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# “A RADICAL PROPOSAL”: TITLE IX HAS NO ROLE IN COLLEGE SPORT PAY-FOR-PLAY DISCUSSIONS

ELLEN J. STAUROWSKY\*

## I. INTRODUCTION

During the 2010 and 2011 college football seasons, renewed interest arose in the issue of paying college athletes. In response to the question of whether Title IX requires that female athletes would have to be paid if male athletes were paid, the general consensus in the press and among experts indicated that Title IX would apply. This Article argues that the assumptions leading to a conclusion that Title IX applies to a pay-for-play system are rooted in a set of questions that have never been resolved and shed light on what an athletic scholarship is and whether athletic scholarships should be covered under Title IX. In an attempt to explore these issues further, this Article will begin with a review of the history associated with the NCAA’s grant-in-aid and athletic scholarship policies, explore a ban on athletic scholarships established by the sport governing body that sponsored women’s collegiate championships in the 1970s called the Association for Intercollegiate Athletics for Women (AIAW), proceed to examine the case of *Kellmeyer et al. v. the National Education Association et al.*, and conclude with an argument that if athletic scholarships represent a form of pay for the work of athletes in televised, commercial sport entertainment, Title IX may not in fact apply.

## II. BACKGROUND

As a matter of collective memory, it will be interesting to explore what is remembered of the college football seasons from 2010 and 2011 a decade from now. Will it be the blazing talent of the Auburn University football team that would eventually lead to its selection as the top team in the nation in January of 2011?<sup>1</sup> Or will the recollection of what some have referred to as

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1. See Nathan Deal, *On to Victory: Auburn Wins the National Championship over Oregon*, BLEACHER REP. (Jan. 11, 2011), <http://bleacherreport.com/articles/569036-on-to-victory-auburn-wins-the-national-championship-over-oregon>.

college sport scandals win out in retrospect?<sup>2</sup>

In a string of bad press stories that can be traced to former University of Southern California (USC) running back Reggie Bush's unprecedented move to return the Heisman Trophy after a National Collegiate Athletic Association (NCAA) investigation revealed that he had accepted compensation well above the value of an athletic scholarship while playing in college, one bad incident turned into one bad month and then one long, unending, bad year and a half.<sup>3</sup> As if a calendar of supposed wrongdoing could be developed from the litany of reports, revelations that the father of star quarterback for the Auburn University team, Cam Newton, had attempted to turn his son's football services into a six-figure payday for the family—something that his son claims to have had no knowledge—would remain fodder for sports news for months while new stories about other programs surfaced.<sup>4</sup>

Rumblings of misdeeds at perennial powerhouse, The Ohio State University, eventually revealed that quarterback Terrelle Pryor and four teammates sold memorabilia for cash and tattoos in violation of NCAA rules, trading on their celebrity status as college athletes who competed in the NCAA's highest division, the Football Bowl Series (FBS).<sup>5</sup> Just as it seemed that a new season offered a fresh page and assurance that the trouble was over as the fall of 2011 approached, a story about the University of Miami presented the picture of a booster who offered favors to athletes in the form of drugs, sex, and the lure of the party scene as played out on exclusive yachts.<sup>6</sup> And so it went, the "FBS Scandal Train," picking up passengers on its transcontinental journey at Louisiana State University (LSU), the University of Oregon, Boise State University, and elsewhere around the nation.<sup>7</sup>

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2. See e.g., Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, available at <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/>; Charles Robinson & Josh Luchs, *College Football Season Kicks off as Scandals Mount*, NPR (Aug. 30, 2011), <http://www.npr.org/2011/08/30/140060696/college-ball-scandals-mount-as-season-kicks-off>; *What the Hell Has Happened to College Sports? And What Should We Do About It?*, THE CHRON. HIGHER EDUC. (Dec. 11, 2011), <http://chronicle.com/article//130071/>.

3. See Bill Pennington, *Bush, Ineligible for '05, Returns His Heisman*, N.Y. TIMES, Sept. 15, 2010, at B15.

4. See *Auburn Releases Cam Newton Docs*, ESPN (Nov. 5, 2011), [http://espn.go.com/college-football/story/\\_id/7190987/auburn-tigers-records-reveal-details-cam-newton-scandal](http://espn.go.com/college-football/story/_id/7190987/auburn-tigers-records-reveal-details-cam-newton-scandal).

5. See e.g., *Ohio State Football Players Sanctioned*, ESPN (Dec. 26, 2010), <http://sports.espn.go.com/nfl/news/story?id=5950873>; *Terrelle Pryor Exiting OSU Amid Scandal*, ESPN (June 8, 2011), <http://sports.espn.go.com/nfl/news/story?id=6636768>.

6. See Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! SPORTS (Aug. 16, 2011), [http://sports.yahoo.com/investigations/news?slug=cr-renegade\\_miami\\_booster\\_details\\_illicit\\_benefits\\_081611](http://sports.yahoo.com/investigations/news?slug=cr-renegade_miami_booster_details_illicit_benefits_081611).

7. See Bill Reiter, *LSU-Oregon a Stark Reminder of Scandals*, FOX SPORTS (Sept. 1, 2011), <http://msn.foxsports.com/collegefootball/story/Drama-defines-LSU-Oregon-showdown-090111>.

In an event that received little coverage, in April of 2011, the NCAA Board of Directors quietly placed a moratorium on its institutional certification process, the purpose of which was to ensure that schools were operating their athletic programs with integrity and in substantial conformity with NCAA rules.<sup>8</sup> While the justification for doing so was the cost of the exercise, both financially as well as in staff time, it was notable that two items were pulled from the list of what would be covered in an institutional review. Those two items were presidential control and compliance with NCAA rules.<sup>9</sup>

In reaction to this seemingly unsettling tour of vice, fueled as it was by perceptions of an out of control college sport system, researchers, writers, and average fans were left wondering if the penalties assessed to players and their coaches for misbehavior and ethical misconduct were proportional to what had actually happened.<sup>10</sup> Contrue Ohio State quarterback Terrelle Pryor announced in June of 2011 that he would not complete his final year at Ohio State after being suspended for five games for receiving extra benefits under NCAA rules, opting instead to pursue his professional football career a year earlier than expected.<sup>11</sup> As one writer put it, “I understand that a rule is a rule, and it applies to everyone. But why does the rule exist in the first place?”<sup>12</sup>

College athletes in premier, moneymaking FBS programs compete in an industry that bears a striking resemblance to professional sports leagues. This resemblance is born out of the fact that in the “major” sports properties firmament, the Bowl Championship Series and the NCAA’s March Madness (Division I men’s basketball tournament) emerge among the top ten events, alongside such storied professional events as the National Football League’s (NFL) Super Bowl, Major League Baseball’s World Series, and the National Hockey League’s Stanley Cup Playoffs.<sup>13</sup>

