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Corruption and College Sports: A Love Story

by Andrea Cristiani Closa¹

Abstract

College sports are a staple of American tradition, bringing in hundreds of millions of viewers each year. Fans from all over the country root for their team's success and hope they will be the ones to take home the national championship each year. Increasingly, however, college sports have been in the public eye for a very different reason: corruption. The National Collegiate Athletics Association's ("NCAA") Amateurism Rule, which prohibits student-athletes from receiving compensation, has contributed to this ongoing corruption. The NCAA insists upon its student-athletes remaining amateurs, even though its own rule is damaging the integrity of college sports. Players, coaches, and fans alike are yearning for change. Nevertheless, the NCAA does not waiver from its Amateurism Rule.

If this corruption is to end, however, something must change. The NCAA has to let go of its archaic rule and allow student-athletes to receive compensation. Or, as an alternative, courts have to refuse to allow the NCAA to hide behind its Amateurism Rule and hold it accountable under section 1 of the Sherman Antitrust Act. Either way, if the NCAA wants the endemic corruption to end, the only solution is to allow student-athletes to receive compensation. Although legal issues arise from student-athletes receiving compensation directly from their colleges and universities, allowing student-athletes to accept endorsement deals and receive compensation for the use of their name, image, and likeness is a solution to this problem.

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Introduction

On September 26, 2017, the Federal Bureau of Investigation (“FBI”) arrested ten people, including four college basketball assistant coaches, as part of an investigation into bribes (pay-for-play²) and other corruption³ occurring in college athletics.⁴ As part of the investigation, Louis Martin Blazer III, working as a cooperating witness for the FBI, recorded Auburn University’s assistant coach Chuck Person accepting a \$50,000 bribe from Blazer in order to compel student-athletes on Auburn’s basketball team to retain Blazer’s business management services.⁵ The resulting criminal complaint further alleged that University of Louisville’s head coach Rick Pitino, one of college basketball’s most successful coaches, was suspended for failing to supervise former staff member Andre McGee, “who allegedly arranged for strip dances or sex acts for three players, fifteen recruits and two coaches.”⁶

One year later, on October 24, 2018, a jury convicted three of those arrested in the pay-for-play sting⁷ on felony charges of wire fraud and conspiracy to commit wire fraud.⁸ The NCAA also stripped Rick Pitino and the University of Louisville Cardinals of four years of tournament wins, including their 2013 national championship win.⁹

Ever since its founding in 1906, the National Collegiate Athletics Association (“NCAA”) has centered around the concept of amateurism.¹⁰ Its current mission statement includes an exhortation that “[s]tudent-athletes

2. *Pay-to-play*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/pay-to-play> (last visited Feb. 28, 2019) (Relating to or denoting a situation in which payment is demanded, often illegally, from those wishing to take part in a particular business activity).

3. *Corruption*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/corruption> (last visited Jan. 17, 2019) (Corruption is defined as “inducement to wrong by improper or unlawful means.”).

4. Mark Schlabach, *The step-by-step process of how the words ‘corruption’ and ‘fraud’ came to college basketball*, ESPN (Sept. 27, 2017), http://www.espn.com/mens-coll-lege-basketball/story/_/id/20834050/the-story-how-fbi-brought-words-corruption.

5. *Id.*

6. *Id.*

7. Mark Schlabach, *James Gatto, Merl Code and Christian Dawkins found guilty in pay-for-play trial*, ESPN (Oct. 24, 2018), http://www.espn.com/mens-college-basketball/story/_/id/25072946/james-gatto-merl-code-christian-dawkins-found-guilty-college-basketball-pay-play-trial.

8. *Id.*

9. Richard Johnson, *Louisville loses NCAA appeal and becomes the 1st men’s basketball program to have an NCAA banner taken down*, SBNATION (Feb. 21, 2018, 8:31 PM), <https://www.sbnation.com/college-basketball/2018/2/20/17032440/louisville-basketball-2013-title-banner-stripped-taken-down>.

10. Patrick McDevitt, *The NCAA’s Amateurism Rules are Indeed Madness*, HUFFINGTON POST (Mar. 2, 2018, 5:47 AM), https://www.huffingtonpost.com/entry/opinion-mcdevitt-ncaa-amateurism_us_5a987314e4b0479c0250a58d.

shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by physical, mental and social benefits derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”¹¹ The NCAA’s conceptualization of amateurism is rooted in student-athletes’ playing and practicing without compensation.¹² Under the current NCAA rules, of course, student-athletes may and do receive compensation in the form of tuition, room, and travel expenses.¹³ However, student-athletes may not receive salaries or endorsement deals, and NCAA rules prohibit them from working with sports agents.¹⁴

The NCAA only prohibits student-athletes from profiting off of college sports. In 2017, the NCAA made \$1 billion in revenue, while student-athletes made no on-the-books revenue.¹⁵ According to the NCAA’s expense sheet, half of this revenue was distributed back to Division I schools, but none of the revenue went directly to the players whose labor and intellectual property generated the money.¹⁶

This stark imbalance has led to a culture where college athletes are receptive to under-the-table compensation (and bribes) that are technically against the NCAA’s rules and, in some cases, against the law. College coaches and sports agents understand that college sports are a lucrative market from which student-athletes deserve to benefit. As a result, several college coaches have begun paying student-athletes in pay-for-play schemes—in other words, bribery to induce student-athletes to commit to a certain university.¹⁷ The widespread corruption in collegiate athletics is a direct result of the NCAA’s ham-fisted and unrealistic Amateurism Rule.

The NCAA will only change its Amateurism Rule if mechanisms exist to hold it accountable for the rule’s harmful side effects. Part I of this Note will look in depth at the Ninth Circuit’s decision in *O’Bannon v. Nat’l Collegiate Athletics Ass’n*,¹⁸ where former NCAA student-athletes brought antitrust challenges to NCAA’s compensation rules.¹⁹ The court in

11. *The Principle of Amateurism*, NCAA 2018-2019 DIVISION I MANUAL.

12. *Id.*

13. *Id.* at 202-03; 233-34.

14. *Id.* at 63-64.

15. Alex Kirshner, *Here’s how the NCAA generated a billion dollars in 2017*, SBINATION (Mar. 8, 2018, 7:00 AM), <https://www.sbnation.com/2018/3/8/17092300/ncaa-revenues-financial-statement-2017>.

16. *Id.* (According to the NCAA’s 2017 financial statement, \$817,517,801 of its \$1 billion total revenue came from the NCAA men’s basketball tournament).

17. *James Gatto, Merl Code and Christian Dawkins found guilty in pay-for-play trial*, *supra* note 7.

18. *O’Bannon v. Nat’l Collegiate Athletics Ass’n*, 802 F.3d 1049, 1052 (9th Cir. 2015).

19. *Id.* at 1055.

O'Bannon reasoned that the NCAA is subject to antitrust challenges, and held that the NCAA must allow student-athletes to be paid up to the full cost of attendance in order to be in compliance with the Sherman Antitrust Act.²⁰ The court stated that amateurism is a legitimate procompetitive purpose;²¹ this determination has allowed the NCAA to hide behind its Amateurism Rule when faced with antitrust challenges. Part II will discuss the NCAA's Amateurism Rule and why it should be abolished. This part will dive into the benefits and detriments of the NCAA's Amateurism Rule and demonstrate specific ways in which it is leading to corruption in colleges and universities. Finally, Part III will outline practical solutions to the problems caused by the NCAA's refusal to appropriately compensate its athletes, including changing NCAA's rules in order to allow student-athletes to accept endorsement deals and receive compensation for the use of their name, image, and likeness.

O'Bannon v. NCAA and NCAA's Amateurism Rule

The NCAA requires all of its student-athletes to be amateurs in order to be eligible to play sports.²² The NCAA defines a professional athlete as "one who receives any kind of payment, directly or indirectly, for athletics participation . . ."²³ Further, payment is defined as "the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics."²⁴ In other words, in the eyes of the NCAA, the difference between an amateur and a professional athlete is the receipt of payment. Under the NCAA's current rules, student-athletes are allowed to receive compensation for "actual and necessary expenses."²⁵ These expenses include things such as: lodging, meals, apparel, equipment, health insurance, transportation, etc.²⁶ However, these "actual and necessary expenses" may be provided only if such expenses are for competition on a team, for a specific event, or for practice that is "directly related" to a competition.²⁷ The NCAA does pay for expenses related to sports events, but, if a student-athlete accepts or promises to accept any form of payment that is not "actual and necessary," then the student-athlete will lose their amateur status and be ineligible to play.²⁸

20. *Id.* at 1075-76.

