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Timothy Davis

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INTERCOLLEGIATE ATHLETICS IN THE NEXT MILLENNIUM: A FRAMEWORK FOR EVALUATING REFORM PROPOSALS

TIMOTHY DAVIS*

I. INTRODUCTION

Over the past year, several authors have proposed models aimed at reforming intercollegiate athletics. One author proposes replacing the commercial model of intercollegiate athletics with a new model in which sports are a “vital part of the educational system.”¹ He offers specific recommendations intended to implement this “participation” model of intercollegiate athletics. These include: replacing athletic scholarships with need and merit-based scholarships;² financing athletic programs with general university funds rather than with funds generated from television, gate receipts, and booster club donations;³ and integrating coaches into the campus community.⁴

Other reformers focus on what they perceive as the inequalities that result from the dissonance between NCAA amateurism rules and the commercial realities of intercollegiate athletics. They propose modifying

* Professor of Law, Wake Forest University Law School.

1. Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351, 358 (1998). Porto argues that Title IX compliance by colleges provides an excellent opportunity to develop a new model of intercollegiate athletics. This is premised, in large part, on the belief that “[m]ost colleges cannot afford to enforce [Title IX] and to maintain expensive football and men’s basketball programs too.” *Id.* at 399. In other words, Title IX compliance will exacerbate the financial troubles that currently beset many intercollegiate athletics programs. *See id.* at 388. Other authors suggest that compliance with Title IX gender equity requirements, when combined with existing financial pressures within intercollegiate athletic programs, may provide the catalyst for major structural changes in intercollegiate athletics. *See generally* John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL’Y 191 (1995); Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51 (1996).

2. *See* Porto, *supra* note 1, at 403-04.

3. *See id.* at 405.

4. *See id.* at 406. Porto advocates three measures that universities should undertake to achieve this objective: require coaches to have at least a master’s degree in physical education and to coach more than one sport or teach a class; pay coaches from general university funds rather than through athletic department revenues or booster club donations; and provide coaches with job security through the use of “‘rolling’ contracts that are reviewable and renewable every five years.” *See id.* at 406-07.

NCAA amateurism rules as a means of ameliorating the exploitation of student-athletes. They argue that exploitation manifests itself, in part, in the under-compensation of certain student-athletes relative to the revenues they generate for their institutions. One author proposes a model of intercollegiate athletics that incorporates concepts similar to the pay-for-play idea presented by Dean Peter Goplerud.⁵ The centerpiece of this model is revenue sharing between institutions and their student-athletes.⁶ The proposed model would permit student-athletes to receive a share of the net profits generated by their teams in addition to their athletic scholarships.⁷ Revenues would be divided as follows:

- (1) each player in his or her fourth year of participation would receive 1% of all revenues generated for that year;
 - (2) each player in his or her third year would receive 0.75%;
 - (3) each player in his or her second year would receive 0.5%;
 - (4) each player in his or her first year would receive 0.25% of the revenue.
- Any money remaining after sharing the revenues would go to the athletic department to pay for miscellaneous expenses associated with the athletic program.⁸

The revenue sharing concept would extend to post-season tournaments⁹ and to revenues that universities earn from endorsements.¹⁰

Alan Sack and Ellen Staurowsky in *COLLEGE ATHLETES FOR HIRE* critically analyze the role of the NCAA in the development of the com-

5. Dean Peter Goplerud argues that notwithstanding difficult structural impediments, fundamental fairness dictates that student-athletes be compensated for participating in intercollegiate athletics. Dean Goplerud's proposals regarding pay-for-play are detailed in the following articles. See generally C. Peter Goplerud, *Pay for Play for College Athletes: Now, More than Ever*, 38 S. TEX. L. REV. 1081 (1997) [hereinafter Goplerud, *Pay for Play for College Athletes*]; C. Peter Goplerud, *Stipends for Collegiate Athletes: A Philosophical Spin on a Controversial Proposal*, 5-SPG KAN. J. L. & PUB. POL'Y 125 (1996). Other recent articles addressing various aspects of the pay-for-play debate include: Michael P. Acain, Note, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L. A. ENT. L. J. 307 (1998); Charlotte M. Rasche, Note, *Can Universities Afford to Pay for Play? A Look at Vicarious Liability Implications of Compensating Student Athletes*, 16 REV. LITIG. 219 (1997); Jeff K. Brown, *Compensation for the Student-Athlete: Preservation of Amateurism*, 5-SPG KAN. J. L. & PUB. POL'Y 147 (1996).

6. See Acain, *supra* note 5, at 336.

7. See *id.* at 337.

8. *Id.* at 338.

