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The NCAA'S Grant in Aid Cap: Injustice Forced on Student-Athletes

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I. Introduction

On April 7, 2014, the University of Connecticut's men's basketball defeated Kentucky University to claim the school's fourth national championship.¹ Shabazz Napier, after a game MVP performance, told reporters that he sometimes goes to bed "starving" even though UConn provides its student-athletes the maximum grant in aid amount to, among other things, feed its athletes.² The remark came after winning a national championship game, and the most salient thought that the best player in the game could convey to the public was, "there's hungry nights and I'm not able to eat and I still got to play up to my capabilities...When you see your jersey getting sold -- it may not have your last name on it -- but when you see your jersey getting sold and things like that, you feel like you want something in return."³

This paper analyzes the morality of the grant in aid limitation of compensation to student-athletes in light of recent and pending litigation of the matter, through the lens of natural law theorist John Finnis's guide to morality. First, it examines the NCAA's stated purpose, brief history, and bylaws. The third section takes an in depth look at the seminal case analyzing challenged provision: the grant in aid cap. The fourth section examines the current state of the law. Finally, the fifth section gives an in depth analysis of the law by examining its effect on the seven universal goods and the nine requirements for practical reasonableness.

II. The NCAA, Amateurism, and Grant in Aid

a. History of NCAA

¹ Sara Ganim, *UConn guard on unions: I go to bed 'starving'*, CNN (April 14, 2014) available at <http://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html>

² *Id.*

³ *Id.*

At the urging of then President and former college athlete, Theodore Roosevelt, the presidents of 65 universities created the National Collegiate Athletic Association (NCAA) in 1905 as a mechanism to regulate rampant cheating, to draft and enforce rules, and to protect and regulate student-athletes.⁴ The organization was originally called the Intercollegiate Athletic Association of the United States, but changed it to NCAA in 1910.⁵ Initially, the NCAA was solely a forum for discourse about the nature and safety of collegiate athletics, as well as a rule making body.⁶ However, in 1921, the NCAA held its first National Championship: the National Track and Field Championship.⁷

After World War II, college attendance increased exponentially in the United States.⁸ Since the prevalence of televisions in homes also grew steadily during this time, a demand to broadcast intercollegiate sporting events developed.⁹ In the 1950's the NCAA developed the Committee on Infractions (COI), which was given lateral authority to sanction members, and it freely used this authority.¹⁰ Additionally, a need developed for a central authority figure, so in 1951 the NCAA named Walter Byers as executive director. Byers made the first move to give student-athletes more exposure almost immediately, by negotiating the first contract to televise college football games.¹¹

The NCAA developed extensive rules governing amateur athletic completion among its member schools, now numbering roughly eleven hundred and spanning about

⁴ Note & Comment: *They're Not Yours, They Are My Own: How NCAA Employment Restrictions Violate Antitrust Law*, 67 U. Miami L. Rev. 737, 762 (2013).

⁵ *Id.*

⁶ *Id.*

⁷ Comment: *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-athlete's Right of Publicity*, 42 Tex. Tech L. Rev. 1069, 1073 (2010).

⁸ MATTHEW J. MITTEN ET AL., *Sports Law Regulation: Cases, Materials, and Problems* 100 (2d ed. 2009).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

two-dozen sports.¹² These rules, constitutions and bylaws, are updated annually, and focus on, among other things, academic eligibility requirements for student-athletes, establishing guidelines and restrictions for recruiting high school athletes, and importantly, place limitations on the amount and number of size of athletic scholarships each school can offer.¹³ Over time, the purpose of the NCAA shifted to include promoting a student-athlete's education and "develop educational leadership, physical fitness, athletic excellence, athletics participation as a recreational pursuit."¹⁴ The NCAA further states that its student-athletes must be amateurs, since their prime motivation should be mental and physical fitness, education, and the social benefits derived from athletic competition.¹⁵

b. Amateurism

From the inception of the NCAA, one of the core principles was that collegiate athletes must be actually enrolled in the college or university they competed for and the student-athlete must maintain status as an amateur.¹⁶ The requirement that a student-athlete maintains the "amateur status" stems from a contractual relationship between the NCAA, member schools, and its student-athletes; the NCAA created the rules, the member schools enforce the rules as part of its membership, and a student-athlete must

¹² NCAA, 2014-15 NCAA Division I Manual art. 1, § 1.1-3 (2013) [hereinafter NCAA Division I Manual].

¹³ *Id.* at viii.

¹⁴ *Id.* art. 1, § 1.1-3.

¹⁵ *Id.* art. 2, § 2.9.

¹⁶ *See id.* at xiii. Stating that the commitment to amateurism holds that "[m]ember institutions shall conduct their athletics programs for students who choose to participate in intercollegiate athletics as a part of their educational experience and in accordance with NCAA bylaws, thus maintaining a line of demarcation between student-athletes who participate in the Collegiate Model and athletes competing in the professional model."

follow the rules or face losing eligibility.¹⁷ The NCAA Division I Manual lists reasons that a student-athlete may lose amateur status:

12.1.2 Amateur Status. An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (*Revised: 4/25/02 effective 8/1/02, 4/24/03 effective 8/1/03, 4/29/10 effective 8/1/10*)

- (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1;
- (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;
- (e) Competes on any professional athletics team per Bylaw 12.02.10, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1;
- (f) After initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); or
- (g) Enters into an agreement with an agent.¹⁸

This outright ban on utilizing a particular skill for profit is perhaps the key aspect to participating in collegiate athletics, and one of the most polarizing topics in sports and labor law today.¹⁹

¹⁷ See *Bloom v. NCAA*, 93 P.3d 621, 623-24 (Colo. App. 2004).

¹⁸ *Id.* art. 12, § 1.2.