21. *Id.* at 1073.

22. *Amateurism and Athletics Eligibility*, NCAA 2018-2019 DIVISION I MANUAL.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Amateurism and Athletics Eligibility*, *supra* note 22.

28. *Id.*

Section 1 of the Sherman Antitrust Act (“Sherman Act”) prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”²⁹ But the Sherman Act prevents only “unreasonable restraints of trade.”³⁰ There are two standards used to determine whether there has been an unreasonable restraint of trade: the rule of reason and the per se rule.³¹ Restraints on compensation (like those challenged in *O’Bannon*³²) are usually analyzed under the rule of reason standard.³³

The rule of reason restraint of trade analysis entails a three-step inquiry. First, the plaintiff bears the burden of showing that the restraint on trade causes significant anticompetitive effects on a relevant market.³⁴ If the plaintiff meets that burden, the defendant must produce evidence of the restraint’s “procompetitive effects.”³⁵ The burden then shifts back on the plaintiff to show that any legitimate objective can be achieved through a substantially less restrictive alternative.³⁶ To be viable, an alternative means must be virtually as effective in serving the procompetitive purposes, without significantly increasing cost.³⁷

In *O’Bannon*, the Ninth Circuit was confronted with the issue of whether the NCAA’s rules prohibiting the compensation of athletes were subject to federal antitrust laws, and, if so, whether the rules constituted an unlawful restraint of trade.³⁸ In this case, O’Bannon, a former University of California Los Angeles (“UCLA”) basketball player, sued the NCAA arguing that the NCAA’s rule prohibiting compensation of student athletes for the use of their names, images, and likenesses (“NILs”) constituted an illegal restraint of trade under section 1 of the Sherman Act.³⁹ The NCAA, in response, made three key arguments. First, the NCAA, relying on dicta, argued that the Supreme Court in *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Oklahoma and Univ. of Georgia Athletic Ass’n*,⁴⁰ held that the NCAA’s Amateurism rule is “valid as a matter of law.”⁴¹ Second, the NCAA argued that its compensation rules were not subject to the

29. 15 U.S.C. § 1 (2012).

30. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla. and Univ. of Ga. Athletic Ass’n*, 468 U.S. 85, 98 (1984).

31. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1016 (10th Cir. 1998).

32. *O’Bannon*, 802 F.3d at 1055.

33. *Id.*

34. *Id.* at 1070.

35. *Id.*

36. *Id.* (citing *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

37. *O’Bannon*, 802 F.3d at 1074.

38. *Id.* at 1052.

39. *Id.* at 1055.

40. 468 U.S. 85, 117 (1984).

41. *Id.*

Sherman Act because the rules did not regulate commercial activity.⁴² Lastly, the NCAA argued that the plaintiffs had no standing to bring suit because they did not suffer antitrust injury.⁴³

First, the NCAA asserted that any antitrust challenge to its Amateurism Rule must fail as a matter of law, because the Supreme Court in *Board of Regents* had held the Amateurism Rule was presumptively valid.⁴⁴ The Ninth Circuit disagreed, reasoning that the Court in *Board of Regents* did not categorically endorse the NCAA's Amateurism Rule as being consistent with the Sherman Act.⁴⁵ Rather, the Ninth Circuit reasoned, *Board of Regents* stood for the proposition that no NCAA rule should be invalidated *without* conducting a rule of reason analysis because NCAA's rules (including its Amateurism Rule) were a part of the "character and quality of the [NCAA's] product."⁴⁶ The Ninth Circuit went on to opine that the Court's dicta in *Board of Regents* supports the preservation of amateurism in college sports because amateurism is a legitimate procompetitive purpose the NCAA can pursue.⁴⁷ The Court in *Board of Regents* states that it is reasonable to assume that NCAA's regulatory controls "are justifiable means of fostering competition *among* amateur athletic teams and therefore procompetitive because they *enhance public interest in intercollegiate athletics*."⁴⁸ However, the Ninth Circuit concluded that "[n]othing in *Board of Regents* supports [the notion that the rule of reason was exempt from an antitrust challenge]."⁴⁹ The Ninth Circuit concluded that the Amateurism Rule's procompetitiveness did not automatically make the Amateurism Rule lawful, as a restraint found to be procompetitive can still be unlawful under a rule of reason analysis if a substantially less restrictive rule would further the same objectives.⁵⁰ Therefore, the Ninth Circuit held that the NCAA's Amateurism Rule was not exempt from antitrust challenges: "[t]he amateurism rules' validity must be proved, not presumed."⁵¹

The NCAA's second argument was that its compensation rules were not subject to the Sherman Act because they were "mere eligibility rules," and therefore did not regulate commercial activity.⁵² The Ninth Circuit began its analysis of this issue by looking at the definition of commerce, which it

42. *O'Bannon*, 802 F.3d at 1061.

43. *Id.*

44. *Id.* at 1063.

45. *Id.*

46. *Id.* (quoting *Bd. of Regents*, 468 U.S. at 102).

47. *O'Bannon*, 802 F.3d at 1063.

48. *Bd. of Regents*, 468 U.S. at 117 (emphasis added).

49. *O'Bannon*, 802 F.3d at 1063.

50. *Id.* at 1064.

51. *Id.*

52. *Id.* at 1064-65.

defined as “every activity from which the actor anticipates economic gain.”⁵³ The court reasoned that, pursuant to this definition, “commerce” included a transaction where an athletic recruit exchanges his labor and NIL rights for a scholarship to a university because both sides expect an economic gain from the transaction.⁵⁴ The court further reasoned that the NCAA’s compensation rules clearly regulated such transactions: a university may not give a recruit compensation beyond a scholarship, and a recruit may not accept compensation which is not sanctioned by the rules, or the recruit will be disqualified and the transaction vitiated.⁵⁵ Therefore, according to the Ninth Circuit, NCAA’s compensation rules regulate commercial activity.⁵⁶ The mere fact that the NCAA characterizes its compensation rules as “eligibility rules,” does not mean the rule is not a restraint of trade subject to antitrust challenges.⁵⁷ After observing that antitrust laws could not be avoided by “clever manipulation of words,”⁵⁸ the Ninth Circuit concluded that the NCAA’s compensation rules were within the Sherman Act’s reach.⁵⁹

The NCAA’s final argument was that the plaintiffs had no standing to bring suit because they had not suffered an antitrust injury.⁶⁰ The NCAA contended that plaintiffs had not been “injured in fact” by its compensation rules because those rules do not deprive plaintiffs of compensation that they would otherwise receive.⁶¹ More specifically, plaintiffs alleged that the NCAA’s rule prohibiting compensation of student-athletes for the use of their NILs (the only category of compensation at issue in the case) constituted an illegal restraint of trade.⁶² The district court had identified three potential markets for NIL rights: (i) live game broadcasts, (ii) video games, and (iii) game rebroadcasts, advertisements, and other archival footage.⁶³ The Ninth Circuit concluded that the plaintiffs were “injured in fact” as a result of the NCAA having foreclosed the market for the use of their NILs in video games.⁶⁴ The court reasoned that, absent NCAA’s prohibitions, video game producers and other licensees, would negotiate

53. *Id.* at 1065 (citing Phillip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th ed. 2013)).

54. *O’Bannon*, 802 F.3d at 1065.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 21-22 (1964).

59. *O’Bannon*, 802 F.3d at 1066.

60. *Id.*

61. *Id.* at 1067.

62. *Id.* at 1055.

63. *Id.* at 1067.

