

RETHINKING AMATEURISM AND THE NCAA

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Measured in terms of sheer organizational growth, Division I-A varsity sports programs would appear to be flourishing. Compared to half a century ago, there are more contests, more coaches, more advertisements, and stronger support systems like weight rooms and trainers. In short, we have a vastly expanded national intercollegiate sport system.

In particular, since the United States Supreme Court decided the *Board of Regents* case in 1984,¹ the television audience for college athletics has skyrocketed. This is true for the major athletic conferences during their regular seasons, for preseason and holiday exhibition matches, and especially for postseason contests. Together, these activities generate billions of dollars in television revenue.² The postseason expansion began with what we now call “March Madness,” an intense three weeks that winnows sixty-five basketball teams down to a single national champion. And in postseason football, those of us of a certain age remember when there were four bowls we regarded as sacred: the Rose, the Cotton, the Sugar, and the Orange. This next holiday season there will be at least twenty-eight bowl games featuring close to sixty football teams, each with their accompanying bands, students, and alumni.³

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¹ NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

² See Marc Jenkins, Note, *The United Student Athletes of America: Should College Athletes Organize in Order to Protect Their Rights and Address the Ills of Intercollegiate Athletics?*, 5 VAND. J. ENT. L. & PRAC. 39, 40-41 (2003).

³ The NCAA posts its current list of certified bowl games online at NCAA, Bowl Contacts and Schedule, at http://www1.ncaa.org/membership/postseason_football/contacts (last visited Mar. 24, 2004).

Many new firms and marketing agencies promote all these activities, and vast dollars are spent to spread sponsors' corporate names and products throughout the land. There's even the vision of a possible answer to the question "Who's Number 1?" in football, with a proposed bowl championship series.

With all this frenzy of activity, you would think that the spring and summer of 2003 would have been happy times in the intercollegiate sports world; but no, this was a spring and summer of deep and foreboding discontent.

First, there was the Atlantic Coast Conference's raid on the Big East, which resulted in name-calling and threatened lawsuits among conferences and universities.⁴ The spectacle left many of us demoralized, as it demonstrated once and for all how high the financial rewards have become, and therefore how much is being staked upon the performance of the "student athletes." Second were the academic integrity questions facing football national champion Ohio State over how its faculty dealt with a star player's questionable academic performance.⁵ Third was the stunning news of the Baylor basketball program: a student athlete charged with murdering a fellow student athlete, followed by a coach's attempted cover-up, perhaps criminal in nature, calling into question the recruiting and oversight of coaches and athletes alike.⁶ Finally, there was the unprecedented flurry of state legislative activity to protect the interests of varsity athletes in Nebraska and California, with Texas, Iowa, and Colorado not far behind.⁷ In California, a supportive force was the "Collegiate Athletes Coalition," organized by Ramogi Huma, a graduated

⁴ See Damon Hack, *A.C.C. Nears Expansion, and Big East Nears a Breakup*, N.Y. TIMES, May 14, 2003, at D1; Damon Hack, *Big East Women's Coaches See A.C.C. Plan as Ruinous*, N.Y. TIMES, June 16, 2003, at D9; Sally Jenkins, *Non-Football Powers Seek NCAA Reform*, CONTRA COSTA TIMES, July 13, 2003; Toni Phifer, *ACC Raid Has Conferences Scrambling*, FORT COLLINS COLORADOAN, June 22, 2003, at D1; William C. Rhoden, *A Divorce in the Big East Exposes Bitter Truths in College Sports*, N.Y. TIMES, June 11, 2003, at D2.

⁵ The athlete is Maurice Clarett; aside from alleged academic improprieties, he has also come under scrutiny for misreporting the value of stolen goods. See Associated Press, *Clarett Inquiries Hear an Accuser*, N.Y. TIMES, Aug. 21, 2003, at D7; Joe Drape & Mike Freeman, *Clarett Faces a Charge and May Transfer*, N.Y. TIMES, Sept. 10, 2003, at D1; Mike Freeman, *Buckeyes Suspend Clarett for Year*, N.Y. TIMES, Sept. 11, 2003, at D1; Mike Freeman, *Clarett: Symbol of College Turmoil*, N.Y. TIMES, Aug. 24, 2003, § 8, at 1; Mike Freeman, *Ohio State Suspends Clarett; Number of Games Unknown*, N.Y. TIMES, Aug. 23, 2003, at D1. Clarett has now filed suit in an attempt to join the NFL draft.

⁶ Baylor player Carlton Dotson has been indicted for the murder of former teammate Patrick Dennehy. Baylor's head basketball coach has also stepped down amid accusations of an attempted cover-up. See Associated Press, *Ex-Baylor Player Was Shot Twice*, N.Y. TIMES, Aug. 13, 2003, at D7; Associated Press, *Player Indicted in Baylor Case*, N.Y. TIMES, Aug. 28, 2003, at D2; Viv Bernstein, *Baylor Coach Told Team to Lie to Investigators*, N.Y. TIMES, Aug. 17, 2003, § 8, at 2; Pete Thamel, *At Baylor, Problems Go Beyond Basketball*, N.Y. TIMES, Aug. 20, 2003, at D2.

⁷ The general motivation behind this legislation is to increase college scholarships to athletes so they reflect the complete cost of a year at college. See Associated Press, *Legislature Votes To Pay Cornhuskers*, N.Y. TIMES, Apr. 12, 2003, at S9; Marcia Chambers, *Brand Endorses More Aid To Athletes*, N.Y. TIMES, Sept. 18, 2003, at D3.

student athlete at UCLA.⁸ The legislation threatens the dominion of the National Collegiate Athletic Association (NCAA).⁹

These events provide an unsettling background for an analysis of the role of amateurism in the current world of big-time intercollegiate athletics. We can make a beginning by examining the origins of the “student athlete.”

I. THE SOCIAL INVENTION OF THE “STUDENT ATHLETE”

We need to step back to the late 1950s to understand how the NCAA transformed college athletics through the concept of the student athlete. Wally Byers, longtime head of the NCAA, described the moment when those who had imposed a “Sanity Code,” calling for need-based aid, began to urge conversion to the grant-in-aid system, the original play-for-pay system based on athletic talent and not justified on grounds of need. Here’s how Byers tells the story:

It was then that they came face to face with a serious, external threat that prompted most of the colleges to unite and insist with one voice that, grant-in-aid or not, college sports still were only for “amateurs.”

That threat was the dreaded notion that NCAA athletes could be identified as *employees* by state industrial commissions and the courts.

We 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*.¹⁰

The NCAA currently captures this commitment to student athletes in two statements from the opening pages of the Division I Manual. The first to appear historically, at the NCAA’s first convention in 1906, is in Article 2, outlining principles for conduct of intercollegiate athletics:

2.9 The Principle of Amateurism:

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

⁸ See Collegiate Athletes Coalition, The Collegiate Athletes Coalition, at <http://www.cacnow.org> (last visited Feb. 25, 2004) (displaying the front page of the Coalition’s website).

⁹ See Collegiate Athletes Coalition, *CAC and California Lawmakers Turn up the Heat on the NCAA*, at http://www.cacnow.org/news/06-2003_californialawmakers.htm (last visited Mar. 24, 2004).