9. See *id.* at 338-39. Revenues would be distributed to student-athletes based not on seniority, but rather on the role he or she played in the post-season tournament. See *id.*

10. See *id.* at 341-42. The author proposes that "[e]ach university that signs a licensing agreement should allocate 35% of the profits to the athletic department. The athletic department should then divide these profits equally among all participating student-athletes." *Id.* at 342. In addition, a portion of the revenues generated by the sponsorship of individual teams of product manufacturers would be shared with student-athletes. See *id.*

mercial model of college sports.¹¹ They advocate reforming intercollegiate athletics by replacing the commercial model with a model of college sports that de-emphasizes commercialism and is based upon true amateurism.¹² Under the Sack and Staurowsky amateur model, all financial aid for athletes would be need-based.¹³ In addition, athletic prowess would be merely one of the factors considered in admission decisions.¹⁴ Student-athletes who encounter academic difficulties could suspend their participation in sports until they are on sound academic footing without any loss of financial aid.¹⁵

According to Sack and Staurowsky, their version of the amateur model of intercollegiate sport, in contrast to the corporate model, would thrive in part because institutions that adopt it would not feel the competitive pressures to engage in the compromises that currently confront intercollegiate athletics. In short, the authors propose increasing the number of schools that fall within what is now categorized as NCAA Division III athletics.¹⁶

A critical feature of the Sack and Staurowsky model is a provision for a professional division proposal similar to the model outlined by panelist Dean Jack Friedenthal.¹⁷ Sack and Staurowsky propose that this division would consist of financially successful intercollegiate athletics programs. In this regard, the authors suggest:

a two-tiered proposal for collegiate sport reform that calls for a substantial increase in the number of colleges and universities en-

11. ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH* (1998).

12. *See id.* at 2-3 (arguing that institutions in collaboration with the NCAA have misused the amateurism principle to conceal the commercialized nature of big-time intercollegiate athletics programs so as to obtain tangibles such as shielding from worker's compensation, federal tax, and antitrust laws). With respect to amateurism, it is important to note that these and other reformist who propose models that focus on amateurism do not adopt the commonly held views of amateurism which they regard as mythical and misleading. *See Porto, supra* note 1, at 398 (arguing that historically institutions proclaimed amateurism, while accepting professionalism); *see also* Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L. J. 269, 274 (1994) (noting that intercollegiate athletics presents a hybrid form of amateurism); Kenneth L. Shrosphire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7 (1991) (critically analyzing the history of the amateurism concept in intercollegiate athletics).

13. *See SACK & STAUROWSKY, supra* note 11, at 136.

14. *See id.*

15. *See id.*

16. *See id.* at 136, 145.

17. Jack Friedenthal, Remarks at the "Sports Law in the 21st Century" Conference (Nov. 20-21, 1998). Jack Friedenthal, concerned with issues of fairness, as well as the compromises wrought by big-time intercollegiate athletics, argues for the development of a professional division within college sports.

gaged in truly amateur sport while at the same time creating a 'super division' of sports teams that can openly operate much like the professional sports franchises they have already become.¹⁸

In short, these authors actually propose an amateur/professional model rather than the purely amateur model of intercollegiate athletics that their book initially suggests.¹⁹

Several observations can be made regarding the foregoing proposals that offer solutions which follow radically different paths. Like proposals before them,²⁰ these models are a product of the frustration wrought by the problems confronting intercollegiate athletics. These well-documented academic, moral, and ethical compromises include: academic fraud such as failing to provide student-athletes with an educational opportunity;²¹ ethical abuses arising from rules violations such as improper gifts to athletes and their family members, altering transcripts, and other recruiting violations;²² and administrators who undermine the institutional mission in the name of commercialism.²³ Summarizes one commentator,

18. SACK & STAUROWSKY, *supra* note 11, at 130-31.

19. *See id.* at 144 (expressly characterizing their plan as "the professional model of sport").

20. Significant studies and commentary describing problems and advocating the reform of intercollegiate athletics include: HOWARD J. SAVAGE, *AMERICAN COLLEGE ATHLETES* (1929); Rodney K. Smith, *An Academic Plan for Reforming Big-Time Intercollegiate Athletics*, 67 *DENV. U. L. REV.* 213 (1990); *The Role of Faculty in the Governance of College Athletics: A Report of the Special Committee on Athletics*, *ACADEME*, Jan.-Feb. 1990, at 43 [hereinafter *The Role of Faculty*]; MURRAY SPERBER, *COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT V. THE UNIVERSITY* (1990); REPORT OF THE KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS: KEEPING FAITH WITH THE STUDENT-ATHLETE; A NEW MODEL FOR INTERCOLLEGIATE ATHLETES 4 (1991) [hereinafter *KNIGHT COMM'N REPORT*]; Reverend Theodore M. Hesburgh, C.S.C., *Reform and Renewal in College Sports*, 22 *J. C. & U. L.* 68 (1995).

21. *See* Timothy Davis, *An Absence of Good Faith: Defining A University's Educational Obligation to Student-Athletes*, 28 *HOUS. L. REV.* 743 (1991); *see also* Porto, *supra* note 1, at 389-90. Porto argues that institutional conduct that ultimately leads to a compromise of academics and a denial of opportunity by student-athletes to enjoy a meaningful educational experience includes:

admission of athletes who are functionally illiterate, the forgery of high school transcripts, the enrollment of athletes in dubious summer courses to obtain the credits necessary for athletic eligibility, the arrangement of athletes' course schedules by athletic department personnel in order to ensure availability for daily practice and the grades necessary for continued eligibility, and the use of academically ineligible athletes in competition.

Id.

22. *See* Davis, *supra* note 21, at 752.

23. *See* *KNIGHT COMM'N REPORT*, *supra* note 20, at 4-6 (describing the problems as pervasive).