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8. See NCAA DIVISION I BOARD OF DIRECTORS, APRIL 2011 LEGISLATIVE ACTION REQUESTED REGARDING NCAA DIVISION I ATHLETICS CERTIFICATION PROGRAM (Apr. 2011), *available at* [http://fs.ncaa.org/Docs/DI\\_MC\\_BOD/DI\\_BOD/2011/April/ACP.pdf](http://fs.ncaa.org/Docs/DI_MC_BOD/DI_BOD/2011/April/ACP.pdf) [hereinafter NCAA DIVISION I BOARD OF DIRECTORS]; Press Release, NCAA, NCAA Announces Latest Division I Certification Decisions (Aug. 18, 2011), *available at* <http://fs.ncaa.org/Docs/PressArchive/2011/20110818+athletic+cert+rls.htm> [hereinafter NCAA Certification Decisions]; see also *Certification Decisions Announced*, NCAA (Mar. 10, 2011), <http://www.ncaa.com/news/ncaa/2011-03-10/certification-decisions-announced>.

9. See NCAA DIVISION I BOARD OF DIRECTORS, *supra* note 9.

10. See Joe Beale, *The State of Sportsmanship and Ethics*, ELEVEN WARRIORS (May 5, 2011), <http://www.elevenwarriors.com/2011/05/the-state-of-sportsmanship>.

11. Erick Smith, *Terrelle Pryor Announces End of His Ohio State Playing Career*, USA TODAY (June 7, 2011), <http://content.usatoday.com/communities/campusrivalry/post/2011/06/terrelle-pryor-leaving-ohio-state/1>.

12. Beale, *supra* note 11.

13. NIELSEN, STATE OF THE MEDIA: YEAR IN SPORTS 2010 (2011).

When considered in that light, the issues for which players were being publicly chastised and privately punished by their institutions and the NCAA in 2010 and 2011 were caused by modest explorations of their own fair market value within a highly commercialized college sport enterprise. For those athletes in revenue-producing sports, the rules have historically been designed to suppress athletes' value while displacing the revenue generated by them. This has resulted in FBS football coaches' salaries rising by 120% in less than a decade and college sport corporate partners realizing millions of dollars.<sup>14</sup> While college-player labor costs are essentially zero, compensation packages for top-tier college football and men's basketball coaches are competitive or exceed those of coaches working in the National Basketball Association (NBA) and NFL.<sup>15</sup>

As various aspects of the college sport business were subjected to scrutiny, renewed interest occurred in the question of whether college athletes should be paid. In July of 2011, *ESPN.com* produced a four-part series on the subject.<sup>16</sup> Energy around the issue would be further fueled by two things that happened in mid-September of 2011, occurring just days apart. The first was the publication of an article by Pulitzer Prize winning author Taylor Branch, entitled *The Shame of College Sports*, which appeared in *The Atlantic* magazine.<sup>17</sup> In an investigative exposé, Branch highlighted in stark detail the inequities that exist in the business practices of college sport that render athletes as a workforce that is denied the most fundamental of rights. The second was the release of a report collaboratively developed by the National

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14. See generally RAMOGI HUMA & ELLEN J. STAUROWSKY, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT (2011), available at <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>; see also James K. Gentry & Raquel M. Alexander, *From the Sideline to the Bottom Line*, N.Y. TIMES, Jan. 1, 2012, at SP1; Joe Nocera, *Here's How to Pay Up Now*, N.Y. TIMES, Jan. 1, 2012, at MM30; Michael Sanserino, *College Coaches' Salaries Continue to Soar*, PITT. POST-GAZETTE, Jan. 15, 2011, at A1; Andy Schwarz, *Pay-for-Play—The Truth Behind the Myths*, ESPN (July 15, 2011), <http://sports.espn.go.com/ncaa/news/story?id=6735469>; Ellen J. Staurowsky, *Urban and Me: We're Almost Twins . . . Except for that 6-Year \$26.6 Million Contract*, COLL. SPORTS BUS. NEWS (Dec. 1, 2011), <http://collegesportsbusinessnews.com/issue/december-2011/article/urban-and-me>.

15. Gentry & Alexander, *supra* note 15; see also Tom Van Riper, *The Highest-Paid NFL Coaches*, FORBES.COM (Jan. 4, 2011), <http://www.forbes.com/2011/01/04/patriots-redskins-seahawks-business-sports-nfl-highest-paid-coaches.html>.

16. See Pat Forde, *Time Has Come to Talk About Play-for-Pay*, ESPN (July 12, 2011), [http://sports.espn.go.com/ncaa/columns/story?columnist=forde\\_pat&id=6746255](http://sports.espn.go.com/ncaa/columns/story?columnist=forde_pat&id=6746255); Mark Schlabach, *Examining Pay-for-Play Proposals*, ESPN (July 15, 2011), [http://espn.go.com/college-sports/story/\\_/id/6768411/pay-play-proposals-ncaa-student-athletes](http://espn.go.com/college-sports/story/_/id/6768411/pay-play-proposals-ncaa-student-athletes); *To Pay or Not to Pay? That's the Debate*, ESPN (July 18, 2011), [http://espn.go.com/college-sports/story/\\_/id/6770743/pay-play-debate](http://espn.go.com/college-sports/story/_/id/6770743/pay-play-debate); Schwarz, *supra* note 15; *Pay-for-Play: Dr. Ellen Staurowsky*, ESPN (July 18, 2011, 10:51 AM), [http://espn.go.com/sportsnation/chat/\\_/id/39354](http://espn.go.com/sportsnation/chat/_/id/39354).

17. Branch, *supra* note 3.

College Players Association (NCPA) and the Drexel University Sport Management Program called *The Price of Poverty in Big Time College Sport*.<sup>18</sup> That report put forward three major findings.

