

VALUING THE "STUDENT" IN "STUDENT-ATHLETE"

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Spring 2014

I. Introduction

Most high school athletes dream of attending a great university or college not primarily for the academics but for the athletic program. Specifically, these young athletes dream of one day playing their sport professionally. The academics of a school or a college education is generally second to the athletic department and obligations. While not all college athletes engage in equally consuming and publicized athletic programs, for Division I football and men's basketball players a college education is often on the backburner, and the extracurricular sport is most focal and consuming.

However, ultimately, according to the National Collegiate Athletic Association (NCAA), less than 2% of college football players play professional football after college, and less than 1.5% of male basketball players play professional basketball after college.¹ Those who will play sports professional will likely have a career and be financially stable for some period but the rest of the 98-98.5% of college athletes that do not, a college education will be their next most valuable skill. The NCAA is the governing body that oversees 23 different sports and athletic championships at 1,200 colleges and universities in the United States.² NCAA also oversees the financial end of the tournaments and enforces rules governing eligibility, sportsmanship, and play.³

¹NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Probability of Competing Beyond High School* (last updated Sept. 2013), <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school>.

² Jackie Burnell, *What is the NCAA?*, ABOUT.COM, <http://youngadults.about.com/od/collegeprep/g/ncaa.htm> (last visited May 4, 2014).

³ Jackie Burnell, *What is the NCAA?*, ABOUT.COM, <http://youngadults.about.com/od/collegeprep/g/ncaa.htm> (last visited May 4, 2013).

First, this Article will argue that student-athletes, and in particular, Division I football and men's basketball players, do not receive an academic education (and the opportunity for an academic education) equal to their colleagues. Next, higher education institutions must prioritize student-athletes' academics as a college education is the current incentive and currency for a student-athlete and a subpar education does not adequately compensate the young athletes. If they do not do so, the NCAA should not consider these athletes "student-athletes" but as "employees" and compensate them accordingly. Finally, this Article will propose that if schools do not prioritize the "student" in "student-athletes" and ensure academics are the forefront of all college students, and they choose to not qualify and compensate arguably eligible student-athletes as "employees," they must/should revise the educational degree some student-athletes are receiving to a "mini-bachelor's degree" or an associate's degree to better reflect actual educational attainment.

II. Current Education of "Student-Athletes"

According to a report conducted by the University of South Carolina's Collegiate Sport Research Institute in 2013, Division I football players graduated at rates 18 percentage points lower than non-athlete students.⁴ More alarming is evidence that football and men's basketball players are admitted to schools and given scholarships not because of their academic criteria but athletic abilities. For example, average student-athletes' SAT scores are over 200 points lower than those of non-athletes.⁵ Additionally, an analysis of data of 83,728 students who entered college in 2005-06 and 2006-07 found that following their first and second years in college, students who were recruited by someone in the athletic department prior to their college or

⁴ INSIDE HIGHER ED, *Report: Football Players Graduate at Rates Lower Than Non-Athletes*, Sept. 27, 2013, <http://www.insidehighered.com/quicktakes/2013/09/27/report-football-players-graduate-rates-lower-non-athletes#sthash.PbAAvSIQ.dpbs>.

⁵ Alison Go, *Athletes Show Huge Gaps in SAT Scores*, US NEWS, Dec. 30, 2008, *available at* <http://www.usnews.com/education/blogs/paper-trail/2008/12/30/athletes-show-huge-gaps-in-sat-scores>.

university admission had lower GPAs when compared with both non-recruited athletes and non-athletes.⁶ Moreover, the analysis found this finding is most apparent at the most highly selective colleges - where the status as a "recruited athlete" was known to the admissions office when applications were reviewed.⁷

In a study conducted by two professors from Bowling Green State University and Colorado State University found college athletes achieved less academically in college than the general student population.⁸ The researchers studied more than two thousand athletes over ten years at a major western university. In addition to lack of academic preparation, the researchers found unethical practices among administrators including falsifying transcripts, athletes receiving credit for classes not taken, and the financial and academic exploitation of athletes.⁹ According to the researchers, the organization responsible for policing the athletic programs for major U.S. universities, the NCAA, has focused on violations of the "student-athlete" contract, such as athletes receiving financial inducements to play, and neglected the investigation of charges that athletes may be receiving inferior educations.¹⁰

A graduate student at UNC-Greensboro researched the reading levels of 183 UNC-Chapel Hill athletes who played football or basketball from 2004 to 2012.¹¹ The student found that 60% of the athletes read between fourth- and eighth-grade levels and between 8% and 10%

⁶ John Emerson, MIDDLEBURY COLLEGE, *College Sports Project Updates Findings about Athletics and Academics in NCAA Division III*, Sept. 13, 2010, available at <http://www.middlebury.edu/newsroom/archive/2010/node/266828>.

