2015

Is the NCAA's Prohibition Against Compensating College Athletes Reasonable?

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LAW AND MORALITY

ADVANCED WRITING REQUIREMENT

FALL 201

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I. INTRODUCTION

The National Collegiate Athletic Association (NCAA), created in 1905, is a non-profit organization including approximately 1,050 colleges, universities, and other institutions.[1] The organization is "dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom and throughout life."[2] NCAA schools are split between three divisions, Division I, Division II, and Division III.[3] The organization issues rules governing the administration of member school college athletic programs, the value and number of scholarships a member school may offer to student athletes, and the eligibility of students at those member schools to participate in the athletic programs.[4] The NCAA is committed to enforcing their rules in order to create "fair competition for student-athletes across the country."[5]

Division I schools are further subdivided between the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS).[6] Eligibility for Division I member status requires strict compliance with the Division Membership rules. [7] These rules address, among other things, the number of scholarships to be issued per school and sport, the maximum value of scholarship (or Grants-in-Aid) that can be granted on a per student basis, the minimum number of sports teams a member school must have, requirements that games must be played against other Division I schools, and minimum ticket sales requirements (the FBS requires an average of

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[1] See About the NCAA, http://www.ncaa.org/about (last visited 9/27/2014).
[2] Id.
[3] Division I is composed of nearly 350 colleges and universities (with over 170,000 student-athletes), Division I schools "manage the largest athletics budgets and offer the most generous number of scholarships." Division II is composed of nearly 300 colleges and universities (with thousands of student-athletes), and Division III is composed of 444 institutions (with over 170,000 student athletes). See supra note 1.
[4] See Fairness and Integrity, http://www.ncaa.org/about/what-we-do/fairness-and-integrity (last visited 9/27/2014).
[5] Id.
[6] See 2013-2014 NCAA Division I Manual, http://www.ncaapublications.com/productdownloads/D114.pdf.
[7] Id. at Article 20, Division Membership.

15,000 in paid attendance for home football games during a rolling two year period for each member school).

The NCAA generated just over $905 million in 2013.[8] $726 million of that revenue, or just over 80%, was generated exclusively through licensing fees from television and marketing rights.[9] Approximately 58% (roughly $527 million) of the total revenue is redistributed to Division I member schools.[10] These redistributed funds are allocated between six funding pools established by the NCAA according to their Division I revenue distribution plan.[11] $230 million of those funds are specifically allocated to academic or student focused purposes (the Academic Enhancement pool, the Grants-in-Aid Fund, and the Student Assistance Fund).[12] This means that just 25%[13] of the total revenue generated by the NCAA gets allocated to direct academic and student support programs at member schools. The remaining funds are distributed to the member schools for administration of their athletic programs, distributed to NCAA management, and/or retained by the NCAA itself.

A fundamental rule imposed on student-athletes by the NCAA is that they may not accept pay for use of their athletic skill, either directly or indirectly,[14] although an exception is made for

[8] National Collegiate Athletic Association (2014, Dec. 4). Independent Auditors Report. http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006715.pdf.
[9] Id.
[10] Id.
[11] The six funding pools and their respective percentage allocation of the Division I redistribution funds are as follows: 1) Basketball Fund: 38%, 2) Academic Enhancement: 5%, 3) Conference Grants: 2%, 4) Sports Sponsorship Fund: 13%, 5) Grants-In-Aid: 26%, and 6) Student Assistance Fund: 15%. See 2013-14 DIVISION I REVENUE DISTRIBUTION PLAN, http://www.ncaa.org/sites/default/files/2013-14%20Revenue%20Distribution%20Plan.pdf.
[12] Id.
[13] $230,787,000 allocated to direct student support programs for the 2013-2014 year divided by the $905,419,498 of total revenue generated in 2013.
[14] NCAA Operating Bylaws, 12.1.2(a), Amateur Status.

Grant-in-Aid[15] funds. This is to ensure that student-athletes maintain their amateur status and focus on education.

In order to maintain student-athlete status, the NCAA rules further restrict the type of pay a student-athlete may receive even in ordinary employment scenarios. These restrictions prevent a student-athlete from getting a job as a waiter or waitress at a local restaurant, salesperson at a local car dealership, jockey at a local radio station, barista at a local coffee shop, or any other variety of jobs available to non-athlete college students, if the NCAA determines the student was hired because of the student-athlete's reputation, fame, or personal following.[16]

The NCAA restrictions further limit student-athletes ability to receive remuneration from the use of their own names, images, and likenesses in live game telecasts, videogames, game re-broadcasts, advertisements, or almost any other scenario.[17] There is even an explicit restriction against student-athletes accepting pay or remuneration simply for the use "of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind."[18]

II. HISTORY AND PURPOSE OF AMATEURISM WITHIN THE NCAA

The NCAA considers amateurism for its student-athletes as "a bedrock principle of college athletics."[19] According to the NCAA, maintaining amateurism for a student-athlete is "crucial to preserving an academic environment in which acquiring a quality education is the

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[15] "A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association's membership." NCAA Operating Bylaws, 12.01.04, Permissible Grant-in-Aid.

[16] See generally NCAA Operating Bylaws, 12.4, Employment.

[17] As discussed above, licensing and marketing fees from live game telecasts, game re-broadcasts and advertisements are what generate 80% of the revenues for the NCAA.

[18] NCAA Operating Bylaws, 12.5.2.1, Advertisements and Promotions After Becoming a Student-Athlete.

[19] See Amateurism, http://www.ncaa.org/amateurism (last visited 9/27/2014).

first priority."[20] Incoming student-athletes are required to certify to their amateur status, which requires that the student refrain from entering contracts with professional teams, receiving a salary for participation in athletic events, accepting prize money (in excess of actual and necessary expenses), playing with other professional athletes, benefiting from or agreeing to be represented by a sports agent, and delaying enrollment in college to participate in organized sports competition.[21]

Currently, the NCAA rules state the principle of amateurism "should be motivated primarily by education and by the physical, mental and social benefits to be derived" therefrom.[22] However, the NCAA has not always held education as the priority of its amateur status rules. For example, the organizations initial bylaws (circa 1905) regarding amateurism stated:

> *No student shall represent a College or University in an intercollegiate game or contest who is paid or receives, directly or indirectly, any money or financial concession or emolument as past or present compensation for, or as prior consideration or inducement to play in, or enter any athletic contest, whether the said remuneration be received from, or paid by, or at the instance of any organization, committee or faculty of such College or University, or any individual whatever.*[23]

These initial bylaws make no mention of education or preserving the academic environment. Instead these rules prevented member schools themselves from providing scholarships to students. Throughout the first forty years of the NCAA's existence the amateurism rules existed without any focus on education.[24] It wasn't until 1948 that the rules were modified to allow

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[20] Id.

[21] Id.

[22] NCAA Operating Bylaws, 2.9, The Principle of Amateurism.