The first finding debunked the myth that college athletes awarded a full scholarship receive a “free” education by demonstrating that NCAA rules restrict scholarship assistance to tuition, room and board, and books, leaving an average shortfall between the scholarship and cost of attendance of about \$3222.<sup>19</sup> The second finding offered an analysis of what a fair market value for FBS football and men’s basketball players might be by applying revenue sharing formulas used in the NFL and NBA (forty-eight percent and fifty percent, respectively) to revenues generated for those sports. Based on the analysis, the value of an athletic scholarship underestimates the value of a player in his respective sport, with the average value of a football player estimated at \$121,048 and a men’s basketball player at \$265,027.<sup>20</sup> And the third finding revealed that, when the value of a scholarship allocated solely for living expenses (room and board) was compared to the federal poverty line, athletes in revenue-producing sports were living below the poverty line.<sup>21</sup>

The pressure brought on by suspicions of wrongdoing and unfair treatment of athletes was compounded by a flurry of activity around conference affiliations. With talk of expansion within the Atlantic Coast Conference, Pac-12 Conference, and the Southeastern Conference (SEC), schools were left scrambling to ensure their position in an increasingly competitive industry, laying the groundwork for what many believe is the creation of a super-conference structure where the power and money associated with big-time football will be localized within four to six major conferences. Writing for *Yahoo! Sports*, Matt Hinton described the changes as consistent with the two hallmarks of an “unstructured, unwieldy, Darwinian ecosystem,” those being turmoil and change.<sup>22</sup> He went on to write, “Schools and conferences have always been in it for themselves—the NCAA, too—and the next phase of that evolution will be every bit as pitiless on those that are slow or ill-equipped to adapt as all of the previous phases.”<sup>23</sup>

By October of 2011, the NCAA Board of Directors fast-tracked legislation

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18. HUMA & STAUROWSKY, *supra* note 15.

19. Branch, *supra* note 3.

20. HUMA & STAUROWSKY, *supra* note 15, at 14–16.

21. *Id.* at 16.

22. Matt Hinton, *The Big Picture: Expansion and the ‘Super Conference’ Are Here Again, Just Like the Good Old Days*, RIVALS.COM (Sept. 14, 2011), [http://rivals.yahoo.com/ncaa/football/blog/dr\\_saturday/post/The-Big-Picture-Expansion-and-the-8216-super-?urn=ncaaf-wp6317](http://rivals.yahoo.com/ncaa/football/blog/dr_saturday/post/The-Big-Picture-Expansion-and-the-8216-super-?urn=ncaaf-wp6317).

23. *Id.*

to provide for the possibility of schools, at the discretion of conferences, to award an additional \$2000 stipend for what they referred to as “miscellaneous expenses,” a move that returned the compensation package for athletes to what it was in the 1950s when athletes could receive an additional amount beyond the scholarship in “laundry money.”<sup>24</sup> While college officials have balked at the increase in the stipend, the \$2000 proposed in the legislation falls short of covering the full cost of attendance. As of this writing, the issue is expected to come up for further review in August of 2012.<sup>25</sup> Further, this represents nothing more than what was to have been put into place following the settlement in *White v. NCAA* in 2008,<sup>26</sup> a case that challenged the limits set by the NCAA on athletic scholarships.<sup>27</sup>

As these discussions evolved, converged, and occasionally collided, the related question emerged. If the college sport system did in fact move to a pay-for-play system in big-time programs, in keeping with the massive shifts that were taking place within major conferences that signaled the likelihood of the creation of a super-conference structure, what would Title IX require? Would Title IX require that female athletes be paid if male athletes were paid?

The general perception has been that Title IX does apply, and female athletes would need to be compensated equitably in relation to their male peers. As ESPN writer Mechelle Voepel reported, “In regard to the concept of ‘pay-for-play,’ Title IX is generally seen as a substantial roadblock” that likely offers “no viable end-around Title IX to allow schools to pay only those athletes who are in profitable sports, which generally are football and men’s basketball.”<sup>28</sup>

In his efforts to research a model to pay college athletes, *Sports Illustrated*

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24. *NCAA Panel Approves Major Changes*, ESPN (Oct. 27, 2011), [http://espn.go.com/college-sports/story/\\_/id/7156548/ncaa-panel-approves-major-scholarship-rules-changes](http://espn.go.com/college-sports/story/_/id/7156548/ncaa-panel-approves-major-scholarship-rules-changes); see also *NCAA Suspends \$2,000 Athlete Stipend*, KENTUCKY.COM (Dec. 16, 2011), <http://www.kentucky.com/2011/12/16/1996432/ncaa-suspends-2000-athlete-stipend.html>. In December of 2011, the proposal to allow conferences to offer a stipend of up to \$2000 was put on hold when at least 125 schools asked for the proposal to be tabled. Opposition to the proposal included concerns that paying athletes a stipend violated the NCAA’s amateur principle and Title IX compliance concerns. See Letter from Josephine R. Potuto, President, NCAA Div. IA Faculty Athletics Reps., to Mark Emmert, President, NCAA, & Judy Genshaft, President, Univ. of S. Fla. Sys. (Dec. 2, 2011), at 1–3 (raising issues regarding the \$2000 stipend and Title IX).

25. See Steve Wieberg, *NCAA Board of Directors Weighs Changes to Stipend Proposal*, USA TODAY (Apr. 25, 2012), <http://www.usatoday.com/sports/college/story/2012-04-25/NCAA-stipends-David-Berst-athletes-APR-bowl-schedule/54538496/1>.

26. See generally *White v. NCAA*, No. 06-CV-0999 (C.D. Cal. 2008).

27. Doug Lederman, *Settlement Raises Questions for NCAA*, INSIDE HIGHER ED (Feb. 4, 2008), <http://www.insidehighered.com/news/2008/02/04/ncaa>.

28. Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (July 15, 2011), [http://espn.go.com/college-sports/story/\\_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics](http://espn.go.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics).

writer George Dohrmann consulted with a tax attorney, two Title IX experts, an antitrust lawyer, a sports agent, and an accountant familiar with the nuances of athletic department financial records, along with current and former college athletes.<sup>29</sup> When confronted with the question of whether a pay system could be devised that would allow male athletes to be paid without providing equitably for female athletes, Dohrmann's conclusion was no. After University of South Carolina head football coach Steve Spurrier garnered support from other SEC coaches for a plan to compensate players per game, even suggesting that the money come from coaches' salaries, *Atlanta Journal Constitution* reporter Jeff Schultz reached a similar conclusion. He wrote, "Finding a fair and workable salary system that fits into Title IX regulations would be nearly impossible."<sup>30</sup> In turn, Lisa Horne, writing for *Fox Sports News*, reported that attorney Michael Buckner, an expert on NCAA enforcement said, "Any plan to pay student-athletes would have to adhere to federal law."<sup>31</sup> Horne took that to mean, "If football players are paid, then somewhere, student-athletes in a women's sport will also have to be compensated."<sup>32</sup>

Although there seems to be a great deal of certainty that Title IX applies to the notion of pay-for-play, the assumptions leading to a conclusion that Title IX applies to a pay-for-play system are rooted in a set of questions that were never resolved, and are questions that shed light on what an athletic scholarship actually is and whether athletic scholarships should be covered under Title IX.

### III. A BRIEF HISTORY OF NCAA POLICY ON ATHLETIC SCHOLARSHIPS AND PAY-FOR-PLAY

The practice of awarding athletic scholarships originated in men's college sport. As early as the 1880s, offering some form of compensation for men with athletic talent was commonplace.<sup>33</sup> Subsidization schemes designed to

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29. George Dohrmann, *Pay for Play: The Mission of Our Universities is to Educate, but College Sports is Big Business, and No One Wants Young Athletes Exploited*, SI.COM (Nov. 7, 2011), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1191778/index.htm>.

