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ESSAYS

AFRICAN-AMERICAN STUDENT-ATHLETES: MARGINALIZING THE NCAA REGULATORY STRUCTURE?

TIMOTHY DAVIS*

I. INTRODUCTION

The regulatory scheme of the National Collegiate Athletic Association (NCAA) has been criticized for failing to comport with the present day realities that propel intercollegiate athletics.¹ In addition, key values—amateurism and educational primacy—that underlie the rules and regulations that are central to the NCAA's regulatory structure have been subjected to harsh criticism.² Moreover, NCAA rules are increasingly assailed as racially and culturally insensitive to ethnic minorities.³

This essay examines allegations that NCAA rules, while facially neutral, disparately impact African-American student-athletes. It begins with an overview of the NCAA regulatory scheme and the principles on which it is premised. Next, it identifies the NCAA rules and regulations most often criticized as disproportionately and adversely impacting the interests of African-American student-athletes. In this regard, the essay examines the impact on African-American student-athletes of rules regulating initial eligibility and financial benefits for athletic related activities.

The essay proposes that rules imposing financial restrictions fail to comport with the economic and social realities that confront many student-athletes, particularly African-Americans. I argue that the dissonance between such realities and NCAA rules converge with the commercialism in college sport to undermine the legitimacy of the NCAA regulatory scheme. The marginalization of this regulatory system

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1. See *infra* text accompanying notes 106-116.

2. See *infra* text accompanying notes 19-24.

3. See *infra* text accompanying notes 26-66.

manifests most saliently in the creation of an underground economy in intercollegiate athletics. The essay concludes with a discussion of the consequences for African-American student-athletes of their participation in this underground economy and the resultant undermining of NCAA rules and regulations.

II. THE NCAA REGULATORY SCHEME

The NCAA is a nonprofit voluntary association consisting of approximately 900 four-year colleges and universities.⁴ Adopting the notion of institutional control, the NCAA Constitution places responsibility on its member institutions for compliance with the "rules and regulations of the Association."⁵ Accordingly, a significant function of the NCAA is the promulgation of the rules and principles with which its member institutions must comply.⁶

Moreover, it is through the NCAA's rule-making and enforcement processes⁷ that the Association articulates adherence to values long perceived as fundamental to intercollegiate athletics: educational primacy and amateurism. The articulated primacy of the education and amateurism values are succinctly stated in the NCAA's statement of its primary purpose: "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."⁸

4. NCAA MINORITY OPPORTUNITY AND INTERESTS COMM., FOUR YEAR STUDY OF RACE DEMOGRAPHICS OF MEMBER INSTITUTIONS 1 (1994).

5. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1995-96 NCAA MANUAL arts. 2.1.1 & 6.01.1 [hereinafter NCAA MANUAL]. Article 6 of the NCAA Constitution expresses the concept of institutional control as follows: "The control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference(s), if any, of which it is a member." *Id.* at art. 6.01.1.

6. These rules and regulations are adopted by the NCAA at its annual meeting. NCAA MANUAL art. 5.1.1.1.

Indeed it is through the rule making process that the NCAA sets national standards for the governance of intercollegiate athletics. Timothy Davis, *A Model of Institutional Governance for Intercollegiate Athletics*, 1995 WIS. L. REV. 599, 600. See Brian Porto, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151, 1174 (1987) (describing the NCAA as the primary regulator of intercollegiate athletics).

7. Another critical function is the investigation and prosecution of alleged rules violations. Jaffe D. Dickerson & Mayer Chapman, *Contract Law, Due Process, and the NCAA*, 5 J.C. & U.L. 107, 109 (1978). Because it also determines sanctions, the NCAA has been characterized as "a hybrid of legislative, executive, and judicial bodies." *Id.*

8. NCAA MANUAL arts. 1.1.3. Other basic purposes of the NCAA include the promotion of competitive equity between its member institutions and the promotion of the economic

More specifically, the amateurism principle is described as follows: "Student-athletes shall be amateurs in an intercollegiate sport. . . . Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."⁹ NCAA Bylaws enumerate the requirements with which a student-athlete must comply in order to retain amateur status. For example, student-athletes are prohibited from accepting pay for use of their athletic abilities,¹⁰ retaining agents,¹¹ and entering into a professional draft.¹²

With respect to educational value, the NCAA considers intercollegiate athletics programs as vital components of the university's educational program.¹³ Thus, the NCAA Constitution provides that "[i]ntercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational welfare of student-athletes."¹⁴ Through this and other provisions, the "NCAA professes to adhere closely to academic or educational values in the governance of intercollegiate athletics, including big-time, revenue producing sports at the collegiate level."¹⁵ Rules reflecting the educational value include those regulating initial eligibility,¹⁶ limiting the numbers of hours

well-being of its member institutions. Andrew K. Craig, *The National Collegiate Athletic Association's No Agent and No Draft Rules: The Realities of Collegiate Sports are Forcing Change*, 4 SETON HALL J. SPORT L. 483, 486 (1994). Rules specifically designed to maintain a level playing field between institutions include those that preclude a student-athlete from employing an agent and from entering a professional draft. *Id.* The NCAA Constitution identifies rules regulating recruiting and eligibility as designed in part to promote equity among member institutions. NCAA MANUAL arts. 2.10 & 2.11.

9. NCAA MANUAL art. 2.7.

10. NCAA MANUAL arts. 12.1.1(a) & 12.1.2.

11. *Id.* at art. 12.1.1(f).

12. *Id.*

13. Section 2.4 of the NCAA Constitution provides:

THE PRINCIPLE OF SOUND ACADEMIC STANDARDS. Intercollegiate athletics programs shall be maintained as a vital component of the educational program and student-athletes shall be an integral part of the student body. The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general.

NCAA MANUAL art. 2.4.

14. NCAA MANUAL art. 2.2.

15. Rodney K. Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics*, 67 DENV. U. L. REV. 213, 217 (1990).

16. Article 14 of the NCAA Manual establishes the academic requirements with which student-athletes must comply in order to participate in intercollegiate athletic competition. NCAA MANUAL art. 14. Freshman eligibility requirements are included within these rules. *Id.* at art. 14.3.1.

per week that student-athletes can devote to athletic participation,¹⁷ and establishing satisfactory progress requirements.¹⁸

Critics question the legitimacy of the education and amateurism values as providing justification for NCAA rules in the context of big-time¹⁹ intercollegiate athletics.²⁰ Moreover, the effectiveness of NCAA rules in enhancing these values has been fiercely debated. For instance, one commentator has argued that the primary purpose of adherence to the amateurism value is to provide a justification for institutions refusing to share with student-athletes the revenues generated by participation in Division I-A football and men's basketball—the most prominent revenue-producing sports.²¹ Noted one commentator, “[c]ritics of these regulations point out that the member universities that run the NCAA have perverse incentives when it comes to considering the effect the regulations have on student-athletes, since the universities themselves derive a direct financial benefit from limiting student-athlete compensation and restricting mobility.”²² In addition, critics question whether rules adequately promote the value of education primacy, particularly given the

17. Student-athlete participation in athletic related activities cannot exceed 4 hours per day or 20 hours per week. *Id.* at art. 17.1.5.1.

18. *Id.* at art. 14.4.1.

19. Big-time intercollegiate sports typically is defined as consisting of Division I-A football and Division I men's basketball, the primary revenue producing sports. Rodney K. Smith, *Little Ado About Something: Playing Games with Reform of Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 567, 569 n.5 (1991).

20. The notion of amateurism has been described as anachronistic. “[I]t is a throwback to an era when only the leisure classes had the time and wherewithal and were permitted to participate in athletics.” Smith, *supra* note 15, at 225 n. 54; Sharon E. Rush, *Touchdowns, Toddlers, and Taboos: On Paying College Athletics and Surrogate Contract Mothers*, 31 ARIZ. L. REV. 549, 551-52 (1989); Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7 (1991) (arguing that the Greek ideal of amateurism on which NCAA rules are based is a myth).

One sports agent described the NCAA's professed principle of amateurism as a mechanism that “artificially [protects] the profit structure of [big time college sports].” D. STANLEY EITZEN & GEORGE H. SAGE, *SOCIOLOGY OF NORTH AMERICAN SPORT* 138 (5th ed. 1993) (quoting Mike Trope).

21. David A. Skeel, *Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA*, 1995 WIS. L. REV. 669, 670; Rodney K. Smith, *supra* note 15, at 224. Craig, *supra* note 8, at 515 (describing as tenuous the justifications for NCAA no-draft and no-agent rules based on the principles of educational primacy, amateurism, and competitive equity given the commercial nature of college athletics and the NCAA); WALTER BYERS, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES* 376 (1995) (describing college amateurism as “economic camouflage for monopoly practice”); Note, *Sherman Act Invalidity of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299 (1992) (reaching the same conclusion); See EITZEN & SAGE, *supra* note 20, at 129-30 (providing illustrations to support their conclusion that “college athletics are not amateur athletics”).

