGLIGENCE 92 (4th ed. 1985).

84. *Id.*

85. Swagger v. City of Crystal, 379 N.W.2d 183, 185 (Minn. Ct. App. 1986) ("Appellants argue that primary assumption of the risk should not bar their claim. However, the supreme court's holding in *Springrose* indicates that primary assumption of the risk is an active doctrine, despite the enactment of the comparative fault act.").

analysis for secondary assumption of risk will be further discussed in the reasonable care portion of this article.

THE RISING POPULARITY OF THE DISTRACTION THEORY

A growing area of concern for the current liability standards utilized by jurisdictions is the expanding prevalence of the "distraction theory." One of the first cases to employ the theory was *Broxson*, where the plaintiff-spectator who was walking back to his seating area was injured by a poor throw from a player warming-up for the scheduled game.[86] When the plaintiff was hit, he was in an area extremely close to the ball-throwers, with some of the seats only five feet away from players who were practicing.[87] The court went on to hold that a stadium owner should provide reasonable care when it is reasonably known that a certain distractions of the game may create dangers for spectators.[88] This gave rise to the distraction theory, where owners can be found liable for distractions they have created, and the distractions were not caused by the plaintiff's lack of attentiveness to the obvious risks of the game.[89]

Thus courts have slowly begun to recognize the external distractions that are present at sporting events, which may cause spectators to redirect their attention to a diversion and forget the existence of dangers such as foul balls.[90] This was the case in *Lowe*, which involved a plaintiff being struck by a foul ball after diverting his attention to a dancing mascot.[91] The mascot's entertainment act was not only a distraction to the plaintiff, but the tail of the mascot also repeatedly bumped him in the head, leading to the plaintiff to be struck by the ball while looking over his right shoulder at the cause of the disruption.[92] The defendant attempted to use the traditional primary assumption of risk defense that the stadium had screened seats available and the plaintiff chose to sit in an unprotected area, thus assuming the risk of being struck by a foul ball.[93] However, the court found that under the distraction theory, the antics of the mascot were not a necessity to the baseball game and whether such a diversion could increase the inherent risks for a spectator was a triable issue of fact.[94]

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86. City of Milton v. Broxson, 514 So. 2d 1116, 1117 (Fla. Dist. Ct. App. 1987).

87. *Id.*

88. *Id.* at 1118 ("[W]here the danger is of such a nature that the owner should reasonably anticipate that it creates an unreasonable risk of harm to an invitee notwithstanding a warning or the invitee's knowledge of the danger, then reasonable care may require that additional precautions be taken for the safety of the invitee.").

89. *See id.*; *see also* Fried & Ammon, *supra* note 78, at 52 ("The 'distraction theory' states that for the facility owner to be liable, the owner must have created the distraction, and that the distraction 'not be self-induced by the plaintiff's [lack of attention] to [the] obvious risk[s].'").

90. *See* Fried & Ammon, *supra* note 78, at 54 (discussing how distractions from vendors, mascots, and merchandise 'hawkers' can divert the attention of spectators away from the game, preventing them from fully realizing the dangers of the game that may exist).

91. Lowe v. Cal. League of Prof'l Baseball, 65 Cal. Rptr. 2d 105, 106 (Cal. Ct. App. 1997).

92. *Id.* at 107. During a question/answer testimony, the plaintiff stated, "A. Well, during that approximate two-minute span he was doing his act. And I felt this bam, bam, bam, on the back of my head and shoulders, and I turned around to see what he was doing.... Q. You felt something on your shoulders? A. Right. Q. How do you know it was the tail that tapped you on the shoulder? A. I turned around and looked." *Id.*

93. *Id.* at 106 ("Defendants were able to persuade the trial court, under the doctrine of primary assumption of the risk . . . that defendants owed no duty to plaintiff, as a spectator, to protect him from foul balls. Such rationalization was faulty.").

94. *Id.* at 111 ("In view of this testimony, as a matter of law, we hold that the antics of the mascot are not an

The recent string of distraction theory cases leads to the conclusion that current liability standards fail to take into account the growing diversions and promotional events that occur during game play.[95] It becomes unfair to assume that a spectator assumes a risk of injury when his attention is diverted to an external attraction at the stadium, particularly when the stadium owner fully expects the activity to be a distraction to game attendees.[96] The increasing prevalence of the distraction theory also demonstrates the murky area of what is "incidental" or "inherent" to the game, where courts are now pressed to decide whether certain distractions qualify under these categories.[97]

PART III – INTRODUCTION TO REASONABLE CARE AND ITS ADVANTAGES

INITIAL JURISDICTIONS UTILIZING A REASONABLE CARE STANDARD

The numerous flaws in the aforementioned liability standards lead to the conclusion that jurisdictions must begin applying a duty of reasonable care to stadium owners. While limited duty and primary assumption of risk ignore factors such as frequency and severity of injury, cost-benefits of providing protection, regulation of seating assignment, and providing effective warnings, reasonable care helps highlight such elements so that stadium owners take effort in reducing spectator injury.[98] The standard of reasonable care began its formation in the Illinois case of *Coronel*, where the plaintiff alleged there was a lack of adequate protected seating and a failure to warn of possible harm from foul balls.[99] In making its determination, the court found that it was a question of fact whether there was a duty to warn spectators of dangers from the game, even if such risks were open and obvious to the patron.[100] Thus, in its ruling, the court concluded that even if a stadium owner did provide adequate protection for the most dangerous seats, liability could attach if the plaintiff was not warned of the dangers and the stadium owner knew of the potential for injury.[101] The reasoning was based on the belief that stadium owners may owe a greater duty

essential or integral part of the playing of a baseball game. In short, the game can be played in the absence of such antics. Moreover, whether such antics increased the inherent risk to plaintiff is an issue of fact to be resolved at trial.").

95. *See* Fried & Ammon, *supra* note 78, at 54 (discussing how advertised products, scoreboard information, mascots, brochures, and promotional events will begin to affect how typical standards of care are utilized in future foul ball cases).

96. *See id.* at 54.

97. Scott B. Kitei, *Is the T-Shirt Canon "Incidental to the Game" in Professional Athletics?*, 11 SPORTS LAW. J. 37, 54–55 (2004) ("Are these events and activities 'incidental and inherent to the games' during which they take place? . . . [L]awsuits always stemmed from the actions and activities of the players, not of cheerleaders, spectators, or other individuals. As a result, it is unclear how a court would apply existing law to such promotional activity.").

98. *See* Horton, *supra* note 5, at 367.

99. Coronel v. Chi. White Sox, Ltd., 595 N.E.2d 45, 46 (Ill. App. Ct. 1992).

100. *Id.* at 46 ("Whether or not there is a breach of a duty, however, is a question of fact, to be determined by the trier of fact.").

101. *Id.* at 49–50 ("[T]he 'obviousness' of a condition or the fact that the injured party may have been in some sense 'aware' of it may not always serve as adequate warning of the condition and of the consequences of encountering it * * *. '[I]n any case where the occupier as a reasonable person should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required . . . '") (alteration in original) (citation omitted).

to sporting event patrons due to possible distractions increasing their exposure to the dangers of the game.[102]

The reasonable care standard was later bolstered in the *Yates* court, another Illinois case involving a minor who attended a Chicago Cubs baseball game and was struck by a foul ball.[103] Although the court found that a ballpark owner does not owe an absolute duty to ensure the safety of invitees, a duty is still owed to provide spectators with reasonable protection.[104] The court recognized that in certain jurisdictions a ballpark owner will not be released from liability solely by providing adequate screening.[105] The alleged per-se rule of non-liability was rejected by the court, leading to the conclusion that not only must the screening be adequate, but there must be enough screen-protection for consumers who are concerned for their safety.[106] The court also cited interesting statistics of testifying experts, with one specialist explaining that even with the most dangerous area of the ballpark screened off – the area behind home plate – 62 foul ball incidents occurred, including 10 behind home plate.[107] This alone demonstrates that the stadium owner did not account for the most dangerous areas of the ballpark, and even with screening behind home plate, spectators were not fully protected from foul balls.[108] After *Yates* and *Coronel* were decided, the Illinois legislature went on to pass the Illinois Baseball Facility Act, thus superseding both cases.[109] However, they provided an adequate basis for how a reasonable standard of care is workable in the spectator injury context.

STATUTES EMPLOYING REASONABLE CARE

Wisconsin represents a jurisdiction that has incorporated a reasonable duty of care standard into statute. It has enacted a safe-place statute designed for the protection of employees from the hazards of the work property, which makes it essential that everything reasonably necessary is done to protect the health and safety of employees.[110] Although

102. *See Coronel*, 595 N.E.2d at 50 ("This is true, for example, where there is *reason to expect that the invitee's attention will be distracted*, as by goods on display, or that after a lapse of time he may forget the existence of the condition, even though he has discovered it or been warned.").

103. Yates v. Chi. Nat'l League Ball Club, 595 N.E. 2d 570, 573 (Ill. App. Ct. 1992).

104. *Id.* at 578 ("In the context of negligence law, this court has held that while a ballpark owner-occupier does not absolutely insure the safety of invitees on its premises, the owner-occupier does owe a duty of reasonable care to such invitees.").

105. *Id.* at 582 ("In most jurisdictions, a ballpark owner-occupier owes no duty to warn of the risk of being hit by a batted ball while attending a baseball game due to the obvious nature of the risk . . . In this jurisdiction, a ballpark owner is not always absolved of liability once he or she provides adequate screening.").

106. *See* Kastenberg, *supra* note 50, at 191.

107. *Yates*, 595 N.E.2d at 582 ("In this case, Cubs employee Rathje testified that in the 1982 season, there were 62 foul ball incidents, 10 of which occurred in the 'area behind home plate,' despite the presence of a screen in that area. Moreover, Rathje testified that the purpose of the screen was to protect spectators in the 'area directly behind home plate.' Thus, there appears to be no doubt that the Cubs were aware that some risk was involved.").

108. *Id.*

109. *See* Baseball Facility Liability Act, *supra* note 27. The Act became effective law on September 24, 1992. 745 ILL. COMP. STAT. 38/49 (West 2009).

110. Wis. Stat. Ann. § 101.11 (West 2004) ("(1) Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter

many jurisdictions have invoked such a statute for the protection of their workers, the Wisconsin safe-place statute has been extended by courts to invitees of buildings and structures, including stadiums and arenas.[111] The extension of the statute was recognized in the *Kaiser* case, where the plaintiff was struck by an automobile tire at a racetrack.[112] The court concluded that the defendant racetrack owners violated the safe-place statute by allowing the spectators to view the event from a dangerous area.[113] Noncompliance with the statute would impose liability upon the defendant if he failed to provide proper safety structures for all areas of the facility that were possibly hazardous to spectators.[114] The court ultimately reinstated the jury finding that the defendant's actions—allowing the spectators to watch the event from a potentially dangerous area without adequate protection—were unreasonable and violated the Wisconsin safe-place statute.[115] In the *Powless* case, the court recognized that the Wisconsin safe-place statute does not necessarily relieve spectators the duty to care for themselves, but also acknowledged that the statute creates an absolute duty for stadium owners with common frequenters.[116] Thus, while primary assumption of risk is not considered a valid defense in Wisconsin safe-place statutory cases, a comparative scheme is still taken into account, thereby weighing the spectator's failure to exercise proper care and the stadium owner's duty to that spectator.[117] Such a statute helps to provide proper compensation for spectator injuries, but still takes into account the degree of the spectator's own fault.

Arizona's limited liability statute, which concerns safeguards to be supplied at baseball facilities, is an excellent utilization of a reasonable care standard. The statute provides that a stadium owner is not liable for injury unless there is not enough protective seating that is

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constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe. (2)(a) No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters; and no employer or owner, or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe, nor prepare plans which shall fail to provide for making the same safe.").

111. *See generally* Kaiser v. Cook, 227 N.W.2d 50, 53–54 (Wis. 1975) (holding that an employer may be held liable under the safe-place statute "where he knowingly permits employees or frequenters to venture into a dangerous area").

112. *Id.* at 52.