[t]he problems [arising from the commercial model] are financial, academic, and social, and are the offspring of an ill-advised marriage which occurred late in the nineteenth century, between higher education and commercialized sport. Like other ill-advised marriages, this one has produced its share of pain and embarrassment. It has also produced hypocrisy, as both partners have portrayed college football and basketball as extracurricular activities for fulltime students, but have operated those sports as profit-seeking entertainment enterprises that ignore, even obstruct athletes' educational goals. The partnership has failed financially and academically at many colleges, and it has contributed to criminal behavior and to numerous scandals.²⁴

Many reform proposals are also borne of the frustration which is derived from the realization that institutions of higher education accept such compromises because of the real and perceived economic and ephemeral benefits produced by student-athletes.²⁵ In the revenue producing sports, student-athletes generate athletic revenues.²⁶ They also enhance a university's prestige, reputation, and image.²⁷ This in turn often results in increased applications for admission by prospective students who want to be associated with a school with winning athletic teams.²⁸ Sums up one commentator, "[s]uccessful recruitment of elite . . . athletes is a vital part of a university's efforts to enhance its reputation and attract needed financial resources."²⁹

For instance, the 1998 transformation of Kansas State University's football team from a perennial loser to a national champion contender resulted in tangible benefits to the university including: an increase in income from licensing from \$47,000.00 in 1986 to between \$600,000.00 and \$700,000.00 in 1998; a 350% increase in donations to \$27 million in

24. Porto, *supra* note 1, at 384 (citations omitted).

25. See Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. TEX. L. REV. 59, 72 (1995).

26. See *id.* at 72, 78 (also noting that intercollegiate sports generate millions of dollars in revenues for colleges and universities).

27. See *id.* at 78; see also Mike Dodd, *Sports a Great Calling Card to Present to Potential Students*, USA TODAY, July 11, 1997, at A1 (arguing that schools experience dramatic increases in applications for admission that are directly attributable to successful athletic programs. This is a result, in large part, of increased name recognition that comes from the mass media exposure that creates a form of brand identification).

28. See Mitten, *supra* note 25, at 72.

29. *Id.* At a symposium hosted in 1995 that examined the issue of reform in college athletics, Reverend Beauchamp of Notre Dame University stated that "at Notre Dame much of our success as an academic institution can be traced back, at least initially, to our national prominence and national recognition in athletics. . . ." William Beauchamp, *Introduction and Welcome*, 22 J. C. & U. L. 2, 4 (1995).

1998; and an increase of enrollment from 15,000 to 21,000 students, of which 500 is estimated to be directly attributable to football.³⁰ Similar types of benefits were estimated to have flowed to Northwestern University when its football team met with success in the mid-1990s.³¹

Given the present day realities of intercollegiate athletics, the proposed reforms seek to arrive at models of governance and structures that will lessen the compromise of ethics and morals and the financial irresponsibility that has accompanied the commercialization of college sports. These reform proposals are also a product of recognition of the difficulties involved in addressing the problems associated with college sports. As a consequence of what they perceive as a congealed system in which various participants with vested interests resist change,³² many reformists argue for radical structural change that must come from outside of the university. Note Sack and Staurowsky:

As the twentieth century comes to a close, it appears that athletic professionalism in the form of athletic scholarships and other financial subsidies has become a permanent fixture in most spectator-oriented collegiate sport. . . . [T]he corporate model seems to be destined to set the tone for both men's and women's athletics well into the next century. Proposals for truly amateur models, grounded in need-based financial aid, seem quixotic in an era

30. See Steve Wieberg, *Miracle in Manhattan*, USA TODAY, Nov. 13, 1998, at C1.

31. See Mike Dodd, *Exploring the Windfall of Winning*, USA TODAY, July 11, 1997, at 12C. (detailing the various ways in which Northwestern University benefitted from a successful football team).

A recent report detailed the profits made by Big-Ten Conference teams. It provided as follows:

Big Ten sports generated big-time money last season, but the conference also has some serious expenses.

Sports teams took in \$403.2 million last season, producing a net profit of \$7.7 million. . . . [T]he eleven schools had \$395.5 million in athletic expenses.

Big Ten football produced \$87 million in profits and basketball produced \$45 million, but other expenses ate most of it up.

For example, other sports had \$63 million in losses . . . \$61 million covered expenses in conference athletic department business offices.

Oscar Dixon, *Big Ten is Making Some Big Money*, USA TODAY, Nov. 18, 1998, at 3C.

32. See Tom McMillen, *Educating the Athlete*, 22 J. C. & U. L. 43, 44 (1995). Notes Professor Gary Roberts, "the money is all part of the system that is entrenched and accepted now. The implications of the money, the compromises that might have to be made, are considered simply the cost of doing business." Debra E. Blum, *All Part of the Game*, CHRON. HIGHER EDUC., Feb. 24, 1995, at A39; see also Porto, *supra* note 1, at 398-99.

when Nike, Reebok, and television networks shape collegiate athletic policy.³³

The remainder of this essay focuses on the philosophical, social, and practical variables of which reformers should be mindful in proposing new models for intercollegiate athletics. I examine these considerations in the context of the Sack and Staurowsky proposal for a professional division within intercollegiate athletics. I conclude that the costs to colleges and universities and to their student-athletes are likely to outweigh any advantages it will produce.

II. EVALUATING A PROFESSIONAL MODEL

A. *General Observations*

When I initially learned of the proposal for a professional model for intercollegiate athletics, I thought of the argument raised by professional players in collective bargaining negotiations with owners regarding salary caps. Players attempt to isolate the issue as merely a question of whether owners are capable of controlling themselves. In other words, in their quest to produce winning combinations of players, owners are willing to award exorbitant contracts to players. Players then argue that owners are responsible for the financial state of affairs of a particular team or sport. Obviously, casting such disputes in these terms obscures the complexity of the issues involved in such negotiations.

