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Rodney K. Smith

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# AN ACADEMIC GAME PLAN FOR REFORMING BIG-TIME INTERCOLLEGIATE ATHLETICS

RODNEY K. SMITH\*

## I. INTRODUCTION

Between 1952 and 1985, thirty out of thirty-three institutions, whose teams won national championships in Division I basketball during that era, were placed on probation for violating rules of the National Collegiate Athletic Association ("NCAA" or "Association").<sup>1</sup> Matters have not improved much on this score in the 1980s, a decade during which 57 of 106 Division I-A schools have been censured, sanctioned, or put on probation at least once.<sup>2</sup> It is little wonder, therefore, that Richard D. Schultz, Executive Director of the National Collegiate Athletic Association, opened the 1990 NCAA Convention with a State of the Association speech calling for major reform in intercollegiate athletics and indicating that, "[i]t's time to develop a new model [for the governance of intercollegiate athletics]."<sup>3</sup> Schultz concluded his remarks by calling on the delegates to the 1990 Convention to "be prepared by the 1991 Convention to introduce and pass legislation that will effect major reform."<sup>4</sup>

With repeated calls from many sources for major reform of big-time, revenue-producing intercollegiate athletics,<sup>5</sup> the demand for significant change in the operation of athletics programs at the collegiate level may be reaching a crescendo. A consensus clearly is developing in support of such reform.<sup>6</sup> Nevertheless, questions remain as to the content of an acceptable reform package. There are those who assert that the NCAA is institutionally incapable of initiating and maintaining the momentum in reform necessary to rectify that which is wrong with big-time intercollegiate athletics.<sup>7</sup> On the other hand, at the *de minimis* end of the reform continuum, there are those who believe that it may be

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\* Dean, Capital University Law School, J.D. 1977, J. Reuben Clark Law School, Brigham Young University; LL.M. 1982, University of Pennsylvania; S.J.D. 1987, University of Pennsylvania. I would like to thank my secretary, Linda Rodichok, for her help in preparing the manuscript of this article.

1. COMMITTEE ON LABOR AND HUMAN RESOURCES, STUDENT ATHLETE RIGHT-TO-KNOW ACT, S. REP. NO. 209, 101st Cong., 1st Sess. 4 (1989) [hereinafter SENATE REPORT].

2. Lederman, *Nearly Half the Members in Top Division of NCAA Cited for Violations This Decade*, The Chron. of Higher Educ., Feb. 22, 1989, at A35, col. 3.

3. The NCAA News, Jan. 10, 1990, at 3, col. 1.

4. *Id.* at 6, col. 5.

5. This article will focus on the reform of big-time, revenue-producing intercollegiate athletics (typically, football programs at NCAA Division I-A institutions and basketball programs at Division I institutions).

6. See Lilley, *Convention Seen As Beginning of Era of Reform*, The NCAA News, Jan. 17, 1990, at 1, col. 1 [hereinafter *Era of Reform*].

7. See, e.g., R. TELANDER, *THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT* (1989) [hereinafter TELANDER]. In that book

possible to refine the NCAA regulatory system so that it can better respond to the acknowledged excesses of big-time intercollegiate athletics.

Those who argue that the NCAA is structurally incapable of responding in a meaningful manner to the excesses of big-time intercollegiate athletics often assert that such athletics have become overly commercialized and are a part of an entertainment, as opposed to an educational, enterprise.<sup>8</sup> For these advocates of major structural reform, the only viable reform strategies require the creation of an entirely new system of governance for intercollegiate athletics.<sup>9</sup>

On the other hand, those who advocate reform from within the NCAA emphasize that the Association is seriously misunderstood and that there is significant support within existing structures to support significant substantive reform.<sup>10</sup> Advocates for this school of reform are inclined to argue that there is a prevailing mood among regulators supporting integrity in intercollegiate athletics.<sup>11</sup> These proponents of reform through refinement of existing structures add that, while there are differing views within the NCAA, there is nevertheless a sentiment that

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Telander, a writer for *SPORTS ILLUSTRATED*, begins by contending that the NCAA "is built on hypocrisy and exploitation," *Id.* at 21, and later bares his feelings:

[L]et me tell you how I feel on a very primitive, visceral level about the NCAA: *I hate it.* There is, I must confess, something about an organization that employs a lot of people whose duty is to govern others with whom they have almost nothing in common that just pisses me off. I see the NCAA's leaders as a bunch of know-nothing, self-righteous stuffed suits who are willing to do just enough labor to keep the organization running forever. That's my prejudice, and having stated it, let me now set it aside and explain without bias why the NCAA can never bring integrity to [big-time intercollegiate football].

*Id.* at 196. His "nonbiased" critique of the NCAA concludes, "[t]he real function of the NCAA is to promote a good image of itself, make money, and protect the status quo. No doubt NCAA brass would squawk that such is not the case, that they remain ever vigilant for fraud and corruption in the college game, but protecting their own butts is what it's really all about." *Id.* at 197-98.

Unfortunately, while Telander's book is an interesting and sometimes disquieting accumulation of a series of anecdotes that describe particularly egregious excesses in big-time football, he is unable to escape his "bias" and his book ultimately serves as little more than a journalistic diatribe. As will be discussed in this article, neither his reform package, which largely calls for the professionalization of big-time intercollegiate football, nor his contempt for the NCAA are justified. Indeed, while the NCAA "brass" is not without blemish, calls for reform by people like Richard Schultz, the Executive Director of the NCAA, are far more thoughtful and realistic than those proffered by Telander. Furthermore, Telander's assertion that NCAA officials know nothing about intercollegiate athletics and have little in common with athletes is simply inaccurate. The NCAA makes a concerted effort to recruit former athletes, who understand intercollegiate athletics, to work within the Association.

8. *Id.* at 127. William Friday, former President of the University of North Carolina System, has argued in a similar vein that, "Americans have turned sports into a religion. What we're getting pretty close to doing is turning our universities into entertainment centers." *The NCAA News*, Aug. 16, 1989, at 4, col. 2 (citing *The Washington Post*).

9. Even Richard Schultz, the Executive Director of the NCAA [hereinafter "Director Schultz"], seems to agree that structural reform is in order. See T. Lilley, *New Athletics Model Needed, Schultz Tells Delegates*, *The NCAA News*, Jan. 10, 1990, at 1, col. 1.

10. Bryce Jordan, President of Penn State University has argued that, "Up to this point, the NCAA has not been able to get the job done." As quoted in T. Sheeran, *Public Wants College Sports Reform, Jordan Says*, *The NCAA News*, Dec. 27, 1989, at 4, col. 2.

11. David Berst, Assistant Executive Director for Enforcement of the NCAA, recently noted that he detects "an enhanced integrity mood, an institutional control mood or atmosphere. . . . I think that's what everyone's after." *Id.*, col. 4.

favors reform that will address the ills that currently plague intercollegiate athletics.<sup>12</sup>

For my part, I contend in this article that reform must combine elements of arguments made by both schools. Structural changes are necessary. Any substantive reform efforts must be supported by structures that are designed to strengthen the voice of those who support reforms of an academic nature. Additionally, structural reforms must be accompanied by substantive reforms. In both structural and substantive areas, the focus must be on academic values. Indeed, one of the major problems with reform efforts to date is that they have lacked a coherent and unified focus, a focus that must be centered on academic values. To date, the NCAA has purported to rely on various purposes and principles in its efforts to govern intercollegiate athletics.<sup>13</sup> While the educational value is one of those principles, perhaps even the principal value adhered to by the NCAA in its efforts to regulate big-time intercollegiate athletics,<sup>14</sup> the NCAA has never adequately focused its reform efforts on that value. The NCAA has never had a coherent and unified game plan based on academic values; rather, it has simply moved from play to play, reform to reform, without any sense of unified academic purpose. The NCAA has also lacked focus in its reform efforts because it has continued to adhere to values, such as amateurism, that have little to do with the realities of big-time intercollegiate athletics.

In this article, therefore, after explicating the values the NCAA purports to adhere to in regulating intercollegiate athletics, I begin by arguing that the NCAA should jettison the amateurism principle, at least in the governance of big-time, revenue-producing sports. By ceasing to adhere to the amateurism value, the NCAA and others in a position to influence the reform of intercollegiate athletics can assure that the reform focuses on academic values and can avoid the dissonance and disillusionment related to the sense that the NCAA is inherently suspect because it indulges in hypocrisy when it asserts amateurism on the one hand and signs a \$1 billion television contract for televising big-time basketball on the other hand.<sup>15</sup> In addition to jettisoning the amateurism value, the NCAA must create or refine governance structures that

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12. Thus, Director Schultz reacted to the "successes" of the 1990 Convention by concluding that "there is now within the membership a very strong and urgent feeling that we need some reform . . . that we need change. And I think what took place (during the Convention) is a very positive step in that direction." *Era of Reform*, *supra* note 6.

13. See *infra* notes 16, 18, 19, and 46.

14. See *infra* notes 16, 18 and 19 and accompanying text.

15. Lederman, *New Affluence Brings College Sports a Problem: How Widely to Spread \$1-Billion TV Bonanza*, *The Chron. of Higher Educ.*, Dec. 6, 1989, at A1, col. 2 [hereinafter cited as Lederman, *TV Bonanza*]. Big-time basketball, which was the source of that bonanza, does not stand alone, however, as a significant commercial enterprise. In 1988, over \$500,000,000 in revenue was generated by 104 Division I-A institutions from gate, television and licensing receipts of big-time football. TELANDER, *supra* note 7, at 44. This commercialization of big-time football renders calls for amateurism on the part of student-athletes suspect. Questions as to why the athletes who generate those revenues should remain un- or under-compensated will not be muted until amateurism notions are jettisoned for big-time, revenue-producing sports.

will aid in the development of a unified package of reforms. The NCAA needs an academic game plan, not a sporadic effort at piecemeal reform. The NCAA should design a long-range plan for reform based on academic values.

In Part II, I deal with the values that ought to underlie intercollegiate athletics and that ought to be central to major reform efforts. Part III, in turn, examines the types of structural changes that should be implemented to enhance the capacity of those governing big-time intercollegiate athletics to focus on appropriate academic values. In Part IV, I briefly examine two major substantive issues, whether academic values could be furthered by holding a national championship in big-time football and whether [and if so, how] we should pay athletes involved in major revenue-producing sports, in light of those same underlying academic values. Part V is my conclusion.

## II. AN EXAMINATION OF THE VALUES THAT OUGHT TO SERVE AS THE FOUNDATION FOR BIG-TIME INTERCOLLEGIATE ATHLETICS (AND THOSE THAT SHOULD NOT)

In Article 1 of the NCAA Constitution, the fundamental policy or basic purpose of the Association is set forth:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. 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.<sup>16</sup>

Actually, this policy states two basic values or purposes: (1) the educational value, maintaining intercollegiate athletics as an integral part of the educational program, and (2) the amateurism value, retaining a clear line of demarcation between intercollegiate athletics and professional sports. These two values or purposes may be complementary in some instances, but, as will be argued in this article, they are separable. For example, an athletic event can be amateur in nature without being an integral part of an educational program, and as I argue in the following section, an athletic program may be commercialized without necessarily compromising its role as an integral part of an educational enterprise.

Thirteen principles for the conduct of intercollegiate athletics by members of the NCAA are delineated in Article 2 of the NCAA Constitution. Those principles can largely be grouped under either the educational value, the amateurism value, or the value of equal competition. This third value of equal competition often is referred to as the need for a "level playing field,"<sup>17</sup> and is designed to ensure that no school is

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16. NCAA CONST. art. I, § 1.3.1, *reprinted in* NATIONAL COLLEGIATE ATHLETIC ASS'N. 1989-90 NCAA MANUAL I (1989) [hereinafter NCAA MANUAL].

17. Wilford Bailey has noted that many problems with the NCAA's legislative process are attributable to "the widespread desire to achieve a perfectly flat playing field." *Cited in*

given benefits that are not also made available under the NCAA rules to other similarly situated institutions. In the following sections of Part II of this article, I discuss these values and evaluate each of them to ascertain whether or not they should be foci for the reform of intercollegiate athletics.