64. *O’Bannon*, 802 F.3d at 1067 (At the time of this litigation, the NCAA no longer permitted college sports video games to be made, and had a policy forbidding the use of student-athletes NILs in video games.).

with student-athletes for the right to use their NILs, just as licensees do with professional athletes.⁶⁵ Therefore, the court concluded the plaintiffs had suffered an injury in fact, and subsequently had standing to bring the antitrust suit.⁶⁶

Having rejected all of NCAA's primary arguments, the Ninth Circuit turned to the merits of plaintiffs' antitrust claim and applied the rule of reason analysis.⁶⁷ The Ninth Circuit first examined whether the plaintiffs had shown that restraint on trade caused significant anticompetitive effects on a relevant market.⁶⁸ The United States District Court for the Northern District of California found that a relevant market exists wherein universities compete for athletic recruits by offering them scholarships and amenities, such as talented coaching staff and state-of-the-art athletic facilities.⁶⁹ Further, the district court found that, but for NCAA's compensation rules, universities would compete to offer athletic recruits compensation for their NILs and labor.⁷⁰ The Ninth Circuit deferred to the district court's findings of fact that the NCAA's compensation rules had a "significant anticompetitive effect" on the relevant market because the rules fix the price that universities pay to secure athletic recruits.⁷¹ In other words, the NCAA's compensation rules fix what universities may and may not "pay" to secure a recruit's services. The Ninth Circuit concluded that these findings had substantial support in the record, and therefore plaintiffs met their burden for the first step of the rule of reason analysis.⁷²

The Ninth Circuit then examined the second prong of rule of reason analysis: procompetitive effects of the at-issue behavior.⁷³ The NCAA offered four procompetitive justifications for its compensation rules: (i) promoting amateurism, (ii) promoting competitive balance among universities, (iii) integrating student-athletes with their academic community, and (iv) increasing output in the college education market.⁷⁴ Once again, the Ninth Circuit deferred to the district court's findings that the NCAA's compensation rules did not promote a competitive balance among universities or increase output in the college education market, and the rules

65. *Id.*

66. *Id.*

67. *Id.* at 1069.

68. *Id.* at 1070.

69. *O'Bannon*, 802 F.3d at 1070.

70. *Id.*

71. *Id.*

72. *Id.* at 1072.

73. *Id.* at 1070.

74. *O'Bannon*, 802 F.3d at 1072.

only played a limited role in the integration of student-athletes with their academic community.⁷⁵

With respect to the NCAA's goal of promoting amateurism, the Ninth Circuit reasoned that a restraint could be procompetitive if the restraint broadened choices for consumers.⁷⁶ The NCAA argued that amateurism increases choice for student-athletes because it gives them "the only opportunity [they will] have to obtain a college education while playing competitive sports as students."⁷⁷ However, the court reasoned that the restraint at issue in this case (NCAA's limits on student-athlete compensation) did not affect choice, because a student-athlete's choice of college would still be available if they were paid some compensation in addition to their scholarships.⁷⁸ Namely, compensation beyond scholarships does not limit the number of colleges student-athletes may choose to attend. The Ninth Circuit therefore rejected the NCAA's argument that its compensation rules increase the choices available to student-athletes.⁷⁹ Nevertheless, the district court found (and the Ninth Circuit agreed) that the NCAA's Amateurism Rule had the procompetitive benefit of increasing the appeal of collegiate sports to consumers.⁸⁰ Therefore, the Ninth Circuit held that NCAA's compensation rules serve two procompetitive purposes: integrating student-athletes with their academic community and "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism."⁸¹

The Ninth Circuit concluded its analysis by examining whether there were substantially less restrictive alternatives to the NCAA's current compensation rules.⁸² To be viable, an alternative must be virtually as effective in serving procompetitive purposes, without significantly increasing the cost of the operative business model.⁸³ The district court found there were two substantially less restrictive alternatives to the NCAA's current compensation rules.⁸⁴ First, the universities could be permitted to give student-athletes grants-in-aid that cover the full cost of attendance.⁸⁵ Second, the NCAA could allow schools to pay student-athletes

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1072-73.

79. *O'Bannon*, 802 F.3d at 1073.

80. *Id.*

81. *Id.*

82. *Id.* at 1074.

83. *Id.*

84. *O'Bannon*, 802 F.3d at 1074.

85. *Id.*

for the use of their NILs.⁸⁶ The Ninth Circuit upheld the first alternative on the logic that allowing for up to the full cost of attendance would not frustrate the NCAA's legitimate procompetitive purpose of amateurism.⁸⁷ Such grants, after all, would still be tethered to education and, therefore, because the payment was indirect, student-athletes would still be considered amateurs.⁸⁸ Therefore, the NCAA must allow colleges to pay for student-athletes' cost of attendance.⁸⁹ The court, however, rejected the second alternative, reasoning that permitting universities to pay student-athletes for the use of the NILs is not as "equally effective" in promoting amateurism as forbidding them to be compensated for the use of their NILs.⁹⁰ In other words, allowing student-athletes to be compensated for the use of their NILs would rid them of their amateur status.

Chief Judge Thomas, in a dissenting opinion, reasoned that the majority misapplied the rule of reason analysis.⁹¹ He believes the proper inquiry should be "whether allowing student-athletes to be compensated for their NILs is 'virtually as effective' in preserving *popular demand for college sports* as not allowing compensation."⁹² Chief Judge Thomas' reasoning for this being the proper inquiry boils down to his disagreement with the majority's opinion as to the procompetitive interests at stake.⁹³ He believes that for purposes of antitrust analysis, amateurism is relevant only as it relates to consumer interest.⁹⁴ Chief Judge Thomas reasoned that the plaintiffs are not required to show that the proposed alternatives are "virtually as effective" at preserving amateurism "as the NCAA chooses to define it."⁹⁵ "Indeed, this would be a difficult task, given that 'amateurism' has proven a nebulous concept prone to ever-changing definition."⁹⁶ The Chief Judge goes on to state that even today's Amateurism Rule does not fall into a bright line rule between paying student-athletes and not paying them.⁹⁷ For example, while basketball and football players are not allowed to receive any compensation other than the full cost of attendance, a tennis player can

86. *Id.*

87. *Id.* at 1075.

88. *Id.* at 1075.

89. *O'Bannon*, 802 F.3d at 1059.

90. *Id.* at 1076.

91. *Id.* at 1081 (Thomas, S., dissenting).

92. *Id.* (Thomas, S., dissenting).

93. *Id.* (Thomas, S., dissenting).

94. *Id.* at 1081 (Thomas, S., dissenting).

95. *O'Bannon*, 802 F.3d at 1083 (Thomas, S., dissenting).

96. *Id.* (Thomas, S., dissenting).

97. *Id.* (Thomas, S., dissenting).

earn up to \$50,000 for playing his sport and still be considered an amateur by the NCAA.⁹⁸

The NCAA insists that fans will lose interest if student-athletes are paid. However, this assertion is contradicted by the district court's findings, and by the NCAA's own rules.⁹⁹ The district court found evidence "suggests that consumer demand for FBS football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography."¹⁰⁰ Further, the NCAA sold television rights to broadcast the NCAA men's basketball tournament to CBS for twelve years for \$10.8 billion.¹⁰¹ Yet, the NCAA insists that this multi-billion dollar industry would disappear if student-athletes were compensated beyond the full cost of attendance. This argument simply does not make sense given that student-athletes do receive stipends untethered to education, and college sports are more popular than ever.¹⁰²

The majority in *O'Bannon* concluded that allowing students to be paid—either by the NCAA or by third-party licensees—would take away their amateur status, which would strip the NCAA of their legitimate procompetitive purpose (i.e. the promotion of amateurism). Yet, this reasoning essentially allows the NCAA to hide behind its own categorization of its Amateurism Rule in order to avoid violating the Sherman Act. The court in *O'Bannon* failed to consider the harm that the Amateurism Rule causes to both student-athletes and the NCAA's integrity. *O'Bannon's* reasoning enables the law and the NCAA to continue to overlook a simple truth: if the NCAA were to get rid of its Amateurism Rule, it would avoid antitrust challenges in the future because it would no longer be restraining trade with its rules against compensation. The next part of this Note will discuss why the NCAA should get rid of its Amateurism Rule.

The NCAA's Amateurism Rule Should be Abolished

There are two main reasons why the NCAA insists its student-athletes be amateurs—each deeply flawed. First, the NCAA's presumption that amateurism is an integral part of the success and popularity of collegiate sports is unfounded or, at the very least, outdated.¹⁰³ The NCAA argues that fans "will lose interest in college sports if student-athletes are paid any

98. *Id.* (Thomas, S., dissenting).

99. *Id.* at 1083 (Thomas, S., dissenting).

100. *O'Bannon*, 802 F.3d at 1082 (Thomas, S., dissenting).

101. *Id.* at 1083 (Thomas, S., dissenting).

102. *2015 tourney most-watched in 22 years*, NCAA (Apr. 7, 2015) <https://www.ncaa.com/news/ncaa/article/2015-04-07/2015-ncaa-tournament-has-highest-average-viewership-22-years> (The 2015 men's basketball tournament averaged 11.3 million viewers, an 8% increase from the previous year).

