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# Major College Sports: A Modern Apartheid

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# Major College Sports: A Modern Apartheid

ROBERT A. MCCORMICK\* AND AMY CHRISTIAN MCCORMICK\*\*

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*Well, it's our n\*\*\*\*\*s against their n\*\*\*\*\*s . . .*<sup>1</sup>

## INTRODUCTION

Major college sports in the United States flourish on the basis of an apartheid system<sup>2</sup> so plain that although it may be (and is) ignored, it cannot be denied. This system, made up of numerous NCAA rules, effectively sanctions the exploitation of mostly African-American young men<sup>3</sup> for the enormous pecuniary gain of mostly European Americans associated with major universities, athletic organizations, and corporations, as well as for the great entertainment of millions of mostly European Americans.<sup>4</sup>

The central principle upon which this system rests is “amateurism,”<sup>5</sup> and it is upon the amateur ideal that U.S. universities, through the NCAA, seek to justify this regime. Major college sports, however, are amateur only in the pernicious sense that the very persons who are most responsible for creating this product are denied all but a sliver of the great wealth they create.<sup>6</sup> In every other way, major college sports have become a sophisticated, visible, and highly lucrative commercial enterprise.<sup>7</sup> Put differently, although college football and men’s basketball players, who are disproportionately African American,<sup>8</sup> generate fantastic sums of money for a wide array of others, they themselves are forbidden from sharing in those riches. Instead, while NCAA rules obligate players to live by a code of amateurism that forecloses any real opportunity to earn compensation for their labor,<sup>9</sup> that precept does not apply to university officers, coaches, athletic directors, conference commissioners, corporations, or NCAA officials, who are predominantly of European descent,<sup>10</sup> and who alone may enjoy the bounteous wealth created in substantial part by the players.<sup>11</sup>

The regime that keeps a young athlete in this modern form of servitude has several legal components and begins even before he enrolls in college.<sup>12</sup> A football or men’s

1. Overheard in the crowd immediately before kickoff at an NCAA football game.

2. See *infra* notes 99–114 and accompanying text.

3. See *infra* notes 188–235 and accompanying text. The terms “African-American” and “black” are used interchangeably in this article as are the terms “European-American” and “white.” While we prefer the more formal descriptions, the U.S. Department of Education data we examine, employs the more familiar.

4. See *infra* notes 174–187 and accompanying text; see also Bill King, *Tightening Up Your Message*, STREET & SMITH’S SPORTS BUS. J., Apr. 30 to May 6, 2007, at 20 (estimating that only approximately ten percent of college basketball fans and nine percent of college football fans are African American).

5. See *infra* notes 119–126 and accompanying text.

6. See *infra* notes 119–126 and accompanying text.

7. See generally Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008) (examining the richly commercial facets of college sports).

8. See *infra* notes 188–235 and accompanying text.

9. See *infra* notes 119–126 and accompanying text.

10. See *infra* notes 174–187 and accompanying text.

11. Corporations, of course, are not European Americans but are predominantly owned and operated by European Americans and include broadcast companies and other sponsoring corporate “partners.” See McCormick & McCormick, *supra* note 7, at 536–39 for a description of the proliferation of corporate sponsorships for NCAA games and tournaments as well as other ways corporations seek to become associated with college sports.

12. NCAA rules apply to “student-athletes.” A student-athlete is defined as “a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student’s ultimate participation in the intercollegiate athletics program.” NCAA, 2009-10 NCAA DIVISION I MANUAL, art. 12.02.5 (2009) [hereinafter DIV. I MANUAL].

basketball player who has signed a National Letter of Intent and matriculated at an NCAA institution may not transfer to another school except under conditions not imposed upon any other university student.<sup>13</sup> Then, once enrolled, the amount of financial aid he may earn, or even receive by way of gift,<sup>14</sup> is limited to tuition, room, board and books.<sup>15</sup> At the same time, he is forbidden from receiving compensation for the only things that could likely bring him real value—his athletic skill and fame.<sup>16</sup> His scholarship may be granted only on a semester-to-semester or a year-to-year basis,<sup>17</sup> and its renewal may be denied at the sole discretion of the coach.<sup>18</sup> Indeed, unlike any other person at the university, he may not even hire a lawyer to help him navigate a future career.<sup>19</sup> These rules, like Gulliver’s restraints,<sup>20</sup> effectively hold these young men in economic servitude to their universities.

13. If a football or men’s basketball player transfers, he loses one of his four years of NCAA eligibility. DIV. I MANUAL, *supra* note 12, arts. 14.5.1, 14.5.5.1, 14.5.5.2.10 (requiring a football or men’s basketball athlete to complete one full academic year of residency at the new institution before becoming eligible to compete); *id.* art. 14.2.1 (noting that an athlete has five years during which he can compete once he enrolls in a full-time course of study); NCAA, 2004–05 TRANSFER GUIDE: DIVISION I/II/III 25 (2004) (indicating that once an athlete begins competing, the five-year clock for using four eligibility years does not pause). These two sets of rules function together to cause the transferring athlete to lose one of his four years of eligibility completely. See DIV. I MANUAL, *supra* note 12, art. 14.2. Moreover, if a new player transfers without permission from his university after having signed a National Letter of Intent, he loses two of his four years of eligibility. See NCAA NATIONAL LETTER OF INTENT, *Basic Provisions*, para. 4, <http://www.ncaa.org/wps/wcm/connect/nli/NLI/NLI+Provisions/Basic+Penalty> (last visited Feb. 19, 2010) (charging an athlete who transfers before completing one year with a year of eligibility at his subsequent institution, which is in addition to the year lost under NCAA rules).

14. NCAA rules forbid players from accepting cash or other gifts from non-family members. DIV. I MANUAL, *supra* note 12, arts. 12.01.1, 15.01.2, 15.01.3 (rendering ineligible for athletic competition any athlete who receives financial aid from sources other than those permitted under NCAA rules); *id.* art. 15.2.6.1 (allowing athletes to receive “financial aid from anyone upon whom the . . . athlete is naturally or legally dependent.”). Even gifts from family and guardians are limited to an amount which, when combined with any grant-in-aid, covers only the cost of attendance. *Id.* arts. 15.01.2, 15.1, 15.2.6.1.

15. *Id.* art. 15.1; see also *infra* note 90 (discussing the fact that even the minimal compensation coming to the athlete must be returned to his university in the form of payments for tuition, room, board, and books, thereby replicating the historical “company store” phenomenon).

16. DIV. I MANUAL, *supra* note 12, arts. 12.1.2, 12.4.1.1 (rendering an athlete ineligible for competition if he uses his athletic skill directly or indirectly for pay and prohibiting him from receiving compensation on the basis of his “reputation, fame, or personal following”).

17. *Id.* art. 15.02.7 (limiting the period of an athletic scholarship award to a maximum of one year); WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 103 (1995) (“Both parties understand the grant-in-aid is given on a year-to-year basis, sometimes semester-to-semester.”).

18. BYERS, *supra* note 17, at 103 (“The coaches, in fact, control the renewals [of athletic scholarships]. . . . [I]f the player does not conform to the demanding college practice and game schedule, his or her grant-in-aid is not renewed and can be terminated [early] for disciplinary reasons.”); see also Murray Sperber, *The NCAA’s Last Chance to Reform College Sports: An Open Letter to the Next President of the National Collegiate Athletic Association*, CHRON. HIGHER EDUC., Apr. 19, 2002, at B12 (asserting that one-year scholarships are often not renewed due to unsatisfactory athletic performance).

19. DIV. I MANUAL, *supra* note 12, art. 12.1.2(g) (prohibiting an athlete from “[e]nter[ing] . . . into an agreement with an agent.”). Furthermore, the professional leagues to which the athlete aspires prevent even the most talented from earning compensation through rules that restrict their eligibility to apply for employment until they have attained a prescribed age or until a prescribed number of years have elapsed since their graduation from high school. See *Clarett v. Nat’l Football League*, 369 F.3d 124 (2d Cir. 2004) (upholding the NFL’s draft eligibility rule against an antitrust challenge).

20.

I attempted to rise, but was not able to stir: for as I happened to lie on my back, I found my arms and legs were strongly fastened on each side to the ground; and my hair, which was long and thick, tied down in the same manner. I likewise felt several slender ligatures across my body, from my arm-pits to my thighs. I could only look upwards; the sun began to grow hot, and the light offended my eyes.

JONATHAN SWIFT, GULLIVER’S TRAVELS: THE TALE OF A TUB AND THE BATTLE OF THE BOOKS 20 (OXFORD ED.,

By restricting athletes' compensation to the cost of attending a university, the NCAA has enabled its members to sharply restrict the cost of this particular, yet essential, labor. And while the NCAA, its member universities, and many others reap billions of dollars in revenues from college sports, the average "student-athlete" earns less than the federal minimum wage<sup>21</sup> and many live below the poverty line.<sup>22</sup> Simultaneously, an array of others harvests the fruits of these athletes' labor from a variety of sources including the sale of television rights, ticket and apparel sales, and advertising revenues from corporate sponsors or "partners."<sup>23</sup> Indeed, the revenue generated in substantial part by the labor of college football and men's basketball players has grown fantastically, so that NCAA sports has become a \$60 billion dollar industry.<sup>24</sup>

While it scarcely requires documentation, the facts easily demonstrate that the population of persons to whom these rules apply is overwhelmingly disproportionately African American<sup>25</sup> and that the universe of persons profiting from their enforcement is vastly disproportionately European American.<sup>26</sup> In short, a matrix of NCAA rules keeps these mostly African-American young men generating vast sums of money for the benefit of predominantly European Americans thereby enshrining an apartheid system in which racial minorities are held in legal servitude for the profit and entertainment of the racial majority.<sup>27</sup>

OXFORD UNIVERSITY PRESS 1919) (1726).

21. "When the value of their scholarships are [sic] computed on an hourly basis, the result is that the average student athlete does not even make minimum wage." Orion Riggs, Note, *The Façade of Amateurism: The Inequities of Major-College Athletics*, KAN. J.L. & PUB. POL'Y, Spring 1996, at 137, 143 (citing DICK DEVENZIO, RIP-OFF U. 160 (1986)); see also Bryan Jurewicz, *Opinions: Pay-for-Play*, NCAA NEWS, Jan. 6, 1997 (computing value received at the University of Wisconsin at \$1.35 per hour for 20 hours a week of mandatory workouts).

22. CBS, *60 Minutes: College 'Sweatshops'?*, (Jan. 3, 2002), [www.cbsnews.com/stories/2002/01/03/60minutes/main323042.shtml](http://www.cbsnews.com/stories/2002/01/03/60minutes/main323042.shtml); see *60 Minutes: Where's Ours?* (CBS television broadcast Jan. 6, 2002), transcript at 15 (quoting Ramogi Huma, former UCLA linebacker). Some athletes have so few resources they sometimes lack money for food. See Ken Peters, *UCLA Football Players Hope to Spur NCAA Reforms*, ASSOCIATED PRESS, Jan. 18, 2001 (describing players who must "scrimp on food" and "pay attention to those cheeseburger deal days at McDonald's" because of financial constraints); *60 Minutes: Where's Ours*, *supra*, transcript at 16 (describing case of Donnie Edwards, former UCLA football player who was suspended by the NCAA after accepting groceries from an anonymous donor); *id.* (describing NCAA admission "that a scholarship falls \$2,000 a year short of what it really costs to get by").

23. See generally McCormick & McCormick, *supra* note 7, at 509–23, 527–44 (describing the wide range of sources, phenomenally high levels, and numerous beneficiaries of college athletic revenues). For example, under an agreement beginning in 2003, CBS will pay the NCAA six billion dollars over eleven years for the right to broadcast March Madness, the NCAA's men's basketball tournament. Welch Suggs, *CBS to Pay \$6-Billion for TV Rights to NCAA Basketball Championships*, CHRON. HIGHER EDUC., Dec. 3, 1999, at A54. In fall 2009, more than 3.8 million fans attended football games at the top-five-attended schools. NCAA, *2009 National College Football Attendance*, [http://web1.ncaa.org/web\\_files/stats/football\\_records/Attendance/2009.pdf](http://web1.ncaa.org/web_files/stats/football_records/Attendance/2009.pdf) (last visited Feb. 27, 2010). The University of Michigan enjoyed the largest per game attendance with an average of 108,933 fans. *Id.* It has been estimated that annual sales of licensed college merchandise reap \$2.5 billion, generating \$100 million annually for universities. D. Stanley Eitzen, *Slaves of Big-Time College Sports*, USA TODAY, Sept. 1, 2000, (Magazine), at 27. In 2004, Comcast Cable agreed to pay the University of Maryland \$25 million for naming rights to the school's basketball arena. Editorial, *Student-Athletes*, BALT. SUN, May 5, 2004, at 18A. Ohio State University has a similar arrangement with Value City. See Tim Martin, *Corporate Sponsorships Net Millions for Ohio St.*, LANSING ST. J., Dec. 16, 2001, at 6A.

24. *The NewsHour with Jim Lehrer: Dollars, Dunks, and Diplomas* (PBS television broadcast July 9, 2001), available at [http://www.pbs.org/newshour/bb/education/july-dec01/ncaa\\_07-09.html](http://www.pbs.org/newshour/bb/education/july-dec01/ncaa_07-09.html).

25. See *infra* notes 188–235 and accompanying text. Of course, given the historical exclusion of African Americans from many U.S. universities, we commend the integration of all races in higher education, including in intercollegiate athletics.

26. See *infra* notes 174–87 and accompanying text.

27. This effect is only magnified by professional league eligibility rules that prevent even the most gifted of these athletes from earning compensation through employment in the NFL and NBA. Under these eligibility restrictions, players are foreclosed for a period of years from applying to be drafted and are essentially forced to

These are sharp words, but the facts are indisputable. Our purpose here is to examine the racial implications of certain NCAA rules which, in their application, economically restrain and burden mostly African-American young men.<sup>28</sup> By these rules, such athletes are treated separately and differently from coaches, administrators, corporations, and all others involved in the college sports industry.<sup>29</sup> In this way, like the separation policies of the former South African system, NCAA rules maintain an apartheid regime which applies different rules to different classes of people, thereby allowing a favored race to capture the wealth created by a disfavored one.<sup>30</sup>

We do not allege that these NCAA rules are facially discriminatory or that they were created for a racist purpose. Instead, while neutral on their face, these rules have been established by U.S. universities through their association—the NCAA—to advance a façade of amateurism in major college sports, allowing them to retain for themselves the pecuniary rewards of dazzlingly successful commercialization. These facially neutral rules, however, have an overwhelmingly disparate economic impact in their application upon a distinct racial minority,<sup>31</sup> and under sound principles of U.S. law, neutral rules, even among private parties, that disproportionately burden racial minorities in significant economic ways require a legitimizing purpose.<sup>32</sup> In this instance, the only justification for the rules that forbid these young men from reaping the fruits of their labor is “amateurism,” and as we will show, that justification is illusory and demonstrably false.<sup>33</sup>

Neither do we deny that there is much good in college sports nor that college sports enable many African-American, and other young people to receive the benefit of attending a university without financial cost. Moreover, we are well aware that participation in athletics may provide critical lessons in discipline, teamwork, dedication to purpose, and other virtues for many.<sup>34</sup> At the same time, however, we seek to reveal that the NCAA system of rules, as a whole, creates a modern apartheid system whereby racial minorities are bound by rules that have them serve and create profits they may not receive themselves, but that are reaped by others. That being the case, unless our universities reform this regime by sharing the wealth of this product with its athletes in much more significant ways, they must suffer history’s condemnation.

