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## REMARKS

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### AMATEURISM AND THE MODERN COLLEGE ATHLETE

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MIKE INGERSOLL\*

#### INTRODUCTION

In the end, I didn't love it. I respected it—the game—but it wasn't football that I loved. No, I loved the locker room. I loved the competition. I loved the preparation, and I loved the cerebral parts of it all. The game itself was irrelevant as far as I was concerned. It was the minutia that comprised it for which I thirsted. It was the minutia that made me feel the most complete.

Mint Hill, North Carolina is a small place—bigger now than it was, smaller still than it will be. Everyone goes to Bain Elementary School and Northeast Middle. And if you live on one side of the street, you go to Independence High School, and if you're on the other, you go to Butler. Everyone is a Carolina fan, but no one ever goes farther than the intersection of Wilgrove-Mint Hill Road and Highway Fifty-One. There, you'll find Earp's Amoco, where, growing up, someone's big brother buys you your Skoal® and, if you're lucky, your beer. Our town all-star team competes for a chance to go to the Little League World Series most years, and the Mint Hill Panthers are usually in the running for the Pop Warner State Championship. From the time you

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first pick up a glove or some pads until you graduate high school, you will play alongside the same group of guys. You'll compete for the same positions, the same grades in school, and the same girls. And when it's all said and done, you go to work for McGee Brothers Masonry, Starr Electric, or McWhirter Grading. You live, you grow, and you die in this place. And it is a wonderfully simple life. Things move at the same pace, but in the consistent simplicity, there is comfort.

We drive Ford® trucks, drink Bud Light®, and, on Fridays, we play football. Mint Hill is home to Independence High School, alma mater of Miss USA 2005, national champion and Heisman Trophy candidate Chris Leak, former New York Giant and Indianapolis Colt Hakeem Nicks, countless high school football All-Americans and NFL draft picks, and from 1999–2007, the second-longest high school football win streak in the United States at 109 games and seven straight state championships (De La Salle High School in California won 151 from 1992–2005.<sup>1</sup>) From 2002–2005, Independence averaged a number three national ranking, climbing to number two in 2004.<sup>2</sup>

Down the street and just over the Matthews-Mint Hill line is rival Butler High School (my alma mater). Since 2002, Butler has sent over thirty players to Division I schools for football and nearly a dozen to the NFL.<sup>3</sup> The program lost only two games between 2010 and 2012 (both in 2011) and won two state championships, touting the top de-

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<sup>1</sup> Kevin Askeland, *Top 10 Greatest High School Players Who Never Won the Heisman Trophy*, MAXPREPS (Dec. 9, 2010), [http://www.maxpreps.com/news/GUWJFgO\\_EeCi4gAcxJSkrA/top-10-greatest-high-school-players-who-never-won-the-heisman-trophy.htm](http://www.maxpreps.com/news/GUWJFgO_EeCi4gAcxJSkrA/top-10-greatest-high-school-players-who-never-won-the-heisman-trophy.htm); *Hakeem Nicks Stats*, ESPN, [http://espn.go.com/nfl/player/stats/\\_/id/12586/hakeem-nicks](http://espn.go.com/nfl/player/stats/_/id/12586/hakeem-nicks) (last visited Mar. 11, 2015); *Independence Has 109-Game Win Streak Snapped with OT Loss*, ESPN (Sept. 14, 2007), [http://espn.go.com/high-school/story/\\_/id/3002083/independence-109-game-win-streak-snapped-ot-loss/](http://espn.go.com/high-school/story/_/id/3002083/independence-109-game-win-streak-snapped-ot-loss/); *Jimmie Johnson Makes a Pit Stop at Independence*, WCNC (Aug. 20, 2014), <http://usatodayhss.com/2014/jimmie-johnson-makes-a-pitt-stop-at-independence>; Curtis Pashelka, *The Night De La Salle's Streak Ended*, BAY AREA NEWS (Sept. 1, 2014, 11:47 AM), [http://www.mercurynews.com/my-town/ci\\_26447521/night-de-la-salles-streak-ended](http://www.mercurynews.com/my-town/ci_26447521/night-de-la-salles-streak-ended).

<sup>2</sup> *Year-by-Year Football Rankings*, USA TODAY (June 20, 2006, 2:57 PM), <http://usatoday30.usatoday.com/sports/preps/football/year-by-year-rankings.htm>.

<sup>3</sup> Lee Brecheen, *Lee's Travels to Charlotte, North Carolina to Visit Butler High School and Independence High School*, LA FOOTBALL MAG. & T.V. (Apr. 5, 2011), <http://lafootballmagazine.com/news/c48-recruiting/lees-travels-to-charlotte-north-carolina-to-visit-butler-high-school-and-independence-high-school/>; *2012 NFL Players from North Carolina*, MAXPREPS (Feb. 4, 2013), <http://www.maxpreps.com/news/ViYZ8CW3kEitAnNJ8T-PLQ/2012-nfl-players-from-north-carolina.htm>.

fense nationally and the third-ranked team in the country in 2011.<sup>4</sup> From 2003–2009, the school averaged eleven wins per year.<sup>5</sup> In 2009, head coach Mike Newsome was named the MaxPreps National Coach of the Year.<sup>6</sup>

Somewhere amidst all of that clutter, there was me—a 6'2", 153-pound beanpole without a hair on my chest or a clue in my brain. I was fourteen years old with an Eddie Munster haircut and absolutely no idea what I was doing on a football field. The coaches barely played me, and I don't blame them. I wouldn't have played me either.

The summer going into my sophomore year, my head football and basketball coaches pulled me out of weightlifting and made me choose: was I a football player who played basketball or a basketball player who played football? I was terrified of both men, but I was more terrified of my football coach. So, naturally, I sided with football and immediately ran back into the weight room and hid in a corner, trying to figure out why my loyalties seemed to be so important to anyone, let alone these men. I had no idea that I'd just made the single most influential decision of my young adult life—the decision that would shape my identity for the next decade. I just didn't want to get yelled at.

Over the next few years, I would improve as a player, eventually earning my way into the starting lineup my first year on the varsity team, becoming ranked the number thirty tight end in the country, and having an opportunity to select from roughly twenty full-tuition scholarship offers to schools I was honestly shocked even knew I existed.

My entire life, I thought I would go to college for my grades. In the end, it was football that got me there.

#### STUDENT-ATHLETE LIFE

The town of Chapel Hill, North Carolina is sports crazed. Even if you only win three football games in 2006, or four in 2007, you're still going to get in free to the bars, you're still probably going to max out

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<sup>4</sup> Doug Huff, *FAB 50 Offseason Primer: Butler (N.C.)*, ESPN (Feb. 1, 2012), [http://espn.go.com/blog/high-school/football/tag/\\_/name/butler-high-school](http://espn.go.com/blog/high-school/football/tag/_/name/butler-high-school).

<sup>5</sup> Stephen Spiewak, *Butler's Newsome is National High School Football Coach of the Year*, MAXPREPS (Jan. 18, 2010), <http://www.maxpreps.com/news/kVG24AOTEd-Us-wAcxJTdpg/butlers-newsome-is-national-high-school-football-coach-of-the-year.htm>.

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

at twenty dollars on your tab regardless of how much you actually ran up, and people are still going to love hanging around you and your teammates. And on top of all of that, we get our school paid for. We get our books paid for, our housing, a little bit of food, and some insurance coverage. On Saturdays, we run out of a tunnel through some smoke and play a game—the same game we played in each other’s backyards back in Mint Hill in front of a few friends and some lightning bugs. But this time, it’s in front of 75,000–100,000 people, all seemingly as invested in the game as we are. We play on national television. We play in pro stadiums. We play during the day, at night, and sometimes even on Thursdays. With one of the largest Nike® contracts in college sports,<sup>7</sup> Carolina athletes are outfitted in the nicest and newest apparel, with moving boxes completely filled with the same workout gear everyone else pays between forty and seventy dollars for at Dicks Sporting Goods®, and even some other things they’ll never get their hands on.

Our facilities are immaculate and cutting edge, upfit with sixty-inch plasma screen televisions littering the walls throughout the football center and locker room. (At Oregon, they even have a barber on staff for the players.<sup>8</sup>) We get to represent our school, our families, and ourselves, doing it all on a stage that less than ten percent of all high school football players will ever have the chance to stand upon. And in the eyes of the public, the full-scholarship college athlete doesn’t pay much for it.