⁷ *Id.*

⁸ Dean A. Purdy, D. Stanley Eitzen & Rick Hufnagel, *Are Athletes Also Students? The Educational Attainment of College Athletes*, SOCIAL PROBLEMS, Vol. 29, No. 4 (Apr., 1982), 441-45, available at <http://www.jstor.org.flagship.luc.edu/stable/800032?seq=1>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Sara Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th-Graders*, CNN, Jan. 8, 2014, available at <http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/>.

read below a third-grade level.¹² The academic challenges athletes face are not a new phenomenon. Former basketball player Kevin Ross publically discussed his struggles at Creighton University in the 1980s and in 1989, football player Dexter Manley told Congress that he got through college and into the pros without ever learning to read.¹³

Considering the main incentive and benefit for a student-athlete is a college education and this college education is evidenced as being subpar, student-athletes, and more specifically, Division I football and men's basketball players should be considered "employees" of the schools they attend and be compensated accordingly. The "employee" status should not only include wages, but extended or improved educational benefits, complete medical insurance for sport related injuries, long term disability insurance for injuries, transfer and eligibility rights not inconsistent with NCAA rules, and a grievance process to challenge abusive treatment by coaches and administrators.¹⁴

A number of arguments for employee status for student-athletes exist. Most commonly referenced is the argument that student-athletes generate significant revenue for schools and the NCAA. Further, student-athletes participate in a market that treats their athletic competition as an implicit apprenticeship.¹⁵ Additionally, as opposed to the universities' other students, student-athletes are under constant direction and control by their coaches, not only during practice but in the scheduling of classes and the rest of their daily routine, and expected workouts during the off-season.¹⁶ Lastly, NCAA athletes lack due process and other fairness protections and some

¹² *Id.*

¹³ *Id.*

¹⁴ Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. Vol. 5, 1125 (2012).

¹⁵ *Id.* at 1082.

¹⁶ *Id.*

athletes want a voice in the rules, regulations, and culture that pervade their lives.¹⁷ Based on specific provisions in the U.S. Tax Code, Fair Labor Standards Act, the employment-at-will doctrine, and worker's compensation laws, the NCAA Division I football and men's basketball programs are employers because they control so much of a player's non-academic activities, and derive a direct financial benefit from this labor.¹⁸

III. Support for Employee Status

1. Revenue from Student-Athletes

The most popular and most cited argument for employee status for student-athletes is large revenue college athletics, specifically Division I college football and men's basketball generate. Schools have significant wealth gains from these athletics, and students do not receive any monetary amount from the revenue. In 2008, NCAA reported college athletics revenue ranged from \$123,769,841 to \$8,392,852.¹⁹ These figures include revenue from ticket sales, student fees, money from playing away games at other colleges, donations (outside contributions, donations to athletics), university funding (subsidy from university coffers), media rights (TV, radio, Internet broadcast deals), and branding.²⁰ In the same year, school expenses ranged from \$123,370,004 to \$9,242,021.²¹ The expenses include student-athletes' tuition and fees, coaches' salaries and benefits, team travel, money paid to visiting teams, costs of recruiting, marketing (costs to fundraise, market, and promote athletics), and game expenses.²² While not all schools generated excess revenue, a significant number of schools did. In addition to revenue generated by individual schools, the NCAA generates a significant amount of money as well.

¹⁷ *Id.* at 1083.

¹⁸ *Id.* at 1084.

¹⁹ ESPN, *College Athletics Revenues and Expenses- 2008*, ESPN.com, available at <http://espn.go.com/ncaa/revenue> (last visited May 4, 2014).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

Perhaps most notably, in 2010, CBS and Turner Broadcasting paid the NCAA \$10.8 billion dollars for the rights to broadcast the event for the next fourteen years.²³

A report conducted by the National College Players Association and Drexel University in 2014 alleged that the projected fair market value of the average college football player is \$178,000 per year from 2011 to 2015, while the projected market value for the average college basketball player for the same time is \$375,000.²⁴ The report also indicated that football players with the top 10 highest estimated fair market values might be worth as much as \$547,000, during the year 2011 to 2012, and basketball players with the top 10 highest estimated fair market values, might be worth more than \$1.6 million for the same year.²⁵ The report calculated the fair market value using the revenue sharing percentages defined in the NFL and NBA collective bargaining agreements and team revenues as reported by each school to the federal government.²⁶