Nevertheless, this sentiment introduces a similar question into the intercollegiate sports context—what factors have shaped intercollegiate athletics such that many administrators, commentators, and scholars conclude that college sports are so out of control that radical reform is necessary? Are external forces largely responsible for colleges seeking increasingly larger venues, changing conference alliances in search of increasingly larger pay-outs, and entering into long-term merchandising and endorsement deals with sports apparel manufacturers and other large corporations? One author, addressing this issue in the context of the effect of Title IX compliance on the viability of certain men's non-revenue sports, answers this question as follows: "colleges are . . . responsible for the commercial model [of intercollegiate athletics], with its massive arenas, plush training facilities, extensive intersectional travel to

33. SACK & STAUROWSKY, *supra* note 11, at 129; *see also* Porto, *supra* note 1, at 399 (arguing that "American colleges embraced commercialized sport because it satisfied their perpetual needs for students and for money").

play games and to recruit high school athletes, and princely salaries for large coaching staffs."³⁴

Another visceral reaction was concern that the proposed professional solution is not a viable solution given that it risks sacrificing the few in order to save the whole. In this instance, the sacrifice is educational attainment; the few are student-athletes, particularly African-Americans, who would participate on teams in a professional division.

As the following discussion demonstrates, these and other considerations warrant taking a cautious approach to the amateur/professional model of intercollegiate athletics. These considerations fall within three broad categories: philosophical, social, and practical.

B. Assessing Fundamental Assumptions

As a predicate for examining these variables, I wish briefly to identify assumptions that appear to underlie the professional model of intercollegiate athletes. Unfortunately, Sack and Staurowsky provide few details as to the structural and operational aspects of their proposed models. What details they do provide appear as follows:

The NCAA's Division IA would be set aside for schools that currently run one or more sports as unrelated businesses. What would be different is that sports in this category would have to be totally self-supporting. Money for administrative expenses, stadium upkeep, and other items that are often taken from the university's general fund would now come from sports revenues. Of course, line items such as coaches' salaries, player compensation, and travel and recruiting expenses would also be the total responsibility of each college sport franchise.

The sources of revenues would be much the same as they are today, including gate receipts, the sale of broadcast rights, corporate sponsorships, the sale of licensed merchandise, and money from alumni and boosters. Because these teams would continue to act as minor leagues for other professional sport organizations, such leagues as the NFL and the NBA would be expected to provide financial support. In Olympic sports such as gymnastics and swimming, the National Olympic Committee could be expected to expand the same kinds of financial support they already provide. Although many nonrevenue-producing sports might be better served by the expanded and revitalized amateur college sport system, those that attract sufficient external funding could con-

34. Porto, *supra* note 1, at 357.

ceivably join the self-supporting professional teams in Division IA.³⁵

Based upon the foregoing, it appears that the professional model will be restricted to revenue-producing sports, most notably football and men's and women's basketball because these intercollegiate sports are most likely to generate revenues that render them financially self-supporting.³⁶ Another premise that appears fundamental to the professional model is the belief that this model of intercollegiate athletics will help to ward off and lessen the problems associated with college sports. In other words, by professionalizing college athletics, the myth of amateurism will finally be removed, and colleges will be permitted to engage in conduct that heretofore they have engaged in under the table.³⁷ This premise concludes that college sports or athletic programs that fall outside of the professional league will experience less corruption and abuse.

Query whether proponents of the professional model do not naively assume that the problems associated with intercollegiate athletics are relegated to big-time athletics and athletic programs. The Knight Commission noted that the problems confronting intercollegiate athletics are most strongly concentrated in "those sports for which collegiate participation serves the talented few as an apprenticeship for professional careers."³⁸ The report added, however, that the problems associated with intercollegiate athletics "are widespread. They are not entirely confined to big schools . . . or to football or basketball . . . or to men's sports."³⁹

35. SACK & STAUROWSKY, *supra* note 11, at 142. Noticeably absent from the description of the professional model is information that defines the role of the athlete within such a model. In this regard, numerous question arise, among them: In addition, to being an employee, will athletes be designated as students? If so, what admissions standards will apply? And what curricular program will athletes be required to pursue?

36. See Joshua Rolnick, *Finances of Big-time College Sports Take a Sharp Turn for the Worse*, CHRON. HIGHER EDUC. Oct. 23, 1998, at A59 (noting that "despite soaring deficits [in intercollegiate athletics], big-time football and men's basketball continue to be profitable as a whole. . . . Seventy-one percent of Division I-A football programs showed a profit in 1997, up four percentage points for 1995. The average profit turned by those programs was nearly \$5-million."). See generally DANIEL L. FULKS, REVENUES AND EXPENSES OF DIVISIONS I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS (1998) (providing a detailed examination the finances of intercollegiate athletic programs); see *supra* note 31, and accompanying text.

37. See SACK & STAUROWSKY, *supra* note 11, at 142 (proposing that under the professional model, colleges and universities will be able to "openly admit that scholarship athletes are paid professionals and to provide a nonexploitative context in which they can further develop their athletic skills").