Our eyes, however, are opening at 5:30 in the morning for 6:00 a.m. workouts. Then, when that workout ends at 7:30 and we finish our shower and scarf down some breakfast, those same eyes somehow stay open in class from 8:00 a.m. until noon or 12:30. We then get to the football center, wolf down some lunch, go to the locker room, get dressed for practice, then make it to meetings at 2:15. At 3:30, meetings end, and at 3:45, practice starts. At 6:30, we head back in for more

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<sup>7</sup> “North Carolina, which gets \$2.95 million to \$3.45 million in cash and product from Nike, has one of the wealthiest apparel contracts when factoring in a \$1 million signing bonus and another \$2 million for the school’s Chancellor’s Academic Enhancement Fund.” Jon Solomon, *How Much Are Colleges Paid for Sports Apparel Deals? Ed O’Bannon Case Offers Details*, AL.COM (Jan. 15, 2014, 12:36 PM), [http://www.al.com/sports/index.ssf/2014/01/how\\_much\\_do\\_colleges\\_get\\_for\\_s.html](http://www.al.com/sports/index.ssf/2014/01/how_much_do_colleges_get_for_s.html).

<sup>8</sup> Daniel Uthman, *Stunning Amenities in Oregon’s New Football Facility*, USA TODAY (Aug. 1, 2013, 1:28 AM), <http://www.usatoday.com/story/sports/ncaaf/2013/08/01/outrageously-unique-amenities-in-oregons-new-football-facility-hatfield-dowlin-complex/2606223/>.

post-practice meetings. At 7:30, those meetings end, and we shower and try to eat dinner before mandatory study hall starts at 8:00 p.m. At 10:00, we get out of study hall, but we could usually only work on so much while there, which always leaves something left over, so we work a little more once we get home. Finally, around midnight, we get to bed. The next day, it starts all over again.

Saturday is game day, and it starts with traveling to the team hotel the evening before. The next morning, on Sunday, we report back to the football center for a workout, more meetings, and a light practice. Around 6:00 p.m., we head back in, shower, and go grab some dinner. The next day, Monday, is the “off day,” which consists of a two-hour workout, “voluntary” film sessions, and meetings.

The “offseason” week consists of Monday to Friday classes, workouts, and study hall. On Saturdays, there are “optional” workouts—voluntary, per NCAA rules,<sup>9</sup> but if you wanted to play on game day, they were mandatory. This lasts from January until March. In March, spring practice begins, which operates much like an abbreviated season—mandatory scheduled workouts, practices, meetings, and film sessions.

#### THE EVIL EMPIRE

The NCAA was formed in 1906 (originally as the IAA, or Intercollegiate Athletic Association) as a loosely organized body designed to establish rules for, primarily, college football, but other sports as well.<sup>10</sup> In the 1950s, led by the efforts of Walter Byers, the NCAA started to become much more recognizable as what it is today.<sup>11</sup> It was then that the current regulatory policies began to be developed. And, for the first time, the NCAA became heavily invested in television contracts.<sup>12</sup>

The NCAA’s annual revenues have steadily increased since 2001 and are approaching the \$1 billion per year mark, totaling roughly

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<sup>9</sup> See *Current Student-Athletes*, NOTRE DAME ATHLETICS COMPLIANCE OFF. (NOV. 4, 2010), [http://www3.nd.edu/~ncaacomp/countable\\_hours.shtml](http://www3.nd.edu/~ncaacomp/countable_hours.shtml).

<sup>10</sup> *National Collegiate Athletic Association (NCAA)*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/404594/National-Collegiate-Athletic-Association-NCAA> (last updated Sept. 3, 2013).

<sup>11</sup> Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 15 (2000).

<sup>12</sup> *Id.*

\$912 million in 2013 under President and CEO Mark Emmert.<sup>13</sup> That same year, the NCAA had \$769.4 million in revenue come from its March Madness basketball tournament, with \$681 million coming in from its television deals with Turner Broadcasting and CBS for the coverage and broadcast rights to the games.<sup>14</sup> Of those payouts, the majority of that revenue is redistributed to the member institutions in the form of funding, grants-in-aid, and something the NCAA calls “supplemental distribution.”<sup>15</sup>

It is important to note, however, that as a bottom-up organization, the member schools control the existence of the NCAA, meaning member schools choose to be a part of the organization and, accordingly, are free to leave the organization if they feel it is necessary (hence the existence of the NAIA, or the National Association of Intercollegiate Athletics, which operates as its own governing body independent of the NCAA).<sup>16</sup>

The power of the NCAA, therefore, is simply a result of the power given to it by its member schools. If a group of member schools, for example the Southeastern Conference (“SEC”), decided they wanted to secede and create their own league with their own governing body, they are, essentially, free to do so. An event of this magnitude would be catastrophic to the NCAA. If the SEC were to secede, so goes with it its television and marketing deals, as well as the notability of those member institutions. It is not unreasonable to assume that other major conferences would follow suit, traveling with the SEC for the very simple reason that schools go where the money goes, and the money goes with the SEC.<sup>17</sup> Point being, the NCAA is, for all intents and purposes, a paper tiger—an invisible hand holding everything together—and it is only as powerful as its member institutions allow it to be.

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<sup>13</sup> Mark Alesia, *NCAA Approaching \$1 Billion per Year amid Challenges by Players*, INDY STAR (Mar. 27, 2014, 11:06 PM), <http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-amid-challenges-players/6973767/>.

<sup>14</sup> *Id.*; Steve Berkowitz, *NCAA Has Net Assets of \$627 Million, Says Records*, USA TODAY (Mar. 20, 2014, 2:36 PM), <http://www.usatoday.com/story/sports/college/2014/03/20/ncaa-expenses-revenue-money-mark-emmert/6651133/>.

<sup>15</sup> Berkowitz, *supra* note 14.

<sup>16</sup> NCAA, COMBAT, <https://www.combatsportsgroup.com/associations/3/> (last visited Mar. 15, 2015).

<sup>17</sup> Victor Luckerson, *How the SEC Became the Richest Conference in College Sports*, TIME (Jan. 7, 2013), <http://business.time.com/2013/01/07/how-the-sec-became-the-richest-conference-in-college-sports/>.

In the NCAA's statement of "Core Values," there is no mention of "amateurism," though the common perception is that this is the basis of the NCAA's governance (particularly because of the NCAA's use of the term as a means to combat the notion of player compensation).<sup>18</sup> In fact, the closest that the NCAA comes to the use of the word "amateur" is to refer to an athlete's participation in athletics as an "avocation"—"The Association—through its member institutions, conferences, and national office staff—shares a belief in and commitment to: (a) The collegiate model of athletics in which students participate as an avocation, balancing their academic, social and athletics experiences."<sup>19</sup> Further, a recent appellate brief filed by representatives of Ed O'Bannon states that, "[t]he NCAA's current version of 'amateurism' is vague and manipulable. NCAA President Mark Emmert testified that an athlete's motivation in playing the game is irrelevant. He offered his subjective definition that 'amateurism' means that 'you don't get paid,' but admitted that it is not stated in any rule."<sup>20</sup> The Oxford Dictionary, meanwhile, defines "avocation" as "a hobby, or minor occupation."<sup>21</sup> However, as has been and will be discussed, the "student-athlete" experience is far from a hobby or minor occupation and more closely resembles a full-time job.

#### NO "STUDENT" IN "STUDENT-ATHLETE"

*"[W]e came here to play FOOTBALL, we ain't come to play SCHOOL . . . ."*

—Cardale Jones, Quarterback, The Ohio State University<sup>22</sup>

All in all, time spent on "football activities" exceeded forty hours per week on average, with the number being higher in-season and slightly lower in the offseason.<sup>23</sup> The argument that attending class constituted a "football activity" drives that number even higher. Those

<sup>18</sup> *NCAA Core Values*, NCAA, <http://www.ncaa.org/about/ncaa-core-values> (last visited Mar. 11, 2015).

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

<sup>20</sup> Brief for Plaintiff-Appellee at 9, *NCAA v. O'Bannon*, Nos. 14-16601 & 14-17068 (9th Cir. Jan. 21, 2015) (internal citation omitted).

<sup>21</sup> OXFORD DICTIONARY OF ENGLISH 110 (Catherine Soanes & Angus Stevenson eds., 2d ed. 2006).