#### A. *The Educational Value*

As previously noted, the educational value is set forth in Section 1.3.1 of Article 1 of the NCAA Constitution. Arguably, it receives further support and definition in Sections 2.2 and 2.4 of Article 2 of the Constitution. Respectively, those provisions provide as follows:

##### 2.2 THE PRINCIPLE OF STUDENT-ATHLETE WELFARE.

Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational welfare of student-athletes.<sup>18</sup>

2.4 THE PRINCIPLE OF SOUND ACADEMIC STANDARDS. Intercollegiate athletics programs shall be maintained as a vital component of the educational program and student-athletes shall be an integral part of the student body. The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general.<sup>19</sup>

Together with Section 1.3.1 of Article 1, these sections make it clear that the NCAA professes to adhere closely to academic or educational values in the governance of intercollegiate athletics, including big-time, revenue-producing sports at the collegiate level. Most commentators favor tying the regulation and reform of big-time intercollegiate athletics to educational values or principles,<sup>20</sup> although some recent advocates of major reform in intercollegiate athletics believe that big-time, commercialized athletics at the collegiate level cannot be tied to academic or educational values. The skeptics, however, claim that in order to avoid hypocrisy, institutions ought to recognize that their commercialized athletics programs cannot be effectively tied to pristine educational values.<sup>21</sup>

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NATIONAL COLLEGIATE ATHLETE'S ASSOCIATION, NCAA PRESIDENTS COMMISSION THIRD NATIONAL FORUM at 60 (1988) [hereinafter THIRD FORUM]). This value largely is set forth in Art. 2, § 2.7 of the NCAA Constitution, *supra* note 16, at 4, which provides that:

The structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics.

18. *Id.* at 3.

19. *Id.*

20. Chancellor Oliva of New York University has written that:

Athletics have an eminently defensible educational role in higher education. If you don't believe that, you're in trouble. If you can't justify the relationship between your institution and its athletic program on an educational basis, then you might just as well make athletics a business enterprise.

Oliva, *Do the Right Thing About Athletics*, REPORTS, THE JOURNAL OF THE ASSOC. OF GOV. BDS. OF UNIVERSITIES AND COLLEGES, July and August 1989, at 11-12 [hereinafter Oliva].

21. See, e.g., TELANDER, *supra* note 7, at 217-18.

Professor John Weistart recently opined that every suggested reform ought to be evaluated under the standard of whether "the particular reforms insure that they will help restore education as institutions' primary focus?"<sup>22</sup> In doing so, he took the view that the educational values ought to be central to questions of reform. In that same commentary, however, Professor Weistart evidenced some ambivalence with regard to this position when he inquired as to whether or not it was "sensible, or even realistic, to link all pre-professional training in basketball and football to a four-year degree."<sup>23</sup> Actually, there is a certain consistency to Professor Weistart's view, if one interprets education broadly, to include other forms of technical training that might not necessarily lead to a four-year degree. Another alternative would be simply to add a separate minor league of some sort in football and basketball that was not connected to education.<sup>24</sup> By creating such a minor league, that emphasized prowess in athletics and that had little or no relation to formal education or the intercollegiate world, institutions with intercollegiate athletics programs could focus more easily on academic or educational values. This result would occur because the athletes who are not interested in receiving a formal education would be removed from their institutions, leaving only students who happen to want to participate in intercollegiate athletics while obtaining an education.

At any rate, even proponents of reforms that would divorce much of big-time athletics from the academic world argue that they do so in order to strengthen educational values. Thus, significant unanimity remains among the disputants regarding the issue of maintaining academic or educational values and standards in intercollegiate athletics. Nevertheless, little attention has been brought to bear on the issue of what educational or academic values inhere directly or indirectly in intercollegiate athletics. This unwillingness to focus on those issues in a thoughtful way is exacerbated by the reaction of academics who assert that big-time athletics is not a "critical ingredient" of the academic life of the university.<sup>25</sup> Thus, whether as a matter of academic hostility to athletics,<sup>26</sup> which may itself be based on some lingering class bias,<sup>27</sup> or

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22. Weistart, *Serious Reform of College Sports Must Go Beyond Fine Tuning*, *The Chron. of Higher Educ.*, Jan. 10, 1990, at A52, col. 3.

23. *Id.* at col. 1.

24. *Id.* Professor Weistart opts for such a view, as does Rick Telander in his critique of college football. TELANDER, *supra* note 16 at 214. For my part, once intercollegiate athletics is reformed to focus on educational values, I would leave the formation of such a minor league to market forces. If there is a demand for such a league on the part of athletes who are uninterested in receiving a formal education and there is a public demand for the entertainment provided by those athletes, then such a league will no doubt be formed.

25. A President of a major Big 10 football power recently ruminated that, "I don't think athletics is even a critical ingredient at this university." *The Columbus Dispatch*, Dec. 3, 1989, at 1A, col. 3. Such a statement is a blend of naivete and possibly even academic hostility to athletics—a certain hope that by ignoring or isolating intercollegiate athletics it might go away or responsibility for its operation might be placed on other shoulders.

26. Richard Lipsky recognizes the existence of "academic hostility toward sports" and asserts that:

simply a lack of analytical focus due to inattention to detail, the interplay between big-time athletics and education has been woefully under-scrutinized. For example, in two recent cases, the Kansas Supreme Court held that the NCAA was exempt from state taxes on the ground that the NCAA was involved in education.<sup>28</sup> In exempting the NCAA on educational grounds, however, the court avoided *any* examination as to what constitutes an educational or academic purpose. Indeed, the court simply exempted the NCAA on the ground that it was an association that represented educational institutions in the operation of their intercollegiate athletics programs. The court never examined the NCAA's involvement in regulating intercollegiate athletics or intercollegiate athletics itself to ascertain whether or not such athletics are educational in nature, even though in *National Collegiate Realty Corp. v. Johnson County* the court framed the issue as "whether the NCAA's use of the premises is exclusively for educational purposes."<sup>29</sup> Later, in the text of that opinion, the court reframed the issue as "whether *any* activities in the use of the property *were not* exclusively for educational or other exempt purposes."<sup>30</sup> This framing of the issue should have led the court to inquire as to whether or not intercollegiate athletics and the NCAA's involvement therein were "exclusively" educational in nature. However, the court refrained from doing so by simply concluding with a holding that is little more than an *ipse dixit*: "There is no serious contention that, *generally speaking*, physical education and sports programs in universities are not within proper 'educational purposes'."<sup>31</sup> The court's very use of the language "generally speaking" seems to indicate that the justices were troubled by the fact that aspects of sports programs as well as the NCAA's role in governing those programs may not directly relate to educational purposes. As such, it is hard to understand how, without more analysis, the court could conclude that the NCAA used its property exclusively for educational purposes.

This superficial equivocation regarding the interplay between athletics and academics hinders efforts to reform intercollegiate athletics by

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On many college campuses the football or basketball team carries more prestige than any academic subject or academician. Historically, coaches and physical educators have struggled with professors and deans over the alleged overemphasis of intercollegiate sports. Additionally, coaches often are anti-intellectual, which strikes a responsive chord in the American public. Not to be outdone, intellectuals have exhibited an equally potent snobbery and disdain. As a result, the study of sports has been left to physical educators, who have not examined its larger political and social implications.

R. LIPSKY, *HOW WE PLAY THE GAME* 6 (1981) [hereinafter Lipsky].

27. The arts are the playground of the rich, and one seldom hears complaints that arts are not educational and should not be part of the educational enterprise. Athletics are like arts in significant respects — ballet in all its beauty is akin to the play of a Michael Jordan. Athletics, however, are in some measure the playground of the poor and are often proclaimed to be uneducational or not a fit part of the educational enterprise. See *infra* note 32 and accompanying text, for a discussion related to athletics as an artistic endeavor.

28. *NCAA v. Kansas Dept. of Revenue*, 781 P.2d 726 (Kan. 1989); *National Collegiate Realty Corp. v. Johnson County*, 690 P.2d 1366 (Kan. 1984).

29. 690 P.2d 1366, 1371 (1984).

30. *Id.*

31. *Id.* (emphasis added).



conforming the athletics programs to clearly articulated educational values. As such, a very important part of any effort to assess reform proposals from an academic vantage point, or in terms of educational values, preliminarily must deal with the issue of whether big-time intercollegiate athletics are educational or can be operated to further educational values.

Donna Lopiano, associate athletic director at the University of Texas, has argued that:

Athletics, like music, art and drama is a performing art. The athletic contest is no different than the theatre or the symphony, albeit the audience appears to be more rabid. . . Athletics and theatre must be, at their heart, laboratory settings where the exceptionally talented student maximizes his or her potential.<sup>32</sup>

In her remarks, Lopiano added that, "[i]t is only when we define athletics as an educational program very closely comparable to an academic entity that we finally possess the litmus paper with which we can test the legislative and other answers to problems in athletics, which have evaded resolution for close to 80 years."<sup>33</sup> Thus, at least in one sense, it can be argued that participation in athletics is comparable to participation in the orchestra or drama and can provide a litmus test for assessing reform efforts. In this regard, it would also seem that big-time athletics should be supported as part of the academic enterprise, because such athletic opportunities give the athlete the opportunity to refine and develop his or her skill in the crucible of the best competition available. However, despite the appeal of such an argument for those who would argue that athletics are educational, it is not clear why such activities must be performed before large, paying audiences or why activities such as drama, dance and orchestra are themselves educational, thereby rendering athletics derivatively educational so long as athletics can be related to other performing arts.

In addition to arguments that participation in intercollegiate athletics is educational in nature, by analogizing such participation to the performing arts, it has been asserted that athletics is like research, and as such should be considered an apt part of the academic enterprise at the intercollegiate level. After arguing that service to society is an important aspect of the educational enterprise, Kenneth J. Weller of Central College (Iowa) recently made an interesting argument to the effect that:

A pervasive and logical case can and should be made for athletics programs based on societal objectives. Like research, athletics can become somewhat autonomous in its organization and can be financed from outside sources, and like research it can and should be respected as an integral part of the mission

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32. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, SIXTH SPECIAL CONVENTION PROCEEDINGS 72 (1987), cited in Smith, *Reforming Intercollegiate Athletics: A Critique of the Presidents Commission's Role in the NCAA's Sixth Special Convention*, 64 N. DAK. L. REV. 423, 450 (1988) [hereinafter Smith, *Sixth Special Convention*].

33. *Id.*

of an educational institution.<sup>34</sup>

Thus, in addition to the assertion that participation in athletics is as much a part of the educational enterprise as are drama, dance and other performing arts, it can be argued that big-time athletics, like research, play an important role in serving societal interests. In both instances, however, I remain troubled that we still may be begging the question by merely arguing that by analogy to other practices that are accepted to be a part of the educational enterprise, athletics should be declared to be an apt part of the collegiate academic enterprise. Those other practices — performing arts and research — must themselves be tied to some educational theory, and then athletics could be assessed in light of that theory, not only by analogy to the practices that purportedly comply with the underlying theory. Furthermore, stating that athletics, like research, perform a service function, without further explication of the nature of that service is to indulge in incomplete analysis. One must examine the nature of the service arising out of big-time intercollegiate athletics in order to support athletics as academics on such grounds.

President Gordon Gee of the University of Colorado recently argued for a third sense in which athletics can be considered to be an integral part of the educational enterprise. He noted that, “[c]ollegiate athletic competition had its origins in the Greek ideal of education. Apart from intellectual and aesthetic development, physical education and competition were essential to molding character.”<sup>35</sup> Others have made similar arguments. Chancellor L. Jay Oliva of New York University has opined that athletics can be justified on educational grounds because athletic participation develops character by teaching the athlete to learn to work with other people and to put his or her ego on the line in support of a perceived worthy objective.<sup>36</sup> Coach Bo Schembechler of Michigan is perhaps a bit more crass when he asserts that participation in athletics teaches the participant the importance of winning.<sup>37</sup>

Big-time intercollegiate athletics may support the educational enterprise in other direct ways. Allen Guttman has noted that, “[i]n sport we can discover the euphoric sense of wholeness, autonomy, and potency which is often denied us in the dreary rounds of routinized work that are the fate of most men and women.”<sup>38</sup>

In a similar vein, Richard Lipsky writes that sport is a microcosm of

34. THIRD FORUM, *supra* note 17, at 36.

35. See Gee, *A College Superbowl: The Ultimate Sellout*, N.Y. Times, Jan. 1, 1990, at 19, col. 2. One wonders, however, whether sports does as much to build characters (*see, e.g.*, Brian Bosworth, Jim McMahon, etc.) as it does to build character. Nevertheless, even the building of characters may in some sense promote creativity in expression and may be tenuously tied to educational values.

36. Oliva, *supra* note 20, at 12.

37. See Smith, *Sixth Special Convention*, *supra* note 32, at 444, where Schembechler is quoted as saying that, “it is important to win. That is the American Way.” Indeed, while I use the term “crass” to depict Schembechler’s view, it nevertheless may be true that instilling a winning spirit, or the desire for achievement directed to victory, may be a character-building endeavor and may have a place in our educational system.

38. A. GUTTMAN, FROM RITUAL TO RECORD: THE NATURE OF MODERN SPORTS 157 (1978) [hereinafter Guttman].

life that is "rich [with] symbolism and dramatic structure,"<sup>39</sup> and that as such it "contrasts sharply with a world of widespread alienation, a world in which people long for close individual and communal ties to overcome the impersonality and coldness of American life."<sup>40</sup> Lipsky adds that, "[t]he Sportsworld becomes a cultic movement that compensates for the deficiencies of the world surrounding it."<sup>41</sup> As such, intercollegiate athletics may perform a dual function of creating a healthy diversion for students<sup>42</sup> and a sense of community that ties students ever closer to the educational enterprise and to one another.<sup>43</sup> This is equally true presumably with alumni and others who are in some way tied to a given institution.