38. KNIGHT COMM'N REPORT, *supra* note 20, at 4.

39. *Id.*

A recent report that shows the range of institutions that were placed on NCAA probation between July 18, 1997 and October 2, 1998, provides anecdotal support for the proposition that college athletics' problems are not restricted to big-time sports and programs. At least fifty percent of the sanctioned schools listed do not operate what, by any definition, would be considered big-time intercollegiate athletic programs. In addition, the nature of the violations for which these schools were sanctioned was widely distributed among both revenue and non-revenue producing sports.⁴⁰ For example, big-time programs that were sanctioned for violations ranging from excessive financial aid to impermissible inducements included the University of Miami, UCLA, Texas A & M University, and Michigan State University. Also sanctioned, however, were schools such as Alabama A & M, Pfeiffer University, Savannah State University, and University of Maine at Orono for violations including extra benefits to athletes and recruits in men's soccer, men's and women's track and field, and impermissible recruiting contacts.⁴¹

C. *Philosophical, Social and Practical Considerations*

1. Impact on the Education Value

Writing in 1929, Howard Savage addressed the impact of commercialism in college athletics and the risk it posed to the overall well-being of colleges and universities.⁴² In 1987, the Special Committee on Athletics of the American Council of Education issued a report in which it emphasized, *inter alia*, that the "goal of structural reform in the governance of college sports should be more fully to integrate athletics into the educational mission of the institution."⁴³ Similarly, in its 1991 report, the Knight Commission on Intercollegiate Athletics voiced the concern that

40. *23 Institutions on NCAA Probation*, CHRON. HIGHER EDUC., Oct. 2, 1998, at A48. The schools listed as those against which the NCAA had taken action between July 18, 1997 and October 2, 1998 are: Alabama A & M Univ., Bethune-Cookman College, Gonzaga Univ., Grambling State Univ., Kansas State Univ., Michigan State Univ., Montana State Univ. at Bozeman, New Mexico State Univ., Pfeiffer Univ., Savannah State Univ., Southeast Missouri State Univ., Texas A & M Univ., Texas Tech Univ., Univ. of California at Berkeley, UCLA, Univ. of Georgia, Univ. of Louisville, Univ. of Maine at Orono, Univ. of Miami, Univ. of Mississippi, Univ. of Texas El Paso, Univ. of Tex-Pan American, and Weber State Univ.

41. *See id.*

42. *See generally* Savage, *supra* note 20.

43. *The Role of Faculty*, *supra* note 20, at 44. This report also emphasized the importance of faculty taking a major role in the governance of an institution's intercollegiate athletics program.

the problems confronting intercollegiate athletics posed a threat to the intrinsic educational value of college athletics.⁴⁴

The proposed professional model differs markedly from major reform initiatives offered over the last several decades. At the foundation of each of these earlier reform proposals was the premise that education is the purpose for which colleges and universities exist.⁴⁵ As such, the purpose of any extracurricular activity should be to further the educational imperative of colleges and universities. In other words, as an extracurricular activity, the presence of intercollegiate athletic programs on college campuses is justifiable only because of their potential to contribute to the college's mission to provide quality education to students.⁴⁶

Proceeding from this premise, each of these studies argued for building a system of governance that subordinates athletic values to educational values.⁴⁷ Unlike the reform proposals debated in the past, the professional model does not have at its core the promotion of the purpose of colleges and universities. Missing is the commitment that the athletic program will support the academic mission of the colleges and universities that will participate in a professional division. As a result, the professional model of intercollegiate athletes, as described by Sack and Staurowsky, appears to be philosophically inconsistent with the fundamental mission of institutions of higher education. In the words of one educator, "[i]t is not the mission of colleges and universities to field professional athletic teams. . . . [T]he athletic program must fit into the educational mission of the university, not be ancillary to it."⁴⁸ Another commentator shared the following description of the "values that higher education and intercollegiate athletics are supposed to promote - the values of providing developmental opportunities for and protecting the welfare of young men and women pursuing higher education, of promoting amateur athletics, and of protecting the academic and moral integrity of

44. See KNIGHT COMM'N REPORT, *supra* note 20, at 5 (The report stated that "[t]heir intrinsic educational value, easily lost in their use to promote extra-institutional goals, becomes engulfed by the revenue stream they generate and overwhelmed by the accompanying publicity."). *Id.*

45. See *e.g.*, *id.* at 11.

46. See *Antitrust Implications of the College Bowl Alliance: Hearings Before the Subcomm. of the Antitrust, Business Rights, and Competition of the Committee on the Judiciary Unsited States Senate*, 105th Cong. 89-132 (1997) (statement of Gary R. Roberts) [hereinafter Roberts' Statement].

47. See Timothy Davis, *A Model for Institutional Governance of Intercollegiate Athletics*, 1995 WIS. L. REV. 599, 603-04.

48. Beauchamp, *supra* note 29, at 9.

our nation's colleges and universities."⁴⁹ I now turn to specific ways in which a professional model of college athletics may undermine the educational mission of higher education and render intercollegiate athletics an illegitimate activity for an institution to pursue.

2. Social Implications of the Professional Model

a. Consequences of Increased Autonomy

Another key theme in earlier reform proposals, and consistent with the idea of college sports as a tool for furthering the educational mission of colleges, is the need to integrate intercollegiate athletics into the university culture.