<sup>22</sup> *Ohio State QB Cardale Jones Thinks Classes Are Pointless*, BRUTUS REP., <http://brutus-report.com/Articles/Latest/Latest-Articles-Detail/ArticleId/1384/Ohio-State-QB-Cordale-Jones-Thinks-Classes-are-Pointless> (last visited Mar. 11, 2015).

<sup>23</sup> See, e.g., Lynn O'Shaughnessy, *Do College Athletes Have Time to Be Students?*, CBS NEWS (Feb. 18, 2011, 10:56 AM), <http://www.cbsnews.com/news/do-college-athletes-have-time-to-be-students/>.

in academia would be aghast at such an assertion and scoff at it from behind their textbooks and graduate degrees. But I can attest to the validity of this argument for many reasons, none more important than the fact that I lived it.

When a class schedule is relegated to a single four-hour block of the day, options are limited as to which classes can be taken. And when those classes are monitored by individuals hired by the university's athletics department to attend each class with football or basketball player enrollment, complete with a roster and a pen for the sole purpose of documenting who is and who is not present, attending class becomes an athletic duty, not an academic one. The fact is, some of us excel at school while some of us do not, which gives us both a legitimate reason for not wanting to go to class. Generally, in my experience, the academically stronger athletes felt they had their studies under control and would rather commit their efforts elsewhere, and the academically weaker athletes, well, they just didn't want to be there. Of course, this was not the case for everyone, but in general, it held true.

In my case, it is likely that I could have been admitted to a school like the University of North Carolina based on academics alone. But in the case of the vast majority of my teammates, this was not true. Entering an academic environment as competitive as any college or university, let alone a top public institution like Carolina, is daunting even for the intellectually apt student. It is understandable how that feeling must be augmented exponentially for a student who is less academically capable. The struggles many of these athletes face early on—at all schools—certainly contribute to the overwhelmingly prevalent attitude presented by Cardale Jones—that is, they did not come to school for school, but in fact were brought there for sports. And gradually, their efforts tend to become apportioned accordingly.

Class attendance, on its face, is essentially optional for any and all regular students.<sup>24</sup> For revenue sport athletes, however, there are penalties for missing class. Rain, snow, sleet, or shine, if you miss class and the class checker puts you on his or her list, rest assured that, at 5:00 a.m. the next morning, the strength coaches will have you run until you nearly (and sometimes actually) become sick. Asleep in class?

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<sup>24</sup> See CAROLINA UNDERGRADUATE BULLETIN: 2014–2015 RECORD 446, available at <http://www.unc.edu/ugradbulletin/pdf/2014-15.pdf> (outlining the general guidelines of UNC's class attendance policy for undergraduate students).



Run. Sick and don't tell anyone? Run. Ice on the ground but school isn't on a delay? You guessed it—run.

Schools all across the country will make the same argument. They will argue that they are operating in the best interests of the athletes. They'll say that they know how tired we are and how early we have to wake up each day and that by forcing us to be in class they are ensuring that we get the most out of our educations. That argument is nice, and it satisfies the public's ideological appetites, but the truth of the matter is that these schools' true motivations are rooted in protecting their investments (which is understandable).

From the university's standpoint, significant resources are expended in the (continued) enrollment of a Division I athlete. Paying academic support staff members, coaches, and administration for both revenue and Olympic sports programs, travel expenses, dining hall salaries, and a myriad of other "expenses" are just some examples of costs the school will point to that it incurs. Some may even be so bold as to claim that the cost of tuition is a burden the school voluntarily undertakes for the athlete. And in return for these losses, the school will claim that they expect the athlete only to compete to the best of his or her ability and succeed academically. In reality, however, this is not the case.

#### THE CONTRACT, THE SCHOOL, AND THE ATHLETE'S SEAT AT THE TABLE

Those in academia will argue that top universities are recognized for their academic achievements, but ESPN isn't airing the UNC-Duke Model U.N. Debate, or the Michigan-Ohio State Spelling Bee (and yes, these are four of the top schools in America academically, further illustrating the point). The truth is that the scholarships granted to athletes are actually contracts between the university and the athlete, one-year renewable at the discretion of the coaching staff, and, though not explicitly stated, are contingent upon the athlete performing in a way that benefits the school.<sup>25</sup> Ultimately, the university is paying for wins, because with wins comes name recognition, brand recognition, and increased enrollment.

This contractual relationship is made obvious through simple introductory contract law analysis. The school makes the offer—which is

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<sup>25</sup> University of North Carolina at Chapel Hill Football Scholarship Agreement with author (2006–07) (on file with author).

literally termed an “offer”—to the athlete while in high school. The athlete accepts this offer first verbally, then by signing both the scholarship agreement and his National Letter of Intent. The detriment to the university is all of its “expenditures,” and the detriment to the athlete is the forbearance of a substantial number of freedoms that are available to each regular student on campus, demonstrating consideration.

In terms of benefit, the university (and many critics of the athlete compensation argument) will argue that the value of the scholarship is benefit enough for the athletes. However, a joint study conducted by the National College Players Association (“NCPA”) and the Drexel University Department of Sport Management revealed that the typical “full” athletic scholarship falls, on average, \$3,222 short per player, per year for the true cost of attending the school, and that eighty-five percent of on-campus and eighty-six percent of off-campus resident athletes lived below the federal poverty line, all while their actual value to the university exceeded, on average, \$100,000.<sup>26</sup> In the case of Duke University’s Men’s Basketball, the valuation of each player to the university exceeded \$1,000,000, but the scholarship still fell nearly \$2,000 short.<sup>27</sup>

The expenses to the school, however, are debatable. The argument that tuition loss is a detriment suffered by the school blatantly fails to recognize the obvious fact that there is no such thing as “lost tuition.” The university does not give the \$40,000 in tuition the athlete would have otherwise paid directly back to the athlete. It is not a debit on the school’s balance sheet. It is simply just that there is no *income* of tuition for the university, but it does not actually *lose* anything. Tuition prices are set by the university, vary from school to school, and therefore serve simply as income. Thus, if a student does not pay tuition, he is not necessarily costing the university that money.

When it comes to these player-school contracts, however, the athlete has absolutely no bargaining power. The contract is offered on a “take it or leave it” basis, and even after verbal acceptance, the university can renege on the offer and strip it from the athlete. This past February, for example, the University of Louisville pulled an offer to a South Carolina high school running back from Dutch Fork High

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<sup>26</sup> Study: *The Price of Poverty in Big Time College Sport*, NCPA, <http://www.ncpanow.org/research/study-the-price-of-poverty-in-big-time-college-sport> (last visited Mar. 22, 2015).

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

School—coached by former Independence High head coach Tom Knotts—a mere two days before 2015’s National Signing Day after Louisville had received his verbal acceptance nearly a year prior.<sup>28</sup>

There is a clear economic benefit to the university from the athlete performing at his or her highest level. And if that standard is not met, and the athlete proves he cannot help the program win games and, consequently, help the university make money, the scholarship does not have to be renewed. Just like most major corporate structures, the athlete, at best, has 364 days of job security until his performance review, at which point his place within the company could be terminated.

In the end, for the athlete’s labor, for the millions of dollars he has helped bring into the university, for the restrictions on his schedule, course load availability and options, and for the injuries he will suffer (particularly with football) which—and make no mistake about this—*will* affect him for the rest of his life, he is given a 10”x12” piece of paper at the end that says he is educated.

#### THE SCHOOL AND THE ATHLETE

Operating as non-profit, non-taxed entities, universities bring in tens, and sometimes hundreds, of millions of dollars per year in revenue just from ticket sales, merchandise sales, bowl payouts, athletic apparel contracts, and television contracts.<sup>29</sup> In order to maintain their nonprofit organization status, these schools must somehow end the fiscal year having spent all of that revenue, striking a “zero” on the balance sheet.<sup>30</sup> They accomplish this, partially, by dumping the money back into the athletics department, paying its administrators, support staff, and coaches handsomely. At most universities, the highest paid employee is the men’s football or basketball coach, usually making them one of the highest paid people in the state.<sup>31</sup> At Alabama, for

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<sup>28</sup> Chris Dearing, *Louisville Pulls Scholarship for Dutch Fork Star Matt Colburn*, STATE (Feb. 2, 2015, 10:11 PM), <http://www.thestate.com/2015/02/02/3965542/louisville-pulls-scholarship-for.html>.