113. *Id.* at 53 ("We conclude that the defendants did violate the safe-place statute by allowing spectators to watch the races from the third and fourth turns. This was a particularly dangerous area. Elmer Cook himself admitted the fourth turn, where Mrs. Kaiser was injured, was the 'worst place' for wheels going over the fence.").

114. *Id.* ("Evidence of compliance with custom in a trade is admissible in safe-place cases as a shield to deny liability, and evidence of noncompliance is admissible as a sword to impose liability. Such evidence is not conclusive, but here it at least permitted the jury to draw the inference that defendants' racetrack was not operated as safely as a racetrack could be.").

115. *Id.* at 54 ("Thus in the instant case, although evidence concerning a safety fence was inadequate, the jury could have found that defendants acted unreasonably under the safe-place statute in allowing spectators to watch from the third and fourth turns. We conclude therefore that the trial court erred in directing a verdict for defendants . . . Judgment reversed and cause remanded with instructions to enter judgment for plaintiffs in accordance with the jury verdict; costs on this appeal as per opinion.").

116. Powless v. Milwaukee Cnty. Stadium, 94 N.W.2d 187, 189 (Wis. 1959) ("[T]he owner's duty under the statute to provide a safe place for frequenters is an absolute one . . . the duty is to provide a place which is as safe *as the nature of the public building will reasonably permit*.").

117. *Id.* at 191 ("While assumption of risk is not a defense under the safe-place statute, contributory negligence is. Frequenters of a public building are under an obligation to exercise ordinary care for their own safety."). It should be noted that the court went on to find that the plaintiff was in total fault for her injury when applying a comparative fault analysis. *Id.*

reasonably available for spectators who expect such seats.[118] The premise behind the statute's reasoning is that the information costs of alerting spectators of possible projectiles and dangerous locations in the stadium are minimal.[119] Considering this, the facility owners will be liable for inherent risks when they fail to offer spectators a risk-averse choice due to a lack of available safe areas of seating.[120] Such a statute takes into account that stadium owners should be liable for not following a reasonable care standard and for failing to provide adequate protection for fans, while properly limiting liability in instances where spectators choose not to be seated in a protected area despite availability. The statute also states that protective seating should be available to satisfy "expected requests" instead of simply providing that screening only be offered in the most dangerous part of the stadium, the area behind home plate.[121] This will force stadium owners to reconsider the dangerous areas of a stadium and provide additional adequate screening protection for fans.

THE ADVANTAGES OF A REASONABLE CARE STANDARD

The benefits of a reasonable care standard are numerous and represent the modern evolution in sports. A major concern under such a standard is that stadium owners will be heavily burdened in providing a multitude of safety devices to protect consumers.[122] However, under a reasonable care standard, stadium owners would need to provide only enough safe locations to meet spectator demand.[123] Indeed, negligence only places a burden on a defendant until the burden outweighs the benefit, and such a result can readily be attained through a cost-benefit analysis.[124] The exaggerated burden of imposing a reasonable care standard is also diminished when jurisdictions take into account a comparative fault analysis. Comparative fault has been fully embraced by the Third Restatement of Torts, which includes an example on apportioning comparative fault in spectator injury cases.[125] For instance, if a fact finder concludes that a spectator did not act reasonably under the circumstances, then his knowledge of the risk would be apportioned comparatively when weighing his fault against the defendant's.[126] The importance of comparative fault comes

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118. ARIZ. REV. STAT. §12–554 (1998).

119. *See* Goplerud & Terry, *supra* note 4, at 473 (reasoning that the statute considers the costs of notifying spectators of the possible dangers at a baseball stadium to be quite low).

120. *See id.* (discussing that under the statute, if spectators are not offered the ability to sit in protected areas, then stadium owners will be liable for inherent risks that occur during the game).

121. ARIZ. REV. STAT. §12–554(A)(1).

122. Maisonave v. Newark Bears Prof'l Baseball Club, Inc., 881 A.2d 700, 706–07 (N.J. 2005) ("It would be unfair to hold owners and operators liable for injuries to spectators in the stands when the potential danger of fly balls is an inherent, expected, and even desired part of the baseball fan's experience. Moreover, owners and operators would face undue hardship if forced to guarantee protection for all fans in the stands from every fly ball.").

123. *See* Horton, *supra* note 5, at 368 (discussing the need to provide more adequate screening, but not to the point of unreasonably burdening stadium owners).

124. *See* Horton, *supra* note 5, at 368; *see also* U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (articulating the negligence formula of $B < P * L$).

125. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. c, illus. 6 (2000).

126. *Id.* ("A attends a baseball game at B's ballpark. A sits in a portion of the stands beyond the point where the screen prevents balls from entering the seats. A is aware that balls occasionally are hit into the stands. The fact that A knew balls are occasionally hit into the stands does not constitute assumption of risk. The fact that A knew balls occasionally are hit into the stands is relevant in evaluating whether A acted reasonably by engaging in particular types of conduct while sitting in the stands (sitting in the stands would not itself constitute unreasonable conduct). If the factfinder concludes that A did not act reasonably under the circumstances, A's knowledge of the

into play particularly when distinguishing between a spectator who knowingly encounters a danger by trying to catch a foul ball and a spectator who is injured by a projectile that was impossible to avoid.[127] In the former instance, comparative fault would account for the spectator's negligent conduct, while in the latter example comparative fault would properly afford redress for the plaintiff's injury.[128] Comparative fault also applies special negligence rules for minors instead of utilizing a blanket negligence standard for all spectators.[129] Hence, a child under a comparative fault-based system is held to the standard of conduct of a reasonable person of like age, intelligence, and experience under the circumstances.[130] The qualms of the baseball rule being applied to a child was echoed in the *Friedman* case, where the court noted that a stadium owner should not be surprised if liability is imposed on him due to a child-plaintiff's unawareness of the dangers inherent to the game, thus requiring that minors be given more warning of injury than spectators with proficient knowledge of the sport.[131]

Sufficient warnings would also be required under a reasonable standard of care. Although courts have been skeptical about most warning requirements, this has been due to the little assistance they have provided to spectators.[132] Warnings are mainly found on the back of tickets, but the fine print makes these disclaimers extremely hard to read.[133] Today's modern era has allowed for consumers to purchase tickets through the Internet and telephone services, which provide satisfactory means of expressing warnings to potential ticket buyers.[134] A warning disclaimer provided at the time of purchase and data or statistics on injuries that have been known to occur in particular parts of the stadium are excellent methods of informing spectators on relevant information before attending a sporting event.[135] Areas where pucks or baseballs have been known to commonly reach could also be marked with a flag at stadiums and arenas, allowing fans who enjoy attempting to catch projectiles to sit in these seats.[136]

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risk is relevant to the percentage of responsibility the factfinder assigns to A . . . If B could reasonably assume that A and other fans are aware that balls are occasionally hit into the stands, this fact is also relevant to whether B acted reasonably in relying on A to watch out for balls instead of constructing a screen or providing warnings.").

127. *See* Horton, *supra* note 5, at 371.

128. *See id.*

129. *See* RESTATEMENT (SECOND) OF TORTS § 283A (1965).

130. *Id.* (holding children to "the standard of conduct of a reasonable person of like age, intelligence, and experience under the circumstances").

131. Friedman v. Houston Sports Ass'n, 731 S.W.2d 572, 576 (Tex. App. 1987) ("[A]dult plaintiffs must lose when their injuries result from the game's obvious hazards . . . It may even be a good rule, when applied to adults. I am not convinced, however, that it is the rule, and certainly not a good rule, to apply this principle, as a matter of law, in a case involving an 11-year-old child as a plaintiff. Some 11-year-olds will know the dangers of baseball, and some will not . . . In my opinion, a landowner who invites an . . . 11-year-old child to its premises should not be surprised if a court imposes liability upon finding that the child is unaware of some particular danger, and thus more in need of warning, than its parents or older siblings.").

132. Keys v. Alamo City Baseball Co., 150 S.W.2d 368, 371 (Tex. App. 1941) ("It would have been absurd, and no doubt would have been resented by many patrons, if the ticket seller, or other employees, had warned each person entering the park that he or she would be imperiled by vagrant baseballs.").

133. *See* Celedonia, *supra* note 74, at 136 ("In addition to not affording spectators the option of purchasing protected seats, the back of the ticket contained extremely fine print that was very difficult to read even with 20-20 vision.").

134. *See* Horton, *supra* note 5, at 370 ("With an increasing number of tickets sold over the Internet and automated telephone services, however, teams could easily provide warnings at the point of sale.").

135. *See id.* (explaining how fans could be required, before buying tickets, to listen to a disclaimer clarifying the possible hazards that may result from game play).

136. *See id.* at 368.

Employing a uniform reasonable care standard across jurisdictions promotes the establishment of standardized safety guidelines among baseball stadiums and hockey arenas.[137] Negligence analysis often considers custom in determining whether or not the defendant acted in a reasonable manner,[138] and thus stadium owners will compare safety measures used by other arenas when attempting to standardize their safety guidelines.[139] For instance, with a reasonable standard of care in place, stadiums could decide on issues such as how far netting should be extended from home plate or the minimum Plexiglas durability requirements in hockey arenas.[140] Adherence to such entrenched standards and customs in safety guidelines can help to limit the liability of owners and eliminate questions of fact for the jury.[141] The National Hockey League did mandate standards to be followed by all arenas, including installing netting areas behind the goal as well as placing Plexiglas at least five feet high around the entire rink.[142] Unfortunately, this standard was only imposed after Brittanie Cecil, a spectator at an NHL game, died after being struck by a hockey puck.[143] In addition, although the NHL's safety mandate has helped to impose a minimum standard that arena owners can rely on,[144] the Milzman study found that a substantial number of injuries occur outside the area directly behind the goal and that over 122 fan injuries occur in a year,[145] further demonstrating the need for a reasonable care custom.

As sports have continued to evolve, so must our liability standards concerning spectator injuries. Ultimately, limited duty and primary assumption of risk place too heavy a burden on spectators when stadium owners can easily remedy this problem under a reasonable care standard. They would be required to implement new safety measures instead of providing the bear minimum, but at the same time will not necessarily be found liable for injury due to the comparative fault system. The time has come again for the law of spectator injuries to change and develop in accordance with the growing popularity of sporting events and to remedy the lack of redress for spectators.

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137. *See id.* at 373 ("[A] duty of reasonable care would allow tort law to be the impetus for establishing uniform safety guidelines . . . ").

138. Tex. & Pac. Ry. Co. v. Behym, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.").

139. *See, e.g.*, Shurman v. Fresno Ice Rink, Inc., 205 P.2d 77, 81 (Cal. Dist. Ct. App. 1949) (granting the defendant's motion for a new trial because they should have been allowed to compare their safety measure with those taken at similar arenas).

140. *See* Horton, *supra* note 5, at 373.

141. MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW & ALTERNATIVES 70, (7th ed. 2001) ("[A] defendant who can prove that it has adhered to a prevailing custom may eliminate what might otherwise be a jury question.").

142. Jim Kelley, *NHL to Run Sabres; Safety Nets Mandated*, FOX SPORTS ON MSN, June 20, 2002, http://msn.foxsports.com/nhl/story/KELLEY%253A-NHL-to-run-Sabres%253B-safety-nets-mandated.

143. *American Morning with Paula Zahn* (CNN television broadcast Mar. 20, 2002), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0203/20/ltm.03.html.

144. *See* Goplerud & Terry, *supra* note 4, at 447.

145. *See* David Milzman, *The Puck Stops Here: Spectators Injuries, A Real Risk Watching Hockey Games*, 36 ANNALS OF EMERGENCY MED. 524 (Oct. 2000) (discussing that in his study, he found 122 fan injuries over the course of the NHL season and that one-fifth of fan injuries occurred outside the area behind the goal).