Viewing college sport as a part of the larger university culture rather than as a quasi-autonomous unit operating within the university has several implications. As an integral part of colleges and universities, athletics must be governed by principles generally applicable to post-secondary education. Consequently, [any] proposed model [must be] premised on an intercollegiate structure which has as its nucleus the most fundamental of these principles, the educational mission of American universities. Building a governance system on this premise sets the stage for subordinating athletic values to educational values.⁵⁰

In short, the greater the integration of the intercollegiate athletics program within the university, the greater the likelihood that it will operate in concert with the academic value.

A professional model is inconsistent with this premise. The following quotation from Sack and Staurowsky is revealing in this regard. A professional division "would allow universities to operate a number of college sports teams primarily as profit centers and as training grounds for high performance athletes."⁵¹ A likely result of their model is to guarantee greater autonomy of athletic departments. Increased autonomy is likely to result in increased isolation from mainstream university life.

Simply stated, financially and socially autonomous athletic departments are less likely to feel that they are accountable to those individuals within the university whose goal it is to ensure that all programs, including extracurricular programs, promote the educational mission. I now turn to the consequences for student-athletes of a professional division.

49. Roberts' Statement, *supra* note 46, at 100.

50. Davis, *supra* note 47, at 603.

51. SACK & STAUROWSKY, *supra* note 11, at 142.

b. *Impact on Educational and Development Interests of Student-Athletes*

Before discussing the specific ways in which a professional model is likely to impact the well-being of student-athletes, two preliminary observations are warranted. As previously noted, the proposed model is bereft of details with respect to the role of the student-athlete participating in professional division sports. Numerous questions emerge including: 1) the nature of the academic eligibility requirements to which these athletes will be subject; 2) will athletes within the professional division be required to take classes; 3) if so, what is the content of the courses that they will be required to take; and 4) will they be subject to any form of a satisfactory progress type rule.

Another preliminary observation is my concern with the accuracy of assumptions that underlie the professional model. The professional model assumes that student-athletes in revenue-producing sports are not interested in educational pursuits. In discussing possible options for reforming intercollegiate athletics, Sack and Staurowsky state that:

Aside from its relative freedom from fraud and duplicity, the professional model of college sport proposed here is remarkably similar to what exists now. Many big-time college athletes devote most of their time to sports and end up giving only one or two classes a semester their full attention. There is no better evidence of this than the rather large numbers of athletes who must take 'incompletes' in classes or who end up taking courses during the intersession and summer, when professors tend to be less demanding. For all intents and purposes, many big-time college athletes are already part-time students. And in some cases, athletes would prefer not to be bothered with school at all.⁵²

At another point, the authors state that it is time to "return college sport to regular students, and get on with the task of educating America's youth."⁵³

Such statements reflect a view of athletes that fit the dumb jock⁵⁴ stereotype inasmuch as it assumes that college athletes who participate in revenue-producing sports have less of an interest in obtaining an education than other students. Certainly for some student-athletes this may

52. SACK & STAUROWSKY, *supra* note 11, at 143-44. They also state as follows: "[t]he other is to openly admit that scholarship athletes are paid professionals and to provide a nonexploitative context in which they can further develop their athletic skills." *Id.* at 142.

53. *Id.*

54. See Harry Edwards, *The End of the "Golden Age" of Black Sports Participation*, 38 S. TEX. L. REV. 1007, 1020 (1997).

be the case. But to assume that this is true for the majority of such student-athletes is inaccurate. To the extent that student-athletes lose interest in focusing on educational pursuits after they arrive at college, the question must be asked what contributes to this change in attitude. The authors of a 1991 study that examined the educational interests of student-athletes addressed both of these points.⁵⁵ With respect to the interest of student-athletes in education, this study concluded that most student-athletes entered college with an interest in educational pursuits.⁵⁶ These authors concluded, however, that the assumption of responsibility of athletic departments of the student-athlete's academic and social affairs

not only creates a relationship of trust, but reinforces the importance of student-athletes' athletic identities to the detriment of their academic identities. The overall consequence of this and other conduct on the part of institutions is to change the educational orientation of student-athletes from one that might have prepared them for careers after college to one that maintains their athletic eligibility.⁵⁷

Statements asserting athlete disinterest in education also indirectly challenge the value that may be derived from a student-athlete's presence on the college campus. Colleges fail and should do more to provide a meaningful educational experience for student-athletes. This failure should not, however, provide the basis for untested assumptions that participation in intercollegiate athletics fails to produce tangible benefits for student-athletes. For example, a 1990 study suggested that participation in intercollegiate athletics correlates into post-college economic benefits for many student-athletes, including African Americans.⁵⁸

55. See PATRICIA A. ADLER & PETER ADLER, *BACKBOARDS & BLACKBOARDS: COLLEGE ATHLETES AND ROLE ENGULFMENT* (1991).

56. See *id.* at 230. See also AM. INSTS. FOR RES., REPT. NO. 3: *EXPERIENCES OF BLACK INTERCOLLEGIATE ATHLETES AT NCAA DIVISION I INSTITUTIONS 47-49* (1989) [hereinafter A.I.R. REPT.] (discussing academic aspirations of African American student-athletes).

57. Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action be Created for Student-Athletes?*, 69 DENV. U. L. REV. 57, 93, n. 267 (1992) (summarizing conclusion set forth in ADLER & ADLER, *supra* note 55, at 131, 221).