103. *The NCAA's Amateurism Rules are Indeed Madness*, *supra* note 10.

amount of money that is not tethered to educational costs.”¹⁰⁴ This argument dates back to Justice Stevens’ dicta in *Board of Regents*: “[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”¹⁰⁵ Justice Stevens believed that NCAA’s Amateurism Rule created fan interest in college athletics.¹⁰⁶ His comment has been a crutch for preserving the illusion of a pre-professional distinction. However, there remains scant empirical evidence for Justice Steven’s assumption. In fact, consumers are arguably attracted to college sports primarily for reasons unrelated to amateurism, such as loyalty to their alma mater or affinity for the university near where they grew up.¹⁰⁷ Further, NCAA’s Amateurism Rule was not in controversy in *Board of Regents*; therefore, no market-based evidence¹⁰⁸ was presented to defend this argument.¹⁰⁹

Moreover, this argument does not hold water after the Ninth Circuit’s decision in *O’Bannon*, where the court held that the NCAA must allow colleges to pay for student-athletes’ cost of attendance.¹¹⁰ This cost of attendance also includes stipends, which range from \$2,000 to \$5,000 a year, with some schools offering a few thousand dollars more.¹¹¹ These stipends are untethered to educational services universities and colleges provide to athletes.¹¹² In other words, student-athletes are not required to spend their stipends on education-related purchases—the occasional slice of pizza or paying for their cell phone bill, for example.¹¹³ In addition to these stipends, the NCAA allows monetary awards it describes as “incidental to athletics

104. Thomas Baker, *Why The Latest NCAA Lawsuit Is Unlikely To Change Its Amateurism Rules—But Should*, FORBES (Sept. 11, 2018, 12:40 PM), <https://www.forbes.com/sites/thomasbaker/2018/09/11/the-economics-of-amateurism-breaking-down-the-latest-lawsuit-against-the-ncaa/#210136092478>.

105. *Bd. of Regents*, 468 U.S. at 117.

106. *Why The Latest NCAA Lawsuit Is Unlikely To Change Its Amateurism Rules—But Should*, *supra* note 104.

107. *O’Bannon*, 802 F.3d at 1059. *O’Bannon*, 802 F.3d at 1059.

108. Mary Jane, *What Is Evidence-Based Marketing?*, CHRON <https://smallbusiness.chron.com/evidencebased-marketing-24597.html> (last visited Jan. 22, 2019) (Market-based evidence is defined as “one type of marketing where the company uses statistics, research, trends, industry practices and customer interviews to prove the product or service works as stated by the company.”).

109. *Bd. of Regents*, 468 U.S. at 117.

110. *O’Bannon*, 802 F.3d at 1075.

111. Chris Isidore, *College athletes finally getting some cash*, CNN BUSINESS (Sept. 4, 2015, 1:43 PM), <https://money.cnn.com/2015/09/04/news/companies/extra-cash-college-athletes/index.html>.

112. *Why The Latest NCAA Lawsuit Is Unlikely To Change Its Amateurism Rules—But Should*, *supra* note 104.

113. *Id.*

participation.”¹¹⁴ These monetary awards reward student-athletes for their participation and/or achievements in athletics, such as winning a national championship.¹¹⁵ A student-athlete on a team that won a national championship could receive a total of \$5,600 simply for participating in a sport.¹¹⁶ Student-athletes have been receiving so-called cost of attendance stipends and monetary awards since 2015, and fan interest in college sports has not decreased over that time period.¹¹⁷

In fact, evidence suggests that interest in certain college sports is increasing. The 2015 NCAA Men’s Basketball Tournament averages 11.3 million viewers, an 8% increase from the previous year; it was the most watched NCAA tournament in twenty-two years.¹¹⁸ There is likewise scant evidence to suggest that fan support would decrease if student-athletes were allowed to accept endorsement deals or be compensated for the use of their NILs. In fact, allowing student-athletes to monetize their NILs might increase fan interest. The NCAA’s argument that its Amateurism Rule is an integral part of the success of college sports does not survive close scrutiny.

The NCAA’s second justification for the Amateurism Rule is that amateurism allows student-athletes to receive an education that they may otherwise not.¹¹⁹ Basically, amateurism is the concept of being a student first and an athlete second.¹²⁰ This is undoubtedly the strongest argument for the Amateurism Rule:

In theory, at least, college sports provided an important opportunity for teaching people about character, motivation, endurance, loyalty, and the attainment of one’s personal best—all qualities of great value in citizens. In this sense, competitive athletics were viewed as an extracurricular activity, justified by the university as part of its ideal objective of educating the whole person.¹²¹

Arguably, however, many Division I student-athletes do not consider the education component of college to be their first priority. As Cardale Jones, an ex-Ohio State University football player, stated: “[w]hy should we have to go to class if we came here to play FOOTBALL, we ain’t come to

114. *In re: National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litigation*, No. 14-md-02541 CW, at *22 (N.D. Cal. 2010).

115. *Id.*

116. *Id.* at *22-23.

117. *Why The Latest NCAA Lawsuit Is Unlikely To Change Its Amateurism Rules—But Should*, *supra* note 104.

118. *2015 tourney most-watched in 22 years*, *supra* note 102.

119. Arash Afshar, *Collegiate Athletes: The Conflict Between NCAA Amateurism and a Student Athlete’s Right of Publicity*, 51 WILLAMETTE L. REV. 101, 105 (2014).

120. *Id.* at 105-06.

121. JAMES J. DUDERSTADT, *INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE* 70 (The University of Michigan Press, 2000).

play SCHOOL, classes are POINTLESS.”¹²² Many student-athletes’ first priority is to play sports, evidenced by many student-athletes entering professional sports drafts when they are eligible, usually before finishing their degree. In the 2017 National Basketball Association (“NBA”) draft, there were twenty players who had completed just one year of college.¹²³ Further, those student-athletes who do graduate usually graduate with degrees that may not prepare them adequately for a competitive job market or for post-graduate studies.¹²⁴ For example, 51% of student-athletes on Baylor University’s football team are general studies majors, while only 1% of all other undergraduates are general studies majors.¹²⁵ Student-athletes are “routinely clustered” into “easy” or less time-consuming majors so that they can focus on their athletics.¹²⁶ Therefore, even though the NCAA argues that student-athletes are students first and athletes second, the evidence shows that this is fiction. Student-athletes routinely prioritize their sport over their academics.

The fact remains that while the NCAA defends the necessity of amateurism, NCAA’s particular definition and understanding of the concept of amateurism have changed over the years whenever it suits the NCAA’s needs.¹²⁷ For example, the NCAA did not allow athletic scholarships until the 1950s, because scholarships were seen as a payment.¹²⁸ The NCAA later decided that scholarships were not payments, and began allowing colleges to award them to student-athletes.¹²⁹ In 2011, a university could be punished for providing student-athletes with textbooks.¹³⁰ But as of 2015, universities can provide student-athletes with textbooks because textbooks are now considered part of the full cost of attending the university, which the NCAA

122. Cardale Jones (@Cordale10), TWITTER (Oct. 5, 2012, 8:43 AM), <https://twitter.com/Cardale7/status/583704108286267393>.

123. *N.B.A. Commissioner Is Ready for Change in ‘One-and-Done’ Rule*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/sports/basketball/adam-silver-nba-draft-one-and-done.html>.

124. Kevin Trahan, *Athletes are getting degrees, but does that actually mean anything?*, SBNATION (July 9, 2014, 7:03 PM), <https://www.sbnation.com/college-football/2014/7/9/5885433/ncaa-trial-student-athletes-education>.

125. Shaun Hittle, *Athletes’ tendencies to ‘cluster’ in certain academic fields problematic, some say*, LAWRENCE JOURNAL-WORLD (June 15, 2012, 12:00 AM), <http://www2.ljworld.com/news/2012/jun/15/athletes-tendencies-cluster-certain-academic-field/>.

126. *Id.*

127. *The NCAA’s Amateurism Rules are Indeed Madness*, *supra* note 10.

128. Kevin Trahan, *The fall of amateurism as the NCAA knows it*, SBNATION (June 19, 2014, 4:47 PM), <https://www.sbnation.com/college-football/2014/6/19/5825222/ncaa-amateurism-mark-emmert-obannon>.