The actual power in the NCAA divisions lies squarely with the collegiate presidents—in the case of Division I, largely the Division I-A presidents. Thus, when one says “NCAA” in the context of big-time college football or basketball, it is in effect shorthand for “a majority of the presidents of Division I-A institutions serving on the NCAA’s executive committee.” This should be remembered when assigning responsibility for NCAA actions.

¹⁰ WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995).

protected from exploitation by professional and commercial enterprises.¹¹

According to NCAA archivist Ellen E. Summers, this principle “has been moved about in the manual and some revisions made, but the basic premise has been a guiding principle since day one.”¹²

The second statement appears right up front on page one, under “Fundamental Policy.” It is from Article I of the NCAA Constitution:

1.3.1 Basic Purpose

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. 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.¹³

Article 1.3.1 was adopted as an amendment to the NCAA Constitution in 1959, shortly after the decision to provide full-ride merit scholarships. Not a word has been changed in the intervening forty-four years.¹⁴

These principles, of course, hold for “student athletes,” who must meet an exacting standard as outlined in section 12 of the NCAA Division I Manual.

12.02.5 Student athlete:

A student athlete is 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. Any other student becomes a student athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department, as specified in Constitution 3.2.4.4. A student is not deemed a student athlete solely on the basis of prior high-school athletics participation.¹⁵

The first appearance of something like this definition was in the 1967 Manual. The current wording first appeared in 1989, when the Manual was recodified.¹⁶

As we shift from the earliest to the more recent of these official enactments, we see the movement from a student whose interests in sport are a mere “avocation,” with no mention of an organized program of athletics, to recognition of programs of athletics and the specific purpose of the NCAA to assure they are maintained as an “integral part” of the student body. And where the original formulation protected athletes vaguely from “professional and commercial enterprises,” the 1959 version drops the word “commerce” entirely, but insists on the wall of separation (“line of demarcation”) between

¹¹ NCAA, 2002-03 NCAA DIVISION I MANUAL art. 2.9 (2002).

¹² E-mail from Ellen E. Summers, NCAA Archivist, to Stanton Wheeler, Professor Emeritus of Law, Yale Law School (Aug. 14, 2003) (on file with author).

¹³ NCAA, *supra* note 11, art. 1.3.1.

¹⁴ E-mail from Ellen Summers to Stanton Wheeler, *supra* note 12.

¹⁵ NCAA, *supra* note 11, art. 12.2.5.

¹⁶ E-mail from Ellen Summers to Stanton Wheeler, *supra* note 12.

intercollegiate athletics and professional sports.¹⁷

Finally, when we move from the vague abstraction of “student athlete” at the NCAA’s founding into the modern era, we learn that the student athlete is a creature of the varsity athletics bureaucracy: someone the department or its interests recruited, or if not, a student known as a “walk-on” who has been anointed by the athletics department.¹⁸ These are distinguished from mere high school athletes who presumably make up a large portion of the intramural and club sport participants in college athletics. Only varsity athletes are “student athletes” for NCAA purposes.¹⁹

Thus was created the social construction of the varsity athlete as a student first, athlete second. And over the years it is this reading that courts have accepted.²⁰ If anything, it has been reinforced, as the NCAA continues to try to differentiate its product—college sport—from the world of professional athletics. And here we see the ultimate irony. The more the NCAA earns in television and other profits, the more it argues that the product is amateur athletics: To pay the athletes would destroy the uniqueness of the product. So the only way to make the billions of dollars now generated by varsity athletic programs is to protect the athletes from receiving any of it.

Go back to my introductory comments and put yourself in the shoes of a current Division I-A athlete in the sports of football or men’s basketball. His basic aid package—with some recent exceptions to be sure—is very similar to what it was almost fifty years ago. It has gone up with the cost of tuition, room and board, and books. But compared to the new-found wealth flowing to coaches and athletic departments, to universities, and to the NCAA itself, he is losing ground. It is hard to imagine a clearer case of what social scientists a half century ago referred to as “relative deprivation,”²¹ or what might now be referred to simply as exploitation.

¹⁷ See *id.*; NCAA, *supra* note 11, art. 1.3.1.

¹⁸ See NCAA, *supra* note 11, art. 12.2.5.

¹⁹ Although they haven’t changed the constitution, the NCAA has certainly wrestled with some of these issues. A report on “Division I Deregulation Proposals” was part of the work of a “Sub-Committee on Amateurism and Agents” that reported in 2000. The one-time-only exemption for basketball players who enter the NBA draft, *see id.* art. 12.2.4.2.1, may have grown out of that body.

²⁰ See, e.g., NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101-02 (1984) (“[T]he NCAA seeks to market a particular brand of football—college football. The identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports In order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.”).

²¹ See, e.g., ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 227-80 (rev. ed. 1957). This article is based on a reexamination of research results first reported in SAMUEL A. STOFFER ET AL., THE AMERICAN SOLDIER (1949); the reexamination was first published as Robert K. Merton & Alice S. Kitt-Rossi, *Contributions to the Theory of Reference Group Behavior*, in CONTINUITIES IN SOCIAL RESEARCH (Robert K. Merton & Paul. F. Lazarsfeld eds., 1950).

When All-American Stanford guard Casey Jacobsen explained why he and his teammates were joining the Collegiate Athletes Coalition, he expressed it this way: "I want to make it clear that we believe we're treated well by Stanford. We just feel that because of the success of our sport and all the money that is being generated [at NCAA schools], we want to see more of it coming back to us."²² Jacobson is giving voice to what critics have been saying in a variety of ways for the last fifteen years.

II. THE LANDSCAPE OF INTERCOLLEGIATE ATHLETICS

The colleges and universities that comprise the NCAA offer a rich variety of varsity sports. The 2002-03 Division I Manual lists twenty-eight separate sports, over half with both men's and women's teams. These range from archery and badminton at the top of the alphabet to water polo and wrestling at the bottom. They include the common sports we all know, but they also include some that might not occur to the average college sports fan. Synchronized swimming? Team handball? These can be understood as a bow to our Olympic efforts, joining such well established Olympic sports as track and field, swimming, and fencing.

These twenty-eight sports are very different as sporting experiences go. Some are non-interactive individual sports where team outcomes are determined by adding individual scores of competitors who are competing against a standard (track and field, swimming, and archery). Some are individual but interactive competitions (squash, badminton, fencing, and wrestling). Others are genuine team competitions. But except for the team sports of football and men's basketball in Division I, the NCAA takes little note of these distinctions.²³

In this they are joined by analysts of intercollegiate athletics. A recent comprehensive review by J. Douglas Toma and Michael E. Cross is blunt:

The landscape . . . is marked by two distinct features: The first is the essentially commercial enterprise associated with the two marquee sports . . . at the roughly 100 largest institutions nationally The second feature . . . is everything else, including the other sports at these large universities and participation in all sports everywhere else.²⁴

Could there be a sadder depiction of the current state of intercollegiate sport? A view from the inside on any number of campuses would reveal a great

²² *Stanford Hoopsters Join Player Coalition*, COACHING MANAGEMENT, Aug. 2001, <http://www.momentummedia.com/articles/cm/cm0905/bbstanford.htm>.