Head East, Young Man (And Comparatively Older Men Who Are Likely to Languish in the Minor Leagues)

ROSS APPEL

INTRODUCTION

There is a strong presence of foreign baseball stars who have made their way to the United States to play Major League Baseball (MLB).[1] However, there has not been a similar inundation of foreign players into what is arguably the world's second best baseball league, Japan's Nippon Professional Baseball (NPB). [2] One of the reasons for the lack of movement of players to Japan is NPB's rule that prohibits Japanese teams from having more than four foreign players on its active roster.[3] As globalization takes hold of sports and American basketball players continue to go into overseas markets to play, foreign baseball players should follow suit and make Japan a viable venue to kick-start their baseball careers. Thus, foreign players would be well served to challenge the NPB foreign player limit as an unfair trade practice and illegal restraint of trade under the Japanese Antimonopoly Act.

The purpose of this paper is to examine the NPB foreign player limit as it relates to the Japanese Antimonopoly Act to determine if the rule violates the provisions set forth in the Act, to investigate if the rule causes nationality-based discrimination, and to explore avenues to modernize the rule. I will also consider whether Japan is a viable market for foreign players to bring their services, and also examine if Japan can benefit by modifying the rule. While leagues in other sports maintain foreign player limits, I will concentrate on Japanese baseball while touching on facts and figures from other leagues to support the need for NPB to modify the foreign player limit.

JAPAN AS A VIABLE DESTINATION FOR FOREIGN TALENT

While the baseball rulebook in Japan reads like that of its American counterpart, it is not necessarily the same game.[4] Japanese players train for and play the game differently.

1. *Opening Day Rosters Feature 231 Players Born Outside the U.S.* (Apr. 7, 2010), http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20100407&content_id=9121458&vkey=pr_mlb&fext=.jsp&c_id=mlb.

2. Wayne Graczyk, *62 Foreign Players Signed by Japanese Teams for 2008 Season*, JAPAN TIMES (Jan. 20, 2008), http://search.japantimes.co.jp/cgi-bin/sb20080120wg.html.

3. *See* Wayne Graczyk, *NPB Commissioner Wanted to Ban Foreign Players 25 Years Ago*, JAPAN TIMES (May 17, 2009), http://search.japantimes.co.jp/cgi-bin/sb20090517wg.html. NPB raised the foreign player limit from two to three in 1994 and from three to the current rule of four in 2002.

4. *See, e.g.*, ROBERT WHITING, THE CHRYSANTHEMUM AND THE BAT, BASEBALL SAMURAI STYLE (1977).

The style of training and play is based on the Japanese social concept of *Wa*, or "harmony and team spirit."[5] *Wa* is a fundamental concept in Japan's moral system and shapes how the game is played.[6] *Wa* leads to less individualism and players giving themselves up for the good of the team.[7] The Japanese begin training in the winter and often work on their craft from dawn to dusk.[8] This differs greatly from professional baseball in the United States, where players begin to work a little more than a month in advance of the season.[9] Star players tend to get their work in, then can be seen heading for the door before spring training games end. [10]

For many years, the Japanese game seemed resistant to change. Bobby Valentine, an American and a former Major League manager, was fired after his first season in Japan due to "philosophical differences" with ownership.[11] He managed his team, a perennial cellar-dweller, to a second-place finish.[12] His methods, despite bringing surprising improvement, were not in line with the traditional way of the Japanese game.[13] Further, each foreign player who has threatened to break Sadaharu Oh's single season home run record has been intentionally walked to avoid having a foreigner break Oh's sacred record.[14]

More recently, baseball in Japan has evolved, partially due to the influx of American management. Bobby Valentine became a star during his second stint in Japan.[15] Valentine led the same team that fired him to a Japan Series Championship using an Americanized approach, highlighted by proper rest and individual instruction.[16] Valentine was recognized as the "ideal boss" by readers of Weekly Spa, a popular magazine for businessmen, and the president of Nippon Metal called for Japanese businesses to treat employees "the same way Bobby does."[17] During Valentine's second stint in Japan, the fans were more willing to

5. ROBERT WHITING, THE MEANING OF ICHIRO: THE NEW WAVE FROM JAPAN AND THE TRANSFORMATION OF OUR NATIONAL PASTIME 65 (1994).

6. *Id.*

7. *See id.* at 67 (explaining that players view sacrifice bunts as an honor in Japan and play so often that it leads to injury).

8. Robert Whiting, *The Samurai Way of Baseball and the National Character Debate*, STUDIES ON ASIA SERIES III 104, 107 (2006), *available at* http://studiesonasia.illinoisstate.edu/seriesIII/Vol%203%20No%202/3_3_2Whiting.pdf [hereinafter Whiting, *Samurai*]; *see* William W. Kelly, *Blood and Guts in Professional Japanese Baseball*, *in* THE CULTURE OF JAPAN AS SEEN THROUGH ITS LEISURE 95, 104 (Sepp Linhart & Sabine Frühstück eds., 1998) (alluding to the heavy burden put on pitchers throwing every day and the tedious fungo drills).

9. *See* THE MEANING OF ICHIRO, *supra* note 5, at 34 (comparing the training habits of Ichiro compared to American players and detailing his discomfort with the relaxed approach many players, teams and managers took towards training and fundamentals).

10. *See* Robert Whiting, *You've Gotta Have 'Wa'*, SPORTS ILLUSTRATED, Sept. 24, 1979, at 58, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1095410/1/index.htm (highlighting that players in the U.S. train for a few hours before hitting the golf course or swimming pool).

11. Whiting, *Samurai, supra* note 8, at 106.

12. *Id.*

13. *See id.* (explaining how Valentine emphasized quick practices, proper rest, individual instruction as opposed to the traditional approach to practice in Japan which was group-based and more tedious).

14. Robert Whiting, *Equaling Oh's HR Record Proved Difficult*, JAPAN TIMES, Oct. 31, 2008, http://search.japantimes.co.jp/cgi-bin/sb20081031j3.html.

15. Robert Whiting, *Clandestine Campaign Led to Valentine's Demise*, JAPAN TIMES, Jan. 17, 2010, http://search.japantimes.co.jp/cgi-bin/sb20100117j1.html.

16. Whiting, *Samurai, supra* note 8, at 106.

17. Whiting, *supra* note 15.

accept a "personality."[18] Similarly, Yu Darvish, a pitcher who was born in Japan to an Iranian father, has been accepted despite his bold, American-like attitude and demeanor.[19]

As the game becomes more accepting of outside influence, now is the best time for foreign players to capitalize and bring their services to the Japanese market. In some instances, the NPB may be a level above its foreign alternatives. In 2009, Japan won its second consecutive World Baseball Classic.[20] Furthermore, in addition to the Japanese home-grown talent, top players from other Asian countries are more likely to test their skills in Japan against better competition, with the ultimate goal of being seen by the many American scouts in the region.[21] Author Robert Whiting has remarked that while Nippon Professional Baseball is still at a level below Major League Baseball, it is above that of AAA Minor League Baseball.[22] Given the level of talent in Japan, the league offers a significant opportunity to foreign players.

Instead of languishing in the minors, players unlikely to reach the Major Leagues and stuck with paltry salaries and miniscule $25 *per diem* would be wise to consider Japan.[23] AAA players in their first four seasons make between $25,434 and $76,646 per year.[24] Chris Aguila, Les Walrond, Brian Falkenborg and Darrell Rasner are all American-born baseball players.[25] Each has seen limited major league action and failed to establish themselves in the big leagues.[26] Aguila, Walrond and Falkenborg each made the MLB minimum of $327,000 in 2006.[27] In 2007, Rasner earned just over $384,000 when the MLB minimum contract was $380,000.[28] In Japan last season, Rasner's salary topped $1,000,000, Falkenborg made almost $900,000, Walrond more than doubled his 2006 salary, and Aguila earned over $550,000.[29] Rasner remarked that while the move to Japan represents a drastic change, it

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18. *Id.*

19. Jeff Passan, *Iconic Ace Darvish Pushes Japan's Boundaries,* YAHOO! SPORTS, Mar. 24, 2009, http://sports.yahoo.com/mlb/news?slug=jp-japandarvish032308&prov=yhoo&type=lgns.

20. Barry M. Bloom, *Ichiro Lifts Japan to Classic Glory*, MLB.COM, Mar. 24, 2009, http://www.worldbaseballclassic.com/news/article.jsp?ymd=20090323&content_id=4056138&team=jpn.

21. Robert Whiting, *NPB Players in Need of Strong Union Like MLBPA*, JAPAN TIMES, Apr. 14, 2007, http://search.japantimes.co.jp/cgi-bin/sb20070414c1.html [hereinafter Whiting, *Strong Union*].

22. Todd Leopold, *When the Japanese Invaded America: Determining 'The Meaning of Ichiro'*, CNN ONLINE, May 27, 2004, http://www.cnn.com/2004/SHOWBIZ/books/05/26/meaning.ichiro/index.html (last visited Mar. 4, 2010).

23. Garrett Broshuis, *Minor Leaguers Per Diem Gets a Bump*, BASEBALLL AMERICA, Jan. 26, 2010, http://www.baseballamerica.com/today/minors/business-beat/2010/269438.html.

24. Payscale.com, *AAA Baseball Player Salary*, http://www.payscale.com/research/US/Job=Baseball_Player,_Minor_League_(AAA)/Salary (last visited Mar. 18, 2010).

25. According to the MLB.COM player database, Aguila was born in Redwood City, California, http://mlb.mlb.com/team/player.jsp?player_id=430894, Walrond in Muskogee, Oklahoma, http://mlb.mlb.com/team/player.jsp?player_id=400113, Falkenborg in Newport Beach, California, http://mlb.mlb.com/team/player.jsp?player_id=237346, and Rasner in Carson City, Nevada, http://mlb.mlb.com/team/player.jsp?player_id=434480.

26. *Id.*

27. *Major League Baseball Salary Database*, USA TODAY, http://content.usatoday.com/sports/baseball/salaries/default.aspx (last visited Mar. 18, 2010) (type the player's name in the search bar and then click on player's name hyperlink).

28. *Id.*

29. *'Gaijin' Salaries in Japan*, BETWEEN THE STICKS: BECAUSE SOMEBODY HAS GOT TO DO IT, http://lvironpigs.wordpress.com/2009/05/09/gaijin-salaries-in-japan/ (last visited Mar. 18, 2010); *see* Bryan Hoch, *Rasner Glad to Have Financial Security*, MLB (Nov. 17, 2008, 4:50 PM), http://mlb.mlb.com/news/article.jsp?ymd=20081117&content_id=3682435&vkey=hotstove2008&fext=.jsp).

was a good career opportunity that provided his family with financial stability.[30] However, it is not only former Major League players who are receiving significant raises by going to Japan. Ryan Wing pitched seven seasons for three different organizations and never once threw a pitch in the Majors.[31] In 2009, he signed a contract for $500,000 to play in Japan.[32] Given the higher level of competition and the possibility of more money, foreigners should consider Japan a viable option for their baseball careers.

CHALLENGING JAPAN'S ANTIMONOPOLY ACT

Japan's competition law, the Antimonopoly Act, closely resembles the United States' antitrust law and is administered by the Japanese Fair Trade Commission.[33] The Act protects against unfair trade practices, unreasonable restraint of trade, and private monopolization.[34] It defines an unfair trade practice as "[a]ny act . . . which tends to impede fair competition."[35]

Baseball players are in the business of playing baseball. Just as lawyers litigate and professors teach, baseball players are compensated to play the game and make their living doing so; thus, they are engaged in employment and trade.[36]

For many years, judges were hesitant to recognize athletes and the sports that they play in a commercial context due to the "sports mystique."[37] Perhaps it had something to do with the perception that playing a game should not be considered work. In the past, many athletes had to depend on other jobs as their main source of income.[38] Today, it is widely recognized that athletes are members of the sports industry. In most instances now, an athlete's career in sports is his only source of income.[39] Sports have become far more commercialized as their popularity has increased; sports leagues and their teams bring in millions of dollars in sponsorship deals and broadcast rights each year.[40] German sociologist Bero Rigauer argues that sports qualify as work because "[c]ompetition, specialisation, achievement orientation and quantification, 'scientific' approaches to improving performance and upward social mobility through success are common elements of elite sport and modern forms of work."[41]

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30. Hoch, *supra* note 29.