<sup>29</sup> See *College Athletics Revenues and Expenses—2008*, ESPN, <http://espn.go.com/ncaa/revenue> (last visited Mar. 22, 2015).

<sup>30</sup> *Understanding Nonprofit Status and Tax Exemption*, COMMUNITY TOOLBOX, <http://ctb.ku.edu/en/table-of-contents/finances/managing-finances/nonprofit-status-tax-exemption/main> (last visited Mar. 22, 2015).

<sup>31</sup> *Highest-Paid Public Employee in Your State? Probably a College Coach*, FISCAL TIMES (May 13, 2013), <http://www.thefiscaltimes.com/Articles/2013/05/13/Highest-Paid-Public-Employee-in-Your-State-Probably-a-College-Coach>.

example, Nick Saban will be paid \$6,950,203 by the university in 2015, making him the highest paid football coach in America.<sup>32</sup> Additionally, he will make another \$209,984 in “other pay,” bringing his total to \$7,160,187.<sup>33</sup> Saban’s staff, on the whole, will be paid \$5,213,400 in 2015 by the university.<sup>34</sup> By comparison, the second-lowest-paid SEC head coach—Mark Stoops of Kentucky—is set to make \$2,700,000.<sup>35</sup>

Before the 1980s, however, this was a different story. The term “Student-Athlete” was created by Walter Byers—the man who created the NCAA and built it into the colossus that it is today—as a tool to combat workman’s compensation claims brought against universities by their athletes for injuries and damages suffered while competing for the school.<sup>36</sup> The argument was simple: players, through their efforts on the field of play and the resulting revenues and exposure brought to the campus, sought workman’s compensation benefits as employees of the university’s athletics department.<sup>37</sup> Walter Byers had the foresight to address this issue before it could be levied against any NCAA member institution:

The colleges are scared to death at the prospect of having their athletes identified as employees and therefore subject to workman’s comp. I had our law firm do major research on this issue. Our law firm, they rely on the old amateur rule to say look: these are students first and athletes second. These are *student-athletes* and they are working at their professional training as a student and therefore not subject to workman’s comp.<sup>38</sup>

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<sup>32</sup> Marq Burnett, *Report: Saban Ranks No. 1 in Nation in Pay*, ANNISTON STAR (Nov. 19, 2014, 2:15 PM), [http://www.annistonstar.com/sports/article\\_c190a5ca-7028-11e4-a18c-fb1efefaf0ff.html](http://www.annistonstar.com/sports/article_c190a5ca-7028-11e4-a18c-fb1efefaf0ff.html).

<sup>33</sup> *Id.*

<sup>34</sup> Mike Griffith, *Michigan State Football Coaching Staff Payroll Ranked No. 5 in Nation in 2014*, MLIVE (Dec. 11, 2014, 11:59 AM), [http://blog.mlive.com/spartans\\_impact/print.html?entry=/2014/12/michigan\\_state\\_football\\_coachi.html](http://blog.mlive.com/spartans_impact/print.html?entry=/2014/12/michigan_state_football_coachi.html).

<sup>35</sup> John Taylor, *Nick Saban, the Seven Million Dollar Man, Tops Coaching Salary List*, NBC SPORTS (Nov. 19, 2014, 3:13 PM), <http://collegefootballtalk.nbcsports.com/2014/11/19/nicksabanthesevenmilliondollarmantopscoachingsalarylist/>.

<sup>36</sup> Jared Wade, *How the NCAA Has Used the Term “Student-Athlete” to Avoid Paying Workers Comp Liabilities*, RISK MGMT. MONITOR (Sept. 13, 2011), <http://www.riskmanagementmonitor.com/how-the-ncaa-has-used-the-term-student-athlete-to-avoid-paying-workers-comp/>.

<sup>37</sup> *See generally id.* (discussing Walter Byer’s opinion on a student athlete’s workman’s compensation death benefit lawsuit).

<sup>38</sup> SCHOOLED: THE PRICE OF COLLEGE SPORTS (Makuhari Media 2013); Benjamin J. Block, *Walter Byers: Was He Responsible for the ‘Pay To Play’ Controversy That Exists in College Sports Today?*, ISPORTS TIMES (Oct. 16, 2013, 12:09 AM), <http://www.isportstimes.com/articles/9152/20131016/walter-byers-responsible-pay-play-controversy-exists.htm>.

It was brilliant. It was exactly the ammunition schools needed to keep from having to pay out benefits to injured players. Contractually, schools now owned players' likeness rights, their schedules, and their labor, and in the event of a catastrophe, did not even have to pay out disability or medical benefits. Brilliance.

What existed now was a completely one-sided contract between these eighteen-to twenty-one-year-old youths and the organization to whom they were answerable but for whom they somehow technically did not work. "‘Student-Athlete’ was a deliberate decision," Byers said in a 1997 deposition, "if workman's comp claims are filed, colleges would have a much stronger case than if they didn't use this language."<sup>39</sup>

The title of "Student-Athlete" for all intents and purposes is a fiction. It is a phrase created in anticipation of litigation by a lawyer representing the interests of the universities that comprised his organization.<sup>40</sup> It is nothing more than words and only has power because the public ascribes weight to it. But since its inception, courts have accepted it as an argument from school after school being sued by a former athlete, solidifying the myth and giving it power that it does not inherently possess in the first place.<sup>41</sup>

The athlete was brought to that school for one purpose—sports. He was not brought in under an "academic grant-in-aid"; he was brought in under an "athletic grant-in-aid." Most schools do this under a "Special Talent Provision" (or something to that effect) in admissions, which allows them to admit students who fall short of their standard baseline for admission but show promise in an area the school wishes to cultivate.<sup>42</sup> This exception is used not just for athletes, but also for students who show potential to be the next great thing in music, or dramatic arts, or who may be a mathematical savant.<sup>43</sup> In the case of the athlete, the "talent" the school chooses to cultivate is his athleticism.

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<sup>39</sup> SCHOOLED: THE PRICE OF COLLEGE SPORTS, *supra* note 38.

<sup>40</sup> Block, *supra* note 38.

<sup>41</sup> Taylor Branch, *The Shame of College Sports*, ATLANTIC (Sept. 7, 2011, 11:28 AM), [http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true).

<sup>42</sup> Michele Hernandez, *In College Admissions, Athletes Are the Problem*, N.Y. TIMES (Mar. 27, 2015, 4:50 PM), <http://www.nytimes.com/roomfordebate/2011/11/13/why-do-top-schools-still-take-legacy-applicants/in-college-admissions-athletes-are-the-problem>.

<sup>43</sup> *Id.*

But just as any employee, the athlete must adhere to a standard of performance, and if he fails to meet that standard, his contract may be terminated. A common misconception is that when a seventeen- or eighteen-year-old kid signs his letter of intent and scholarship agreement, he is agreeing to attend that school for the next four to five years. As previously stated, the reality is that these scholarships are one-year renewable and must be re-signed each year. It is at the discretion of the coaching staff whether that player will be re-signed at year's end, and though it may only happen to a few players at each school per year, scholarships do get revoked (more often for behavioral issues, but performance reasons are not uncommon).

In the event that a scholarship is terminated for failure to perform, the athlete is left out in the cold, now with an unanticipated accumulation of tuition and bills. His choices are simple: perform and possibly sacrifice some school work to maintain his scholarship, or pour his energies into his studies while his performance suffers on the field or the court and hope that he provides enough benefit to the team's overall grade point average that he will be retained. Otherwise, he may be looking to enroll at a new school, a decision he was not planning on having to make back in his senior year of high school.