129. *Id.*

130. Andy Schwarz, *The NCAA Has Always Paid Players; Now It’s Just Harder To Pretend They Don’t*, DEADSPIN (Aug. 29, 2015, 12:25 PM), <https://deadspin.com/the-ncaa-has-always-paid-players-now-its-just-harder-t-1727419062>.

has lately deemed is acceptable.¹³¹ Before January 2015, universities were prohibited from providing travel services to parents of student-athletes because it was considered a form of payment, but now these services are officially classified as non-payment, and therefore allowed.¹³² As one reporter put it:

It was . . . pay to provide an athlete with cream cheese on his bagel, and since pay is evil and cream cheese was pay, it appears cream cheese was evil. But now . . . schools can give as much food as they want, which means food, even cream cheese, is no longer pay and this is no longer evil.¹³³

The idea that college athletics would somehow be sullied if the economics of the real world were allowed to impinge is also fiction. Lots of people become very wealthy off of college sports, just not student-athletes.¹³⁴ For example, college coaches are some of the highest paid employees in the sports world. In 2018, Duke University's head coach, Mike Krzyewski, made \$8.98 million,¹³⁵ while Steve Kerr, who coached the Golden State Warriors to three NBA championships, made \$5 million last year.¹³⁶ "The commercial aspect of college athletics—television contracts and bowl game revenue, for example—counteracts the nonprofit, amateur motives of the organization."¹³⁷ The NCAA's Amateurism Rule is in direct conflict with the presence of these economic objectives, yet the NCAA does not waiver from its purported amateurism ideals.

The Benefits and Detriments of NCAA's Amateurism Rule

The NCAA's practices with almost every party except student-athletes are inconsistent with its professed amateurism ethos. Apart from the hypocrisy of allowing administrators, coaches, and the NCAA to exploit college athletes, there are several affirmative benefits to eliminating the

131. *Id.*

132. *Id.*

133. *Id.*

134. Kristin R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 262 (2003).

135. Chris Chavez, *Coach K, John Calipari Top The List Of Highest Paid College Basketball Coaches*, SPORTS ILLUSTRATED (Mar. 1, 2018), <https://www.si.com/college-basketball/2018/03/01/highest-paid-college-basketball-coaches-salaries-mike-krzyewski-john-calipari>.

136. Richard Johnson, *Steve Kerr's about to finally get paid his worth*, SBNATION (June 29, 2018, 7:53 PM), <https://www.sbnation.com/nba/2018/6/29/17519872/steve-kerr-contract-extension-salary>.

137. *Weakening Its Own Defense? The NCAA's Version of Amateurism*, *supra* note 134.

NCAA's Amateurism Rule. First, players may stay in college longer if they were compensated.¹³⁸ College basketball is notorious for the "one-and-done" rule, where players leave college after one year, coinciding with their eligibility to enter the NBA draft. Even the NBA commissioner, Adam Silver, acknowledges that it is a problem, "[m]y sense is it's not working for anyone . . . [i]t's not working for the college coaches and athletic directors I hear from. They're not happy with the current system."¹³⁹ A National Football League ("NFL") executive also noted the problem: "[t]he college coaches are always on us about their kids leaving early, and I tell them, until you start paying them, they're leaving."¹⁴⁰ Compensating student-athletes might be a solution to this problem, as students will be more willing to stay in college if they receive compensation. "Athletes might well be more likely to attend college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school."¹⁴¹

Financial pressures at home are often so extreme that finishing college at the expense of beginning a professional sports career is untenable. "Many of these athletes come from urban, lower-class families and often leave school early because of the unimaginable pressure to be the main provider of their family at a young age."¹⁴² If student-athletes received compensation, then they could support their families while remaining in school to receive the college education that the NCAA wants them to receive. LeBron James, a three-time NBA champion, expressed his concerns with the current system, "[m]e and my mom was poor, I'll tell you that, and they expected me to step foot on a college campus and not go to the NBA? We weren't going to be poor for long, I'll tell you that. That's a fact."¹⁴³ LeBron James did not attend college, as he was not required to do so when he entered the NBA draft in 2003.¹⁴⁴

The next benefit of getting rid of the Amateurism Rule is that compensating student-athletes would reduce the amount of corruption now occurring in college sports. Student-athletes are likely going to receive payment whether it is allowed or not. By not allowing student-athletes to be paid, the NCAA is creating a market for illicit payments, and college coaches

138. Malcom Lemons, *College Athletes Getting Paid? Here Are Some Pros And Cons*, HUFFINGTON POST (Mar. 29, 2017, 10:06 AM), https://www.huffingtonpost.com/entry/collegeathletes-getting-paid-here-are-some-pros-cons_us_58cfcee0e4b07112b6472f9a.

139. *N.B.A. Commissioner Is Ready for Change in 'One-and-Done' Rule*, *supra* note 123.

140. Robert Klemko (@RobertKlemko), TWITTER (Mar. 21, 2019, 12:56 PM), <https://twitter.com/RobertKlemko/status/1108819810547191809>.

141. *O'Bannon*, 802 F.3d at 1073.

142. *College Athletes Getting Paid? Here Are Some Pro And Cons*, *supra* note 138.

143. Dave McMenamin, *Lebron James calls NCAA 'corrupt' in wake of scandals*, ESPN (Feb. 27, 2018), http://www.espn.com/nba/story/_/id/22596036/lebron-james-calls-ncaa-corrupt-says-nba-give-alternative.

144. *Id.*

have begun taking matters into their own hands and paying players as part of the recruitment process.¹⁴⁵ This corruption will continue as long as the NCAA does not amend its amateurism values and allow student-athletes to be compensated in one form or another.

There are of course a few detriments to compensating student-athletes. The first, and strongest argument, is the fear that student-athletes will be irresponsible with the money they earn.¹⁴⁶ Most of Division I student-athletes are aged eighteen to nineteen and likely have no money management skills.¹⁴⁷ As sports commentator Colin Cowherd noted, “most 19-year-olds (are) gonna spend it—and let’s be honest, they’re gonna spend it on weed and kicks!”¹⁴⁸ However, a solution to this problem may be to enroll student-athletes in money-management skill courses. Conveniently, the NCAA has begun to develop a program for student-athletes to learn such skills.¹⁴⁹ “So the Division I Student-Athlete Advisory Committee has started developing a standardized program to teach athletes how to be fiscally responsible.”¹⁵⁰ Even without such a program, justifying a refusal to pay athletes by worrying about their future spending habits rings hollow. Why should players not be able to spend the money they earn in the manner they wish?

The second detriment to compensating student-athletes, is that any compensation system would result in salary differentials for players.¹⁵¹ Yet, while allowing student-athletes to take endorsement deals and receive compensation for the use of their NILs will create uneven compensation between student-athletes, this is acceptable because not all student-athletes generate as much money as others:

In almost all cases, one or two sports dominate the merchandise, ticket sales, and publicity at any college—usually football, men’s basketball, and women’s basketball. In those situations, it’s a stretch to say that the guys on the rugby team are owed the same money as the football players.¹⁵²

145. James Gatto, *Merl Code and Christian Dawkins found guilty in pay-for-play trial*, *supra* note 7.

146. *College Athletes Getting Paid? Here Are Some Pro And Cons*, *supra* note 138.

147. *Id.*

148. *Id.*

149. Brian Hendrickson, *Teaching Dollars and Sense*, NCAA (July 21, 2015, 10:00 AM), <http://www.ncaa.org/champion/teaching-dollars-and-sense>.

150. *Id.* See also *Online platform offer financial tips for college athletes*, NCAA (Sept. 7, 2017, 11:25 AM), <http://www.ncaa.org/about/resources/media-center/news/online-platform-offers-financial-tips-college-athletes> (“NCAA student-athletes now have an online financial awareness platform that provides them with tips on how to be more fiscally responsible while in college, while also preparing them for financial decision that may impact them after graduation.”).

151. *College Athletes Getting Paid? Here Are Some Pro And Cons*, *supra* note 138.

152. Daniel Roberts, *Offering equal pay to college athletes won’t work*, *FORTUNE* (Nov. 18, 2013), <http://fortune.com/2013/11/18/offering-equal-pay-to-college-athletes-wont-work/>.

Further, salary inequity amongst groups of players or teammates is not new to sports, as professional athletes get paid different salaries depending on their skill level, so there is no reason for college athletics to operate differently in this respect than literally every other professional sports league.