22. Skeel, *supra* note 21, at 670.

failure of many institutions to provide their student-athletes with an opportunity to derive substantively valuable benefits.²³ Indeed, emphasizing the development of successful athletics programs may cause institutions to pay insufficient attention to the education student-athletes receive during their college careers.²⁴

The conflict residing in the NCAA's stated goals of educational primacy and amateurism and its role as an economic regulator underlies the problems that give rise to such criticisms. At the base of this conflict is the commercialization of college sport.²⁵ Ultimately, these criticisms focus on the extent to which NCAA rules and regulations promote the principles on which they derive their justification. This, in turn, raises questions regarding the legitimacy of the NCAA's regulatory system.

III. NCAA RULES: RACIALLY AND CULTURALLY INSENSITIVE?

In discussing NCAA legislation that raised academic standards, a sports columnist recently wrote, "the Presidents Commission is continuing down a path that creates rules in a vacuum, harming economically disadvantaged and academically at-risk student-athletes. . . . [T]here has to be responsible insight involved, not knee-jerk surface reform."²⁶ This statement reflects the sentiment of many, including organizations such as the Black Coaches Association (BCA)²⁷ and the Rainbow Commission on Fairness in Athletics,²⁸ that have focused attention on the racial impact of NCAA rules and regulations.

23. John R. Allison, *Rule-Making Accuracy in the NCAA and its Member Institutions: Do Their Decisional Structures and Processes Promote Educational Primacy for the Student-Athlete?*, 44 KAN. L. REV. 1, 6, 56 (1995). See generally EITZEN & SAGE, *supra* note 17, at 134-35 (arguing that in the context of college sports, the pursuit of education is subordinated to the pursuit of economic interests); Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269 (1994); Robert N. Davis, *Athletic Reform: Missing the Bases in University Athletics*, 20 CAP. U.L. REV. 597 (1991); Smith, *supra* note 19, at 568.

24. Skeel, *supra* note 21, at 670.

25. See Christopher L. Chin, Note, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1216-17 (1993); NAND HART-NIBBRIG & CLEMENT COTTINGHAM, *THE POLITICAL ECONOMY OF COLLEGE SPORTS* 15 (1986) (concluding that college sports currently rests on values, such as commercialism, which depart fundamentally from the amateurism principle).

26. Bryan Burwell, *After String of Setbacks at Convention, Protest Forces Cast an Eye Toward Courts*, USA TODAY, Jan. 5, 1996, at 6C.

27. The BCA is comprised of approximately 3,000 African-American high school and college athletic coaches. Debra E. Blum, *Eyes on the Prize*, CHRON. HIGHER EDUC., July 13, 1994, at A33, A34.

28. The Rainbow Commission on Fairness in Athletics is a group organized by the Rev. Jessie Jackson. Debra E. Blum, *Black in Sports; Freshman Eligibility; NCAA Restructuring*,

The BCA has assailed limited African-American involvement in the NCAA's rule-making process, the disproportionate impact of certain rules on African-American students, and African-Americans' access to coaching opportunities.²⁹ The BCA drew attention to these issues in 1993 by threatening to mount a series of protest activities, including a possible coaches' and players' boycott of basketball games.³⁰ The threatened boycott was forestalled by behind the scenes negotiations.³¹ Nevertheless, the BCA's activities heightened awareness of racial inequities in college sport.³²

CHRON. HIGHER EDUC., Apr. 7, 1995, at A38. In 1994, it developed a seven point plan for increasing racial diversity at NCAA institutions. Key components of the plan included: developing affirmative action plans to increase the numbers of minorities and women in sports administrative positions; increasing the number of minority student-athletes in nonrevenue sports; developing programs that will provide life-skills for student-athletes; and developing and implementing diversity training by institutions for athletic administrators and coaches. *Rainbow Coalition Develops Diversity Plan for Institutions*, NCAA NEWS, Nov. 7, 1994, at 1, 20.

29. Steve Berkowitz, *Black Coaches' Group to Boycott Issues Forum*, WASH. POST, Oct. 13, 1993, at F1.

30. Steve Wieberg, *NCAA Move Doesn't Deter Black Coaches*, USA TODAY, Oct. 21, 1993, at 7C. The threatened boycott, which was characterized as "Black Saturday," would have urged players and coaches to boycott college basketball games on a specific Saturday.

31. These negotiations culminated in a plan whereby the Community Relations Service, a branch of the United States Justice Department, intervened to mediate the BCA's dispute with the NCAA. *BCA Delays Boycott Action*, NCAA NEWS, Jan. 19, 1994, at 1; Steve Richardson, *Black Coaches Association Postpones Boycott of College Basketball Games*, DALLAS MORNING NEWS, Jan. 15, 1994, at 1A. The first in a series of mediation sessions between the BCA and NCAA was convened on March 1, 1994. Wieberg, *supra* note 30, at 1C. In turn, these discussions led to an agreement that addressed "a number of issues related to expansion of education, employment and governance-participation opportunities for Blacks and other ethnic minorities within the NCAA. . . ." *Method for Addressing Issues Provided by NCAA-BCA Talks*, NCAA NEWS, Mar. 30, 1994, at 1. The agreement delineated a set of governing principles that provided the framework for future discussions between the BCA and NCAA. In addition, endorsements set forth in the agreement call for enhanced communication between the NCAA and the BCA so as to facilitate increased opportunities for African-Americans to participate in all levels of intercollegiate athletes. Debra E. Blum, *Black Coaches and NCAA Agree to Discuss Disputed Rules*, CHRON. HIGHER EDUC., Mar. 30, 1994, at A36 (summarizing the accord reached between the NCAA and BCA).

32. Richard Lapchick credits the BCA for the recent surge of interest on the issue of racism in college sport. Richard Lapchick, *Finally a Small Step in the Right Direction*, SPORTING NEWS, Jan. 31, 1994, at 8.

The BCA's activities represent a continuation of protest efforts by black coaches and administrators. As noted by one commentator, "[f]or years, black coaches and others have complained about academic standards set by the NCAA, which they say discriminate against black athletes. They have also voiced their discontent with what they see as the shrinking availability of scholarships for black athletes and limited opportunities in college sports for the advancement of black coaches." Debra E. Blum, *Black Coaches vs. an NCAA Rule*, CHRON. HIGHER EDUC., Nov. 10, 1993, at A36.

The alleged unfairness of NCAA rules with respect to African-American student-athletes represents one of the primary concerns on which the BCA has aroused interest.³³ Several NCAA rules allegedly reflect racial or cultural bias.³⁴ These rules include: a) alleged disparate impact and cultural bias of NCAA initial eligibility standards;³⁵ b) rules that restrict the money student-athletes are permitted to earn; and c) legislation that limits the access of coaches to student-athletes and prospective recruits.³⁶ This essay examines two of these concerns: initial eligibility standards and financial restrictions.

33. The alleged racial insensitivity of NCAA rules is perceived as one of the manifestations of a larger problem—the persistence of racism in college sport. The BCA identifies “two broad category of harmful consequences caused by the persistence of racism in intercollegiate athletics: (i) denial of unqualified participation in the college sport infrastructure; and (ii) the adverse impact on the academic, social and psychological well-being of the African-American student-athlete.” Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 653 (1995). See *Black Caucus Backs Basketball Coaches*, DETROIT FREE PRESS, Oct. 20, 1993, at 2C (noting black coaches’ criticisms of uniform rules that more severely impact the interests of African-American student-athletes); *Black Coaches Seek Help on Capitol Hill*, PLAIN DEALER (Cleveland), Oct. 20, 1993, at 1D (discussing how several NCAA policies disparately impact African-Americans).

34. In addition to the legislation discussed below, critics assert that other NCAA legislation and decisions result in inequitable treatment for African-American student-athletes. This includes NCAA legislation that reduced the number of athletic scholarships in basketball and football. As a part of an agenda aimed at reducing costs of intercollegiate athletic programs, the NCAA at its 1993 convention reduced scholarships as follows: football from 95 in 1992 to 85 in 1994, and basketball from 15 in 1992 to 13 in 1993. NCAA MANUAL arts. 15.5.4, 15.5.5; Steve Berkowitz, *Two Groups, but Similar Agenda; Black Basketball Coaches Split from National Group to Press Issues*, WASH. POST, Oct. 19, 1993, at E2.

Critics assert these reductions limit opportunities for prospective African-American student-athletes. George H. Raveling, *Black Coaches Want to be Heard*, NCAA NEWS, Nov. 29, 1993, at 4; Berkowitz, *supra*, at F1. BCA members asserted that scholarship reductions eliminate opportunities for black student-athletes and demonstrate a lack of sensitivity to the African-American community. John Weyler, *Baker Among Those Boycotting Conference of Black Coaches*, L.A. TIMES, Oct. 19, 1993, at 7C. Others expressed concern that cuts in scholarships were made to accommodate gender equity issues at the expense of issues and concerns involving black athletes. Berkowitz, *supra*, at F1.

At its 1996 Convention, the NCAA rejected a proposal that would have increased the number of men’s basketball scholarships from 13 to 14. NCAA CONVENTION, NCAA NEWS, Jan. 11, 1996, at 6C.