31. The Baseball Cube, *Ryan Wing Statistics*, http://www.thebaseballcube.com/players/W/Ryan-Wing.shtml (last visited Mar. 14, 2010).

32. *'Gaijin,' supra* note 29.

33. Frank J. Schweitzer, *Flash of the Titans: A Picture of Section 301 in the Dispute between Kodak and Fuji and a View Toward Dismantling Anticompetitive Practices in the Japanese Distribution System*, 11 AM. U.J. INT'L L. & POL'Y 847, 869 (1996).

34. *Id.* at 869–70.

35. Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947, amended by Act No. 35 of 2005, art. 2(9)(vi) (Japan), *available at* http://www.jftc.go.jp/e-page/legislation/ama/amended_ama09.pdf.

36. James Johnson, *Restraint of Trade Law in Sport*, SPORTS L. EJOURNAL, July 1, 2009, at 10 (2009), http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1009&context=slej.

37. Hayden Opie & Graham Smith, *The Withering of Individualism: Professional Team Sports and Employment Law*, 15 U. NEW S. WHALES L.J. 313, 315 (No. 1992), *available at* http://www.austlii.edu.au/au/journals/UNSWLJ/1992/14.pdf.

38. For example, Hall of Fame baseball player Stan Musial worked in zinc mining during the off-season. JOSEPH STANTON, STAN MUSIAL: A BIOGRAPHY 35 (2007); and Hall of Fame NBA basketball player Dave Cowens drove a taxi cab. BILL SIMMONS, THE BOOK OF BASKETBALL 7 (2009).

39. *See* Opie & Smith, *supra* note 37, at 316.

40. *Id.*

41. *Id.* at 317.

In Japan, baseball teams were conceived more as marketing branches of larger corporations than stand-alone companies.[42] The idea was that it would be cheaper to run a baseball team and have that team on television daily, instead of advertising products on Japanese prime-time television.[43] Given that the teams were created as brand-promoting machines, the players and teams are most definitely involved in a commercial trade.

STANDING TO BRING SUIT

Article 24 of the Antimonopoly Act entitles any person to file suit and request an injunction when an entrepreneur commits an unfair trade practice that causes or is likely to cause damage to the plaintiff. [44] At of the end of the 2009 NPB season, all twelve teams were at their quota of foreign players.[45] Given the dearth of roster spots remaining for foreign players, any qualified player denied a spot in the league would likely be able to show injury caused by the practice. Further, even if an incoming player was granted a spot on a team, it would come at the expense of another foreign player's spot. Thus, the player departing the team would suffer injury as a result of the foreign player limit. Certainly, the player who is either denied a spot on the team or sent packing would need to prove that he has earned a position as judged against all other members of the team. Therefore, a quality player (at a position of need) denied a roster spot could make a strong case that he suffered damage worthy of filing suit under the Antimonopoly Act.

RESTRICTED BUSINESS ACTIVITIES

Article 2(9) of the Antimonopoly Act lays out six items which are intended to cover the range of activities that may constitute unfair trade practices.[46] Of the listed items, NPB's foreign player limit fits the description of "[d]ealing with another party on such conditions as will unjustly restrict the business activities of the said party."[47] By definition, the foreign player limit restricts the business activities of foreign players who wish to compete in Japan.

42. Scott R. Rosner & William T. Conroy, *The Impact of the Flat World on Player Transfers in Major League Baseball*, 12 U. PA. J. BUS. L. 79, 96 (2009).

43. *Id.* at 97.

44. Act No. 54 of 1947, art. 24, *supra* note 35.

45. Yomiuri Giants – Dicky Gonzalez, Edgardo Alfonzo, Seth Greisinger, Marc Kroon, Seung-Yeop Lee, Wirfin Obispo, Alex Ramirez; Hanshin Tigers – Scott Atchison, Aarom Baldiris, Craig Brazell, Kai-Wen Cheng, Wei-Chu Lin, Kevin Mench, Jeff Williams; Chunichi Dragons – Tony Blanco, Wei-Ying Chen, Tomas de la Rosa, Byung-Kyu Lee, Maximo Nelson, Nelson Payano; Hiroshima Toyo Carp – Scott Dohman, Colby Lewis, Scott McClain, Andy Phillips, Scott Seabol, Mike Schultz; Tokyo Yakult Swallows – Ricky Barrett, Jamie D'Antona, Aaron Guiel, Hye-Chun Lee, Chang-Yong Lim; Yokohama Bay Stars – Ryan Glynn, Dan Johnson, Tom Mastny, Stephen Randolph, Les Walrond; Seibu Lions – Jonah Bayliss, Hiram Bocachica, Alex Graman, Chieh-Ming Hsu, John Wasdin; Orix Buffaloes – Alex Cabrera, Jose Fernandez, Greg LaRocca, Jon Leicester, Ryan Vogelson; Hokkaido Nippon Ham Fighters – Jason Botts, Luis Jimenez, Terrmel Sledge, Brian Sweeney, Chung-Shou Yang; Chiba Lotte Marines – Benny Agbayani, Gary Burnham, Jr., Chase Lambin, Juan Muniz; Tohoku Rakuten Golden Eagles – Matt Childers, Marcus Gwyn, Todd Linden, Darrell Rasner, Fernando Seguignol, Rick Short; Fukuoka Softbank Hawks – Chris Aguila, Brian Falkenborg, Justin Germano, Dennis Houlton, Mu-Young Kim, Kameron Loe, Jose Ortiz, Yao-Hsun Yang. 2009 Regular Season Stats, http://bis.npb.or.jp/eng/2009/stats/ (last visited Mar. 18, 2010) (follow hyperlink for each individual team's statistics).

46. Act No. 54 of 1947, art. 2(9), *supra* note 35.

47. *Id.*

The rule limits the number of foreign players on a team's active roster to four, including no more than three position players or pitchers.[48] As a result, foreign players who wish to compete abroad are all but shut out of what would otherwise be a viable market for their athletic prowess.

While Major League Baseball is the preeminent baseball league in the world, Japan's NPB is often recognized as the league with the second-best pool of talent. After these two baseball markets, there is a deficiency of other leagues worthy of attracting top baseball talent.[49] Therefore, if a given player is prevented from signing a contract in Japan, he is left with few options. Quite simply, the rule closes an entire market to a large number of players from around the world.

BARGAINING POSITION

Furthermore, the foreign player limit may be actionable as "[d]ealing with another party through undue use of one's bargaining position."[50] The foreign player limit can drop a foreign player's value to zero in the Japanese market for baseball talent and thus remove all bargaining power from the player. For example, if a foreign player seeks work with the Chiba Lotte Marines but the Marines already have four foreign players on its active roster, the player would have to be more valuable than the team's other foreign players. On the surface, this may appear similar to most situations in which a player seeks playing time. However, the given player may be less valuable than the foreign players already on the team, but more valuable than the local talent, and still be denied a spot on the roster. The given player would not be evaluated against all similarly situated players, whether that is every player on the team or every player who plays the same position: the player would be judged against the limited number of foreign players on the team. In such a situation, a player who would deserve a roster spot is denied all bargaining power at the hands of the NPB team.

On the other hand, one could reasonably argue that the rule can also do just the opposite. A simple understanding of supply and demand would demonstrate that upper-echelon foreign players who enter the Japanese baseball market may find themselves with the upper hand in terms of bargaining position. With roster spots limited for foreign players, teams would want to sign the best foreigners available, and thus significantly elevate the value of such a player. Also, a big-name addition with a major league pedigree is more likely to excite a fan base and create marketing opportunities that would generate extra revenue.

Furthermore, a foreign player can be signed by an NPB team and placed on the developmental squad rather than the active roster.[51] Accordingly, the player may retain some of his bargaining power as he can still carry significant value to the team. However, this is likely only the case for pitchers. Since pitchers do not pitch every day, they can more easily be shuffled between the developmental squad and the active roster as need dictates. Conversely, position players traditionally play every day and would potentially lose a

48. *Nippon Professional Baseball Roster Rules*, BASEBALLREFERENCE.COM, http://www.baseball-reference.com/bullpen/Nippon_Professional_Baseball_roster_rules (last visited Mar. 18, 2010).

49. Mark S. Nagel et. al., *Expanding Global Market for American Sports: The World Baseball Classic*, *in* SPORT AND PUBLIC POLICY: SOCIAL, POLITICAL, AND ECONOMIC PERSPECTIVES 217 (Charles A. Santo & Gerard C.S. Mildner eds., 2010).

50. Act No. 54 of 1947, art. 2(9)(v), *supra* note 35.

51. *Nippon Professional Baseball Roster Rules*, *supra* note 48.

significant amount of value, and thus bargaining power, if they were assigned to the developmental squad where they could not directly impact the parent club on a daily basis. An NPB team could very well assert that if a given player wants to play in the Japanese market, he will have to accept less money than would typically be paid to a player of such talent for a spot on the developmental squad. So, while the foreign player limit will not give an NPB team an unfair advantage in all cases, the rule will allow an NPB team to exert undue influence via its bargaining power in some situations with foreign players.

Additionally, Japanese organizations may claim that while they may have an edge in negotiations due to the limited positions available to foreigners, a foreign player is free to shop his services to other leagues. Still, besides North America's baseball market, there is not another league nearly as talented as the NPB, thus allowing its teams the ability to unfairly use their bargaining position since a player does not have many options.[52] Consequently, some qualified players who prefer to play in the burgeoning Japanese league can potentially suffer at the hands of an NPB team with greater bargaining power. Some players simply lose all bargaining power and can either agree to a team's terms or else take their services to a lesser market. As a result, foreign players may have a legitimate case based on the undue use of a team's bargaining position.

RESTRAINT OF TRADE

Chapter Two of the Antimonopoly Act prohibits unreasonable restraint of trade.[53] Unreasonable restraint of trade is defined as a business activity in which an entrepreneur together with another entrepreneur "by contract, agreement or any other means . . . mutually restrict or conduct their business activities in such a manner to fix, maintain or increase prices, or to limit production . . . thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade."[54] As established earlier, baseball players are engaged in the business of baseball. A foreign player who is denied an opportunity in Japan may allege that the foreign player limit restrained his trade by preventing him from receiving an opportunity to bring his skill to the Japanese baseball market. If a qualified player is prevented from playing in Japan due to the limit, he has been restricted from pursuing his trade.

Since there is a scarcity of other strong baseball markets, the effects of the limit are even more restrictive.[55] If a player had a multitude of other markets to which he could take his services, the limit would not have as much of an effect on players because they could simply take their services elsewhere. However, since there is only one other baseball league in the world that is at or above the talent level of Japan's league, a given player is effectively prevented from engaging in his trade in one of the world's legitimate baseball markets because of the limit.

While a restraint of trade claim would have legitimacy in the United States, the same may not hold true in Japan. Restraint of trade generally refers to cartels in Japan.[56] When

52. Nagel et. al., *supra* note 49, at 217.

53. Act No. 54 of 1947, Ch. II, *supra* note 35.

54. Act No. 54 of 1947, art. 2(6), *supra* note 35.

55. *See* Stephen F. Ross, *International Sports Law & Business in the 21st Century: Player Restraints and Competition Law Throughout the World*, 15 MARQ. SPORTS L. REV. 49, 51 (2004) (discussing the monopoly power that clubs have on players in sports that have limited geographic markets).

56. Nishizawa Nobuyoshi & Kabir Mohammod Lutful, *Concept of Unreasonable Restraint of Trade: A*

determining if a cartel exists, the Fair Trade Commission tends to measure the combined market share of the three largest firms in a given product market.[57] It is arguable that in the Japanese professional baseball market, Nippon Professional Baseball is the only "firm" in the industry. However, it can also be argued that all member organizations of the NPB, having agreed not to include more than four foreign players on their active rosters at any given time, represent a cartel that restricts the trade of foreign players.

A potential claim may be further hampered by the portion of the Act that suggests that a cartel is only illegal if it is contrary to public interest.[58] The Act does not clearly define "public interest," which causes great subjectivity in how it is applied.[59] Over time, "public interest" has included the interests of consumers, producers and the government; it has allowed for "situational regulation" in which cartels that obstruct government policy goals are held to be against public interest.[60] Perhaps the foreign player limit is against public interest in that it restricts the league from adding more talent and thus from providing its consumers with the highest quality product possible. Yet, because the foreign player limit has been in place for so long, and because it does not run afoul of any specific government policy, a challenge based on restraint of trade can lead to a dead end.