As each of the preceding arguments for the tie between athletics and the educational enterprise indicate, it can be argued with some force that athletics is and should be an integral part of collegiate education. Of course, one need not examine each of the preceding arguments closely to discern that the relationship is delicate and must be viewed circumspectly or at least analytically — asking whether a particular aspect of intercollegiate athletics in fact furthers or is closely related or fitted to the types of educational interests asserted. Relatedly, questions must be raised on the micro, individual student-athlete, level as well as on the macro level which deals with the relationship between athletics generally and the institution. In this regard, one commentator has stated that, "[r]ecognizing that a university owes some form of reciprocal commitment to its student-athletes necessitates an inquiry into the nature and extent of this commitment. This commitment is typically termed the University's 'duty' to educate its student-athletes."<sup>44</sup> Thus, not only must the relationship between big-time athletics and academia be clear, but the institution must also fulfill its educational obligation to

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39. LIPSKY, *supra* note 26, at 10.

40. *Id.*

41. *Id.*

42. I use the term "healthy" intentionally, because it is my sense that at times we may become so immersed in athletics that it becomes more like a religion and an end in itself rather than a diversion. In her thoughtful article, Professor Rush agrees, noting that college athletics has become "almost religious in nature . . ." Rush, *Touchdowns, Toddlers and Taboos*, 31 ARIZ. L. REV. 549, 560 (1989) [hereinafter Rush]. By focusing on the academic value of sport as a diversion, however, attention can be drawn to the excesses of such a view and care can be taken to avoid transforming athletics from a diversion to a drug that becomes an end in itself that overwhelms the remainder of reality.

43. Ernest Boyer has been quoted as making this point:

Big-time sport, collegiate and professional, is becoming the new civil authority in our culture. It draws the pride and unifies the community the same way great cathedrals did in earlier times. Today, successful coaches have an importance that would rival that of priests and bishops of the church.

Boyer in R. LAPCHICK AND J. SLAUGHTER, *THE RULES OF THE GAME: ETHICS IN COLLEGE SPORT* xi (1989) [hereinafter LAPCHICK AND SLAUGHTER]. Again, of course, concern must be directed to assuring that the sense of community created by big-time sport does not become a substitute for other forms of social and political community.

44. Dixon, *Achieving Educational Opportunity Through Freshmen Ineligibility and Coaching Selection: Key Elements in the NCAA Battle for Academic Integrity of Intercollegiate Athletics*, 14 J.C. & U.L. 383, 385 (1987). See also Jennings and Zioiko, *Student-Athletes, Athlete Agents and Five Year Eligibility: An Environment of Contractual Interference, Trade Restraint and High-Stake Payments*, 66 U. DET. L. REV. 179, 216 (1989).

the student-athlete. Indeed, this second requirement, to the effect that the educational institution must act in a manner that meets the educational interests of the student-athlete, may be more significant in evaluating individual reforms taken in conjunction with the governance and operation of the athletics program than is the requirement that athletics have some direct tie to macro educational values.

Care must be taken to protect both the micro interests of the student-athlete and the macro interests of the educational institution itself in analyzing any reform package demonstrated by the interplay between Section 2.2 of Article II of the NCAA Constitution, calling for the protection of the physical and educational welfare of student-athletes, and Section 2.4, requiring that intercollegiate athletic programs be maintained "as a vital component of the educational program." For the sake of its own institutional integrity, an institution must evaluate the role that athletics plays at the institution generally. Additionally, for the sake of its ethical and educational duty to its individual students, the institution and other entities involved in governing intercollegiate athletics must be attentive to the educational needs of the student-athletes. Indeed, care must be taken to ensure that structural and substantive reforms address the need to protect the student-athlete's interests, particularly given the student-athlete's relative lack of power in the decisionmaking process related to the governance of intercollegiate athletics.<sup>45</sup> Much of this article, therefore, will focus on the impact of various reform proposals, both as a structural and as a substantive matter, on the student-athlete, thus confirming the need to emphasize the educational value as it relates to the individual student-athlete.

As such, I assert that every reform package, my own included, must be evaluated to ascertain whether or not it directly furthers educational purposes both at the institutional and the student-athlete levels. If those questions are not raised and analyzed, then decisions will necessarily be suspect. Indeed, as I assert throughout this article, one of the major problems with the governance of intercollegiate athletics is that clear-cut thoughtful articulation of the underlying values supporting big-time intercollegiate athletics, and the evaluation of the relationship between those values and particular actions, is too often non-existent or post hoc, occurring at the time that decisions are made rather than at the time that reforms are formulated. Furthermore, as will be demonstrated in Parts III and IV of this article, such an analysis is immensely helpful in evaluating the current status of intercollegiate athletics and the reforms offered to deal with existing maladies.

Having concluded that there is both a direct or macro and indirect or micro relationship between intercollegiate athletics and educational

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45. See Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 1050-57 (1987) [hereinafter Smith, *Death Penalty*], for a discussion of the need for more attention to the interests of student-athletes and for a delineation of a series of reform proposals to provide greater recognition for the student-athletes' interests in the governance of big-time intercollegiate athletics.

values adhered to by colleges and universities, in the remainder of this section, I will explore whether other asserted governance values or principles are also helpful.

### B. *The Amateurism Value*

As previously noted, both Sections 1.3.1 and 2.6 of Articles I and II, respectively, of the NCAA Constitution require that attention be given to the principle of amateurism, in evaluating NCAA regulations. In particular, Section 2.6 provides that, "[s]tudent-athletes shall be amateurs in an intercollegiate sport . . . . Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."<sup>46</sup>

There is less consensus among commentators regarding the utility of the amateurism value, particularly as it relates to the heavily commercialized, revenue-producing sports of Division I-A football and Division I basketball that largely make up big-time intercollegiate athletics. For example, in his recent book assailing big-time intercollegiate football, Rick Telander argued that the concept of amateurism is "corrupt."<sup>47</sup> Relatedly, it has been argued that it is questionable to assert that student-athletes should be protected "from exploitation by . . . commercial enterprises" when the NCAA has just signed a \$1 billion television contract for big-time basketball.<sup>48</sup> Nevertheless, it remains conceivable that amateurism may nevertheless be defended, as it relates to the role of the student-athlete, despite the fact that Division I institutions are on a commercial fast-track. As was the case with academic or educational values, the interests of the student-athlete might be separated from those of the institution. As such, amateurism might need to retain some vitality to protect the student-athlete from exploitation, but not necessarily to eliminate all commercialization of intercollegiate athletics.

It does not take great insight to recognize that assertion of the amateurism value has a certain self-serving allure for the institution, in that it might justify institutional refusals to share the income generated from such athletic events with the athlete who helped to earn it.<sup>49</sup> However, even before assailing the amateurism value on the ground that it is self-serving, it would be worthwhile to examine the value itself as it relates to big-time athletics in the intercollegiate context. To begin with, like "education," amateurism is difficult to define. Professor Ronald Smith has pointed out that we have never come up with "a successful, workable definition of amateurism."<sup>50</sup> In fact, if amateurism means that an athlete does not receive anything of economic value for his or her participation in intercollegiate athletics,<sup>51</sup> it is recognized more in the breach

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46. NCAA CONST. art. II, § 2.6, *reprinted in* NCAA MANUAL, *supra* note 16, at 4.

47. TELANDER, *supra* note 7, at 48.

48. In such circumstances, Telander refers to nonpayment of athletes as "a form of modern day slavery." *Id.*

49. *Id.*

50. *Id.* at 50, (citing R. SMITH, SPORTS AND FREEDOM (1988)).

51. An "amateur" has been defined as, "one who engages in an art, science, or sport

than in reality in both Divisions I and II, because athletes receive scholarships for their participation in many intercollegiate sports at those levels.

Athletic scholarships, which can be worth more than \$10,000 per year, can hardly be said to be a non-economic benefit to their recipient. Pure amateurism would seemingly require that a student not receive anything of economic value for his or her participation in intercollegiate athletics. That is why Professor Susan Rush has noted that today we have "scholarship amateurism" as opposed to "pure amateurism" in big-time intercollegiate athletics. Nevertheless, Professor Rush goes on, correctly I believe, to note that the movement from "scholarship amateurism" to "pure professionalism" would be a bold and, perhaps, unwarranted step.<sup>52</sup>

Actually, the matter of economic value received by the student-athlete for his or her participation in intercollegiate athletics goes well beyond the issue of the receipt of a scholarship. Student-athletes involved in big-time intercollegiate athletics receive many other benefits of economic value as well, including: access to academic support; room and board, which are often grouped with tuition in descriptions of scholarship aid; and other tangible benefits including access to training personnel and equipment and related perquisites. Thus, it is clear that student-athletes do receive substantial economic benefits.<sup>53</sup> Nevertheless, can it be said that some vestige of amateurism ought to remain, as a litmus test in evaluating regulatory and related reform of big-time intercollegiate athletics?

For a number of reasons, I do not believe that amateurism should continue to be a significant litmus test, except where it can be asserted to protect a student-athlete from actual exploitation. First, amateurism in big-time intercollegiate athletics is anachronistic and may even be reflective of some class bias.<sup>54</sup> It is at best anachronistic and clearly is hypocritical because institutions are generating substantial revenues from their major athletic programs and because intercollegiate athletics have been prone to some degree of professionalism from their very inception.<sup>55</sup> Athletes have been paid; sometimes quite well.<sup>56</sup> However, at least with the rise of the NCAA and its professed allegiance to amateurism, payments beyond those enumerated in the preceding para-

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for enjoyment rather than money," WEBSTER'S II, NEW RIVERSIDE DICTIONARY, OFFICE EDITION at 24 (1984).

52. Rush, *supra* note 42, at 581.

53. See *infra* notes 306-15 and accompanying text, for a discussion of how student-athletes are "paid" for participating in college sports.

54. See, e.g., Rush, *supra* note 42, at 552, where Professor Rush argues that amateurism reflects a "split between social classes," with only the middle and upper-middle classes being able to afford to be amateurs. As such, it may be anachronistic, in that it is a throw-back to an era when only the leisure classes had the time and wherewithal and were permitted to participate in athletics. See also TELANDER, *supra* note 7, at 49. For his part, Telander argues that even ancient amateurism is little more than a myth.

55. See Smith, *Death Penalty supra* note 45, at 987-91.

56. *Id.* at 989.

graph have been forced underground or under the table. Nevertheless, as institutions reap revenues from their big-time sports events, and in light of the fact that athletes in those sports often come from lower socio-economic classes,<sup>57</sup> the very appearance of impropriety ought to be of concern to academic institutions. Relatedly, as Professor Rush has pointed out, amateurism reflects a "split between social classes," in that the middle and upper-classes can afford to be amateurs, while the lower-classes socio-economically can ill-afford such a luxury.<sup>58</sup> Also, it is troublesome that amateurism may be used as a prop to maintain the current state of affairs, under which funds are generated by revenue-producing sports, which have a large percentage of minority participants in their ranks, both racially and economically, and are used by the institution to fund other operations, athletic and non-athletic alike. For example, dollars are often taken from the funds generated by a big-time football or basketball program to fund "minor" sports, such as swimming, tennis, and other sports that tend to have participants who often are from other social classes. In a sense, institutions take from the poor and give to the rich.<sup>59</sup> The same is true to some degree when a revenue-producing sport generates funds that are used elsewhere in the university. Certainly, the minority athlete gets to share in the benefits that come from such revenue-sharing, but that benefit is indirect and is diluted by the fact that more students from nonminority classes are able to benefit from such gifts than are minorities at the typical university, where nonminorities outnumber minorities significantly. Dollars generated by revenue-producing sports should be directed to academic purposes that support the student-athletes who participate in those sports. To do otherwise may be to engage in subtle, unintended racism and classism. Of course, one might argue that the funds should go, in part, to women's athletics, to rectify inequities in funding for women's athletics and Title IX may require as much. However, I would maintain that it would not be inequitable to have all scholarships for participants in non-revenue-producing sports be need-based.

In addition to being hypocritical, anachronistic and perhaps even biased, the invocation of amateurism as a value critical to the operation of big-time intercollegiate athletics, may inhibit the necessary focus on the educational value. Indeed, amateurism seems to be of utility only to the extent that it furthers educational or academic values. The value of amateurism as a principle related to the governance of big-time intercollegiate athletics seems to be related to its capacity to focus on exploitation that may result from too much attention to economic and commercial matters and too little attention to educational ones. As such, nothing would be lost by focusing solely on the educational value and jettisoning the amateurism value, as applied to big-time intercollegi-

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57. See, e.g., R. Lapchick, *Race on the College Campus*, in LAPCHICK AND SLAUGHTER, *supra* note 43, at 63-68.