Part I of this article will show how this modern form of apartheid has roots in ancient civilization as well as in colonial and pre-Civil War America<sup>35</sup> and that the “amateurism” distinctions mouthed by the NCAA today grew out of nineteenth century British class

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play in college without monetary compensation. *See supra* note 19.

28. *See infra* notes 188–235 and accompanying text.

29. *See infra* notes 173–87 and accompanying text; *see also* McCormick & McCormick, *supra* note 7.

30. *See infra* notes 99–114 and accompanying text.

31. Scholars have examined the disparate impact of facially neutral rules on racial minorities in a number of different legal contexts. *See, e.g.*, Susan Bisom-Rapp, *Contextualizing the Debate: How Feminists and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law*, 44 J. LEGAL EDUC. 366 (1994); Arthur L. Burnett, Sr., *Permeation of Race, National Origin and Gender Issues from Initial Law Enforcement Contact through Sentencing: The Need for Sensitivity, Equalitarianism and Vigilance in the Criminal Justice System*, 31 AM. CRIM. L. REV. 1153 (1994); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 2006 WIS. L. REV. 751.

32. *See infra* notes 236–84 and accompanying text.

33. *See infra* notes 119–26 and accompanying text.

34. *See* Jackie Hyman & Matthew Van Jura, *Elite Collegiate Athletics and the Academy: Criticisms, Benefits and the Role of Student Affairs*, 30 VT CONNECTION 42 (2009), available at [http://www.uvm.edu/~vtconn/v30/Hyman\\_VanJura.pdf](http://www.uvm.edu/~vtconn/v30/Hyman_VanJura.pdf).

35. *See infra* Parts I.A – B.

distinctions.<sup>36</sup> It will also describe the employment rules of the South African apartheid system and demonstrate how those economic policies reserved the wealth created by black laborers for the benefit of the white population.<sup>37</sup> Part II will describe the rules by which the NCAA and its members ensure that the profits earned by athletes are reserved for those institutional members, while foreclosing any opportunity for the athletes' meaningful economic advancement and simultaneously indenturing athletes to their respective institutions.<sup>38</sup> Part III will describe the remarkable riches that these NCAA rules preserve for the many actors in the college sports enterprise other than the athletes—the NCAA, its member universities, the athletic conferences, coaches, administrators, and the corporations that sponsor NCAA sports.<sup>39</sup> Part III will also illustrate that which is already obvious—that major college sports flourishes on the shoulders of predominantly African-American young men who provide entertainment and produce vast wealth for the enjoyment and economic betterment of European Americans in a modern form of apartheid.<sup>40</sup>

As described in Part IV, settled principles of U.S. law establish that when economic actors and governmental entities enforce facially neutral rules that economically burden racial minorities in grossly disproportionate ways, they must justify those rules as manifestly related to a legitimate purpose.<sup>41</sup> In this instance, the NCAA justifies its rules on the grounds that they promote college sports as amateur activities. Amateurism, however, plainly fails as a legitimizing factor because, of course, major college sports are anything but amateur. The young men whose labor substantially creates the product are not college students who happen to play football and basketball for pleasure after class. They are highly skilled athletes whose labor creates a fantastically lucrative commercial product for everyone but themselves. And thus, until the members of the NCAA—our U.S. universities—acknowledge the commercial nature of the college sports industry and lift the ban on payment for athletic services for these young men,<sup>42</sup> their shameful legacy will be the knowing maintenance of a modern system of apartheid.

## I. EXPLOITATION FOR PROFIT AND ENTERTAINMENT: HISTORICAL PRECURSORS TO AMATEURISM

The phenomenon we describe—the exploitation of one race or people for the profit and entertainment of another—is hardly new. Indeed, societies have sanctioned such activity for millennia.

### A. ANCIENT ROME

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36. See *infra* Part I.C.

37. See *infra* Part I.D.

38. See *infra* Part II.

39. See *infra* Parts III.A-B.

40. See *infra* Parts III.A-C.

41. See *infra* Part IV.

42. See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006) (arguing that football and men's basketball athletes at Division I universities are "employees" within the meaning of the National Labor Relations Act, and, consequently should receive all the rights that designation carries).

Ancient Rome was a society in which slaves were exploited for entertainment and profit. Because the Romans “frowned on a citizen making a public spectacle of himself,”<sup>43</sup> they required slaves to serve as performers.<sup>44</sup> By approximately 100 B.C., Roman armies had conquered most of the countries of the Mediterranean<sup>45</sup> and enslaved prisoners of war from modern-day Israel, Greece, Italy, France, Spain, Palestine, North Africa and Asia Minor.<sup>46</sup> Slaves conscripted during these campaigns, in turn, provided much Roman entertainment as actors, musicians, artists, and athletes.<sup>47</sup> At the same time, Roman leaders considered entertainment for the masses to be critical to the maintenance of a cohesive state and accordingly financially supported such events so citizens could attend the arena, theatre, or circus without charge, or for a small fee.<sup>48</sup>

The primary circus event for Romans was chariot racing.<sup>49</sup> Private chariot-racing companies sponsored races throughout the Empire<sup>50</sup> and “owned the horses, the chariots, the stables, other equipment, and even the drivers, most of whom were slaves.”<sup>51</sup> All classes of society enjoyed the spectacles, especially their dangerous aspects, and Romans anticipated seeing “crashes and the broken, mangled bodies of drivers and horses.”<sup>52</sup> “Chariot racing was a spectator sport . . . designed to make a profit for its organizers.”<sup>53</sup> Owners, not drivers, enjoyed a handsome profit if their slaves won a chariot race.<sup>54</sup>

Of course, the most dramatic form of Roman entertainment were the gladiatorial contests which began as private events and became publicly sponsored entertainment by 42 B.C.<sup>55</sup> Most gladiators were slaves selected from the ranks of captured military personnel.<sup>56</sup> In these contests, gladiators were rented out by their owners to fight animals or each other in an arena or coliseum before large crowds.<sup>57</sup> Meals were often arranged by wealthy Romans for themselves and their guests to enjoy during the events.<sup>58</sup> The Roman experience was an

43. JO-ANN SHELTON, *AS THE ROMANS DID* 335 (2d ed. 1998).

44. *Id.*

45. MILTON MELTZER, *SLAVERY: A WORLD HISTORY* 101 (1993).

46. *See id.* at 106–10.

47. SHELTON, *supra* note 43, at 335. By enslaving its enemies, the Romans imposed ongoing degradation on them. “To enslave an enemy rather than to slay him was a device to reap his labour, but it was also a way of enjoying a perpetual triumph over him; it was at once a humiliation to him and a punishment for his presumption in taking up arms.” R.H. BARROW, *SLAVERY IN THE ROMAN EMPIRE* 2 (1928).

48. *See* SHELTON, *supra* note 43, at 330, 336; MAGNUS WISTRAND, *ENTERTAINMENT AND VIOLENCE IN ANCIENT ROME* 62 (1992).

49. SHELTON, *supra* note 43, at 337 (“Chariot racing was the oldest and most enduring of the public entertainments. According to Roman legend, the first public entertainment was a day of chariot racing planned by Romulus shortly after he founded Rome in 753 B.C.”).

50. *Id.* at 337–38.

51. *Id.* at 338.

52. *Id.*; *see also id.* at 339 (describing a fatal chariot race).

53. *Id.* at 337.

54. *Id.* at 339 n.204.

55. *Id.* at 330 & n.154.

56. *Id.* at 350.

57. *Id.*

58. FIK MEIJER, *THE GLADIATORS: HISTORY’S MOST DEADLY SPORT* 13–14 (2004).

The Romans organised performances by gladiators, a habit they had acquired from the Etruscans, not only at festivals and in the theatres but also at feasts. That is to say, certain people would frequently invite their friends for a meal and other pleasant pastimes, but in addition there might be two or three pairs of gladiators. When everyone had had plenty to eat and drink, they called for the gladiators. The moment anyone’s throat was cut, they clapped their hands with pleasure.

*Id.*



early example of the exploitation of subjugated young men for others' entertainment and profit.

## B. EARLY AMERICA

In colonial America, so-called "quarter racing"<sup>59</sup> became our nation's "first form of mass entertainment,"<sup>60</sup> and the Virginia-North Carolina border, where most jockeys were slaves, became the "Race Horse Region" for this sport.<sup>61</sup> Gambling on these races was common, with owners sometimes wagering tobacco crops on the outcome.<sup>62</sup> Not surprisingly, slaves who helped turn their masters' stables into profitable businesses were favored,<sup>63</sup> while those who failed faced the threat of punishment.<sup>64</sup> Many masters also organized parties for their slaves on Saturday nights,<sup>65</sup> and some used these events "for self-amusement by arranging to have the blacks fight each other in gladiator style."<sup>66</sup> Other owners used slaves for entertainment as musicians and singers,<sup>67</sup> sometimes hiring out their services at exhibitions or fairs.<sup>68</sup>

Literature is often a reflection of society, and perhaps the most eloquent depiction of the abuse of African Americans for entertainment in all of American literature may be found in Ralph Ellison's classic, *Invisible Man*. In this book, the narrator, a black high school student, recalls his grandfather who had been a slave and was, "a quiet old man who never made any trouble"<sup>69</sup> declaring on his death bed that "our life is a war, and I have been a traitor all my born days. . . ."<sup>70</sup> Deeply troubled by the old man's last words, and despite his own doubts, he nevertheless delivers his high school graduation address in which "I showed that humility was the secret, indeed, the very essence of progress."<sup>71</sup> His speech "was a great success. Everyone praised me and I was invited to give the speech at a gathering of the town's leading white citizens. It was a triumph for our whole community."<sup>72</sup>

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59. The "quarter race" was an American invention. When the first English settlers arrived to the North American continent in 1607, the eastern seaboard was too heavily wooded to create mile-long race courses as had been the custom in England. Instead, the new Americans built shorter race courses, "always a quarter of a mile long, so that performances in different races could be compared." EDWARD HOTALING, *THE GREAT BLACK JOCKEYS: THE LIVES AND TIMES OF THE MEN WHO DOMINATED AMERICA'S FIRST NATIONAL SPORT* 11 (1999). The new sport was called quarter racing. *Id.*

60. *Id.*

61. *Id.* at 11–12.

62. *Id.* at 14.

63. *Id.* at 12, 18 (explaining that some even received cash stipends from their masters for their success).

64. *Id.* at 20 (discussing that this punishment has been characterized as sometimes having been severe).

65. EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 569 (1974).

66. *Id.*

67. LESLIE HOWARD OWENS, *THIS SPECIES OF PROPERTY: SLAVE LIFE AND CULTURE IN THE OLD SOUTH* 167 (1976).

68. *Id.* at 168.

The ranks of slave musicians and songsters were never thin. Bondsmen saw that vocal and instrumental ability captured the fancy of both whites and blacks. At some slave and planter parties, musicians played competitively, catering to the whims of those in attendance. Members of the audience called out tunes for them to perform. The slave who played the best at white parties received additional money for his few hours' work plus his share of appreciative glances.

*Id.* at 167.

69. RALPH ELLISON, *INVISIBLE MAN* 16 (Random House 2d ed. 1995) (1947).

70. *Id.*

71. *Id.* at 17.

72. *Id.*

The gathering was in the main ballroom of the leading hotel. When I got there I discovered that it was on the occasion of a smoker, and I was told that since I was to be there anyway I might as well take part in the battle royal to be fought by some of my schoolmates as part of the entertainment. The battle royal came first.<sup>73</sup>

Each of the nine boys was issued a pair of boxing gloves. “It was foggy with cigar smoke. And already the whiskey was taking effect. I was shocked to see some of the most important men of the town quite tipsy. They were all there—bankers, lawyers, judges, doctors, fire chiefs, teachers, merchants. Even one of the more fashionable pastors.”<sup>74</sup> Soon, a nude blonde woman appeared and danced sensually. Some men “threatened us if we looked and others if we did not.”<sup>75</sup> Mayhem swiftly ensued, the men grabbing and tossing her “as college boys are tossed at a hazing, and above her red, fixed-smiling lips I saw the terror and disgust in her eyes, almost like my own terror and that which I saw in some of the other boys.”<sup>76</sup>

The boys were then blindfolded and forced to fight one another.<sup>77</sup> In elegant and excruciating detail, the narrator describes the chaotic, horrifying battle. “Everyone fought hysterically. It was complete anarchy”<sup>78</sup> while the men berated them. “Slug him, black boy! Knock his guts out!”<sup>79</sup> When the fight ended, the boys were told to “come on up . . . and get your money”<sup>80</sup> and were led to a rug “covered with coins of all dimensions and a few crumpled bills.”<sup>81</sup> “Boys, it’s all yours,”<sup>82</sup> the master of ceremonies said. “You get all you grab.”<sup>83</sup> But when he touched a coin, the narrator recalls, “[a] hot, violent force tore through my body, shaking me like a wet rat. The rug was electrified.”<sup>84</sup> “The men roared above us as we struggled. ‘Pick it up, goddamnit, pick it up!’ someone called like a bass-voiced parrot. ‘Go on, get it!’”<sup>85</sup>

When the men were finally sated and the festivities drew nigh, he was directed to repeat his speech praising assimilation—to the catcalls and derision of the besotted audience.<sup>86</sup> At its conclusion, the master of ceremonies announced, “Gentlemen, you see that I did not overpraise this boy. He makes a good speech and some day he’ll lead his people in the proper paths,”<sup>87</sup> whereupon he was handed a briefcase containing “an official-looking document”<sup>88</sup>—“a scholarship to the state college for Negroes.”<sup>89</sup> This painful passage depicts a social dynamic hauntingly echoed today—where the prize awarded for the violent physical use of young black men for entertainment is a college scholarship.

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73. *Id.*

74. *Id.* at 18.

75. *Id.* at 19-20.

76. *Id.* at 20.

77. *Id.* at 21.

78. *Id.* at 23.

79. *Id.*

80. *Id.* at 26.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 27.

85. *Id.*

86. *Id.* at 29.

87. *Id.* at 32.

88. *Id.*

89. *Id.*

Organized societies have long sanctioned the exploitation of racial minorities through rules that place them in physical, often dangerous, contests for the entertainment and profit of the majority. So it is in America today, where mostly European-American university officials arrange for mostly African-American young men to provide dangerous and highly lucrative entertainment. In major U.S. college sports, the justification offered for the rules that tether young athletes to their institutions to labor while their compensation is limited to a form of scrip<sup>90</sup> is the amateur ideal. Put differently, U.S. universities, through the NCAA, defend the numerous rules that keep these college athletes in this modern form of servitude on the ground that they preserve “amateurism.”<sup>91</sup>

### C. GREAT BRITAIN AND AMATEURISM

The roots of amateurism in modern American sports may be traced to nineteenth century Great Britain where the idea served that society’s rigid class divisions.<sup>92</sup> Amateurism requirements limited participation in athletic events to members of the upper classes—those who could afford to compete for enjoyment only, rather than to earn a living.<sup>93</sup> This amateur requirement precluded the working classes from competing in athletic contests, reserving that privilege for the wealthy and thereby reinforcing the British system of segregation and separation of the classes.<sup>94</sup>

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90. Scrip was part of the “company store”—a classic form of labor exploitation used during the industrial revolution in America. The “company store” was usually part of a “company town” where employees were required as a condition of employment to live in company-owned housing and to purchase company-provided goods and services at grossly inflated prices. THOMAS R. BROOKS, *TOIL AND TROUBLE: A HISTORY OF AMERICAN LABOR* 92–93 (1964). Under that regime, employers paid employees with draft, known as “scrip,” which was redeemable only at the employer’s outlets. GEORGE S. MCGOVERN & LEONARD F. GUTTRIDGE, *THE GREAT COALFIELD WAR* 23 (1972). Athletic scholarships are a form of scrip because they cannot be traded for goods and services from any source, but can be redeemed only by the university provider.