¹⁹ Compare Sean Gregory, *It's Time to Pay College Athletes*, TIME, Sept. 16, 2013, available at <http://time.com/568/its-time-to-pay-college-athletes/> with Tom Van Riper, *Sorry Time Magazine: Colleges Have No Reason to Pay Athletes*, Forbes, Sept. 6, 2013, available at <http://www.forbes.com/sites/tomvanriper/2013/09/06/sorry-time-magazine-colleges-have-no-reason-to-pay-athletes/>

c. Grant in Aid

Although this at first glance appears to be an outright ban on receiving compensation for a student-athlete's prowess, some feel that student-athletes are in fact adequately compensated for their collegiate athletic abilities.²⁰ Van Riper, and others like him, argue that student-athletes are compensated in the form of their athletic scholarship, and are free to quit and "become a tuition-paying student like anyone else."²¹ The NCAA limits the number of scholarships its member schools have the ability to award each year.²²

Furthermore, the NCAA limits the amount of scholarship money a student athlete may be given by prohibiting them from receiving any "financial aid based on athletics ability" that surpasses the value of full "grant in aid."²³ The NCAA then defines "full grant in aid" as "financial aid that consists of tuition and fees, room and board, and required, course-related books."²⁴ The amount of a "full grant in aid" varies from school to school, and year-to-year based on member schools' calculations of cost of room, board, and tuition.²⁵

It should be noted here that the "grant in aid limit" expressly does not cover the full cost of attendance.²⁶ "Cost of attendance" is separately and more broadly defined as, "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,

²⁰ Van Riper *supra* note 16.

²¹ *Id.*

²² NCAA Division I Manual art. 15, § 01.1.

²³ *Id.* at art. 15, § 1.

²⁴ *Id.* at art. 15, § .02.5.

²⁵ *Id.* at art. 15, § 2.

²⁶ *Id.*

transportation, and other expenses related to attendance at the institution.”²⁷ Therefore, grant in aid is typically lower than the full cost of attendance, with a gap that ranges from \$952/year to \$6,127/year, depending on the institution.²⁸

III. O’Bannon v. NCAA: Name and Likeness

The Northern District of California recently struck down the limitation on grant in aid to student-athletes and the *per se* ban on compensating student-athletes with revenue from the sale of licenses to use their names, images, likenesses for commercial purposes of Division I men’s basketball and FBS.²⁹ In 2009, former member of the 1995 National Champion UCLA men’s basketball team, Ed O’Bannon³⁰, filed a class action lawsuit against the NCAA, Electronic Arts (EA), and The Collegiate Licensing Company (CLC).³¹ The group of 20 former collegiate men’s basketball or football players alleged that the rules banning student-athlete’s ability to receive a portion of the revenue that the NCAA and its member schools share from licensing sales of student-athletes’ names, images and likeness in videogames, live game telecasts, and footage used for other purposes, such as promotions, highlight reels, or rebroadcasting of games.³²

Plaintiffs asserted that these rules, primarily the grant in aid limitations on compensation for use of their images and likeness places an unreasonable restraint on trade.³³ The NCAA, on the other hand, contended that the ban is necessary to maintain its academic mission, namely that student-athletes must maintain amateur status, and to

²⁷ *Id.* at art. 15, § .02.2.

²⁸ Ramogi Huma & Ellen J. Staurowsky, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 3 (Nat’l Coll. Players Ass’n & Drexel Univ. Mgmt. Program 2013) *available at* <http://www.ncpanow.org/research/body/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>

²⁹ *O’Bannon v. NCAA*, 7 F. Supp 3d. 955 (N.D. Cal. 2009).

³⁰ O’Bannon was also named the tournament’s Most outstanding player that year.

³¹ *O’Bannon*, 7 F. Supp. 3d. 355.

³² *Id.*

³³ *Id.* at 985.

protect the integrity and popularity of collegiate sports.³⁴ EA and CLC withdrew from the litigation and privately settled with the Plaintiffs.³⁵ The \$40M settlement is predicted to bring around \$4,000 to around 100,000 former student athletes.³⁶

To succeed under § 1 of the Sherman Act, plaintiffs must show: "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a *per se* rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce."³⁷ Plaintiffs alleged that the NCAA's rules and bylaws that prohibit FBS football players and Division I men's basketball players from receiving any compensation, grant in aid cap, for the use of their names, images, and likenesses in videogames, live game telecasts, re-broadcasts, and recorded game footage operate as an unreasonable restraint in trade.³⁸ The NCAA neither disputed that these rules were adopted and were imposed *vis a vis* an agreement between its Division I member schools and conferences, nor that rules affected interstate commerce.³⁹ Therefore, the only question was whether the challenged rules unreasonably restrained trade.⁴⁰

"A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects."⁴¹ Courts perform this weighing analysis under a burden-shifting framework.⁴² The "plaintiff bears the initial burden of showing that the restraint

³⁴ *Id.* at 963.

³⁵ Tom Farrey, *Players, game makers settle for \$40M*, ESPN, May 31, 2014 available at http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm

³⁶ *Id.*

³⁷ *O'Bannon*, F. Supp. 3d. at 984-85 (citing *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001).

³⁸ *Id.* at 985.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 985 citing (*Tanaka*, 252 F.3d at 1063).

⁴² *Id.*

produces 'significant anticompetitive effects' within a 'relevant market.'"⁴³ If the plaintiff satisfies the initial burden, the defendant must show evidence of the challenged restraint's procompetitive effects.⁴⁴ Finally, if the defendant shows a procompetitive effect, the plaintiff must "show that any legitimate objectives can be achieved in a substantially less restrictive manner."⁴⁵ This final burden includes a showing that the alternative is "substantively less restrictive and is virtually as effective in serving the legitimate objective without significantly increased cost,"⁴⁶ and the solution should either be based on "actual experience in analogous situations or else be fairly obvious."⁴⁷

Honorable Claudia Wilken delivered both findings of fact and of law, since a non-jury trial was held between June 9, 2014 and June 27, 2014.⁴⁸ Judge Wilken found that Division I football and basketball programs compete to sell a unique bundle of goods and services.⁴⁹ They do so as part of the NCAA, governed by an 18 person Board of Directors, composed entirely of university presidents or chancellors.⁵⁰ Judge Wilken found two distinct national, relevant, markets existed and that the NCAA restrained trade within.⁵¹

⁴³ *Id.* at 985 citing (*Tanaka*, at 1063).

⁴⁴ *Id.*

⁴⁵ *Id.* at 985 citing (*Tanaka*, at 1063).

⁴⁶ *Id.* at 1005 (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).

⁴⁷ *Id.* at 1005 (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1913b (3d ed. 2006)).

⁴⁸ *Id.* at 963.

⁴⁹ *Id.* at 964-66. The court also notes that Division I football is divided into two groups: Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS). The court states that since the FBS is allowed to offer 85 scholarships per team, it is generally more competitive than FCS schools, which cannot offer as many. Finally, the court takes note that both the FBS and FCS are further broken down into "Conferences," containing between 8 to 15 teams, which are wholly independent of one another, and so long as their bylaws comport with the NCAA, are fully autonomous and can generate their own revenue. The judge focuses her opinion on the FBS and Division I men's basketball.