[23] O'Bannon v. National Collegiate Athletic Association, No. C 09-3329 CW, at 24 (N.D. Cal. Aug. 8, 2014) (citing Docket No. 189, Stip. Undisputed Facts).

[24] There were modifications to the amateurism rules throughout this period, but no such modifications addressed education. For example, in 1916 the rule was revised to define an amateur as "one who participates in competitive physical sports only for pleasure, and the physical, mental, moral, and social benefits directly derived therefrom." In 1922 another revision defined an amateur as "one who engages in sport solely for the physical,

colleges to provide financial aid to students playing on NCAA member school sport teams.[25] However, with this change, the door began to open towards athletes possibly being considered employees of the university due to the receipt of scholarship money in exchange for playing on one of the school's athletic teams. Were athletes ultimately considered to be employees of the school, they would be entitled to certain benefits such as workers-compensation. It was only after NCAA member schools were first subjected to litigation over this possibility that the NCAA began to shift its focus towards education as their principle for amateurism.

III. HISTORY OF BENEFITS LITIGATION INVOLVING COLLEGE ATHLETES

In the years after the NCAA began to allow for schools to provide scholarships to their players, two major cases were filed against NCAA member schools by injured students seeking employee benefits in return for their service to college or university athletic departments. These cases spurred the NCAA into adopting the term "student-athlete," a term allowing colleges and universities to mask any potential employer-employee relationship, and the liabilities associated with such relationships.[26]

The first major case involved a student, Mr. Nemeth, who injured his back during football practice at the University of Denver in 1950.[27] Mr. Nemeth had been given free meals and a job cleaning the grounds in exchange for housing from the school.[28] The University of Denver claimed that this employment opportunity was extended to Mr. Nemeth "exclusively by reason of his being a student at the University and had no connection with his football activities,"

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mental or social benefits he derives therefrom, and to whom the sport is nothing more than an avocation." O'Bannon at 25 (N.D. Cal. Aug. 8, 2014) (citing Docket No. 189, Stip. Undisputed Facts).

[25] O'Bannon at 25 (N.D. Cal. Aug. 8, 2014) (citing Docket No. 189, Stip. Undisputed Facts).

[26] See The Myth of the Student-Athlete; The College Athlete as Employee, 81 Wash. L. Rev. 71.

[27] University of Denver v. Nemeth, 127 Colo. 385 (Colo. 1953).

[28] Id. at 390.

and was provided to assist the student in obtaining an education. [29] However, the court found that these opportunities were afforded to Mr. Nemeth specifically so that he could continue to play football for the school.[30] The football coach confirmed the schools policy that "the man who produced in football would get the meals and a job" and "meals and the job ceased when the student was cut from the football squad."[31] This was enough for the court to determine that Mr. Nemeth's employment was "dependent on his playing football, and he could not retain his job without playing football."[32] The court found "it cannot be said that the University is merely 'assisting' the student to obtain an education," that "the injuries sustained by Nemeth arose out of and in the course of his employment," and that he was entitled to workers compensation because of that relationship.[33]

The second case involved the wife (Karen) of a student, Edward Gary Van Horn, who died in 1960 in an airplane crash while he was returning to California with the California Polytechnic College football team on the team airplane.[34] Karen sued the school for death benefits, arguing that Edward was an employee of the school and that she was entitled to those benefits under the workmen's compensation act, as a result of Edward's death.[35] To assess whether Edward was an employee, the court noted that after Edwards first year of playing football for the college he expressed dissatisfaction with the football program and "withdrew from it so that he would have time to work in order to support his family."[36] To get Edward to return to the team, the school offered him a "pretty good deal to play football" in the form of a

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[29] Id.
[30] Id.
[31] Id.
[32] Id. at 392.
[33] Id. at 399.
[34] Van Horn v. Industrial Accident Commission, 33 Cal. Rptr. 169 (Cal. Ct. App. 1963).
[35] Id.
[36] Id. at 188.

scholarship.[37] The school argued that the scholarship provided "was not dependent upon participating in sports," but instead was offered for Edward's education.[38] The court found, however, that there was a relationship between the scholarship and his athletic prowess, and "[t]he only inference to be drawn from the evidence is that [Edward] received the 'scholarship' because of his athletic prowess and participation."[39] The court then provided the following guidance for athletic scholarships and the employer-employee relationship:

> *It cannot be said as a matter of law that every student who receives an "athletic scholarship" and plays on the school athletic team is an employee of the school. To so hold would be to thrust upon every student who so participates an employee status to which he has never consented and which would deprive him of the valuable right to sue for damages. Only where the evidence establishes a contract of employment is such inference reasonably to be drawn.*[40]

From these findings the court held that Edward was an employee of the school and that his wife was entitled to receive death benefits under the workmen's compensation act.[41]

IV. THE "STUDENT ATHLETE," MODERN AMATEURISM, AND SCHOLARSHIP REFORM

The above cases were a cause of great concern for the NCAA due to the risk of having athletes identified as employees. Walter Byers, Executive Director of the NCAA from 1951 to 1988[42], said the following about the litigation:

> *[The] threat was the dreaded notion that NCAA athletes could be identified as employees by state industrial commissions and the courts. [To address that threat, w]e 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*

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[37] Id. The scholarship was for $ 50.00 at the beginning of each school quarter and $ 75.00 rent money during the football playing season.

[38] Id.

[39] Id. at 192.

[40] Id. at 193. The court cited other cases where a member of a college football team received a scholarship for tuition and the evidence did not establish a contract of hire to play football and thus did not support a finding of an employee-employer relationship.

[41] Id.

[42] The time period during which the both of the University of Denver v. Nemeth, 127 Colo. 385 (Colo. 1953), and the Van Horn v. Industrial Accident Commission, 33 Cal. Rptr. 169 (Cal. Ct. App. 1963) cases took place.

college publicists to speak of "college teams," not football or basketball "clubs," a word common to the pros.[43]

Byers indicated a law firm was also consulted to "do major research on the issue."[44] According to Byers the law firm suggested the NCAA could rely on the phrase 'student-athlete' and a definition of amateurism that suggests the players are "students first and athletes second" in order to establish that the players are "student athletes, and they are working at their professional training as a student, and therefore are not subject to workman's comp."[45]

These cases also led to reform in the way schools offered scholarships, or Grants-in-Aid, to their student-athletes. The NCAA reformed its definition of amateurism to incorporate a focus on education, as described above.[46] Additionally, the NCAA limited the amount of financial aid student-athletes could receive so as to not exceed the cost of attendance[47] at a member college or university.[48] Under this principle of amateurism, now focused on education under the revised bylaws of the NCAA, colleges are able to offer scholarship to students-athletes without implicating an employer-employee relationship. Additionally, the NCAA regulates a student-athletes eligibility to play through imposing restrictions on financial aid provided by third parties (parties other than the student-athletes college or university) to ensure that aid does not exceed the cost of attendance and is "awarded solely on bases having no relationship to athletics

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[43] See The Myth of the Student-Athlete; The College Athlete as Employee, 81 Wash. L. Rev. 71, quoting Walter Byers.