91. Although the NCAA defends its prohibition against paying players market wages with the justification of preserving “amateurism,” “amateurism” means nothing other than not paying players for their services. So when it defends its current policy of not paying players by asserting the desire to preserve no pay for athletes, the NCAA engages in fallacious and circular reasoning that still begs the question why athletes should not be paid for their work. The NCAA’s amateurism defense is circular, and therefore, offers no real justification for its no-pay position.

92. Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 673, 676 (2003); Rick Telander, *Something Must Be Done*, *SPORTS ILLUSTRATED*, Oct. 2, 1989, at 94, 95, reprinted in RICK TELANDER, *THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT* (1989).

93. Freedman, *supra* note 92, at 676 (citing Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, *NCAA NEWS*, Jan. 3, 2000, available at <http://www.ncaa.org/news/2000/20000103/active/3701n03.html> (last visited Mar. 31, 2005) (on file with author)); Telander, *supra* note 92, at 96.

94. Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, *ANTITRUST*, Spring 2000, at 46; Seth Davis, *A Loan at the Top: The NCAA’s New Proposal on Cash for Athletes Benefits Only the Elite*, *SPORTS ILLUSTRATED*, Apr. 30, 2001, at 25 (quoting NCAA subcommittee chair Christine Grant’s discussion of historical purpose of amateurism being “to create class distinctions”). The Amateur Athletic Club of England first defined the term “amateur” in 1866 as “a gentleman who never takes part in public competitions, neither for money nor for awards, or in competitions where entrance tickets are sold, who during no period in his life treats sport as a source of maintenance, who is neither a mechanic, nor a craftsman nor a worker.” Barbara Krawczyk, *The Social Origin and Ambivalent Character of the Ideology of Amateur Sport*, 12 *INT’L REV. FOR THE SOC. OF SPORT* 44 (1977), available at <http://irs.sagepub.com/cgi/content/abstract/12/3/35>. This definition shows that the concept of amateur sport was created to establish a clear delineation separating the aristocracy from the working class. *Id.*

Ironically, amateur standing was never a requirement for Olympic competition in ancient Greece.

The whole concept of amateurism would have been incomprehensible to the ancient Greeks. You had to be a professional to compete in the Olympics, which meant that you had to prove you were a full-time

Amateurism requirements continue to reinforce class and race differences in America, not by excluding working class athletes as in Great Britain, but by applying only to the players and not to any of the many other participants in the lucrative college sports enterprise.<sup>95</sup> Thus, the ideal of “amateurism” prevents athletes from sharing in the profits they help create, and reserves those profits for universities and their officials. In this way, amateurism requirements separate players from the managers of college athletics, forming a separation, or apartheid, system.<sup>96</sup> As we have noted, by these rules, major universities, corporate sponsors, television networks, coaches, conference commissioners, and others reap a surfeit of riches, without bearing the cost of the players’ labor, while the athletes themselves, many of whom come from impoverished backgrounds, work for substandard compensation,<sup>97</sup> and with extremely little likelihood of ever playing professionally.<sup>98</sup> In this vein, the same principle of amateurism that reinforced class distinctions in Great Britain for generations continues to do so today through the systematic differentiation between NCAA athletes and all other parties in the college sports enterprise, exacting labor from the former and reserving economic benefit for the latter.

#### D. SOUTH AFRICA AND APARTHEID

In South Africa, the term “apartheid” meant segregation, apartness, or separation of the races.<sup>99</sup> It was accomplished as social policy through the physical separation of races into distinct, geographically defined areas<sup>100</sup> and was made effective in the late 1940’s and the

athlete and that you had been doing nothing but training for three months prior to the Games.

Telander, *supra* note 92, at 95 (quoting Olympic historian, Andrew Strenk); accord DAVID C. YOUNG, *THE OLYMPIC MYTH OF GREEK AMATEUR ATHLETICS* 7 (1985) (noting the ancient Greeks had no word for the concept of amateurism); Shropshire, *supra*, at 47-48.

95. See *infra* notes 119–126 and accompanying text.

96. See *infra* notes 99–114 and accompanying text.

97. See *supra* notes 21–22 and accompanying text.

98. The NCAA reports that only 1.2% of NCAA men’s basketball players will become professional and that only 1.7% of college football players will do so. NCAA, *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, available at [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/NCAA/Academics+and+Athletes/Education+and+Research/Probability+of+Competing/Methodology+-+Prob+of+Competing](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Academics+and+Athletes/Education+and+Research/Probability+of+Competing/Methodology+-+Prob+of+Competing) (last visited Feb. 11, 2011).

99. Elizabeth S. Landis, *South African Apartheid Legislation I: Fundamental Structure*, 71 *YALE L.J.* 1, 1–2 (1961) (explaining the legal institution of apartheid and demonstrating its method and effect in South Africa); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 98 (3d ed. 1986) (defining apartheid as “separateness, . . . racial segregation, . . . [and] a policy of segregation and political and economic discrimination against non-European groups in the Republic of So. Africa.”).

100. Landis, *supra* note 99, at 16–29. South African law and custom recognized four racial categories: “white, black, yellow, and coloured.” *Id.* at 4. “Whites” were comprised of Afrikaners (descendants of early Dutch and Huguenot settlers who were often farmers) and English (descendants of 19<sup>th</sup> century colonists who dwelled mostly in cities and controlled most of South Africa’s commercial interests). They were generally referred to as “European” or “blankes.” *Id.* “Black” people “consisted primarily of the Bantus, racially mixed descendants of Northeast African Hamitic peoples and Negroid people,” *id.*, as well as “yellow-skinned Bushmen and the Hottentots, . . . the region’s only aboriginal inhabitants.” *Id.* at 5. The terms “Native,” “Bantu,” and “African” were all used to refer to “black” South Africans. “Coloured” people were mixed-race descendants of unions between Cape Malays (descendants of East Indians) or Europeans on the one hand and Hottentots or Bantus on the other and were generally assimilated into the European culture. *Id.* “Yellow” people were generally individuals of Indian, Pakistani, or Chinese descent. *Id.* In the portions of this article in which we analyze the system of apartheid, we will use the term “white” to refer to Afrikaners and English who were also known as Europeans. We will use the term “black” to refer to those individuals who were known as “Natives,” “Bantu,” and “African.”

1950's through a "complex of statutes . . . developed to ensure—and increase—the separation of the 'races.'"<sup>101</sup> These rules had the effect, among other things, of requiring blacks to labor for little economic benefit, thereby reserving the wealth created from their efforts for whites.<sup>102</sup>

A variety of South African laws reduced or eliminated any bargaining power black workers might otherwise have enjoyed, consequently reducing their earning potential. By law, for example, it was a crime for a black employee to strike,<sup>103</sup> and while unions composed of white employees enjoyed legal protection, those for black employees did not.<sup>104</sup> Of course, these and other laws created conditions under which black South Africans would earn significantly less than their white counterparts.

Moreover, another class of apartheid-era laws explicitly mandated lower wages for blacks than for whites, just as the NCAA's amateurism rules now explicitly limit compensation for players but not for athletic managers and administrators.<sup>105</sup> First, under the Wage Act of 1957, white South African government officials set the wages and hours for many blacks,<sup>106</sup> while whites' wages were determined by market forces.<sup>107</sup> Of course, this model is strikingly parallel to ours, where predominantly white university administrators enact NCAA legislation limiting the compensation of predominantly African-American players to the level of the athletic scholarship, while leaving athletic administrators free to reap the benefits of the unfettered marketplace. Second, under a variety of South African social welfare acts, financial benefits were often reduced or eliminated altogether for black workers.<sup>108</sup> Third, South Africa enacted a formal system of job reservation whereby certain desirable high-paying jobs were reserved for white workers while other low-paying or dangerous jobs were reserved only for black workers.<sup>109</sup>

101. *Id.* at 1.

102. See Elizabeth S. Landis, *South African Apartheid Legislation II: Extension, Enforcement and Perpetuation*, 71 *YALE L.J.* 437, 437–47 (1962) (describing economic legislation enacted in the 1940's and 1950's designed to enrich white South Africans at the expense of blacks).

103. *Id.* at 437–38, 440 (citing the Native Labour (Settlement of Disputes) Act, Act No. 48 of 1953, § 18(1), superseded by Act No. 59 of 1955, § 1). The penalty for violating this law was £500 or three years in prison or both. *Id.* at 440 (citing Act No. 48 of 1953, § 18(2), superseded by Act No. 59 of 1955, § 1).

104. *Id.* at 438–39 (citing the Industrial Conciliation Act, Act No. 28 of 1956, § 1(xi) and (xxxviii)).

105. See McCormick & McCormick, *supra* note 7.

106. Landis, *supra* note 102, at 441–42 (citing Act No. 5 of 1957, §§ 3(1), (4), (11), 8(1), 13, 14, 15, 16, 17, 19(1)) (describing how white boards recommended wages and hours for black laborers to the white Minister of Labor who could set them conclusively and who could ignore input from blacks whose role was only advisory).

107. See *id.* at 446 (describing market forces, such as potential competition from black workers, which affected whites' wages).

108. *Id.* at 444. For example, the Workmen's Compensation Act excluded from its benefits a range of jobs employing the majority of blacks in the country. *Id.* (citing Act No. 30 of 1941, §§ 3(2) (f), (g), (j)). Similarly, the Unemployment Insurance Act excluded specified jobs typically held by black workers. *Id.* (citing Act No. 53 of 1946, §§ 2(2) (b), (c), (i)). And "[i]n 1953 the UN Commission on the Racial Situation in South Africa stated that social welfare expenditures appear[ed] to be in the proportion of three for whites, two for coloreds, and one for Africans [or blacks], . . . [with] many instances . . . [of greater] discrepancies . . ." *Id.* In parallel fashion, NCAA athletes are likewise not entitled to workers' compensation, unemployment compensation, other social welfare benefits, or other legal rights enjoyed by employees generally. See, e.g., *Rensing v. Ind. State Univ. Bd. Trs.*, 444 N.E.2d 1170, 1173–75 (Ind. 1983) (holding that college athletes are not employees under state workers' compensation laws because they are students and not employees, and therefore are not entitled to workers' compensation for athletics-related injuries); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 226–28 (Mich. Ct. App. 1983) (same).

109. *Id.* at 444–47. For example, The Native Building Workers Act of 1951 made it a crime for a black person to perform skilled labor in an urban or European area. *Id.* at 445 (citing Act No. 27 of 1951 § 15 (1), superseded by Act No. 60 of 1955 § 2, and Act No. 27 of 1951 § 15 (3), superseded by Act No. 60 of 1955, § 2). Limits were also imposed on the number of blacks who could become registered (a requirement) to undertake

Not surprisingly, the financial results of apartheid economic legislation left the average black worker impoverished in contrast to the whites of that society. “The average earnings of Non-Europeans in most occupations . . . [were] insufficient to support a family and [fell] . . . below the Poverty Datum Line.”<sup>110</sup> White industrial workers were paid about five times the amount that black industrial workers earned.<sup>111</sup> Similarly, white domestic servants on farms earned about five times the wage of the average black domestic farm servant,<sup>112</sup> but white farm workers working in the fields were paid twelve to fifteen times the amount that black farm workers were paid.<sup>113</sup> In general, “[t]he ratio of whites’ earnings to nonwhites’ earnings remained 4 to 1 over a long period.”<sup>114</sup>

By applying solely to athletes, the NCAA’s amateurism rules function like the economic regime of South African apartheid. Through their labor, mostly African-American players generate great economic value, but the NCAA rules of amateurism deny them the fruits of that labor, reserving that bounty instead for the largely European-American managers of college sports.<sup>115</sup>

The NCAA seeks to preserve amateurism today through numerous rules created to distinguish those who use their athletic skill for pecuniary gain from those who do so for educational or other benefit.<sup>116</sup> As we will show, however, these rules also serve to press predominantly African-American young men into contractual and economic relationships

certain skilled jobs. *Id.* at 446 (citing the Native Building Workers Act of 1951, Act No. 27 of 1951, §§ 10(2), 11(1), (2) and (4), and 14(1)(b)). The Minister of Labor was later given broad, general powers to reserve jobs for particular races. *Id.* at 446 (citing Act No. 28 of 1956, § 77, 77(6)(a), (6)(b), (7)(a)). As a result, it became illegal in Capetown, for example, to hire a black person to be a traffic policeman, ambulance driver, or fireman. *Id.* at 447.

Other laws also mandated higher remuneration for white South Africans than for their black counterparts. For example, white mineworkers were greatly favored over black miners.

European workers got a great many improvements in their conditions of employment during . . . [World War II], none of which went to the African mine-workers. They got extended holidays with pay, they got benefit societies, and . . . a cost-of-living allowance which the Native mineworkers never got, while cost of living was rising. Every other section of the industrial field got a statutory cost-of-living allowance, but the African mineworkers did not get it.

*Id.* at 443 (citing H.A, DEB., Apr. 16, 1959, col. 3636 (Mrs. Ballinger, African representative)).

110. *Id.* at 442 (quoting HANDBOOK ON RACE RELATIONS IN SOUTH AFRICA 144, 309, 345 (Hellmann ed. 1949)).

111. *Id.* at 443.

112. *Id.*

113. *Id.*

114. *Id.* at 446. Of course, nonwhites included categories of mixed-race individuals and people of Asian heritage who were generally paid more than blacks but less than whites. *See generally* Landis, *supra* note 99, at 4-16 (describing the complexity of the different racial categories created under South African law).

115. *See infra* notes 119–126.

116. *See* DIV. I MANUAL, *supra* note 12, arts. 1.3.1 (“A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”), 2.9 (“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.”). The NCAA’s assertion that it seeks to protect athletes from exploitation is ironic in the extreme given its own ongoing exploitation of these athletes for commercial profit. Rather, its professed concern is, in our view, more accurately a means by which the NCAA seeks to exclude outside economic actors who might otherwise dilute the NCAA’s financial interests by competing for a share of the college sports dollar. By asserting it protects athletes from exploitation by commercial interests, the NCAA is simply, in effect, eliminating potential competitors and reserving for itself the great financial rewards of college sports.

with their universities in which their arduous and often dangerous,<sup>117</sup> but richly valuable, labor is essentially given away.

## II. THE RULES OF THE GAME

The *NCAA Division I Manual* consists of 419 pages of detailed rules governing, *inter alia*, the athlete<sup>118</sup> and his relationship to his university. Several of those rules, ostensibly designed to preserve “amateurism” in college sports, also establish an array of ties that bind him to his institution and guarantee that his institution and others, not he, will reap the pecuniary fruits of his labor.