²³ See NCAA, *supra* note 11, art. 20.9, ¶ (e) (requiring Division I schools to "sponsor at the highest feasible level . . . one or both of the traditional spectator-oriented, income-producing sports of football and basketball.").

²⁴ J. Douglas Toma & Michael E. Cross, *Contesting Values in Higher Education: The Playing Field of Intercollegiate Athletics*, 15 HIGHER EDUC.: HANDBOOK THEORY & RES. 406, 407 (2000).

smorgasbord of competition across a wide variety of sports. Close study would reveal small subcultures surrounding most of these sports, where roommates, friends, and families of competitors gather to give support, and where the occasional former competitor may return—these are, after all, subcommunities in which many have invested a serious portion of their lives. Some of these team sports also have large followings that experience collectively the thrill and agony of victory and defeat.

But Toma and Cross are viewing college athletics from a distance, and from a mass culture perspective that blinds us to rich detail and gives us the view from the television-driven, couch potato's world. This is the world forged by the alliance between the big-time universities that now dominate policymaking at the NCAA and in the television industry.

So the description by Toma and Cross is sad but true. With the occasional exception of women's basketball and men's ice hockey, it is football and men's basketball that attract the acclaim, the media attention, the major money, and the major problems, at least for now. And for this reason I'd like to treat the amateurism question in two parts: first as it applies to all varsity sports, and then considering what is so special about the tiny few that draw all the attention.

A. *Amateurism Then and Now*

The model of amateurism was taken largely from Oxford and Cambridge and a British upper class that envisioned the true sportsman as one who had a love of sport for its own sake and who had the social position and time to pursue excellence in athletics.²⁵ Sport was not an activity for working people. Indeed, common wage labor was a basis for exclusion from sporting contests in England. Professional coaching was also looked down upon.

The Oxbridge model did not sit easily in the American college system, but is clearly reflected in the language of article 2.9 with its accent on sport as an avocation and its distancing from professional and commercial activity. The language of article 2.9 also slightly echoes the beliefs of Baron Pierre de Coubertin, who founded the modern Olympic Games. His ideal was that the athlete competed in sport for the pure love of it.²⁶ It was this view that governed the early modern Olympics and led, for example, to the stripping of gold medals from one of our greatest athletes, Jim Thorpe, because he had been

²⁵ RONALD A. SMITH, *SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS* 4-13 (1990); see also Ronald A. Smith, *History of Amateurism in Men's Intercollegiate Athletics: The Continuance of the 19th-Century Anachronism in America*, 45 *QUEST* 430 (1993).

²⁶ See generally JOHN MACALOON, *THIS GREAT SYMBOL: PIERRE DE COUBERTIN AND THE ORIGINS OF THE MODERN OLYMPIC GAMES* (1981) (discussing Coubertin's role); see also SMITH, *supra* note 25, chs. 4, 6 (detailing the complexities of the amateurism issue in the early modern games).

paid for playing semi-professional baseball before the Stockholm Olympics of 1912. Avery Brundage, president of the International Olympic Committee from 1952 to 1972, believed deeply in amateurism, insisting that athletes not profit from sport. He felt that “commercialism would destroy higher motivations of fair play and moral development.”²⁷ But the pressure to win generated by the Olympics meant that “dishonesty and secret payments plagued the Olympic games during his tenure.”²⁸

After his retirement, the International Olympic Committee re-examined its position on amateurism, and in 1981 took action allowing the governing body for each Olympic sport to determine its own criteria for eligibility. The word “amateur” had already been removed from the Olympic charter in the 1970s. In a gesture symbolizing the end of amateurism, Thorpe’s medals were returned to his family in 1982. By now, many if not all of the sports federations allow professionals to compete, including in track and field, the one sport with the most direct ties to the ancient Olympics, which were themselves anything but amateur.²⁹

So amateurism is essentially gone from the Olympics but is alive in its original form in the NCAA. The association’s words have an anachronistic ring, not only in the context of the Olympics but when we consider what has been happening more generally in the American world of sport from childhood into young adulthood. The key words are specialization, intensity, and professionalization. Here are three brief examples:

a) Children are competing against one another on organized teams at younger and younger ages. Some teams are formed when the children are five or six and continue through mid-adolescence. I have a grandson who at thirteen represented his state of Oregon in age-group soccer. The western regional playoffs were held, in recent years, in Mexico, Utah, and Hawaii. As he now enters ninth grade, he will have two-a-day workouts for two weeks — two hours in the morning for conditioning, two in the afternoon for skills training.

b) There are commercially sponsored (Nike, Adidas) and intense summer training camps where players can not only get training in their sport, but can be exposed to others who are similarly committed.³⁰

²⁷ Amateur Athletic Found. of L.A., *An Olympic Games Primer* § VI, at http://www.aafra.org/6oic/primer_frmst.htm (Apr. 5, 2002).

²⁸ *Id.*

²⁹ M.I. FINLEY & H.W. PLEKET, *THE OLYMPIC GAMES: THE FIRST THOUSAND YEARS 68-82* (1976).

³⁰ Nike currently sponsors summer camps in at least fourteen sports, including tennis, golf, basketball, baseball, and volleyball. See U.S. Sports Camps, *Welcome to U.S. Sports Camps*, at <http://www.usportscamps.com> (last visited Mar. 24, 2004). Adidas sponsors summer camps in, at the very least, volleyball, see Towson University, *Adidas Volleyball Camps at Towson University*, <http://www.towsontigers.com/info/camps/files/2003Volleycamp.pdf> (last visited Mar. 24, 2004), for basketball, see Adidas Best in the West SUPERCAMP, see Douglas College Center for Sport, Recreation & Wellness, *Best in the West Basketball Supercamp*, <http://summercamps.douglas.bc.ca/bestwest.htm> (last visited Mar. 24, 2004).

c) There are well-known tennis and golf schools where teenagers can go to high school while getting intense pre-professional training in their sport. The same thing can be said about some ski schools.³¹

All colleges face these new circumstances. As Jeff Orleans, the executive director of the Council of Ivy Group Presidents, said recently:

A lot of what has gone on [in college sports] is tied into major cultural changes. Particularly athletes in high school and at even earlier ages increasingly see themselves as highly specialized and as wanting to compete in a single sport all year. They bring this mindset with them to college. Any college that does not offer them opportunities runs the risk of losing them.³²

Thus, recruited athletes coming to college out of such programs are unlikely to be willing to treat their sport as an “avocation.” What better training ground and launching pad for professional careers than some years on a nationally competitive college golf team? Ask Annika! Ask Tiger!