The last detriment to compensating student-athletes, according to the NCAA, is that compensation “incentivizes athletics over academics.”¹⁵³ However, as argued earlier, many student-athletes already prioritize athletics over education.¹⁵⁴ The NCAA has a rule where student-athletes must be academically eligible to play sports, i.e. student-athletes must maintain a certain grade point average (“GPA”) in order to be allowed to play their respective sport.¹⁵⁵ The result of this rule tends to be a focus on eligibility rather than education.¹⁵⁶ Due to this incentive system, most student-athletes opt for easy majors with a low time commitment in order to remain technically eligible to play sports.¹⁵⁷ Such course and major gamesmanship hardly satisfies the spirit of the NCAA’s avowed rationale.

The benefits of getting rid of NCAA’s Amateurism Rule outweigh its detriments. Nevertheless, the NCAA persists on its student-athletes remaining amateurs. The problem, however, is that college sports are a lucrative market from which many people benefit, except student-athletes. College coaches and sports agents understand this and believe that student-athletes deserve to benefit because they are the ones who make it lucrative. Several college coaches and sports agents have therefore taken the matter of player compensation into their own hands and begun paying student-athletes in pay-for-play schemes. As a result, the Amateurism Rule has directly led to a rise in corruption at colleges and universities. As one NFL executive stated, “[t]here’s so much money at the college level, and if the good guys aren’t gonna pay you, then the bad guys are.”¹⁵⁸

Corruption in College Sports

Despite the NCAA’s high-minded philosophizing, money is very much a part of college athletics. The NCAA’s rules ignore the economic realities and pressures many student-athletes face. Accordingly, the rules have contributed to a thriving culture of corruption and under-the-table dealings.

153. *NCAA Defends Scholarships for College Athletes*, NCAA, <http://www.ncaa.org/about/resources/media-center/feature/ncaa-defends-scholarships-college-athletes> (last visited Jan. 22, 2019).

154. *Athletes are getting degrees, but does that actually mean anything?*, *supra* note 124.

155. *Id.*

156. *Id.*

157. *Id.*

158. Robert Klemko (@RobertKlemko), TWITTER (Mar. 21, 2019, 12:36 AM), <https://twitter.com/RobertKlemko/status/1108819810547191809>.

On September 26, 2017, college basketball assistant coaches from the University of Arizona, Auburn University, University of Louisville, University of Miami, Oklahoma State University, and University of Southern California were implicated in an FBI investigation into bribes and other corruption in the sport.¹⁵⁹ Rashan Michel, a former NBA referee, and Louis Martin Blazer III, an FBI cooperating witness, had an arrangement where Blazer would pay Michel on a monthly basis, and Michel would introduce Blazer to college coaches who were willing to accept bribes.¹⁶⁰ In accordance with this arrangement, Michel introduced Blazer to Auburn's assistant coach, Chuck Person.¹⁶¹ Blazer and Person met with an Auburn student-athlete to discuss a \$15,000 bribe to induce the student-athlete to retain Blazer's financial services.¹⁶² Person warned the player, "[t]he most important thing is that you . . . don't say nothing to nobody . . . [b]ut don't share with your sisters, don't share with any of the teammates, that's very important cause this is a violation . . ." ¹⁶³ The FBI said Blazer paid Person a total of \$91,500, which Person distributed among several of Auburn's student-athletes and their families.¹⁶⁴ Person was arrested on September 26, 2017.¹⁶⁵ His trial began on February 2019 in the United States District Court for the Southern District of New York.¹⁶⁶

Another scandal uncovered during the investigation concerned Andre McGee, a former Louisville staff member, who allegedly arranged for strip dances and sex acts for three current student-athletes and fifteen recruits at a Louisville dormitory.¹⁶⁷ Due to the scandal, on June 15, 2017, the NCAA suspended Rick Pitino, Louisville's head coach, for five games, and vacated 108 regular-season wins and fifteen NCAA tournament wins, including Louisville's 2013 national championship win.¹⁶⁸ Less than a month later, on July 10, a Louisville assistant coach spoke with Merl Code, an Adidas employee, and an undercover FBI agent about covering up Adidas' \$25,000 payment to a father of a high school player who had recently committed to

159. *The step-by-step process of how the words 'corruption' and 'fraud' came to college basketball, supra note 4.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *The step-by-step process of how the words 'corruption' and 'fraud' came to college basketball, supra note 4.*

165. *Id.*

166. *James Gatto, Merl Code and Christian Dawkins found guilty in pay-for-play trial, supra note 7.*

167. *The step-by-step process of how the words 'corruption' and 'fraud' came to college basketball, supra note 4.*

168. *Id.*

Louisville.¹⁶⁹ According to the complaint, James Gatto, Adidas' head of sports marketing, had agreed to pay the recruit's father a total of \$100,000 at the request of a Louisville coach.¹⁷⁰

The FBI further alleged that undercover agents paid \$20,000 in bribes to Arizona's assistant coach, Emmanuel Richardson, and \$13,000 in bribes to University of Southern California's assistant coach, Tony Bland.¹⁷¹ Further, James Gatto was further implicated in a few other schemes to pay recruits in order to induce them to commit to a particular university: \$150,000 to a University of Miami recruit,¹⁷² \$100,000 to a Louisville recruit, \$90,000 to a University of Kansas recruit, and \$20,000 to another University of Kansas recruit.¹⁷³ On October 24, 2018, James Gatto and several others were found guilty on felony charges of wire fraud and conspiracy to commit wire fraud.¹⁷⁴ In a statement, U.S. Attorney Robert S. Khuzami said, "[t]oday's convictions expose an underground culture of illicit payments, deception, and corruption in the world of college basketball . . . [t]hese defendants now stand convicted of not simply flouting the rules but breaking the law for their own personal gain."¹⁷⁵ Further, two additional federal criminal cases involving corruption in college basketball are scheduled for trial at the United States District Court for the Southern District of New York in 2019.¹⁷⁶ Arizona's assistant coach Emanuel Richardson, Oklahoma State's Lamont Evans, and USC's Tony Bland are scheduled for trial in April.¹⁷⁷

Of course, college basketball is not the only collegiate sport to be plagued by corruption: college football has also dealt with corruption for decades. Former sports agent, Josh Luchs, admitted that he illegally paid thirty college football players from 1990 to 1996.¹⁷⁸ Luchs wrote an article about the "inner workings of an oily business" and showed how pervasive the illegal payments truly are.¹⁷⁹ Further, in 2007, a sports marketer claimed that Reggie Bush received \$280,000 in benefits while playing for USC's

169. *Id.* (Louisville has a shoe and apparel deal with Adidas.).

170. *Id.*

171. *Id.*

172. *The step-by-step process of how the words 'corruption' and 'fraud' came to college basketball*, *supra* note 4.

173. *James Gatto, Merl Code and Christian Dawkins found guilty in pay-for-play trial*, *supra* note 7.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Top 5 'pay to play' scandals rocking college football*, *THE WEEK* (Jan. 6, 2011), <https://theweek.com/articles/488252/5-pay-play-scandals-rocking-college-football>.

179. *Id.*

football team.¹⁸⁰ In June 2010, the NCAA sanctioned USC by imposing a two-year bowl¹⁸¹ participation ban, and vacated fourteen football victories, including Reggie Bush's Heisman award.¹⁸² Moreover, in 2011, five University of North Carolina football players were kicked off the team for accepting money from sports agents.¹⁸³

Corruption is endemic in college sports due in no small part to the NCAA's insistence on amateurism. If the NCAA cares about reforming this culture, its first step should be to drastically amend or eliminate its Amateurism Rule and to allow student athletes to be compensated. The NCAA should allow student-athletes to accept endorsement deals and receive compensation for the use of their NILs, as this would avoid a myriad of legal issues and would bring the NCAA into compliance with the Sherman Act.

A Practical Solution to the Problem: Allowing Student-Athletes to Accept Endorsement Deals and Receive Compensation for the Use of their NILs

In order to eliminate the black market for student-athlete labor, something has to change. "In the absence of free markets for college athletes' services, darker and more dubious markets emerge that are an ideal breeding ground for unscrupulous individuals to engage in schemes to defraud college athletes and exploit their labor."¹⁸⁴ As discussed below, requiring the NCAA or colleges to directly pay student-athletes is impractical and creates legal difficulties. But, allowing student-athletes to accept endorsement deals and receive compensation for the use of their NILs would stem the corruption, while allowing the NCAA to avoid the entanglements of directly paying student-athletes. Further, as mentioned in Part II of this Note, the NCAA wants its student-athletes to remain amateurs for two reasons: first, the NCAA presumes that amateurism is an integral part of the success and popularity of collegiate sports; and second, the NCAA asserts that being an amateur athlete allows students to get an education that they may not otherwise receive.