35. Raveling, *supra* note 34, at 5.

36. The NCAA imposes limitations on the amount of time that Division I student-athletes can spend with off-season sports programs. NCAA MANUAL art. 17.1.5.2. In discussing this issue in an earlier article, I concluded as follows: “Limiting the degree to which student-athletes can participate in such organized activities has the subsidiary effect of limiting the time that they spend under a coach’s guidance. Black coaches criticize this rule as interfering with the mentoring function that African-American coaches can provide for black-students.” Davis, *supra* note 33, at 661; see Blum, *supra* note 32, Nov. 10, 1993, at A48 (noting the access of coaches to players and prospective players is a concern which seems only to have recently emerged).

A. Earned Income Limitations

At their 1996 Convention, NCAA members defeated a proposal that would have exempted from scholarship athlete's grant-in-aid limits money that they earned from employment during the academic year when their sport was not in season.³⁷ A more controversial proposal that would have "permitted student-athletes to work during the academic year and exempt up to \$1,500 from grant-in-aid limits was with-

Similar criticisms are voiced with respect to NCAA rules limiting coaches' access to high school students. NCAA rules limit the contact that coaches may have with prospective student-athletes from the time the latter enter the ninth grade. Recruiting contact limitations grew out of abuses relating to contact with high school athletes. Blum, *supra*, at A49. Possible legitimate reasons for such limitations have not quieted critics:

The problem with the rules at the high school level echoes that of the NCAA rules: such restrictions inhibit the mentoring role that coaches can provide for troubled black youths. The frustration emanating from this rule was dramatically articulated by John Thompson: "When somebody's shooting somebody down here on First and K Street and I can't jump in a car and go down there because, without a manual, I can't determine whether he's a recruitable athlete or not, that's where we're frustrated." In short, many African-American coaches view such rules as being inconsistent with what they perceive as their special obligation to help young people in African-American communities.

Davis, *supra* note 33, at 661-62. See *id.* at 661 n.242 (discussing the skepticism held by many in the athletic community of the seemingly altruistic motivations of black coaches).

37. Ronald D. Mott, *Delegates Reject Modification to Initial-Eligibility Standards*, NCAA News, Jan. 15, 1996, at 7. Delegates were concerned that approval of this proposal would lead to athletic departments arranging jobs for students that required no real work. Debra E. Blum, *Upholding Standards: NCAA Rejects Effort to Ease Eligibility Rules; Changes in Governance Approved*, CHRON. HIGHER EDUC., Jan. 19, 1996, at A31, A33.

The text of Proposal 31, provided, in part, as follows: "Permit Division I student-athletes to exempt legitimate on-or-off campus employment income in excess of a full grant-in-aid, provided the employment occurs during the nontraditional or out-of-season segment of the playing season in the student-athlete's sport. . . ." *Convention will Focus Right Away on Restructuring*, NCAA News, Nov. 27, 1995, at 1, 9.

The NCAA Student-Athlete Advisory Committee advocated in favor of Proposal 31. "We feel very strongly about a student's right to work. . . . Often, a full grant-in-aid does not cover a number of incidental expenses. Allowing a student-athlete to work in the off-season would enable that individual to receive valuable work experience while at the same time earning money for outside expenses." Bridget Niland, *A Mixed Bag of Results from the Convention*, NCAA News, Jan. 22, 1996, at 4.

It should be noted that student-athletes do not represent a monolithic group with all members sharing identical interests. One commentator spoke to this reality in the context of compensation. "Yet even within the limited context of revenue-producing sports, student-athlete interests are far from uniform. While the limits on compensation seem to penalize the very best football and basketball players, for instance, other athletes may actually benefit if restrictions on marketable players leave more money for granting scholarships and related support to those who are not among the very best athletes." Skeel, *supra* note 21, at 670.

drawn."³⁸ In a move viewed as favorable for student-athletes, delegates voted to discontinue calculating Pell Grants into determining what constitutes a full grant-in-aid.³⁹

The foregoing actions by NCAA delegates are the latest in the continuing controversy surrounding NCAA restrictions on the amounts student-athletes are permitted to earn. For example, the BCA and other groups have argued in favor of controversial proposals that would permit student-athletes to receive stipends of as much as \$1,500 per year.⁴⁰ These proposals represent an assault on NCAA regulations that limit the amount of income that student-athletes can earn.⁴¹ Yet proponents of these initiatives argue that easing financial restrictions on student-athletes is justified given the effort expended by student-athletes and the benefits derived therefrom by their institutions.⁴² Critics also point to the limited access that student-athletes from economically disadvantaged backgrounds have to spending money as a basis for easing limits on the income student-athletes are permitted to earn.⁴³

Opponents of initiatives that would pay student-athletes a stipend and ease other financial restrictions argue that student-athletes are adequately compensated. They believe that the athletic scholarship, the NCAA's special assistance fund, and Pell Grants are sufficient to satisfy

38. *Id.* Proposal 32 provided: "Permit Division I student-athletes to earn up to \$1,500 in legitimate on-or-off campus employment income in excess of a full grant-in-aid, provided the institution's athletics department staff members and/or representatives of the institution's athletics interests are not involved in arranging the employment." *Convention Will Focus Right Away on Restructuring*, NCAA NEWS, Nov. 27, 1995, at 1, 9.

39. *Id.* Proposal 33 provides "that a Pell Grant shall not be included when determining the permissible amount of a full grant-in-aid for a student-athlete." *Id.*

40. Raveling, *supra* note 34, at 5. The NCAA Student-Athlete Advisory Council is among the groups that support this and other legislation easing restrictions on the income student-athletes can earn. *Student-Athletes Push Earnings Proposal Again*, NCAA NEWS, Sept. 18, 1995, at 5.

41. Davis, *supra* note 33, at 662.

42. Ronald D. Mott, *Student-Athlete Voices Join Pay-for-Play Debate*, NCAA NEWS, Sept. 19, 1994, at 1, 19. Explained a student-athlete from a high profile program, "athletes are put through tough workouts and (are) expected to train and keep up their skill level all year. . . ." *Id.* at 19. This perspective was echoed by another student-athlete. "I do feel that these players should receive some type of status other than scholarships, especially the athletes, whom these universities are really broadcasting and using (their) names on university issues. . . ." *Id.*

The extent to which institutions derive financial benefits from the services provided by their student-athletes is discussed *infra* in text accompanying notes 81-91.

43. *Black Coaches Association Seeks End to Freshman Eligibility*, NCAA NEWS, June 1, 1994, at 1. Studies reveal that African-American student-athletes come from households with lower socioeconomic status. AM. INSTS. FOR RES., REPT. NO. 3: EXPERIENCES OF BLACK INTERCOLLEGIATE ATHLETICS AT NCAA DIVISION I INSTITUTIONS 13 (1989).

financial needs of student-athletes.⁴⁴ The financial realities of intercollegiate athletes are also stated as a rationale for rejecting pay-for-play ideas.⁴⁵ Says one coach commenting on the stipend issue, "I agree that it would be wonderful if it could be done, but when you're looking at the number of athletics departments that are running in the red already and the fact that if you are going to do it for revenue-producing sports—football and basketball—you also are going to have to do it for a similar number of female athletes. . . I just don't think it's feasible."⁴⁶

B. Academic Eligibility Standards

At the 1996 NCAA Convention, delegates acted on other rules that have been criticized as racially insensitive to black student-athletes: initial eligibility standards. The delegates rejected a proposal to modify Proposition 16. Under Proposition 16, eligibility is determined pursuant to an indexed scale, which requires that high school graduates with a 700 or 17, on the SAT or ACT, respectively, must have at least a 2.5 GPA in a core curriculum that consists of 13 courses.⁴⁷ A prospective student-athlete with a 2.0 GPA would be required to score at least 900 or 17 on the SAT or ACT, respectively.⁴⁸ The rejected proposal sought to redefine partial qualifiers so as to include those student-athletes who would be qualifiers under the existing standards known as Proposition 48.⁴⁹ In rejecting Proposal 19, the NCAA membership decided to adhere to

44. Jonathan Feigen, *Green with Envy; Athletes Earn Colleges and NCAA Money, but what's in it for Them?*, HOUSTON CHRONICLE, March 31, 1995, at 1 (discussing the position of NCAA administrators who also contend that a college education and the college experience are of substantial value to student-athletes).

Others, however, challenge the assertion that scholarships adequately compensate student-athletes. Notes one commentator, "a scholarship is a pittance compared to the millions of dollars that an institution can make." Leroy D. Clark, *Pay to Play: is It Time to Change the Playing Field?*, EMERGE, Oct. 31, 1994, at 54. Moreover, the value of the scholarship is questionable inasmuch as many student-athletes obtain little in the way of substantive educational benefit from their college experience. *Id.* See Feigen, *supra* (quoting a basketball coach who states that the \$40,000 estimated value of tuition and other benefits is minuscule in comparison to the billions generated).

45. *Id.* Feigen, *supra* note 44, at 1 (noting that according to NCAA executive director, Cedric Dempsey, paying student-athletes a stipend would add to athletic budgets already in the red).

46. *Id.*

47. NCAA MANUAL art. 14, § 14.3.1.1(b).

48. *Id.* § 14.3.1.1(a). Under current standards, commonly known as Proposition 48, a scholarship athlete is eligible to compete during his or her first year only if he or she scores 700 or 17 on the SAT and ACT, respectively. The student must also have at least a 2.0 grade point average in a core curriculum which consists of 11 courses. *Id.* §§ 14.3.1.1(a), (b).