[44] Benjamin J. Block, *Walter Byers: Was He Responsible For The 'Pay To Play' Controversy That Exists In College Sports Today?*, isportstimes.com, Oct 16, 2013. Quoting Walter Byers from the documentary "SCHOOLED: The Price of College Sports" (2013).

[45] Id.

[46] The current principle of amateurism adopted by the NCAA 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 professional and commercial enterprises." NCAA Operating Bylaws, 2.9, The Principle of Amateurism.

[47] The "cost of attendance" is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution. NCAA Operating Bylaws, 15.02.2, Cost of Attendance.

[48] NCAA Operating Bylaws, 15.02.4.1, Institutional Financial Aid. Financial aid now being defined as "funds provided to student-athletes from various sources to pay or assist in paying their cost of education at the institution."

ability."[49] A student-athlete receiving any financial aid which is not permitted by the NCAA bylaws will not be eligible to play intercollegiate athletics.[50]

While the NCAA generates hundreds of millions of dollars of revenue each year from marketing college athletic events they inhibit a student-athlete from similarly benefiting from any such revenue on their own. Such constraint is achieved through the amateurism rules discussed above, restrictions on student-athlete financial aid, restrictions on the type of general employment a student-athlete may take, and the restrictions on student-athletes ability to use their own names, images, and likenesses.

The NCAA enforces these rules with zeal through sanctions on schools, and suspension of student-athlete amateur status, even for minor violations, as has been shown on numerous occasions. For example, consider the sanctions issued by the NCAA against the University of South Carolina (USC) stemming from a June 2010 NCAA Infraction report, which also led to Reggie Bush's loss of the Heisman trophy.[51] In this report the infractions committee found that Reggie Bush had violated the amateurism rules by accepting "impermissible benefits in the form of cash, merchandise, an automobile, housing, hotel lodging and transportation" from a marketing company.[52] Because the relevant season had been completed by the time of the infractions report the NCAA was unable to prevent Reggie from playing, so instead the committee vacated 14 USC victories from games that Bush played from October 2004 to November 2005, and Bush eventually forfeited his Heisman trophy from that season.[53]

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[49] See NCAA Operating Bylaws, Article 15, Financial Aid.
[50] Id.
[51] Report of the National Collegiate Athletic Association Division I Infractions Appeals Committee, Report No. 323, May 26, 2011.
[52] Id.
[53] Id. Consider also a five game suspension against quarterback Terrelle Pryor and four other players on the Ohio State football team for selling championship rings, jerseys, awards, and for "receiving improper benefits" in the form of free tattoos. In addition to suspension the players were required to repay the value of what they received from selling the goods. ESPN news, *Ohio State Football Players Sanctioned*, ESPN.com, Dec. 26, 2010.

Fear of similar sanctions or loss of amateur status undoubtedly prevents a number of other college athletes from using their own image or likeness as a source of income while the NCAA continues to generate their own revenues from marketing and licensing the student-athletes image and likeness.

V. RECENT LITIGATION

Two recently decided cases suggest the 'student-athlete' defense against the employer-employee relationship may no longer be insurmountable, challenge the limits of the NCAA to continue to impose certain of their amateurism restrictions on those student-athletes, and serve as evidence that the NCAA's exploitation of their student-athletes through professional and commercial enterprises without remuneration to those athletes may be unjust.

a. NORTHWESTERN UNIVERSITY v. COLLEGE ATHLETES PLAYERS ASSOCIATION

First, in a National Labor Relations Board (NLRB)[54] decision dated March 26, 2014, the NLRB held that student-athletes receiving Grants-In-Aid from Northwestern University[55] to play

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Consider also a half game suspension against Johnny Manziel for allegedly receiving thousands of dollars for selling his autograph. Because there was no actual evidence of Manziel receiving payment he was suspended for half of a game for violation of the NCAA bylaw that "says student-athletes cannot permit their names or likenesses to be used for commercial purposes, including to advertise, recommend or promote sales of commercial products." Brett McMurphy, *Half-game Penalty for Johnny Manziel*, ESPN.com, Aug. 29, 2013.
Further consider the suspension of Dez Bryant from his last ten games at Oklahoma State University. Bryant was suspended for having dinner with Deon Sanders, to discuss helping with Sanders' youth camp and mentoring the younger players, without properly disclosing the contact with the former N.F.L. player to the NCAA. Thayer Evans, *Oklahoma State Declares Star Receiver Bryant Ineligible*, The New York Times, Oct. 7, 2009.

[54] The National Labor Relations Board is an independent federal agency that protects the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions. http://www.nlrb.gov/who-we-are (last visited 10/30/2014).

[55] Northwestern University "is a private, non-profit, non-sectarian, coeducational teaching university chartered by the State of Illinois...[Northwestern University] maintains an intercollegiate athletic program and is a member of the National Collegiate Athletic Association (NCAA)... As part of its athletic program, the Employer has a varsity football team that competes in games against other universities. The team is considered a Football Bowl Subdivision (FBS) Division I program." Northwestern University v. College Athletes Players Association, Case 13-RC-121359 (NLRB, Mar. 26, 2014).

football are "employees" under Section 2(3) of the National Labor Relations Act.[56] The issue arose when those student-athletes receiving Grants-In-Aid from Northwestern University petitioned the NLRB for a hearing to determine whether they were eligible to vote to be represented by the College Athletes Players Association (CAPA)[57] for collective bargaining purposes.

Northwestern University sought to prevent the vote, arguing that the football players are not employees within the meaning of the National Labor Relations Act, and therefore should not be eligible for collective bargaining. An employee, for purposes of the National Labor Relations Act, is "a person who [i] performs services for another under [ii] a contract of hire, [iii] subject to the other's control or right of control, and [iv] in return for payment."[58] The NLRB addressed each factor in detail in order to determine whether the football players receiving Grants-In-Aid were employees under this standard.[59]

First, the NLRB found that the student-athletes were performing valuable services to Northwestern University.[60] The NLRB noted that Northwestern University football program generated revenues of $235 million from 2001-2012 from "ticket sales, television contracts,

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[56] Decision and Direction of Election. Northwestern University v. College Athletes Players Association, Case 13-RC-121359 (NLRB, Mar. 26, 2014).

[57] This NLRB decision also addressed whether the College Athletes Players Association (CAPA) was eligible to serve as a labor organization under the act. An eligible organization is defined in the act as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." CAPA introduced evidence that it was "established to represent and advocate for certain collegiate athletes, including the [Northwestern University] players who receive scholarships, in collective bargaining with respect to health and safety, financial support, and other terms and conditions of employment." The NLRB found that CAPA was a labor organization within the meaning of the Act based on this evidence. Id.

[58] Id. (citing Brown University, 342 NLRB 483, 490, fn. 27 (2004)).

[59] Id.