180. *Marketer claims Bush received \$280K in benefits at USC*, ESPN (Oct. 11, 2007), <http://www.espn.com/college-football/news/story?id=3056397>.

181. "Bowls" are post-season college football games which teams qualify to play in.

182. Jim Tanner, *Athletes, agents, and the NCAA: It's time for a fix*, USA Today, https://usatoday30.usatoday.com/news/opinion/forum/2010-08-04-column04_ST1_N.htm# (last visited Feb. 18, 2019).

183. *Top 5 'pay to play' scandals rocking college football*, *supra* note 178.

184. Marc Edelman, *Corruption Will Continue In NCAA College Basketball Until Schools Can Openly Pay Their Players*, FORBES (Sept. 27, 2017, 9:01 AM), <https://www.forbes.com/sites/marcedelman/2017/09/27/corruption-will-continue-in-ncaa-college-basketball/#46872cbd3315>.

As to the first point, this Note has already argued that fans are indifferent as to whether student-athletes get paid because most fans are primarily attracted to college sports for reasons unrelated to athletes' amateur status, such as loyalty to their alma mater or affinity for the university near where they grew up.¹⁸⁵ Furthermore, if consumers were not in favor of college athlete endorsements, then there would be no market for companies to hire college athletes as endorsers, because fans are the consumers of such endorsements.¹⁸⁶ The market for endorsements already exists, but as presently constituted only benefits colleges and the NCAA.

The culture of corruption in college athletics does nothing to bolster the integrity of college sports. In fact, an argument can be made that the current system is actively undermining the public's feelings toward college sports and toward the NCAA in particular. Even prominent sports figures such as LeBron James have been outspoken about their dislike for the NCAA: "I'm not a fan of the NCAA . . . I'm not a fan of how the kids don't benefit from none of this . . ."¹⁸⁷ Therefore, allowing student-athletes to receive compensation in the form of endorsement deals and the right to use their NILs would decrease the corruption while still preserving the success and popularity of college sports.

Secondly, allowing student-athletes to accept endorsements and receive compensation for the use of their NILs would facilitate the NCAA's goal of incentivizing education: student-athletes would likely stay in college longer if they were receiving compensation in some form.¹⁸⁸ As discussed in Part II, many student-athletes leave college to join their sports' professional draft once they are eligible; these athletes do so in many cases because they must. Allowing student-athletes to receive some compensation, even in the form of monetizing NILs, would help further the NCAA's purported goal of supplying an education by enabling students to remain in school rather than creating incentives for athletes to bolt to the draft.

Finally, as discussed below, allowing student-athletes to accept endorsement deals and receive compensation for the use of their NILs is a more practical solution than the NCAA's or individual university's paying student-athletes because this practice would avoid legal issues including

185. *O'Bannon*, 802 F.3d at 1059.

186. Marc Edelman, *9 Reasons To Allow College Athletes To License Their Names, Images and Likeness*, FORBES (May 11, 2018, 8:59 AM), <https://www.forbes.com/sites/marcedelman/2018/05/11/9-reasons-to-allow-college-athletes-to-license-their-names-images-and-likenesses/#729dd2ca5488>.

187. Cuck Schilken, *LeBron James is no fan of college basketball: 'The NCAA is corrupt'*, L.A. TIMES (Feb. 24, 2018, 12:00 PM), <https://www.latimes.com/sports/sportsnow/la-sp-lebron-james-ncaa-20180227-story.html>.

188. *O'Bannon*, 802 F.3d at 1073.

Title IX violations, vicarious liability, and comply with the governing jurisprudent of section 1 of the Sherman Act.

Title IX, Employment Liability Considerations, and the Sherman Act

Title IX states, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance”¹⁸⁹ At its inception the NCAA, which received federal financial assistance through the statute, contested Title IX’s application to college athletics.¹⁹⁰ But in 1987, Congress amended the law to require Title IX to apply to all of an institution’s programs, including athletics that do not directly receive federal funds.¹⁹¹

In *Cohen v. Brown Univ.*,¹⁹² the First Circuit held that a school must meet one of three requirements in order to comply with Title IX.¹⁹³ First, schools may provide athletic participation opportunities for male and female students “in numbers substantially proportionate to their respective enrollments.”¹⁹⁴ Second, if a gender is or has been underrepresented among student-athletes, the school may show that it has a continuing practice of striving for equal athletic opportunities between both genders.¹⁹⁵ Finally, if a school cannot meet the first or second requirements, then it must demonstrate “that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.”¹⁹⁶ In short, schools must provide female and male student-athletes equal athletic opportunities and must give equal treatment to both genders.

If the Director of the Office for Civil Rights of the Department of Health and Human Services finds that a school which receives federal funds has discriminated against persons on the basis of their sex, the school “must take such remedial action as the Director deems necessary to overcome the effects of the discrimination.”¹⁹⁷ Furthermore, violating Title IX leaves schools open to possible litigation from those discriminated against, which could end up costing the school a lot of money. The National Center for Higher Education Risk Management has found that the average jury award in Title

189. 20 U.S.C. § 1681 (2019).

190. Erin Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O’Bannon*, 41 J.C. & U.L. 297, 322 (2015).

191. *Id.*

192. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).

193. *Id.* at 166.

194. *Id.*

195. *Id.*

196. *Id.*

197. 15 Am. Jur. 2d *Civil Rights* § 356 (2019).

IX cases is about \$200,000.¹⁹⁸ Some courts have awarded up to \$4.52 million plus legal fees to Title IX plaintiffs.¹⁹⁹ Therefore, a violation of Title IX could prove to be costly for schools.

Requiring colleges to pay student-athletes directly would create Title IX problems, because colleges would be forced to give equal pay to *all* student-athletes. Under Title IX, schools are already required to distribute athletic-based financial aid proportionally among female and male student-athletes.²⁰⁰ Under current jurisprudence, therefore, schools would be required to give proportional pay to both female and male student-athletes. This would create financial problems for colleges and universities, because there would not be enough of a cash reservoir to pay all student-athletes equally while maintaining all athletic programs.²⁰¹ Although Division I universities generate millions of dollars from their men's football and basketball programs, universities use this money to fund other non-profitable sports, usually female sports.²⁰² If universities were required to pay all student-athletes equally, universities would be forced to cut some of these non-profitable programs, which could cause a Title IX problem as equal opportunities would not be offered to both female and male student-athletes.

Allowing student-athletes to accept endorsement deals and receive compensation for the use of their NILs would not violate Title IX, because schools would not be paying student-athletes directly or indirectly. "The endorsement plan does not create an environment where schools treat women's sports unfairly because it does not require schools to compensate athletes unequally, as the endorsement plan excludes participation of schools."²⁰³ Furthermore, by allowing student-athletes to accept endorsement deals and receive compensation for the use of their NILs, the NCAA is creating equal opportunities for both genders as female and male student-athletes would be able to accept endorsement deals and receive compensation for the use of their NILs. "Because it's a plan that would allow notable student-athletes to essentially get whatever somebody believes

198. Robin Hattersley-Gray, *Not Complying with Title IX Could Cost You*, CAMPUS SAFETY (June 3, 2012), <https://www.campussafetymagazine.com/university/not-complying-with-title-ix-could-cost-you/>.

199. Brian L. Porto, *Halfway Home: An Update on Title IX and College Sports*, 34-SUM VT. B.J. 28, 32 (2008).

200. *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon*, *supra* note 190 at 324.

201. Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created By Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 407-08 (2012).

202. *Id.* at 406.