58. Rush, *supra* note 42, at 552.

59. This is precisely what minorities and lower economic classes believe to be happening. See LAPCHICK AND SLAUGHTER, *supra* note 43, at 79-82.

ate athletics. In fact, much might be gained. In particular, enforcing amateurism values may detract from the educational benefits made available to the student-athlete. I make a version of this argument when I assert that athletes should be paid, but that pay should be focused on educational benefits, directly related to the needs of student-athletes who participate in time-consuming, revenue-generating athletics.

Finally, in a related sense, by focusing on the academic needs of student-athletes involved in prominent sports, rather than amateurism, savings might be generated in other areas, including the savings gained by eliminating non-need-based scholarships for minor sports.<sup>60</sup> Indeed, amateurism may have some utility at that level, because if the assertion that there is subtle class bias in the amateurism value applied across the board, to revenue-producing and non-revenue-producing sports, is accurate, then it might be applied to non-revenue-producing sports in an even purer form without raising objections of class bias. In other words, sports like swimming and tennis, which are largely non-revenue-producing and whose participants often come from middle and upper-income groups, could be made purely amateur, with scholarships granted only on the basis of need, and the savings generated could be directed to assistance in the form of academic support for the student-athletes involved in revenue-producing sports.

All of the preceding arguments indicate that it would be appropriate to jettison the amateurism value, as it applies to big-time revenue-producing sports, while retaining it as to other sports; perhaps, so long as the focus remains on academic or educational values, both at the institutional and the individual student-athlete levels. As such, when one considers the reform of big-time intercollegiate athletics, amateurism is of little help and may, in fact, constitute a detriment.

### C. *The Principle of Competitive Equity*

The principle of competitive equity provides that, "[t]he structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics."<sup>61</sup> Additionally, this principle is further defined in Article II Section 2.13 of the NCAA Constitution which provides that, "[i]ntercollegiate athletics programs shall be administered in keeping with prudent management and fiscal practices to assure the financial stability necessary for providing student-athletes with adequate opportunities for athletics competition as an integral part of a quality educational experience."<sup>62</sup>

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60. It has been noted that the "major types of [athletic] expenses classified by object are grants-in-aid." M. RAIBORN, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETICS PROBLEMS: ANALYSIS OF FINANCIAL TRENDS AND RELATIONSHIPS 1981-85 42 (1986). Since grants-in-aid are a major expense, eliminating all aid other than need-based aid in minor sports would generate substantial savings.

61. NCAA MANUAL, *supra* note 16, at 4.

62. *Id.* at 5.



Like amateurism, the principle of competitive equity can and should be subsumed in the academic value.

In its efforts to maintain competitive equity and contain costs, the NCAA arguably may violate antitrust law. It was on such grounds that the NCAA was held to violate antitrust law in its exercise of control over the televising of intercollegiate football.<sup>63</sup> In its efforts to maintain a level playing field, so the argument would seem to go, the NCAA inhibits competition on the part of those who are more effective and efficient in developing and packaging their big-time athletics programs.

In questioning such reasoning, Professor Grauer recently contended that:

Because sports league members operate in the broad entertainment market, they are forced to produce an entertainment product that can compete successfully for consumers' limited leisure time funds. The most effective and competitive product that sports league members can produce is a series of competitions among relatively evenly balanced teams, leading to a championship. Thus, the product that the league members produce in concert is not simply a unique product that each league member could not produce on its own; it is also a necessary product for the league members to be able to compete effectively and efficiently for the limited leisure time dollars of consumers in the broad entertainment market. Because the production of this product enables the league members to compete effectively and efficiently, the cooperation needed to produce this product must be deemed efficiency enhancing. Therefore, this cooperation cannot be anticompetitive in the consumer welfare sense and should be deemed the internal cooperation of a single entity.<sup>64</sup>

However, while Professor Grauer makes a substantial argument for why the NCAA does not necessarily engage in an antitrust violation when it organizes a championship or otherwise tries to further its level playing field and cost-containment values, he understandably does not deal with the issue of whether or not such values should constitute litmus tests in evaluating and promulgating rules and regulations to govern big-time intercollegiate athletics. Nevertheless, Professor Grauer's treatment of the issue highlights the fact that such values are important insofar as they enhance efficiency and cost savings among members and also seems to intimate that those values are inherently secondary in nature. Both efficiency and cost-containment are secondary values, in that one must always ask why efficiency and/or cost-containment are important. It is important to save money, but the real importance of such saving relates to what the money saved will be used to produce or acquire. In

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63. *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (in which the College Football Association successfully challenged the NCAA's control over television broadcasting of big-time collegiate football on antitrust grounds).

64. Grauer, *The Use and Misuse of the Terms "Consumer Welfare": Once More to the Mat on the Issue of Single Entity Status for Sports Leagues Under Section 1 of the Sherman Act*, 64 TUL. L. REV. 71, 99 (1989).

Section 2.13, of its Constitution, the NCAA seemingly recognizes this when it asserts that such fiscal and related cost-containment practices are necessary to provide "student-athletes with adequate opportunities for athletics competition as an integral part of a quality educational experience." Efficiency and cost-containment are important to further the educational value, both in terms of athletic participation as an educational value in itself and in terms of the indirect benefits accruing to the student-athlete from the efficient operation of intercollegiate athletics. As such, the primary focus should remain on academic or educational values; efficiency and cost-containment should not be permitted to become ultimate ends in themselves. If they were to become ends in themselves, they might be used to temper or dilute the educational value, particularly as it relates to student-athletes involved in big-time intercollegiate athletics. For example, it is conceivable that it might be argued that funds could be saved by cutting academic services to the student-athletes involved in big-time intercollegiate athletics. It would not be enough that cost savings or efficiency ensued; it would also be necessary to inquire whether such savings unduly inhibit educational values.

#### D. *Summary*

In this Part of my article, I have argued that the educational value, both institutionally and as applied to the particular student-athletes involved in big-time intercollegiate athletics, should be retained and should become the focal point of all efforts to reform the regulation of intercollegiate athletics. Other values espoused by the NCAA, including amateurism, efficiency and cost-containment, are at best secondary, in that they should be used to enhance the educational value, as related to big-time intercollegiate athletics. When those values become ends in themselves, however, they may actually be invoked in a manner detrimental to academic values.

In the remaining sections of this article, I will seek to apply my conclusion that academic matters can and should be used as the primary litmus test in evaluating reform efforts related to the regulation of big-time intercollegiate athletics. In Part III, I examine structural reforms that would further educational or academic values. In turn, Part IV contains an analysis focused on academic values of two major substantive proposals that are being discussed at this time in light of academic values. The analysis in each of those parts of this article demonstrate that vitality can be given to the educational value, in a manner that leads to some surprising conclusions.

### III. REFORMING BIG-TIME INTERCOLLEGIATE ATHLETICS THROUGH FOCUSING ON EDUCATIONAL VALUES: SOME STRUCTURAL REFORMS

Professor Weistart recently indicated that most proponents of reform in big-time intercollegiate athletics advocate a refinement of the current system, a refinement that focuses on creating new rules to deal

with old problems.<sup>65</sup> He added that it will not be enough to refine the current system, unless such refinement is accompanied by "structural" reforms, such as reforms in the institutional makeup of the NCAA governance system.<sup>66</sup> I agree that structural changes must accompany substantive reforms in order to address the problems that appear to inhere in big-time intercollegiate athletics. Indeed, one of the major problems with the nature of most proffered reforms is that they are piecemeal in nature — they address a single problem or related set of problems without recognizing that to tinker with a single problem may simply result in similar difficulties arising in other areas. For example, increasing the penalties for violating NCAA rules may increase the risk to one who would "cheat" to win, and may decrease the relative number of coaches willing to take that risk, but it may also increase the benefits to those who are able to "cheat" surreptitiously or who believe that they can or must do so to win. Similarly, making freshmen ineligible for athletics competition may help further the academic value,<sup>67</sup> but standing alone, it cannot insure that more student-athletes will make significant academic progress and ultimately graduate with an education. Issues of punishment, eligibility and academic progress, among others, are interdependent or polycentric in a reform sense. Structural and substantive changes, therefore, must come in packages; packages that are designed as coherent efforts to further the educational or academic values that must be at the core of the operation of intercollegiate athletics programs.

In this section, therefore, I will examine structural suggestions that will further academic values. However, those structural changes can only be of significance when they are coupled with substantive changes that, together with the structural changes, focus on educational values.

#### A. *Structural Reforms Within the NCAA*

The NCAA is often maligned and misunderstood. In his book regarding intercollegiate football, Rick Telander expresses his contempt for the NCAA and asserts, with only anecdotal support, that those involved in the NCAA "know nothing."<sup>68</sup> Whether Telander is expressing his real view or merely is indulging in journalistic license or exaggeration to make his point that big-time intercollegiate football is in serious need of reform, his position belies a certain misunderstanding regarding the operation of the NCAA. The NCAA simply is an association of schools involved in intercollegiate athletics at various levels. The schools send delegates to conventions, where those delegates vote on issues related to the governance of intercollegiate athletics among the

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65. Weistart, *supra* note 22.

66. *Id.*

67. I say "may" because there is evidence that indicates student-athletes perform better in an academic sense during the playing season, when they actually are participating in athletic competition, See Slatton, *Freshman Ineligibility: Whose Interests Are Served*, *The NCAA News*, Nov. 6, 1989, at 4, col. 1.

68. TELANDER, *supra* note 7, at 196.

membership. As such, the NCAA is not an evil behemoth, but is merely reflective of the views of its membership as evidenced in the NCAA's legislative process.

For his part, Professor Brody has argued that the NCAA is inherently suspect because it facilitates the operation of what he refers to as the "association syndrome" which he defines as, "the ability of a group [like the NCAA] to hold values that no single member of the group has or, at least, would admit to having. . . . Under the 'association syndrome' the sum is not greater than the parts; it is *different* from any of the parts."<sup>69</sup> If Professor Brody is correct, then the NCAA might well be an entity deserving of vilification, because it would provide its members with a structure that is somehow inherently bad or is peculiarly susceptible to being used by those who would impose their tainted view on other unwitting participants in the NCAA governance process. However, as I have argued elsewhere at some length,<sup>70</sup> the NCAA membership might use the "association syndrome" to aid in the collective promotion of values, such as academic integrity, in the operation of their athletic programs that could not be promoted on their individual campuses for political reasons. On many campuses, powerful groups, including alumni, boosters, trustees, legislators and others committed to a "win-at-all-costs" athletics philosophy, pressure the President and others to bend to their will. Indeed, that is just what happened at Southern Methodist University (SMU) throughout the 1970's and much of the 1980's, when athletics personnel engaged in wanton violation of the NCAA rules to satisfy the almost insatiable desire of certain institutionally powerful groups for victories on the playing field.<sup>71</sup> Collectively, in the open forum provided by the NCAA, those committed to furthering academic values could do so, with less threat of retribution than might be felt on their individual campuses, if they only would exert the will to do so. As such, the NCAA might provide just the kind of forum or climate "in which college presidents can work for change without fearing for their jobs."<sup>72</sup> If this is the case, as I believe it is, the presidents need only exercise their "will", assuming they have one.<sup>73</sup> At any rate, it seems clear to me that at most the so-called "association syndrome" is neutral, in that those interested in meaningful reform may use it if they have the will to do so or they simply may defer to those who would use the system for more pernicious, less academic, purposes.

For my part, I would assert that the NCAA is unfairly maligned on the facts, as well. Admittedly, the NCAA's record of reform is hardly

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69. Brody, *NCAA Rules and Their Enforcement: Not Spare the Rod and Spoil the Child — Rather Switch the Values and Spare the Sport*, 1982 ARIZ. ST. L. J. 109, 110 n. 5.

70. Smith, *Death Penalty*, *supra* note 45, at 996-98.

71. THE COMMITTEE OF BISHOPS, REPORT TO THE BOARD OF TRUSTEES OF SOUTHERN METHODIST UNIVERSITY (June 19, 1987) [hereinafter SMU REPORT].

72. Lederman, *Hesburgh and Friday to Head Knight Panel on Reforming Sports*, The Chron. of Higher Educ., Oct. 4, 1989, at A1, col. 2 [hereinafter cited as Lederman, *Panel*].