First, NCAA rules arbitrarily limit the amount of compensation a university may pay an athlete to the cost of attending the university<sup>119</sup> and render him ineligible to participate in his sport if he receives financial aid from his university in excess of that cost.<sup>120</sup> These rules, thus, ensure that any economic advantage the athlete creates in excess of the cost of his attendance benefits only his university. At the same time, other NCAA rules forbid him from earning, in any form, compensation for his abilities or his reputation as an athlete.<sup>121</sup> And

117. College football is an especially dangerous activity. From 1977 through 2007, thirty-three college football players suffered cervical cord injuries, and from 1984 through 2004, eleven suffered permanent cerebral injuries. NAT'L CTR. FOR CATASTROPHIC SPORT INJURY RESEARCH, DATA TABLES, ANNUAL SURVEY OF CATASTROPHIC FOOTBALL INJURIES 1977–2007, <http://www.unc.edu/depts/nccsi/CataFootballData.htm> (last visited Feb. 21, 2010). From 1931 through 2007, eighty-six college football players died from direct injuries sustained from playing or practicing football, and another 107 died from indirect injuries. NAT'L CTR. FOR CATASTROPHIC SPORT INJURY RESEARCH, DATA TABLES, ANNUAL SURVEY OF FOOTBALL INJURY RESEARCH: 1931-2007, <http://www.unc.edu/depts/nccsi/FootballInjuryData.htm#TABLE%201> (last visited Feb. 21, 2010) (defining direct injuries as those resulting directly from participation in the skills of the sport and indirect ones as those caused by systemic failure resulting from exertion or by a complication secondary to a non-fatal injury).

118. We use the term “athlete” to mean a student on athletic scholarship at an NCAA institution. We purposely do not use the term “student-athlete”—a term coined by the NCAA in 1953 as a direct result of a finding by the Colorado Supreme Court that a university football athlete was, in fact, an employee for purposes of workers’ compensation law, and that consequently, the university had to provide workers’ compensation for his football injuries. *See University of Denver v. Nemeth*, 257 P.2d 423, 429-30 (Colo. 1953). Stunned by the *Nemeth* ruling, the NCAA swiftly coined the term “student-athlete” and mandated its exclusive use to emphasize the idea that athletes were “students,” and simultaneously to diminish any tendency to view them as “employees.” *See BYERS, supra* note 17, at 69; McCormick & McCormick, *supra* note 42, at 83–86 (examining the NCAA’s use of terminology to manipulate public opinion regarding the status of college athletes). As then-NCAA Executive Director Walter Byers later wrote:

[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*. BYERS, *supra* note 17, at 69 (emphasis in original).

119. DIV. I MANUAL, *supra* note 12, arts. 15.01.6 (“Maximum Institutional Financial Aid to Individual. An institution shall not award financial aid to a student-athlete that exceeds the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution.”), 15.02.2 (“Cost of Attendance. 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.”).

120. *Id.*, art. 15.1 (“Maximum Limit on Financial Aid – Individual. A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance as defined in Bylaw 15.02.2.”).

121. *Id.*, arts. 12.1.2 (“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 in that sport. . . .”), 12.4.1.1 (prohibiting pay based on an athlete’s reputation).

while he may undertake other kinds of work in the unlikely event he has time and energy to do so,<sup>122</sup> he can receive no more than the prevailing wage for actual services rendered,<sup>123</sup> and his athletic reputation must have no bearing on his compensation.<sup>124</sup> That is, he may receive no remuneration for the use of his name or reputation as an athlete to promote the sale of any commercial product or service.<sup>125</sup> Together, these rules extinguish any possibility for an athlete to profit from his athletic skill or reputation—almost certainly his most valuable assets—and thereby deprive him of any meaningful opportunity for personal economic advancement. By contrast, the NCAA and its member universities profit from these athletes' fame through royalties they receive from videogame makers who use individual players' likenesses in their products.<sup>126</sup> So while athletes are not permitted to profit even from their own likenesses or fame, these valuable resources are reserved for the economic benefit of others.

In addition to being subject to the above "amateurism" rules, the college athlete is also restricted by other NCAA mandates. For example, he is tied to his initial college choice in ways not required of any other university student through rules that restrict his ability to transfer to another NCAA institution. By NCAA rule, an athlete who transfers must complete a full academic year at his new institution before becoming eligible to play his sport.<sup>127</sup> Tellingly, however, athletes in every sport *other* than the revenue generating sports enjoy a one-time exception to this rule,<sup>128</sup> the effect being that football and men's basketball

122. See generally McCormick & McCormick, *supra* note 42, at 97–108 (documenting in detail the demanding daily obligations imposed on Division I college football and men's basketball players which extend throughout most of the calendar year and exceed the obligations imposed on any other university employee).

123. DIV. I MANUAL, *supra* note 12, art. 12.4.1 ("Criteria Governing Compensation to Student-Athletes. Compensation may be paid to a student-athlete: (a) Only for work actually performed; and (b) At a rate commensurate with the going rate in that locality for similar services.").

124. *Id.* art. 12.4.1.1 ("Athletics Reputation. Such compensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.").

125. *Id.*

126. Universities have long profited from the sale of jerseys bearing star players' numbers. Of late, they have begun earning substantial fees from licensing athletes' images to videogame manufacturers who, in turn, use them in their highly popular products. See Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227, 239–44 (2001) (describing realistic features of computerized videogames); Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting on the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 83 (2004) (describing NCAA practice of allowing videogame creators to use schools' fight songs and uniforms as well as jersey numbers, but not the names, of athletes). Because individual athletes can be identified by number and from facial features, however, reviews of videogames refer to athletes by name. See Matzkin, *supra*, at 240–41. It was recently estimated that EA Sports, for example, would generate \$180 million in gross revenues from its "NCAA Football 2008" videogame. Ryan Finley, *They're in the Game: Popular Sports Titles Put Fans under Center, Cash in School Coiffers*, ARIZ. DAILY STAR, Aug. 12, 2007. Videogame manufacturers, in turn, pay royalties to the NCAA, which distributes those funds to its member universities on the basis of many factors, including each university's recent athletic performance. See Andy Latack, *Quarterback Sneak: With Its College Football Video Game, EA Sports is Making an End Run Around the NCAA's Rules*, LEGAL AFF., Feb. 2006, at 69; Rachel Bachman, *A Piece of the Pixels*, OREGONIAN, July 20, 2007 at E1. Two recent cases are testing players' rights to receive royalties for the use of their images. See *O'Bannon, et al. v. Nat'l Collegiate Athletic Ass'n*, No. C 09-3329 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010) (rejecting NCAA's motion to dismiss lawsuit in which a college athlete asserts that NCAA earnings from videogames properly belong to athletes); *Keller, et al. v. Electronic Arts, Inc., et al.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010) (same).

127. DIV. I MANUAL, *supra* note 12, art. 14.5.1 ("A student who transfers . . . from any collegiate institution is required to complete one full academic year of residence . . . before being eligible to compete . . . , unless the student satisfies . . . an exception as set forth in this bylaw.").

128. *Id.* art. 14.5.5.2.10(a) ("[An athlete is eligible to compete immediately upon transferring if, inter alia,



players,<sup>129</sup> but not volleyball players, for example, lose a full year out of their four years of eligibility upon transferring.<sup>130</sup> By contrast, other students, including those with academic scholarships, face no bar to transferring to another university where they can be eligible for academic scholarships, as well as the full range of university programs, without delay.<sup>131</sup> By forbidding *only* athletes in revenue-generating sports from competing on another institution's athletic team for a full year after transferring, NCAA universities have revealed their unmistakable purpose—to discourage only income-producing athletes from transferring to other institutions. By this mechanism, universities have unabashedly combined to protect their significant economic interest in valuable athletic assets.

While these NCAA rules burden certain athletes in ways not experienced by any other university student, additional rules also ensure that athletes' economic security remains uncertain and fragile. For example, NCAA rules forbid member institutions from awarding financial aid to an athlete for more than one year at a time,<sup>132</sup> grant them authority to refuse to renew the scholarship for a subsequent term,<sup>133</sup> and even allow them, for cause, to withdraw the aid during the term of the grant.<sup>134</sup> Moreover, under NCAA rules, coaches, not faculty, determine whether financial aid will be renewed.<sup>135</sup> Under this system, an athlete's ability to retain his scholarship depends in substantial part upon his athletic performance.<sup>136</sup> By mandating athletes' economic insecurity, the universities collectively guarantee the

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he] is a participant in a sport other than baseball, basketball, bowl subdivision football or men's ice hockey at the institution to which the student is transferring.”).

129. The transfer penalty also applies to baseball and men's hockey players—the other athletes who could potentially generate revenue for universities. *See id.*

130. *See supra* note 13 and accompanying text.

131. *See supra* note 128.

132. DIV. I MANUAL, *supra* note 12, arts. 15.02.7 (“An athletics grant-in-aid shall not be awarded in excess of one academic year.”), 15.3.3.1 (“If a student’s athletics ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period in excess of one academic year nor for a period less than one academic year.”).

It was not always the case that athletic scholarships were limited to a year. Early NCAA rules safeguarded athletes, allowing an athletic grant-in-aid to be awarded for up to four full years, guaranteeing a gifted athlete four years of education regardless of his athletic performance. BYERS, *supra* note 17, at 72; Allen L. Sack, *Big-Time Athletics vs. Academic Values: It's a Rout*, CHRON. HIGHER EDUC., Jan. 26, 2001, at B7.

133. BYERS, *supra* note 17, at 103.

134. DIV. I MANUAL, *supra* note 12, art. 15.3.4.2 (“Institutional financial aid based in any degree on athletics ability may be reduced or canceled during the period of the award if the recipient [makes himself ineligible to compete, fraudulently misrepresents information, engages in serious misconduct, or voluntarily withdraws from the sport].”).

135. BYERS, *supra* note 17, at 76, 164. Under prior NCAA legislation, university committees composed of faculty members, not athletic administrators, made this determination. *Id.*

136. *Id.* at 164–66; Sperber, *supra* note 18, at B12 (asserting that one-year scholarships are often not renewed due to unsatisfactory athletic performance).

players' complete dedication to their sports, often at the expense of their education<sup>137</sup> and health.<sup>138</sup>

The rules by which NCAA universities regulate athletes ensure that the institutions, not the athletes whose skill and labor generate great economic value, reap the rich financial rewards<sup>139</sup> of major college sports. Simultaneously, those rules extinguish any real opportunity for athletes to advance themselves and their families economically and, in order to protect universities' valuable economic interests, indenture them to their institutions in ways alien to any other student.

### III. THE STAKES OF THE GAME AND ITS PLAYERS

The economic and other wealth generated by major college sports is the subject of daily news reports, and its magnitude is immense.<sup>140</sup> Indeed, the sums of money created in the college sports industry are so fantastic as to have become mind-boggling. And while athletes' remuneration is limited in both amount and character<sup>141</sup> by NCAA rule, every other actor in the enterprise enjoys huge financial benefit.<sup>142</sup>

Unfortunately, European Americans "still dominate key positions"<sup>143</sup> in the industry and hold the vast majority of all NCAA university presidencies, athletics and associate athletics directorships, head coaching positions, faculty athletics representative positions, and sports information directorships.<sup>144</sup> More startlingly, European Americans hold one hundred percent of the conference commissioner positions in Division I.<sup>145</sup> In sharp contrast,

137. Many aspects of athletes' college experience are at odds with academic pursuits. For example, extensive practice and playing schedule obligations monopolize their lives. See Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy to College Basketball*, 12 MARQ. SPORTS L. REV. 595, 629 (2002) (recommending restrictions on travel to permit athletes more time as students); McCormick & McCormick, *supra* note 42, at 97–108 (detailing daily athletic commitments imposed on athletes which make meaningful academic pursuits unlikely); Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1240 (1993) (characterizing heavy athletic schedules as unrealistic for students and as promoting commercial purposes); Welch Suggs, *How Gears Turn at a Sports Factory: Running Ohio State's \$79-Million Athletics Program is a Major Endeavor, with Huge Payoffs and Costs*, CHRON. HIGHER EDUC., Nov. 29, 2002, at A32 (describing how coaches do not permit athletes to enroll in classes that conflict with practice, travel to away games, or tournaments).

138. See *supra* note 117 (regarding injury statistics in football).

139. Not only do revenues arise from the sale of television broadcasting rights and from ticket and apparel sales, but universities also benefit from increases in admissions applications and alumni donations following periods of athletic success. See, e.g., McCormick & McCormick, *supra* note 7, at 524–27 (2008).

140. Anthony Jerrod, *Are College Athletes Being Pimped by Agents and the NCAA?*, THE ATLANTA POST (Sept. 15, 2010), <http://atlantapost.com/2010/09/15/are-college-athletes-being-pimped-by-agents-and-the-ncaa>; David Ramsey, *Air Force and Brigham Young Going Opposite Directions*, STANDARD-EXAMINER (Sept. 13, 2010), <http://www.standard.net/topics/sports/2010/09/13/air-force-and-brigham-young-going-opposite-directions>.

141. See *supra* notes 119–26 and accompanying text (on NCAA amateurism rules), note 90 and accompanying text (describing how NCAA rules preclude any form of compensation other than the athletic scholarship which may be redeemed only by the university provider and which is reminiscent of the "company store" phenomenon).

142. McCormick & McCormick, *supra* note 7, at 509–44 (documenting the extraordinary revenues generated in college sports and their distribution).

143. RICHARD LAPCHICK ET AL., THE 2008 RACIAL AND GENDER REPORT CARD: COLLEGE SPORT I (2009), available at [http://web.bus.ucf.edu/documents/sport/2008\\_college\\_sport\\_rgrc.pdf](http://web.bus.ucf.edu/documents/sport/2008_college_sport_rgrc.pdf).

144. See *id.* (estimating that between eighty-eight and ninety-seven percent of these positions are held by European Americans throughout Divisions I, II, and III).

145. *Id.* (excluding historically black colleges and universities).

as we will show, the young men whose labor creates the product are vastly disproportionately African American.<sup>146</sup> The product they create—major college sports—is fantastically popular and generates billions of dollars annually, virtually all of which go to the other actors in the game, including the NCAA, athletic conferences, universities, coaches, and administrators.