58. See CLIFFORD ADELMAN, DEPARTMENT OF EDUCATION, *LIGHT AND SHADOWS ON COLLEGE ATHLETES* 16-17 (1990); see also Douglas Lederman, *Blacks Make Up Large Proportion of Scholarship Athletes, Yet Their Overall Enrollment Lags at Division I Colleges*, CHRON. HIGHER EDUC., June 17, 1992, at A30 (noting that some scholars believe that participation in intercollegiate athletics is "an avenue for 'upward mobility' for young blacks"). But see Edwards, *supra* note 54, at 1026 (questioning whether the exploitation of African American student-athletes negates the usefulness of sports as a means of upward mobility).

African Americans will comprise the majority of the student-athletes who will participate in a professional division, assuming it will consist of football and basketball programs. During 1996, African Americans accounted for 61% and 52% of Division I basketball (male) and football players, respectively.⁵⁹ The racial composition of the revenue-producing sports, concomitant with the likelihood that only the revenue producing sports would become professionalized, means that the impact of the professional model will be disproportionately felt by African American student-athletes. Consequently, careful study should be made of the short and long-term impact of such a model on African Americans with respect to a range of matters including: access to four-year colleges and universities, the long-term economic consequences, and the extent to which the model will deter African American student-athletes who would otherwise have benefitted from attending college from doing so.

I also caution proponents of the professional model to avoid engaging in language that may constitute code words that mask or hide the racial implications of the proposed model. The impact of proposed models on African American Division I-A football players and Division I male and female basketball players must be directly and thoroughly assessed. I also regrettably question to what extent the underlying premises of the professional model both rely on and feed into untrue stereotypes of African American student-athletes' intellectual acumen and desire to seek educational pursuits.⁶⁰ As noted above, the possibility that African American student-athletes benefit from attending college should not only lead to further study in this regard, but also to explore models that encourage rather than discourage their matriculation into the university environment.

In general, allowing intercollegiate athletics to develop as a subculture within post-secondary institutions will pose increased risk to the well-being of student-athletes participating in such programs.⁶¹ Under a professional model, institutions will be more likely to abandon any sense of obligation to provide student-athletes with a meaningful educational opportunity. This will be due, in part, to the assumptions discussed above with regard to the beliefs concerning the academic interest of student-athletes. Even more than is the case today, the focus of institutions

59. See RICHARD E. LAPCHICK, 1997 RACIAL REPORT CARD 1, 3 (1997).

60. See Edwards, *supra* note 54, at 1020; see also Timothy Davis, *The Myth of the Super-spade: The Persistence of Racism in Intercollegiate Athletics*, 22 *FORDHAM URB. L. J.* 615, 669 (1995).

61. See Davis, *supra* note 47, at 604.

with regard to these athletes will be on maintaining their eligibility to participate in intercollegiate competition.

Athletes who participate in the professional division are more likely to feel isolated from an institution's academic and social mainstream. This no doubt will negatively impact their academic achievement. Issues of stigma are likely to become more prevalent. Will athletes be individuals who feel that they "occupy a legitimate place as students" on college campuses?⁶² In particular, will African American student-athletes become even more isolated and stigmatized on college campuses and suffer the consequences that ensue therefrom.⁶³ Given the emphasis on professionalism, it is unlikely that they will. Query also whether another potential effect of athlete isolation from mainstream institutional life will be an increase in social problems as it relates to interaction between athletes and non-athletes.

The ultimate goal of any model of intercollegiate athletics should be "to promote the overall academic and social experiences of student-athletes."⁶⁴ As described by one author, the critical elements of a student-athlete's college education are: "(a) the refinement of personal competence; (b) upward social mobility; and (c) the earning of a degree."⁶⁵ It is unlikely that athletes participating within a professional division will be presented with such opportunities. Any intercollegiate athletics program that decreases the likelihood that students will benefit in the total sense from their university experience is inappropriate and cannot justify its presence on a university campus.⁶⁶ Given the above risks posed to student-athletes' well-being, one cannot help but wonder if student-athletes (particularly African Americans) participating in a professional division will finally have achieved the status of modern day gladiators, as characterized by sociologist Harry Edwards.⁶⁷

62. KNIGHT COMM'N REPORT, *supra* note 20, at 7.

63. See Harry Edwards, *The Black "Dumb Jock": An American Sports Tragedy*, 131 C. BD. REV. 8, 9 (1984); Robert M. Sellers, et al., *Life Experiences of Black Student-Athletes in Revenue-Producing Sports: A Descriptive Empirical Analysis*, ACAD. ATHLETIC J. 20, 33 (1991); A. I. R. REPT., *supra* note 56, at 25.

64. Davis, *supra* note 47, at 605.

65. Robert M. Sellers, *Black Student-Athletes: Reaping the Benefits or Recovering from the Exploitation*, in RACISM IN COLLEGE ATHLETICS: THE AFRICAN-AMERICAN ATHLETE'S EXPERIENCE 143, 157 (Dana Brooks & Robert Althouse eds., 1993).