73. As President Friday puts it, "[w]e must develop the political will among the academic leadership to address these problems and do something about them . . . ." *Id.*

unblemished, particularly insofar as inaction is concerned.<sup>74</sup> Nevertheless, the NCAA has engaged in some meaningful efforts, preparatory and otherwise, that could lead to significant structural and substantive reform. For example, while Senator Bradley has asserted that the NCAA has done "too little, too late" with regard to disclosing graduation rates, it should be noted that the NCAA actually initiated efforts to accumulate and ultimately disclose graduation rates.<sup>75</sup> Thus, it was the NCAA, and not Senator Bradley, that spawned the idea of accumulating and disclosing graduation rates. The NCAA has initiated studies and has taken action in other areas as well.<sup>76</sup> In particular, the NCAA has initiated or completed formal studies at both the institutional (e.g., institutional self-studies<sup>77</sup>) and the national (e.g., the study regarding student-athletes in the academic environment<sup>78</sup>) levels. With those studies, as will be discussed throughout the remainder of this article, the NCAA has the beginning of a data base from which to evaluate and promulgate reforms. Indeed, I believe that the latter-half of the 1980's might well be referred to as the era of preparation of reform.<sup>79</sup> With the data currently available (and that soon to become available)<sup>80</sup> regarding the academic aspects of intercollegiate athletics, the NCAA is poised to exercise its will, if it has one, in reforming intercollegiate athletics. A death knell for the NCAA might be in order if it fails to engage in meaningful reform during the next few years, but it would be premature to commence a dirge at this time. Indeed, as will be discussed, there are some indications that the NCAA is mustering both the data and the concerted will necessary to initiate a game plan of reform.

If the members of the NCAA can muster the needed will, significant reform will be possible, both structurally and substantively. The following structural reforms should be considered in exercising that will.

### 1. Accrediting Intercollegiate Athletics

As early as 1982, an independent Select Committee on Athletic Problems and Concerns in Higher Education, established by the NCAA, recommended "a comprehensive audit and certification program in intercollegiate athletics in order to bring 'sunshine' to athletics pro-

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74. In the words of Senator Bradley, the NCAA often does "too little, too late." The Chron. of Higher Educ., Sept. 20, 1989, at A1, col. 2.

75. NCAA, REPORT OF THE SELECT COMMITTEE ON ATHLETIC PROBLEMS AND CONCERNS IN HIGHER EDUCATION, at 11 (1983) [hereinafter 1982 REPORT].

76. See, e.g., Smith, *Death Penalty*, *supra* note 45, at 1050-57 for a discussion of some of the major reform initiated in 1985.

77. *Id.* at 1006-08.

78. See The NCAA News, Feb. 15, 1989, at 12, col. 1. for an indepth discussion of the NCAA Forum regarding the major, independent research project commissioned by the NCAA regarding student-athletes.

79. The 1990 Convention has been called by some the beginning of the era of reform. The NCAA News, Jan. 17, 1990, at 1, col. 1. If this is so, as only time will tell, the second half of the 1980's might well be deemed the era of preparation for reform.

80. For example, the NCAA study regarding restructuring of the governance system is to be delivered to the Council sometime during 1990. The NCAA News, Oct. 30, 1989, at 1, col. 1.

grams."<sup>81</sup> Since that time there have been some preliminary steps taken toward the creation of an accreditation or certification program.

In June of 1985, the NCAA passed a resolution that provides that institutions are to "conduct a comprehensive self-study and evaluation of their intercollegiate athletics programs at least once every five years."<sup>82</sup> The self-study must include information regarding institutional purpose and athletics philosophy, the authority of the chief executive officer in personnel and financial affairs, athletics organizations, and administration, finances, personnel, sports programs, recruiting policies, services for student-athletes and student-athlete profiles.<sup>83</sup> This self-study was introduced as the precursor to accreditation or certification of athletic programs.<sup>84</sup>

The hue and cry for accreditation of intercollegiate athletics has not dissipated. President Coor recently argued in a national forum that intercollegiate athletics should be incorporated into the accreditation process at the institutional level.<sup>85</sup> He has been joined in that call for an accreditation process by other influential individuals concerned about the reform of intercollegiate athletics.<sup>86</sup>

In April of 1989, Director Schultz introduced a proposal for the development of a certification/peer review process for the evaluation of the operation of intercollegiate athletics programs at member institutions.<sup>87</sup> Later in 1989, Schultz established a blue ribbon panel to review college athletics and to examine the status of the certification/peer review process.<sup>88</sup> The NCAA Council has supported Schultz's call for a certification or peer review process, and would make it voluntary for 1990.<sup>89</sup> In the 1990 Convention of the NCAA, Schultz summarized the nature of the voluntary certification procedure, which he referred to as a "pilot program."<sup>90</sup>

With this move toward voluntary certification, and given that the self-study and academic reporting requirements are in place, the accreditation of intercollegiate athletics programs should not be difficult. As Chancellor Oliva recently recognized, since schools already pay for the

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81. 1982 REPORT, *supra* note 75, at 19.

82. Smith, *Death Penalty*, *supra* note 45, at 1006-08.

83. *Id.* See also NCAA MANUAL, *supra* note 16, § 6.3 at 40-41.

84. See Smith, *Death Penalty*, *supra* note 45, at 1006 n. 125. Within this framework, support for accreditation has grown. For example, Father Hesburgh recently stated that he favors "a stringent accrediting system for college sports, in which all facets of a sports program — academic, financial and otherwise — would be monitored closely and regularly by an outside auditor." Lederman, *Panel*, *supra* note 72, at 42, col. 2.

85. THIRD FORUM, *supra* note 17, at 55.

86. See, e.g., J. OLIVA, WHAT TRUSTEES SHOULD KNOW ABOUT INTERCOLLEGIATE ATHLETICS, AGB SPECIAL REPORT, at 27-29 (1989) [hereinafter AGB REPORT].

87. *Certification, Proposal 42 Among Items on Council's August Agenda*, The NCAA News, July 19, 1989, at 1, col. 3. Schultz first introduced his certification/peer review proposal in April of 1989.

88. *Initial-eligibility Legislation has Proved Beneficial*, The NCAA News, Sept. 18, 1989, at 3, col. 4.

89. *Prepared Text of Schultz's Convention Address*, The NCAA News, Oct. 23, 1989, at 3, col. 3.

90. The NCAA News, Jan. 10, 1990, at 6, col. 2.

accreditation process, bringing accreditation teams to colleges and universities to take a piercing look at athletics on campus should not create significant additional economic burdens.<sup>91</sup> Any additional costs related to the implementation of an accreditation process at the Division I level, which may be the only level at which accreditation of athletics programs should be required, could be funded at the national level out of the \$1 billion in television revenues to be received under the upcoming contract recently negotiated by the NCAA and out of football revenues, if the NCAA can wrest some control over those funds away from the historically avaricious College Football Association ("CFA").

Ernest Boyer has argued for a stringent accreditation program:

When serious athletic violations are discovered, the accreditation status of the institution should be revoked — along with the eligibility status for the National Collegiate Athletic Association. It is ironic that one hears that a university has lost its athletic eligibility but never hears that a college has been on accreditation probation or suspended because of unethical behavior in athletic procedures or its abuse of students.<sup>92</sup>

Stringent accreditation requirements would induce those involved in the administration of higher education to be more attentive to the operation of their athletics programs and, as such, would enhance the likelihood that focus will be placed on academic matters in the operation of big-time athletics programs at the institutional level.

While the NCAA might be involved in appointing an accreditation team member who is familiar with the operation of a big-time athletics program and with the rules governing such a program, other members of the accreditation team should not defer entirely to the findings made by that member of the committee. Other members of the accreditation team also should be actively involved in assessing the role of athletics at the school being accredited. Such an accreditation process would have numerous benefits: it would provide a school with an external evaluation of its athletics program and would help to buffer an institution from internal pressures that might be contrary to the institution's academic objectives; it would provide accreditation team members with much needed exposure to the role of intercollegiate athletics at other institutions and would sensitize them to the kinds of concerns that they ought to have regarding their home institution's program; and, perhaps most importantly, it would serve as evidence that athletics are a significant part of an institution's academic program and would force presidents and other academic administrators to be directly concerned about the operation of their institution's athletics program. The accreditation process would firmly place the athletics program within the academic mission of an institution and would help to increase focus on educational issues or values as they relate to the operation of intercollegiate athletics.

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91. Oliva, *supra* note 20, at 13.

92. LAPCHICK AND SLAUGHTER, *supra* note 43, at xii-xiii.

In developing such an accreditation process, it will be necessary to establish accreditation standards, both nationally and institutionally. While those standards can be related to the rules governing intercollegiate athletics, they must do more than just replicate the rules — they also must focus on direct and indirect educational values served by big-time intercollegiate athletics and must look closely at the internal operations of big-time athletics programs.<sup>93</sup> There must be some examination, in an accreditation visit, of the educational values purportedly furthered by the operation of an institution's athletics program. In that analysis there should be some examination of whether or not the athletics program fulfills an educational value at the macro level by virtue of its: (1) being treated like a performing art;<sup>94</sup> (2) fulfilling a service function analogous to research;<sup>95</sup> (3) building character in the participants;<sup>96</sup> (4) developing a sense of community among participants and spectators;<sup>97</sup> and/or (5) providing a meaningful diversion from the alienation involved in routine work.<sup>98</sup> Relatedly, and perhaps more importantly given the potential for a conflict of interest on the part of the institution, the accreditation process also must examine closely the issue of whether student-athletes are being treated as students and are being given the necessary support to assure that their opportunity to gain an education is maximized.<sup>99</sup> Indeed, it is at this micro student-athlete level that accreditation standards can best be fashioned in a concrete manner. For example, graduation and academic progress standards,<sup>100</sup> as well as requirements regarding tutorial and academic support programs,<sup>101</sup> should be promulgated and enforced. By examining both the macro, large value questions, and micro, student-athlete related educational values furthered by the athletics program, the accreditation process can do much to ensure that big-time athletics remain consistent with the academic mission of the institution being accredited.

Accreditation should also include a close examination or audit of the athletics budget, to ensure that academic values are being furthered in budgetary allocations and to ensure that the budgetary process is under the control of academic interests within the institution. As such, accreditation can assure that the budget process is not controlled by interests outside the institution's governance structure. The accrediting body also should examine recruiting and related procedures to see that they are conducted ethically and in a manner conducive to academic integrity.

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93. As Father Hesburgh has argued, academic, financial and other aspects of the athletics program should be closely evaluated. Lederman, *Panel, supra* note 72, at A1, col. 1.

94. See *supra* notes 32-33 and accompanying text.

95. See *supra* note 34 and accompanying text.

96. See *supra* notes 35-37 and accompanying text.

97. See *supra* note 43 and accompanying text.

98. See *supra* notes 38-42 and accompanying text.

99. See *supra* notes 18-27 and accompanying text.

100. See *infra* notes 317-18 and accompanying text.

101. See *infra* notes 301-18 and accompanying text for a discussion of the need to pay student-athletes with academic support.



Among structural reforms, the addition of an accreditation process is a must. While it will not cure problems, it will draw attention to academic values and could help provide the necessary information, pressure and will for more meaningful substantive reforms at the institutional, conference and national levels.

## 2. The Academic Impact Statement

In a recent national forum, Wilford Bailey argued that the NCAA should require a statement of intent and rationale for each piece of significant legislation considered by the NCAA.<sup>102</sup> Proposal 68,<sup>103</sup> passed at the January, 1990 NCAA Convention provides for just such a publication of statements of intent and rationale for all legislation. The next step that should be taken would be to require that all statements of intent and publicized rationales be grounded in academic values. With such information in hand, delegates can assess the academic value of particular legislative proposals.

The Advisory Committee to Strengthen the Presidents Commission recently recommended that an "academic impact statement" be provided for each proposed piece of legislation.<sup>104</sup> Such a proposal would take the statement of intent yet a step further toward achieving academic integrity in the operation of big-time intercollegiate athletics. If every piece of legislation had to be supported by an academic impact statement, delegates and the public alike would be able to focus on the values underlying that legislation and would be able to evaluate the legislation on that basis. Such a structural addition to the NCAA process would be beneficial both substantively and symbolically, as an indication that the NCAA genuinely is concerned about academics.

By analogy to other existing legal constructs, an academic impact statement could be built on a form like that provided for in environmental impact statements which are commonly used to explicate the impact of a particular land use or related proposal on environmental values.<sup>105</sup>

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102. See THIRD FORUM, *supra* note 17, at 62, where President Bailey is quoted as saying: I suggest that the preliminary proposals be accompanied by not only a statement of intent, but also by a concise statement of rationale for the proposed amendment. The latter should provide a brief justification for the proposed legislation as an effective way to address the problem in the context of the principles for the conduct of intercollegiate athletics to which the membership is committed.

Such a procedure could do much to help focus attention on academic justifications or purposes related to each proffered piece of legislation.

103. Proposal 68, which was adopted at the 1990 Convention, has been summarized as follows:

To revise the Association's amendment process to establish new deadlines for amendments-to-amendments, to require the identification of a primary contact person for each legislative proposal submitted by the membership, to redefine permissible amendments-to-amendments, to establish a new publication date for certain amendments-to-amendments, and to require the submission and publication of statements of intent and statements of rationale for all legislative proposals.

Reprinted in *The NCAA News*, Dec. 11, 1989, at 3, col. 3. (Emphasis added).

104. *Commission Receives Advisory Committee Statement*, *The NCAA News*, Aug. 2, 1989, at 3, col. 2.