49. Mott, *supra* note 37, at 7. "The measure, Proposal 19, would have lowered the bar for athletes to be considered as partial qualifiers under the new rules [Proposition 16]. . . . The

plans to toughen academic standards for freshman athletes.⁵⁰ In addition, a proposal that would have eliminated the standardized test score component of Proposition 16 requirements if an incoming freshman demonstrated a strong high school record was withdrawn for lack of support.⁵¹

The NCAA's decision to reject efforts to redefine partial qualifiers represents the latest chapter in the debate concerning the fairness of initial eligibility standards. The soon to be effective Proposition 16 and its predecessor Proposition 48 have been subjected to harsh criticism. Critics assert that these rules reflect bias against African-American student-athletes.⁵² Specifically, critics challenge these standards as relying too

failed proposal would have permitted athletes who meet some but not all of the rules to compete as freshman." *Id.*

50. Debra E. Blum, *Upholding Standards, NCAA Rejects Effort to Ease Eligibility Rules; Changes in Governance Approved*, CHRON. HIGHER EDUC., Jan. 19, 1996, at A31. Proposal 19 lost by three votes when it was initially considered and by two votes on reconsideration. *Id.*

51. Debra E. Blum, *Legal Challenges; Restricted-Earnings Rules*, CHRON. HIGHER EDUC., Jan. 19, 1996, at A33. This proposal was supported by the NAACP, the Women's Sports Foundation, and the Mid-Eastern Athletic Conference, a league of historically black Division I colleges. *Id.*

52. Professor Linda Greene, the first legal scholar to critically evaluate initial eligibility rules, examined Proposition 48. Linda S. Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism*, 28 ST. LOUIS U. L.J. 101 (1984). Based upon her examination, she concluded that its implementation invoked both procedural and substantive concerns. The former related to the exclusion of African-American educators and administrators in the rule promulgation process. The substantive concerns related to the potentially adverse impact of the rules on African-American student-athletes and historically black colleges. *Id.* at 111-12. Other commentators have evaluated equal protection challenges premised on the disproportionate impact of the standards on African-Americans. See generally Michael R. Lufrano, *The NCAA's Involvement in Setting Academic Standards: Legality and Desirability*, 4 SETON HALL J. SPORT L. 97 (1994).

In addition to charges of racism, other less publicized, yet in many cases related criticisms, were leveled against Proposition 48. Some critics lashed out at the universal application of Proposition 48. They argued that it failed to take into account the unique circumstances not only of student-athletes but also of institutions. Marvin Cobb, *Schools Have Responsibility to Underprepared Athletes*, USA TODAY, Jan. 21, 1992, at 8C (noting that Proposition 48 indirectly limited black athletes' access to historically black institutions as well as predominantly white institutions). David Davidson, *Administrators Say Prop 48 a Lose-Lose Situation*, ATLANTA J. CONST. July 28, 1991, at F1 (arguing Proposition 48 failed to provide for institutional diversity). An administrator at a historically black institution expressed the following criticism: "An athlete below a 2.5 might have trouble at Notre Dame or Penn State or Southern California, but he would be right in line and have a good opportunity for success at Valley, Grambling, Jackson State and a lot of predominantly black institutions. . . ." *Id.*

Other critics asserted that Proposition 48 had less to do with restoring academic integrity and more to do with protecting the sphere of influence and power of the NCAA. Some perceived it as a measure intended to serve as a shield against governmental legislation that would regulate sports. William C. Rhoden, *Sports of the Times: N.C.A.A.'s Smoke and Mirrors*, N.Y. TIMES, Jan. 11, 1992, § 1, at 27.

heavily on what they believe are culturally and racially biased standardized tests.⁵³ Data collected by the NCAA and independent researchers to the effect that "class room performance is by far the best predictor of academic achievement in college" lend credence to these allegations.⁵⁴ According to critics, heightened standards unfairly reduce college access to many black student-athletes unable to comply with the rules.⁵⁵

On the other hand, advocates for heightened standards argue that stricter initial eligibility standards reflect neither patent nor latent racism. Rather, they argue that the new standards promote the education value.⁵⁶ Proponents also argue that heightened standards represent a means of ensuring that student-athletes have a reasonable chance to obtain a meaningful degree.⁵⁷ The nature of the debate is reflected in

Finally, others viewed the new standards as a move by the NCAA to protect the competitive position of predominantly white Division I institutions. Cobb, *supra* note 52.

53. Cobb, *supra* note 52. For example, the National Center for Fair and Open Testing (FairTest), a non-profit group that monitors standardized tests, asserts that the NCAA's initial eligibility rules reflect racial and gender bias. Blum, *supra* note 51, at A33. Specifically, FairTest alleges that reliance on standardized tests has a disparate impact on black and females. *Id.* The findings of FairTest can be found in FAIR TEST, NATIONAL REPORT OF THE MCINTOSH COMMISSION FOR FAIR PLAY IN STUDENT-ATHLETE ADMISSIONS (1994).

54. Bob Oates, *The Heartless Bunch; College Presidents Disregard NCAA Studies: SAT Test Are Unfair to Athletes*, L.A. TIMES, Jan. 8, 1995, at C3.

55. Davis, *supra* note 33, at 666. In 1993, the President of the BCA, Marian Washington, asserted that the NCAA would soon "be legislating people out of going to college." Steve Berkowitz, *Coaches' Boycott Possible: African-American Officials Air Grievances*, WASH. POST, Oct. 11, 1993, at C5.

Two-thirds of the students who failed to meet Proposition 48 requirements were minorities. Steve Weiberg, *Minority Leaders Set to Respond to Academic Rules*, USA TODAY, Jan. 6, 1995, at 10C.

56. For many, Propositions 48 and 16 marked the beginning of efforts to restore academic integrity at colleges and universities, which had been undermined by scandals arising from intercollegiate sports. Rhoden, *supra* note 52, § 1.

57. Davidson, *supra* note 52, at F1 (quoting a college administrator).

Blacks did not express a homogenous view with regard to Proposition 48. The National Alliance of Black School Educators, National Associations for Equality of Opportunity in Higher Education, and notable African-Americans such as Jesse Jackson and Benjamin Hooks criticized the lack of black input in formulating the standards as well as the discriminatory implications of the rules. Audwin Anderson & Donald South, *Racial Differences in Collegiate Recruiting, Retention, and Graduation Rates*, in RACISM IN COLLEGE ATHLETICS: THE AFRICAN-AMERICAN ATHLETE'S EXPERIENCE 89-90 (Dana Brooks & Ronald Althouse eds., 1993).

An equally sincere group of African-Americans viewed the standards as nondiscriminatory and a step towards emphasizing the educational component of college athletics and stemming the exploitation of African-American student-athletes. *Id.* Lloyd V. Hackley, Chancellor of the University of Arkansas at Pine Bluff, Arthur Ashe, and Harry Edwards were among those favoring the new standards as tools for motivating black student-athletes to focus more on education. *Id.*

comments made during discussions of proposals to modify the definition of partial qualifiers under Proposition 16:

Expressing concern about the impact of Proposal No. 19 on ethnic minorities, [Steven B.] Sample, [president of the University of Southern California], said increasing academic requirements is in the best interest of student-athletes. He added that the passage a decade ago of Proposition 48 — perhaps the most publicized legislation in the history of the Association — has benefited minorities. . . .

Nothing has done more to raise standards in our inner-city schools than Prop 48. Student-athletes are the role models in our inner city schools . . . and the really good news is that if we stand firm, (performance) standards are going to go up dramatically. The adoption of Proposition 19 will do good things for minorities.⁵⁸

In short, those who favor Proposition 16 argue that African-American student-athletes will meet the new academic challenges presented by Proposition 16.⁵⁹ They point to findings that black student-athletes are entering Division I institutions at rates higher now than before Proposition 48 went into effect to support their position.⁶⁰ Critics of stricter standards assert that such figures belie the fact that standards discriminate against black student-athletes and those from lower socio-economic backgrounds.⁶¹ "Yes, you will get student-athletes who meet the standards, but are you simply replacing students from low socio-economic backgrounds with people from higher socio-economic backgrounds?"⁶² They also point out that the number of whites to blacks on athletic schol-

58. Ronald D. Mott, *Delegates Reject Modifications to Initial-Eligibility Standards*, NCAA NEWS, Jan. 15, 1996, at 7.

59. See, e.g., William Friday & Leroy Walker, *Minorities will Gain, not Lose, under Plan*, USA TODAY, Jan. 6, 1995, at 2C; E.M. Swift, *Propping up Student-Athletes; With Prop 48's Success, College Educators are Pushing High Schoolers to Aim Even Higher*, SPORTS ILLUSTRATED, Dec. 4, 1994, at 88.

60. Debra E. Blum, *Proportion of Black Athletes Rises at NCAA's Division I Institutions*, CHRON. HIGHER EDUC., Feb. 10, 1995, at A36.