30. Jeff Schultz, *Spurrier's Pay Petition Meaningless but Concept Has Merits*, ATL. J. CONST. (June 2, 2011, 10:48 AM), <http://blogs.ajc.com/jeff-schultz-blog/2011/06/02/spurriers-pay-pitch-meaningless-but-concept-has-merits/>.

31. Lisa Horne, *Pay for Play Could be Disastrous*, FOX SPORTS (July 25, 2011), <http://msn.foxsports.com/collegefootball/story/Paying-student-athletes-could-open-door-to-a-union-and-a-strike-072411>.

32. *Id.*

33. ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH* 23 (1998).



attract male athletes who could help teams win were a part of college sport culture, as evidenced in an article entitled *Buying Football Victories*, which appeared in *Collier's Magazine* in 1905.<sup>34</sup> Coaches, like famed University of Chicago's Amos Alonzo Stagg, had access to trust funds that they would allocate to male athletes who could not otherwise play football, attend college, and hold down a campus job because of the demands of their sport.<sup>35</sup> While the amateur ideal of sport being pursued as a leisurely activity was given lip service, the tide had already turned on the issue of paying college athletes. As Chancellor of Allegheny College, W. H. Andrews commented in 1905, "We go out after men for the sake of baseball and football, offering all sorts of inducements. . . . Scholarships are offered to promising players. Professionalism is winked at."<sup>36</sup> In exasperation, Brown University Dean Alexander Meikeljohn objected to the "outright hiring of players," but noted that "thousands of dollars are expended annually in the work of securing for the teams men who have no right to play on them whatever."<sup>37</sup>

Throughout the span of men's college sport history, the issue of how athlete compensation could be reconciled with amateur principles has been the subject of much debate. Consider the stance of the NCAA in 1906, which identified "[t]he offering of inducements to players to enter Colleges or Universities because of their athletic abilities and of supporting or maintaining players while students on account of their athletic abilities, either by athletic organizations, individual alumni, or otherwise, directly or indirectly" as a violation of the amateur code.<sup>38</sup> The official prohibition on athletic scholarships merely served to create an underground economy that flourished in the 1920s and 1930s.<sup>39</sup>

Despite such a stance, by the mid-1940s, the NCAA had not yet been able to exert a unified voice on the question, with conferences around the country offering a myriad of compensation options. Some, like the Ivy League and the Big Ten, were opposed to offering athletic scholarships, while conferences in other parts of the country chose instead to provide full scholarships. In an attempt to forge a compromise between those college sport officials in favor of

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34. Edward S. Jordan, *Buying Football Victories*, *COLLIERS*, Nov. 18, 1905, at 19–20.

35. *See id.*

36. *No Football Reform; Delay By New Body*, *N.Y. TIMES*, Dec. 30, 1905, available at <http://query.nytimes.com/mem/archive-free/pdf?res=FA0B13FA3E5E12738DDDA90B94DA415B858CF1D3>.

37. Alexander Meiklejohn, *The Evils of College Athletics*, *HARPER'S WKLY.* 49, Dec. 2, 1905, at 1751.

38. *BYLAWS*, art. VI, § (a)(1), *INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S.*, in *PROCEEDINGS OF THE FIRST ANNUAL MEETING* 33 (Dec. 29, 1906).

39. *See SACK & STAUROWSKY*, *supra* note 34, at 35–40.

full scholarships and those who believed that athletes should be treated like all other students with the purpose of bringing order to what had become a fairly freewheeling landscape, the NCAA adopted what came to be called the Sanity Code in 1948.<sup>40</sup>

The Sanity Code was important for two reasons. First, it “abandoned the NCAA’s forty-two-year-old commitment to amateur principles and allowed financial aid to be awarded on the basis of athletic ability.”<sup>41</sup> Although the awards would still need to be allocated within a need-based financial aid system covering tuition and incidental expenses, the Sanity Code nevertheless acquiesced on the issue of recognizing athletic talent as the reason for the award.<sup>42</sup> Second, the Sanity Code also provided that athletes could not be deprived financial assistance because of failure to participate in intercollegiate athletics.<sup>43</sup>

Despite the best efforts to reach a compromise, the Sanity Code was not embraced by the entire membership. In 1949, it was determined that twenty institutions were not in compliance.<sup>44</sup> Threatened with expulsion from the NCAA, thirteen institutions eventually conceded and fell in line, with seven holdouts staging what amounted to a revolt.<sup>45</sup> When it came time to vote to expel those schools, the membership hesitated, and the proposal to dismiss the noncompliant schools fell short of the two-thirds majority required.<sup>46</sup> With the failure of that vote, the Sanity Code died.<sup>47</sup>

Out of the collapse of the Sanity Code arose the framework for the current athletic scholarship system.<sup>48</sup> NCAA rules passed in 1957 provided for athletic scholarships, or what were called grants-in-aid (GIA), to cover room, board, tuition, and fees.<sup>49</sup> Significantly, Walter Byers, the first full-time executive director of the NCAA, who was at the helm of the organization

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40. *See id.* at 43–46; JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA’S FIRST CENTURY* 69 (2006); SACK & STAUROWSKY, *supra* note 34, at 43–46; JOHN SAYLE WATTERSON, *COLLEGE FOOTBALL: HISTORY, SPECTACLE, CONTROVERSY* 209–14 (2000). It should be noted that the Sanity Code evolved from discussions about something NCAA officials referred to as the Purity Code. *See also* WALTER BYERS & CHARLES HAMMER, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES* 53–55 (1995); RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* 88–99 (2011).

41. *See* SACK AND STAUROWSKY, *supra* note 34, at 44.

42. *Id.*

43. *Id.*

44. *Id.* at 45.

45. *Id.*

46. *Id.*

47. *Id.*

48. *See id.* at 46–47.