NPB'S POSSIBLE RESPONSE

The Japanese league may claim that the foreign player limit is not designed to restrict freedom of movement, but rather is meant to promote national interest in the game. The Union of European Football Associations (UEFA) has attempted to put a similar rule in place, citing its belief that a lack of homegrown talent negatively impacts its national team as well as fan morale.[61] FIFA (Federation Internationale de Football Association – the governing body of world football) President Sepp Blatter, who also supports limits on foreign players, described the dilemma caused by an influx of foreign players as such:

> Over the years and decades, by signing more and more foreign players, clubs have gradually lost their identity, first locally and regionally, and today even nationally as in some cases all players hail from abroad or even from a different continent. Young players lose their motivation in the same way as their perspectives dwindle in terms of one day getting a chance to play in their favourite club's first team. Strong club competitions with huge prize money for the participating clubs have brought about a two-tier society in many countries as the gulf between the haves and have-nots has widened. Only two or three teams play for the league title . . . [62]

The Japanese have a similar concern in preserving the future of its national team and local interest in the game. In 1996, U.S. Olympic basketball gold medalist Teresa Edwards

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Comparative Analysis Between Japan and Bangladesh with Special Reference to Some Case Laws, 5 IKOMA J. ECON. 67, 71 (No. 2 2001).

57. ULRIKE SCHAEDE, COOPERATIVE CAPITALISM: SELF REGULATION, TRADE ASSOCIATIONS, AND THE ANTIMONOPOLY LAW IN JAPAN 122–23 (Oxford 2000).

58. *Id.* at 15.

59. *Id.*

60. *Id.*

61. Lindsey Valaine Briggs, *UEFA v The European Community: Attempts of the Governing Body of European Soccer to Circumvent EU Freedom of Movement and Antidiscrimination Labor Law*, 6 CHI. J. INT'L L. 439, 441 (2005) (citing *UEFA Chief: Too Many Foreigners*, GUARDIAN (UK), June 30, 2004, http://football.guardian.co.uk/News_Story/0,,1250891,00.html.).

62. *Yes in Principle to 6+5 Rule*, FIFA (Feb. 5, 2008) http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=684707.html.

was released from her Japanese basketball team when the league stopped allowing foreign players; league officials cited a dependence on foreign talent and a need to produce its own Olympic-caliber basketball players as motivation for the rule and release.[63]

South Africa is strongly considering limiting the foreign athlete participation on its club soccer teams.[64] The President of the South African Football Association (SAFA) pointed to Egypt as inspiration; he reasoned that Egypt is the top African team because its leagues are full of local players.[65] However, it is impractical to conclude that Egypt is Africa's top team, and back-to-back-to-back winner of the African Cup of Nations, simply because its leagues are stocked with local players.[66] Sudan's soccer team lost all three games it played in the 2008 African Cup of Nations[67] and, like Egypt, its team was comprised completely of local club team players.[68] It may be easy to see the results of Egypt's strong team and point to its local league players, but it is far more likely that there are other factors in play. Egypt may excel in training its younger generation or the cultural milieu may push more towards soccer than other hobbies. Advocate General Lenz of the European Court of Justice, in an opinion given in *URBSFA v. Bosman* and *UEFA v. Bosman*, determined that "[n]othing has demonstrated that the development of young players . . . would be adversely affected if the rules on foreign players were dropped."[69] He further held, contrary to the reasoning of the SAFA President, that participation of foreign talent promotes the development of local sports and early contact with foreign stars benefits young players.[70] Competing against top level talent is an effective way of sharpening one's own skills. Merely stocking a country's local leagues with local talent does not lead directly to national team success.

In some cases, when there is greater talent available that is being shut out of the league, excluding foreign players may cause local interest to wane. People tend to prefer a quality product, and local youth may be more likely to strive to play a sport they watch that is full of talent rather than to play in a league full of local players with less talent.

Similarly, the success of Japanese players abroad could lead Japanese youth to try to follow in the footsteps of their successful heroes. Children will strive to play baseball and show their talents to MLB scouts and will result in a continuous production of talent in Japan. Additionally, it is easier to envision that such a restrictive rule may be necessary during the infancy of a league when local interest is not great; but in this case, baseball is the national sport in Japan and the interest already exists. So, while such protectionism and

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63. Martin Greenberg & James Gray, *Citizenship Based Quota Systems in Athletics*, 6 MARQ. SPORTS L. REV. 337, 341–42 (1996).

64. *South African Clubs to Limit Foreigners*, ZAMBIAN WATCHDOG (Feb. 18, 2010, 8:46 AM), http://www.zambianwatchdog.com/?p=5903.

65. *Id.*

66. *Super-Sub Gedo Lands Egypt Title*, ESPN (Jan. 31, 2010) http://soccernet.espn.go.com/report?id=287699&cc=5901.

67. Dani Rodrik, *Globalization and the Beautiful Game*, PROJECT SYNDICATE (Mar. 13, 2008), http://www.project-syndicate.org/commentary/rodrik17/English.

68. *Id.*; *see also* SUDAN FOOTBALL, sudanfootball.net, (click on International competitions > Africa > African Nations Cup 2008 > National Team Sudan > Team Players), *available at* www.goalzz.com/main.aspx?team=458&mode=p.

69. Case C-145/93, Union Royale Belge des Sociétés de Football Association ASBL, et al. v. Jean-Marc Bosman, 1995 E.C.R. I-4921 at para. 145, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993C0415:EN:HTML.

70. *Id.*

xenophobia may in some ways be compelling, it does not undo the restrictive nature of the rule.

Furthermore, the NPB could even claim that the rule helps to control private monopolization.[71] Such a rule may, in some ways, foster competition. The elimination of the foreign player limit could conceivably lead to an arms race in which the richest organizations outbid the other clubs to obtain the best available foreign talent. A team like the Yomiuri Giants, which has the largest team payroll in the NPB, could stockpile foreign talent while other teams lag behind.[72] A superpower such as that envisioned could be incredibly hurtful to local interest in the sport because a game becomes far less interesting when one can reasonably predict an outcome prior to the beginning of a season. That said, the foreign player limit eases the potential trouble of such an arms race and fosters fair competition as a result.

Advocates of the NPB may claim that the rule is not nearly as restrictive as its adversaries claim. As it stands, there exists no limit on the number of foreign players that an NPB team may sign.[73] The rule does not impinge on the movement of a qualified foreign player to a team whose needs match the talent of the player. However, while the rule does not necessarily have a drastic limiting effect on where a player may sign, it can be the overriding factor that determines the usefulness and value of a given player to a team, especially in the case of position players. Position players maximize their utility to a team when they are available to play every day. A Japanese team may pass on a valuable foreign player if it would have to stash the player on the farm team at times to avoid having too many foreign players on the active roster.

Even if the rule does not restrict where a player may sign, it can greatly affect the bargaining power of a given player. As discussed earlier, if a team has reached its quota of foreign players on the active roster, it can use its bargaining position to offer less money to a foreign player since that player can be obstructed from maximizing his utility because of the rule. While it can be argued that the rule does not impinge completely on a foreign player's freedom of movement, it certainly has multiple negative effects that are not overcome by the lack of a limit on the overall team roster.

Though the rule may foster competition and help to avoid private monopolization by a superpower in certain circumstances, it also creates powerful limits which, by their very nature, restrict foreign players from entering the market. While the NPB may have persuasive arguments that support the limit, it appears dubious that it could overcome the restrictive nature of its foreign player limit.

CHALLENGING THE LABOR STANDARDS ACT

Even if the NPB could rely on the fact that its rule does not limit foreign players on the roster but instead only limits the number of foreigners on the active roster, foreign players

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71. Act No. 54 of 1947, art. 2(5), *supra* note 35."The term 'private monopolization' as used in this Act means such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade." *Id.*

72. *Yomiuri Giants Top 2009 NPB Team Payrolls*, BASEBALL DEWORLD (Apr. 29, 2009), http://baseballdeworld.com/2009/04/29/yomiuri-giants-top-2009-npb-team-payrolls.

73. *Foreign Player Restrictions?*, JAPANESE BASEBALL, http://japanesebaseball.com/faq/gaijin.jsp (last visited Oct. 5, 2010).

relegated to the farm club in favor of another foreign player may have a case based on discriminatory treatment. Article 3 of the Labor Standards Act declares that "[a]n employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker."[74] When an NPB player is denied an opportunity to participate on the active roster in favor of another foreign player, it would be hard to claim that the decision was not made on the basis of the player's nationality.

If a given foreign player is qualified to be on the active roster and is not being blocked by another foreign player at the same position, then it would appear that the overarching reason that the player is not on the active roster is due to his nationality. To expound upon the point, if an NPB team already has four foreign players on its active roster and needs to call up a pitcher to the active roster, and that pitcher is foreign, there is no doubt that the player to go down to the farm club from the active roster will be a foreign player. In this case, the decision would be based completely on nationality. Such discrimination is necessitated by the foreign player limit.

Further, Article 90 of the Japanese Civil Code provides that any "juristic act which has for its object such matters as are contrary to public order or good morals is null and void."[75] This is a rather vague provision. Nevertheless, the Japanese Supreme Court held that a company's retirement policies that forced women to retire earlier than men violated Article 90.[76] While it is settled that unequal treatment of male and female employees is contrary to the Civil Code, it is not clear if unequal treatment based on nationality violates Article 90. Players who have been demoted as a result of their nationality who, without the rule, would have remained with the parent club could point to unequal treatment due to nationality. However, it would probably not be prudent to rely on a vague provision when challenging a rule in a foreign country.

Players who are never contracted by a team as a result of the player limit would not have a case under Article 3 because failure to hire based on national origin has not been held unlawful under the Act.[77] In the *Mitsubishi Jushi* case, the Japanese Supreme Court implied that discrimination would be permissible in the initial hiring period.[78] The Court concluded that there is a clear distinction between the hiring phase and the phase after employment

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74. Labor Standards Act, Act No. 49 of April 7, 1947, art. 3 (Japan), *available at* http://www.jil.go.jp/english/laborinfo/library/documents/llj_law1-rev.pdf; Ryoko Sakuraba, *The Amendment of the Employment Measure Act: Japanese Anti-Age Discrimination Law*, 6 JAPAN LAB. REV. 56, 59 (No. 2 2009); Ryoko Sakuraba, *Employment Discrimination Law in Japan: Human Rights or Employment Policy?*, *in* NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW 233, 234 (2008).

75. MINPŌ [MINPŌ] [CIV. C.] art. 90, para. 22 (Japan), *available at* http://www.law.tohoku.ac.jp/kokusaiB2C/legislation/pdf/Civil%20Code.pdf; *see* Kristina T. Geraghty, *Taming the Paper Tiger: A Comparative Approach to Reforming Japanese Gender Equality Laws*, 41 CORNELL INT'L L.J. 503, 507 (2008).

76. Saikō Saibanshō [Sup. Ct.] Mar. 24, 1981, 35 SAIKŌ SAIBANSHŌ MINJI HANREISHŪ [MINSHŪ] 300, 303 (Japan). An English translation is available in Lawrence W. Beer and Hiroshi Itoh, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961–70, 179 (1978).