[60] Id.

merchandise sales and licensing agreements."[61] The athletic services the student-athletes perform for Northwestern University are what make the generation of those enumerated revenue streams possible. The student-athletes awarded the Grants-In-Aid are sought out and recruited because of their athletic prowess on the football field.[62] The NLRB found it was clear that the student-athletes were awarded the Grants-In-Aid because of the athletic services they perform for Northwestern University.[63]

Next, the NLRB noted that the "under contract of hire" requirement was satisfied because student-athletes are required to sign a scholarship agreement in order to accept their Grant-In-Aid award and be eligible to play for the team.[64] This scholarship agreement is referred to as a "tender" by the school.[65] The tender agreement explains that the scholarship can be reduced or canceled during the term of the scholarship if the student-athlete:

> *"(1) renders himself ineligible from intercollegiate competition; (2) engages in serious misconduct warranting substantial disciplinary action; (3) engages in conduct resulting in criminal charges; (4) abuses team rules as determined by the coach or athletic administration; (5) voluntarily withdraws from the sport at any time for any reason; (6) accepts compensation for participating in an athletic contest in his sport; or (7) agrees to be represented by an agent."*[66]

The NLRB found that this tender "serves as an employment contract and also gives the players detailed information concerning the duration and conditions under which the [scholarship] will be provided to them."[67]

The NLRB also found the student-athletes are "subject to the [] control or right of control" of Northwestern University as evidenced by the special rules which apply to the

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[61] The NLRB additionally recognized the "immeasurable positive impact to Northwestern's reputation a winning football team may have on alumni giving and increase in number of applicants for enrollment at the university." Id.
[62] Id.
[63] Id.
[64] Id.
[65] Id.
[66] Id.
[67] Id.

recipients of Grants-In-Aid.[68] Such rules include restrictions on where the players will live,[69] restrictions on outside employment,[70] requirements to disclose information about the vehicle they drive, and requirements to follow a social media policy.[71] Further, the student-athletes are prohibited from giving media interviews[72] and prohibited from profiting off their image or reputation, including the selling of merchandise and autographs.[73] The NLRB also reviewed the time commitments these student-athletes are subject to, noting the student-athletes spend 50 to 60 hours per week engaging in football-related activities during training camp, 40 to 50 hours per week on football related activities during the regular football season before classes begin, and upwards of 20 hours per week once the academic year begins.[74]

The NLRB found the school was showing a right of control over the players further by "monitoring their adherence to NCAA and team rules and disciplining them for any violations that occur."[75] For example, if a student-athlete is late to a scheduled practice they are to attend one hour of study hall for "each minute they were tardy."[76] Further, violation of other minor team rules would result in the student-athlete being required to run laps, and if a student-athlete is repeatedly missing practice or games they may be "deemed to have voluntarily withdrawn from the team and will lose [their] scholarship."[77]

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[68] Id.

[69] Freshman and sophomore athletes are required to live on campus. Juniors and seniors are required to submit their lease to the football coach for his approval before they are permitted to live off campus. Id.

[70] "If players want to obtain outside employment, they must likewise first obtain permission from the athletic department. This is so that the Employer can monitor whether the player is receiving any sort of additional compensation or benefit because of their athletic ability or reputation." Id.

[71] This policy restricts what student-athletes are allowed to post on the internet and prohibits them from denying a "friend" request from the team coach so that their internet presence can be monitored. Id.

[72] Except when the student-athlete is "directed to participate in interviews that are arranged by the Athletic Department." Id.

[73] Id.

[74] Id.

[75] Id.

[76] Id.

[77] Id.

Finally, the NLRB found that the student-athletes were receiving payment from Northwestern University. The Grant-In-Aid awards received by the student-athletes from the school cover "tuition, fees, room, board, and books" for up to five years.[78] Combined, the total aid is typically $61,000 each year, and can total as much as $76,000 each year.[79] Additionally, the junior and senior students who elect to live off campus receive some of their scholarship money "in the form of a monthly stipend well over $1,000 that can be used to pay their living expenses."[80] The board clarified that although the student-athletes do not receive this compensation as a paycheck, and that Northwestern University does not treat the Grants-In-Aid as taxable income to the student-athletes, they "nevertheless receive a substantial economic benefit for playing football."[81]

The NLRB found the payment was clearly provided "in exchange for the athletic services being performed."[82] This factor was determined in reliance on the fact that "the Head Coach of the football team, in consultation with the athletic department, can immediately reduce or cancel the players' scholarship for a variety of reasons" and because the "scholarships can be immediately canceled if the player voluntarily withdraws from the team or abuses team rules."[83]

In considering all of the factors as described above, the NLRB ultimately found that Northwestern University "football players who receive scholarships fall squarely within the Act's broad definition of "employee."[84] The decision allows the football players receiving

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[78] Id.

[79] Resulting in players receiving compensation in excess of "one quarter of a million dollars throughout the four or five years they perform football duties for [Northwestern University]. Id.

[80] Id.

[81] The NLRB additionally stressed that because "NCAA rules do not permit the players to receive any additional compensation or otherwise profit from their athletic ability and/or reputation, the scholarship players are truly dependent on their scholarships to pay for basic necessities, including food and shelter." Id.

[82] Id.

[83] Id.

[84] Id.

Grants-In-Aid from Northwestern University to vote on "whether or not they desire to be represented for collective bargaining purposes by CAPA.[85]

While the decision is a major shift towards student-athletes being considered employees in certain circumstances, it should be noted there are limitations on the impact of the decision. For example, walk-on players[86] were not determined to be "employees" for the purposes of the National Labor Relations Act, and therefore the walk-on players remain ineligible for voting on or participating in the collective bargaining.[87] Additionally, Northwestern University is a private school. Many student-athletes in NCAA Division I football programs at public schools will remain ineligible for collective bargaining because those public schools are governed by Federal Law, and the National Labor Relations Act rights which apply to private employees do not extend to the student-athletes at those public schools.[88]

b. O'BANNON v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

A second recent case, O'Bannon v. National Collegiate Athletic Association, decided August 8, 2014, further addressed the legitimacy of the amateurism restrictions put in place against student-athletes by the NCAA. Specifically, the case addressed the rule preventing student-athletes from using their own name, picture, or likeness to advertise, recommend or promote the sale or use of a commercial product or service of any kind.[89] In this case, a group of

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[85] Id.

[86] Those players who do not receive Grants-In-Aid to play for the football team.

[87] Decision and Direction of Election. Northwestern University v. College Athletes Players Association, Case 13-RC-121359 (NLRB, Mar. 26, 2014).

[88] Reply Brief for Petitioner. Northwestern University v. College Athletes Players Association, Case 13-RC-121359 (Jul. 31, 2014).