⁵⁰ *Id.* at 964.

⁵¹ *Id.* at 965.

Plaintiffs alleged that the challenged restraint caused anticompetitive effects in two related markets: (1) the “college education market” in which member schools compete to recruit athletes to play FBS football or Division I men’s basketball⁵² and (2) “the group licensing market,” where videogame creators, broadcast networks, and others compete for group licenses to use the names, images, and likenesses of FBS and Division I men’s basketball players for commercial profit.⁵³

First, the court considered the monopoly theory of the “college education market,” where the unique bundle of goods that the schools sell to student-athletes include scholarships that cover the cost of tuition, books, and fees, room and board, and books and some supplies.⁵⁴ The bundle also includes the value of high quality coaching, medical treatment, state of the art training facilities, and opportunities to compete at the highest level in front of large crowds.⁵⁵ In return, student-athletes agree to provide the full value of their athletic services to their school, acquiesce to the use of their name, image and likeness for commercial purposes, even though do so without compensation.⁵⁶ Finally, because of the discrepancy between grant in aid and cost of attendance, Judge Wilken also found that student-athletes also implicitly agree to pay any additional costs associated with providing the school with their athletic ability.⁵⁷

The court first found that Division I basketball and the FBS are the only suppliers of this unique bundle, since 100% and 98% of highly valued recruits pursue their career in these arenas, respectively, because they are the only levels that offer scholarship

⁵² *Id.*

⁵³ *Id.* at 986.

⁵⁴ *Id.* at 965-66.

⁵⁵ *Id.* at 966.

⁵⁶ *Id.*

⁵⁷ *Id.*

opportunities to guarantee high quality competition, regardless of fluctuation in discrepancy between grant in aid cost of attendance.⁵⁸ Finally, the court found that there were no alternative markets because the professional leagues, the National Football League and National Basketball Association, do not allow players to enter their leagues coming directly from high school, and that playing professionally abroad does not offer the same educational benefits of playing in Division I of the NCAA.⁵⁹ In sum, the court held this market to be distinct for two reasons: (1) there was no reasonable interchangeability of the FBS and Division I men's basketball and other member schools for the in the recruiting market for athletes' services⁶⁰; and (2) "the fact that historic fluctuations in the price of attending FBS and Division I schools resulting from changes in the grant-in-aid limit have not caused large numbers of FBS football and Division I basketball recruits to migrate toward other schools or professional leagues."⁶¹

When looking to the restraint on competition in this market, the court first found that Plaintiffs demonstrated that FBS football and Division I basketball schools had fixed the price of their unique bundle by agreeing not to compensate any recruit a share of the licensing revenues generated from the use of his name, image, and likeness, or fix the price at zero.⁶² Furthermore, this agreement removed one form of price competition from

⁵⁸ *Id.* at 966-67.

⁵⁹ *Id.* at 967.

⁶⁰ *Id.* at 987.

⁶¹ *Id.* at 988. This is known as "cross-elasticity of demand," an economic concept describing the responsiveness of sales of one product to price changes in another. *Id.* at 987. *See also Lucas Auto. Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 767 (9th Cir. 2001) ("The determination of what constitutes the relevant product market hinges, therefore, on a determination of those products to which consumers will turn, given reasonable variations in price.").

⁶² *Id.* at 990.

the relevant market: the valuation of name, image, and likeness.⁶³ The court found that under the rule of reason, the indirect effects of this agreement on the relevant market sufficiently satisfied the Plaintiffs burden.⁶⁴

The court next found that the Plaintiffs also met this burden under a monopsony theory of the “college education market,” where the unique good would be the highest ranked high school football and basketball players each year, and the member schools agreed to fix prices as buyers rather than sellers.⁶⁵ This agreement would violate § 1 of the Sherman Act, similarly to the price-fixing agreement as sellers because the member schools are the only buyers of this unique good.⁶⁶ The court found that restraints on competition within a labor market give rise to an antitrust violation under § 1 of the Sherman Act, even against the NCAA.⁶⁷ Plaintiffs demonstrated a cognizable harm to competition under the rule of reason under this theory as well, as analogized to other labor markets because removing the restraint would force the member schools to compete

⁶³ *Id.* at 990 (citing *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 355 (2d Cir.2008) (Sotomayor, J., concurring) (An agreement to eliminate price competition from the market is the essence of price fixing.).

⁶⁴ *Id.* at 990.

⁶⁵ *Id.* at 991.

⁶⁶ *Id.*

⁶⁷ *Id.* at 992-93 (citing *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948); *Anderson v. Shipowners' Ass'n*, 272 U.S. 359, 365 (1926) (holding that a multi-employer agreement among ship owners restrained trade in a labor market for sailors); *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.) (holding that a conspiracy among oil industry employers to set salaries at “artificially low levels” restrained trade in a labor market and noting that “a horizontal conspiracy among buyers [of labor] to stifle competition is as unlawful as one among sellers”); *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 740 (9th Cir. 1984) (holding that a multi-employer agreement in the paper lithograph label industry may restrain trade in a “market for personal services”); *Agnew v. NCAA*, 683 F.3d 328, 346 (7th Cir. 2013) (recognizing that the NCAA's scholarship rules may restrain trade in a “labor market for student-athletes” and noting that “labor markets are cognizable under the Sherman Act”); *Law v. NCAA*, 134 F.3d 1010, 1015 (10th Cir. 1998) (finding that an NCAA rule capping compensation for entry-level coaches restrained trade in a “labor market for coaching services” and noting that “[l]ower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises”); *In re NCAA I–A Walk–On Football Players Litig.*, 398 F.Supp.2d 1144, 1150 (W.D. Wash. 2005) (recognizing that the NCAA's scholarship rules may restrain trade in an “ ‘input’ market in which NCAA member schools compete for skilled amateur football players”).

for their talent, meaning that the grant in aid cap placed a restriction on competition by not allowing recruits to hear larger bids from competing member schools.⁶⁸

In sum, under a monopolistic theory, the challenged restraint of prohibiting additional compensation to student-athletes for the use of their name, image and likeness for a commercial purpose causes an anticompetitive effect on “college education market” because member schools agreed to fix the price of the student-athletes’ name, image, and likeness at zero.⁶⁹ Additionally, under the monopsonistic theory, the challenged restraint of capping the compensation of student-athletes at the grant in aid calculation causes an anticompetitive effect on the “college education market” because member schools do not have to outbid one another to attain the services of the student-athlete.⁷⁰

Turning to the second relevant market, the court analyzed three submarkets within the “group licensing market” of the use student-athletes’ names, images, and likenesses: (1) in live football and basketball game telecasts; (2) in videogames; and (3) in game re-broadcasts, advertisements, and other archival footage.⁷¹ First, the court found a market existed in the first submarket because the NCAA, several conferences, and individual member schools already had been contracting with cable networks the permission to use student-athletes’ names, images, and likenesses.⁷² The court found the existence of the second submarket for two reasons: (1) EA acknowledged that it required licenses from professional athletes and teams to recreate the names, images, and likenesses of those players and teams to a sufficient level that pleased purchasers of the game, including

⁶⁸ *Id.* at 933.