#### A. THE NCAA AND THE ATHLETIC CONFERENCES

The NCAA receives enormous income annually from intercollegiate athletics, as a cursory review of its annual report reveals. It most recently reported revenues of \$636 million, up from \$622 million in 2007, and \$558 million in 2006,<sup>147</sup> notwithstanding the sharpest economic downturn in recent U.S. history. More than eighty-five percent of NCAA income—nearly \$550 million—was derived from selling rights to televise games, especially its annual NCAA men's basketball tournament,<sup>148</sup> and most of that income was allocated among NCAA member institutions.<sup>149</sup> In 2007-08, the NCAA distributed nearly \$360 million to Division I universities.<sup>150</sup>

The NCAA, however, also pays its own officers and staff handsomely. Myles Brand, the late-President of the NCAA, was paid more than \$1.7 million in salary and benefits in 2007-08,<sup>151</sup> and the other principal officers of the association were each paid between \$450,000 and \$587,000.<sup>152</sup> In addition, the five highest paid employees other than officers earned between \$313,000 and \$423,000,<sup>153</sup> numerous independent contractors were paid between \$980,000 and \$4.3 million,<sup>154</sup> and more than five hundred other employees and independent contractors were paid more than \$50,000 each.<sup>155</sup>

At the same time, in 2008 eighty-three percent of officers at the senior levels of the NCAA were European American while only seventeen percent were African American.<sup>156</sup> Of the sixty-eight NCAA Chief Aides and Directors, seventy-six percent were white and

146. See *infra* notes 188–235 and accompanying text.

147. NCAA, 2008 NCAA MEMBERSHIP REPORT, available at [http://web1.ncaa.org/web\\_video/membership\\_report/2008/](http://web1.ncaa.org/web_video/membership_report/2008/) [hereinafter MEMBERSHIP REPORT] (Revenue chart summarizing annual revenues from 2003–04 through 2007–08). Notably, 2008 revenues increased despite a more than \$4 million loss in investment earnings. See *id.* (2007–08 Revenue Sources).

148. *Id.* (2007–08 Revenue Sources and pie chart). Beginning with the 2003 men's basketball tournament, the NCAA began enjoying the fruits of its fantastically lucrative broadcasting-rights contract with CBS television. See Tim Martin, *Cash Up for Grabs*, LANSING ST. J., Mar. 9, 2003, at A1. Under that agreement, CBS is paying the NCAA \$6 billion over eleven years for the right to broadcast March Madness, the NCAA men's basketball tournament. Suggs, *supra* note 23, at A54.

149. See MEMBERSHIP REPORT, *supra* note 147.

150. *Id.* (2007–08 Expenses chart, describing distributions of over \$359 million to Division I members). To be sure, NCAA costs are also substantial. For example, costs associated with running NCAA championship tournaments exceeded \$110 million, while other Association-wide expenses exceeded \$100 million. *Id.* In the end, however, the NCAA itself was highly profitable, having earned approximately \$23 million of revenues in excess of total expenses. See *id.* (comparing total revenues with total expenses). The NCAA normally enjoys a multimillion-dollar surplus each year. BYERS, *supra* note 17, at 370.

151. National Collegiate Athletic Association, IRS Form 990, EIN 44-0567264, FYE Aug. 31, 2008 (on file with author).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. LAPCHICK ET AL., *supra* note 143, at 27 (Appendix 1).

only sixteen percent were African American.<sup>157</sup> Of the 195 administrators, seventy-seven percent were European American and some nineteen percent were African American.<sup>158</sup> Even among NCAA support staff, a full eighty percent were European American and, once again, just sixteen percent were African American.<sup>159</sup>

The conferences into which universities group themselves, originally representing regional ties and historic rivalries, also profit greatly from college sports. Like the NCAA, conferences also sell rights to broadcast their members' football and basketball games, thereby harvesting significant wealth.<sup>160</sup> For example, in the year ending August 31, 2008, the Southeastern Conference (SEC) received \$161.5 million and distributed more than \$135 million to its twelve member universities, an average of \$11.25 million per member.<sup>161</sup> Salaries for SEC employees, including pension and benefit contributions, exceeded \$2.6 million, with the Commissioner alone earning \$650,000.<sup>162</sup> The Big Ten Conference received almost \$218 million in income that year and distributed nearly \$207 million to its eleven members, about \$18.8 million each.<sup>163</sup> Salaries for those conference employees exceeded \$1.9 million including pension and other benefits, and the Commissioner alone earned \$1.2 million in salary and benefits.<sup>164</sup> The Atlantic Coast Conference (ACC), for its part, enjoyed revenues of nearly \$163 million and distributed \$141 million to its twelve member schools, for an average of almost \$11.8 million each.<sup>165</sup> Like the others, the Atlantic Coast Conference also compensated its employees well, paying them more than \$3.6 million in salaries and benefits and \$888,000 to the Commissioner alone.<sup>166</sup> The Big Twelve Conference, in turn, received revenues of nearly \$130 million, distributed \$103 million to its twelve member universities, and paid its Commissioner more than \$713,000 in salary and benefits as well as salaries and benefits for other employees totaling \$2.2 million.<sup>167</sup> As these figures show, the major athletic conferences are powerful commercial entities that receive and distribute hundreds of millions of dollars annually and, like the NCAA, are important economic actors in the college sports business.

Astonishingly, however, not one of the thirty conference commissioners in Division I was African American in 2008.<sup>168</sup> Put differently, "100 percent of the 11 Football Bowl Subdivision (FBS) . . . conference commissioners were white men,"<sup>169</sup> and "[i]n all of Division I, . . . all 30 (100 percent) of Division I conference commissioners were white."<sup>170</sup>

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157. *Id.* at 28.

158. *Id.* at 29.

159. *Id.* at 30.

160. See McCormick & McCormick, *supra* note 7, at 511–13 (describing function of conferences, their revenues, and member distributions).

161. Southeastern Conference, IRS Form 990, EIN 63-0377461, FYE Aug. 31, 2008 (on file with author).

162. *Id.*

163. The Big Ten Conference, Inc., IRS Form 990, EIN 36-3640583, FYE June 30, 2008 (on file with author).

164. *Id.*

165. Atlantic Coast Conference, IRS Form 990, EIN 56-0599082, FYE June 30, 2008 (on file with author).

166. *Id.*

167. Big Twelve Conference, Inc., IRS Form 990, EIN 75-2604555, FYE June 30, 2008 (on file with author).

168. LAPCHICK ET AL., *supra* note 143, at 1, 3, 31. This statistic does not take into account conference commissioners of historically black conferences. *Id.*

169. *Id.* at 3. Football Bowl Subdivision universities are those formerly known as Division I-A schools. *Id.*

170. *Id.* "Being a conference commissioner is a powerful position and those that head BCS Conferences are considered to be among the most powerful and influential people in college sport." *Id.* at 10.

Moreover, 88.3% of the 103 associate conference commissioners were European American and only 8.7% were African American.<sup>171</sup>

The NCAA has made public efforts to increase the presence of African Americans at its senior staff levels with some success,<sup>172</sup> but, as these statistics show, NCAA officials remain predominantly European American. The conferences, however, appear to have done little to address the regime over which they preside, in which people of a minority race provide wealth and entertainment for the majority race, while laboring under rules that prevent their own economic advancement.

#### B. UNIVERSITY PRESIDENTS, COACHES, AND ATHLETIC DIRECTORS

While the compensation of university presidents is only tangentially related to the performance of their universities' athletic teams, that performance is nevertheless of substantial significance to the institutions and to their presidents.<sup>173</sup> Thus, it is noteworthy that more than 92.5% of university presidents at Football Bowl Subdivision institutions were European American in 2007-08 while only 2.5% were African American.<sup>174</sup>

The most obvious beneficiaries of the college sports business, of course, are football and men's basketball coaches, many of whose salaries and benefits lead the front pages of the nation's sports sections.<sup>175</sup> Other beneficiaries, however, include assistant coaches, athletic directors, and other athletic department personnel. As regards coaches generally, European Americans "dominate the head coaching ranks on men's teams,"<sup>176</sup> holding nearly ninety percent of all head coaching positions in Division I, while African Americans hold only seven percent.<sup>177</sup> The representation of African-American head coaches was greatest among the ranks of men's Division I head basketball coaches, where nearly twenty-three percent were African American.<sup>178</sup> Of the head coaches for the current top twenty-five-ranked men's basketball teams, however, only sixteen percent are African American.<sup>179</sup>

171. *Id.* at 10.

172. *See id.* at 8-9.

173. *See, e.g.*, Frank G. Splitt, *The Economics of College Sports*, CHRON. HIGHER EDUC. 3 (Oct. 22, 2004) available at [http://www.thedrakegroup.org/Splitt\\_Essays.pdf](http://www.thedrakegroup.org/Splitt_Essays.pdf).

174. LAPCHICK ET AL., *supra* note 143, at 3.

175. Data regarding the extraordinary levels of compensation paid to head football and men's basketball coaches have been so thoroughly chronicled that we provide only a few examples here. The most recent instance of this salary escalation is that of Mack Brown, the head football coach at the University of Texas, whose salary was recently increased to \$5 million annually, despite severe budgetary shortfalls in the university's core programs. Sean Braswell, Op-Ed., *How A Tiny Russian Nesting Doll Affects UT's Greater Mission*, AUSTIN AM.-STATESMAN, Jan. 22, 2010, available at <http://www.statesman.com/opinion/braswell-how-a-tiny-russian-nesting-doll-affects-191672.html>; *see generally* McCormick & McCormick, *supra* note 7, at 527-32 (detailing compensation packages for many high-profile head coaches); *Compensation for Division I Men's Basketball Coaches: What the Coaches Earn at the 65 Schools that Played in the 2006 NCAA Tournament*, USA TODAY, Mar. 8, 2007, at C8.

176. LAPCHICK ET AL., *supra* note 143, at 4.

177. *Id.*

178. *Id.* at 14. Although in 2008, there was a decline in the percentage of African-American men's basketball coaches in Division I, that sport "continues to be the best representation of diversity at all levels and across all sports." *Id.* "There are no other . . . sports that even came close to being as diverse as Division I men's basketball." *Id.*

179. *See infra* notes 187, 220-222 and accompanying text (providing information about the racial composition of the top twenty-five ranked men's basketball teams according to the ESPN/USA Today poll from January 2010. The racial composition of head coaches from those teams was examined with a finding that twenty-one of the coaches were European American and the other four, or sixteen percent, were African American).

In marked contrast to the record in men's basketball, during 2008, only six of the 120 head football coaches at FBS universities were African Americans—a mere five percent.<sup>180</sup> Of the head coaches for the top twenty-five ranked football teams at the end of the 2009 season, only one was African American.<sup>181</sup> Additionally, some eighty-five percent of offensive and defensive coordinators at all FBS schools were of European-American descent, while only twelve percent were of African-American ancestry.<sup>182</sup> Moreover, European Americans held ninety percent of the athletic director positions in Division I during that period, while African Americans held just seven percent.<sup>183</sup> In fact, these percentages were almost exactly replicated in the associate and assistant athletic director positions at Division I universities as well.<sup>184</sup>

Our recent review of current top college football and men's basketball teams permitted an assessment of the racial composition of top administrators at each of the respective universities.<sup>185</sup> We reviewed photographs of the university president or chancellor, the athletic director, and the head football or men's basketball coach for each institution, and determined the racial composition of those individuals. For the top twenty-five football teams, only three of the seventy-five surveyed administrators—four percent—were African American.<sup>186</sup> For the top twenty-five men's basketball teams, only six of the seventy-five surveyed administrators—eight percent—were African American.<sup>187</sup>

To be sure, there are a great many persons, institutions, and corporations that profit from major college sports and we examine only a few, but those we do examine—the NCAA, conferences, and universities—have created and now maintain the college sports industry, an industry of enormous economic power. That power translates to billions of dollars annually which generously benefits the NCAA, conferences, universities, coaches, and other administrators. At the same time, those individuals are predominantly, and sometimes exclusively, European American.

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180. LAPCHICK ET AL., *supra* note 143, at 5, 14, 37. To his credit, Mr. Brand conceded that the underrepresentation of African-American head football coaches is an embarrassment in college athletics and that “the talent pool exists and it contains men who are ready and able to successfully lead these teams . . . .” *Id.* at 8 (quoting Miles Brand, former Executive Director for the NCAA).

181. See *infra* notes 186, 210–212 and accompanying text (providing information about the racial composition of the top twenty-five ranked football teams according to the final 2009 BCS standings. The racial composition of head coaches from those teams was examined with a finding that only one – four percent – was African American).

182. LAPCHICK ET AL., *supra* note 143, at 15.

183. *Id.* at 6.

184. *Id.* At the associate athletic director position, European Americans held eighty-nine percent of the Division I positions, and African Americans held seven percent. *Id.*

185. As described below, we identified elite programs by referring to the ESPN/USA Today poll for the top-twenty-five men's basketball teams as of January, 2010, ESPN/USA Today, *2010 NCAA Men's Basketball Rankings - Week 9 (Jan. 11)*, ESPN/USA TODAY COACHES POLL, [http://espn.go.com/mens-college-basketball/rankings/\\_year/2010/week/10/seasontype/2](http://espn.go.com/mens-college-basketball/rankings/_year/2010/week/10/seasontype/2) (last visited Oct. 13, 2010) (showing ranked basketball teams) (on file with author) [hereinafter January 2010 Basketball Poll], and to the final 2009 BCS standings for the top-twenty-five football teams. ESPN, *BCS Standings - December 6, 2009*, <http://espn.go.com/college-football/bcs> (last visited Oct. 13, 2010) (showing ranked football teams) (on file with author) [hereinafter January 2010 Football Standings].

186. Seventy were European American, one was Hispanic, and one was Asian.

187. Sixty-six were European American, two were Hispanic, and one was Asian.

### C. THE ATHLETES

In sharp relief to the racial composition of those who receive compensation for their work in the college sports industry, the laborers most immediately responsible for this important entertainment product—the athletes themselves—are forbidden from benefiting economically from the wealth their efforts create except to a limited degree. And these athletes are overwhelmingly disproportionately African American. While African-American males make up sixty percent of men’s basketball players and forty-six percent of football players in all of Division I,<sup>188</sup> these statistics only begin to describe the concentration of African Americans producing major college sports revenue. Indeed, the data show that African Americans not only populate the class of persons producing college sports revenue at astonishingly high rates, they have been doing so for some time, and will likely continue to do so for the foreseeable future.<sup>189</sup>

To determine the racial composition of NCAA football and men’s basketball players at the elite levels of the sport—where the revenues generated are the greatest<sup>190</sup>—we first examined the races of the young men populating the starting lineups of the top twenty-five NCAA football and men’s basketball teams in 2004-05.<sup>191</sup> Using U.S. Department of Education data, we also recorded the racial composition of the undergraduate student bodies at those same institutions to determine whether the racial disparities between the football and men’s basketball players and their fellow students mirrored those between the athletes and the managers of the enterprise. If they did, we decided, then a logical conclusion one could draw is that the African-American athletes are on campus for a special purpose—to provide high-level athletic entertainment to the rest of the predominantly European-American university community, and not to further their own intellectual development. In 2009-10 we expanded our review to examine the racial composition of the university

188. LAPCHICK ET AL., *supra* note 143, at 12 (“The percentage of Division I African-American male student-athletes in basketball reached 60.4 percent in this reporting period. The percentage for African-American football players was up slightly to 45.9 percent.”).

189. *See infra*, notes 191–235 and accompanying text.

190. Winning athletic programs generate the greatest revenue because athletics success is rewarded financially. For example, football teams earn revenue for their conferences by winning, or even attending, a BCS Bowl Game. *See* Bowl Championship Series, *The BCS Is...*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809716> (last visited Feb. 22, 2010) (on file with author). “Each conference whose team qualifies automatically for the BCS receives approximately \$18 million in net revenue. A second team qualifying brings an additional \$4.5 million to its conference.” *Id.* Moreover, men’s basketball teams generate payments for their conferences for each game they play in the March Madness men’s basketball tournament. *See* MEMBERSHIP REPORT, *supra* note 147, at 14 (“For Division I members, the plan consists of basketball fund distribution based on historical performance in the Division I Men’s Basketball Championship...”). “In 2007–08, each basketball unit was approximately \$191,000 . . . [and i]n 2008–09, each basketball unit will be approximately \$206,020 . . . .” NCAA, 2008–09 REVENUE DISTRIBUTION PLAN 8 (2009) (on file with author). Thus, in 2009 for each game won in the men’s basketball tournament, the team earned its conference approximately \$206,020. Conferences, in turn, distribute their revenues, in large part, to their member universities. *See, e.g.*, Big Twelve Conference, Inc., IRS Form 990, EIN 75-2604555, FYE June 30, 2008 (on file with author). The more athletic success a team enjoys, the more revenue is generated for its conference, and thus, for the conference members.