77. Sakuraba, *supra* note 74, at 68.

78. Saikō Saibanshō [Sup. Ct.] Dec. 12, 1973, 27 SAIKŌ SAIBANSHŌ MINJI HANREISHŪ [MINSHŪ] 1536 (Japan), *available at* http://www.courts.go.jp/english/judgments/text/1973.12.12-1968-O-No.932.html ("an employer enjoys the freedom to enter into contracts which are linked to the said economic activities, and in employing a worker for the sake of its own business, it can as a general rule decide freely what kinds of persons to employ and under what terms to employ them. Consequently, even if an employer refuses to employ a worker for the reason that he possesses certain thoughts and creeds, it cannot necessarily be illegal."); Sakuraba, *supra* note 74, at 68.

begins.[79] Therefore, Article 3 applies only to conditions after employment has been initiated, but not to the decision to hire. If a player wished to challenge discriminatory hiring practices, he would fail because the Japanese Civil Code is subordinate to Japanese statutes and consequently the Labor Standards Act would control.[80]

CONSTITUTIONALITY OF THE RULE

It is similarly unclear if the foreign player rule violates the Japanese Constitution. Article 14, paragraph one of the Constitution—a precursor to Article 3 of the Labor Standards Act—states that "[a]ll of the people are equal under the law, and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."[81] In 2005, the Japanese Supreme Court decided a case in which a Korean national, who lived and worked in Japan, was denied the opportunity to take the Examination for Management Selection in medical chemistry based on the premise that examinees should be of Japanese descent.[82] The Supreme Court reversed the ruling of the court of second instance which had held that "measures to deprive non-Japanese employees of the opportunity to take Examinations for Management Selection bar the door for non-Japanese employees to be promoted to division director-level managerial posts and therefore are in violation" of Article 14 of the Constitution.[83] The Supreme Court ruled that the Constitution did not prohibit employers from treating its employees differently based on nationality if they do so based on "reasonable grounds."[84] It further held that the performance of local government duties is significantly related to the lives of Japan's inhabitants and thus there were "reasonable grounds" for discrimination based on family origin.[85]

While that case concerned employees involved in public governing functions, which arguably has greater importance than baseball, it is possible that a Japanese court could hold that the promotion of national interest in the game constitutes "reasonable grounds" for the foreign player limit.[86] Baseball may have an everyday effect on the lives of the Japanese, whether it is national morale or the family nature of taking a child to a game, but that effect, compared to the decisions of public officials, is dubious at best. Nonetheless, precedent may allow the Japanese Supreme Court to cite "reasonable grounds" for the difference in treatment between local and foreign players caused by the foreign player limit.[87] Thus, the Supreme Court's ruling that such discriminatory practices do not violate the Constitution stands as another possible hurdle to successful litigation by a foreign player.

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79. *Id.*

80. *See* Carl F. Goodman, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 46 (2008).

81. NIHON KOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14 (Japan), *available at* http://www.ndl.go.jp/constitution/e/etc/c01.html#s3.

82. Saikō Saibonshō [Sup. Ct.] Jan 26, 2005, 59 SAIKŌ SAIBANSHŌ MINJI HANREISHŪ [MINSHŪ] 93, para. 1(6) (Japan), *available at* http://www.courts.go.jp/english/judgments/text/2005.01.26-1998.-Gyo-Tsu-.No..93.html (case appears as one of the search results on Japanese Supreme Court website following a search of "nationality").

83. *Id.* at para. 3(4).

84. *Id.* at para. 4(1).

85. *Id.*

86. *See id.* at para. 4(2).

87. *Id.*

LITIGATION IN JAPAN

The Japan Fair Trade Commission (JFTC) is the administrative body charged with conducting investigations under the Antimonopoly Act.[88] The JFTC takes legal action in unfair trade practice cases only a few times per year and generally does not issue more than a cease and desist order. In 2008, it took legal action in four cases of unfair trade practices.[89] While that number may seem low, it is not out of the norm. In the five years prior to 2008, the JFTC took legal action against unfair trade practices twenty-four times, four each in 2007, 2005, and 2003.[90] It would seem, based on these numbers, that challenging the foreign player limit under the Antimonopoly Act may prove futile.

Further, a thorough examination of the Antimonopoly Act suggests that the Japanese tend to favor established, and thus local, business.[91] Even if it may be at odds with the ideals of the Antimonopoly Act, the Act favors long-standing business relationships between firms over newer relationships, resulting in adverse effects on competition.[92] One would expect the intent of this section of the Act to carry over and apply similarly to unfair business practices. Such intent seems to support local businesses and companies at the expense of new entrants. This may provide further evidence that an antitrust suit against Nippon Professional Baseball would prove unsuccessful.

Additionally, another barrier to possible litigation lies in the Japanese Code of Civil Procedure, which does not allow class action suits.[93] Consequently, it is not practical, without strong financial backing, to pursue a case unlikely to result in the sought-after rule-change.[94]

Moreover, there have been no antitrust or labor lawsuits filed against the league or its owners, including during the fifteen years that there has been a players association.[95] The Japanese culture, as discussed earlier, is based on a principle of harmony. Many have

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88. JAPANESE FAIR TRADE COMMISSION, ANNUAL REPORT ON COMPETITION POLICY IN JAPAN: JANUARY-DECEMBER 2008, at 3, *available at* http://www.jftc.go.jp/e-page/reports/annual/japan08.pdf.

89. *Id.* at 4

90. JAPANESE FAIR TRADE COMMISSION, ANNUAL REPORT ON COMPETITION POLICY IN JAPAN: JANUARY-DECEMBER 2007, at 3, *available at* http://www.jftc.go.jp/e-page/reports/annual/japan07.pdf; JAPANESE FAIR TRADE COMMISSION, ANNUAL REPORT ON COMPETITION POLICY IN JAPAN: JANUARY-DECEMBER 2006, at 3, *available at* http://www.jftc.go.jp/e-page/reports/annual/japan06.pdf; JAPANESE FAIR TRADE COMMISSION, ANNUAL REPORT ON COMPETITION POLICY IN JAPAN: JANUARY-DECEMBER 2005, at 3, *available at* http://www.jftc.go.jp/e-page/reports/annual/japan05.pdf; JAPANESE FAIR TRADE COMMISSION, ANNUAL REPORT ON COMPETITION POLICY IN JAPAN: JANUARY-DECEMBER 2004, at 3, *available at* http://www.jftc.go.jp/e-page/reports/annual/japan04.pdf; JAPANESE FAIR TRADE COMMISSION, ANNUAL REPORT ON COMPETITION POLICY IN JAPAN: JANUARY-DECEMBER 2003, at 3, *available at* http://www.jftc.go.jp/e-page/reports/annual/japan03.pdf.

91. Tahirih Lee, Professor, Florida State University College of Law, Class Lecture on International Business Transactions (Feb. 18, 2010).

92. SECRETARY GENERAL, JAPAN FAIR TRADE COMMISSION, GUIDELINES CONCERNING DISTRIBUTION SYSTEMS AND BUSINESS PRACTICES UNDER THE ANTIMONOPOLY ACT 3-4 (1991).

93. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 631 (1985) [hereinafter Ramseyer] ("[T]he Japanese Civil Procedure . . . does not permit class actions. . . . As a result, many victims of antitrust or other violations are unable to raise the damage pool high enough to make litigation financially worthwhile.").

94. *Id.*

95. Ping-Chao Lee et al., *A Comparative Study of Governance of Professional Baseball Systems in Japan and Taiwan*, 13 THE SPORT JOURNAL 19 (2010), *available at* http://www.thesportjournal.org/article/comparative-study-governance-professional-baseball-systems-japan-and-taiwan.

theorized that this cultural preference is a major deterrent to litigation.[96] Japanese citizens likely prefer alternate forms of dispute resolution over litigation.[97] Furthermore, the Japanese see litigation as "selfish and un-Japanese."[98] As a result, local players have not challenged a free agency system that is light-years behind that of Major League Baseball.

Conversely, Takeyoshi Kawashimi, a Japanese legal sociologist, speculated that Japan's societal modernization was not complete and that it would become more litigious as it progressed.[99] From the mid-1980s through 2000, the amount of litigation per person has steadily increased along with the number of lawyers in Japan.[100] Moreover, recent surveys suggest, whether it is by working with and for foreigners or allowing their children to marry foreigners, the current generation of Japanese people is more willing to accept change.[101] In addition, players who were part of Bobby Valentine's system in Japan, a system far different from the usual martial arts brand of baseball, intimated off the record that the old style of baseball was unsuitable for the game in its current state.[102] As the westernization of Japan continues, and with individualism and litigation on the rise, the time is ripe to seek further change and challenge the NPB's foreign player limit.

MLB AS ADVOCATE FOR CHANGE

One option to avoid costly litigation would be for Major League Baseball to bargain on the players' behalf to have the foreign player limit eliminated, or at least changed. Such advocacy by the league could represent a show of goodwill toward its players association. While it may seem counterproductive to push for the elimination of a rule that would allow the league to lose its talent to a different market, there are also incentives for MLB to pursue such change.

As it is, Japan represents Major League Baseball's most lucrative international market, bringing in between sixty and seventy percent of foreign revenues.[103] MLB licensees grew ten-fold from 2000 to 2008 and retail sales revenue nearly tripled.[104] Further, after Ichiro broke into the major leagues in 2001, MLB negotiated a six year television deal with Japanese advertising firm Dentsu, Inc. for over $200 million.[105] While MLB captured much of its Japanese audience due to its Japanese imports, it is reasonable to believe that it could add to that audience through more of its own exports. One Major League Baseball fan in Japan, a renowned chemical engineer, remarked that the Japanese enjoy watching their heroes on television, but "Nippon pro ball teams have their own enthusiastic fans who will

96. Tom Ginsburg & Glen P. Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation* (U. Ill. Law & Economics Working Paper, No. LE04-009, 2004), *available at* http://works.bepress.com/tom_ginsburg/14.

97. Ramseyer, *supra* note 93, at 608.

98. *Id.* at 607.

99. Ginsburg & Hoetker, *supra* note 96, at 3.

100. *Id.* at 2.

101. Whiting, *supra* note 21.

102. Robert Whiting, *Valentine's Philosophy Brought Marines Glory, Money*, JAPAN TIMES, Jan. 24, 2010, http://search.japantimes.co.jp/cgi-bin/sb20100124c1.html.

103. Blaine Harden, *Japan's Starry Gems of the Diamond*, WASH. POST, Mar. 25, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/03/25/AR2008032502080_3.html?sid=ST2008032502398; *see also* Rosner & Conroy, *supra* note 42, at 96.

104. Michael S. Arnold, *MLB Pitches to Fans in Japan*, WALL ST. J., Mar. 26, 2008, at B5E.

105. *Id.*

continue to support their favorite teams even if the big stars leave the team."[106] Furthermore, MLB does not face any serious risk of losing its stars to Japan, so an alteration of the foreign player limit would not significantly affect the talent available in the North American game.[107] While the loss of marginal major league talent from North America to Japan would not harm MLB, former top prospects and big names that never quite panned out in the big leagues could capture an audience in Japan, thereby creating further marketing and merchandising options.

In addition, Major League Baseball has a preexisting relationship with the NPB and, perhaps, enough leverage to negotiate a rule-change. Japanese business people prefer long-standing and personal relationships in negotiations. Personal relationships with face-to-face contact relieve the skepticism and potential aggression of the common Japanese businessman.[108] This can work in the favor of MLB. In 1998, MLB officials worked with the NPB to create the posting system by which Japanese ballplayers come to North America.[109] The system was developed to avoid Japanese players following in Hideo Nomo's footsteps and retiring from the NPB in order to sign with a major league team.[110] The current posting system requires a player to be posted by his NPB team and, if posted, MLB teams have four days to submit closed bids to the MLB commissioner.[111] If the highest bid is accepted by the Japanese club and the player agrees to a contract with the MLB team prior to the close of the posting period, the NPB team receives the winning funds; otherwise, it retains the player and receives no compensation.[112] Financially, this system weighs heavily in the favor of the Japanese clubs. In 2006, when the Red Sox won the rights to negotiate with, and ultimately sign Daisuke Matsuzaka, the MLB club in effect subsidized the operations of the Seibu Lions, who received a posting fee approximately three times greater than its entire payroll.[113]

Most recently, Bud Selig proposed that the champions of MLB and NPB meet in an international World Series.[114] Both leagues stand to gain from staging such an event. On first glance, Japanese baseball stands to gain more respect as a top tier baseball league if its champion can compete with MLB's champion. Also, viewership of the 2009 World Baseball Classic first round was up 88% from the previous event three years earlier.[115] Pitting MLB's best against the champion of the Japanese league, which has recently produced a handful of major league stars could create a handsome financial reward for Major League Baseball. Granted, Major League Baseball officials would likely have to work around players union

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106. Whiting, *supra* note 21.