⁶⁹ *Id.* at 988.

⁷⁰ *Id.* at 991.

⁷¹ *Id.* at 969.

⁷² *Id.*

height, weight, skin color, tattoos, and facial features; and (2) the NCAA sold and renewed licensing rights with EA for the student-athletes' names, images, and likenesses, including "EA avatars [that] played the same positions as their real-life counterparts, wore the same jersey numbers and uniform accessories, hailed from the same home state, and shared the same height, weight, handedness, and skin color."⁷³ Finally the court found the existence of the third submarket because, similar to the first submarket, cable networks and production companies already had been purchasing licensing rights market to use student-athletes' names, images, and likenesses while rebroadcasting and advertising recorded competitions, even after the student-athletes were no longer governed by the NCAA.⁷⁴

The court found that the Plaintiffs' demonstrated they were harmed by being denied revenue of the use of their name, image, and likeness; however, the court found that there was no Sherman Act violation in this market because the "harm [did not] result from a restraint on *competition* in the "group licensing market."⁷⁵ The court held that buyers already compete for to purchase the licenses, and in each scenario, in absence of the challenged restraint would not affect that competition.⁷⁶ Furthermore, the court found that, absent the challenged restraint, the student-athletes would not compete against one another for the sale of their individual licenses, even if grouped as a team license, because the licenses are "perfect compliments: every group license would have to be sold in order for any single [or] group license to have value."⁷⁷

⁷³ *Id.* at 970.

⁷⁴ *Id.* at 970-71.

⁷⁵ *Id.* at 995-94 (emphasis in the original).

⁷⁶ *Id.* at 994-1000.

⁷⁷ *Id.* at 995.

Since the Plaintiffs satisfied the first burden by showing that the grant in aid cap and the ban on student-athletes receiving compensation for the use of their name, image, and likeness for commercial purposes, created an restraint on competition in the “college education market” under two theories of price fixing, the burden shifted to the NCAA to show that there were precompetitive effects of the grant in aid cap.⁷⁸ The NCAA asserted that the grant in aid limitation on compensation was precompetitive and reasonable because it was “necessary to preserve its tradition of amateurism, maintain competitive balance among FBS football and Division I basketball teams, promote the integration of academics and athletics, and increase the total output of its product.”⁷⁹ The court weighed each procompetitive justification of the restrictions in turn.

To demonstrate that the restrictions on compensation are necessary for the preservation of amateurism, which drives popularity and is a core principle of the NCAA, the NCAA offered historical evidence, commercial survey data, and lay witness testimony.⁸⁰ The court found that the historical and current discrepancies in the definition of amateur are “not indicative of a core principle,”⁸¹ and the evidence presented actually supported the notion that the popularity of FBS and Division I men’s basketball stems from school loyalty and geography.⁸² However, the court noted that “preventing schools from paying FBS football and Division I basketball players large sums of money while they are enrolled in school may serve to increase consumer demand for its product,” and therefore the NCAA has met its burden of production for this

⁷⁸ *Id.* at 999.

⁷⁹ *Id.*

⁸⁰ *Id.* at 973-78.

⁸¹ *Id.* at 1000 (noting that different sports have different amounts of money athletes can receive to maintain amateur status, and that the definitions have changed sporadically over time).

⁸² *Id.* at 1001.

justification.⁸³

Second, the court found that the NCAA did not meet its burden to show that the restrictions on student compensation have any effect on competitive balance.⁸⁴ Significantly, the court here rejected the District Court's finding of fact in *Board of Regents*, which found that the NCAA's "restrictions designed to preserve amateurism" promoted competitive balance⁸⁵ because revenue from FBS and Division I men's basketball have "grown exponentially since *Board of Regents* was decided and that, as a result of this growth, many schools have invested more heavily in their recruiting efforts, athletic facilities, dorms, coaching, and other amenities designed to attract the top student-athletes."⁸⁶ The court held that this "arms race" has negated the equalizing effect of the challenged restraints on student-athlete compensation that once may have had on competitive balance.⁸⁷

Third, the court found that there was sufficient evidence presented to overcome the burden of production that "this restriction may facilitate its member schools' efforts to integrate student-athletes into the academic communities on their campuses, thereby improving the of educational services they offer."⁸⁸ The court noted that the schools' incentives to support the student-athletes academically remain unchanged by the challenged restrictions, and that the student-athletes incentives to remain eligible might actually increase if the challenged restrictions were removed.⁸⁹ However, the court found a narrow procompetitive purpose: that compensating athletes "for the use of their name,

⁸³ *Id.* at 1004.

⁸⁴ *Id.* at 1001.

⁸⁵ *Id.* at 1002 (discussing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984) ((citing district court order, 546 F.Supp. 1276, 1296 (W.D.Okla.1982))).

⁸⁶ *O'Bannon*, at 1002.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1004.

⁸⁹ *Id.* at 1003.

image, and likeness” may encourage student-athletes to be cut-off from the broader campus.⁹⁰

Finally, the court reviewed whether the challenged restraint served the procompetitive purpose of increasing the total output of its product.⁹¹ The NCAA contends its output is that of an increase in Division I and FBS schools, student-athletes and total games.⁹² The court rejected the notion that schools joined Division I because of a commitment to amateurism, since these schools all recognize significant revenue and profits from competing in Division I and the FBS.⁹³ Furthermore, the court noted that the requested injunction would not require member schools to compensate student-athletes, it merely asked that they be allowed to do so, and that “high coaches’ salaries and rapidly increasing spending on training facilities at many schools suggest that these schools would, in fact, be able to afford to offer their student-athletes a limited share of the licensing revenue generated from their use of the student-athletes’ own names, images, and likenesses.”⁹⁴

Since the NCAA proffered two marginal procompetitive justifications for the challenged restraints, increased consumer demand and integrating student-athletes into the academic community, the court next analyzed the proposed “less restrictive alternatives.”⁹⁵ Plaintiffs provided two less restrictive and legitimate alternatives to achieve the goals of the procompetitive justifications: (1) allow FBS and Division I men’s basketball schools to give stipends, derived from the sources of licensing revenues of the

⁹⁰ *Id.*

⁹¹ *Id.* at 1003-4.