[89] The rule states: "After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service." NCAA Operating Bylaws, 12.5.2.1, Advertisements and Promotions After Becoming a Student-Athlete.

current and former student-athletes challenged the rule as a violation of the Sherman Antitrust Act.[90] The case took the form of a federal class action lawsuit in the United States District Court for the Northern District of California.[91] For the case, the court certified the following class[92] represented by Edward O'Bannon:

> *"All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as "University Division" before 1973) college or university men's basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men's football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees."* [93]

The class alleged that the NCAA was restraining trade in the "college education market," for which there is no alternative to the specific bundle of goods and services offered by the NCAA to students in the form of educational and athletic opportunities.[94]

The class identified the limitations on their ability to use their own name and likeness through licensing or employment scenarios (where their value as an employee is derived from their "publicity, reputation, fame, or personal following") as well as the cap on financial aid which is limited to the cost of attendance for a particular school. If this cap did not exist, the class argued, schools would be allowed to compete for students by offering them greater scholarship awards, effectively reducing the price that a student-athlete must pay for the "combination of educational and athletic opportunities that the school provides."[95] The court found that:

> *In the complex exchange represented by a recruit's decision to attend and play for a particular school, the school provides tuition, room and board, fees, and book expenses,*

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[90] Id. at 1.
[91] O'Bannon v. National Collegiate Athletic Association, No. C 09-3329 CW (N.D. Cal. Aug. 8, 2014).
[92] As certified under Federal Rule of Civil Procedure 23(b)(2) by the Court in November 2013. O'Bannon at 6, (N.D. Cal. Aug. 8, 2014).
[93] Edward O'Bannon was member of the UCLA basketball team from 1991-1995. Id.
[94] Id. at 12.
[95] Id. at 21.

> *often at little or no cost to the school. The recruit provides his athletic performance and the use of his name, image, and likeness. However, the schools agree to value the latter at zero by agreeing not to compete with each other to credit any other value to the recruit in the exchange. This is an anticompetitive effect.*[96]

The NCAA argued that the restrictions are "[1] necessary to preserve its tradition of amateurism, [2] maintain competitive balance among FBS football and Division I basketball teams, [3] promote the integration of academics and athletics, and [4] increase the total output of its product."[97] The court addressed each of the four arguments from the NCAA in turn and found none of them wholly persuasive, stating the "justifications that the NCAA offers do not justify this restraint and could be achieved through less restrictive means."[98] The court concluded that "the challenged NCAA rules unreasonably restrain trade in the market for higher education and athletic opportunities offered by NCAA Division I schools."[99]

The remedy offered by the court from this decision took the form of an injunction.[100] The injunction prevents "the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid."[101] Additionally, the injunction prevents "the NCAA from enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires."[102]

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[96] Id. at 22.
[97] Id. at 23.
[98] Id. at 43
[99] Id. at 2. "This Court will enter an injunction to remove any unreasonable elements of the restraint found in this case."
[100] Id. at 96.
[101] Id. at 96.
[102] Id. at 96. This injunction further prevents the NCAA from setting a cap on the amount to be held in trust below $5,000 for every year that the student-athlete remains academically eligible to compete. However, the injunction does allow for the NCAA to enact new rules to prevent student-athletes "from using the money held in trust for

The Judge deciding this case, United States District Judge Claudia Wilken, specifically noted that because the nature of the cause of action for this case was based on antitrust law, the remedy she was able to afford was limited to the antitrust issues raised.[103] The judge made a point of stating that the injunction she issued would not be able to prevent the NCAA from continuing to enforce its rule prohibiting student-athletes from endorsing commercial products.[104] Further, she noted that many other challenged restraints imposed by the NCAA (which were not at issue in this specific case), "could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here. Such reforms and remedies could be undertaken by the NCAA, its member schools and conferences, or Congress."

VI. APPLICATION OF THE FINNIS NATURAL LAW AND NATURAL RIGHTS ANALYSIS

The recent litigation described above address the validity of the NCAA's amateurism principles and policy in depth from a United States legal system perspective. Both litigation matters have been appealed and the results of those appeals remain pending as of the time of this writing. While their ultimate outcome is not yet certain, these cases serve as solid framework for understanding the issues the United States legal system considers relevant in reviewing the NCAA's amateurism policies. However, a separate analysis of the NCAA's amateurism principles and policies is warranted to address how such policies should be regarded from a natural law perspective. Accordingly, the restrictions the NCAA imposes on student-athletes

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their benefit to obtain other financial benefits while they are still in school" – such a rule would prevent student-athletes from obtaining secured loans (or similar financial benefits) where the trust serves as the security for such loan.

[103] Id. at 98.

[104] Id. at 97.

through its amateurism principles will be analyzed using the theories of John Finnis from his book Natural Law & Natural Rights[105] as the guidepost for such analysis. NCAA Bylaw 12.1.2(a), which states "**An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual (a) uses his or her athletics skill (directly or indirectly) for pay in any form**" will serve as the rule evidencing the basic principle of the NCAA which is subject to this evaluation.[106]

a. THE SEVEN BASIC FORMS OF HUMAN GOOD

The evaluation begins with determining which of the seven basic forms of human good, as identified by Finnis, are implicated by this rule. Finnis has identified Life, Knowledge, Play, Aesthetic Experience, Sociability (Friendship), Religion, and Practical Reasonableness as the seven basic forms of human good.[107] Each will be addressed in turn below.

i. LIFE

The first basic value to address is Life. Finnis describes this value as "signif[ying] every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination. Hence, life here includes bodily (including cerebral) health, and freedom from the pain that betokens organic malfunctioning or injury."[108] There is little doubt that the NCAA has plenty of rules and regulations promoting the safety of their players, and even less doubt that the purpose behind those rules is to promote the basic human value of life.[109] Despite the NCAA's obvious

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[105] John Finnis, Natural Law & Natural Rights (Oxford Univ. Press Second ed. 2011).

[106] Note that this Bylaw is the source principle of amateurism which yields the panoply of restrictions on student-athletes receiving pay, including rules restricting the type of jobs a student-athlete can take, and the rules preventing student-athletes from using their own name, picture, or likeness to advertise, recommend or promote the sale or use of a commercial product or service of any kind.

[107] Finnis, supra note 105.

[108] Id. at 86.

[109] "Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical [] well-being of student-athletes." NCAA Constitution, Article 2.2, The Principle of Student-Athlete Well-

commitment to its student-athletes physical safety, NCAA Bylaw 12.1.2(a) and its progeny do not implicate (either positively or negatively) the pursuit of bodily health and avoidance of physical injury.

ii. KNOWLEDGE

The second value to consider is Knowledge. Finnis indicates this basic human value addresses seeking out truth and information for its own sake, not necessarily as a means to an end or as a solution to a problem, but instead knowledge as a process to be enjoyed and that enriches the human experience.[110] The NCAA claims that its principle of amateurism is designed to promote the overall educational experience of students, indicating that maintaining amateurism for a student-athlete is "crucial to preserving an academic environment in which acquiring a quality education is the first priority."[111] Additionally the NCAA claims that student-athletes should be protected from exploitation by professional and commercial enterprises.[112] However, the majority of the revenue generated by the NCAA is derived from the NCAA's own commercial exploitation of those student-athletes. This is evidenced by ticket sales, team apparel sponsorships, and the marketing and licensing of the student-athletes names and likeness.[113]

Further, by enforcing NCAA Bylaw 12.1.2(a), the NCAA prevents every student-athlete from engaging in the learning process and experience of managing the use of their own name and likeness, and from learning how to properly market themselves either collaboratively with their team or independently to the world. Freed from these restrictions student athletes would be able

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Being. "It is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes." NCAA Constitution, Article 2.2.3, Health and Safety.