61. *Id.* Others caution against drawing conclusions from the data due to a lack of availability of comparable data for all entering freshman which might provide insight on trends that could have had an impact on the entry of black student-athletes. *Id.*

62. *Id.* (quoting William B. DeLauder, president of Delaware State University). Others assert that no evidence exists to support assertions that lower socio-economic minority students are being replaced by those who are better-off. Friday & Walker, *supra* note 59, at 2C.

arships has increased since tougher initial eligibility requirements took effect.⁶³

More fundamentally, critics assert that tougher standards focus blame on student-athletes for the failure of institutions to curb the educational exploitation of their athletes.⁶⁴ Stiffer requirements are seen as a mechanism to create a positive perception and ease the public's fears regarding the imbalance between athletics and education.⁶⁵ In other words, heightening eligibility requirements are viewed as an easy means of shifting educational responsibility from universities to student-athletes.⁶⁶

IV. THE MARGINALIZATION OF NCAA RULES

In summary, critics assert that, with regard to African-Americans, certain NCAA rules reflect racial bias, cultural insensitivity, or both. Such criticisms are derived in large measure from beliefs that certain rules are divorced from the realities of the African-American student-athletes' experiences. The essay next discusses the consequences of such perceptions.

A. Contributing Factors

1. Dissonance Between NCAA Rules and Justifications

Rules provide the guidance that allows us to organize our morality, social behavior, and legal relations.⁶⁷ They are designed to promote an end and therefore to obtain particular principles.⁶⁸ "The principle is the end and the rule is the means."⁶⁹ But a rule functions as more than the articulation of specific objectives, it also imposes sanctions for violations of its terms.⁷⁰

63. Steve Weiberg, *Prop 48 Study Raises Questions of Racial Equity*, USA TODAY, July 7, 1995, at 10C. According to results released in 1995, the "ratio of whites to blacks on athletic scholarships has gone from 2.5-to-1 to 3-to-1." *Id.*

64. Oates, *supra* note 54, at C3.

65. Charles Farrell, *Many Blacks Would Not Get Chance to Attend College*, CHI. TRIB., Jan. 8, 1995, at 5C.

66. *Id.*

67. Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 PENN. L. REV. 1191 (1991) (adding that "effective government depends on rules and obedience to rules"); Robert Henle, *Principles of Legality: Qualities of Lon Fuller, St. Thomas Aquinas*, 39 AM. J. JURIS. 47 (1994) (noting Fuller's proposition that rules are necessary to have a viable society).

68. Allison, *supra* note 23, at 12.

69. Allison, *supra* note 23, at 13.

70. *Id.* at 11 ("rules designate the consequence of violative acts"); Alexander & Sherwin, *supra* note 67, at 1194, 1199.

The rules and regulations that comprise the NCAA regulatory structure adhere to established precepts concerning the purpose and function of rules. As discussed above, NCAA rules are promulgated to promote the principles of amateurism, educational primacy and competitiveness. Moreover, the NCAA's regulatory scheme incorporates procedures for investigating and meting out sanctions for conduct that violates the rules that theoretically attempt to achieve these objectives. Yet the threat of significant sanctions, such as the loss of athletic eligibility, has not deterred student-athlete conduct that defies the NCAA regulatory system and consequently marginalizes it.

One factor that contributes to the marginalization of NCAA rules is the perceived dissonance between NCAA rules and the principles that they are intended to promote. In discussing rules in the context of the NCAA's rule-making process, Professor John Allison states that accuracy in rule-making occurs when a rule is specified that seems best to implement the backing principle.⁷¹ He concludes that rules that inadequately promote the principles of educational primacy are inaccurate and tend to negatively impact student-athletes.⁷² As noted above, similar arguments have been made with respect to rules intended to promote the amateurism value.

The exclusion of student-athletes from the decision-making process may also undermine the legitimacy of NCAA rules and regulations. Recently, the NCAA has attempted to enhance the role of student-athletes in its governance process, principally through a Student-Athlete Advisory Committee.⁷³ For a variety of reasons, the advisory committee and other mechanisms intended to amplify the student-athlete's voice in NCAA decision-making fail to serve as appropriate vehicles for obtaining input from student-athletes.⁷⁴ Unfortunately, the absence of effective student-athlete representation in the NCAA governance process makes it easier to ignore their interests, which results in inequitable

71. Allison, *supra* note 23, at 13.

72. *Id.*

73. NCAA MANUAL art. 21.3.28. The purpose of the committee is to "receive information on and explanations of NCAA activities and legislation and, in consultation with former NCAA officers . . . review and react to topics referred to it by other [NCAA] committees and by the Council." *Id.* at art. 21.3.28.3. Other mechanisms intended to increase student-athlete input include requiring that each NCAA member institution create student-athlete advisory committees and adding student-athletes to NCAA committees. Skeel, *supra* note 21, at 679.

74. Allison, *supra* note 23, at 24-25. Professor Allison discusses the factors that limit meaningful student-athlete input into the NCAA rule-making process. *Id.* See also Skeel, *supra* note 21, at 679 (discussing the same).

treatment.⁷⁵ According to one commentator, "inclusion is justified as a means of ensuring that decision-makers will pay closer attention to the constituency in question."⁷⁶ Thus, inequities converge with ineffective opportunities for input into NCAA decision-making to increase the likelihood that student-athletes will question the legitimacy of the NCAA regulatory structure.⁷⁷

a. Institutional Commercialism

In addition, student-athlete attitudes concerning those charged with enforcement responsibilities significantly contribute to the devaluation of NCAA rules and the principles on which they are premised.⁷⁸ The NCAA's executive director, Cedric Dempsey, recently warned that "mistrust among college athletic programs and duplicitous behavior by college administrators have placed the NCAA in peril."⁷⁹ The duplicitous behavior described by Dempsey includes the gap between what administrators say and what they do.

The entry of colleges into the lucrative athletic endorsement field is illustrative of the type of institutional commercial behavior that generates cynicism on the part of student-athletes and thereby undermines the amateurism and educational values professed to underlie NCAA rules and regulations.⁸⁰ During 1994, colleges generated \$2.5 billion in retail sales of merchandise bearing their names, logos, and mascots.⁸¹ Many of college athletics most successful programs⁸² have entered into multi-million dollar deals with major apparel manufacturers such as Nike and

75. Smith, *supra* note 15, at 264-66.

76. Skeel, *supra* note 21, at 677.

77. See Allison, *supra* note 23, at 14 (suggesting that effective involvement in the decision-making process confers legitimacy on decisions).

78. See Jane K. Winn, *Relationship Practices and the Marginalization of Law: Informal Financial Practice of Small Business in Taiwan*, 28 LAW & SOCIETY 193, 201 (1994) (identifying formalistic legislation divorced from social realities and the misconduct of those charged with enforcing laws as contributing to the marginalization of law).

79. Doug Bedell, *NCAA's Leader Warns of Dangers for Athletics*, DALLAS MORNING NEWS, Jan. 8, 1996, at 3B.

80. Another all too familiar illustration is the message sent by administrators who profess the values of academic primacy and amateurism while luring coaches with huge salaries and dismissing them solely on the basis of their win-loss record. *Id.*

81. Mark Asher, *NCAA Schools Search for Shoe Deals that Fit; College Gear Worth Millions to Nike, Schools*, WASH. POST, Nov. 19, 1995, at A1.

82. Apparel companies such as Nike and Reebok are most interested in dealing with schools with successful and visible athletic programs. For example seven of the 10 schools with whom Nike and Reebok have all-sports contracts were ranked in 1995 among the top 25 football teams. *Id.*

Reebok.⁸³ For example, over the next five years the Nike swoosh logo will appear on the team jerseys, shoes, wristbands, and gloves of football players at Florida State. In addition, it will appear on clothing and hats worn by Florida State football coach Bobby Bowden and his staff.⁸⁴ In exchange, Nike will pay Florida State six million dollars, and provide equipment and apparel for Florida State's seventeen varsity teams. Coach Bowden will receive a yearly payment of \$225,000 in addition to his salary.⁸⁵

Nike sells Florida State football jerseys with the number of a star running back. When the athlete was asked whether he should receive money for the sale of these jerseys, he replied:

That always crosses my mind. Just imagine if I wore another number, they'd probably be buying that number. . . . The university's just making money off of us. We can't do anything about that. All we do is go out and play well, get a free education, and hopefully good things happen to us.⁸⁶

The foregoing statement is consistent with the belief that a possible consequence of this new form of corporate involvement is that companies such as Nike may play too significant a role in the affairs of college athletic programs.⁸⁷ Moreover, collegiate administrators and officials are concerned that this involvement "fosters an environment in which athletes might be more tempted than ever to accept money or gifts from player agents or boosters in violation of [NCAA] rules, or leave school well before their scheduled graduation dates."⁸⁸

83. *Id.*

84. *Id.*

85. *Id.* Nike has contracted with several other major football powerhouses. "Michigan's deal will give the school \$8 million in cash and equipment over six years; Colorado's \$5.6 million over six years; Penn State's \$2.6 million over three years. . . . Reebok has a six-year, \$6.48 million arrangement with UCLA. . . ." *Id.*

86. *Id.* Another student-athlete explains:

A certain level of hypocrisy surrounds any major athletics program. College athletes are asked to sacrifice in order to generate revenue to support total athletics programs. Moreover, both directly and indirectly, entire universities and college-town communities derive significant revenue from those attending athletics events. At the same time, athletes are denied academic scholarships that they may earn through scholastic excellence. They also are ineligible for certain need-based financial aid for which they may qualify.