107. The average player on Major League Baseball's New York Yankees earns more per week than the average player on any other sports team on the planet. Nick Harris, *Premier League Footballers not the Richest on the Planet*, TELEGRAPH(UK), Mar. 27, 2010, http://www.telegraph.co.uk/sport/football/competitions/premier-league/7527796/Premier-League-footballers-not-the-richest-on-the-planet-revealed.html.

108. Naoki Oikawa & John F. Tanner, Jr., *The Influence of Japanese Culture on Business Relationships and Negotiations*, 7 J. BUS. & INDUS. MARKETING 55, 56 (4th iss. 1992).

109. Duane W. Rockerbie, Peculiarities of the Major League Baseball Posting System, 891, 1-2 (Nov. 21, 2006) (unpublished paper) (on file with the Munich Personal RePEC Archive), *available at* http://people.uleth.ca/~rockerbie/posting%20system%203.pdf.

110. *Id.* at 2.

111. *Id.* at 3.

112. *Id.* at 3-4.

113. Rosner & Conroy, *supra* note 42, at 87.

114. *NPB, MLB Commissioners to Discuss Prospect of True World Series*, JAPAN TIMES, Jan. 8, 2010, http://search.japantimes.co.jp/cgi-bin/sb20100108j1.html.

115. Bill Gorman, *World Baseball Classic Off to Hot Start on ESPN*, TV BY THE NUMBERS, Mar. 12, 2009, http://tvbythenumbers.com/2009/03/13/world-baseball-classic-off-to-hot-start-on-espn/14496.

complaints that the extra strain of excruciatingly long travel and adding an extra two weeks to an already long season are unduly burdensome. While MLB could further expand its international market, the NPB stands to gain dramatically with increased exposure. Given the MLB's development of a posting system that favors NPB clubs and its strong presence in Japan, MLB may have the necessary leverage to negotiate an alteration to the foreign player limit.

NPB INCENTIVES TO CHANGE

Despite the NPB's fear of losing talent and interest in its national game, incentives abound if a rule-change is embraced. First, infusing the league with talent from abroad could have a positive effect on local interest and viewership. People enjoy watching talent and quality. If Japanese teams add more talent, fans would likely appreciate the apparent determination to compete and, in turn, support the players as their own. Japanese fans have accepted Bobby Valentine and have all but made him a marketing icon; similar commercial success could follow if foreign ballplayers bring success to their new NPB team.[116] A more competitive league with a higher level of talent could certainly capture the local audience.

NPB AND NASL: A COMPARATIVE CASE STUDY

The North American Soccer League (NASL) began in 1966 and played 19 seasons of games before folding.[117] In its first seven years of operation, the league had paltry attendance, averaging below 5,000 people per game.[118] However, beginning in 1973, attendance grew in six of the next eight years, hovering near 15,000 per game in some years.[119] The NASL's New York franchise, the Cosmos, signed Brazilian soccer star Pele in 1975 to a record $4.5M deal over three years.[120] At this point in his career, Pele was well past his prime and three years removed from his final World Cup appearance, but his arrival sparked interest and bolstered attendance.[121] Other NASL teams signed foreign players in an effort to spark similar interest and increase the talent level of the American game.[122]

However, while following the Cosmos example could have grown the league, haphazardly chasing the Cosmos doomed it.[123] Although attendance and revenues rose, costs were increasing at a higher rate. Jack Daley, former President of the San Diego Sockers NASL franchise, stated that "[i]t became fashionable to chase the Cosmos. Everyone had to have a Pelé. Coaches went around the world on talent searches, forcing the prices up."[124]

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116. *See* Chris Ballard, *Bobby Valentine's Super Terrific Happy Hour*, SPORTS ILLUSTRATED, Apr. 30, 2007, http://sportsillustrated.cnn.com/vault/article/magazine/MAG1110958/index.htm (discussing the commercial and cultural appeal of Valentine in Japan).

117. NATIONAL SOCCER HALL OF FAME (Mar. 19, 2010), http://national.soccerhall.org/NASL_Info.htm.

118. David A. Litterer, Rec. Sport. Soccer Statistics Foundation, http://www.rsssf.com/usadave/nasl.html (last visited Mar. 19, 2010).

119. *Id.*

120. ROGER ALLAWAY ET AL., THE ENCYCLOPEDIA OF AMERICAN SOCCER HISTORY 200 (2001).

121. Clive Gammon, *The NASL: It's Alive But on Death Row*, SPORTS ILLUSTRATED, May 7, 1984, http://sportsillustrated.cnn.com/vault/article/magazine/MAG1122044/index.htm.

122. *Id.*

123. N. Jeremi Duru, *This Field is Our Field: Foreign Players, Domestic Leagues, and the Unlawful Racial Manipulation of American Sport*, 84 TUL. L. REV. 613, 620 (2010).

124. Gammon, *supra* note 121.

The owner of the Chicago Sting said franchises were spending money that was not yet justified by attendance and revenue figures.[125]

Many claimed the teams' interest in foreign players doomed the soccer league.[126] However, the international presence captured the attention of local fans.[127] Irresponsible business practices more likely led to the league's demise.[128] It is far more plausible that the league could have continued its success if its teams' management had reacted more responsibly to the success of the Cosmos. While the international presence in North American soccer brought short-lived financial prosperity, reckless payment of salaries ruined the league.[129]

The NPB would be wise to understand the reasons for the short-lived success of the NASL. Like the NASL, the NPB is more of a secondary, or minor, league in the global sports landscape. A well-known foreign import on a Japanese team, similar to Warren Cromartie in 1984, might increase attendance figures, foreign interest, and marketing opportunities.[130] If NPB teams could follow up a high-profile signing with signings of other talented foreign players, the league would have much to gain.

SEATTLE MARINERS – THE DIFFERENCE THAT FOREIGN TALENT CAN MAKE

While an increase in foreign players would most certainly lead to a similar increase in salary expenses, responsible spending and marketing campaigns could offset the salary outlays. In the two years before Ichiro joined the Seattle Mariners in 2001, the Seattle franchise filled, on average, just 68% of its stadium in 1999 and 82% in 2000. The attendance increase in 2000 can be attributed to the team moving into a new, state-of-the-art stadium and making the playoffs; still, the team failed to sell seats. However, in the two seasons after Ichiro arrived, the Mariners sold about 92% of their seats.[131] In 2000, the Mariners experienced "modest" net profits.[132] It was the first time in almost eight years that the franchise had reported a profit at year-end.[133] Without the benefit of moving into its new stadium, the team likely would have remained in the red that year.[134] Yet, in 2001, the Mariners were the second most profitable team in all of baseball.[135] The team's financial success continued in 2002.[136] By the same token, Japanese teams could thrive and sell more tickets by offering fans a better product. Richard Lapchick, chair of the DeVos Sports

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. WARREN CROMARTIE & ROBERT WHITING, SLUGGING IT OUT IN JAPAN: AN AMERICAN MAJOR LEAGUER IN THE TOKYO OUTFIELD (1991).

131. Seattle Mariners Attendance Data, BASEBALL-ALMANAC, http://www.baseball-almanac.com/teams/mariatte.shtml (last visited Mar. 19, 2010).

132. Neil Modie & Angelo Bruscas, *Safeco Field Put Money in Bank for Mariners' Owners*, SEATTLE POST-INTELLIGENCER, Feb. 29, 2000, http://www.seattlepi.com/baseball/safe29.shtml.

133. *Id.*

134. *Id.*

135. Doug Pappas, *The Numbers (Part Six): Profits and Revenue Sharing*, BASEBALL PROSPECTUS, Feb. 4, 2002, http://www.baseballprospectus.com/article.php?articleid=1333.

136. Angelo Bruscas, *Mariners Report Shows $10.72M Profit Last Year*, SEATTLE POST-INTELLIGENCER, Mar. 11, 2003, http://www.seattlepi.com/baseball/111956_pfd11.shtml.

Business Management Graduate Program at the University of Central Florida and expert on ethics and diversity in sports, remarked that "[f]ans pay to see winning teams . . . [i]f an international player makes a team better, it's good for the team and good for the game."[137] The NASL proved that a foreign presence in a second-tier league could bolster the league's prospect of success; the NPB simply must spend wisely and run its teams responsibly in order to succeed.

INCREASED INTERNATIONAL INTEREST

In addition, a change to the foreign player limit could also lead to a spike in international interest in the league. An influx of foreign talent would likely make the league more attractive to the foreign markets from which the players were imported.[138] Just as Japanese fans have religiously followed their exports, such as Ichiro and Daisuke, so too might foreign fans whose favorite players leave to compete in Japan. The results could be similar, albeit on a smaller scale, to the success that Major League Baseball has had in Japan due to the addition of Japanese players. European soccer, such as the UEFA Champions League, has had success with fans in the United States and is featured on Fox Soccer Channel; 90 million households will receive playoff games on FSC and its Fox Sports affiliates.[139] Granted, the soccer featured on the channel is considered the best in the world while the NPB would be considered secondary to Major League Baseball. Nonetheless, the example of European soccer proves that foreign leagues can succeed in the North American market.

LESS DEFECTION

Introducing more foreign talent to the league could give Japanese players pause before moving to the major leagues. Before leaving Japan to play for the Tampa Bay Rays, Aki Iwamura indicated that he wanted to leave Japan to test his skills against the best talent in the world before his own skills faded.[140] Infusing the Japanese league with foreign talent and enhancing its reputation around the world could prevent such thoughts. A change to the foreign player limit could make Japan a destination for talent rather than just a proving ground for players who hope to reach MLB. A better product on the field could potentially lead to a money-making global World Series in which Major League Baseball's champion is not just assumed to be the best in the world.

As it has become more acceptable for Japanese teams to sign foreign players in the past two decades, teams with poor records have been quicker to add foreign players to the roster.[141] There is a clear implication that Japanese teams realize that adding foreign talent is

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137. Richard Lapchick, *Money Speaks Louder Than Age*, ESPN, May 10, 2004, http://sports.espn.go.com/espn/page2/story?page=lapchick/040510.

138. Rosner & Conroy, *supra* note 42, at 80.

139. Ridge Mahoney, *Fox Soccer Channel's Hot Property*, SPORTS ILLUSTRATED (Oct. 1, 2009, 2:23 PM), http://sportsillustrated.cnn.com/2009/writers/soccer_america/10/01/champions.league/index.html.

140. Stephen Ellsesser, *Japan's Iwamura Sets Sights on MLB*, WORLD BASEBALL CLASSIC (Feb. 26, 2006, 3:00 PM), http://web.worldbaseballclassic.com/news/article.jsp?ymd=20060226&content_id=1323382&c_id=mlb.

141. Akihiko Kawaura & Sumner La Croix, *Baseball in Japan and North America: Same Game, Same Rules, Same Results?*, (University of Hawai'i at Manoa Economics Department Seminar Paper, 2002), *available at* http://www.economics.hawaii.edu/research/seminars/01-02/10-04.pdf.

a quick path to improvement; similarly, a quick way to increase interest in the team and league is by improving the level of play. A change to the foreign player limit and to the way ownership handles its teams could make the NPB and its member teams much more profitable.

CAN FOREIGN PLAYERS SUCCEED IN JAPAN? – A STATISTICAL ANALYSIS

American businesspeople often find doing business in Japan to be an "extremely time-consuming, frustrating, and . . . losing proposition."[142] In a culture that values maintaining harmony over honesty, frustration and misunderstandings are frequent.[143] Joseph Adler, a Professor of Asian Studies, finds that the preference for social harmony turns:

> what could be a very simple and effective communication or negotiation [into] a problem, fraught with misunderstanding or miscommunication, involving more people than those directly involved, thus multiplying the possibility of miscommunication. The potential problems are often so complex—with the number of people whose hypothetical feelings have to be taken into account, and the various permutations of possible misunderstandings that can be envisioned—that in fact nothing is done.[144]

The pursuit of harmony can have similar negative effects on the baseball field. Former Major Leaguer and successful export to Japan, Warren Cromartie, observed that the game moves at a very slow pace in Japan, much like a business meeting; additionally, Japanese managers fear making mistakes and thus can take an excruciating amount of time before making a decision.[145] In that sense, cultural differences carry over from the business world to the baseball world.