[110] Finnis, supra note 105.

[111] See Amateurism, supra note 19.

[112] See NCAA Operating Bylaws, supra note 46.

[113] See Independent Auditors Report, supra note 8.

to seek out and experience the process of managing their image as an asset and learning how to properly manage the income generated by their skill set. This experience would be invaluable to student-athletes, and deeply enrich their life if they ultimately become full time professional athletes. The structured environment and educational atmosphere provided by a college or university could serve as an excellent teaching environment for guiding student-athletes through experiencing and learning how to properly handle those issues. Instead, student-athletes are shielded from experiencing that knowledge process and are only exposed to it once they leave the structured college or university environment.

A recent article from CBS news indicates that 78 percent of professional football players, and 60 percent of NBA players face "bankruptcy or serious financial stress" when they leave professional athletics.[114] Finnis states that "Knowledge is something good to have...Muddle and ignorance are to be avoided."[115] If NCAA Bylaw 12.1.2(a) was not enforced it seems student-athletes would have a better opportunity to avoid their personal ignorance resulting from such restrictions. Such a shift would almost certainly better prepare these student-athletes for what may lie ahead of them in the realm of full time professional athletics.

iii. PLAY

The third basic value to address is Play. Finnis indicates this value includes engaging in performances "which have no point beyond the performance itself" and that such performances "may be solitary or social, intellectual or physical, strenuous or relaxed, highly structured or relatively informal, conventional or ad hoc in its pattern."[116] The NCAA principle of amateurism

[114] Robert Pagliarini, *Why athletes go broke*. Moneywatch, CBSNEWS.com, Jul. 1, 2013.
[115] Finnis, supra note 105 at 63.
[116] Id. at 87.

appears on its face to promote this basic value.[117] In fact, the NCAA Constitution, Article 2, directs that student-athlete participation should be motivated "by the physical, mental, and social benefits to be derived" therefrom.[118] NCAA Bylaw 12.1.2(a) seems to further promote this principle by ensuring student-athletes may only play for the physical, mental, and social benefits derived from the performance of sport itself, completely preventing student-athletes from engaging in sport for the purpose of profit. However, NCAA Bylaw 12.1.2(a) promotes the principle of Play through the subordination of the principle of Knowledge, as discussed above. This subordination is unnecessary and irrational. The principle of Play would not be diminished through the repeal of NCAA Bylaw 12.1.2(a). Even Finnis states that "an element of play can enter into any human activity" and the principle remains intact as "analytically distinguishable from its 'serious' context."[119] Accordingly, the principle of Play and Knowledge could both be promoted by the NCAA through the relaxation of Bylaw 12.1.2(a), as opposed to its current state of promoting the principle of Play at the expense of the principle of Knowledge.

iv. AESTHETIC EXPERIENCE

The fourth basic value to address is Aesthetic Experience. Finnis describes this value as the appreciation of observing "the beautiful form 'outside' one, and the 'inner' experience of appreciation of its beauty" for its own sake.[120] Notably, Finnis identifies football as an "occasion of aesthetic experience." The NCAA surely promotes this value by organizing sporting events for spectators to observe. The NCAA argues that the principle of amateurism "contribute[s] to the popularity of college sports and help distinguish them from professional sports and other

[117] NCAA Constitution, Article 2.9, The Principle of Amateurism
[118] Id.
[119] Finnis, supra note 105 at 87.
[120] Id. at 88.

forms of entertainment in the marketplace."[121] In the O'Bannon case the NCAA offered survey evidence that "sixty-nine percent of respondents to [the] survey expressed opposition to paying student-athletes while only twenty-eight percent favored paying them."[122] The NCAA uses this as evidence to support their theory that consumers prefer the experience of watching college athletics with the knowledge that the players are not receiving compensation. The NCAA would argue that Bylaw 12.1.2(a) is designed to maintain and promote the Aesthetic Experience that their consumers value and express interest in observing.

While the NCAA may be promoting Aesthetic Experience for their consumers in this respect, again, they do so at the expense of the principle of Knowledge for the student-athletes as described above. Further, there is ample survey evidence to show that consumers would continue to enjoy watching college athletics even if the student-athletes were paid, despite their personal preferences on student-athlete pay. [123] This evidence goes to show that the NCAA could modify or repeal Bylaw 12.1.2(a) so that both the value of Aesthetic Experience for fans and value of Knowledge for student-athletes could be supported, instead of irrationally promoting one value over the other.

v. SOCIABILITY (FRIENDSHIP)

The fifth basic value to consider is Sociability. Finnis describes this value as "peace and harmony amongst persons...acting for the sake of one's friend's purposes, one's friend's well-being."[124] The NCAA would argue that its amateurism principles are designed to promote the well-being of its student athletes by preserving participation in college athletics as an avocation,

[121] O'Bannon, supra note 23 at 78.
[122] Id. at 28. Further note that the court in the O'Bannon case ultimately found that the survey was not "credible evidence that consumer demand for the NCAA's product would decrease if student-athletes were permitted to receive compensation."
[123] Robert Smith and Jacob Goldstein, *Is The NCAA An Illegal Cartel?* Planet Money, NPR.org, Oct. 31, 2014.
[124] Finnis, supra note 105 at 88.

placing education first, and protecting the student athletes from "exploitation by professional and commercial enterprises."[125] While this is one seemingly valid interpretation, this reasoning doesn't fully respect the value of Sociability. The NCAA uses the spectacular skills of its student-athletes to sell tickets and licensing agreements, and further generates revenues through marketing the names and likenesses of its student athletes.[126] Despite the hundreds of millions of dollars the NCAA generates from student-athletes, it limits the student-athletes participation in those revenues to the value of the Grants-In-Aid awarded, and prevents the students from experiencing the negotiation and management process altogether. If the NCAA were to truly promote friendship and collaboration between itself and student-athletes, the NCAA would engage in a process that allows for revenues generated by the student-athletes hard work to be shared with those student-athletes, and allow them to participate directly, or indirectly through voting for group representation, in the process of managing their names, images, and likenesses. Such an approach would more fully ensure the well-being of the student-athletes and reduce the self-serving nature of the NCAA's policy. As Bylaw 12.1.2(a) currently stands, however, it does not fully promote the principle of Sociability.

vi. RELIGION

The sixth basic value identified by Finnis is Religion. For Finnis, Religion addresses the responsibility "to act with freedom and authenticity, and to will the liberty of other persons equally with his own-in choosing what he is to be; and all this, because, prior to any choice of his, 'man' is and is-to-be free."[127] Religion involves the "recognition [] of, and concern about,