49. BYERS & HAMMER, *supra* note 41, at 73.

between 1951 and 1987, described the athletic scholarship system created in 1956 as the start of what would become “a nationwide money-laundering scheme,” where funds that had previously been given directly to athletes or their parents from alumni and boosters were redirected through university channels.<sup>50</sup> This represented a complete reversal of the NCAA’s position from five decades previous, and practices that were once thought to violate amateurism rules became a part of the fabric of college sport.<sup>51</sup> It was here that amateurism was replaced with professionalism.<sup>52</sup>

There was one final element that needed to be dismantled before a full-blown pay-for-play system was in effect. In 1956, the athletic scholarship system still allowed for athletes to receive four-year awards with the stipulation that an athlete could retain that award whether he was participating on an intercollegiate team or not.<sup>53</sup> This provision was removed from NCAA rules in 1973, creating the one-year renewable scholarship and leaving athletes subject to conditions that resemble those that apply to at-will employees.<sup>54</sup> While athletes have the right to appeal the revocation of their scholarship, it is the case that athletes do not retain athletic scholarship awards due to excellence in academic performance. College athletes can have their scholarships reduced or completely revoked because of nonproduction on the athletic field due to an array of issues—injury, an off-year, coaching staff decisions, reduction in playing time, or a myriad of other related issues.<sup>55</sup>

With this final piece in place, the one-year renewable scholarship signaled a change in the expectations for athletes. They were no longer assured the opportunity to receive funding whether they played their sport or not. They were no longer assured a four-year award that would allow them to complete their degrees. And they were subject to dismissal at the discretion of the coach.<sup>56</sup>

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50. *Id.*

51. See SACK & STAUROWSKY, *supra* note 34, at 47.

52. See *id.* at 46.

53. CROWLEY, *supra* note 41, at 92. The legislation was approved in 1956 and implemented in 1957.

54. *Id.*

55. David Cassilo, *For College Scholarship Athletes, Injury Can Spell Financial Disaster*, DAILY CALLER (Nov. 9, 2011), <http://dailycaller.com/2011/11/09/for-college-scholarship-athletes-injury-can-spell-financial-disaster/>; *New One-and-Done: Revoked Scholarships Surprise Athletes*, USA TODAY (May 24, 2010), [http://www.usatoday.com/sports/college/mensbasketball/2010-05-24-revoked-scholarships\\_N.htm](http://www.usatoday.com/sports/college/mensbasketball/2010-05-24-revoked-scholarships_N.htm).

56. In the fall of 2011, the NCAA Division I Board of Directors allowed institutions the discretion to award four year scholarships, resulting in some institutions doing just that in the spring of 2012 while other institutions continuing the practice of offering one year renewable awards. David Barron, *NCAA DILEMMA; 4-year Ride or Override? Colleges Weigh In; Scholarship Rule Attracts*

This has resulted in the real consequence of athletes having their scholarships taken away for a variety of reasons. Several cases illustrate this point. Grayson Mullins, a former football player at the University of South Carolina, had his scholarship awarded to another player after head coach Steve Spurrier took over the program after Lou Holtz.<sup>57</sup> In an effort to ensure the best possible roster of players, some coaching staffs engage in the practice of oversigning players, meaning that they bring in more athletes than they have scholarships. Once an athlete gets to one of those schools, the athlete finds out that the funding that the athlete expected to receive is no longer available.<sup>58</sup> In turn, athletes suffering injuries may be released from their programs. Former Rice University football player Joseph Agnew experienced this when he suffered an injury that resulted in the withdrawal of a scholarship in his senior year.<sup>59</sup>

#### IV. ASSOCIATION FOR INTERCOLLEGIATE ATHLETICS FOR WOMEN: A STANCE AGAINST ATHLETIC SCHOLARSHIPS

In 1971, a year before the passage of Title IX, women physical education leaders who served in the Division of Girls and Women in Sport (DGWS) (a section of the American Alliance for Health, Physical Education, and Recreation, otherwise known as AAHPER), approved the creation of the AIAW.<sup>60</sup> The AIAW, the first and only national women's collegiate athletic association, would survive for a decade before eventually being overtaken by the NCAA.

The AIAW's women-only focus was not the only feature that distinguished it from its brother organizations, the NCAA and the National Association of Intercollegiate Athletics (NAIA). With links to the National Education Association (NEA) through AAHPER, the AIAW was, and remains, the only national intercollegiate sport-governing body born out of an

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*Critics, Supporters Alike*, HOUSTON CHRON., Feb. 12, 2012, at SPORTS 1.

57. Doug Segrest, *College Athletes' Rights: Some Athletes Lose Their Single-Year Scholarships to Better Players*, AL.COM (Oct. 23, 2011), [http://www.al.com/sports/index.ssf/2011/10/college\\_athletes\\_rights\\_some\\_a.html](http://www.al.com/sports/index.ssf/2011/10/college_athletes_rights_some_a.html).

58. *Id.*

59. Katie Thomas, *N.C.A.A. Sued over One-Year Scholarships*, N.Y. TIMES, Oct. 26, 2010, at B16.

60. See ELLEN W. GERBER ET AL., *THE AMERICAN WOMAN IN SPORT* 83–84 (1974); SACK & STAUROWSKY, *supra* note 34, at 112; SMITH, *supra* note 41, at 144–45; WELCH SUGGS, *A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX* 49–50 (2005); YING WUSHANLEY, *PLAYING NICE AND LOSING: THE STRUGGLE FOR CONTROL OF WOMEN'S INTERCOLLEGIATE ATHLETICS, 1960–2000* 70–75 (2004). There is some discrepancy between scholars as to the actual year that the AIAW was created; however, for the sake of this Article, the author relies on 1971 as the appropriate year.

educational association.<sup>61</sup>

Confronted with a largely blank canvas when it came to offering college sport at an elite level for female athletes, the leaders of DGWS and the AIAW had a keen awareness of their educational roots and understood the outlook and sensibilities that they brought to the creation of a women's college sport structure were different from some of their male contemporaries.<sup>62</sup>

Former AIAW president, athletics administrator, and coach at James Madison University, Leotus Morrison, addressed this when she wrote, "One must remember that the AIAW leaders were educators first, and they were trying to develop a very different model to govern athletics."<sup>63</sup> Proceeding from the premise that whatever model they adopted had to place the interests of female students at the core, AIAW leaders embarked on a journey to forge a new model of college sport distinct from that in place for men.<sup>64</sup> What set the AIAW apart from the NCAA in a profound way was the structural commitment to the individual rights of athletes as students.<sup>65</sup> This was a radical departure in the way that college sport governance was conducted, reflecting the belief of AIAW leaders that the existing male models of intercollegiate athletics failed to mesh with the educational mission of higher education because of the nature of the professional and commercial aspects of the enterprise. It was a model above all else that sought to prevent female students from being treated as pawns in the pursuit of victory for victory's sake in a way that would alienate them from the rest of the student body.

According to the worldview of the AIAW, shaped as it had been by watching the evolution of men's athletics over time, sacrificing the health and well-being of female students to a fan-driven, commercial-seeking enterprise was anathema to the idea of an educational-based college sport system. Scholarships and the limitations imposed on athletes who received them were seen as a corrupting influence that distorted relationships between students, their coaches, and their institutions. Conceptualized as a matter of justice, another former AIAW president, Bonnie Slatton from the University of Iowa, stated that "there are certain rights [namely, freedom of education] which belong to a [student-athlete]" and ought not to be infringed upon by the

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61. SACK & STAUROWSKY, *supra* note 34, at 112; WUSHANLEY, *supra* note 61, at 63–64.