College golf is one of the varsity sports often sponsored by athletic departments, and although each varsity sport has its unique qualities, we can use it as an example. Nowadays virtually no golfers come into professional golf the old-fashioned way, up from the caddie ranks to the pro shop or driving range, and then to the PGA Tour if they are good enough. That was the pattern in Ben Hogan’s and Byron Nelson’s day and even beyond, in the case of minority players like Lee Trevino. But ever since the battles between Arnold Palmer (Wake Forest) and Jack Nicklaus (Ohio State), colleges have served as major training grounds. Indeed, these days the U.S. Amateur champion is likely to be a college golfer (this year’s Walker Cup team of leading amateurs had only one member older than twenty-three!). The United States Golf Association has had to invent a new mid-career championship for players younger than the seniors, but old enough to exclude those young college kids.³³

Young women are similarly precocious—sometimes more. The female phenom of this past summer was Michelle Wie, a nearly six foot tall thirteen-year-old who hits 290 yard tee shots. And she says she wants to come to Stanford.³⁴

and soccer, *see* Pikes Peak Soccer Club, PPSC Summer Camp 2003, http://www.peaksoccer.org/event_summertimecamp.shtml (last visited Mar. 24, 2004).

³¹ Examples include the International Junior Golf Academy in South Carolina, the Brent Morrison Golf Academy in British Columbia, the Weil Tennis Academy in Ojai, California, and the Rowmark Ski Academy in Salt Lake City, Utah.

³² WILLIAM G. BOWEN & SARAH A. LEVIN, *RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 200* (2003). The fact that specialization is here doesn’t mean that it is healthy. There is any number of cases of burnout at an early age. But this is the reality college coaches face. It may also help explain why so many NCAA sports now have a second season—six weeks of intense off-season training in soccer, lacrosse, and some other sports.

³³ The competitors in both the men’s and women’s mid-amateur championships must have reached their twenty-fifth birthday. *See* U.S. Golf Association, *Apply to Play*, at <http://www.usga.org/champs/apply/index.html> (last visited Mar. 24, 2004).

³⁴ Wie made her first appearance on the LPGA Tour at the age of thirteen. In 2003 she

One of the qualities illustrated by golf is how young the excellent players can be. Would we really want to lose touch with such high achievers if they can do the academic work at the school in question? Probably not, but then we should assure ourselves that the sport season, sport by sport, is compatible with the academic schedule. I know a nearby professor of undergraduates who says he has greater problems of classroom absenteeism from varsity golfers, who often have three-day tournaments, than football players. So it's no wonder that article 17 of the NCAA Manual on "Playing and Practice Seasons," is nearly ninety pages long.³⁵

In other sports like tennis and swimming, talent may emerge even earlier. In fact, athletic talent in many sports is at its peak during the college years. The universities and the NCAA need to make sure that they do not put any unnecessary burdens in the way of all this talent. Most of us are capable of doing more than one thing at a time. It should be enough if we ensure that they are real students, not yet professional athletes, and are meeting their university's academic standards. We needn't deny them the right to pursue excellence in another forum at the same time.

The policy conclusion that derives from this point involves relaxing the rules that forbid student athletes from pursuing their sport dreams, which may include a career as a professional athlete. Why should athletes face a form of paternalism that no other undergraduates face? What about musicians? Artists? Journalists? They can pursue their careers without obstruction by their university. We shouldn't make it so hard for athletes.

The dissent by Judge Joel M. Flaum in the *Banks* case³⁶ in 1992 speaks to this problem. At the time, Braxton Banks wanted to test his marketability with the National Football League (NFL). When he went undrafted, he sought unsuccessfully to get his eligibility reinstated for his senior year at Notre Dame. The district court, and by a 2-1 majority, the Seventh Circuit Court of Appeals, denied Banks' request, but Judge Flaum, now the chief judge, noted in his dissent the court's apparent willingness to accept the NCAA's "incredulous assertion that its eligibility rules are 'noncommercial.'"³⁷ He went on to note that the NCAA "continues to purvey . . . an outmoded image of intercollegiate sports that no longer jibes with reality."³⁸ Perhaps his dissent had something to do with the easing of this rule in the last ten years—a move in the right direction.

became the youngest winner ever of the U.S. Women's Amateur Public Links, and, at her young age, is already one of the longest hitters on the LPGA Tour. See Brent Kelley, Michelle Wie Biography, at <http://golf.about.com/cs/womensgolf/a/michellewie.htm> (last visited Oct. 23, 2003). The LPGA also has a biographical page on Wie at LPGA, Michelle Wie, at http://www.lpga.com/players/playerpage.cfm?player_id=44641 (last visited Oct. 22, 2003).

³⁵ NCAA, *supra* note 11, art. 17.

³⁶ *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).

³⁷ *Id.* at 1098; see also *Banks v. NCAA*, 746 F. Supp 850 (N.D. Ind. 1990).

³⁸ *Banks*, 977 F.2d at 1099.

B. *The Marquee Sports*

Golf and the other so-called minor sports, including those identified historically with the Olympics, are not what the presidents of the ACC and Big East universities, or for that matter the Collegiate Athletics Coalition or state legislators, are concerned about. The sports that have created the public perception of problems in the world of intercollegiate athletics are a tiny subset of all varsity teams, primarily the flagship sport of football and the American invention of basketball. These have been called different things through the years, and labels here, as elsewhere, are telling.

“Marquee sports” calls attention to their glamour and mass appeal, and to big-time commercialism. “Spectator sports” connotes arenas, but is entirely passive. Years ago they were known simply as the “revenue-producing” sports: football and men’s basketball for sure, ice hockey in the north and northeastern states, and more recently women’s basketball, as most Connecticut and Tennessee residents are aware. But as it has become evident that even the biggest Division I-A programs often have expenses that exceed revenues—to call them “revenue-producing” is misleading. “High profile” is an improvement, as it points to a distinctive feature of these sports—their visibility both on the campus and often far beyond it. In Shulman and Bowen’s *The Game of Life*,³⁹ a study of athletes in highly selective liberal arts colleges, the authors distinguish between athletes in the high profile sports of football, men’s basketball, and ice hockey, and athletes in all others sports. The “high profile” label is also adopted in the Toma and Cross article as essentially interchangeable with “marquee” sports, those that have “pushed competition away from amateur ideals and toward professionalism and commercialism.”⁴⁰

High profile? Revenue Producing? Spectator? Marquee? Each captures a part of the social reality of big-time sport, but the heart seems missing. I am also struck by the similarities, rather than differences, in how these two particular sports are received across all divisions, even in the face of vast differences in scale.

What makes them so attractive in the small college setting as well as the huge state university? In particular, what is it about football and basketball that leads schools to maintain them despite the corruption that often accompanies them? Is it really only, or even primarily, the dollar? Is that why institutions that suffer major and humiliating scandals insist on trying to clean up their programs rather than abandoning them?

This last question led me to the single most concise and coherent answer that I’ve found. It comes from a report written some eighteen years ago in March 1986 by a “Select Committee on Intercollegiate Athletics,” from Tulane

³⁹ JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* (2002).

⁴⁰ Toma & Cross, *supra* note 24, at 415.

University.⁴¹ The committee was appointed in the aftermath of a sensational scandal in which several members of the men's basketball team had been arrested for accepting bribes to shave points in home games. Reports alleging drug use, improper payments by coaches to players, and compromises in admissions standards for student athletes followed these accusations. Many, including Tulane's then-president, wanted to drop the program. A committee was formed to study this issue.