⁹² *Id.*

⁹³ *Id.* at 1004.

⁹⁴ *Id.*

⁹⁵ *Id.*

use of student-athletes' name, image, and likeness, to the student-athletes to make up for the discrepancy between the grant in aid number and the actual cost of attendance; and (2) to permit its schools "to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires."⁹⁶ The court concludes that both of these options would serve as less restrictive ways to achieve the only two accepted justifications of the challenged restraints because they do not reduce consumer demand for the NCAA's product or thwart the member schools' ability to integrate and educate student-athletes.⁹⁷

The court enjoined the NCAA from enforcing any rules or bylaws that would prohibit its member schools 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" as well as the compensation of a full grant-in-aid.⁹⁸ The injunction explicitly did not preclude the NCAA from instituting rules or bylaws capping this compensation available to student-athletes during enrollment; "however, the NCAA will not be permitted to set this cap below the cost of attendance, as the term is defined in its current bylaws."⁹⁹ Finally, the court held that a member school may not cap the amount of compensation allocated to a student-athlete's trust less than \$5,000 a year he remains eligible to compete.¹⁰⁰

IV. The *O'Bannon* Effect

⁹⁶ *Id.* at 1005.

⁹⁷ *Id.* at 1007.

⁹⁸ *Id.* at 1007-8.

⁹⁹ *Id.* at 1008.

¹⁰⁰ *Id.*

O'Bannon did not explicitly address whether the artificial cap on grant in aid violated the Sherman Act; however, Judge Wilken will have the chance to do so soon because on August 19, 2014 a group of class action lawsuits were consolidated and transferred before her.¹⁰¹ These classes allege that the NCAA and its member schools engage in a monopsony in three labor markets in college sports (1) the market for NCAA Division I football player services; (2) the market for NCAA Division I men's basketball player services; and (3) the market for NCAA Division I women's basketball player services.¹⁰²

The consolidated complaint alleges that student-athletes work and perform for their school, but schools unlawfully agree not to compensate the student athletes at a rate commensurate to the actual cost of attendance, thus creating a market where the buyer sets the price at a "take it or leave it" rate below the fair value of the student-athlete services.¹⁰³ Furthermore, the complaint alleges that the conferences co-conspire with the NCAA to keep the value of the grant in aid low, so that coaches and universities can substantially benefit from the billions of dollars in revenue.¹⁰⁴ The complaint states that the NCAA and Conference Defendants collude to tacitly force student-athlete to accept compensation that is below the amount a free market would provide.¹⁰⁵

¹⁰¹ *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.*, 2014 U.S. Dist. LEXIS 115122 (J.P.M.L. Aug. 19, 2014).

¹⁰² Consolidated Amended Complaint at 1-2, *In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, No. 4:14-md-2541-CW (July 11, 2014). [hereinafter "Complaint" or "Consolidated Complaint"].

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 3-4.

¹⁰⁵ *Id.* at 4.

This complaint is alleging precisely the monopsony described in *O'Bannon*, only in greater detail.¹⁰⁶ Throughout the analysis of *O'Bannon*, the court continually referred to the challenged restraints as the “rules prohibiting student-athletes from receiving *any compensation* for the use of their names, images, and likenesses” for commercial purposes.¹⁰⁷ While the court did explicitly state that the injunction prohibited student-athlete compensation to be capped below the cost of attendance, it does not explicitly strike down the grant in aid cap as *per se* unreasonable.¹⁰⁸

The consolidated complaint argues that there is not a reasonable justification for the grant in aid cap.¹⁰⁹ Instead, the complaint alleges that the grant in aid cap is a cost minimizing mechanism, designed to keep revenue with the member schools, conferences, coaches, and NCAA executives.¹¹⁰ By noting that the average grant in aid's are between \$1,000 and \$7,000 less than the actual cost of attendance, the complaint finally alleges that the collusive effort places undue hardships on student-athletes, often who come from low income areas, by creating a quality of life that is below the poverty line.¹¹¹

The complaint prays for an injunction barring the use of the grant in aid cap, as *per se* unreasonable.¹¹² Based on Judge Wilken's holding in *O'Bannon*, it seems likely that she will do so because of its monopsonic anticompetitive effects on the “college education market.”

¹⁰⁶ See *O'Bannon*, at 991 (the court noted that this monopsonic theory was only raised in post-trial briefs, and that is why it is discussed briefly; however, this is the only one of the two “college education market” theories that directly implicates the grant in aid cap).

¹⁰⁷ See, e.g. *id.* at 1007 (emphasis added).

¹⁰⁸ *Id.* at 1008.

¹⁰⁹ *Id.* at 7.

¹¹⁰ *Id.* at 6-7.

¹¹¹ *Id.*

¹¹² *Id.* at 8.

V. Grant in Aid: Moral?

The NCAA's cap on scholarship money to grant in aid is inconsistent with natural law philosopher John Finnis's seven basic goods and nine principles of practical reasonableness.¹¹³

a. Seven Basic Goods and Which Apply to Grant in Aid

Finnis maintains that there are seven basic practical principles that show the basic forms of human flourishing as goods to be pursued and realized.¹¹⁴ These basic goods, either individually, or grouped uniquely are used by everyone who considers his behavior, regardless how unsound his conclusion.¹¹⁵ The seven basic goods are: life,¹¹⁶ knowledge,¹¹⁷ play,¹¹⁸ aesthetic experience,¹¹⁹ sociability or friendship,¹²⁰ practical reasonableness,¹²¹ and religion.¹²² Before examining the practicable reasonableness of the NCAA's grant in aid cap, a determination of whether the grant in aid cap promotes or hinders any of these basic goods, and which of these goods are irrelevant.¹²³

The first basic good, life, corresponds to self-preservation and the value of life.¹²⁴ Life, here, means vitality in terms of both physical and mental health.¹²⁵ Finally, the basic good, life relates to the transfer of life by the procreation of children.¹²⁶ This basic good may be hindered once a recruit becomes a student-athlete who attends a member

¹¹³ JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* (2d ed. 2011).