Yes, the athlete gets experiences, training, and skills that he would not otherwise have available to him if it were not for college athletics. But that does not change the fact that student-athletes are providing free labor in exchange for millions upon millions of dollars in annual revenue for the university. To ignore this—or even worse, to deny it—is to disregard the obvious nature of the current college sports climate. In an interview for the documentary *Schooled: The Price of College Sports*, a film detailing the relationship between student-athletes, their universities, and the NCAA, Wallace Renfro, former Vice President of the NCAA, claims that “[s]tudent-athletes, because they should be motivated by being a student-athlete and by education and participation in sports, . . . should be protected from the influences of commercialism and professionalism.”<sup>44</sup>

These athletes, however, are training for a shot at something more than just that week's game or the following season—they are training for that same professionalism described by Renfro and to one day be a part of it. Yes, it is true that, as the NCAA puts it, most athletes “will go

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<sup>44</sup> SCHOOLED: THE PRICE OF COLLEGE SPORTS, *supra* note 38.

pro in something other than sports,”<sup>45</sup> but that does not change the fact that most NCAA athletes still hope to become professional athletes. They play in uniforms designed to be wearable billboards in front of tens of thousands of people who are all paying between thirty and two hundred dollars for a ticket,<sup>46</sup> and on television networks that contractually pay conferences millions of dollars to air their member schools’ games.<sup>47</sup> These athletes are actively participating in the arena of professionalism with which Renfro seemed concerned but without one major component: compensation. The athletes are not the ones who have been caught amongst the trappings of professionalism—the schools, the conferences, and the NCAA itself have. Even Renfro recognized as much in 2010, conceding, “the notion that athletes are students is the great hypocrisy of intercollegiate athletics.”<sup>48</sup> And unfortunately for the NCAA, today’s college athletes are fully aware of it. Enter Ed O’Bannon.

#### THE EMPIRE STRIKES BACK

*“As long as I’m president of the NCAA, we will not pay student-athletes to play sports.”<sup>49</sup>*

—Mark Emmert, President, NCAA

In 1988, David McCormack, representing alumni, football players, and cheerleaders, brought suit against the NCAA for its decision to give the Southern Methodist University football program what is commonly referred to as the “Death Penalty”—a cessation of all activities of a given athletics program at a university for a specified period of time.<sup>50</sup>

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<sup>45</sup> See *Estimated Probability of Competing in Professional Athletics*, NCAA (Feb. 25, 2015), <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics>.

<sup>46</sup> Catey Hill, *College Football’s Most and Least Expensive Towns*, MARKET WATCH (Sept. 20, 2014, 7:31 AM), <http://www.marketwatch.com/story/college-footballs-most-and-least-expensive-towns-2014-09-18>.

<sup>47</sup> Chris Smith, *The Most Valuable Conferences in College Sports 2014*, FORBES (Apr. 15, 2014, 2:49 PM), <http://www.forbes.com/sites/chrissmith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014>.

<sup>48</sup> George Schroeder, *O’Bannon Trial: Mark Emmert Sticks to NCAA’s Script*, USA TODAY (June 19, 2014, 8:51 PM), <http://www.usatoday.com/story/sports/college/2014/06/19/obannon-antitrust-case-against-ncaa-mark-emmert/10860101>.

<sup>49</sup> Darren Rovell, *NCAA Prez: We Won’t Pay Student Athletes, Give Jersey Royalties*, CNBC (Dec. 8, 2010, 1:34 PM), <http://www.cnbc.com/id/40570628#>.

<sup>50</sup> Eric Prisbell, *‘Death Penalty’ a Relic of the Past*, WASH. POST (Oct. 10, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/09/AR2007100902068.html>.

A primary argument made by McCormack was that the NCAA's eligibility rules violated the Sherman Antitrust Act, arguing that "the eligibility rules constitute price fixing by a cartel of buyers of labor and so should be conclusively presumed to be unreasonable and therefore illegal."<sup>51</sup> The NCAA argued, and the Fifth Circuit U.S. Court of Appeals agreed, that the NCAA's "eligibility rules are not subject to the antitrust laws because . . . the eligibility rules have purely or primarily noncommercial objectives."<sup>52</sup> The court stated: "The Sherman Act does not forbid every combination or conspiracy in restraint of trade, only those that are unreasonable."<sup>53</sup> However, the court did concede that the only reason it considered the NCAA's eligibility rules reasonable was because McCormack had failed to present any facts to the contrary.<sup>54</sup>

"Noncommercial objectives" is a broad, vague term, and yet it seems easily combatted. The labor force in college sports is comprised solely of student-athletes, and the price for their services is fixed—not high, but instead low—by the member institutions. Without having to compensate players and incur this added expense, universities and the NCAA are free to use this money elsewhere (for example, to pay coaches and administration). The product is profited from, but the workers are not paid for creating it. In this regard, it seems the objectives of the NCAA, contrary to *McCormack*, are purely commercial. If the Sherman Act only forbids unreasonable trade restraints, it does seem unreasonable that the players see little to no return but give up plenty, including freedom in their schedules, while incurring the inherent risk of serious injury each time they take the field of play.

Possibly the most significant event in the chronicles of the fight against the NCAA, though, recently came from one former UCLA basketball player playing video games.<sup>55</sup> For years, Electronic Arts Sports ("EA") had been producing video games in partnership with the NCAA that featured all Division I men's basketball and football pro-

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<sup>51</sup> *McCormack v. NCAA*, 845 F.2d 1338, 1343 (5th Cir. 1988).

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Ben Strauss & Marc Tracy, *N.C.A.A. Must Allow Colleges to Pay Athletes, Judge Rules*, N.Y. TIMES, Aug. 8, 2014, [http://www.nytimes.com/2014/08/09/sports/federal-judge-rules-against-ncaa-in-obannon-case.html?\\_r=0](http://www.nytimes.com/2014/08/09/sports/federal-judge-rules-against-ncaa-in-obannon-case.html?_r=0).



grams.<sup>56</sup> Users could select any team and play any other team in a matchup of their choice. These games became wildly popular amongst college athletes because the similarities they shared with the players in the game were astounding. EA accomplished this by procuring active rosters from each school along with individualized statistics from the previous season to create each individual player.<sup>57</sup> The similarities were uncanny. I know, because while playing as UNC on “NCAA Football ’10,” I noticed that the right offensive tackle looked strikingly similar—to me.

The detail was incredibly accurate, with even my dress having been rendered nearly identical to my normal game day attire, all the way down to the way I wore my socks and my elbow sleeve. I then went back to check “NCAA Football ‘09” and sure enough, there I was again. Every kid dreams of being in a video game one day, and here I was seeing it play out right in front of me on my television screen. But as I thought about it more, I began to question why, despite my being in the game for two years at that point, I had to pay over sixty dollars for a copy. My questions would soon be answered by the 1995 Men’s Basketball National Player of the Year.

While playing EA’s NCAA men’s basketball game, O’Bannon noticed his likeness blatantly being used, which he assumed was without his permission.<sup>58</sup> This model of the game incorporated a past teams feature in which certain teams were singled out from past years of NCAA Men’s Basketball competition and regenerated for interactive use in the game.<sup>59</sup> One of O’Bannon’s former UCLA teams was featured and, though his name was not attached to the player, his jersey number, statistics, measurable and even physical features were all in accordance with those he possessed as a player. The only problem was that O’Bannon had not played college basketball in over a decade.

He filed a complaint, referencing Form 08-3a of the NCAA’s guideline paperwork—given to all NCAA athletes to re-sign each year—which stipulates, “[y]ou authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local

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<sup>56</sup> Brent Schrottenboer, *EA Sports Re-ups on College Football After NCAA Snub*, USA TODAY (July 19, 2013, 8:30 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/07/19/ea-sports-college-football-contract-renewed/2570119/>.

<sup>57</sup> *Id.*

<sup>58</sup> Strauss & Tracy, *supra* note 55.

<sup>59</sup> See *NCAA Basketball 10*, EA SPORTS, <http://www.ea.com/ncaa-basketball> (last visited Mar. 30, 2015).

organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”<sup>60</sup>

Before continuing, it is important to provide some context regarding the signing of NCAA paperwork in order to understand the significance of this particular section cited by O’Bannon. Each year, before the start of the academic school year, the entire team is brought together (in the case of football, that means eighty-five scholarship players), typically crammed into the team meeting room. As a group, the players are “informed” as to the new rules implemented by the NCAA for that given year. Understandably, in order to get through the bulk of the material—which is extremely dense—the school’s compliance officials must skim over much of the information in order to touch on all the important areas, and at the end of the session, the players are told which forms to sign and where, with little to no real explanation as to the complexity of the document they are signing or the true ramifications of giving their signature.

So when O’Bannon alleges that “the form requires student athletes to ‘relinquish all rights in perpetuity to the commercial use of their images, including after they graduate and are no longer subject to NCAA regulations’”<sup>61</sup> and that the “student athletes’ participation in intercollegiate athletic events is conditioned on signing this form[,]”<sup>62</sup> he is correct. It is also correct that neither I nor the vast majority of my teammates understood that we were relinquishing our rights in perpetuity. This is most likely because this particular facet of this section was either withheld from our knowledge, glazed over for time’s sake, or was even misunderstood by our own compliance officials.