[125] NCAA Constitution, Article 2.9, The Principle of Amateurism
[126] See Independent Auditors Report, supra note 8.
[127] Finnis, supra note 105 at 90.

an order of things 'beyond' each and every one of us."[128] This basic value is not directly at stake, and is neither positively nor negatively impacted by the NCAA's reliance on Bylaw 12.1.2(a).

vii. PRACTICAL REASONABLENESS

The seventh basic form of human good to address is Practical Reasonableness. Finnis stresses that Practical Reasonableness involves "the basic good of being able to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and life-style and shaping one's own character."[129] The NCAA, through Bylaw 12.1.2(a) has chosen to restrict its student-athletes from participating in the revenue generated by their athletic skills, and from participating in the process of managing their own name, image, and likeness. The NCAA believes these restrictions are in the best interest of college athletics as a business, and in the best interest of the student-athletes who participate. The NCAA has listed protection against exploitation by professional and commercial enterprises, preserving the tradition of amateurism, maintaining competitive balance among teams, promoting the integration of academics and athletics, and increasing the total output of its product as reasons for this rule.[130] Although this reasoning, on its face, appears to confirm that the NCAA has used its own experience and intelligence to determine that the rule best serves the purpose of college athletics, the basic value of practical reasonableness demands a more thorough examination.

b. THE BASIC REQUIREMENTS OF PRACTICAL REASONABLENESS

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[128] Id.
[129] Id. at 88.
[130] O'Bannon, supra note 23 at 23.

Practical Reasonableness is participated in "by shaping one's participation in the other basic goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out."[131] Through application of the nine requirements of practical reasonableness, addressed in turn below, it will become apparent whether the NCAA's rule is actually a Practicably Reasonable way of carrying out its objectives or if the rule is something that "morally ought not to be done."[132]

i. A COHERENT PLAN OF LIFE

The first requirement, a coherent plan of Life, involves maintaining a "harmonious set of purposes and orientations, not as the 'plans' or 'blueprints' of a pipe-dream, but as effective commitments."[133] The NCAA states that it is "dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom and throughout life."[134] In a misguided attempt to achieve this harmonious orientation the NCAA has imposed a rule which prevents student-athletes from experiencing the rewards of their hard work and determination. While the NCAA believes it is protecting its student-athletes, it is in fact denying them an opportunity to learn skills for success in life. As stated above, a great majority of professional athletes eventually face bankruptcy or serious financial distress.[135] Teaching student-athletes, while they are still in a structured educational environment, how to properly manage their image, name, likeness, and revenue would be a Practicably Reasonable way of "safeguarding" the student-athletes well-being over time. Finnis suggests that participating in the commitment to a particular harmonious orientation requires "the redirection

[131] Finnis, supra note 105 at 100.
[132] Id. at 103.
[133] Id. at 104.
[134] See Who We Are, http://www.ncaa.org/about/who-we-are (last visited 11/9/2014).
[135] See *Why athletes go broke*, supra note 114.

of inclinations, the reformation of habits, the abandonment of old and adoption of new projects, as circumstances require."[136] It seems apparent that to better participate in its commitments the NCAA should embrace such reform, modify its amateurism rules for student-athletes, and engage in the process of further educating those student-athletes on how to manage their income and market themselves, instead of denying them the opportunity to learn such skills until it is too late.

ii. NO ARBITRARY PREFERENCES AMONGST VALUES

The second requirement recognizes that there must be "no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values."[137] Notably, Finnis states that "if...as a self-directing individual, one treats truth or friendship or play or any other basic forms of good as of no account, and never asks oneself whether one's life-plan(s) makes reasonable allowance for participation in those intrinsic human values, then one can be properly accused both of irrationality and of stunting or mutilating...those in one's care."[138] As described above, when addressing the seven basic forms of human good, the NCAA has discounted Knowledge and Sociability, by imposing Bylaw 12.1.2(a). It should seem clear to an impartial observer that under this standard the NCAA is being irrational by treating Knowledge and Sociability as of no account. Even further, it is readily apparent that the NCAA's stated purpose[139] (its life-plan) certainly would make an allowance for participation in those intrinsic human values.

iii. NO ARBITRARY PREFERENCES AMONGS PERSONS

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[136] Finnis, supra note 105 at 104.
[137] Id. at 105.
[138] Id. at 106.
[139] As an "organization dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom and throughout life." See Who We Are, supra note 134.

The third requirement of Practicable Reasonableness asks us to recognize the "fundamental impartiality among the human subjects who are or may be partakers of" the basic forms of human goods.[140] This requirement can be more easily understood by reference to the 'golden rule' which states: "do not prevent others getting for themselves what you are trying to get for yourself."[141] The NCAA's rule which prevents student-athletes from receiving any form of remuneration (aside from Grants-In-Aid) generated from their athletic skill, while the NCAA collects all of that income for itself, shows clear self-preference and violation of this 'golden rule.' Simply put: the NCAA desires to retain all of the money generated from college athletics for itself, and as a result of this greed is actively preventing student-athletes from receiving some of that money which they play such an integral role in producing. The NCAA should revise Bylaw 12.1.2(a) in an effort to "see the whole arena of human affairs" and keep the "interests of each participant in those affairs equally at heart and equally in mind."[142] Until the NCAA implements a modification to Bylaw 12.1.2(a) it will remain subject to the criticisms of "selfishness, special pleading, double-standards, hypocrisy, [and] indifference to the good of others whom one could easily help," which are associated with actors who do not take this requirement of Practical Reasonableness into consideration.[143]

iv. DETACHMENT

The fourth requirement of Practical Reasonableness, detachment, requires one to take an objective approach to the specific and limited projects that one undertakes.[144] As Finnis suggests, there is no reason to be so committed to the success of one idea or one particular way

[140] Finnis, supra note 105 at 108.
[141] Id.
[142] Id.
[143] Id.
[144] Id. at 110.

of carrying out that idea that its failure would "drain life of all meaning."[145] Such an approach is irrational and leads to fanaticism. It seems apparent that the NCAA has committed itself to the idea that student-athletes could not be successful if they were allowed to participate in the management of their name, image, likeness, and revenues generated therefrom. This belief by the NCAA has been established time and again as evidenced through the NCAA's staunch opposition to any alternative theories regarding student-athlete pay, including as shown in the litigation described above. The NCAA would be better able to achieve Practicable Reasonableness through detaching itself from this specific idea, and instead considering alternative approaches to achieving its "life-plan," which may include allowing student-athletes to participate in the benefits their athletic skills generate.

v. COMMITMENT

This fifth requirement is deeply related to the fourth requirement, as it "establishes the balance between fanaticism and dropping out, apathy, unreasonable failure, or refusal to 'get involved' with anything."[146] To conform with this requirement "one should be looking creatively for new and better ways of carrying out one's commitments, rather than restricting one's horizon and one's effort to the [] methods, and routines with which one is familiar."[147] The NCAA has restricted its horizon and efforts to its current method of keeping student-athletes from participating in the profits generated by the marketing of their skills. To better conform to the principle of Practicable Reasonableness, the NCAA must instead seek out alternatives to Bylaw 12.1.2(a) which would allow student-athletes to receive some portion of the income they generate in order to more fully carry out its commitment to the well-being of student-athletes.