¹¹⁴ *Id.* at 23.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 85

¹¹⁷ *Id.* at 59, 87.

¹¹⁸ *Id.* at 87.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 88.

¹²¹ *Id.*

¹²² *Id.* at 89.

¹²³ *Id.* at 90.

¹²⁴ *Id.* at 86.

¹²⁵ *Id.*

¹²⁶ *Id.*

school with a large discrepancy between the grant in aid cap and actual cost of attendance and does not have enough money to purchase food. While the basic good is not implicated until after the anticompetitive effect on the “college education market” has been felt, the good is still hindered by the effect on capping financial aid below the actual cost of attendance.

The second basic good, knowledge is desirable for its own sake, unlike a mere belief “is an achievement word; there are true beliefs and there are false beliefs, but knowledge is of truth... truth is not a mysterious abstract entity; we want the truth when we want the judgments in which we affirm or deny propositions to be true judgments”¹²⁷ or “want the sane proposition affirmed or denied, or to be affirmed or denied, to be true propositions.”¹²⁸ Finnis states that knowledge is pure curiosity, the interest to know the truth about something simply due to the desire to no longer be ignorant.¹²⁹ Certainly the grant in aid cap hinders the knowledge of student-athlete, but not necessarily in the ability to pursue knowledge once enrolled at the academic institution. Since the grant in aid cap enables a monopsolothic “college education market,” a recruit can never know his or her own value to a member school. The NCAA’s procompetitive justification for the grant in aid cap, the integration of student-athletes to the academic campus, seems to promote this good.

The third universal value, play, has the ability to take a variety of forms.¹³⁰ It is defined as the pursuit in excellence in one’s activities.¹³¹ Play can be “solitary or social,

¹²⁷ *Id.*

¹²⁸ *Id.* at 59-60.

¹²⁹ *Id.* at 60.

¹³⁰ *Id.* at 87.

¹³¹ *Id.*

intellectual or physical, strenuous or relaxed, highly structured or relatively informal, conventional or *ad hoc* in its pattern...but is always analytically distinguishable from its 'serious' context."¹³² From the perspective of athletes making a decision on which school to attend, in either the monosophic or monopolistic market, the grant in aid cap seemingly has no effect on play because the grant in aid cap does not limit the athletes ability to pursuit the joyous pursuit of excellence in the chosen sport. Even after the decision is made, when a student athlete is suffering from the effects of the grant in aid cap, play is too strongly rooted in humanity to be effected by the grant in aid gap, similar to its effect on life, since play derives from the pure satisfaction student-athletes have from the pursuit of their sport. The NCAA might argue that the grant in aid cap seeks to further play by advancing amateurism, but the court expressly rejected that the grant in aid cap advances amateurism as a legitimate procompetitive justification. Some might suggest that play is inherently affected by the grant in aid cap simply because it only affects student athletes, who are making a decision to play sports. However, that is based on a mischaracterization of play. Play, as envisioned by Finnis, is the pure enjoyment of the pursuit of one's chosen activity. By explicitly distinguishing play from a "serious" context, he underscores the separation of purposes for pursuing the activity. Play is the *puruist* of excellence, not actual achievement. Play is the driving force behind the why the athletes compete, practice, play informal pick-up games, or in national championships; it is void of legerdemain subterfuge. Therefore, the restriction and limitation on financial aid, undoubtedly negatively affects the student athletes in several respects of their lives; however, it does not affect play because play really is the momentary lapse of all distractions and tangential problems of student-athlete life. Even

¹³² *Id.*

Shabaz Napier, who outspokenly could not afford food, still had the fullest ability to pursue the highest level of enjoyment in his sport. Play is the freedom and enjoyment of pursuing athletics, which is not affected by the grant in aid cap.

The fourth basic component in humanity's flourish goodness is aesthetic experience, which most often is conceived as the creation or active appreciation of some work of significant and satisfying form.¹³³ Again the grant in aid cap has no bearing on this basic goodness because it does not add or detract from a recruit or student athlete's ability to create or enjoy significant or satisfying works because that ability is almost exclusively an internal mechanism.

The fifth basic value is that of sociability or friendship, which ranges from peaceful harmony between persons to fully developed friendship.¹³⁴ The cap on grant in aid does not affect sociability because the activity of sportsmanship, teambuilding, and working towards common goals that inevitably affect sociability, not the anticompetitive effect on the "college education market" of the grant in aid cap.

The sixth basic good, being able to make practically reasonable choices is a highly complex methodology of nine considerations to utilize when approaching a decision.¹³⁵ It requires peace of mind and free authenticity to self-determine using reason, integrity, and genuine realizations of preference.¹³⁶ Clearly the grant in aid cap negatively affects the ability to make practically reasonable choices, since it does not allow recruits to make decisions that are based on the entirety of the situation. In the

¹³³ *Id.* at 88.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

monopsophic “college education market,” recruits cannot make authentic decisions about which school to select because they cannot weigh how each member school individually values that athlete. However, since the grant in aid cap neither prevents recruits the ability to engage in practical reasonableness, nor promotes the ability, this good seems to be subsumed into knowledge because it affects the practical reasonableness in that the decision making is cut short by lack of ability to have knowledge.

The seventh, and final, basic good that Finnis identifies is “religion.”¹³⁷ Finnis essentially articulates a “first causer” way to express religion as a universal good by arguing that the “natural order of means to ends, and the pursuit of life, truth, play, and aesthetic experience in some *individually* selected order of priorities and pattern of specialization, and the order can be brought into human relations through collaboration, community, and friendship, and the order that is to be brought into one’s character and activity...”¹³⁸ Finnis, though perhaps not clearly, is suggesting that there is a unifying force of humanity, that although all people are unique in their experience and pursuits, the universal nature of the basic and fundamental goods can only maintain a sort of natural, invisible, chaotic order of unity by the design of divinity.¹³⁹ Finnis does not discuss religion in terms of orthodoxy, sects, or canon; he merely posits that very the freedom and ability of all human beings to engage in the complex exercise of practical reasonableness suggests a subordination to a some superior, non-human being.¹⁴⁰ The NCAA has not articulated a moral or religious purpose for the grant in aid cap, and it is difficult to imagine how the challenged restraint would affect religion.

¹³⁷ *Id.* at 89.