O’Bannon further asserts in his complaint that

Form 08–3a and Article 12.5.1.1 enable NCAA to enter into licensing agreements with companies that distribute products containing student athletes’ images. He alleges that neither he nor other student athletes consent to these agreements and that they do not receive compensation for the use of their images. He claims that CLC, which is incorporated and has a principal place of business in Georgia, serves as NCAA’s “licensing arm” and facilitates these arrangements.<sup>63</sup>

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<sup>60</sup> See O’Bannon v. NCAA, Nos. C 09–1967 CW, C 09–3329 CW & C 09–4882 CW, 2010 WL 445190, at \*1 (N.D. Cal. Feb. 8, 2010).

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

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*2.

He concludes that “[the NCAA] violated section 1 of the Sherman Act by agreeing to fix prices and to engage in a group boycott, both of which constitute unreasonable restraints of trade.”<sup>64</sup>

In 1984, the NCAA faced similar allegations, brought on by representatives from the University of Oklahoma and the University of Georgia in *NCAA v. Board of Regents of the University of Oklahoma*.<sup>65</sup> The district court ruled that the NCAA’s television broadcast plan at the time violated Sherman by restraining competition within the market, based on the argument that: (1) the NCAA fixed prices; (2) the plan’s exclusive network contracts constituted a group boycott; and (3) the plan placed an artificial limit on the production of televised college football.<sup>66</sup> The Court of Appeals agreed, asserting a Sherman violation because the plan constituted illegal *per se* price fixing, a decision that was upheld by the United States Supreme Court.<sup>67</sup>

Over thirty years later, the NCAA faced new allegations of antitrust violations due to its multimedia licensing deals, but this time it was not just the television agreements that were being attacked. It was the entire premise of student-athlete likeness rights and the justification for compensation for the use of those likenesses.<sup>68</sup> If the *Board of Regents* ruling was big, this was monumental.

O’Bannon alleged that the Collegiate Licensing Company (“CLC”)—the official licensor and distributor of NCAA-sanctioned products—“is the ‘licensing representative’ of NCAA and that CLC represents colleges, universities, and athletic conferences.”<sup>69</sup> Therefore, argued O’Bannon, the NCAA and CLC violated the Sherman Act.<sup>70</sup> The court ruled that O’Bannon sufficiently supported his theory that “after [the] NCAA and its members obtain releases from student athletes, CLC brokers agreements that do not compensate him or the putative class members for the use of their images.”<sup>71</sup>

The District Court for the Northern District of California held that O’Bannon’s case differed from the *Board of Regents* case in that he did not allege a horizontal agreement with respect to his Sherman

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<sup>64</sup> *Id.*

<sup>65</sup> 468 U.S. 85 (1984).

<sup>66</sup> *Id.* at 96.

<sup>67</sup> *Id.* at 97.

<sup>68</sup> *O’Bannon*, 2010 WL 445190, at \*1.

<sup>69</sup> *Id.* at \*3.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

claim, which requires that the individual member schools operate as direct competitors with one another for profits from the use of former athletes' likenesses, and because the court considered his antitrust theory "novel," his claims were not subject to illegal *per se* analysis but rather rule of reason analysis.<sup>72</sup> Accordingly, O'Bannon was found to have sufficiently established a collegiate licensing market created by the NCAA and CLC, as well as having sufficiently pled anticompetitive effects by the NCAA and CLC, satisfying these requirements per the rule of reason analysis.<sup>73</sup> The "unreasonable restraint" argument that failed in *McCormack* prevailed when the court heard O'Bannon's version.<sup>74</sup> The court also held that O'Bannon had established antitrust standing,<sup>75</sup> as well as a claim for unjust enrichment.<sup>76</sup>

As a result of this ruling, O'Bannon was able to establish claims against the NCAA that had not previously been recognized by the courts. For years, lawsuits had been filed against the NCAA calling for player compensation.<sup>77</sup> But this time, instead of the argument for player compensation being rooted in how much money was brought in from broadcasting rights and ticket and merchandise sales, the argument hinged upon the misuse of players' likenesses and the circumstances surrounding their agreement to those terms in the NCAA's requirements for participation. In doing so, O'Bannon may have found the chink in the armor of the NCAA's decades-long amateurism stance, revealing potentially damning testimony from high-ranking officials within the NCAA itself, including President and CEO Mark Emmert, former Vice President Wallace Renfro, and even the architect of the "Student-Athlete" fallacy himself, Walter Byers.<sup>78</sup>

Remember the special talent provision?<sup>79</sup> Here is the major difference between an athlete and the hypothetical math major both brought in under that exception, which exemplifies the effects and potential effects of the compensation component of the *O'Bannon* litigation: the math major, if he has a stroke of *Good Will Hunting* genius and breaks some unbreakable formula, is not penalized if he decides to monetize his achievement. Now, say that same kid takes that money

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<sup>72</sup> *Id.* at \*5.

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

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at \*7.

<sup>76</sup> *Id.* at \*8.

<sup>77</sup> See, e.g., Straus & Tracy, *supra* note 55.

<sup>78</sup> See Brief for Plaintiff-Appellee, *supra* note 20, at 13–16.

<sup>79</sup> See *supra* notes 42–43 and accompanying text.

and sends it home to help his family or uses it to raise his little sister who is living in his dorm room because back home where they come from is so unsafe that he needed her to come live with him. He then enrolls her in the local school system and serves as her legal guardian. People would rave about this kid, talk about how great and wonderful he is. Articles would be written about him extolling his virtues. Matt Damon and Clint Eastwood would set aside their partisan differences and, together, would make a heart-wrenching, beautiful movie about this kid, and it would win Best Picture. No one would dare tell this kid he couldn't profit off of his accomplishments while in school. People would say that is ludicrous.

But in the case of the "student"-athlete, if he does the same exact thing and uses his talents to make money for those same purposes, he'll be made a pariah. He'll be cast out by his school and fed to the NCAA wolves waiting at the door. And here's the best part: he'll be portrayed as a criminal, a no-good, rule-breaking bamboozler. But nothing he's done is illegal. The NCAA's rules are not law. This seems to get lost amid the national news media's impassioned reporting of NCAA news and the stigma that it creates. The NCAA's rules are simply policies put in place by men who were commissioned back in the 1950s to protect the interests of the member *schools*, not students.<sup>80</sup> But whereas that math major is still in school making money off of his talents and being celebrated, that athlete has probably lost his eligibility and maybe the only shot he ever had at going pro and making money off of *his* talent.

No, now he's at home, back in the 'hood—with no degree, no prospects, and no one to look out for him. And here's what's even more perverse: that situation I described about the little sister living with the student? That is the true story of one of my teammates. And for taking money from an agent to help with the costs of providing housing for his sister to stay with him while at school, this player was stripped of his eligibility and made out to be a monster. Lucky for him, he was one of the best players at his position so he had his shot in the NFL. But the sad part is that the next "student"-athlete who is in that situation may not be so fortunate. The next guy may be Maurice Clarett, who was sent back to Youngstown, Ohio with no degree, re-

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<sup>80</sup> Branch, *supra* note 41.

sorted to selling drugs, and almost lost everything, all because he needed a rental car for a week back in college.<sup>81</sup>

There are two sides to the compensation argument. Both have merit, and both are flawed. Regardless of whichever argument to which you subscribe, there is a very real possibility that the *O'Bannon* litigation may put one of them to bed very soon.

#### AFTERMATH OF *O'BANNON*

Following the district court's ruling, the NCAA appealed to the Ninth Circuit Court of Appeals. A recent appellate brief filed by the *O'Bannon* camp emphasizes the fact that the district court "made extensive factual findings that the NCAA restrains trade in two related national markets, the 'college education market' and the 'group licensing market'" and that "[t]he court further found that the NCAA exercises market power, fixes prices, and restrains competition in both markets."<sup>82</sup> If nothing else, *O'Bannon* has succeeded in exposing some legal flaws in the NCAA's model and has done so with greater success than its predecessors.