Just a year later, the committee issued a thorough report. Here was their recommendation: "The Tulane University Select Committee on Intercollegiate Athletics believes that continued participation in Division I-athletics can make a positive contribution to our primary mission as an educational institution and it recommends that we remain at this level of athletic competition."⁴²

They dismissed the usual reasons about the importance of big-time athletics for fundraising or for attracting a quality student body. The critical section was as follows:

We recommend a Division I-A profile for Tulane because we feel it is a vital link between the institution and our increasingly national alumni, and because it can be a force for bringing together the diverse constituencies that comprise a larger and complex university like Tulane. Whether we individually approve or not, nothing enhances the national visibility of an educational institution more than a major athletic program and nothing seems to unite an educational community as much as a winning team. This appears to be an unalterable fact of American life and culture. When the football or basketball team does well a *contagious euphoria* sweeps the campus and the city, affecting the community at every level. It is a positive spirit, inseparable from the college experience itself. A not insignificant part of Tulane's tradition has involved 'big-time' sports. Because of these intangible contributions, the committee believes this part of Tulane's tradition should remain unbroken: We thus support the continuation of Division I-A athletics at Tulane for the same reasons they were established and continue to be maintained at any Division I-A institution: because it provides an ongoing link with our former students at the same time that it can serve as a rallying point for students, faculty, staff, alumni and friends in the local community. This has always been the reason for playing big-time sports and will doubtless remain as the only reason for continuing this kind of activity at an educational institution like Tulane. The other arguments that have been advanced appear to be self-deceptions.⁴³

To me the key phrases are "vital link to alumni" and "bringing together diverse constituencies," and the key product is what they call "contagious euphoria." Unless I'm wrong, we have all experienced this—a collective euphoria that gives the local community a palpable input of excitement, pleasure, a feeling of well-being.

The Tulane analysis is echoed in others. For example, Toma and Cross

⁴¹ TULANE UNIV. SELECT COMM. ON INTERCOLLEGIATE ATHLETICS, THE REPORT OF THE SELECT COMMITTEE ON INTERCOLLEGIATE ATHLETICS (1986) (on file with author).

⁴² *Id.* at 23.

⁴³ *Id.* at 24-25.

examine the “big game” and the thousands in the stadium and millions more at home. They present numerous stories about the teams, thousands of cars with people enjoying tailgates, and “the 200-plus member marching bands sponsored by each school . . . highlighting the pageantry that is an important part of the attraction of college football.”⁴⁴ They conclude that the main difference between football and men’s basketball and participation in other sports “is that the games take on an importance that transcends the participants on the field or court.”⁴⁵

Other accounts buttress theirs, including the conclusion of Bailey and Littleton, which they quote: “In return for entertainment, identification, and the opportunity to be part of a ‘winner,’ the public ‘adopted’ the institution. In this way, intercollegiate athletics became the university’s most vital public relations vehicle, the well-traversed bridge between the ivory tower and the state.”⁴⁶

Naturally, any institution that can accomplish all these things must be of value, even though the value may be “intangible.” No one at Tulane said athletics was as important as the educational mission of the school, but all thought it important enough to be worth preserving.

Collective euphoria occurs when fans, rather than just being spectators, are a significant part of the crowd. That experience requires an identification with the institution that goes beyond mere spectatorship. Only then does the caring and emotional attachment that is so much a part of fandom develop. In his book *Fans! How We Go Crazy Over Sports*, Michael Roberts notes the quality that turns spectatorship into fandom for almost every kind of spectator sport now flourishing: “[t]he linking of the participant’s destiny with the ‘fans on the basis of common city, homeland, educational institution, race, religion, or place of national origin.”⁴⁷

The fascinating thing about this list is that of all six of these focal points for fan identification, *only the educational institution must be attained*—the rest for the most part you are born with—and only the educational institution, once attained, requires that you leave it (at least physically), and requires that you do so after only a four year stay. So, having earned entrance to the institution in the first place, then leaving, is it any wonder that many feel passionately about staying attached, and need symbolic occasions like homecoming games to do so?

Also note that the athlete, recruited or not, must also leave. Whatever long-term fan identification occurs will need to be attached to the collectivity, the team, since individual stars are destined to have a short shelf life. This reinforces the belief, as Roberts puts it, that empty team uniforms “comprise a

⁴⁴ Toma & Cross, *supra* note 24, at 409.

⁴⁵ *Id.*

⁴⁶ *Id.* at 415 (quoting WILFORD S. BAILEY & TAYLOR LITTLETON, *ATHLETICS AND ACADEME: AN ANATOMY OF ABUSES AND A PRESCRIPTION FOR REFORM* 411-12 (1991)).

⁴⁷ MICHAEL ROBERTS, *FANS! HOW WE GO CRAZY OVER SPORTS* 17 (1976).

spiritual container whose meaning is constant, although the flesh filling the uniforms changes ceaselessly.”⁴⁸ Individual players come and go, but the team goes on and on. That is the mundane magic of teams with the capacity for creating collective euphoria.

C. *Why Just Football and Basketball?*

Many team sports have the capacity to be fan-friendly and produce collective euphoria: women’s field hockey and softball, men’s baseball, ice hockey, lacrosse, soccer, and volleyball (neglecting for now the less fan-friendly water sports of rowing and water polo). Several schools specialize in one or another, and they have sizable followings on many campuses. Since they play the world’s most popular sport, women’s and men’s soccer teams may edge their way into visibility. But with the important exceptions of women’s basketball and men’s ice hockey, none have captured sustained national media attention.

There are good reasons for the popularity of football and basketball, of course. Football is America’s flagship sport, with us since the nineteenth century, and basketball is an American invention now played around the world. But there are other reasons as well, noted many years ago by one of the first and best sports law analysts, John Weistart, of Duke Law School, who referred to the football-basketball situation as “The Great American Non Sequitur”:

We have, in this country, embraced the not-wholly-logical notion that if a young man exhibits certain unusual physical skills and wants to secure refinement of his talent, he must also be both motivated and qualified to go to college. Stated more precisely, the notion has even less coherency: a young man who shows promise in the physical skills associated with basketball and football—but not in the areas of baseball, hockey, tennis and golf—must also be academically inclined if he desires to secure further high level pre-professional training. The point, of course, is that college sports effectively provide the only avenue for further training for talented high school football and basketball players.⁴⁹

Since Weistart penned those lines some twenty years ago, the National Basketball Association (NBA) has relaxed its cartel-like relationship with the colleges (witness LeBron James’s move from high school to the pros). But the NFL’s collective bargaining agreement, which freezes out college football players until their senior year, has yet to be challenged, though Ohio State’s Maurice Clarett has been publicly urged to do so by a Michigan State law professor.⁵⁰ The symbiotic relationship between college sport and professional sport continues.

⁴⁸ *Id.* at 30.

⁴⁹ John C. Weistart, *Legal Accountability and the NCAA*, 10 J.C. & U.L. 167, 174 (1983).

⁵⁰ The professor is Robert McCormick. See Robert A. McCormick, *Open Letter to Maurice Clarett: Why You May Turn Professional Now*, N.Y. TIMES, Aug. 17, 2003, § 8, at 11.

D. "Pay for Play"

"Pay for Play" was a phrase first used fifty years ago by supporters of the old Sanity Code to describe the emerging grant-in-aid systems. But by March of 2003 it was being used to distinguish a new movement. One thing is clear: new movement or old, we are no longer talking about whether athletes will be paid, but how much.