191. The top twenty-five teams for 2004 were identified by referring to the preseason ESPN/USA Today Coaches polls for college football and for men’s basketball in the fall of 2004. *See* ESPN, *2004 NCAA Football Rankings – Preseason: USA Today Poll*, [http://espn.go.com/college-football/rankings/\\_/year/2004/week/1](http://espn.go.com/college-football/rankings/_/year/2004/week/1) (last visited Oct. 13, 2010) (revealing top twenty-five football teams in 2004) [hereinafter 2004 Football Poll]; ESPN, *2005 NCAA Men’s Basketball Rankings – Preseason: ESPN/USA Today Coaches Poll*, [http://espn.go.com/mens-college-basketball/rankings/\\_/year/2005/week/1/seasontype/2](http://espn.go.com/mens-college-basketball/rankings/_/year/2005/week/1/seasontype/2) (last visited Oct. 13, 2010) (revealing top twenty-five basketball teams in 2004) [hereinafter 2004 Basketball Poll]. The starting lineups for each team were revealed on each university’s website.

president or chancellor, head coach, and athletic director at each of the top twenty-five schools<sup>192</sup> to compare the racial makeup of those central managerial figures with those of their athletes. To complete our review and to gain a glimpse of the future, we then examined the racial composition of the top high school football and men's basketball athletes<sup>193</sup>—the young men who will become the major college laborers for the next four or five years.

Ours is not a longitudinal study. That is, we did not examine precisely the same data over time.<sup>194</sup> In 2004-05, for example, we examined the racial composition of the starting lineups for each of the top twenty-five football and men's basketball teams,<sup>195</sup> while in 2009-10 we reviewed the racial composition of each entire basketball team. For football, we continued to examine only the starting lineup. And as we have noted, in 2009 we also expanded our investigation to include the race of three principal administrators—the head coach, the athletic director, and the university president or chancellor—at each institution. Our purpose in these varied approaches was to review the data in several ways to learn whether it supported our thesis in each of those ways. Here are our findings.

1. THE PAST – 2004-05
  - a. FOOTBALL

The 2004-05 USA Today/ESPN Coaches Top 25 preseason college football poll<sup>196</sup> ranked the following NCAA universities in order of their predicted finish in the ensuing football season. We examined photographs available on each of those teams' websites to determine the race of each player in the starting lineup.<sup>197</sup> Accompanying that USA

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192. For 2009-10, the top twenty-five college football teams were identified by referring to the 2009 BCS Final Standings as of January 2010. January 2010 Football Standings, *supra* note 185. The top twenty-five men's basketball teams were identified by referring to a January 2010 ESPN/USA Today Coaches poll. January 2010 Basketball Poll, *supra* note 185.

193. The 2010 high school athlete rankings were derived from the Rivals.com Prospect Ranking Rivals 250 for the class of 2010. Rivals.com, *Prospect Ranking Rivals 250 for Class of 2010*, RIVALS.YAHOO.COM, [http://rivals100.rivals.com/viewrank.asp?SID=880&Year=2010&ra\\_key=2303](http://rivals100.rivals.com/viewrank.asp?SID=880&Year=2010&ra_key=2303) [hereinafter Rivals football rankings] (last visited Feb. 24, 2010) (providing top 250 ranked football players from the high school class of 2010); Rivals.com, *Prospect Ranking Rivals 150 for Class of 2010*, RIVALS.YAHOO.COM, [http://basketballrecruiting.rivals.com/viewrank.asp?SID=910&Year=2010&ra\\_key=1909](http://basketballrecruiting.rivals.com/viewrank.asp?SID=910&Year=2010&ra_key=1909) [hereinafter Rivals basketball rankings] (last visited Feb. 24, 2010) (providing top 150 ranked basketball players from the high school class of 2010).

194. For this reason, we draw no judgments as to potential trends in the data.

195. In basketball, this data included the first substitute, or "sixth man." In football, this data included the starting eleven players on offense and on defense. Occasionally, the university listed a twelfth player as a starter.

196. 2004 Football Poll, *supra* note 191.

197. Of course, race is a social construct, rather than a scientifically objective phenomenon, and is, therefore, not always readily determinable or, in fact, definable. See Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. J. 7, 14–21 (1997) (describing scientists' difficulties in objectively confronting race, a concept with no scientific reality). Consequently, labeling a player one race or another is sometimes challenging and may not even be a meaningful exercise except that many individuals in the United States and elsewhere regularly make racial distinctions, and those distinctions have had monumental social consequences. That is, despite the lack of biological objectivity, race does have a "powerful social reality and is very instrumental in shaping our individual and collective identities." John A. Powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. J. 99, 99 (1997); see Omi, *supra*, at 21.

The most valid way to classify players racially might be to ask each what race or races he considers himself to be, but information regarding individual players' racial self-identification is not publicly available and is confidential under the Buckley Amendment. See Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A.



Today/ESPN ranking below is a description of the number and percentage of African Americans and European Americans, as well as the number of players of other racial heritage (or whose race could not be determined) on each starting lineup. The percentages of African Americans and European Americans in the undergraduate student body at each respective institution are also shown.

**2004/05 USA TODAY / ESPN COACHES POLL – TOP 25 COLLEGE FOOTBALL TEAMS  
STARTING LINEUPS<sup>198</sup>**

School	Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans	Overall Undergraduate Racial Composition	
						Percent African-Americans <sup>199</sup>	Percent European-Americans <sup>200</sup>
USC	11	6	5	65% <sup>201</sup>	35% <sup>202</sup>	6.7%	47.5%
University of Oklahoma	18	4	1	82%	18%	5.9%	74.4%
LSU	18	4	0	82%	18%	9.5%	80.1%
Georgia	15	7	0	68%	32%	4.8%	88.2%
Miami	18	3	1	86%	14%	9.6%	50.0%
Florida State	19	3	0	86%	14%	11.9%	73.2%
Michigan	12	9	1	57%	43%	8.0%	63.8%
Texas	18	4	0	82%	18%	3.6%	60.6%
Ohio State	9	13	0	41%	59%	8.1%	78.0%
Florida	18	4	0	82%	18%	8.5%	70.0%
West Virginia	15	8	0	65%	35%	4.0%	90.6%
Iowa	13	9	0	59%	41%	2.1%	86.1%

§ 1232(g) (1990 & Supp. 1995). Therefore, we made assessments of race by examining player photographs. Because a person's treatment is often affected by others' visual perceptions of his race, whether accurate or not, an assessment based on photographic information seemed relevant to our inquiry. Nonetheless, instances arose in which we could not determine probable race by examining photographs, and in those cases, as well as for players of racial origins other than European American or African American, we excluded the player from our computations. Thus, if a team had twenty-one African-American players and one whose race we could not determine, we treated the team as being composed of twenty-one African Americans out of twenty-one total players, not twenty-one African Americans out of twenty-two players. In this manner, the unclassified player would not be presumed to be one race or another.

198. Study, including photographs, on file with author.

199. NATIONAL CENTER FOR EDUCATION STATISTICS, Search for Schools, Colleges, and Libraries, U.S. DEPT. OF EDUC. [hereinafter U.S. DEPT. OF EDUC.], <http://nces.ed.gov/globallocator> (search for each college by checking the "Colleges" box under "Institutions," by choosing to sort by "Name," by entering college name in name field, and by clicking on search) (searches performed on Apr. 3, 2005) (showing percent of undergraduate enrollment by race/ethnicity upon search for each university).

200. *Id.*

201. Computed as follows:  $11 / 17 = 65\%$ .

202. Computed as follows:  $6 / 17 = 35\%$ .

School	Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans	Overall Undergraduate Racial Composition	
						Percent African-Americans <sup>199</sup>	Percent European-Americans <sup>200</sup>
Kansas State	11	9	1	55%	45%	2.9%	88.5%
Tennessee	17	1	4	94%	6%	7.3%	86.6%
California	10	10	2	50%	50%	4.0%	30.0%
Clemson	18	4	0	82%	18%	7.5%	82.8%
Missouri	16	6	0	73%	27%	5.6%	84.3%
Auburn	18	5	0	78%	22%	7.3%	87.8%
Virginia	16	5	0	76%	24%	8.5%	67.2%
Maryland	16	7	0	70%	30%	12.3%	59.1%
Utah	4	10	8	29%	71%	0.6%	80.2%
Wisconsin	12	8	1	60%	40%	2.4%	86.0%
Minnesota	14	9	0	61%	39%	4.3%	76.5%
Purdue	13	8	1	62%	38%	3.4%	82.9%
Oregon	11	7	4	61%	39%	1.7%	74.7%

These figures show that in 2004-05 African Americans comprised between twenty-nine and ninety-four percent of the starting lineups of these top teams, while European Americans constituted between six and seventy-one percent. On average, sixty-eight percent of those athletes were African American while only thirty-two percent were European American. By contrast, as a percentage of the overall student body, African Americans constituted an average of only 6.0% of the student population, while European Americans constituted 74.0%.

As an initial matter, it is noteworthy that on average, over two-thirds of these starting football players are of African-American descent. This is an indication that African Americans are, to a large measure, responsible for creating the product of college football entertainment. Moreover, the concentration of African Americans on these football teams greatly exceeds that in the student body overall, and while football unquestionably creates an opportunity for some African Americans to experience some elements of college life, these data at least suggest that universities are using African Americans for an athletic purpose, not solely to educate them. Unless the athletes reap benefits proportional to those enjoyed by the university, this situation could well be viewed as exploitation. And given the contrasting racial compositions of athletes on the one hand, and university and athletic administrators on the other, such exploitation could fairly be said to be racial in character.

## b. MEN'S BASKETBALL

Like its football counterpart, the 2004-05 USA Today/ESPN Coaches Top 25 preseason college basketball poll<sup>203</sup> ranked the following NCAA universities in order of their predicted finish in the ensuing basketball season. Again, we made racial classifications by examining athletes' photographs. Accompanying that USA Today/ESPN Coaches ranking is a description of the number and percentage of African Americans and European Americans on each starting lineup, as well as the number of players of other racial heritage (or whose racial identity could not be determined). The percentages of African Americans and European Americans in the undergraduate student body at each institution are also provided.

**2004/05 USA TODAY / ESPN COACHES POLL – TOP 25 COLLEGE BASKETBALL TEAMS  
STARTING LINEUPS<sup>204</sup>**

School	Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans	Overall Undergraduate Racial Composition	
						Percent African-Americans <sup>205</sup>	Percent European-Americans <sup>206</sup>
Kansas	5	1	0	83% <sup>207</sup>	17% <sup>208</sup>	3.2%	83.8%
Wake Forest	5	1	0	83%	17%	6.7%	86.8%
North Carolina	6	0	0	100%	0%	11.1%	75.7%
Georgia Tech	5	1	0	83%	17%	7.5%	69.3%
Illinois	4	2	0	67%	33%	7.3%	66.2%
Syracuse	4	2	0	67%	33%	6.1%	68.1%
Connecticut	6	0	0	100%	0%	4.8%	74.2%
Oklahoma State	4	2	0	67%	33%	3.5%	79.1%
Kentucky	5	1	0	83%	17%	5.4%	88.8%
Michigan State	4	2	0	67%	33%	8.7%	78.7%
Arizona	6	0	0	100%	0%	3.0%	66.3%

203. 2004 Basketball Poll, *supra* note 191.

204. Study, including photographs, on file with author.

205. U.S. DEPT. OF EDUC., *supra* note 199 (showing percent of undergraduate enrollment by race/ethnicity upon search for each university).

206. *Id.*

207. Computed as follows:  $5 / 6 = 83\%$ .

208. Computed as follows:  $1 / 6 = 17\%$ .

School	Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans	Overall Undergraduate Racial Composition	
						Percent African-Americans <sup>205</sup>	Percent European-Americans <sup>206</sup>
Duke	4	2	0	67%	33%	10.2%	59.5%
Louisville	5	0	1	100%	0%	13.5%	79.9%
Mississippi State	4	2	0	67%	33%	19.4%	77.1%
Texas	4	2	0	67%	33%	3.6%	60.6%
Maryland	5	1	0	83%	17%	12.3%	59.1%
Pittsburgh	6	0	0	100%	0%	9.3%	81.8%
Alabama	6	0	0	100%	0%	13.7%	81.7%
North Carolina State	4	1	0	80%	20%	10.2%	80.6%
Wisconsin	2	3	0	40%	60%	2.4%	86.0%
Notre Dame	4	1	0	80%	20%	3.6%	79.5%
Florida	2	3	0	40%	60%	8.5%	70.0%
Memphis	6	0	0	100%	0%	35.6%	58.5%
Washington	5	1	0	83%	17%	2.6%	52.9%
Stanford	2	3	0	40%	60%	9.7%	44.0%

These figures show that African Americans comprised between forty and one hundred percent of the starting lineups of these top basketball teams, while European Americans constituted between zero and sixty percent. On average, seventy-eight percent of these athletes were African American while only twenty-two percent were European American. Simultaneously, African Americans constituted an average of 8.5% of students in the undergraduate student body at those universities, while European Americans constituted 65.5%.

Again, the predominance of African Americans on the starting lineups of the top basketball teams indicates that African Americans are greatly responsible for creating this popular and lucrative entertainment product. Moreover, their strikingly greater concentration on the teams than in the overall student body populations at least suggests that universities are using African Americans for athletic, and, therefore, commercial, purposes, rather than to provide them with an education. As we noted above regarding football players, unless athletes receive a benefit proportional to that which universities enjoy, their treatment could be said to be exploitative. And given the dramatic contrast between the races of the athletes and the managers, such exploitation has obvious racial implications.