After the commencement of the *O'Bannon* litigation, however, the NCAA did begin to take positive steps toward creating a plan to close the disparaging gap between the value of scholarships and the actual cost of attendance. Despite his adamant assertions to the contrary, it seems President Emmert has heard the cries for change and has initiated policies to ameliorate some of the grievances, doing what he can consistent with the NCAA's ideals to change with the times.<sup>83</sup> In a 2012 editorial to the *Wall Street Journal*, Emmert outlined a plan, presumably in its infancy, to grant what he calls a "miscellaneous expense allowance" in the amount of \$2,000.<sup>84</sup> That amount has increased to \$5,000 in some discussions, as well as a possible trust being set up for the players as another alternative to pay-for-play, available to them post-graduation.<sup>85</sup>

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<sup>81</sup> See Bill Livingston, *Maurice Clarett Is Still a Curious Case, Years After His Ohio State Buckeyes Career*, CLEV. PLAIN DEALER (Dec. 13, 2012, 3:46 PM), [http://www.cleveland.com/livingston/index.ssf/2012/12/years\\_after\\_his\\_career\\_with\\_oh.html](http://www.cleveland.com/livingston/index.ssf/2012/12/years_after_his_career_with_oh.html).

<sup>82</sup> See Brief for Plaintiff-Appellee, *supra* note 20, at 20.

<sup>83</sup> Mark Emmert, *Paying College Athletes Is a Terrible Idea*, WALL ST. J., Jan. 11, 2012 <http://www.wsj.com/articles/SB10001424052970204257504577151212467142838>.

<sup>84</sup> *Id.*

<sup>85</sup> See Brief for Plaintiff-Appellee, *supra* note 20, at 18.

The ultimate test to the NCAA's model—and Emmert's resolve—it seems will be the *O'Bannon* case, however. As it continues to push the NCAA's amateurism model to its absolute limits, the question remains whether we have yet to see the extent to which reform within the amateurism model in intercollegiate athletics will be allowed. In other words, whether the NCAA and its collegiate model has made it through the proverbial woods, or if they have only just started their journey into them. As the case is in ongoing litigation, only time will tell, but it seems safe to say that *O'Bannon* may be just the beginning.

#### A NOTE ON UNC

At the 2011 NFL Draft, one ESPN analyst referred to the 2010 North Carolina football team as “maybe the greatest college football team that never happened” in the midst of a record nine of its players being drafted.<sup>86</sup> Of the eighteen seniors from that team, sixteen participated in North Carolina's Pro Day a month prior to the Draft.<sup>87</sup> All sixteen of us were in preseason camp with an NFL team, many of us on the same teams.<sup>88</sup> And at the end of our rookie year in 2011, thirteen of us were still in the NFL, including me.<sup>89</sup> Of that class, the nine draft picks, sixteen free agent signings, and thirteen year-end roster players were all records.<sup>90</sup>

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<sup>86</sup> See *History*, NFL, <http://www.nfl.com/draft/history/fulldraft?abbr=N&collegeName=Nor22th+Carolina&abbrFlag=0&type=school> (last visited Mar. 22, 2015). Three of the top four players drafted in 2011 never played a down for UNC in 2010, as they were ruled permanently ineligible. See *Agent Scandal Costs UNC Three Players*, ESPN (Oct. 11, 2010), <http://sports.espn.go.com/nfl/news/story?id=5673405>.

<sup>87</sup> See Will Spencer, *North Carolina Pro Day—2011* (Apr. 1, 2011), <http://draftbreakdown.com/north-carolina-pro-day-2011/>.

<sup>88</sup> The following players were drafted: Robert Quinn (St. Louis Rams); Marvin Austin (New York Giants); Johnny White (Buffalo Bills); Da'Norris Searcy (Buffalo Bills); Greg Little (Cleveland Browns); Ryan Taylor (Green Bay Packers); T.J. Yates (Houston Texans); Bruce Carter (Dallas Cowboys); Quan Sturdivant (Arizona Cardinals). The following players were signed as undrafted free agents before the start of preseason camp: Ed Barham (Minnesota Vikings); Mike Ingersoll (Kansas City Chiefs); Anthony Elzy (Buffalo Bills); Zack Pianalto (Buffalo Bills); Alan Pelc (Oakland Raiders); Shaun Draughn (Washington Redskins); Kendrick Burney (Carolina Panthers).

<sup>89</sup> Quinn, Austin, White, Searcy, Little, Taylor, Yates, Carter, Sturdivant, Ingersoll, Pianalto, Draughn, and Burney all remained in the NFL at the end of the 2011 season.

<sup>90</sup> See Eddy Landreth, *Davis' Tar Heels Set New Standard with Successful Draft Day*, CARRBORO CITIZEN (May 5, 2011), <http://www.iliblio.org/carrborocitizen/main/2011/05/05/davis-tar-heels-set-new-standard-with-successful-draft-day/> (“A school-record nine players were selected in last weekend's National Football League draft. Even more are almost certain to sign as free agents and make rosters.”).

During our senior year, fourteen players sat out at least one game, with many others being forced to sit out multiple games or even the entire season.<sup>91</sup> The NCAA informed our coaching staff and compliance office that they had “suspicion” that many of those players had committed infractions, though they did not have proof. Consequently, if those players were found to have committed the infractions of which they were accused and the coaches played them prior to the NCAA issuing its rulings, the team would have been forced to forfeit the games to which those “ineligible” players contributed.<sup>92</sup>

Most were found to have done nothing wrong. Many had to sit out half of the season or longer, waiting, despite their innocence, for the NCAA to clear them of its allegations.<sup>93</sup> By comparison, eventual Heisman Trophy winner Cam Newton of Auburn was declared ineligible and re-declared eligible within the span of only twenty-four hours.<sup>94</sup> The NCAA’s investigation into UNC would continue for another two years.<sup>95</sup> It would then close, only to be re-opened again earlier in 2014,<sup>96</sup> making it one of the longest investigations into any university conducted by the NCAA.<sup>97</sup>

At the heart of the situation were allegations of fraudulent classes. These courses, officially named “Independent Studies” but nicknamed “Paper Classes,” were portrayed as imitation classes with no real requirements for grading and no standard for completion of work. Personally, I will admit, I was in two of them. The media portrays these classes as having strictly athlete enrollment with no requirement of in-

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<sup>91</sup> *UNC Hit with One-Year Postseason Ban*, FOX SPORTS, <http://www.foxsports.com/collegefootball/story/north-carolina-hit-with-one-year-postseason-ban-reduction-of-scholarships-three-years-of-probation-031212> (last updated Jun. 6, 2014, 3:04 PM).

<sup>92</sup> NAT’L COLLEGIATE ATHLETIC ASS’N, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL PUBLIC INFRACTIONS REPORT 22 (2012), available at <http://www.ncaa.org/sites/default/files/UNC%2BPublic%2BInfractions%2BReport.pdf>.

<sup>93</sup> Charles Robinson, *North Carolina Ruled Ineligible for a Bowl Next Season and Must Forfeit 15 Scholarships*, YAHOO! SPORTS (Mar. 12, 2012), [http://sports.yahoo.com/ncaa/football/news?slug=r-robinson\\_north\\_carolina\\_sanctions\\_031212](http://sports.yahoo.com/ncaa/football/news?slug=r-robinson_north_carolina_sanctions_031212).

<sup>94</sup> John Taylor, *Cam Newton, Auburn Cleared by NCAA*, NBC SPORTS (Dec. 1, 2010, 1:15 PM), <http://collegefootballtalk.nbcsports.com/2010/12/01/cam-newton-auburn-cleared-by-ncaa/>.

<sup>95</sup> Brett Friedlander, *Timeline of Events in UNC Athletic/Academic Scandal*, STAR NEWS ONLINE (Oct. 22, 2014, 10:01 AM), <http://acc.blogs.starnewsonline.com/44425/timeline-of-events-in-unc-athleticacademic-scandal/>.

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., Steve Eder, *After Long N.C.A.A. Inquiry, Miami Loses 12 Scholarships*, N.Y. TIMES, Oct. 22, 2013, [http://www.nytimes.com/2013/10/23/sports/miami-avoids-further-bowl-ban-in-ncaa-penalties.html?\\_r=0](http://www.nytimes.com/2013/10/23/sports/miami-avoids-further-bowl-ban-in-ncaa-penalties.html?_r=0).



class or consultation time with a professor. This, however, is incorrect. From my experience, there were far more regular students enrolled in these classes than athletes,<sup>98</sup> and during my enrollment I was required to meet with the grading professor and give a progress report regarding my writing. I wrote two twenty-five page papers and submitted them. They were good papers, one was better than the other, and I was graded accordingly, receiving the “A” and “A-” that I had earned. Because this class was available to me, I was able to take a trip to Ireland with my parents and late grandmother to meet my direct blood-line family members in County Corke and Kilkenny, and I was able to walk along the farm that had been in my family for over 400 years. It was a real-life history lesson with actual learning that took place, and it was all possible because of the flexibility created by those “no-show, fraudulent paper classes” that I spent six to eight hours per day working on.