62. SACK & STAUROWSKY, *supra* note 34, at 112.

63. L. Leotus Morrison, *The AIAW: Governance by Women for Women*, in *WOMEN IN SPORT: ISSUES AND CONTROVERSIES* 59–62 (Greta L. Cohen ed., 1993).

64. See *id.*; see also Ellen Gerber, *The Controlled Development of Collegiate Sport for Women, 1923–1936*, 2 *J. SPORT HIST.* 1, 27 (1975).

65. See Bonnie L. Slatton, *AIAW: The Greening of American Athletics*, in *THE GOVERNANCE OF INTERCOLLEGIATE ATHLETICS* 144–45 (James H. Frey ed., 1982).

collective action of any sport-governing body.<sup>66</sup>

This perspective resulted in a set of policies that ran counter to those espoused by the NCAA, namely no off-campus recruiting, more liberal transfer rules, and a governance structure that included athlete representatives who could exert their voice in the formulation of policy and vote on it.<sup>67</sup>

The ideological centerpiece of the AIAW's educational model of college sport was its original prohibition on athletic scholarships. Drawn from the 1969 DGWS position paper on the topic, the ban on athletic scholarships was designed to avoid the perceived problems associated with men's college sport, including "pressure recruiting, the possibility of exploiting athletes, and the increased financial costs associated with buying athletic talent."<sup>68</sup> In the estimation of AIAW leadership, offering athletic scholarships was antithetical to a model of amateur, educational athletics. Within months of Title IX's passage, the AIAW's model of college sport for women would be challenged on several fronts, starting with the rule barring athletic scholarships.

#### V. KELLMEYER V. NATIONAL EDUCATION ASSOCIATION<sup>69</sup>

In January of 1973, the charismatic physical education director at Marymount College, who would soon leave that position to become the first executive director of the newly formed Women's Tennis Association (WTA), Fern Lee "Peachy" Kellmeyer, became the lead plaintiff in a lawsuit that raised questions regarding the legality of the AIAW's policy barring female athletes who received athletic scholarships from competing in AIAW championships.<sup>70</sup> As one of the first skirmishes in the battle over the destiny of women's college sport, the case has had an enduring effect on how equitable treatment is defined.

Interestingly, the complaint itself is a mere twelve pages long, half of which are devoted to the identification of the fourteen plaintiffs from Marymount College and Broward Community College (Kellmeyer along with two tennis coaches and eleven players who were on scholarship) and the eight associations and officers named as defendants (NEA, the AAHPER, the DGWS, the AIAW, the National Association of Physical Education of College

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66. *Id.* at 146; SACK & STAUROWSKY, *supra* note 34, at 113.

67. *See* SACK & STAUROWSKY, *supra* note 34, at 135.

68. *See id.* at 114.

69. *See generally* Complaint, Kellmeyer v. Nat'l Educ. Ass'n, 73-CV-21 (S.D. Fla. Jan. 4, 1973) (on file with author).

70. *Women's Tennis Pioneer Peachy Kellmeyer to be Inducted in 2011*, INT'L TENNIS HALL OF FAME & MUSEUM (Jan. 27, 2011), <http://www.tennisfame.com/womens-tennis-pioneer-peachy-kellmeyer-to-be-inducted-in-2011>.

Women, the Florida Association for Physical Education of College Women, the Florida Commission of Intercollegiate Athletics for Women, and the Southern Association for Physical Education for Women).<sup>71</sup>

Broadly conceived, the suit alleged that the AIAW's anti-scholarship ban denied plaintiffs' equal protection of the law under the Fourteenth Amendment, discriminated against them on the basis of sex in an educational setting receiving Federal financial assistance under Title IX, and violated their rights to equal employment under Title VII.<sup>72</sup> In his analysis of the case, NEA lead counsel Joel Gewirtz believed the plaintiffs would not be successful. In a briefing memo to AAHPER Executive Secretary Carl Troester, Gewirtz wrote that "the Kellmeyer suit [did] not appear an effective vehicle for obtaining a judgment against AIAW. . . . There [we]re a number of possible bases for such a dismissal, including the argument that plaintiffs, in view of the nature of their claims, ha[d] not selected appropriate defendants."<sup>73</sup>

Additionally, there was no previous history to determine how or in what ways Title IX would be applied to the case. At the time the suit was prepared, Title IX was less than one year old. The Title IX regulation would not be adopted until 1975,<sup>74</sup> while the policy interpretation on Title IX (Intercollegiate Athletics Policy Interpretation) would not be completed and published for another six years.<sup>75</sup>

Despite the weaknesses of the lawsuit, Gewirtz advised that the AIAW policy be changed because of a strong likelihood of other suits following that might ultimately succeed. He wrote,

I believe that this suit is the first of many which will be filed by various plaintiffs around the country. It appears that, to be successful, such a suit need only name a public university which is a member of AIAW as a defendant. Plaintiffs could then claim that the defendant university denied equal protection to women, either by failing to provide to women athletic scholarships equivalent to those provided to men similarly situated and therefore discriminating against

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71. See generally *Kellmeyer*, 73-CV-21.

72. *Id.* at 2.

73. Memorandum from Joel Gerwitz, Counsel, Nat'l Educ. Ass'n, to Carl Troester, Exec. Sec'y, Am. Alliance for Health, Physical Educ. & Recreation (Feb. 21, 1973), at 3 (on file with author) [hereinafter Gerwitz Memorandum].

74. See Athletics, 34 C.F.R. § 106.41 (2011).

75. A *Policy Interpretation: Title IX and Intercollegiate Athletics*, OFFICE FOR CIV. RIGHTS, DEP'T OF EDUC. 71,413 (Dec. 11, 1979), available at <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html>

athletically talented women who could not afford admission to the school, or by simply denying to women the opportunity to participate in intercollegiate competition while affording it to men. It appears that such litigation would succeed.<sup>76</sup>

While the AIAW leadership expressed a desire for the issues raised in *Kellmeyer* to be debated in court, the AIAW's parent associations were not supportive of such a strategy. "The NEA, in particular, balked at the prospect of participating in a lawsuit that had the potential to generate a public impression that the NEA did not support the right of students to demand equal access to education."<sup>77</sup> The tensions that emerged as a result of the NEA's stance on the *Kellmeyer* case were expressed in a letter to AIAW Executive Director Allan West from AIAW President Carole Oglesby, who wrote:

AIAW is a sport governing body but, unlike any other such collegiate body, its philosophical heart is within a group of professional educators (DGWS); its home is within Associations of professional educators (AAHPER and NEA); its policies place women's collegiate athletics within the regular departmental and budgeting structure of each member institution. AIAW policies are determined by professional educators who conceive of themselves as creating and implementing a desirable curricular or co-curricular program consistent in all ways with the traditional goals of higher education. If the NEA cannot support professional educators, as they function as educational decision-makers within the specific area of their expertise, I don't know who will.<sup>78</sup>

Without the support of the NEA and AAHPER, the AIAW gave in and put before its members a modification of the DGWS Scholarship Statement, which would rephrase "the rules to reflect that receipt of athletic scholarships will no longer disqualify students or colleges from full participation in AIAW events."<sup>79</sup> According to a March 1973 press release issued by the AIAW,

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76. See Gerwitz Memorandum, *supra* note 74, at 3.