## 2. THE PRESENT – 2009-10

### a. FOOTBALL

In 2009-10 we examined the actual outcome of the NCAA football season rather than the preseason predictions, as we had done in 2004-05. For this purpose, we reviewed the rosters of the final Bowl Championship Series (BCS) top twenty-five teams.<sup>209</sup> As before, we looked at photographs of the starting lineups of each team to determine the number of African Americans and European Americans, as well as the number of players of other racial heritage (or whose racial identity could not be determined). Again, we also recorded the percentages of African Americans and European Americans in the undergraduate student body on each campus, but unlike 2004-05, we also noted the racial composition of key university administrators—the president or chancellor, the head coach, and the athletic director at each university.<sup>210</sup>

**FINAL 2009 BCS STANDINGS - TOP 25 FOOTBALL TEAMS  
STARTING LINEUPS<sup>211</sup>**

School	Number of African-American Players	Number of European-American Players	Number of Players of Other or Unknown Racial Origin	Percentage of African-American Players	Percentage of European-American Players	Overall Undergraduate Racial Composition		Racial Composition of Top Administrators <sup>212</sup>
						Percent African-Americans <sup>213</sup>	Percent European-Americans <sup>214</sup>	
Alabama	14	8	0	64% <sup>215</sup>	36% <sup>216</sup>	11.2%	83.7%	100% white
Texas	14	8	0	64%	36%	4.8%	54.7%	100% white
Cincinnati	13	9	0	59%	41%	11.3%	76.9%	100% white
TCU	15	7	0	68%	32%	5.4%	74.1%	100% white
Florida	19	2	1	90%	10%	10.1%	62.7%	100% white
Boise St.	12	10	0	55%	45%	1.5%	80.4%	100% white
Oregon	9	10	3	47%	53%	1.8%	74.9%	100% white
Ohio St.	12	10	0	55%	45%	6.7%	79.2%	67% white
Georgia Tech	16	6	0	73%	27%	6.8%	65.0%	100% white
Iowa	8	12	2	40%	60%	2.2%	83.9%	100% white
Virginia Tech	16	5	1	76%	24%	3.9%	73.8%	100% white
LSU	17	5	0	77%	23%	9.0%	79.8%	100% white

209. January 2010 Football Standings, *supra* note 185.

210. Obviously, these three top administrators are not the only persons who benefit from college athletic revenues. Ultimately, however, no one is more important than these three figures in determining intercollegiate athletic policy.

211. Study, including photographs, on file with author.

212. For this category, we considered the three posts of university president or chancellor, the athletic director, and the head coach for each school. Again, if someone's race was unknown, he or she was not included in the computation.

213. U.S. DEPT. OF EDUC., *supra* note 199 (searches performed on Feb. 2, 2010) (showing percent of undergraduate enrollment by race/ethnicity upon search for each university).

214. *Id.*

215. Computed as follows:  $14 / 22 = 64\%$ .

216. Computed as follows:  $8 / 22 = 36\%$ .

School	Number of African-American Players	Number of European-American Players	Number of Players of Other or Unknown Racial Origin	Percentage of African-American Players	Percentage of European-American Players	Overall Undergraduate Racial Composition		Racial Composition of Top Administrators <sup>212</sup>
						Percent African-Americans <sup>213</sup>	Percent European-Americans <sup>214</sup>	
Penn St.	14	8	0	64%	36%	4.1%	83.2%	100% white
Brigham Young	3	16	3	16%	84%	0.5%	86.7%	100% white
Miami (FL)	17	4	1	81%	19%	8.0%	45.2%	50% white <sup>217</sup>
West Va.	14	8	0	64%	36%	3.3%	89.4%	100% white
Pittsburgh	12	10	0	55%	45%	8.4%	79.8%	100% white
Oregon St.	9	9	4	50%	50%	1.6%	71.4%	100% white
Okla St.	16	6	0	73%	27%	4.2%	76.8%	100% white
Arizona	13	6	3	68%	32%	3.1%	64.3%	100% white
Stanford	7	14	1	33%	67%	9.9%	38.2%	100% white
Nebraska	12	9	1	57%	43%	2.4%	83.2%	100% white
Utah	10	6	6	63%	38%	1.1%	78.0%	100% white
USC	16	4	2	80%	20%	5.4%	46.6%	67% white
Wisconsin	12	10	0	55%	45%	2.8%	78.1%	100% white <sup>218</sup>

These data show that African Americans comprise between sixteen and ninety percent of the starting lineups of these top football teams, while European Americans constitute between ten and eighty-four percent. On average, however, sixty-one percent of these athletes are African American while thirty-nine percent are European American. Simultaneously, African Americans constitute an average of only five percent of students in the undergraduate student body at these universities, while European Americans constitute seventy-two percent, at least suggesting again that universities are enrolling these African Americans for the special, commercial purpose of fielding successful athletic teams.

As noted above, only three of the seventy-five surveyed administrators from these schools, four percent, were African Americans.<sup>219</sup> Of those, two were university athletic directors and one was a head football coach, but not one university president at these twenty-five schools was African American. The fact that three-fifths of the football athletes, but only one in twenty-five administrators, are African American, reveals the pattern we describe—that predominantly African American athletes are creating wealth for European Americans.

#### b. MEN'S BASKETBALL

217. University of Miami President Donna Shalala, an Asian, was not included in this computation because we contrast only African Americans and European Americans in our examination. Therefore, because there was one African American, one European American, and one Asian at this institution, fifty percent of those we examined, or one of two, were counted as white, and fifty percent were recorded as black.

218. In this circumstance, the athletic director was Hispanic and was not included in the computation. Because the university president and the head coach were both white, we recorded this statistic as having been 100% white, or two out of two individuals.

219. See *supra* note 186 and accompanying text.

To complete our examination of present conditions, we undertook a mid-season review of the top twenty-five NCAA Division I basketball teams as ranked by ESPN/USA Today in January 2010.<sup>220</sup> This time, however, we did not limit our examination to each university's starting team. Rather, to address potential concerns regarding the breadth of our sample, we extended our review to include each team's entire roster. The following chart reveals our findings:

**ESPN / USA TODAY POLL, 2009-10 SEASON TOP 25 BASKETBALL TEAMS  
ENTIRE ROSTER<sup>221</sup>**

School	Number of African-American Players	Number of European-American Players	Number of Players of Other or Unknown Racial Origin	Percentage of African-American Players	Percentage of European-American Players	Overall Undergraduate Racial Composition		Racial Composition of Top Administrators <sup>222</sup>
						Percent African-Americans <sup>223</sup>	Percent European-Americans <sup>224</sup>	
Texas	11	5	0	69% <sup>225</sup>	31% <sup>226</sup>	4.8%	54.7%	100% white
Kentucky	10	3	0	77%	23%	6.5%	86.2%	100% white
Kansas	10	7	0	59%	41%	3.7%	80.6%	67% white
Villanova	10	1	1	91%	9%	4.8%	76.2%	100% white
Syracuse	10	5	0	67%	33%	7.4%	57.8%	67% white
Purdue	6	11	0	35%	65%	3.4%	80.6%	100% white
Duke	4	10	0	29%	71%	9.7%	50.7%	100% white
Michigan State	8	6	0	57%	43%	8.0%	75.9%	100% white
W. Virginia	9	7	0	56%	44%	3.3%	89.4%	100% white
Tennessee	11	4	0	73%	27%	8.1%	85.0%	100% white
Georgetown	9	2	0	82%	18%	6.5%	64.7%	67% white
Kansas St.	11	0	2	100%	0%	3.5%	84.6%	100% white
North Carolina	10	6	0	63%	38%	10.9%	70.6%	100% white
Gonzaga	7	7	1	50%	50%	1.4%	76.8%	100% white
Connecticut	11	3	0	79%	21%	5.1%	64.3%	100% white
Wisconsin	5	10	0	33%	67%	2.8%	78.1%	100% white
BYU	4	8	1	33%	67%	0.5%	86.7%	100% white
Georgia Tech	12	4	0	75%	25%	6.8%	65.0%	67% white
Clemson	11	4	0	73%	27%	7.2%	81.9%	67% white
Pittsburgh	14	1	0	93%	7%	8.4%	79.8%	100% white

220. January 2010 Basketball Poll, *supra* note 185.

221. Study, including photographs, on file with author.

222. We include the university president or chancellor, the head coach, and the athletic director. Again, if an individual's race was unknown, he or she was not included in the computation.

223. U.S. DEPT. OF EDUC., *supra* note 199 (searches performed on Jan. 28, 2010) (showing percent of undergraduate enrollment by race/ethnicity upon search for each university).

224. *Id.*

225. Computed as follows:  $11 / 16 = 69\%$ .

226. Computed as follows:  $5 / 16 = 31\%$ .

School	Number of African-American Players	Number of European-American Players	Number of Players of Other or Unknown Racial Origin	Percentage of African-American Players	Percentage of European-American Players	Overall Undergraduate Racial Composition		Racial Composition of Top Administrators <sup>222</sup>
						Percent African-Americans <sup>223</sup>	Percent European-Americans <sup>224</sup>	
Temple	10	3	2	77%	23%	16.9%	57.6%	100% white
Butler	6	9	0	40%	60%	3.7%	84.5%	100% white
Mississippi	11	2	0	85%	15%	13.3%	79.0%	100% white
Baylor	11	2	0	85%	15%	7.5%	70.8%	100% white
Florida St.	9	5	0	64%	36%	10.6%	72.0%	67% white

These figures show that African Americans comprise between thirty-three and one hundred percent of the entire basketball teams at these universities, while European Americans constitute between seven and seventy-one percent of those rosters. Overall, however, African Americans currently comprise an average of sixty-six percent of those athletes, while European Americans constitute just thirty-four percent. Because African Americans comprise such a large proportion of the players on these top basketball teams, it can be said that elite college basketball, like college football, is, to a large degree, a product of African-American labor. At the same time, however, African-American students constitute an average of just seven percent of the undergraduate student bodies at these universities, while European Americans comprise seventy-four percent. Of course, these data give rise to the same concerns about racial exploitation by universities that we have observed above with regard to both football and basketball programs in 2004-05 as well as for football players today.

It bears remembering that in contrast to the players' demographics, only six of the seventy-five surveyed administrators—or eight percent—from these top basketball schools were African Americans,<sup>227</sup> and only one African American served as a university president or chancellor. Thus, what is true for football is also true for basketball—African-American labor is generating wealth for a class of mostly European-American individuals. This would not necessarily be objectionable if those laborers were being compensated proportionately, but university-supported NCAA amateurism rules purposefully prohibit this very outcome, thereby preserving this modern form of apartheid.<sup>228</sup>

### 3. THE FUTURE

The racial composition of future NCAA football and men's basketball players can best be gauged by examining the races of the young men who will enter the college sports business in the near future. Rivals.com (Rivals) ranks prospective college football and basketball players, and its rankings are closely followed by millions.<sup>229</sup> Each year, Rivals ranks the top 250 high school senior football players and top 150 basketball players. Each young man on these lists is a highly coveted athlete with an opportunity to attend the NCAA

227. See *supra* note 187 and accompanying text.

228. See *supra* notes 119-126 and accompanying text.

229. See Rivals.com, *About Us*, RIVAL.COM, <http://www.rivals.com/content.asp?CID=36178>.



institution of his choice.<sup>230</sup> Most, if not all, will attend major Division I universities with elite football and basketball programs for the next four or five years, and together they will form the foundation for successful college teams. In a sense, they will soon become the driving force behind major NCAA sports, and it will be their labor that will generate the enormous projected profits for that enterprise. For this reason, an examination of the races of these future athletes not only can provide clear evidence of the probable racial composition of NCAA football and basketball programs in the next five years, but also, if past is prologue, may show that the current pattern will continue in which African Americans disproportionately create, but are denied, the vast revenue of college sports.

The following charts depict the racial composition of the leading high school senior football and men's basketball prospects in the United States as ranked and published by Rivals.<sup>231</sup> We created this chart by examining the Rivals rankings and the associated biographies of each ranked athlete. The biographies generally included players' photographs. By examining these available photographs, we made a determination as to the race of each young man.<sup>232</sup> When race was ambiguous or a photograph was not available, we did not attempt to determine the individual's race, and instead included him in the charts below as "unknown."

#### **RIVALS.COM - TOP 250 HIGH SCHOOL SENIOR FOOTBALL PROSPECTS**

##### **Class of 2010<sup>233</sup>**

Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans
198	44	8	81.8	18.2

#### **RIVALS.COM - TOP 150 HIGH SCHOOL SENIOR BASKETBALL PROSPECTS**

##### **Class of 2010<sup>234</sup>**

Number of African-Americans	Number of European-Americans	Number of Players of Other or Unknown Racial Origin	Percentage of African-Americans	Percentage of European-Americans
131	17	2	88.5	11.5

These figures<sup>235</sup> demonstrate unmistakably that the future laborers in the college sports vineyards will be, as they have been, vastly disproportionately African-American

230. *See id.*

231. *See* Rivals football rankings, *supra* note 193; Rivals basketball rankings, *supra* note 193.

232. When the Rivals ranking did not include a photograph, we were sometimes able to find photographs from alternative media sources.

233. Study, including photographs, on file with author.

234. Study, including photographs, on file with author.

235. In determining the percentage of African Americans and European Americans for these two tables, we excluded from the computation the players whose race was unknown. Thus, for the top 250 football player

young men. And there is little to suggest that the managers of college sports will differ from what they are today, disproportionately European American. When amateurism rules apply only to athletes, and not to managers and other beneficiaries, those rules will continue to burden African Americans disproportionately and to reserve the wealth they create largely for the benefit of European Americans.

#### IV. THE END GAME – ADVERSE IMPACT THEORY

The college sports industry has flourished fantastically in recent decades, and the NCAA's amateurism rules have enabled it to grow, in substantial part, from the labor and sacrifice of the athletes whose economic power is sharply limited, and whose lives are otherwise controlled, by NCAA rule.<sup>236</sup> These amateurism rules prevent athletes from benefitting economically from their skill, effort, or even their reputation, and reserve all but a fraction of that bounty for others.<sup>237</sup> Coincidentally, as we have shown, the beneficiaries of this regime are predominantly European American, while the athletes whose work creates the product are vastly disproportionately African American.<sup>238</sup>

We do not claim that universities, through the NCAA, either created or have fostered this system to burden African Americans purposely, but that has unquestionably become one of its effects, and U.S. justice properly looks skeptically upon rules that, while neutral on their face, systematically burden racial minorities in grossly disproportionate ways.<sup>239</sup> This skepticism, borne of our nation's catastrophic experiment with slavery and its struggles to deal with the vestiges of that regime, has given rise to the adverse or disparate impact theory of employment discrimination which prohibits an employer from using facially neutral rules that have an unjustified adverse impact upon the members of a protected class.<sup>240</sup> Put

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ranking, there were 198 African Americans out of a total of 242 players whose race was known, or 81.8%, and forty-four European Americans out of 242, or 18.2%. In determining the percentage of African Americans and European Americans for the top 150 basketball player ranking, there were 131 African Americans out of 148 players whose race could be determined, or 88.5%, and seventeen European Americans out of 148, or 11.5%. Were it possible to identify the race of each ranked player precisely, the percentages in each table could be slightly higher or lower than reflected here.

236. See *supra* notes 119–26 and accompanying text.

237. See *supra* notes 119–26 and accompanying text.

238. See *supra* Part III.B-C.

239. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (condemning practices that are facially neutral but burden one class more than others); *Smith v. City of Jackson*, 544 U.S. 228 (2005) (officers receiving lesser raises were entitled to relief under disparate impact theory of recovery).

240. See generally MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 356–90 (1988) (describing adverse impact law generally); CHARLES A. SULLIVAN ET AL., *EMPLOYMENT DISCRIMINATION* 140–244 (1988) (same).