105. See, e.g., Baker, Kaming and Morrison, ENVIRONMENTAL IMPACT STATEMENTS; A GUIDE TO PREPARATION AND REVIEW, Practising Law Institute (1977). In Chapter 5 of that

As such, the academic impact statement could be built around a series of questions that address both the macro educational values purportedly furthered by intercollegiate athletics<sup>106</sup> and the micro effect on the student-athletes' educational opportunities and progress.<sup>107</sup> A well-devised academic statement could do much to further a renewed emphasis on academic values, and might even include a requirement that the anticipated cost of the legislation be balanced against educational values furthered or at least justified on such grounds. It, therefore, is clear that use of an academic impact statement, particularly when included with a meaningful accreditation process, could do much, as a structural matter, to reinforce academic values in the operation of intercollegiate athletics programs.

### 3. Organizational Changes Within the NCAA

In addition to adding a meaningful accreditation process and a requirement that an academic impact statement be filed with every new piece of legislation considered by the NCAA, the NCAA could undergo some structural reform that would support the furtherance of academic values in the governance of intercollegiate athletics.

#### a. *Federation to Recognize Differences Among Athletics Programs*

There has been significant clamor for increased federation in the NCAA governance structure.<sup>108</sup> Such federation, which would facilitate variation in the rules applied to programs at various institutions based on the differences in emphasis in those programs, seems to be supported by the great disparity economically and in terms of emphasis among institutions in the operation of their intercollegiate athletics programs. Economically, programs at the Division III level are often run with budgets in the thousands of dollars, while Division I programs are operated under budgets in the hundreds of thousands and millions of dollars.<sup>109</sup> Indeed, even in Division I, the disparity is so great, ranging from programs operated with a budget of as little as \$400,000 to programs operated in the \$15-20,000,000 range.<sup>110</sup> The economic disparity among programs, even at the Division I level, is indicative of major differences in terms of emphasis in the operation of athletics programs. Some athletics programs have budgets that make them big businesses, and the NCAA needs to recognize this by focusing on the furtherance of educational values in the context of such big-time athletics programs. Such focus can be enhanced by federation proposals that would permit

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text, the authors examine the contents of environmental impact statements and the relationship between such statements and land use values.

106. See *supra* notes 32-43 and accompanying text, for an explication of the macro values.

107. See *supra* notes 44-45 and accompanying text, for an explication of the micro values.

108. See THIRD FORUM, *supra* note 17, at 23.

109. See *id.* at 24, for a discussion by Director Schultz of the disparity in athletics budgets and the need for giving more attention to federation issues.

110. *Id.*

the NCAA to treat different programs in terms of economics and emphasis differently.

With rising revenues generated by such big-time programs,<sup>111</sup> and the need to decide how to best utilize NCAA revenues, which have grown enormously during the past few years,<sup>112</sup> there has been more talk of the need to share revenues among programs to ensure equality of competition, a level playing field.<sup>113</sup> Based on this increased push for revenue-sharing and a recognition that programs within Division I are quite different in terms of emphasis both economically and in terms of sports offered, with many Division I programs which do not offer football, Thomas Hansen, Commissioner of the PAC-10 Conference, has argued that schools with broad-based programs should be treated differently than institutions with limited programs.<sup>114</sup> Indeed, as early as 1982, an independent Commission established by the NCAA suggested that, "institutions with major, revenue-producing programs be provided greater autonomy in the NCAA's legislative process."<sup>115</sup> It is not surprising, therefore, that current legislative efforts reflect a trend toward increased federation.<sup>116</sup>

Federation efforts can enhance the focus on academic values in big-time intercollegiate athletics, but will not do so without some vigilance on the part of members and without other structural changes, such as the addition of an accreditation process and academic impact statements. Legislative autonomy, with regard to the promulgation of rules and regulations governing large programs, that recognizes the differences between those programs and smaller programs, without compromising academic values, should be welcomed on the ground that such legislation is more realistic and less hypocritical. For example, it is clear that big-time programs do not further the amateurism value and should not be subjected to its strictures.<sup>117</sup> Smaller programs, or minor sports within larger programs, on the other hand, may be more amateur in nature.

Furthermore, such federation may be designed in a fashion that directly furthers academic values. For example, it could be coupled with revenue-sharing among like programs, with such revenue-sharing focusing on academic values and needs that are largely indigenous to big-time

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111. See SENATE REPORT, *supra* note 1, at 4, stating that annual revenues for college sports are estimated to be \$50 billion.

112. See, e.g., Lederman, *TV Bonanza*, *supra* note 15, at A1, where it is noted that revenues from the NCAA's television contract alone will average \$143 million yearly.

113. *Id.* See also, 1982 REPORT, *supra* note 75, at 20-21 (an early call for institutions to bond together to maximize revenues and benefits generated by big-time intercollegiate athletics).

114. See Lederman, *TV Bonanza*, *supra* note 15, at A29.

115. 1982 REPORT, *supra* note 75, at 14.

116. See, e.g., *Convention Legislation Reflects Trend Toward More Federation*, *The NCAA News*, Nov. 13, 1989, at 1, col. 3.

117. See *supra* notes 46-60 and accompanying text, for a discussion of the need to jettison the amateurism value as related to intercollegiate athletics.

athletics.<sup>118</sup> Similarly, rules might be fashioned to reflect particular macro values furthered by such major athletics programs, and the micro interests of the student-athletes who participate in those programs. In this regard, for example, student-athletes participating in big-time intercollegiate athletics typically spend more time away from their studies and away from class than do other athletes and students involved in other extra-curricular programs. Student-athletes in such sports programs, therefore, have different academic needs.<sup>119</sup> As argued later in this article, legislation should be devised to meet those different academic needs,<sup>120</sup> and any efforts to further federation should be combined with such legislation.

There also is a sense in which federation-like issues arise at the institutional level. Institutions involved in big-time, revenue-producing athletics programs, generally football and basketball, typically also offer minor sports that do not generate significant revenue and are run at a loss. Thus, a school might offer football and basketball, which generate revenues, while also offering sports such as track, tennis and swimming, that may entail costs that exceed revenues. Legislation should be fashioned that recognizes these differences, as well, for a couple of reasons.

First, the pressures that accompany revenue-producing sports may be quite different for all parties involved, including administrators, coaches and student-athletes, than the demands related to minor sports at the same institution. Thus, there may be some need to examine potential demands placed on coaches and athletes involved in major pressure-packed sports that may not exist in the operation of minor sports.<sup>121</sup>

Second, as I implied earlier in this article,<sup>122</sup> I have a sense that there is some lingering bias or racism involved in failing to recognize the differences between major, revenue-producing and minor, cost-generating programs at institutions. On the one hand, particularly in the case of football and basketball, many of the athletes involved in major sports are minorities and come from lower socio-economic backgrounds than the typical participants in sports like tennis and swimming.<sup>123</sup> Particularly when combined with the time-consuming nature of participation in big-time athletics, these differences in terms of race and socio-economic

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118. Revenue-sharing could be conditioned on the attainment or performance of certain academic objectives or conditions by the recipient institutions.

119. See *NCAA Forum*, *The NCAA News*, Feb. 15, 1989, at 12-13. (A principal research scientist at the American Institutes for Research, Robert J. Rossi, compares the demands on student-athletes involved in big-time athletics with their student counterparts, who are heavily involved in extra-curricular activities.)

120. See *infra* notes 301-18 and accompanying text.

121. The disparity in coaches' salaries between major and minor sports may be reflective of this variance in pressure and risk. It seems clear that a coach in a minor sport might suffer through a series of losing seasons without jeopardizing his or her contract, while the position of a coach in a major sport would be in jeopardy if he or she failed to win. *But see*, *N. Y. Times*, Jan. 7, 8 and 9, 1990 (a series of articles regarding pressures in minor sports).

122. See *supra* notes 54-57 and accompanying text.

123. See LAPCHICK AND SLAUGHTER, *supra* note 43, at 63-80, for a discussion of racial and related issues in intercollegiate athletics.

background may beget differences related to the needs of the student-athletes, in the areas of financial aid and academic support, and should be reflected in the rules governing such athletics programs.<sup>124</sup> Taking dollars that are needed to meet the peculiar academic needs of athletes involved in big-time athletics to support athletes involved in minor sports, therefore, may be Robin Hoodism in reverse — taking from the poor and giving to the rich.

In any event, federation efforts at the national institutional levels, which appear justified on their face, must be accompanied by a searching examination of their ramifications for academic values, both in a macro and a micro sense. In moving toward federalism, therefore, changes should be conditioned on the furtherance of academic values.

In discussing federation, Chuck Neinas, Executive Director of the CFA, recently suggested four possible options that might be implemented at the Division I level: (1) retaining the status quo; (2) more stringent membership requirements for Division I; (3) creation of a Division IV category; or (4) creation of an auxiliary organization for major programs.<sup>125</sup> Of these options, I believe that the most viable one is the second. Given the disparity in emphasis and economics between existing Division I programs, option number one simply is no longer realistic. In turn, creating a new Division IV at the bottom of the NCAA hierarchy would impact most significantly on Divisions II and III and would do little to address the enormous disparities of emphasis involved in Division I programs. Option four is unacceptable because it takes programs outside the gambit of NCAA control and would only be acceptable if the move were accompanied by very stringent adherence to a set of rules that focus on academic values. One benefit to such a move would be that the entire fabric of rules could be newly assessed from an academic perspective. However, given the likelihood that such a move would be motivated by economic as opposed to academic purposes,<sup>126</sup> I could not support a move away from NCAA governance unless it were heavily conditioned on academic values. In this regard, even option two, which recognizes the need for more federation, must itself be conditioned primarily on academic as opposed to economic needs. Of course, it is hopeful that the economic and related pressures that seem to be dictating a move toward federation may give institutions and the

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124. See *infra* notes 306-15 and accompanying text, for a discussion of the need for additional educational compensation for such student athletes.

125. THIRD FORUM, *supra* note 17, at 32.

126. For example, from its formation, the CFA has done little to further academic values and was designed to feather the economic nests of its members by serving as a conduit through which television revenues generated by the broadcasting of football games between member institutions could pass. The experience of the CFA indicates that the creation of a super-division, without expressly tying the creation to academic values, merely would serve as a new and larger conduit through which revenues could pass to fuel major athletics programs. However, such greed may well spell the demise of the CFA, as witnessed by the fact that Notre Dame University recently "took the money and ran" in making a contract directly for the televising of its football games. The \$40 million contract by Notre Dame may signal the unraveling of the CFA. See Lupica, *With TV Deal, Notre Dame Sells Higher Ideals Down the Tube*, *The National Sports Daily*, Feb. 11, 1990, at 10, col. 1.

NCAA another opportunity to examine how academic values can be furthered as a part of such a move.

b. *Redistribution of Power: Increasing the Role of Certain Institutional and Other Actors Within the NCAA Governance Structure*

In order to effectuate the necessary focus on academic values in reforming intercollegiate athletics, there will be some need for restructuring within the governance structure of the NCAA and its member institutions. In restructuring, the emphasis should be placed on empowering those groups that, by their very nature, are most inclined to favor academic reform. There also is a need for additional support resources for those groups that would be most inclined to further the academic values that should inhere in the operation and governance of intercollegiate athletics. However, more than empowerment is required. There must also be the will and the willingness to commit that most precious of all resources — time — to institute major reforms on the part of those who espouse the importance of academic integrity in big-time intercollegiate athletics programs.

Those directly involved in administering intercollegiate athletics programs, the athletic directors and coaches, have historically had the greatest interest in the governance of intercollegiate athletics, and that interest has often translated into power within the regulatory realm.<sup>127</sup> The athletic directors and coaches typically have not been leaders in the reform effort. Unfortunately, oftentimes the proponents of meaningful reform have been ill-prepared<sup>128</sup> as compared to athletic directors and coaches, and have lacked support from others who should share their interest in supporting major reform efforts in intercollegiate athletics.<sup>129</sup> Without better preparation on the part of those who must lead the effort for reform and more support from others who should favor academic integrity in the operation of big-time intercollegiate athletics, the likelihood of meaningful reform is marginal. Nevertheless, structures can be developed that will help increase preparation on the part of constituencies prone to support academic values and may provide those who espouse major reform with the information base necessary to sway those who waver in their support of such reform.

Recently, there have been calls within the NCAA for the hiring of a consulting firm to examine the NCAA governance process.<sup>130</sup> Such a consulting firm should also be directed to examine the structure, as well as the legislative process, of the NCAA. In doing so, the firm should evaluate the entire governance process in light of the academic values

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127. See discussion in Smith, *Sixth Special Convention*, *supra* note 32, at 430-39.

128. *Id.*

129. For example, when the President of the University of Iowa came out in support of freshmen ineligibility, which in his view would support academic values, the Governor of Iowa sought favor with the public by denouncing the University President. See *The Chron. of Higher Educ.*, April 19, 1989, at A1.