Rob Zatechka, *Outright Pay is not the Only Alternative*, NCAA News, Aug. 3, 1994, at 4-5.

87. *Id.*

88. *Id.* Washington Bullets basketball star Chris Webber has stated that the NCAA rules and the money that Michigan made from selling his jersey and likeness influenced his decision to leave after his sophomore year. *Id.*

School officials justify these arrangements on grounds that the revenues generated are necessary to fund the non-revenue producing sports. Others criticize the duplicitous nature of these attitudes. Noted one administrator, "I would object to any suggestion we are selling out the student The fact of life, at least as far as college athletics is concerned, is that two sports are revenue producing sports and 18 sports are not."⁸⁹ Institutions making these statements have been criticized as trying to have it both ways.

This new form of commercialism has led many commentators to cynically describe student-athletes as walking billboard/advertisements.⁹⁰ Moreover, the effect of such arrangements will no doubt exacerbate the problems that have ensued from the increased commercialization of college athletics.⁹¹ For example, because of the potentially significant revenues that can be derived from the sponsorship arrangements, the pressure to win will only be enhanced.⁹² Added to this is the fundamental change in the university's relationship with its student-athletes.⁹³

Notes one commentator: "The advertising potential of each student is now an asset the university will seek to claim."⁹⁴ "It's becoming harder and harder to talk about the athletes as students, because it looks like they're really just engaged in a money-making enterprise for the university."⁹⁵

The duplicitous nature of these institutional activities was described by Walter Byers as follows:

Thus, while accepting the highest possible commercialization of their "extracurricular" sports activities, the colleges even to this day steadfastly:

89. Dan Cray, *Colleges Score Windfall Selling Ads on Athletes; Sports: Nike and Reebok Deals Buoy Cash-Strapped Programs, Campus Official Say. Others See Exploitation*, L.A. TIMES, May 9, 1994, at A1.

90. *Id.* Sonny Vaccaro, an advocate for paying student-athletes, argues that "universities are renting space on the student athlete's body, and he's not getting anything for it." *Id.* Charlie Vincent, *Swoosh U., Home of the Fighting Interest; Colleges Will Sell Their Names, but Beware the Student Who Tries to Just do It by Himself*, SPORTING NEWS, Oct. 9, 1995 (describing student-athletes as unpaid models for Nike products, plain and simple").

91. Commercialism increases competition and the pressure to win. These pressures often result in ethical and academic abuses. See, e.g., Timothy Davis, *Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOU. L. REV. 751-58 (1991) (describing abuse caused by commercialization in college sports).

92. John Weistart, *The 90's University: Reading, Writing and Shoe Contracts*, N.Y. TIMES, Nov. 28, 1993, § 8, at 9.

93. *Id.*

94. *Id.*

95. Cray, *supra* note 89.

1. deny for tax purposes that they are engaged in a dollar-generating business enterprise;
2. endorse private initiative on the part of their coaches and merchandisers, but not their athletes;
3. agree that coaches and staff members should receive bonuses for winning, making sure NCAA rules deny such rewards to athletes;
4. enlarge athletics department support staffs, but vote that grants-in-aid for athletes be reduced; and
5. emphasize that job security for coaches is important and routinely pay off contracts when they are fired, but insist that threatened ineligibility for the athlete shall be the main NCAA enforcement tool.⁹⁶

b. Institutional Misconduct

Given the forms of commercial behavior described above, it is not surprising to find cynicism among student-athletes that contributes to their marginalization of NCAA rules.⁹⁷ In addition, institutional involvement in illegal conduct that violates rules premised on amateurism and educational values further contributes to the willingness to disregard NCAA rules and regulations. During the past few years, colleges and universities have been sanctioned for conduct violating the educational value, which includes: coaches giving junior college recruits terms papers and changing their test score;⁹⁸ knowingly allowing athletes to compete who failed to meet NCAA eligibility requirements;⁹⁹ and requiring student-athletes to participate in athletically related activities in excess of NCAA weekly time limits.¹⁰⁰

Similarly, institutional representatives have participated in conduct inconsistent with the amateurism principle, including: paying wages and

96. BYERS, *supra* note 21, at 360-361.

97. *Id.*

98. *Cheating Coaches Spared Jail Terms; 3 Years' Probation for Ex-Baylor Aides*, CHI. TRIB., July 8, 1995, at N1. The Baylor University men's basketball coach and three of his assistant coaches were indicted on federal mail fraud and wire fraud charges for their part in a scheme to provide fraudulent academic credit for junior-college basketball players. Danny Robbins, *Johnson's Blueprint Spelled Baylor's Ruin: Scandal Could Rival SMU Violations*, HOUSTON CHRONICLE, Jan. 20, 1994. The three assistant coaches were found guilty. CHI. TRIB., *supra*.

99. *Infractions Case: University of Washington*, NCAA NEWS, Mar. 9, 1994, at 16 (describing one of the violations that resulted in probation for Washington State University's athletics program).

100. *Id.*

granting tuition waivers to athletes for work they failed to perform;¹⁰¹ providing extra benefits in the form of payments totalling close to \$100,000 to student-athletes;¹⁰² and a coach offering cash to a student-athlete in return for signing a Letter of Intent.¹⁰³

The University of Miami's Pell Grant scandal provides perhaps the most celebrated of the recent illustrations of institutional involvement in conduct violative of NCAA rules. Among the violations that resulted in the NCAA sanctioning Miami's program are: the award by the school of more than \$412,000 in excessive financial aid; an athletic department representative assisted sixty to seventy-seven student-athletes in fraudulently obtaining Pell Grant funds; and failure by the athletic department to adhere to the institution's drug testing program.¹⁰⁴

2. Dissonance Between NCAA Rules and Social Realities

As noted above, many NCAA rules are perceived as unfairly antithetical to the interests of African-American student-athletes. Several factors contribute to the development of these beliefs. Primary among them is the notion that NCAA rules are culturally insensitive in their failure to consider African-American student-athletes' experiences. In short, a dissonance allegedly exists between NCAA rules and the social and economic realities experienced by African-American student-athletes. As discussed below, rules believed to be divorced from reality result in their devaluation.

The consequences of these perceptions are multiple. Most fundamentally, the actors whose conduct rules are intended to govern are less likely to adhere to them. This is true in spite of sanctions that will be imposed for rules violations. As was recently noted, sanctions alone do not "engender belief in rules; they simply coerce action that simulates the action citizens would take if they believed in the rules."¹⁰⁵ Thus the threat of sanctions is an ineffective coercive instrument regarding rules perceived as unfair or irrelevant. In the context of college sport, experi-

101. *Id.*

102. From 1986 through 1989, the head wrestling coach for Virginia State University provided at least \$99,429 of improper tuition assistance for approximately 30 student-athletes. *Virginia State Placed on Probation for Two Years*, NCAA NEWS, Feb. 22, 1995, at 14.

103. The University of Mississippi's athletic program was placed on four years probation because of this and other conduct. *Mississippi Receives Four Years of Probation*, NCAA NEWS, Nov. 21, 1994, at 18.

104. *Infractions Case: University of Miami (Florida)*, NCAA REGISTER, Dec. 25, 1995, at 4.

105. Alexander & Sherwin, *supra* note 67, at 1201.

ence shows us that the threat of ineligibility has not been particularly effective in curbing student-athlete violations of amateurism rules.

A probable consequence, then, is the marginalization of the NCAA's formal legislative scheme.¹⁰⁶ In particular, student-athletes tend to disregard rules based on amateurism and educational principles since such rules are believed to be divorced from social and economic realities.¹⁰⁷ Persistent and continuing violations by student-athletes of NCAA rules and regulations said to promote the amateurism value illustrate the extent to which this marginalization has occurred.¹⁰⁸

Disregard of regulations theoretically premised on the amateurism principle is well illustrated by what has been described as the "problem of the 90's and beyond: sports agents involvement with student-athletes."¹⁰⁹ Student-athletes violate NCAA rules by signing with agents or accepting money or gifts from agents.¹¹⁰ The University of Miami was sanctioned by the NCAA for, *inter alia*, the involvement of sports agents with several players on Miami's football team.¹¹¹ At least seven Florida State University football players went to a sporting goods store and selected merchandise worth \$6,000.¹¹² The merchandise was paid for by an agent. Florida State players also, before and after the incident, allegedly received cash payments in amounts ranging from \$60 to more than \$200 from agents. In addition, an agent arranged for a \$23,000 loan to be made to the mother of a player.

106. See Winn, *supra* note 78, at 195 (discussing how the relational structure of traditional Chinese society marginalizes formal legal institutions).

107. See *id.* at 201 (identifying formalistic legislation divorced from social realities and the misconduct of those charged with enforcing laws as contributing to the marginalization of law).