Last March, the NCAA ran a page one story in the *NCAA News* under the headline: *Pay for Play Resurfaces, but NCAA Still Opposed*.⁵¹ In a lengthy "Pay-for-Play Counterpoint" section, the NCAA points to the undeniable economic value of a full grant-in-aid at a Division I school as well as supplemental aid through Pell grants and the NCAA special assistance fund, and presents all of its rationalizations for why providing even more aid is both unnecessary and a bad idea. Myles Brand, president of the NCAA, was quoted in the same issue:

The NCAA historically has been against pay for play. I couldn't agree more with that position. If you start paying student athletes (other than assisting them through financial aid), you essentially ruin the integrity of the college game. You take a first-rate set of college athletics programs and turn them into third-rate professional programs.⁵²

Well, maybe. There's no denying that a full grant-in-aid at a Division I school, spread over four years, is a substantial amount. The NCAA estimates this would amount to a \$50,000 to \$75,000 scholarship at state schools, in or out of state, and as much as \$160,000 for full scholarships at more expensive private schools.⁵³ And these figures don't include the tax-free nature of the educational stipend. I'm not convinced more is needed to cover the basic costs of school in the average case, and I'm not in favor of actions that would change the basic relationship from teacher- (or coach-) student to employer-employee.⁵⁴

But one thing seems clear. By extending normal seasons into preseasons and postseasons, by converting playoffs into media events, by collaborating with the NBA and NFL to feature star athletes as they make their move to the pros while the great bulk of varsity football and basketball players must find their careers elsewhere, the NCAA and its Division I-A presidents put themselves in a difficult moral position from which to trumpet the virtues of amateurism.

⁵¹ *Pay for Play Resurfaces, but NCAA Still Opposed*, NCAA NEWS, Mar. 17, 2003, at 1.

⁵² *Id.* at 16.

⁵³ *Id.*

⁵⁴ Already, as Allen Sack has noted, the schools offering scholarships based on athletic merit, rather than need-based aid, give renewal-of-aid decisions largely to athletic departments, not university financial aid offices. Letter from Allen Sack, Professor, University of New Haven School of Business, to Stan Wheeler, Professor Emeritus of Law, Yale Law School (Sept. 14, 2003) (on file with author).

At an absolute minimum, they should see that the needs of basketball and football players who make these riches possible are fully and generously met. It is *their* sports that produce a collective good for the university in a manner unmatched by other sports or programs.

This contemplates doing something the NCAA seems to resist. According to it, whatever we do for one varsity sport we must do for all. The laudable goal of nondiscrimination trumps everything else. In the sphere of Title IX, this has been on balance a wonderful thing, for women are now beginning to enjoy all the positives that flow from exposure to high-level sport competition as part of their education.

But the NCAA has created the very conditions that might lead to special problems in these two sports. From the seating capacities of arenas or stadia, to the expansion of seasons, to the attraction of media coverage, the conditions surrounding the play in these two sports have been moved into the world of mass entertainment. It would not be surprising if the varsity athletes in those programs have distinctive problems that need special solutions.⁵⁵

One example is accident insurance. This is what led Wally Byers and company to anoint the concept of student athlete, and it has been a lament of injured college athletes ever since.⁵⁶ The Foreword to Allen L. Sack and Ellen J. Staurowsky's *College Athletes for Hire*⁵⁷ was written by none other than Kent Waldrep, the running back whose football accident three decades ago while competing for TCU turned him into a paraplegic, but who was not eligible as a student athlete for coverage under state worker's compensation law.⁵⁸ Despite some improvements—for example, increasing life insurance coverage from \$10,000 to \$25,000—health issues remain, such the provision of medical coverage over summer months when athletes have to stay in shape. Student athletes in sports that add special value to the college experience should not have to bear this burden. It is simply unfair. And if we understood such costs as a necessary part of sustaining a valued activity—as part of the student's relation to the university—it might not have to mean considering Waldrep as an employee.

A more general issue is monetary benefits. There are enough stories of special need to think that the current policies may not suffice. When coaches like Randy Edsell of the University of Connecticut report that they would favor paying a small stipend to players (perhaps \$50 to \$100 a month), some of whose families are in such dire financial straits that athletes send their Pell grant money straight home, the answer from the NCAA seems to be that they must treat all varsity athletes alike. President Brand expressed that view when

⁵⁵ The courts already recognize the special demands on coaches in the big-time programs. See *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994).

⁵⁶ See BYERS & HAMMER, *supra* note 10, at 70-72; *supra* notes 10-16 and accompanying text.

⁵⁷ Kent Waldrep, *Foreword* to ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH*, at ix (1998).

⁵⁸ See *Waldrep v. Tex. Employers Ins. Ass'n*, 21 S.W.3d 692 (Tex. Ct. App. 2000).

announcing his own support for giving athletes \$2,000 to \$3,000 more a year to cover the actual costs of college. "In my mind it would apply to all varsity sports I don't see any reason to make it exclusively to the two revenue sports, football and basketball."⁵⁹

This is fine if the NCAA has the funding to do it for all varsity athletes, but there is a justification even if it does not. What if these are funds designed for athletes in the sports that capture the imagination of college communities and in fact produce the revenues that later become distributed to other sports? Those who provide the occasions for collective euphoria are making a unique contribution to the community and deserve to be recognized for it. This is true, I would argue, even if they are also hoping for a professional career as an athlete.

The NCAA seems to be moving in this direction with its special assistance fund and its student athletic opportunity fund. I simply express a hope that it be done affirmatively and proactively, on the ground that these students are making a special contribution to the vitality of their institutions.

E. *"An Integral Part of the Student Body?"*

The NCAA has never taken seriously this notion, which lies at the heart of the assertion that student athletes are students first and clearly on the student side of the line between intercollegiate athletics and professional sports. The NCAA sets national standards for freshman eligibility, it sets formal standards for progress toward graduation, and it threatens to impose standards for graduation rates, but the organization never looks closely at the social reality of life as a recruited student athlete to see whether such students are in fact integrated into collegiate life on their campuses.

If they were to take the issue seriously, those who monitor the Division I programs would ask two questions: First, is it really possible for student athletes to pursue both athletics and academics successfully at the same time? And second, even if it is possible, does it preclude the athletes from having a student life in addition to the pressures of the classroom and the court or playing field? If not, what meaning can we assign to "integral part of the student body"?

These questions are particularly pertinent given Weistart's observation that, by some curious alchemy, the only two sports that require special attention in the NCAA's Division I Manual⁶⁰ are identical to the two professional sports in this country that have failed to develop minor league training programs. In baseball, the minor leagues perform the role of training young athletes for professional play. But in football and basketball, colleges and universities serve that purpose. In fact, Division I universities are the primary transmission

⁵⁹ Chambers, *supra* note 7.