66. See Davis, *supra* note 47, at 605.

67. See Edwards, *supra* note 63.

3. Practical Issues

a. Legal Implications

Based principally upon the notion of academic abstention, courts have traditionally exhibited considerable unwillingness to intervene in matters involving student-athletes and their institutions.⁶⁸ Academic abstention "arises from the beliefs that because of their expertise in educational matters, faculties and governing bodies of educational institutions should be afforded considerable discretion."⁶⁹ Despite this doctrine, courts have not been nearly as hesitant to become involved in issues involving the business functions of universities.⁷⁰ Consequently, the adoption of a professional model will increase judicial regulation of the relationship between student-athletes and their institutions.

In addition, a professional model is likely to produce legal implications similar to those apt to arise if institutions elect to pay student-athletes a stipend. Dean Goplerud has thoroughly analyzed these issues,⁷¹ consequently, I will only identify them here. These legal issues include: antitrust issues relating to the determination of salaries of student-athletes,⁷² athlete entitlement to workers compensation given their employee status,⁷³ labor issues such as the applicability of the National Labor Relations Act,⁷⁴ gender equity issues,⁷⁵ and taxation issues relating to the tax status both of the compensation paid to athletes and of the revenues generated by a professional team.⁷⁶

b. Structural Issues

It is difficult to identify and assess the structural issues that will arise due to the lack of detail regarding the professional model of college sports. Nevertheless, certain issues are likely to arise including:

(1) The basis on which it will be determined if a school is qualified for entry into the "elite class" of schools that will make up the professional division? Given the rewards which institutions will no doubt believe can be derived from participation therein, legal conflicts will probably arise from decisions and standards developed for excluding

68. See Davis, *supra* note 21, at 783.

69. *Id.*

70. See *id.*

71. See generally Goplerud, *supra* note 5.

72. See *id.* at 1089-94.

73. See *id.* at 1094-1100.

74. See *id.* at 1100-1102.

75. See *id.* at 1100.

76. See Goplerud, *supra* note 5, at 1102.

some and including other institutions. Will a new athletics arms race ensue as institutions attempt to qualify for the professional division?⁷⁷

Another issue that may arise with regard to a professional model is its impact on the popularity, and thus the profitability, of the sports that are played within a professional division. It is possible that professionalizing college football and basketball will lessen its appeal to spectators. One could also argue, however, that the impact in this regard will be negligible. Indeed, it has been suggested that factors other than the amateur status of college sports contribute to the high degree of public interest in intercollegiate athletics. These factors include, "alumni pride and loyalty, tradition, long-standing rivalries, national rankings, and conference and national championship tournament competition."⁷⁸

Similarly, a professional model may raise the sort of anti-competitive concerns that arose in the aftermath of the development of the college bowl alliance. In this regard, the views of Gary Roberts regarding the potential anti-competitive impact of the alliance may be equally relevant to a professional league.

Even more significantly, however, the consumers (fans) on the non-Alliance schools will suffer from even lower product quality than exists now, or possibly having no team at all, because of the exclusive membership criteria of the Alliance. . . .

The reason the Alliance will in a short time drive the excluded 50 Division I-A schools into permanent second-tier status or out of 'business' all together, and will create insurmountable barriers to any new entry, is that it enormously enlarges the financial and prestige gap between the 'haves' and the 'have nots' of college football.⁷⁹

(2) Will the NCAA or some newly constituted body be responsible for the governance of the professional body?

(3) Will governance of intercollegiate athletics programs be based on the notion of institutional control? Moreover, what will be the role of presidents and faculties in the governance of such programs?

(4) Apart from sustaining the particular sport, for what purposes will revenues be used?

(5) What standards will determine the eligibility of athletes to participate in sports in the professional division? In particular will these athletes be subject to weaker academic requirements than athletes in

77. In this context a question that will arise is whether membership will be permanent or will be flexible such that it allows for schools to enter or re-enter.

78. Mitten, *supra* note 25, at 78.

79. Roberts' Statement, *supra* note 46, at 93.

non-professional division sports? On what basis will the level of pay be set for student-athletes?

(6) What will be the impact on African American student-athletes who participate in football and basketball? If one assumes that participation in intercollegiate athletics has been a source of upward mobility for African American student-athletes, will a professional model have an adverse impact in this regard?

III. CONCLUSION

Since its earliest days, commercialized intercollegiate athletics has represented a threat to the moral and financial stability of colleges and universities. Consequently, new and innovative ways must be explored to keep this threat in check. However, the costs attendant to a model of reform anchored by a professional division may render it inadequate as a reasonable and effective means of achieving this objective.⁸⁰ It is unclear whether the proposed model will result in the creation of an entertainment arena in which institutions will no longer even pretend that athletes are students? Is it a model that is antithetical to the educational mission of colleges and universities? Will a professional model of intercollegiate athletics ultimately represent "an unacceptable surrender to despair," rather than a solution?⁸¹ Moreover, it is important that we examine basic assumptions on which models are likely to be challenged or supported. An example of such an assumption is the belief held by many that most athletes who participate in Division I basketball and football are neither academically inclined nor interested in academics. I suggest that these questions and the factors discussed in this paper should be carefully considered not only in evaluating reforms of intercollegiate athletics based upon a professional model but other proposed models.

80. Again, I turn to the words of Professor Roberts which may be applicable in this context. "Intercollegiate athletics in football and men's basketball have already travelled too far down the path of commercialism and exploitation, but we at least still struggle through the NCAA to try to maintain the difficult balance between the need for revenue and the values the enterprise is ultimately all about." *Id.* at 100.

81. KNIGHT COMM'N REPORT, *supra* note 20, at 11.