203. *Id.* at 420.

they're worth, and it would neither be a financial strain on universities nor a Title IX nightmare."²⁰⁴

In addition to complying with Title IX, allowing student-athletes to accept endorsement deals and receive compensation for the use of their NILs also protects universities from being vicariously liable for their student-athletes' actions. The doctrine of *respondeat superior* states that an employer is subject to liability (i.e. vicariously liable) for the acts of his employees committed while acting in the scope of their employment.²⁰⁵ An employee is defined as: "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."²⁰⁶ Scope of employment is defined as: "[t]he range of reasonable and foreseeable activities that an employee engages in while carrying out the employer's business"²⁰⁷ An employer is not vicariously liable for torts committed by an employee acting outside the scope of employment, unless the employer was negligent or reckless.²⁰⁸ An employer is, however, liable for torts committed by an employee acting within the scope of their employment.²⁰⁹ Moreover, an employer is liable on a contract between their employee and a third party when the employee acts with actual, apparent, or inherent authority.²¹⁰

If student-athletes receive a salary from their colleges or from the NCAA, they will likely be classified as employees of the school. This means that, within certain parameters, a school or the NCAA may be liable for the student-athlete's actions. This potential liability is understandably a frightening prospect for schools and the NCAA, given patterns of student-athlete misbehavior. For example, an ex-Duke University basketball player is being accused of sexual assault, which allegedly occurred in 1999 while the player was a student there.²¹¹ If this player was paid by and therefore considered an employee of Duke, and committed torts considered within the scope of his employment or the university was found to be negligent, then the university could be vicariously liable for this student-athlete's actions.

204. Gary Parrish, *Everybody wins if the NCAA will allow players to accept endorsements*, CBS SPORTS (Apr. 12, 2016, 9:28 AM), <https://www.cbssports.com/college-basketball/news/everybody-wins-if-the-ncaa-will-allow-players-to-accept-endorsements/>.

205. RESTATEMENT (SECOND) OF AGENCY § 219.

206. *Employee*, Black's Law Dictionary (10th ed. 2014).

207. *Scope of Employment*, Black's Law Dictionary (10th ed. 2014).

208. RESTATEMENT (SECOND) OF AGENCY § 219.

209. *Id.*

210. *Id.* § 140.

211. A.J. Perez, *Coach K says he had 'no knowledge' of alleged 1999 sexual assault linked to Duke player*, USA TODAY (Feb. 9, 2019, 10:02 PM), <https://www.usatoday.com/story/sports/ncaab/2019/02/09/duke-mike-krzyzewski-no-knowledge-ex-player-rape-allegation/2827702002/> (last visited Feb. 9, 2019).

This means the university could face timely and costly legal proceedings. It is not difficult to imagine a situation where a student-athlete commits a criminal or civil infraction on a team road trip or at a team party. These kinds of stories happen often, and it's important to shield colleges from this type of liability.

Allowing student-athletes to accept endorsement deals and receive compensation for the use of their NILs would circumvent the problem of vicarious liability. Further, as student-athletes would not be considered employees of their schools, "colleges and universities would avoid any type of workers' compensation payments or collective bargaining agreements that could arise if the student-athletes were wage earners."²¹²

Lastly, allowing student-athletes to accept endorsement deals and receive compensation for the use of their NILs would likely comply with the current section 1 of the Sherman Act jurisprudence. The court in *O'Bannon* reasoned that amateurism is a legitimate procompetitive purpose and that is why the NCAA's current anti-compensation rules do not violate the Sherman Act.²¹³ The proposed solution would virtually eliminate the NCAA's Amateurism Rule because student-athletes would receive "pay" which rids them of their amateur status. Nevertheless, the NCAA would be in compliance with the Sherman Act because it would no longer be restraining trade. Under its current rules, the NCAA is restraining trade because it does not allow student-athletes to be compensated for their labor. Therefore, if the NCAA allowed student-athletes to be compensated, it would no longer be restraining trade, and subsequently, there would no longer be an antitrust violation.

Conclusion

NCAA's Amateurism Rule has a long, complicated history. The NCAA firmly believes that its student-athletes should remain amateurs, and while that made sense thirty years ago, it does not make sense now. Last year alone, the NCAA made a billion dollars in revenue, and none of it went directly to the student-athletes whose labor made the money.²¹⁴ Corruption has ensued at colleges and universities due to the NCAA's persistence that its student-athletes remain amateurs. The NCAA argues that if it eliminates its Amateurism Rule, fans will lose interest in college sports.²¹⁵ Arguably, however, the ongoing corruption and scandals are already damaging the integrity of college sports. Therefore, the best solution to all involved would

212. Corgan, *supra* note 201, at 420-21.

213. *O'Bannon*, 802 F.3d at 1073.

214. *Here's how the NCAA generate a billion dollars in 2017*, *supra* note 15.

215. *Why The Latest NCAA Lawsuit Is Unlikely To Change Its Amateurism Rules—But Should*, *supra* note 104.

be for the NCAA to allow student-athletes to accept endorsement deals and receive compensation for the use of their NILs.

Moreover, the NCAA once again finds itself in litigation (*In Re: Nat'l Collegiate Athletics Ass'n Athletic Grant-in-Aid Cap Antitrust Litigation*²¹⁶) defending against antitrust challenges to its compensation rules. The plaintiff student-athletes are arguing that limiting their compensation prevents colleges from competing against one another.²¹⁷ On March 8, 2019, Judge Wilken, applying the antitrust rule of reason analysis, found that the challenged practices did have significant anticompetitive effects because greater compensation would be offered in the recruitment of student-athletes but for these restrictions.²¹⁸ Many people argue that the court's holding in *O'Bannon* precludes student-athletes from receiving compensation for the use of their NILs. However, *O'Bannon* does not present a hurdle for this litigation or congressional action:

The *O'Bannon* case did not implement an outright ban of compensation beyond a full scholarship, and it misapplied the Rule of Reason balancing test. Although the Supreme Court has not accepted an appeal, this case would neither prohibit a future ruling in favor of an amendment to the NCAA's amateurism regulation, nor would it place any burden on Congress should Congress decide to implement a bill that amended the regulation.²¹⁹

On March 22, 2019, the NCAA filed a notice of appeal to the Ninth Circuit.²²⁰ This allows the Ninth Circuit to revisit its ruling in *O'Bannon* and, hopefully, hold that the NCAA is violating section 1 of the Sherman Act by restricting compensation.

Nevertheless, on September 11, 2019, the California legislature passed Senate Bill 206, which allows California universities to compensate student-athletes for the use of the NILs.²²¹ The NCAA sent Governor Gavin Newsom a letter stating that this bill “would wipe out the distinction between college

216. 375 F. Supp. 3d 1058 (N.D. Cal. 2019)

217. *Id.* at 1062.

218. *Id.* at 1110.

219. Dalton Thacker, *Amateurism vs. Capitalism: A Practical Approach to Paying College Athletes*, 16 SEATTLE J. FOR SOC. JUST. 183, 195 (2017).

220. *In Re: Nat'l Collegiate Athletics Ass'n Athletic Grant-in-Aid Cap Antitrust Litigation*, No. 4:14-md-02541-CW, at *1 (N.D. Cal. 2019) (The NCAA filed a notice of appeal to the Ninth Circuit).

221. *SB-206 Collegiate athletics: student athlete compensation and representation*, CALIFORNIA LEGISLATIVE INFORMATION (Sept. 14, 2019, 4:00 AM), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206.

and professional sports”²²² While California schools are not required to compensate student-athletes for the use of their NILs under Senate Bill 206, this new development definitely puts pressure on the NCAA to reconsider their Amateurism Rule.

In a shocking turn of events, on October 29, 2019, the NCAA’s Board of Governors unanimously voted to permit student-athletes to profit from the use of their NILs.²²³ While the NCAA has not stated how this will function with its current Amateurism Rule, NCAA President Mark Emmert stated that student-athletes will remain “students and not professionals.”²²⁴ Therefore, it is likely the NCAA will retain its Amateurism Rule and simply state that compensation based on the use of student-athletes’ NILs is no longer considered pay under its compensation rules. As stated earlier, the NCAA has changed what is considered “pay” in the past without abolishing its Amateurism Rule (e.g. student-athletes were not allowed to receive scholarships because it was considered “pay”).²²⁵ However, as long as the NCAA keeps its Amateurism Rule, courts will continue to allow it to hide behind the rule when faced with future antitrust challenges. As such, while this is definitely a step in the right direction, the NCAA has to get rid of its Amateurism Rule if it wishes to end all corruption occurring at colleges and universities.

222. *NCAA responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bil-1-206>.

223. Ben Pickman, *NCAA Votes to Start Process Permitting Athletes to Benefit from Likeness*, SPORTS ILLUSTRATED (Oct. 29, 2019, 11:44 AM), <https://www.si.com/college/2019/10/29/ncaa-student-athlete-likeness-permitted-vote>.

224. *Id.*

225. *The NCAA’s Amateurism Rules are Indeed Madness*, *supra* note 10.