The question is, then, do these cultural differences affect foreign baseball players who make the transition to Japan? Many have posited that the differences in culture, the game, and game preparation make the move to Japan a tough one for many foreign ballplayers. Some have cited the living conditions, which are certainly not up to the lavish standards of the majors, as a great difficulty.[146] The language barrier, training regimen, and umpires are also major reasons that American players cannot survive in Japan.[147] Many players have drawn the ire of the Japanese fans and media for perceived laziness and inability to fit into a team's culture.[148] However, players have struggled and been accused of many unflattering things in every baseball market; it would be unfair, even in today's knee-jerk sports radio environment, to simplify the struggles of any player to one clichéd reason.

My analysis spans the three NPB seasons from 2007 through 2009. It includes all players, foreign and local, who made their NPB debut in those three seasons and examines

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142. Oikawa & Tanner, *supra* note 108, at 55.

143. *Id.* at 57.

144. Joseph Adler, *Wa (Harmony)*, WASEDA UNIVERSITY INTERNATIONAL DIVISION NEWS, No. 40, Aug.1, 1997, http://174.36.9.161/syllabus/syllabi/a/adler/1JN1T-275/wa.htm.

145. David Barker, *Take Me Out to the Beseburo Game*, EXPLORING, http://isaac.exploratorium.edu/dbarker/beseboru.html (last visited Mar. 12, 2010) (explaining that Walter Cromartie once played a half inning in Japan that took 45 minutes).

146. *See* Graczyk, *supra* note 3.

147. *Id.*

148. WILLIAM W. KELLY, *Blood and Guts in Japanese Professional Baseball*, *in* THE CULTURE OF JAPAN AS SEEN THROUGH ITS LEISURE, 95, 96-97 (Linhart & Frühstück eds., 1998).

the numbers to determine whether foreigners struggle to adjust to the Japanese game. All statistics and player information are from the official website of Nippon Professional Baseball.[149] Based on accounts of foreigners making the transition to Japan, one expects foreign players to struggle initially. Statistical analysis found the following:

In 2007, foreign newcomers pitched 1,022 innings while local pitchers making their debuts pitched 1,563 innings. The average foreign pitcher allowed 4.09 earned runs per nine innings while the average local pitcher gave up 3.89. However, the average foreign pitcher allowed only four hundredths more of a base runner per inning. With such similar averages, there was an insignificant correlation between success on the field and nationality of a pitcher. Even the handedness of a pitcher proved to have a stronger relationship with base runners allowed than nationality did.[150]

The pitching numbers in 2008 were similar. In that season, the average foreign pitcher allowed almost four-tenths of a run less per nine innings than local pitchers (4.14 ERA compared to 4.5 ERA). Again, there was a difference of only .04 of a base runner allowed per inning; this time the foreign pitchers had the lower average. For perspective, that is merely a difference of merely four base runners, or a combination of four walks or hits, allowed over 100 innings, an insubstantial difference. Again, the similar averages showed no significant correlation between nationality and success, whether calculated by ERA (earned run average) or WHIP (walk and hits per inning pitched).[151]

The trends continued in 2009. While throwing just 68 fewer innings than the local pitchers, the foreign newcomers to Japan allowed three hundredths of a run more per nine innings and six hundredths of a base runner more per inning. Once more, the correlation between success and nationality was very weak. Given the similarities between Japanese pitchers and foreign pitchers over the three year stretch, it is difficult to imagine that a struggle to adapt to the Japanese culture was significantly detrimental to the foreign pitchers. Furthermore, in 2009, of the nine pitchers who had previously pitched over fifty innings in the major leagues, only two performed noticeably worse in their first season in Japan, with one of those players having a sample size of fewer than nine innings pitched in Japan, a sample size too small to allow for any normalization toward the mean. Based on these numbers and the relatively few foreign pitchers who make the journey east and perform worse than they did in the Majors, tone cannot conclude that the differences have a significant impact on the way the players perform on the field.

The statistics were less similar between foreign and local position players; however, the differences were not unexpected. In 2007, both groups of players had over 2,000 at bats; the average foreign player hit twenty-two points higher (twenty-two more hits over a 1,000 at-bat sample size) and had an on base percentage that was three thousandths higher than the average local player who debuted in 2007. Over 1,000 plate appearances, the average foreign player would reach base only three more times than the average local player. However, the average foreigner had a slugging percentage that was nearly 100 points higher than that of the average local player, demonstrating that foreign players tend to have more power than Japanese players. The correlation between slugging percentage and nationality was about five times stronger than the correlation between on-base percentage and

149. Nippon Professional Baseball 2009 Regular Season, http://bis.npb.or.jp/eng/2009/stats (last visited Mar. 22, 2010).

150. *See generally id.* There was a correlation coefficient of 0.18 for handedness compared to -0.0002 for nationality.

151. *See generally id.* There was a weak correlation coefficient of -0.056 for ERA and nationality and 0.135 for WHIP and nationality.

nationality.[152] Japanese players are known for being light-hitting players focused on fundamentals, so this should not come as a surprise.

The numbers were similar in 2008. Foreigners batted four points higher and reached base 3% more often than Japanese players. The correlation between slugging and nationality were even stronger than in the prior year.[153] Further, there was a similar correlation between slugging and age, which can be explained by the fact that the average foreign rookie was seven years older than the average Japanese newcomer. In 2009, there was a wider gap between offensive production by foreign and local players. The average foreign player who debuted in 2009 hit more than fifty points higher, reached base almost 10% more often and slugged over 200 points higher than the average local player.[154] Again, there was a moderate correlation between power numbers and nationality; while the correlation between batting average, on-base percentage, and nationality was far weaker.

Furthermore, foreign position players had 311 more at-bats despite having eighteen fewer players debuting in the 2007 season (ten players compared to twenty-eight). This shows that foreign players enter Japan ready to contribute, as expected given their higher salaries. This statistic is less surprising in light of the fact that the average age of the foreign players entering the league in 2007 was just under thirty-four, seven years older than the average Japanese player who debuted that season. Players with more experience would be expected to contribute to the team earlier than their younger counterparts.

Also, the average age of all foreign players in the NPB during the 2009 season was thirty-one. The league would prefer that this number drop in the coming years, as it suggests that foreign players go to Japan only after they have passed their prime and are in the twilight of their careers. Most players from the United States do not play in Japan until it becomes clear that they will not have prolonged careers in the majors. One study noted that players who move from a high-level league, such as MLB or AAA, to a lower league like the NPB likely do so for economic reasons.[155] On the other hand, foreign players who were not from North America or the minor league system were, on average, three years younger than the other foreign players. This suggests that players, especially those from other Asian countries, are migrating to Japan to compete against better players and perhaps be noticed by MLB scouts.

A number of factors might affect the transition of a foreign player to Japan. Any given player may respond differently to the culture change, the language barrier, and the way individuals are expected to fit into the framework of the team in Japan. One cannot hypothesize that all players are affected in the same way. Some may very well be able to adapt quickly while others may struggle due to the new environment. Other players may struggle until they have a chance to scout the players they will face. In 1977, in the midst of a spectacular season in Japan, former MLB All-star Willie Davis was hurt and forced to miss the remaining two months of the season.[156] While his team greatly improved in his absence, his manager insisted it was due to more effective pitching, but the fans and media

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152. *See generally id.* Slugging percentage is calculated by dividing total bases by at-bats. There was a correlation coefficient of 0.376 for slugging percentage compared to 0.074 for on-base percentage.

153. *See generally id.* Correlation of .433 between slugging percentage and nationality.

154. *See generally id.* Foreign players, on average, batted .249, reached base 33% of the time, and slugged .461. Local players, on the other hand, batted .196, reached base 24% of the time and slugged .258.

155. Naoki Chiba, *Pacific Professional Baseball Leagues and Migratory Patterns and Trends: 1995-1999*, 28 J. SPORT & SOC. ISSUES 193, 203 (No. 2 2004).

156. Robert Whiting, *You've Gotta Have 'Wa'*, SPORTS ILLUSTRATED, Sep. 24, 1979, at 68, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1095410/1/index.htm.

simply assumed the team harmony had been restored.[157] Whatever the case may be, if cultural differences affect foreign players off the field, player performance does not seem to be negatively impacted.

WHY JAPAN? NOT ALL FOREIGN PLAYER LIMITS WERE CREATED EQUAL

Many sports leagues around the world have guidelines that limit the participation of foreign players per team. Almost every sports league in Japan has such a rule either limiting or completely banning foreign players on its teams.[158] A number of basketball leagues in Europe also have strict foreign player limits, including top leagues in Greece and Spain that allow only two foreign players per team.[159] Greece and Spain have both put together strong national teams in recent years, giving ammunition to those who claim that limiting foreign players is designed to lead to a stronger national team.[160] Even Major League Soccer, a North American league, restricts each team to eight foreign players.[161] However, "everyone else was doing it" is not an effective defense.

While many leagues have instituted restrictions on foreign players, they do not all have the same effect as NPB's rule. Nippon Professional Baseball has, by many accounts, become the professional baseball league with the second-strongest pool of talent.[162] More importantly, there is not another professional baseball league that can compete with MLB or NPB. In basketball, players can take advantage of a global market and find high level competition in Greece, Spain, Turkey, and Israel, among others. Hockey players can do the same in Russia, Sweden, and the Czech Republic. However, the global market for baseball, especially the secondary market of professional baseball leagues is not nearly as deep as in these other sports. As a result of Japan's higher level of talent compared to other Asian and international leagues, there is a greater likelihood of injury for foreign players looking for work outside of North America. In contrast, basketball players who may struggle to find work in Spain due to the foreign player limit can turn to other viable markets and will not struggle to find suitable work.

CONCLUSION

While speaking of the changes to the game in Japan and its future, sportswriter Rob Smaal commented that "global competition is a fact of life."[163] As Japan adjusts with the times, so too should its professional baseball league. Japan has much to gain by doing away

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157. *Id.*

158. Greenberg & Gray, *supra* note 63, at 342.

159. Marc Edelman, *Does the NBA Still Have Market Power? Exploring the Antitrust Implications of an Increasingly Global Market for Men's Basketball Player Labor*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473493.

160. *See* Men's Ranking after 2010 FIBA World Championship for Men, http://www.fiba.com/pages/eng/fc/even/rank/rankMen.asp (last visited Oct. 5, 2010). In the current rankings published by international basketball's governing body, FIBA, Spain is currently ranked second in the world and Greece fourth. *Id.*

161. Steve Davis, *New Roster Rules Analysis*, MAJOR LEAGUE SOCCER, Dec. 18,2007, http://web.mlsnet.com/news/mls_news.jsp?ymd=20071218&content_id=133420&vkey=news_mls&fext=.jsp (last visited Mar. 12, 2010).

162. Nagel et. al, *supra* note 49, at 217.

163. Whiting, *supra* note 12.

with or altering its foreign player limit. Foreign baseball players similarly stand to gain by a change to the restrictive rule. For some players, higher salaries await them in Japan, and for others, Japan represents a step up in talent and a possible path to Major League Baseball.

Foreign ballplayers interested in playing in a different market should consider challenging the NPB's foreign player limit. Such a challenge could come via the Antimonopoly Act or even Japanese Labor Law. However, given the low quantity of litigation in Japan and a perceived support of local business, challenging the rule in court may be a losing proposition. Major League Baseball, which has worked with Japan in the past, should attempt to negotiate a change to the rule, as it and some of its minor league players stand to gain from a rule-change.

The positive effects of a rule-change in Japan would be endless. A change could conceivably have a snowball effect that begins with a more talent-laden league, leads to more profitable operations for the NPB teams, and ends with a Japanese league that can compete with its North American counterpart in an international World Series. Foreign players would be wise to consider Japan as a viable market for their services; and the NPB should strongly consider making the foreign player limit less restrictive or removing it altogether.