Many of those in the academic community who have criticized these classes and the university were Carolina employees, and I had direct interactions with some of these individuals during my time at UNC. These are also the same people who, early in my academic career, critiqued a paper of mine to the point where it was suggested I commence a complete overhaul and re-write it. Out of spite, I turned in the rough draft of that paper—a period piece critiquing Marxist views of power hierarchies within the then-growing industrial workplace bracketed by a discussion of theories of hegemony championed by Italian Marxist theorist Antonio Gramsci, if I remember correctly—to my upper-level organizational communications class. I received an A on the paper.

Point being, the public would be wise to not believe everything that is reported. Depending on how you may feel towards me as a writer (which, after this long-winded effort, some of you may have mixed feelings), creatively, my writing is not that different from that which I produced nearly ten years ago as a nineteen-year-old undergraduate, and if those at the forefront of the UNC “scandal” did not

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<sup>98</sup> Notably, in their recently released book, *Cheated*, Jay Smith and Mary Willingham also acknowledge the fact that independent study and paper classes were not just offered to athletes, nor did athletes comprise the majority of at least some of these classes. See, e.g., JAY M. SMITH & MARY WILLINGHAM, *CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS* 27 (2015) (“The spring 2001 AFAM 190 was one of many such courses, numerically dominated by nonathletes but serving athlete needs as well . . .”).

think that I knew how to write, imagine what they may have thought about some of my teammates who found themselves much more fleet of foot than of tongue. The writing of the special talent-provisioned flautist would not be so heavily questioned. Why is the special talent-provisioned athlete held to a higher standard?

Understand the root of the information being reported—much of which is mere regurgitation and reconstitution of old stories—and the bias of media outlets reporting on UNC matters. This is not to diminish the work of many fine journalists who have done an exceptional job illuminating a decades-long issue of academic imbalance that was and is system-wide within major college athletics. It is simply a plea to understand there are always two sides. As a Tar Heel, it is a shame to me that my school had to be the catalyst for the discussion. But there is a lot of self-serving, unfounded, and inflammatory trite being reported as “breaking news” these past few years, especially in the regional media. Much of it has merit, but then again, much of it does not.

Make no mistake, the climate at Carolina right now is not very desirable. The greatest travesties are the lawsuits that have been previously filed against the University (*McAdoo v. The University of North Carolina at Chapel Hill*<sup>99</sup>), as well as currently pending litigation,<sup>100</sup> both brought by ex-players who are former teammates of mine and for whom I have great respect. Due to the fact that, as of the time of this writing, a suit brought by Devon Ramsey and Rashanda McCants (both of whom I consider friends) against the University is ongoing, I will choose to abstain from any personal commentary regarding that litigation other than to say, I hope that middle ground can be found.

The crux of the argument is that many former athletes feel they were promised an education by their university (in this case UNC), but by gearing efforts primarily towards meeting NCAA eligibility requirements and not the advancement of higher education, the university did not hold up its end of the bargain.<sup>101</sup> My personal opinion regarding all of these recent conversations is simply that as athletes, our educational experience while undergraduates was what we made of it—we got out of it what we put into it. Perhaps arguments made by either

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<sup>99</sup> *McAdoo v. Univ. of N. Carolina at Chapel Hill*, \_\_ N.C. App. \_\_, 736 S.E.2d 811, review denied, 366 N.C. 581, 740 S.E.2d 465 (2013).

<sup>100</sup> Jon Solomon, *Ex-North Carolina Athletes Sue NCAA, UNC over Academic Scandal*, CBS SPORTS (Jan. 22, 2015, 4:20 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24984287/ex-unc-athletes-sue-ncaa-unc-over-academic-scandal>.

<sup>101</sup> *Id.*

Carolina or those representing the current and former athletes will change my more specific views on some of these matters, but for now, I do not wish to disclose those opinions. What I will say is that I cherished my time in Chapel Hill. I love Carolina, but I also have love for my former teammates. As a budding lawyer, I hope the best argument wins. As a Tar Heel, I just hope a resolution is reached.

My desire to be both a successful athlete and a successful student paid off for me—athletically, in that I had a wonderful experience as a professional in the NFL until a knee injury ended my career, and academically, in that I am now a law student at an extremely promising law school here at Elon University. Essentially, I got to have my cake and eat it, too. And the academic support staff for Carolina football steered me in that direction and provided ample guidance to help me realize both goals.

In the end, I encourage all to be active consumers of information. Do not believe everything that is reported. Become informed, educated, and as well versed as you can be on the issues facing us as both sports fans and Americans and formulate educated opinions accordingly. There will always be the extreme right and the extreme left, but somewhere in the middle lies the truth. If you search for it, you will find it.

In the case of UNC, I can promise anyone who is reading this that the situation is nothing like it is portrayed. Take it from me—I lived it. We went to class, we worked hard, and our coaches preached the importance of capitalizing on our educations. My head coach, Butch Davis, was a good man and an even better teacher, and to call him a cheater and dishonest could not be further from the truth. I learned much from the man, and I am proud to say I played for him. He was always an advocate for me as a player, and I will always return the favor.

#### CONCLUSION

The NCAA has grown from a small organization with more filing cabinets than employees to a colossal governing body and one of the most powerful organizations in sport. In challenging the amateurism model, the *Board of Regents* decision dealt a minor blow to the NCAA legally, from which the Association was able to recover, but not without some of its weaknesses illuminated in the process. The *O'Bannon* litigation may prove to be a damaging—if not fatal—blow to the NCAA if the district court's ruling is affirmed at the completion of the appeals process. Regardless of the outcome, the discussion about student-ath-

lete compensation is at the forefront of not only the athletic world but also pop culture and has evolved from small-talk amongst athletes to a heated topic of both interest and concern, depending on what side you are on, that has gained noticeable traction and is showing no signs of slowing down. As a kid from little Mint Hill, North Carolina, I never dreamed that I would have the experiences that my life has given me to this point, nor did I ever dream I would encounter these types of issues. I feel fortunate to continue to have a platform on which to discuss them.

The times have changed since the early days of NCAA-regulated competition in intercollegiate athletics. College sports have become not just big but huge business in the three decades since the *Board of Regents* case. No longer, it seems, can the outdated notion of amateurism prove to be the winning argument against athlete compensation. This fact is even recognized by the architect of modern amateurism.

At one of his last public appearances a few years following his retirement from the NCAA, Byers stated:

I look around, and see these young people here, and I suppose sports is a fountain of youth, because each generation of young persons come along and all they ask is, "Coach give me a chance, I can do it," and they go on and surpass the marks of their predecessors, and the excitement continues. And it is a disservice to these young people—the management of intercollegiate athletics stays in place committed to an [outdated] code of amateurism drawn, quite frankly, in 1956. They can count the house, and they can multiply the ticket prices, and they can read the T.V. contracts, and it doesn't take any great genius to understand that what was real in 1956 can hardly be remembered in the gross commercial climate of intercollegiate athletics today. And I attribute that to the "ye olde plantation" mentality that exists on the campuses of our country and in the conference offices and in the NCAA, that the rewards belong to the overseers and the supervisors. Coach owns the athlete's feet, the college owns the athlete's body, and what trickles down after that can go to the athletes. All this is not fair, and I predict that the amateur code now, based on a foregone philosophy and held in place for sheer economic purposes, will not long stand the test of the law.<sup>102</sup>

The perception of the college athlete experience is undergoing a dramatic shift from one of privilege to one of exploitation. Regardless of whether you agree or disagree, it is safe to say that this certainly is an exciting time for college sports. It is also a scary one, as there is no telling what the future holds. These are uncharted waters that the

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<sup>102</sup> SCHOOLED: THE PRICE OF COLLEGE SPORTS, *supra* note 38.

NCAA and all present and former college athletes are entering. And someone, unfortunately, is going to find out that he cannot swim.