130. THIRD FORUM, *supra* note 17, at 58.

that must be furthered within the NCAA. In other words, for example, in assessing the power of the NCAA Council<sup>131</sup> in governance issues, the firm should determine whether the selection process for and makeup of the Council is reflective of those groups that, by their nature, are most inclined to support academic values.<sup>132</sup> In doing so, the consulting firm might well conclude, as President Coor has, that there is a need for a policy committee, made up of individual members of the Presidents Commission, who should naturally, by virtue of their position, be concerned with academic integrity in intercollegiate athletics, and members of the Council. The committee would be given significant policymaking authority.<sup>133</sup>

In the following sections, I will examine the kinds of structural adjustments that could be made to enhance the likelihood that academic integrity would be central to the operation of intercollegiate athletics programs.

### (1) The Executive Director

Historically, the Executive Director of the NCAA has been a significant force in the governance of intercollegiate athletics, less because he has been given express powers and more because he has been able to forge his position into one of some authority, by the power of persuasion and by his control over staff and related matters at the NCAA headquarters. In this regard, just as the "reign" of Walter Byers, as Executive Director of the NCAA, ushered in a "new era" in intercollegiate athletics,<sup>134</sup> the current tenure of Richard Schultz may well portend yet another new era in the governance of intercollegiate athletics. With increasing regularity, Schultz has called for major reform of the NCAA to ensure "academic integrity and rules compliance" in intercollegiate athletics.<sup>135</sup> Indeed, Director Schultz's early call for a "major reform"<sup>136</sup> effort in intercollegiate athletics at the 1991 Convention is audacious, in a heartening way. Schultz has placed the force of his position behind the movement for major reform, and time will tell whether or not he will have squandered the necessarily limited capital of his position in support of a platform and call for reform that will not be heeded. However, while it will be informative to observe the 1991 Convention to see whether or not the delegates respond to his clarion call for reform,

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131. The Council consists of 46 members, representing each of the three NCAA divisions, and is arguably the most powerful group currently in the NCAA governance structure. See NCAA CONST., art. IV, § 4.1, reprinted in NCAA MANUAL, *supra* note 16, at 17-20.

132. Drawing representation, as the Council does, from Divisions II and III might further academic reform because programs at those levels tend to be tied closer to the academic enterprise, but representatives from those divisions might lack understanding regarding the need for and the nature of reform necessary at the Division I level.

133. See THIRD FORUM, *supra* note 17, at 56-57. But see Witte's remarks to the effect that there is little support among influential members for such a committee within the NCAA governance structure. *Id.* at 67.

134. For a discussion regarding the "reign" of Walter Byers, see Smith, *Death Penalty*, *supra* note 45, at 993-94.

135. See, e.g., The NCAA News, Jan. 10, 1990, at 6, col. 1.

136. *Id.*

Schultz deserves to be supported by the presidents and others in his efforts in this area.

There is little that can be done directly as a structured matter to support Schultz in his efforts, short of giving him authority to introduce a major reform package of his own, much like the President is permitted and expected to offer a legislative agenda in our national government. If Schultz is able to put together a coherent reform package and garner support for it from academic circles, it might be worthwhile to give the Executive Director the power to initiate legislation. Indeed, such an effort might help insure coherence in legislation. Short of giving the Director such power, it might be possible to increase formal ties between the Executive Director and groups like the Presidents Commission that should be supportive of his efforts to reform intercollegiate athletics to ensure academic integrity and rules compliance.

## (2) The Council

The Council is arguably the most powerful entity in the NCAA governance structure as currently constituted. The Council has power to: (1) "[e]stablish and direct the general policy of the Association in the interim between Conventions,"<sup>137</sup> (2) "[a]ppoint such committees as may be necessary for executing the provisions of [the NCAA] constitution or the bylaws,"<sup>138</sup> (3) "[r]eport its proceedings to the general business session of the annual Convention,"<sup>139</sup> (4) "[m]ake interpretations of the constitution and bylaws in the interim between Conventions,"<sup>140</sup> (5) "[r]eview and approve policies and procedures governing the administration of the enforcement program,"<sup>141</sup> (6) "[a]dopt administrative regulations for the efficient implementation of the Association's general legislative policies,"<sup>142</sup> and (7) "[f]ill vacancies that occur among the officers of the Association or on the Council, the Executive Committee or other committees of the Association [for the unexpired term]."<sup>143</sup> While this executive power does not dwarf the legislative power of the membership as expressed by the delegates voting in convention, it does provide for significant express power and also is a source of perhaps even greater implied power. The implied power is a function of the fact that members of the Council have access to and can create information through the committee process.<sup>144</sup> Members of the Council are very involved in overseeing the day-to-day operations of the NCAA and gain the power of information by virtue of that immersion. As any lawyer knows, information is central to persuasion. As such, the Council is for-

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137. NCAA CONSTITUTION, art. IV, § 4.1.3 (a), *reprinted in NCAA MANUAL, supra* note 16, at 19.

138. *Id.* at (b).

139. *Id.* at (c).

140. *Id.* at (d).

141. *Id.* at (e).

142. *Id.* at (f).

143. *Id.* at (g).

144. *See, e.g.,* NCAA CONSTITUTION, art. IV, § 4.1.1., *reprinted in NCAA MANUAL, supra* note 16, at 17-19.



midable, both in terms of its expressed powers and in terms of its implied power of persuasion and access to and control over information.

The Council historically has not been at the forefront of reform. In the 1990 convention, the Council again indicated its opposition to aspects of the Presidents Commission's rather modest reform proposals.<sup>145</sup> While much of the Council's opposition to the Commission's proposals was well-founded,<sup>146</sup> it is sad that the Council has never used its authority to work to devise a coherent package of major reforms that would help to instill academic integrity in big-time intercollegiate athletics. Given this lack of inspired direction on the part of the Council, efforts to reform the governance structure, like those espoused by President Coor,<sup>147</sup> should be given serious consideration. More importantly, perhaps, efforts should be made to strengthen both the express power of other entities such as the Presidents Commission, which by the nature of their membership, are more inclined to promote reforms supportive of academic integrity and their implied power in terms of access to information. In the following sections, I discuss how the power of other entities or groups might be augmented to stimulate meaningful substantive reform efforts.

### (3) The Presidents Commission

It has repeatedly been asserted that the presidents must become "proactive rather than passive participants"<sup>148</sup> in the governance of intercollegiate athletics. The Presidents Commission was formed in 1984 for just that purpose.<sup>149</sup> While the presidents were unable to gain veto power over NCAA legislation, they did gain significant power relative to the legislative process,<sup>150</sup> and were ultimately granted a veto over the selection of the Executive Director of the NCAA, when Schultz was selected.<sup>151</sup>

Despite being given this power, the Presidents Commission has had a checkered history, in terms of its ability to shape the direction of NCAA legislation. For example, it was fairly successful in 1985, when it strengthened penalties for noncompliance with NCAA rules. At that time, the presidents effectively sponsored what has been referred to as

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145. See, e.g., Lederman, *NCAA Council Refuses to Back Presidents' Call Limits on Football, Basketball Seasons*, *The Chron. of Higher Educ.*, Oct. 25, 1989, at A35, col. 3.

146. The presidents often act rashly and symbolically without thinking much about the ramifications of their actions. See *infra* notes 178-95 and accompanying text, for a discussion of this weakness and the need for more attention to detail on the part of the presidents. Nevertheless, the Council has never initiated a major package of reforms on its own, perhaps because it tends to reflect the interests of the rank and file membership of the NCAA delegates, which has been heavily dominated by athletic directors and coaches, or their supporters, who tend to support the status quo.

147. See discussion, *supra* note 133 and accompanying text.

148. LAPCHICK AND SLAUGHTER, *supra* note 43, at 180.

149. For a discussion regarding the history of the Presidents Commission, see Smith, *Death Penalty*, *supra* note 45, at 997-1000.

150. *Id.*

151. *Id.* at 1000 n. 85.

the "death penalty" for repeat, major infractions of NCAA rules.<sup>152</sup> In 1987, however, in its push for cost-containment, the Presidents Commission was "finessed"<sup>153</sup> and due to lack of preparation suffered one legislative defeat after another at the hands of the anti-reform forces marshalled by coaches and athletic directors.<sup>154</sup> In 1990, the Presidents Commission again enjoyed marginal success in terms of gaining support for three reforms it had sponsored. The 1990 reforms dealt with a partial repeal of financial-aid restrictions for freshmen athletes at the Division I level, a requirement that Divisions I and II publish graduation rates, and a limit on the length of the playing and practice seasons in basketball. The limit finally agreed upon by the delegates was less than that which had been sought by the presidents and came only after a "rancorous, five-and-a-half hour debate and intense arm-twisting by several members of the [Presidents Commission]."<sup>155</sup>

The Presidents Commission has experienced a checkered record for a number of reasons. First, presidents simply have lacked the will to act decisively.<sup>156</sup> Second, the Presidents Commission has not been as prepared as it should be in making its arguments for reform and has been outmatched by those who are directly concerned with and involved in the administration of intercollegiate athletics.<sup>157</sup> Third, since they often operate as crisis managers and are unable to give extensive and continuous attention to all matters related to higher education, intercollegiate athletics have received, at best, sporadic attention from the presidents.<sup>158</sup> Finally, there is some perception that the presidents "are too politic a class of men [and women] to take any really effective steps against an enterprise that brings in such large sums of money"<sup>159</sup> and public attention to their respective institutions. This final problem may explain, in part, the reason why presidents tend to be intransigent and why reforms are sporadic and focus more on cost-containment than reform to achieve academic purposes.

The first three reasons why the presidents have not been as effective as had been hoped in bringing academic reform to intercollegiate athletics are somewhat related and may be cured by strengthening staff and related support, at the NCAA level, for the Presidents Commission. Lack of will, failure to prepare, and the president's role as crisis man-

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152. See, e.g., Smith, *Death Penalty*, *supra* note 45.

153. For a discussion of the resounding defeat suffered by the Presidents Commission during the summer of 1987, see Smith, *Sixth Special Convention*, *supra* note 32, at 423.

154. *Id.*

155. Lederman, *NCAA Adopts 3 Major Rules Changes Endorsed by Presidents' Panel*, *The Chron. of Higher Educ.*, Jan. 17, 1990, at A1, col. 4.

156. See, e.g., *Commission Receives Advisory Committee Statement*, *The NCAA News*, Aug. 2, 1989, at 1, col. 4. The Presidents Commission Advisory Committee concluded that: [T]here remains a concern that the involvement of the Commission and of chief executives in general is not as effective as it could be. For the most part, this is due to (1) a lack of effectiveness by the Commission in communicating its positions and building support for them among other CEOs, and (2) CEOs' failure in general to exercise the authority that they hold in the existing NCAA procedures.

157. See Smith, *Sixth Special Convention*, *supra* note 32, at 423.

158. *Id.* See also, Smith, *Death Penalty*, *supra* note 45, at 998.

159. H.L. Mencken, *cited in* LAPCHICK AND SLAUGHTER, *supra* note 43, at 185.

ager, all might be mitigated by increased institutional support for the Presidents Commission. Such support could come in various forms, including the creation of a number of full time staff positions reporting directly to the Presidents Commission,<sup>160</sup> special committees of interested and dedicated presidents, and increasing presidential authority and accountability within the NCAA governance process by giving the Presidents Commission a veto over legislative action taken in convention.

The final problem — that of the pressures of economics and public attention — may be more intractable. It takes an extraordinary president to be willing to enforce academic values when he or she must do so at the risk of losing revenues or the public attention that the institution may gain through the operation of its big-time intercollegiate athletics program. Nevertheless, I continue to maintain that it is more likely that such obstacles to reform can be addressed by conscientious presidents at the national level, where there is some insulation from institutional pressures,<sup>161</sup> than by a single president at the institutional level. Thus, as the Presidents Commission experiences some success, the buffer between the pressure felt at the institutional level and the president's desire to further academic purposes may be increased by providing the president with a set of national rules which mandate compliance. Of course, such a buffer could be greatly enhanced by requiring accreditation of the athletics program at individual institutions. Indeed, presidents and deans alike understand that accreditation demands can be very beneficial in efforts to ensure the kind of academic program they favor by putting pressure on institutional constituencies that oppose those efforts.

#### (4) *Conference*

In addition to structural changes at the national level, conferences are beginning to take actions that would enhance academic values in the operation of intercollegiate athletics at the conference level. For example, one conference recently agreed to give advertisers a rebate if the schools within the conference failed to graduate all eligible basketball players,<sup>162</sup> the presidents in the PAC-10 Conference recently decided to eliminate their conference basketball tournament at the cost of approximately \$700,000, in terms of lost revenues to the conference, as a token of their commitment to academic values by lessening demands on the student-athlete's time,<sup>163</sup> the chief executive officers of the Southern Conference recently met to begin to consider conference-level re-

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160. See Smith, *Sixth Special Convention*, *supra* note 32, at 455-57.