¹³⁸ *Id.* (emphasis added).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Therefore, the goods at stake when determining the morality of capping student-athlete compensation at grant in aid are: life (after a recruits decision has been made), knowledge, and the ability to make practicably reasonable choices (subsumed by knowledge).

b. Application of Goods at Stake to Requirements of Practical Reasonableness

Now that the goods at stake have been identified, Finnis provides an interrelated framework of nine self-evident, requirements of practicable reasonableness to determine if decisions are moral.¹⁴¹ The nine requirements include:¹⁴² a coherent plan of life;¹⁴³ no arbitrary preferences amongst values;¹⁴⁴ no arbitrary preferences amongst persons;¹⁴⁵ detachment;¹⁴⁶ commitment;¹⁴⁷ the (limited) relevance of consequences: efficiency, within reason;¹⁴⁸ respect for every basic value in every act;¹⁴⁹ fostering the common good of the communities;¹⁵⁰ and lastly, following one's conscience.¹⁵¹ Whether the grant in aid cap is a moral restriction must therefore be determined in light of these requirements.

The first basic principle is a coherent plan of life.¹⁵² "Implicitly or explicitly one must have a harmonious set of purposes and orientations, not as the 'plans' or 'blueprints' of a pipe-dream, but as effective commitments."¹⁵³ These plans, Finnis notes, are not

¹⁴¹ *Id.* at 100-126.

¹⁴² *Id.*

¹⁴³ *Id.* at 103.

¹⁴⁴ *Id.* at 105.

¹⁴⁵ *Id.* at 106.

¹⁴⁶ *Id.* at 109.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 111.

¹⁴⁹ *Id.* at 118.

¹⁵⁰ *Id.* at 125.

¹⁵¹ *Id.*

¹⁵² *Id.* at 103.

¹⁵³ *Id.*

merely un-weighed preferences about time and spatial movements, but require an examination of the totality of the circumstances when considering the future of one's life.¹⁵⁴ When considering the impact of the grant in aid cap on recruits and student-athletes, its effect is unclear because the statute does not prevent recruits from making an informed decision about what college to attend based on quality of education, athletic facilities, and location. It does affect the ability of recruits to make a decision based on how the school values him, but even if the statute is repealed, the cap would likely only be moved up to the actual cost of attendance, which also does not shed intrinsic light on a particular coach or programs sentiment towards a player's ability any more than the basic fact that they are recruiting the player shows interest. Furthermore, the statute does not prevent the pursuit of life, as it relates to planning, since every student-athlete is free to dutifully plan and pursue the best mental and physical regiment in college athletics.

The second principle is that there should be no arbitrary preference in values.¹⁵⁵ Finnis states, "any commitment to a coherent plan of life is going to involve some degree of concentration on one or some of the basic forms of good, at the expense, temporarily or permanently, of other forms of good."¹⁵⁶ When considering the NCAA's stated two purposes for the challenged restraint, promoting the product by preserving amateurism and integrating student-athletes into the academic community, the grant in aid cap seems not to be arbitrary because it promotes knowledge by encouraging student-athletes to immerse themselves in the academic possibilities. However, it arbitrarily prefers

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 105.

¹⁵⁶ *Id.*

knowledge over life;¹⁵⁷ the NCAA has not stated how this goal would be impeded by raising the grant in aid cap to the level of purely actual cost of attendance. In that way, forcing recruits to accept a scholarship that ranges from \$2000 to \$7000 below what it actually costs to be immersed in the academic community is arbitrary because the cap prevents students from pursuing a fully healthy mind and body by limiting the financial resources *per se*. For example, a recent study states that in the FBS 85% of on campus student-athletes and 86% of off campus student-athletes who receive the maximum grant in aid live below the poverty line. Indeed, these students would still be inclined to pursue knowledge if the incentive to stay in school remained the same.¹⁵⁸ Since the NCAA cannot state a purpose for promoting knowledge over the student-athletes' pursuit of vitality, the grant in aid cap hinders principle of no arbitrary preference of values.

The third principle, no arbitrary preference amongst persons,¹⁵⁹ holds that the basic goods are human goods and just as there can be no arbitrary preference among the good, there can be no arbitrary preference "among the human subjects who are or may be partakers of those goods."¹⁶⁰ Finnis illustrates this by referring to the Golden Rule: "do to (or for) others what you would have them do to (or for) you."¹⁶¹ The NCAA's grant in aid cap is non-discriminatory in its application athletic recruits, yet the NCAA has not articulated why the cap cannot be raised to the actual cost of attendance. To illustrate a

¹⁵⁷ In some ways the NCAA implies that play is also at risk here, since the assumption is that a student-athlete cannot play and pursue academics without the NCAA's encouragement.

¹⁵⁸ Nicole Auerbach and Jeffery Martin, *One and done, but never as simple as it sounds*, USA Today, (February 14, 2014) available at <http://www.usatoday.com/story/sports/ncaab/2014/02/17/college-basketball-nba-draft-early-entry-one-and-done-rule/5552163/> (arguing that several Division I men's basketball players do not have the financial stability to remain in college for longer than the mandatory one year before they are eligible for the NBA, and if they had more support many players would have stayed longer than one year to develop their schools graduate).

¹⁵⁹ FINNIS at 106.

¹⁶⁰ *Id.* at 107.

¹⁶¹ *Id.* at 108.

distinction, consider that currently 72 head coaches of FBS programs earn over \$1M a year,¹⁶² yet 85% of their players live below the poverty line. Considering the NCAA's two stated purposes of the grant in aid cap, this seems to be an arbitrary preference of coaches to players.

The fourth and fifth requirements, detachment and commitment, closely compliment one another and will be analyzed together, keeping in mind the coherent plan of life.¹⁶³ Put simply, detachment can best be described as not focusing on one good or fanatically pursuing good.¹⁶⁴ Therefore, the grant in aid cap is fanatical because it focuses solely on amateurism as it relates to knowledge. Commitment "establishes the balance between fanaticism and dropping out, apathy, unreasonable failure, or refusal to 'get involved' with anything. It is simply the requirement that having made one's general commitments one must not abandon them lightly."¹⁶⁵ Finnis also states that commitment should always be developing by looking for creative ways to carry out one's commitment, and this commitment should not be abandoned lightly.¹⁶⁶ By drafting the grant in aid cap, the NCAA was creatively pursuing its commitment to maintaining a competitive level of amateur student-athletics, which promotes, generally the goods of play and knowledge. Therefore, the two split on whether the grant in aid cap is reasonable.