⁶⁰ See *supra* note 23 and accompanying text.

conduit between high schools and the NFL and NBA. And as economist Andrew Zimbalist has noted, the professional teams don't even have to pay for the service.⁶¹

Zimbalist is only the most recent of the critics of big-time college sport, and the title of his book, *Unpaid Professionals*, is suggestive, as are others: Rick Telander's *The Hundred Yard Lie*,⁶² the aforementioned Sack and Staurowsky's *College Athletes for Hire*,⁶³ and *College Sports, INC*,⁶⁴ only one of the many contributions of the dean of NCAA critics, Murray Sperber. I don't agree with all of their thoughts and proposals, but they are serious critics. Three are extremely familiar with the college community, while the fourth is an experienced journalist who played Big Ten football at Northwestern.

Allen Sack also experienced big-time football at Notre Dame, before he attained his Ph.D. in sociology. In the book he coauthored, he gives an idea of what the NCAA might find if it insisted on a certification process that took the above two questions seriously. The book reports an anthropological study of the Tulsa University basketball team by Patricia A. and Peter Adler that richly conveyed the problems players had concentrating in class when their minds were on the upcoming game. One reported, "I go to bed every night I be thinkin' 'bout basketball. That's what college athaletics [sic] do to you. It take [sic] over your mind."⁶⁵ They describe the process by which athletics overtake over academics "role engulfment."⁶⁶

The NCAA can't do in-depth qualitative research of this type, but it could certainly get an independent research group to set up focus groups of athletes on a team, or find other ways for getting closer to the actual living experience of football and basketball teams. Right now, the questions aren't even asked. Since these are matters crucial to the announced mission of the NCAA, they should become part of the certification process.

Sack also notes the rise in the number of black athletes in college programs. For a variety of reasons, some laudable and some not, a large number of "talented but academically marginal" black students have been recruited. But often they find themselves isolated on their campuses, in part because recruitment of talented black nonathletes has lagged:

Although black students constitute just 6.6% of the undergraduates at Division I institutions, they make up 46.% of the Division I football teams

⁶¹ ANDREW ZIMBALIST, *UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG TIME COLLEGE SPORTS* 197 (2001).

⁶² RICK TELANDER, *THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT* (1996).

⁶³ SACK & STAUROWSKY, *supra* note 57.

⁶⁴ MURRAY SPERBER, *COLLEGE SPORTS, INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY* (1990).

⁶⁵ PATRICIA A. ADLER & PETER ADLER, *BACKBOARDS AND BLACKBOARDS* 85 (1991), *cited in* SACK & STAUROWSKY, *supra* note 57, at 101.

⁶⁶ *See* ADLER & ADLER, *supra* note 65, at 219-31.

and 60% of the Division I basketball teams. It is in these high-pressure sports that produce millions of dollars in revenue that graduation rates are lowest for both black and white athletes.⁶⁷

It would be surprising if these circumstances didn't complicate the problem of integrating these students into campus life.

It's not as though the NCAA is unaware of this problem for both black and white athletes. It was addressed in the most recent report by the Knight Foundation Commission on Intercollegiate Athletics:

Athletes are often admitted to institutions where they do not have a reasonable chance to graduate. They are athlete-students, brought into the collegiate mix more as performers than aspiring undergraduates. Their ambiguous academic credentials lead to chronic classroom failures or chronic cover-ups of their academic deficiencies.⁶⁸

F. Recruiting

When President Brand reported to the National Press Club last March that in a recent period, a total of thirty-six NCAA Division I schools did not graduate any men's basketball players in five years, he had to be embarrassed.⁶⁹ A newly announced incentives/disincentives package is, one hopes, a response to this disaster. Another response would be to look more closely at who is recruited in the first place.

Though it is not based on Division I schools, we now have a rich study from which much can be learned. In *Reclaiming the Game*,⁷⁰ William Bowen and Sarah Levin produce an extraordinary study of intercollegiate athletes, wiser and more detailed than its predecessor, Shulman and Bowen's *The Game of Life*.⁷¹ *Reclaiming the Game* is an unparalleled empirical analysis of the recruitment and performance of athletes and their classmates at thirty-three of the nation's most selective colleges.

Briefly, what Bowen and Levin show is that recruited athletes have a great admissions advantage, but that once admitted they more often end up in the bottom third of the class, and that they "underperform," that is, they do even more poorly academically than predicted by their high school grades and test scores. Furthermore, the gap between recruited athletes and other students has widened over the years.

So even in the most selective liberal arts colleges, there is an increasing

⁶⁷ SACK & STAUROWSKY, *supra* note 57 at 105 (citation omitted).

⁶⁸ KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION 16 (2001), available at http://www.knightfdn.org/publications/knightcommission/Kcfinal_06-2001.pdf.

⁶⁹ Myles Brand, Address at the National Press Club (Mar. 4, 2003) (transcript on file with author).

⁷⁰ BOWEN & LEVIN, *supra* note 32.

⁷¹ SHULMAN & BOWEN, *supra* note 39.

performance gap between recruited athletes and their classmates. The performance gap is troubling, because the Ivy League, like other Division III schools, is committed to selecting athletes who are reasonably representative of their fellow students.⁷² These are chastening results for those who might have thought that Ivy League and Division III schools were somehow immune to the athletic arms race.

The Ivy League even uses a special technique called “banding” to ensure that each school’s recruited athletes do not depart too far from that school’s academic profile.⁷³ Banding basically assures that high profile recruits have academic credentials that on average are not more than one standard deviation below that school’s average for all students.

Recruiting for both football and basketball shows the qualities of intensity, specialization, and professionalization we found for the nonmarquee sports. And like the pros, Division I coaches are mostly free to look at a potential student’s athletic talent as paramount over other considerations. Save initial eligibility requirements, there are no barriers to admission. Those eligibility requirements that do exist, according to Sack and Staurowsky, only deny freshman eligibility to athletes “whose academic preparedness borders on functional illiteracy.”⁷⁴

If Division I conferences were worried about such matters they could use something like the Ivy League banding method or a variant. In the meantime, an athletic scholarship policy requiring renewal each year,⁷⁵ coupled with minimal admissions standards, almost guarantees a supply of academically marginal student athletes.

III. THE NCAA AND THE FUTURE: PUTTING THE “STUDENT” BACK IN “STUDENT ATHLETE”

From its inception, intercollegiate sport has been conflicted over commercialism and professionalism. As we saw, the principle of amateurism, which conceives of sport as an avocational pursuit, was a principle of the founders, and was designed to protect the student-athletes from commercialism. But commercialism as a threat was a feature of the Carnegie Commission report in 1929,⁷⁶ and of virtually every serious commentary since, and

⁷² See IVY LEAGUE, 1979 STATEMENT OF PRINCIPLES ¶ 5 (1979), reprinted in BOWEN & LEVIN, *supra* note 32, at 175.

⁷³ See BOWEN & LEVIN, *supra* note 32, at 267 n.9.

⁷⁴ SACK & STAUROWSKY, *supra* note 57, at 99.

⁷⁵ Allen Sack has impressed upon me the importance of the decisions in the late 1960s and early 1970s to allow scholarships to be removed from students who voluntarily withdraw from sports, and to replace four-year scholarships with one-year renewable grants. Athletes in Division I-A schools, unlike those in I-AA or Division III, are obligated to give sports their top priority.