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[145] Id.
[146] Id.
[147] Id.

vi. THE RELEVANCE OF CONSEQUENCES: EFFICIENCY, WITHIN REASON

The sixth requirement addresses bringing "about good in the world (in one's own life and the lives of others) by actions that are efficient for their (reasonable) purpose(s)."[148] Under this requirement an action should be assessed by its effectiveness, fitness for a purpose, its utility, and its consequences.[149] This reasoning may lead to the use of cost-benefit analysis; however such analysis should not be relied on as the best or only tool for determining whether an action is effective in "avoiding the definite harms which we choose to regard as unacceptable."[150] Instead it must be taken in consideration alongside the other requirements of Practical Reasonableness.

A full cost-benefit analysis addressing whether and how Bylaw 12.1.2(a) should be modified or repealed is too complex to consider here. However, another useful analysis under this requirement is to remember that in considering alternative decisions "it is reasonable to prefer basic human goods...to merely instrumental goods" and that "lesser, rather than greater damage to one-and-the-same basic good" is preferable.[151] An assessment of the current NCAA Bylaws would seem to indicate that the NCAA does in fact prefer instrumental goods (money) to the basic human goods (Knowledge and Sociability) which could be promoted by modifying Bylaw 12.1.2(a). Accordingly, it appears that with Bylaw 12.1.2(a) in place the NCAA has adopted an inefficient method of achieving its ultimate goals of promoting the well-being of student-athletes.

vii. RESPECT FOR EVERY BASIC VALUE IN EVERY ACT

The seventh requirement of Practical Reasonableness is connected to the formulation that "the end does not justify the means" and that "evil may not be done that good might follow

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[148] Id. at 111.
[149] Id.
[150] Id. at 118
[151] Id. at 111.

therefrom."[152] More directly, this requirement establishes that actions should not be engaged in if the action "does nothing but damage or impede a realization or participation of any one or more of the basic forms of human good." While it cannot be conceded that NCAA Bylaw 12.1.2(a) does *nothing* but damage participation in the basic forms of human good, it does appear the NCAA has taken on a flawed consequentialist approach in thinking that preventing student-athletes from receiving payment (beyond Grants-In-Aid) is simply a necessary step towards carrying out the ultimate goal of promoting the well-being of student-athletes. This is exactly the type of flawed reasoning that consequentialism is used to justify and which should be avoided.[153]

Practical Reasonableness instead requires the NCAA to accept that "each and every choice of an act" is itself a complete act, "whether or not it is also a step in a plan or phase in a project."[154] Through application of this principle it becomes apparent that the NCAA's ultimate goal of promoting the "well-being" of student-athletes cannot be utilized as justification for shielding student-athletes from participation in the professional and commercial enterprises which generate so much revenue through the marketing of the student-athletes skills, when that action standing alone does not promote the basic forms of human good.

viii. THE REQUIREMENTS OF THE COMMON GOOD

The eighth requirement involves "favoring and fostering the common good of one's communities."[155] In considering the common good, one in authority should look to develop "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have

[152] Id. at 122.
[153] Id. at 119.
[154] Id. at 121.
[155] Id. at 125.

reason to collaborate with each other in a community."[156] There is no doubt that the NCAA is in authority here, and their authority is much needed. It would be surprisingly difficult for student-athletes to co-ordinate and organize athletic events without the guidance and authority provided by the NCAA. However, the NCAA must use this authority appropriately, and in a manner that is designed to achieve the common good of all participants in the community. The NCAA and student-athletes are in a community together. Their ultimate purposes are not inconsistent; however the two groups do possess differing values and short term objectives.

The NCAA must come to recognize that in order to ensure the promotion of the common good its authority must be exercised in a way that will foster student-athletes growth in Knowledge and Sociability. The rates at which professional athletes face bankruptcy or other serious financial distress are disturbingly high. This serves as valid evidence that those professional athletes were not adequately educated in how to constructively manage their money and/or play a role in the marketing of their name, image, and likeness. If the NCAA were to truly promote the fundamental common good (that of participation in d process which seeks to achieve the betterment of all people) the NCAA would adopt a role as educator with these issues. It could allow student-athletes to receive remuneration for the use of their names, images, or likeness and provide them with guidance on how to manage that income. The NCAA is in the perfect position to improve those financial distress statistics by providing much needed education and guidance to student-athletes while they are still under the NCAA's direct authority. Until the NCAA recognizes and adopts the role it must play as a supportive authority figure, it will remain out of touch with this requirement of Practical Reasonableness and will not be an active participant in promoting the common good.

ix. FOLLOWING ONE'S CONSCIENCE

[156] Id. at 155.

The ninth requirement states that "one should not do what one judges or thinks or 'feels'-all-in-all should not be done."[157] The NCAA would grasp onto this language alone, without a more detailed review, and proclaim their feelings that student-athletes should not be entitled to receive any portion of the revenues generated by their athletic skill (beyond the value of their Grants-In-Aid). Resting on this judgment the NCAA would state they should not be compelled to modify their Bylaw 12.1.2(a).

But this requirement demands more than just a cursory evaluation of what an actor "feels" should be done. Instead, the actor must consider the implications their actions have on the basic forms of human goods, and the demands of Practicable Reasonableness. Only upon reflection and assessment of these considerations should an actor decide what "feels" right. So it seems, if NCAA decision makers were to put aside consideration of the financial implications and instead evaluate Bylaw 12.1.2(a) by the impact it has on the basic forms of human good and the requirements of Practicable Reasonableness, they would likely come to a different conclusion about what it "feels" like should or should not be done.

VII. CONCLUSION

Through consideration of the seven basic human goods and the nine requirements of Practicable Reasonableness, it seems readily apparent that the NCAA must relax its prohibition against student-athletes participating in the financial rewards their athletic skills produce. The fundamental rights of student-athletes will remain unjustly repressed by the NCAA until such time as Bylaw 12.1.2(a) is modified to allow for student-athletes to participate in some way in the management of their names, images, likenesses and the financial benefits generated therefrom. Such a shift would clearly serve to promote the common good, and is justified by the

[157] Id. at 125.

requirements of Practicable Reasonableness, because it would allow student-athletes to benefit further from the basic human goods of Knowledge and Sociability. Not only would the student-athletes be benefited by the financial gains derived from their hard work, but they would also be exposed to the complexities of managing their income and being involved in the management of their name, image, and likeness (both individually and as teammates). Such skills would be invaluable to those student-athletes whether or not they ultimately become professional athletes after college. The NCAA serves as the authority figure for college athletics. Coupled with this authority is the responsibility to promote the common good through the exercise of their authority. Accordingly, the NCAA must reconsider its current stance on whether student-athletes should be eligible to receive payment, either directly or indirectly, for the use of their athletic skills.