We have argued elsewhere that NCAA athletes in revenue-generating sports should, in fact, be viewed as “employees” under the National Labor Relations Act. See McCormick & McCormick, *supra* note 42, at 71–157. Were they to be found “employees” under Title VII of the Civil Rights Act of 1964 as well, then a disparate impact theory would likely be available to challenge universities’ and the NCAA’s compensation system in which amateurism rules apply only to labor positions held predominantly by African Americans, but not to those managerial posts held overwhelmingly by European Americans. It bears remembering, moreover, that disparate impact analysis, as described below, operates in many areas in addition to employment law. See *infra* notes 282–284 and accompanying text. Therefore, even if athletes were not viewed as “employees” under the law, they might

somewhat differently, the adverse impact theory outlaws the use of employment rules or practices that do not appear on their face to be discriminatory, but are so in their application or effect unless the employer can justify those rules as manifestly related to job duties.<sup>241</sup> The Supreme Court has crisply described the doctrine as condemning “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”<sup>242</sup>

The adverse impact theory was initially articulated by the Supreme Court in its 1971 *Griggs v. Duke Power Co.* decision.<sup>243</sup> Prior to the passage of the Civil Rights Act of 1964,<sup>244</sup> Title VII of which prohibited discrimination in employment on the basis of race, Duke Power Company had employed African Americans only in the labor department, one of five departments at a North Carolina power generating facility.<sup>245</sup> At the same time, the company required a high school diploma for employment in the other, all-white, departments.<sup>246</sup> After 1965, the company ceased excluding African Americans from the formerly all-white departments, but required all prospective employees in those departments not only to have a high school diploma but also to pass two standardized general intelligence tests.<sup>247</sup> These preconditions—a high school diploma and passage of the two tests—had the effect of excluding African Americans from employment in those departments at significantly higher rates than European Americans.<sup>248</sup>

Despite the fact that the standards had not been shown to be substantially related to job performance in those positions,<sup>249</sup> the lower courts found the company’s employment criteria to be legitimate business tools adopted to help it hire the best qualified applicants and not for a racially discriminatory purpose.<sup>250</sup> The Supreme Court, however, reversed the lower courts, and gave birth to the adverse impact theory of employment discrimination.<sup>251</sup> In *Griggs* and similar cases, the Court reasoned, proof of discriminatory motive is not required because Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”<sup>252</sup> As the Court famously put it, the “absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built in headwinds’ for minority groups and are unrelated to measuring job capability.”<sup>253</sup> To justify such rules, the Court wrote, an employer must show that “any given requirement . . . [has] a manifest relationship to the employment in question.”<sup>254</sup> “The touchstone is business necessity,”<sup>255</sup> the Court announced. “If an

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still be able to prevail in a disparate impact challenge to NCAA amateurism rules.

241. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

242. *Teamsters*, 431 U.S. at 335 n.15.

243. *Griggs*, 401 U.S. at 432.

244. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

245. *Griggs*, 401 U.S. at 427.

246. *Id.*

247. See *id.* at 427–28 (describing company’s introduction of the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test as new conditions for employment in the previously all-white departments).

248. See *id.* at 430 n.6 (stating that only twelve percent of African Americans in North Carolina had high school degrees in contrast to thirty-four percent of whites and that some fifty-eight percent of whites passed the test compared with six percent of blacks).

249. See *id.* at 431–32 (noting that employees hired before the standards were imposed had performed satisfactorily in those positions).

250. See *id.* at 429.

251. See *Griggs*, 401 U.S. at 431.

252. *Id.*

253. *Id.* at 432.

254. *Id.*

255. *Id.* at 431.

employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”<sup>256</sup>

In *Griggs*, African Americans had suffered under North Carolina’s segregated educational system, leaving them less educated and, therefore, at an obvious disadvantage in educational achievement.<sup>257</sup> The Supreme Court has made it plain, however, that adverse impact theory has broader application and is not limited solely to circumstances in which racial minorities have been victimized by societal discrimination. In *Dothard v. Rawlinson*, for example, the Court invoked adverse impact doctrine to strike down a state’s use of height and weight minima in selecting prison guards when their effect was to create a barrier to employment opportunity for women and where other, less discriminatory, testing mechanisms were available.<sup>258</sup> The Court has also signaled a sharp distrust of testing mechanisms that disproportionately burden minorities, even when an employer’s “bottom line” hiring statistics showed minorities had not been disproportionately excluded.<sup>259</sup> Thus, in *Connecticut v. Teal* the Court struck down Connecticut’s multi-tiered employee selection mechanism when only the initial screening stage had an adverse impact on African Americans, and despite the fact that African Americans who passed the initial test were hired at a much higher rate than European Americans who also passed the test.<sup>260</sup>

In fact, when the Court has seen fit to limit the adverse impact doctrine, Congress has reacted by restoring its authority in employment discrimination law. In *Ward’s Cove Packing v. Atonio*, for example, the Supreme Court reviewed the business necessity defense and held, *inter alia*, that although an employer whose employment practices disproportionately burdened racial minorities was required to set forth a legitimate business reason for their use, the plaintiff, nevertheless, continued to bear the burden of establishing that he or she had been denied an employment opportunity on the basis of race or other protected consideration.<sup>261</sup> As regards the business necessity defense, the Court in *Ward’s Cove* rejected the “necessity” requirement, stating “there is no requirement that the challenged practice be ‘essential’ or ‘indispensible’ to the employer’s business for it to pass muster.”<sup>262</sup> On the contrary, the decision required only that the challenged practice serve “in a significant way, the legitimate . . . goals of the employer.”<sup>263</sup>

*Ward’s Cove* was roundly criticized as unduly limiting disparate impact theory,<sup>264</sup> and two years later, Congress passed the Civil Rights Act of 1991,<sup>265</sup> which reversed the Court’s holding that the burden of persuasion remains with the employee at all times. It also confirmed that once a plaintiff has shown a challenged employment practice to have caused a significant disparate impact upon a protected group, the employer must prove, not merely

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256. *Id.*

257. *Griggs*, 401 U.S. at 430–31.

258. *Dothard v. Rawlinson*, 433 U.S. 321, 329–32 (1977) (using disparate impact analysis to strike down as a violation of Title VII an Alabama statute requiring applicants for prison guard positions to be at least 5’2” tall and to weigh at least 120 pounds).

259. *Connecticut v. Teal*, 457 U.S. 440, 440 (1982).

260. *Id.* at 442–51.

261. *Ward’s Cove Packing v. Atonio*, 490 U.S. 642, 658–59 (1989).

262. *Id.* at 659.

263. *Id.*

264. See, e.g., Michael H. Gottesman, *Twelve Topics to Consider Before Opting for Racial Quotas*, 79 GEO. L.J. 1737, 1750–51 & n.41 (1991) (criticizing *Ward’s Cove*); Reginald Alleyne, *Smoking Guns Are Hard to Find*, L.A. TIMES, Jun. 12, 1989, at 5 (stating that the Supreme Court’s “underlying dislike” for Title VII “is openly revealed by the illogic of the reasoning” in *Ward’s Cove*).

265. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991).

articulate, the validity of its business justification for the practice.<sup>266</sup> The Act also reaffirmed the significance of the availability of less discriminatory alternatives by declaring unlawful an employment practice that disproportionately burdens a protected group when there is an alternative employment practice which produces a less discriminatory impact that the employer has refused to adopt.<sup>267</sup>

Early adverse impact cases like *Griggs* frequently scrutinized employer-imposed rules which had the effect of disproportionately excluding minorities from eligibility for employment in particular jobs. Title VII, however, also prohibits illegal employment discrimination in other matters, including wage levels,<sup>268</sup> as we assert is the case in college sports, and the Supreme Court has approved the application of disparate impact analysis in such circumstances. In *Smith v. City of Jackson*, for example, the Court held that a pay plan which operated to discriminate against older workers could be struck down using disparate impact analysis under the Age Discrimination in Employment Act (ADEA)<sup>269</sup> if the plaintiffs identified a “specific test, requirement, or practice within the pay plan that ha[d] an adverse impact on older workers.”<sup>270</sup> Significantly, that Court also made it clear that disparate impact theory should be applied even more broadly under Title VII than under the ADEA.<sup>271</sup> Thus, compensation plans, as well as employment eligibility rules, may be challenged using disparate impact theory under Title VII.<sup>272</sup> Here, the NCAA’s amateurism rules have an adverse racial impact objectionable under Title VII because they tend to restrict the compensation of African Americans while tending not to limit earnings for European Americans.

The adverse impact theory has likewise been adopted in the application of numerous employment statutes other than Title VII. So, for example, the 1967 ADEA is identical to Title VII in its description of unlawful discrimination, and the Court has held that decisions under one statute are controlling for similar cases under the other.<sup>273</sup> As noted above, the Supreme Court has recently confirmed in *Smith v. City of Jackson* that the adverse impact model announced in *Griggs* applies under the ADEA.<sup>274</sup> In addition, the Rehabilitation Act

266. 42 U.S.C. § 2000e(m) (2000) (“The term ‘demonstrates’ means meets the burdens of production and persuasion.”); 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (outlawing employment practices with an adverse impact on a protected class unless the employer can “demonstrate that the challenged practice is job related . . . and consistent with business necessity”) (emphasis added).

267. 42 U.S.C. § 2000e-2(k)(1)(C) (2006).

268. 42 U.S.C. § 2000e-2(a) (2010) (“It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual’s race.”).

269. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621 et seq. (2006)).

270. *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005).

271. *Id.* at 228, 240. The Court determined disparate impact analysis to be broader under Title VII than under the ADEA because Congress’s overruling of *Ward’s Cove* through the Civil Rights Act of 1991 had broadened the scope of adverse impact theory under Title VII without addressing the ADEA, *id.* at 228-29, 240, and because the ADEA was narrower than Title VII due to an exception to that law which did not exist under Title VII. *Id.* at 233, 240. Therefore, under Title VII even a generalized showing, without reference to a particular “test, requirement, or practice,” *id.* at 229, 241, that a pay plan adversely impacted African Americans could be a cognizable claim.

272. *See, e.g., Bazemore v. Friday*, 478 U.S. 385 (1986) (involving race-based disparate impact claim under Title VII against public employer’s wage system).

273. *See, e.g., Smith*, 544 U.S. at 233; *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985) (both finding that because the operative language of the ADEA was modeled upon Title VII, merely substituting “age” for the term “race” from Title VII, the identical terms of the two statutes should be construed in a parallel fashion).

274. *See Smith*, 544 U.S. at 228, 236-40; *see also EEOC v. Borden’s Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984); *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 690 (8th Cir. 1983); *Allison v. W. Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982); *Geller v. Markham*, 635 F.2d 1027, 1030 (2d Cir. 1980).

of 1973,<sup>275</sup> passed to “promote and expand employment opportunities . . . for handicapped individuals”<sup>276</sup> protects such persons from discrimination in employment because of their handicap. Additionally, in *Alexander v. Choate*, the Supreme Court specifically held adverse impact analysis to be applicable under that act.<sup>277</sup> “Discrimination against the handicapped,” the Court wrote, “was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”<sup>278</sup> Finally, in the Americans with Disabilities Act of 1990 (ADA),<sup>279</sup> Congress specifically adopted disparate impact theory. Under the ADA, a plaintiff need not demonstrate improper motive and can prevail upon a mere showing that the defendant uses:

qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria . . . is shown to be job related for the position in question and is consistent with business necessity.<sup>280</sup>

Under this language, neutral employment practices that result in differing treatment of persons with and without disabilities are unlawful unless justified by business necessity.<sup>281</sup> In this, Congress specifically adopted the *Griggs* adverse impact model of employment discrimination in the interpretation of the ADA.

Finally, the idea that facially neutral rules that disproportionately burden racial minorities require justification appears not only in employment law, but in other areas where African Americans have been disproportionately burdened by apparently neutral rules. For example, in *Gaston County v. United States* the Supreme Court rejected the argument that a facially neutral literacy test for voting was valid when Gaston County had “systematically deprived its black citizens of the educational opportunities it granted to its white citizens”<sup>282</sup> and declared that “[i]mpartial’ administration of the literacy test . . . would serve only to perpetuate these inequities in a different form.”<sup>283</sup> Lower courts have also used disparate impact analysis to find unlawful discrimination in housing under Title VIII.<sup>284</sup>

275. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. § 794 et seq. (2006)).

276. *Id.* at § 2(8), 87 Stat. at 357.

277. *Alexander v. Choate*, 469 U.S. 287, 294–99 (1985).

278. *Id.* at 295.

279. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101 et seq. (2006)).

280. *Id.* at § 12112(b)(6).

281. *See, e.g.*, JAMES G. FRIERSON, EMPLOYER’S GUIDE TO THE AMERICANS WITH DISABILITIES ACT 405 (2d ed. 1995).

282. *Gaston Cnty. v. United States*, 395 U.S. 285, 297 (1969).

283. *Id.*

284. In *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8<sup>th</sup> Cir. 1974), for example, the court wrote,

[t]he burden of proof in Title VIII cases is governed by the concept of the ‘prima facie case.’ To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because ‘. . . whatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.’

*Id.* (citations omitted)

Adverse impact theory is an indispensable part of U.S. law because slavery, its aftermath, and other forms of invidious discrimination, have wisely cautioned us to question rules that disproportionately burden African Americans, even when those rules were not created for a racist purpose. As applied to college sports, the fact that NCAA rules were created for other, facially neutral, reasons has no bearing on whether, given their grossly disproportionate impact on African Americans, they may be justified. The fact remains that NCAA amateurism rules operate to burden African Americans in grossly disproportionate ways while reserving the wealth their labor produces for others.

## CONCLUSION

*We do not ask for what cannot be given, says John Kumalo. We ask only for our share of what is produced by our labour. New gold has been found, and South Africa is rich again. We ask only for our share of it.*

....

*... It is only our share that we ask, enough to keep our wives and our families from starvation. . . .*

....

*... We ask only for those things that laboring men fight for in every country in the world, the right to sell our labour for what it is worth. . . .*

*They say that higher wages will cause the mines to close down. . . . They say it makes the country rich, but what do we see of these riches? Is it we that must be kept poor so that others may stay rich?*

....

*... This industry is powerless without our labour. . . .*

....

*... I tell you we have labour to sell, and it is a man's freedom to sell his labour for what it is worth.<sup>285</sup>*

Given the foregoing, the question becomes whether NCAA amateurism rules for athletes, ostensibly designed to shield college sports from professionalism, but that also have the effect of financially exploiting mostly African-American young men, are justified by notions of amateurism. In our view, the answer is plainly no. These rules have not preserved college sports as an amateur enterprise. Quite to the contrary, major college sports has become a thoroughly commercial enterprise and carries only the façade of amateurism by maintaining a system of rules that, like apartheid systems throughout history, have separated races and classes from each other and assigned the burden to one, while reserving the financial rewards for the other. Whether the dynamic we describe is the product of “thoughtlessness[,] . . . indifference[,] . . . [or] benign neglect,”<sup>286</sup> if the NCAA and its

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285. ALAN PATON, CRY, THE BELOVED COUNTRY 217–20 (Scribner Paperback Fiction 1987) (1948) (condemning the former system of racial apartheid in South Africa through the words of a fictional black mine worker). The economic pattern present in South Africa whereby blacks created wealth but were not permitted fair payment for their labor so it could be reserved for the profit of whites is equally present in college revenue-generating sports.

286. *Alexander v. Choate*, 469 U.S. 287, 295 (1985); see also *City of Black Jack*, 508 F.2d at 1185 (warning

member universities now insist upon maintaining their current regime, binding predominantly African-American athletes while confiscating the fruits of their labor, then they must concede that this modern form of apartheid is acceptable and leave it for history to judge.

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that the "arbitrary quality of thoughtlessness can be . . . disastrous . . . to private rights and the public interest.").