The sixth principle, limited relevance of consequences of efficiency within reason, introduces a range of problems for practical reason, problems that go to the heart of

¹⁶² *NCAA Salaries*, USA Today (last accessed on November 24, 2014) available at <http://sports.usatoday.com/ncaa/salaries/>

¹⁶³ FINNIS at 109.

¹⁶⁴ *Id.* at 110.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

“morality”.¹⁶⁷ This principle requires that one bring about good in the world (in one’s own life and the lives of others) “by actions that efficient for their (reasonable) purposes. One must not waste one’s opportunities by using inefficient methods. One’s actions should be judged by their effectiveness . . . fitness for their purpose . . . utility . . . [and] their consequences.”¹⁶⁸ Essentially, Finnis articulates a need for a balancing test for choosing amongst goods between the efficiency of acting and the consequence of acting.¹⁶⁹ He states that, consequentialism, trying to do the greatest good for the greatest number of people is irrational for three reasons:¹⁷⁰ (1) it is based on an inadequate idea of the good,¹⁷¹ (2) it wrongly assumes goods are commensurable, and;¹⁷² (3) analyzing and evaluating all of the possible consequences of an act could go on endlessly.¹⁷³ Here, the NCAA’s grant in aid cap fails the requirement because, as the *O’Bannon* court held, there are less restrictive, and therefore more reasonable, ways to achieve the goods the grant in aid cap seeks to achieve.

The seventh requirement for practical reasonableness, respect for every basic value in every act, holds that “one should not choose to do any act which of *itself does nothing but* damage or impede a realization or participation or any one or more of the basic forms of human good.”¹⁷⁴ The grant in aid cap hinders this principle because arguably all of the assertions of the purpose of the bylaw are all *ex post facto* to the harms caused, namely the hindering of a recruits knowledge and ability to make a fully

¹⁶⁷ FINNIS at 111.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 111-12.

¹⁷¹ *Id.* at 112.

¹⁷² *Id.* at 113.

¹⁷³ *Id.* at 114.

¹⁷⁴ *Id.* at 118.

informed practicably reasonable choice. Furthermore, the bylaw hurts the pursuit of life, with some play subsumed in it, once a recruit becomes a student-athlete by unreasonably limiting his resources.

The eighth requirement of practical reasonableness, fostering the common good, refers to the good of communities including, family, friends, work, neighborhood, town, state, country, and international communities.¹⁷⁵ This principle may be the most important in determining the morality of the grant in aid cap, since Finnis states that morality requires actions be made for the greater good.

Finnis elaborates on the “common good” by describing different types of relationships and how the good changes between them.¹⁷⁶ As *O’Bannon* holds, the NCAA’s grant in aid cap violates the Sherman Act. The NCAA created a monopsony, in which member schools hold all of the power. This relationship creates an unreasonable ability for member schools to take advantage of the student-athletes. The grant in aid cap does not promote the common good. Instead, it leaves student-athletes exploited by their schools, coaches, video game developers, and apparel companies.¹⁷⁷ The grant in aid cap does not promote any good for a student-athlete, the specific group the bylaw affects; instead it does not fully cover the cost of an education that is being exploited. For example, Men’s Division I basketball players are not allowed to be compensated for any reason derived from their athletic ability, yet Nike, UnderArmour, and others are willing to pay the member schools hundreds of millions of dollars to ensure that these student-

¹⁷⁵ *Id.* at 125.

¹⁷⁶ *Id.* at 135

¹⁷⁷ See, e.g. Josh Saburn, *Why Apparel Companies Compete to Outfit College Hoops Teams*, TIME (March 29, 2013) available at <http://business.time.com/2013/03/29/why-apparel-companies-compete-to-outfit-college-hoops-teams/>

athletes advertise their brands for free every time a game is nationally televised.¹⁷⁸ The grant in aid cap promotes no common good, and thus indicates it is an immoral law.

The grant in aid cap also frustrates the requirements of justice, which Finnis states are (1) other-directedness, or one's relations and dealings with other persons; (2) duty to deliver what is owed or to be given what is owed; and (3) equality, in the sense that a proper balance or equilibrium is struck.¹⁷⁹ "The requirements of justice, then, are the concrete implications of practical reasonableness that one is to favor and foster the common good of one's communities."¹⁸⁰ The grant in aid cap violates all three aspects of justice. First, since it creates a monopsonistic "college education market" it maliciously changes the parties' relatedness and their dealings in recruitment. Second, this improper positioning also does not give the student-athletes a fair bargain for their talents. Finally, the collusive effect does not foster a beneficent or natural equilibrium. Therefore, the grant in aid is not moral because it is also unjust.

Surely the NCAA has the authority to exercise rulemaking for college athletes, but since the bylaw they created is unjust, then it was also an unreasonable exercise of its authority. Furthermore, the *O'Bannon* court's validation of two less restrictive alternatives only underlines this distinction.

The final requirement for practical reasonableness, following one's conscious,¹⁸¹ is most likely what guides each person's application of all of the principles.¹⁸² "It is the requirement that one should not do what one judges or thinks or 'feels'-all-in-all should

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 161-63.

¹⁸⁰ *Id.* at 164.

¹⁸¹ *Id.* at 125.

¹⁸² *Id.*

not be done.”¹⁸³ In regards to any law of men, it is probably assumed, rightly or wrongly, that the persons’ who proposed and passed the law did so because they “felt” it was the right thing to do. However, since the *O’Bannon* court held that there were better ways to accomplish the same goods, the NCAA’s following of its “conscious” was probably not effectively done on the best evaluative scale as described in the sixth principle: the limited relevance of consequences of efficiency within reason.

VI. Conclusion

Since the grant in aid cap frustrates several of the basic and fundamental human goods, and violates several of the requirements of practical reasonableness, the law cannot be said to be moral.¹⁸⁴ Since the *O’Bannon* court did not explicitly overrule the bylaw, but instead worked an injunction around it, it is unlikely that schools will be bound to follow an unjust law. As a just and practical solution, the NCAA should limit the compensation of student athletes on their own to the cost of attendance, as defined by the current bylaws. Furthermore, this should be expanded beyond the narrow scope of the FBS and Division I men’s basketball because the effect of the change will have a strong and resounding effect on a great common good by further promoting the stated goods of the NCAA: a commitment to the expansion and integration of athletes and academics, or stated as Finnis: knowledge, play, life, sociability, and practical reasonableness.

¹⁸³ *Id.*

¹⁸⁴ *See Id.* at 126.