A major opponent against student-athletes winning the right to unionize or be paid is member of the board of directors of the NCAA, Division 1 and president of the University of Delaware, Patrick Harker. Harker has been outspoken about the consequences of the student-athletes' eligibility to unionize. In an op-ed in the New York Times, Harker states unionization will not benefit student-athletes everywhere but rather player unions would be a disaster for universities, sports fans and for student-athletes themselves.²⁷ Harker explains that only about 10 percent of Division I college sports programs turn a profit and most lose money.²⁸ Additionally,

²³ Brad Wolverton, *NCAA Agrees to 10.8-Billion Deal to Broadcast Its Men's Basketball Tournament*, CHRONICLE OF HIGHER EDUCATION, Apr. 22, 2010, available at <http://chronicle.com/article/NCAA-Signs-108-Billion-De/65219/>.

²⁴ Mark Koba, *Pay for Play: Some College Players Could Score Big Bucks*, NBC NEWS, Apr. 14, 2014, available at <http://www.nbcnews.com/business/careers/pay-play-some-college-players-could-score-big-bucks-n79871>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Patrick T. Harker, Op-Ed, *Student-athletes Shouldn't Unionize*, N. Y. Times, Apr. 1, 2014, available at http://www.nytimes.com/2014/04/02/opinion/student-athletes-shouldnt-unionize.html?_r=1.

²⁸ *Id.*

changing scholarship dollars into salary would almost certainly increase the amount schools have to spend on sports, since earnings are taxed and scholarships are not and in order to match the value of a scholarship, the university would have to spend more.²⁹

However, in response, proponents of student-athlete unionization have cited the tax code and regulations of the IRS and argued that unionizing does not automatically move a scholarship from a grant to a salary. The Internal Revenue Code states “those portions of a scholarship, fellowship, or grant used to pay tuition, fees, books, supplies, or equipment are classified as a ‘Qualifying Scholarship’ and are not includible in gross income.”³⁰ Supporters of unionizing student-athletes claim the regulations do not distinguish between students and employees or otherwise indicate that unionizing moves a scholarship from a grant to a salary since the code says scholarships do not qualify as gross income for any individual who is a candidate for a degree at a school or university.³¹ Although it is unclear how the IRS will tax compensated student-athletes, in 2002, the National Labor Relation Board ruled a group of auxiliary choristers were employees of the Seattle Opera, though their modest income was not deemed taxable by the Internal Revenue Service.³²

While student-athletes generate this revenue from their performance, they are not compensated other than by scholarship or grant-in-aid contracts. Further, players often receive oral promises from coaches of a four year scholarship but their contract limits aid to annual renewals, subject to limitations.³³ Grant-in-aid contracts also do not cover the full cost of

²⁹ *Id.*

³⁰ 26 U.S. Code § 117.

³¹ Michael Sanserino, *College athletes union raises tax, discrimination questions*, Pittsburgh Post-Gazette, Apr. 6, 2014, available at <http://www.post-gazette.com/business/employment/2014/04/06/College-athletes-union-raises-tax-discrimination-questions/stories/201404030298>.

³² *Id.*

³³ Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 1078 WIS. L. REV. Vol. 5, 1081 (2012).

student-athletes' education.³⁴ The revenue generated by the NCAA and schools leads to an unequal distribution of wealth, especially when correlated with a subpar education.

2. Student-athletes and Employee Criteria

Under the U.S. Tax Code, the IRS uses a multi-factor test to determine if an employment relationship exists.³⁵ When the factors, behavioral control and financial control, are applied to the experiences of football players, they tend to support a finding of an employment relationship.³⁶ Behavioral control is the right to direct how a person performs specific tasks for which he is engaged and financial control applies as schools strictly control the financial activities of players.³⁷ A recent, high-profile decision by the National Labor Relations Board that found players receiving scholarships from Northwestern University are “employees” under Section 2(3) of the National Labor Relations Act described the behavioral control college athletic programs exert over student-athletes. In the decision, the National Labor Relations Board stated that athletic training begins from the first week in August when the scholarship and walk-on players begin their football season with a month-long training camp.³⁸ In training camp (and the remainder of the calendar year), the coaching staff prepares and provides the players with daily itineraries that detail which football-related activities they are required to attend and participate in.³⁹ The itineraries likewise delineate when the players are to eat their meals and receive any necessary medical treatment.⁴⁰ Considering those significant behavioral controls over student-athletes, as well as the financial restrictions imposed on student-athletes through NCAA's

³⁴ *Id.*

³⁵ *Id.* at 1094.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Northwestern University and College Athletes Players Association*, NLRB Case NO 13-RC-121359 at 5.

³⁹ *Northwestern University and College Athletes Players Association*, NLRB Case NO 13-RC-121359 at 5.