77. See SACK & STAUROWSKY, *supra* note 34, at 117.

78. Letter from Carole Oglesby, President, Ass'n for Intercollegiate Athletics for Women, to Dr. Allan West, Exec. Dir., Nat'l Educ. Ass'n (Jan. 30, 1973), at 1 (emphasis in original) (on file with author).

79. DIV. FOR GIRLS & WOMEN'S SPORTS, AM. ASS'N FOR HEALTH, PHYSICAL EDUC., & RECREATION, ASS'N FOR INTERCOLLEGIATE ATHLETICS FOR WOMEN RESPONSE SHEET (1973) (containing resolution regarding change in the athletic scholarship statement) (on file with the author).



eighty percent of the membership offered a resounding “yes” vote in support of changing the statement.<sup>80</sup> In describing the vote, the AIAW noted, “This surprisingly high affirmative vote reflects the consciousness of member institutions that the time for change has arrived.”<sup>81</sup>

While some scholars have interpreted this release to mean that the majority of women in AIAW member institutions were not supportive of the organization’s anti-scholarship stance, such a reading neglects the context out of which the vote occurred.<sup>82</sup> It was clear that the AIAW did not have the financial resources to attempt to go at it alone in defending its position on athletic scholarships.<sup>83</sup> Given the practical realities of the situation, it is difficult to know exactly what that affirmative vote meant. What is apparent in the record is that there were some women who were very pleased with the decision and others who were not. In submitting ballots on the resolution, some women attached notes clarifying the meaning of their vote.

An avid supporter of the change, Linda Estes, Director of Women’s Athletics at the University of New Mexico, wrote, “I sincerely hope the voting members have the sense to vote in favor of the resolution.”<sup>84</sup> Others casting a positive vote, however, did so under duress. Roberta Howells from Western Connecticut State College queried, “Do we want to move in the direction this may lead? Should we let the U.S. courts define *amateur* and *educational*?”<sup>85</sup> Syracuse University athletic administrator Doris Soladay put it this way, “It is with deep regret that we vote ‘yes’ on this issue. I was sure it was coming but hoped not so soon.”<sup>86</sup>

In point of fact, the lingering reluctance to go down this path is evidenced in the language contained in the AIAW’s New Interim Regulations for Awarding of Financial Aid, which went into effect in April of 1973.<sup>87</sup> In releasing those rules, the AIAW indicated, “We wish it to be understood that this practice is not recommended but it is now permitted.”<sup>88</sup>

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80. Press Release, Ass’n for Intercollegiate Athletics for Women, Policies on Women Athletes Change (Mar. 1973) (on file with author).

81. *Id.*

82. See SMITH, *supra* note 41, at 145–48; WUSHANLEY, *supra* note 61, at 71–72.

83. See WUSHANLEY, *supra* note 61, at 72.

84. SACK & STAUROWSKY, *supra* note 34, at 167.

85. *Id.*

86. *Id.*

87. See ASS’N FOR INTERCOLLEGIATE ATHLETICS FOR WOMEN, INTERIM REGULATIONS FOR AWARDING OF FINANCIAL AID, NEW INTERIM REGULATIONS (April 2, 1973) (on file with the author).

88. *Id.* at 1.

## VI. THE AIAW'S ANTI-SCHOLARSHIP STANCE: WAS IT REALLY SEX DISCRIMINATION?

While the *Kellmeyer* case raised the question of whether prohibiting female athletes who received athletic scholarships from competing in college championships sponsored by the AIAW constituted sex discrimination, a position against athletic scholarships was not, in and of itself, sex-specific. The AIAW had not invented the notion that college sport programs could be run without athletic scholarships. Nor was the AIAW the first to point out that compensating students for athletic performance amounted to a pay-for-play system that openly contradicted claims of amateurism and education.

In 1954, following the battle over the Sanity Code and the NCAA membership decision to offer athletic scholarships, thus violating its own principle of amateurism, presidents in the Ivy League entered into an agreement that looks remarkably like the AIAW anti-scholarship position. In part, the Ivy Group Agreement read as follows: "Athletes shall be admitted as students and awarded financial aid only on the basis of the same academic standards and economic need as are applied to all other students."<sup>89</sup>

In an article appearing in *The Harvard Crimson*, marking the first football game of the 1956 season and the first time football teams competed under the umbrella of the newly constituted Ivy League, discussion continued on the significance of the position being taken by the presidents of the Ancient Eight: "The members of the Group reaffirm their prohibition of athletic scholarships. Athletes shall be admitted as students and awarded financial aid only on the basis of the same academic standards and economic need as are applied to all other students."<sup>90</sup> Following the decision to offer athletic scholarships in 1954, the Ivy League (formerly the "Ivy Group") refused to go along, establishing a position that it has maintained for well over half a century to preserve an educational model of athletics.<sup>91</sup> Within the same window of time that the *Kellmeyer* case was coming forward, the scholarship issue was serving as a philosophical area of disagreement within NCAA schools, eventually leading to the movement to federate the NCAA structure, resulting in the divisional affiliations that currently exist, with Division III providing a space

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89. Bernard M. Gwertzman, *Ivy League: Formalizing the Fact: Contests for Today Mark New Conference Opening*, HARV. CRIMSON, Oct. 13, 1956, available at <http://www.thecrimson.com/article/1956/10/13/ivy-league-formalizing-the-fact-pthe/> (quoting Ivy Group Agreement, Jan. 18, 1954, art. IV(A)(f)).

90. *Id.*

91. *Id.*

for institutions that did not wish to offer athletic scholarships.<sup>92</sup>

Under the theory operating in the *Kellmeyer* case, a Title IX lawsuit could have just as easily been filed against the NCAA for establishing policies that allowed athletic scholarships for some of its members and prohibited scholarships for others. The notion of that happening was not even flickering in the background. The parallel was lost in the move to rapidly resolve the case.