108. With respect to the educational value, cases involving fraudulent academic credentials and the controversy surrounding student-athletes who transfer from two-year junior colleges is illustrative. At the 1996 convention, NCAA members enacted legislation aimed at curbing academic abuse involving junior college transfers. The thrust of the legislation is two fold: 1) football and men's basketball players who transfer from two-year colleges to four-year colleges and who do not satisfy initial eligibility requirements must either have completed 35% of their four-year degree requirements or sit out a season of competition after transferring; and 2) limitations are placed on the "number of two-year college summer-school transferable hours for student-athletes who are partial or non-qualifiers." Ronald D. Mott, *Delegates Reject Modifications to Initial-Eligibility Standards*, NCAA NEWS, Jan. 15, 1996, at 7.

109. Ronald D. Mott & Stephen R. Hagwell, *Schools Struggle to Combat Agent Issues*, NCAA NEWS, Oct. 16, 1995, at 1.

110. *Id.* See also NCAA MANUAL arts. 12.1.1 & 12.1.2.

111. *Infractions Case: University of Miami (Florida)*, *supra* note 104, at 4.

112. Alan Schmadtke, *No Major Violations at FSU, NCAA Finds*, ORLANDO SENTINEL, Jan. 24, 1996, at A1; Alan Schmadtke, *NCAA to "Double-Check" FSU*, ORLANDO SENTINEL, Feb. 25, 1995, at B1; Sonja Steptoe & E.M. Swift, *Anatomy of a Scandal*, SPORTS ILLUSTR., May 16, 1994, at 18.

The Miami and Florida State experiences provide some indication of the enormity of the problem. Many of the estimated seventy percent of student-athletes who have contact with agents are said to receive illegal benefits.¹¹³ Moreover, an estimated one hundred percent of top football and basketball players receive benefits from agents.¹¹⁴

Finally, the attitude of student-athletes on a range of other issues reflects their views on amateurism. For example, the degree to which student-athletes perceive of themselves as employees entitled to employee rights is an indicator of their commitment to principles of amateurism.¹¹⁵ Similarly, their attitudes toward the extent to which they are entitled to share in television revenues provides an indication of their commitment to these principles.¹¹⁶

3. Marginalization By Black Student-Athletes

a. Participation in Underground Economy

The limited empirical research suggests a racial variable concerning the marginalization of NCAA rules and regulations. In a 1991 study, sociologist Allen Sack examined the degree to which student-athletes violate NCAA amateurism rules.¹¹⁷ The study revealed that overall, fifty-three percent of the athletes surveyed saw nothing wrong with accepting benefits in violation of NCAA amateurism rules.¹¹⁸ The improper benefits consisted primarily of clothing, meals, money for travel, the use of cars, and small amounts of spending money.¹¹⁹ Most of the former student-athletes reported that payments were typically used to meet living

113. Stephen R. Haywell & Ronald D. Mott, *Agents Confirm Problems Run Deep*, NCAA News, Sept. 25, 1995, at 1, 13.

114. *Id.* Agents do not limit their gifts to blue-chip prospects. "In fact, more and more agents—specifically those looking to gain a niche in the business—are recruiting student-athletes with little professional potential on the chance that the athlete may show unexpected development." *Id.* at 13.

115. Allen L. Sack, *Recruiting: Are Improper Benefits Really Improper?*, in *THE RULES OF THE GAME: ETHICS IN COLLEGE SPORT* 76-77 (Richard E. Lapchick & John B. Slaughter eds., 1989).

116. *Id.*

117. Allen L. Sack, *The Underground Economy of College Football*, *SOCIOLOGY OF SPORT J.* 1 (1991).

118. *Id.* at 10-11. The athletes in the survey consisted of former college football players who, at the time of the survey, were current or retired members of National Football League teams. *Id.* at 4.

119. *Id.* at 7.

expenses.¹²⁰ A more limited number of athletes reported receiving substantial benefits such as stipends of several hundred dollars.¹²¹

According to the study, African-American athletes exhibited more of a willingness than white athletes to participate in what has been characterized as the "underground economy of college football."¹²² As the study's author noted, "[w]hereas 72% of the black athletes saw nothing wrong with accepting benefits, this was true of only 47% of the whites. And the younger the athlete, the less likely they were to see nothing wrong."¹²³ Indeed, over fifty percent of the athletes saw nothing wrong with violating the amateurism principle.¹²⁴ Professor Sack concludes that the perception of these athletes is that there was nothing wrong with participating in the underground economy; this "has more to do with the perceived injustice of NCAA rules than with immorality on the part of athletes."¹²⁵ Professor Sack's conclusions are consistent with research that detected a disproportionately high level of involvement by African-American student-athletes in major scandals in college sports.¹²⁶ Spivey found that:

[o]f the 29 substantial scandals in collegiate sports during the 1950s and 1960s, 19 occurred on teams with one or more black athletes. Of these 19 teams, 74 percent of the black athletes, as compared to 11 percent of the white athletes, were allegedly involved in the rules violations. For example, three of the four athletes charged in the Long Island University basketball fixes were blacks. Of the eight athletes involved in the Illinois scandal, seven were black.¹²⁷

The author of this study concluded that three factors contributed to the disproportionately high levels of black involvement in various scandals: the socio-economic realities that cause the black athlete to seek additional financial assistance; the recruitment of highly sought after black athletes; and racism.¹²⁸

120. *Id.* at 8.

121. *Id.*

122. The underground economy of college sports extends beyond illegal benefits to student-athletes. It also encompasses indirect benefits, such as sneaker endorsement contracts, which are bestowed on coaches of successful big-time athletic programs. HART-NIBBRIG & COTTINGHAM, *supra* note 25, at 63-64. See Smith, *supra* note 15, at 225-26.

123. Sack, *supra* note 117, at 11.

124. *Id.* at 13.

125. *Id.*

126. See Donald Spivey, *The Black Athlete in Big-Time Intercollegiate Sports, 1941-1968*, 44 *PHYLON* 116, 123 (1983).

127. *Id.*

128. *Id.*

Anecdotal evidence suggests that African-American student-athletes continue to participate in an underground economy. In responding to the controversy concerning agents, a former student-athlete who now plays professional football expressed what perhaps is illustrative of the views of other current and former African-American student-athletes:

The guys accepting pay or the guys who want to take pay, that mainly falls on you guys—the NCAA. . . . I think that's your fault because of the strict restrictions on how long guys can work and how much (financial aid) guys get.

Many families are too poor to give that child money. My mom couldn't give me any money. Sometimes your team has functions where you have to dress up. Some guys don't have suits. I didn't have a suit. I had to wear jeans all of the time. . . .¹²⁹

These comments also reflect that from the student-athlete perspective, rules perceived as unfair and irrelevant to their life circumstances effectively fail to deter illegal involvement within the underground economy of college sport.

The factors discussed above—dissonance between NCAA rules and their justifications, institutional conduct, and rules divorced from reality—contribute to the African-American student-athletes' willingness to marginalize NCAA rules and regulations. In addition to these, other factors appear to result in the marginalization of rules by African-American student-athletes. A few of these factors are discussed below.

b. Social Realities for African-American Student-Athletes

As noted above, NCAA rules have been criticized for failing to comport with the social and economic circumstances of many of the student-athletes whose conduct they are intended to govern. This appears to be particularly true in the case of African-American student-athletes. Studies of the college experiences of African-American student-athletes suggest that they have special needs and are harmed by the failure of NCAA rules and regulations to consider such needs. Concluded one sociologist:

129. These comments were made by Greg Hill, a running back for the Kansas City Chiefs. Ronald D. Mott & Stephen R. Hagwell, *Student-Athletes: NCAA Rules no Deterrent for Agents*, NCAA NEWS, Oct. 2, 1995, at 1.

Adds another student-athlete: "I think agents usually take advantage of most athletes who aren't from well-to-do families. . . . In college they don't have much money, and they're just making it from day to day." *Id.* at 8. Some agents disagree. They contend that student-athletes are very knowledgeable and the line between need and greed can be passed very quickly. *Id.*

Black student-athletes' reliance on off-campus support may interact with their socio-economic background to place them at greater risk. Because black student-athletes come from poorer families and because their support systems are more likely to be located away from campus, it is more difficult for them to access their support systems personally. This problem is exacerbated by the NCAA's financial restraints which forbid student-athletes to work during the school year and yet do not provide them with any money beyond tuition, room and board.¹³⁰

Richard Lapchick described the social environment that spawns many of today's black student-athletes as follows:

Our campuses are now attracting a generation of students who come from a world where for so many hope has been eclipsed by despair. Many of them are black.

We are now getting student-athletes who have seen friends killed, who have children of their own, who have family members with drug or alcohol problems, who are children of abusive parents, or who have themselves been victims of overt acts of racism.¹³¹

As a result of the convergence of these social realities and the factors delineated above, African-American student-athletes delimit the principles on which NCAA rules and regulations are based. In so doing, they jeopardize their eligibility to participate in intercollegiate competition—a sanction imposed for violating NCAA amateurism rules.¹³² Moreover, deviations from amateurism rules creates a perception of morally culpable behavior.¹³³ Unfortunately, viewing the African-American student-athlete's violations of NCAA rules as deviant behavior may provide a convenient basis for attaching certain stereotypes assigned to African-Americans, particularly young males, in society at large.¹³⁴ Relatedly, "[i]t has to be a dangerous thing for character-building to have these

130. Robert Sellers et al., *Life Experience of Black Student-Athletes in Revenue-Producing Sports: A Descriptive Empirical Analysis*, 1991 *ACA. ATHLETIC J.* 20, 33.