⁷⁶ See, e.g., HOWARD J. SAVAGE ET AL., AMERICAN COLLEGE ATHLETICS 306 (1929), quoted in BOWEN & LEVIN, *supra* note 32, at 246.

especially in the last quarter century with the explosion of marquee sports at the college level.⁷⁷

Two features of the student as athlete have dominated NCAA principles. One is that a student should not receive undue monetary benefits or be a professional athlete. The other is that the student should somehow be representative of his or her college or university—in the words of the 1959 amendment, an “integral part” of the student body.

This is NCAA rhetoric. But in the conversion of the rhetoric into operational practice—from principles to rules to their enforcement—the NCAA has been fixated on the first to the virtual neglect of the second. It has used its meager enforcement staff to patrol the boundaries of professionalism and extra benefits—students testing their worth in the professional marketplace,⁷⁸ getting use of a car from a booster, even receiving a free meal from a coach⁷⁹—while having no apparent interest whatever in whether, on a particular campus, athletes see themselves or are seen by others as at least minimally integrated into the life of the place. Such matters can not be assumed by knowing only that the student is still enrolled.

But perhaps it is wrong to make so much of this failure to integrate athletes into campus life. Perhaps we should treat integration an aspirational principle, an outcome to be hoped for but not insisted upon. Such an inquiry would surely be seen by coaches as well as some athletes as an invasion of their collective privacy. Also, what right do we have to single out athletes for this inquiry? There are many college subcultures. Why single out varsity sport for such special inquiry?

Because only varsity sport, through the NCAA, has mandated a code of student conduct enforced by a national private regulatory agency. Blindness to these issues is not fair to the students involved, many of whom report the impossibility of combining the two roles of student and athlete. The NCAA should at least consider whether this issue should become a more explicit part of the certification process. The new amateurism, so far as college sport is concerned, must focus less on whether the student athlete is really a

⁷⁷ In addition to the works already cited, see DEREK CURTIS BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* (2003); FRANCIS X. DEALY, *WIN AT ANY COST: THE SELL OUT OF COLLEGE ATHLETICS* (1990); JAMES J. DUDERSTADT, *INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE* (2000); PAUL R. LAWRENCE, *UNSPORTSMANLIKE CONDUCT* (1987).

⁷⁸ See *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).

⁷⁹ In a recent public infractions report, the NCAA announced its finding that at the University of Utah, “[d]uring the 1990s and, specifically, on multiple occasions during the 1996-97, 1997-98, 1998-99, 1999-00 and 2000-01 academic years, the head coach knowingly purchased impermissible meals for most, if not all, men’s basketball student athletes,” in violation of NCAA rules. NCAA, *UNIVERSITY OF UTAH PUBLIC INFRACTIONS REPORT § II(A)* (2003), available at <http://www.ncaa.org/releases/infractions/2003073001in.htm>. The University of Utah took a number of “self-imposed” corrective measures, but received additional sanctions from the NCAA, including a public reprimand and three years of probation. *Id.* § III(B).

professional, and more on whether the student athlete is really a student.

I return to the Tulane report and the reasons for fighting to keep college sport as a significant part of the undergraduate experience: the linkage to a vast but dispersed alumni and the power to unite students, staff, faculty, and local community in a collective, sometimes euphoric experience. Most of us have assumed, until recently, that the bodies that fill the “spiritual container” author Michael Roberts wrote about are actual students at the universities in question. The assumption is that they are part of “our” school, representing us. That’s what makes the identification strong. It’s why we care.⁸⁰ This, presumably, is the feeling of Division III schools, and one of the reasons they favor scholarships based on need rather than scholarships based on athletic ability.⁸¹

Division I-A institutions repeatedly suffer the scandals identified with big-time college sport, which are the impetus for the suggestions of having paid performers replace undergraduate students as the ones who wear the uniforms, as if it will make little difference to the fans.⁸²

Before we test that dubious proposition,⁸³ why couldn’t the NBA, the NFL, and the NCAA collaborate on setting up a first-rate training program for 18- to 21-year-old athletes with football or basketball careers in mind who do not desire or are unprepared to seek a college education? These are the three organizations most responsible for the current dysfunctional system, which is clearly succeeding in the marketplace but failing badly at a number of Division I universities. That the colleges should take on the total burden of preprofessional training made no sense when Weistart drew attention to it twenty years ago and makes even less sense now. The three organizations obviously work well together and have the funds to establish such a program if they would give it the high priority it deserves. The universities and conferences could contribute their know-how and experience with the age group, and the leagues could pony up for all the money they have saved by using NCAA schools as free minor league training grounds. The training would extend beyond the court or playing field to include public speaking, dealing

⁸⁰ See ROBERTS, *supra* note 47. But must they be enrolled in classes full time while also playing their sport? One reader of this Article has asked why athletes couldn’t use the tuition part of their stipend even long after their student playing days are over, when they might really have the time to be true students.

⁸¹ See BOWEN & LEVIN, *supra* note 32, at 308.

⁸² See TELANDER, *supra* note 62, for an example. Where fandom ends and mass market commercialism takes over is not easy to discern. All followers of the flagship state institutions may have a legitimate rooting interest because the school is supported by their tax dollars. One needn’t be a student, an alum, or even a resident of the local community to develop such an attachment.

⁸³ A *Chronicle of Higher Education* piece by Henk Rossouw describes a professional soccer team affiliated with the University of Witwatersrand that plays in the highest division of professional soccer in South Africa. Its players may attend the university, and some do, but they’re not required to do so. This model seems to work in its cultural setting. Henk Rossouw, *A Clever Approach to College Sports*, CHRON. HIGHER EDUC., Dec. 12, 2003, at A32-34.

with the media, and whatever additional skills will enhance the recruits' attractiveness as potential NFL or NBA draftees.

The downside for colleges is that they may lose some star athletes, but others will surely emerge to replace them. The big upside is that the athletes they would lose would be ones who didn't want to be there in the first place but had no other choice.

This single organizational innovation, unlikely as it is to occur,⁸⁴ might well do more to return integrity to college athletics than yet another attempt to tighten NCAA rules on recruiting and continuing eligibility, or to enforce higher graduation rates. And by creating a different route for entering the NBA and NFL, it would increase the choices available to young athletes.

The "Great American Non Sequitur" is still with us. Like NASA, the NCAA's problem is structural, not to be solved by the search for "bad actor" coaches or administrators. Whether we like it or not, the big-time football and basketball programs seem to be here to stay. By now they are an indelible part of the college scene at Division I-A institutions. The athletes who contribute centrally to their organizational mission are doing something special for their schools. It is only fair that the actual costs of their college attendance be fully covered.

But it's also fair to insist that student athletes not be merely hired hands—that they attend college to get an education as well as to represent their school on the court or playing field. Their coaches and assistants will deliver a high quality sport experience. As they reconsider amateurism, it is up to the presidents of the universities and to the NCAA to ensure that their recruited athletes are also genuine students.

⁸⁴ It is unlikely not because it is the wrong thing to do, although some might argue that, but because all the parties may feel they have too much to lose; the professional leagues because they already benefit from years of professional coaching at the college level, and the colleges out of fear of losing too many star athletes too soon. In addition, many of the pressures of big-time programs would still remain under such a system. For a good discussion by one who has studied these and related matters, see ZIMBALIST, *supra* note 61, at 195-206.