The arguments for and against athletic scholarships have never been sex-specific but are grounded in an understanding of what an athletic scholarship represents, which is pay-for-play. In light of conversations about pay-for-play and whether Title IX applies, this should be an important consideration within the conversation. If the NCAA, in its scholarship structure, has been getting away with denying revenue-generating athletes employment status for all of these years, Title IX holds no jurisdiction. Title IX responds to the educational interests of students and deprivations that could come if they are treated differently on the basis of sex. If different treatment emanates out of a difference in status (worker versus student), is it a given that Title IX applies?

## VII. CONCLUSION

While the notion that Title IX may not apply to the recent proposal to offer stipends to revenue-producing athletes in big-time college sport programs because the rationale for offering stipends emanates from the limitations on determining the value of players in the mass-mediated college sport marketplace and not on an argument that has anything to do with educational access or opportunity may seem novel, a strong advocate for Title IX understood the issue and wrote about it in January of 1986. In a column written for the magazine that she founded, *Women's Sports and Fitness*, tennis legend Billie Jean King put forward what she called a "radical proposal" to pay college athletes.<sup>93</sup> King knew well the distinction between amateurism and professionalism and the injustices associated with underpaying athletes.<sup>94</sup> She received a suspension while still an amateur from the U.S. Lawn Tennis Association because she accepted money under the table, violating its amateurism rules at the time.<sup>95</sup> She also sought equal pay for women in the competitive arena.<sup>96</sup>

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92. See CROWLEY, *supra* note 41, at 93–94.

93. King, *supra* note 1, at 60.

94. *Id.*

95. *Id.*

96. *Id.*

Amidst the name-calling and outrage directed toward Reggie Bush, Terrelle Pryor, and others, few have taken note that some of the nation's most highly celebrated athletes also suffered similar suspensions and humiliations, protesting a hypocritical system. Arguing that college athletes be paid, King wrote that by doing so, college "athletes would no longer be forced to live a lie."<sup>97</sup> She further suggested, "They could put their energies into learning their way around the business world, rather than learning how to participate in a corrupt system."<sup>98</sup>

And while the assumption prevails that Title IX requires that schools allocate stipends to female and male athletes equitably, the assumption is based on a belief that athletic scholarships have an inherent educational purpose. What if this is not, however, the case? Athletic scholarships recognize the capacity to produce on the athletic field, court, or arena. One does not receive an athletic scholarship for any educational reason apart from meeting whatever minimum educational criteria may be imposed as a threshold qualifier to enter a college or university, subject to whatever caveats and exceptions individual institutions invoke in their admission processes.

Over time, scholars have found more historical evidence to show that athletic scholarships became part of a toolkit used by NCAA officials to deny worker status to athletes competing in the top-tier revenue programs so as to avoid paying worker's compensation, fair compensation, and other employment benefits.<sup>99</sup> The most recent discussion regarding pay-for-play has surfaced because it is becoming increasingly more difficult to accept the rhetoric that the commercialization around big-time college sport has an educational purpose and that the athletes competing in the enterprise are students.

The entire athletic scholarship, or grant-in-aid, structure as outlined in NCAA rules is anchored in a discussion about appropriate levels of athlete compensation. At the center of the NCAA's official stance on athlete compensation is the principle of amateurism, which states, "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by

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97. *Id.*

98. *Id.*

99. See generally Amy C. McCormick & Robert A. McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006); See also Amy C. McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008).

professional and commercial enterprises.”<sup>100</sup>

What if, however, amateurism is simply a corporate veil woven from legal fictions designed to perpetuate the myth that the scholarship system is not a play-for pay-system? One need only read the memoir of former NCAA Executive Director Walter Byers to know that the NCAA has engaged in the creation of such fictions, starting with the term “student-athlete.”<sup>101</sup> Devised as a tool of propaganda, the term was created in 1954 following a ruling by the Colorado Supreme Court in favor of Ernest Nemeth, a football player from the University of Denver, who was determined to be a worker under state law and was found eligible to receive worker’s compensation by the state’s industrial commission for injuries suffered while playing football.<sup>102</sup> As Byers explained the origin of the term, “We crafted the term *student-athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes. We told college publicists to speak of ‘college teams,’ not football or basketball ‘clubs,’ a word common to the pros.”<sup>103</sup>

In assessing where the resistance to paying college athletes within the athletic community came from, Billie Jean King wrote, “The real issue is not how much money the plan would cost, but how much control the colleges are willing to give up.”<sup>104</sup> Significantly, this issue of control is reflected in the NCAA rules pertaining to compensation, where the NCAA does not take an outright stance against either professionalism or paying athletes. In NCAA Bylaw 12.02.3, “[a] professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation *except* as permitted by the governing legislation of the Association.”<sup>105</sup> Similarly, “pay” is defined in NCAA Bylaw 12.02.2, as “the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.”<sup>106</sup> Thus, the NCAA officials are not opposed to paying athletes. They are opposed to paying athletes under terms and conditions that they cannot control.<sup>107</sup>

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100. NCAA, 2010–2011 NCAA DIVISION I MANUAL 4, NCAA CONST. art. 2.9 (2010) [hereinafter 2010–2011 NCAA DIVISION I MANUAL].

101. See generally Ellen J. Staurowsky & Allen L. Sack, *Reconsidering the Use of the Term Student-Athlete in Academic Research*, 19 J. SPORT MGMT. 103 (2005).

102. *Univ. of Denver v. Indus. Comm’n. of Colo.*, 335 P.2d 292 (Colo. 1959).

103. BYERS & HAMMER, *supra* note 41, at 69.

104. See King, *supra* note 1, at 60.

105. 2010–2011 NCAA DIVISION I MANUAL, *supra* note 101, at 65, BYLAW 12.02.3 (emphasis added).

106. *Id.* at 65, BYLAW 12.02.2.

107. See generally Ellen J. Staurowsky, *Piercing the Veil of Amateurism: Commercialisation*,

Given that, is it proper for Title IX, a civil rights law, to be used in such a way that it aids and abets a system that has sought to subvert the value of an unnamed and unrecognized labor force comprised, at times, of minors and young adults who are systemically denied the benefit of knowledgeable representation (agents and lawyers) when they enter into agreements with institutions?<sup>108</sup> Here is another moment where the effects of *Kellmeyer* are once again being played out without confronting the central issues. This time around, college sport officials should be asked to explain what the purpose of an athletic scholarship is. If it is pay for services rendered by athletes in the college sport enterprise of mass-media spectacle, is a Title IX analysis even relevant?

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*Corruption and US College Sports*, in *THE COMMERCIALISATION OF SPORT* 143 (Trevor Slack ed., 2004).

108. See HUMA & STAUROWSKY, *supra* note 15; see also Richard G. Johnson, *Submarining Due Process: How the NCAA Uses its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until Oliver v. NCAA*, 11 FLA. COASTAL L. REV. 459, 459–602 (2010).