131. Richard Lapchick, *Race Still Most Pressing Ethical Issue in College Sports*, DALLAS MORNING NEWS, Jan. 8, 1996, at 3B.

132. Violations of NCAA amateurism rules result in a student-athlete's loss of amateur status, which in turn renders him or her ineligible for intercollegiate competition. NCAA MANUAL art. 12.1.1.

133. Sack, *supra* note 117, at 1.

134. "The image of young black males conveyed by the mainstream media is one associated with drugs, crime, and violence. . . . 'Criminal' has become the noun often used to describe young black men." Adeno Addis, "Hell Man, They Did Invent Us:" *The Mass Media, Law, and African Americans*, 41 *BUFF. L. REV.* 523, 555-56 (1993).

young athletes seduced or drafted into covert arrangements, which have the aura of criminality.”¹³⁵

But the consequences of rules violations extend beyond the nurturing of stereotypical images or criminalizing behavior. Focusing on the student-athlete's conduct regarding rules violations heightens the likelihood that systematic factors will not be fully considered.¹³⁶ In other words, blaming student-athletes for the existence and perpetuation of the underground economy ignores contradictions in the NCAA governing structure that nourish its existence.¹³⁷ It also de-emphasizes the possibility that the system of rules may be in need of study and reform.¹³⁸

c. *The Perception of Exploitation*

Another factor that may play a particularly important role in the black student-athletes' willingness to participate in the underground economies of college sport is the perception of exploitation. I return to the issue of merchandising. Recall the comment made by the college administrator that merchandising of football and basketball are critical since those two sports support the non-revenue sports.¹³⁹

This comment raises another issue that is often ignored: the role that African-American student-athletes play in funding non-revenue produc-

135. Clark, *supra* note 44, at 54.

136. Sociologist Allen Sack refers to this as a person-blame approach to social problems. “[D]eviance is the result of personal defects, character flaws, or maladjustment.” Sack, *supra* note 117, at 3. He adds that the approach is imbued with a certain attractiveness to particular groups. “Person-blame approaches to social problems . . . are more likely to be embraced by those who benefit from existing social arrangements and see deviant behavior as a threat to their interests.” *Id.*

137. Sack, *supra* note 117. From a system-blame approach, athletes who accept money in excess of that allowed by NCAA rules are no more morally culpable than coaches who make millions of dollars by endorsing basketball sneakers. The only difference is that the former lack power and can therefore be labeled as deviant by those who make the rules. *Id.* at 3. See EITZEN & SAGE, *supra* note 20, at 138 (arguing the NCAA deflects attention from systemic problems by focusing on student-athletes); Clark, *supra* note 44, at 54 (arguing the system that denies to student-athletes payment for their services is corrupt not the athlete).

138. Sack, *supra* note 112, at 13 (suggesting the need to study NCAA amateurism rules in order to assess their moral legitimacy). See Allison, *supra* note 23, at 14 (arguing that any decisional system that has been in existence for some time should be periodically reevaluated to determine the fit between outcomes and the principles they are intended to promote).

Professor Sack opines that the significance of the theoretical and public policy questions concerning underground payments provides a reason why systematic studies of the underground economy have not been conducted. “Instead of doing systematic studies, people often take lists of alleged cases of athletes' misconduct from newspaper accounts, pick the behaviors they dislike most and then try to come up with some explanation for those behaviors.” *Id.* at 4.

139. See *supra* note 89 and accompanying text.

ing sports. The infrequent discussion on this issue is due, in part, to disagreement concerning the extent to which the revenue producing sports—football and men's basketball—actually contribute to funding of other sports.¹⁴⁰ This uncertainty fails, however, to eliminate the popular perception that revenue-producing sports provide financial support for sports that fail to generate revenues.¹⁴¹ What are the consequences of this perception?

The demographics of African-American student-athletes serve as a useful point of departure for understanding this perception. African-American student-athletes are disproportionately represented in the revenue-producing sports. During the 1994-95 academic term, African-Americans accounted for 50.7 percent and 65.0 percent of football and basketball players, respectively, in Division I schools.¹⁴² In contrast, blacks comprise only 5.6 percent of Division I student-athletes in other men's sports, excluding baseball¹⁴³ and track.¹⁴⁴ In short, African-American males are disproportionately represented in the revenue-producing sports.

One possible consequence of this imbalance is real or perceived exploitation.¹⁴⁵ This perception is based in part on student-athletes' beliefs

140. Considerable disagreement exists regarding the profitability of college sports and hence the extent to which the revenue-producing sports actually generate revenues for their institutions. The NCAA's executive director, Cedric Dempsey, asserts that most institutions are not making money from athletics. Feigen, *supra* note 44, at 1. According to the NCAA, figures for 1993 indicate that "one-third of all Division I-A football and Division I men's basketball programs lose money. The average profit is \$3.83 million; the average loss for the remainder is 1.02 million. Money-making basketball programs in Division I-A reap on average \$1.63 million; the average loss is \$226,000." *Id.*

Others contend that such figures are misleading. Losses often result from mismanagement (e.g., overly generous travel budgets and higher salaries for athletic department personnel) and the allocation of revenues generated to upgrade facilities. EITZEN & SAGE, *supra* note 20, at 131. In an exhaustive study of the economics of college sports, Professor Murray Sperber concluded that although intercollegiate athletics generate big money, most institutions actually lose money on their programs. MURRAY SPERBER, *COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY* 2-3 (1990). This results in large part because as revenues increase so do athletic department expenditures. *Id.* at 3, 39.

141. See Ronald D. Mott, *Student-Athlete Voices Join Pay for Play Debate*, NCAA NEWS, Sept. 19, 1994, at 1, 19.

This perception was expressed by one student-athlete as follows: "Athletes make their institutions a lot of money and do not get any benefits." *Id.*

142. *Division I Racial Composition*, NCAA NEWS, Jan. 15, 1996, at 2.

143. 7.3 percent of Division I baseball players are black. *Id.*

144. 28.4 percent of Division I male track athletes are African-American. *Id.*

145. Smith, *supra* note 15, at 239 (Lingering bias or racism may underlie the lack of recognition given to this and other differences between revenue-producing and non-revenue producing sports).

that their schools derive significant financial rewards from the athletic services that the former perform.¹⁴⁶ One commentator asserts that this perception of exploitation arises from the fact that many of the student-athletes involved in revenue-producing sports are minorities or come from lower socio-economic backgrounds than student-athletes who typically participate in the non-revenue-producing sports.¹⁴⁷ Contrasting life experiences may create unique financial and academic support needs by athletes in the revenue-producing sports. By not using monies generated by revenue-producing sports to enhance academic support for these student-athletes, one commentator argues, is to engage in subtle, and unintended racism.¹⁴⁸ "Taking dollars that are needed to meet the peculiar academic needs of athletes involved in big-time athletics to support athletes involved in minor sports, therefore, may be Robin Hoodism in reverse—taking from the poor and giving to the rich."¹⁴⁹ The issue addressed by Professor Smith is illustrated by the University of Kansas. The basketball television contract and the Big 12 football contract that Kansas signed allowed it to fund rowing, soccer and other sports.¹⁵⁰ The failure of NCAA rules to address this imbalance, at a minimum, creates the appearance of exploitation.¹⁵¹

VI. CONCLUSION

The forgoing discussion is not intended to rationalize student-athlete violations of rules and regulation. Rather, the principal goal of this essay is to raise questions concerning the impact of NCAA regulations on the interests of African-American student-athletes. The primary question is this: do NCAA rules and regulations impose restrictions on African-American student-athletes that are overly burdensome to the point of

146. See, e.g., Feigen, *supra* note 44 (providing illustrations of student-athlete views of exploitation). One college administrator believes that a way to mitigate the harsh feelings of exploitation and unfairness held by student-athletes is to emphasize the academic mission of universities. "The more that collegiate athletes feel like professional sports . . . the more its participants will feel unfairly used." *Id.*

147. *Id.*

148. *Id.* at 226. "The galling and insulting thing about exploitation of the student-athlete is that it occurs primarily on the backs of youngsters, a great majority of them Black. In the sports that generate revenues for colleges, Blacks are more than 50 percent of the football players and more than 70 percent of the basketball players." Clark, *supra* note 44.

149. *Id.* at 240.

150. Feigen, *supra* note 44. According to Kansas' athletic director, "I know that at the University of Kansas, many student-athletes in many sports greatly benefit from the men's basketball television contract. And there are sports at other institutions in my conference that benefit from Kansas' success in the Tournament over the years." *Id.*

151. Smith, *supra* note 15, at 226, 239-40.

being unjust?¹⁵² Unfortunately, little has been done to empirically examine this issue. I suggest that efforts be directed toward studying the impact of rules intended to preserve the amateurism precept on African-American student-athletes. Obtaining this information will at least create the predicate for a regulatory system that better balances the interests of institutions and their student-athletes.

152. See Henle, *supra* note 67, at 60 ("Laws that are too burdensome are unjust").