⁴⁰ *Northwestern University and College Athletes Players Association*, NLRB Case NO 13-RC-121359 at 5.

regulations (and which are binding from scholarship and grant-in-aid student contracts student-athletes sign), it is evident an employee relationship may exist under the U.S. Tax Code.

Since the professional football league, the National Football League, does not have a minor league and athletes are recruited from the colleges, college football can arguably be viewed as an NFL apprenticeship in which the NCAA provides the equivalent of training in an unpaid internship.⁴¹ The Fair Labor Standards Act (FLSA) is potentially relevant because the Wage and Hour Division of the Department of Labor has determined that some unpaid internships violate the law's requirement of minimum compensation. The Department of Labor regulates unpaid internships for the services that college students render to "for-profit" employers and while schools are not profit seeking institutions, many Division I football programs generate greater revenues than costs, and thus "profit" from the performance of student-athletes.⁴²

Additionally, the doctrine of employment-at-will (EAW) allows either an employer or individual to terminate the work relationship at any time, for any reason.⁴³ The significance of EAW is an employer's freedom to discipline an employee, either by suspension or termination.⁴⁴ Similar to fired employees, NCAA student-athletes can be summarily dismissed from teams, not only for violating rules but for subpar performance.⁴⁵ Further, just as discharged employees lose their benefits, players can lose their scholarships.⁴⁶

Lastly, courts around the U.S. have found college football players may receive workers' compensation benefits. One example is a case from California in which a student-athlete who

⁴¹ Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 1078 WIS. L. REV. Vol. 5, 1096 (2012).

⁴² *Id.*

⁴³ *Id.* at 1077-78.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1094.

⁴⁶ *Id.* at 1100.

received financial assistance from California Polytechnic State University San Luis Obispo died in an airplane crash while returning from a game.⁴⁷ In the case, the Court of Appeals held that the student had an employment contract with the college, and his heirs were entitled to worker's compensation benefits.⁴⁸ The court held the student-athlete's agreement to play football was a contract to render services within the meaning of worker's compensation law.⁴⁹

Additionally, a student-athlete was awarded a worker's compensation benefit in another case in Colorado.⁵⁰ The state Supreme Court concluded that the student-athlete's injury arose in the course of employment,⁵¹ stating that the better players "engage in football games under penalty of losing the job and meals," and therefore "playing football was an incident of his employment by the University, well-known to it and a requirement which it imposed on claimant."⁵² The Court reasoned the school's provision of athletic equipment and a field, plus medical care for injured athletes brought the player's injury within the scope of employment.⁵³

Opponents of the unionization of student-athletes have cited the consequences of exposure to Title IX and Title VII of the Civil Rights Act. Some have questioned whether schools would have to pay its female scholarship athletes under Title IX if the male scholarship athletes are paid more than their female colleagues receive in scholarships. In addition, as employees, student-athletes would be covered under Title VII of the Civil Rights Act, which prohibits employers from discriminating based on race, religion, gender or national origin.⁵⁴ This protection would mean universities could face harassment lawsuits and hostile work environment

⁴⁷ *Van Horn v. Ind. Acc. Comm.*, 219 Cal.App.2d 457 (1963) cited in Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 1078 WIS. L. REV. Vol. 5, 1102 (2012).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *University of Denver v. Nemeth*, 257 P.2d 423 127 (1953) cited in Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 1078 WIS. L. REV. Vol. 5, 1103 (2012).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

claims.⁵⁵ This could play a role in some sport programs such as the right of head coaches to control athletes' schedules and off-field activities.⁵⁶ While exposing universities to risk is not beneficial to the university or its students, such a law may likely protect student-athletes and their personal autonomy.

IV. Conclusion

Given the unequal and inadequate education college student-athletes receive, schools must reform the education and academic criteria. All student-athletes must receive either an equal education or the opportunity for an equal academic education as non-athletes enrolled in the same academic institution and undergraduate program. If schools do not do this and continue to value the "athlete" in "student-athlete" rather than the "student," student-athletes must be eligible for employee status under common and statutory U.S. law. If schools do not choose to reform student-athlete status in either of those ways, they should revise the educational degree these student-athletes are receiving. A more fitting degree, such as an associate's degree, or an abridged bachelor's degree, would be more appropriate in adequately reflecting the education some student-athletes receive. If necessary, student-athletes could continue their education at the same institute or a different one to earn a bachelor's or higher degree. This would allow for both schools and student-athletes dedicated and committed to sports and aiming to play professionally the ability to continue to do what they are doing without leaving the student unqualified as compared to their non-athlete colleagues.

⁵⁵ *Id.*

⁵⁶ *Id.*