161. See discussion *supra* note 69 and accompanying text.

162. *MAAC Links Corporate Sponsor Payments to Graduation Rate*, The NCAA News, Dec. 11, 1989, at 17, col. 1 (discussing the M.A.A.C.'s linkage of advertising to graduation rates).

163. Kelley, *PAC-10's Decision to Drop Tournament Praiseworthy*, The NCAA News, Dec. 27, 1989, at 4, col. 1 [hereinafter cited as Kelly, *PAC-10's Decision*].

forms,<sup>164</sup> the Atlantic Coast Conference is expected to initiate a reform effort directed at cutting costs and relieving time pressures on athletes,<sup>165</sup> and the Big 10 chief executive officers recently acted to support a ban on freshmen eligibility, although they stressed that they would not act alone as a conference.<sup>166</sup>

As illustrated by the conditional action of the Big 10 in banning freshmen eligibility only if other conferences follow suit, reform at the conference level is more difficult to bring to fruition than is reform at the national level. This is particularly true because of the "level playing field" or equity in athletics competition concept. As such, if a conference were to initiate major reform in furtherance of academic values, it might adversely impact on the ability of schools within the conference to recruit student-athletes and to compete with schools outside the conference that do not adhere to equally stringent requirements. Nevertheless, some conferences may be willing to initiate academically related reforms in order to place their institutions in a positive academic light in the media.

As a structural matter, there are some things that can be done nationally and at the conference level to increase the impetus for reform in furtherance of academic values. Nationally, economic and other incentives can be given to conferences and institutions willing to engage in meaningful reform. For example, the NCAA might provide funds to support particular efforts designed to further academic values at both conference and institutional levels. Similarly, the conference might provide its members with economic and related incentives to engage in meaningful reform at the institutional level. Economic incentives could be used as rewards for successes in areas such as graduation rates, as aid for schools within the conference that have more competitive admission standards than other conference members, and as support for programs designed to further academic values.

Efforts at the conference level should be supported both nationally and at the institutional level. Indeed, a combined effort at reform could create the momentum necessary to ensure that meaningful reform package is initiated and enacted.

##### (5) *Board of Trustees*

When one turns from the national and conference levels to the institutional level, one must look first to the Board of Trustees in examining what kinds of changes might be made to enhance the academic values that ought to inhere in big-time intercollegiate athletics pro-

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164. *Southern CEO's Seek Bigger Sports Role*, The NCAA News, Nov. 13, 1989, at 13, col. 3. It should be noted, however, that the suggestions were quite weak in terms of their likely capacity to generate meaningful reform.

165. The A.C.C. announced that, during the spring of 1990, it would "adopt a series of league-wide changes designed to cut costs and relieve pressures on athletes." The Chron. of Higher Educ., Jan. 17, 1990, at A39, col. 2.

166. *Big Ten CEO's Back More to Bar Freshmen*, The NCAA News, June 21, 1989, at 4, col. 1.

grams. As Director Schultz recently noted, the Board of Trustees or governing board is ultimately responsible for everything at a university, including intercollegiate athletics.<sup>167</sup>

The degree of potential involvement on the part of a governing board in the administration of a big-time intercollegiate athletics program was demonstrated during the woes experienced by SMU during the 1970s and much of the 1980s.<sup>168</sup> In the Report to the Board of Trustees of SMU from the Committee of Bishops, it was noted that Presidents Zumberge and Shields "were the administrators of the University during their respective terms, but Cox, Stewart and Clements (board members) were the 'leadership.' And it was clear that the administrators reported to and were responsible to that leadership."<sup>169</sup> Indeed, at one juncture, President Shields reported that Clements told him "to 'stay out of [athletics]' and 'go run the university'."<sup>170</sup>

The SMU experience amply demonstrates that the governing board ultimately is responsible for intercollegiate athletics. Of course, at most institutions the board may take a far less aggressive role in terms of the operation of the intercollegiate athletics program. However, the fact that governing boards can be passive in exercising their responsibility to oversee the operation of the athletics program at their institution does not absolve them of their responsibility. Indeed, as was concluded in the SMU report, the board must exercise "reasonable care and diligent inquiry" in overseeing the operation of the athletics program at their institution.<sup>171</sup>

Given that the governing board ought to be responsible for oversight, it would be appropriate to hold them to a duty of care in the exercise of their oversight function. Under NCAA rules, it is arguable that members of a governing board can and, I believe, should be held accountable in exercising their duty of care to oversee the operations of their athletics program.<sup>172</sup> Certainly, the NCAA could require that a particular member of a governing board disassociate himself or herself from a program if he or she has either "engaged in or condoned a major violation [of NCAA rules]."<sup>173</sup> Some states have also passed legislation

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167. Schultz noted that, "The message has to start with the governing board at each university that it is responsible for the integrity of everything that goes on at the university, including intercollegiate athletics." Quoted in Franckling, *Athletics Suffer From Lack of Direction, Purpose, Yow Says*, *The NCAA News*, July 5, 1989 at 5, col. 3.

168. See SMU REPORT, *supra* note 71, at 14.

169. *Id.*

170. *Id.* at 18.

171. See Smith, *Death Penalty*, *supra* note 45, at 1026-27, arguing that the language of the repeat violator (death penalty) legislation is broad enough to cover presidents. Similarly, it could be construed to cover board members. It is clear that board members, as representatives of an institution's athletics interests, could be disassociated under § 19.4.2.6 of the NCAA Bylaws, which provides in pertinent part that: "[t]he disassociation of relations with a representative of an institution's athletics interests may be imposed on a permanent basis, for the duration of the applicable probationary period or for another specified period of time . . ." *reprinted in* NCAA MANUAL, *supra* note 16, at 270.

172. NCAA MANUAL, *supra* note 16, at 270.

173. See, e.g., Section 10.1 of 1989 Nev. ALS 382; 1989 Nev. Ch. 382; 1989 Nev. AB563, which provides that:

that would possibly make such actions by members of a governing board actionable, either civilly or criminally.<sup>174</sup> Such efforts to hold board members accountable are laudable and are analogous to notions of responsibility and accountability that exist in the corporate area.<sup>175</sup>

Holding board members accountable for what they know and condone, explicitly or implicitly, and for what they should have known, in terms of the operation of their institution's athletics program, will help to ensure that academic values are furthered in intercollegiate athletics. Certainly, board members cannot be expected to oversee intercollegiate athletics on a daily basis, but they can be expected to require their president to report to them on a regular basis with regard to the operation of the university's athletics program. Relatedly, they can require that the president and the athletics staff execute contracts that mandate such reporting and that provide for dismissal in the event that there is a major infraction of NCAA rules on the part of the athletics department. Such a reporting system, particularly if a level of specificity is demanded and is coupled with contractual accountability, will have a decided "trickle down" effect, requiring the president to exercise his or her oversight more closely and creating a closer relationship between the athletics department and the president. It might also help to ensure that the board will support the president in taking decisive action against an errant coach or athletics department.<sup>176</sup>

In addition to holding members of the board accountable, some structural changes might be invoked that would further academic values in the operation of intercollegiate athletics programs. First, it would be helpful for the board to delineate their own responsibility and the responsibility of the president and others with regard to oversight of the intercollegiate athletics program.<sup>177</sup>

Second, and relatedly, the board should require a written report each year regarding the operation of the intercollegiate athletics program at their institution. The basic form for that report — the questions to be answered — might be provided by the NCAA itself and should require the president and the athletics department, and all personnel

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A person who causes a student athlete or an institution to violate a rule of the National Collegiate Athletic Association to which the institution is a member, or aids in any such violation, is liable to the institution for damages. . . if:

(a) The person knew or reasonably should have known that a rule was violated or would be violated; or

(b) The violation of the rule is a contributing cause of:

(1) Disciplinary action, including loss of eligibility, taken by the institution against a student athlete; or

(2) Disciplinary action taken by the National Collegiate Athletic Association against the institution or a student athlete.

174. See, e.g., Fletcher, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS*, Vol. 3, § 838 at 177-203. Fletcher notes that, "[a] director can be liable for a violation of the fiduciary duty even in the absence of bad faith or dishonesty; affirmative malfeasance is not required. Mere passive negligence can be enough to breach the duty and result in liability." *Id.* at 181.

175. See Oliva, *supra* note 20, and AGB REPORT, *supra* note 86.

176. See, e.g., recommendations to this effect in SMU REPORT, *supra* note 71, at 46-47.

177. LAPCHICK AND SLAUGHTER, *supra* note 43, at xxix.

therein, to respond to questions regarding the values and functions actually furthered by intercollegiate athletics at their institution, including performing arts, research-like functions, building of character, development of a sense of community, and the furtherance of educational values related to student-athletes involved in the athletics program. The material regarding students should include information as to the academic progress of each athlete, graduation rates, academic support, time spent in practice and preparation for performance by the student-athlete in his or her sport, and a section dealing with the treatment of student-athletes by their coaches. This final series of questions would be designed to ascertain whether the coach emotionally abuses his or her athletes. The questions included on the report form should be designed to require specific answers and to provide the board with detailed information about the operation of the athletics program. The form also might be used as a part of the long-range planning effort for the athletics program. Such a questionnaire would fit in nicely with the idea of an academic accreditation process for athletics programs and would give the board and the president alike access to information that would heighten the direct responsibility of both the president and the board. Finally, in conjunction with the filing of the questionnaire, an annual audit of the athletics program should be provided, which audit would cover income and expenses from all sources, including coaches' income from all sources. All items on the report should be certified, acknowledged or declared under penalty of perjury, by members of the athletics department and the continuation of the contracts of all those involved in athletics should be conditioned upon the filing of an accurate report.

As closer ties are created between the board, the president and the athletics department, institutional governance of athletics can be directed to the furtherance of academic values. Where institutions fall short of academic objectives, despite the use of such a reporting system, there will be fewer questions as to whom is responsible. In exercising its responsibility, the board must support the president in his or her efforts to effectuate academic values in the operation of an intercollegiate athletics program, even when that means firing an otherwise popular coach, or retaining a coach who is under pressure after having suffered through a season in which he or she has won fewer games than fans and others momentarily may demand.

#### (6) *Presidents*

As is obvious from the preceding section, the board must work closely with the presidents of the various universities. Indeed, given the president's proximity, on a daily basis, to all that goes on at his or her institution, the president clearly is directly responsible for the operation of the athletics program at his or her institution. Of course, the president cannot actually run the athletics program, but he or she can engage

in more "delegation with accountability."<sup>178</sup> Indeed, the most oft-shirked responsibility of presidents is to "know what is going on [in the operation of their athletics program]."<sup>179</sup> As the SMU report concluded, the president must be involved in "active surveillance" and cannot stand by as a "passive sentry."<sup>180</sup>

Not everyone agrees that the president must be more proactive, however. Bo Schembechler, former football coach and athletics director at the University of Michigan, recently asserted, with regard to the Big-10 presidents' actions relative to the possibility of adding Penn State University to the conference, that, "[t]his confirms the worst fear I have of presidents getting too much control in athletics, . . . . Making decisions like this without ever studying it is terrible. Not one athletic director was consulted on this matter. How can they do that?"<sup>181</sup> Schembechler has been even more emphatic with regard to his negative views relative to the involvement of presidents in reforming athletics. He has stated that, "[i]n the next five years, the presidents will completely confuse the field of intercollegiate athletics. Then, they'll dump it on the athletics director and say, '[y]ou straighten this out.' Then, about the year 2,000, it may be back on track again."<sup>182</sup> This attitude is often reflected in battles between the athletic directors, who align with coaches, and presidents over the nature of and need for reform in intercollegiate athletics.<sup>183</sup>

Given the movement toward reform in intercollegiate athletics, one is inclined to disregard views like those expressed by Coach Schembechler, which seem to imply that all is well in intercollegiate athletics and that reform-minded intervention on the part of the presidents is uncalled for. However, there is some truth in what the athletic directors and coaches assert. Presidents often are ill-prepared and act rashly, without considering the implications of their actions for the day-to-day operations of the athletics programs.<sup>184</sup> Even the recently enacted reform limiting the number of basketball games played during the season fails to consider the impact of lost revenues on the operations of athletics programs at institutions that have come to depend on those funds.<sup>185</sup> Thus, without much foresight, presidents can place contradictory demands on athletic directors: for example, on the one hand, presidents

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178. *Id.*

179. SMU REPORT, *supra* note 71, at 166.

180. *Id.* at 46.

181. *Scorecard*, *Sports Illustrated*, Jan. 1, 1990, at 21.

182. *Comment*, *The NCAA News*, Jan. 3, 1990, at 4, col. 1.

183. In commenting on the battles between athletic directors (and coaches) the presidents at the 1990 NCAA Convention, one reporter concluded, "the effort required to pass [the reform measures adopted] pointed up deep rooted differences in priorities that exist between academic and athletic interests in intercollegiate athletics." Rhoden, *NCAA Restricts Practices, Seasons*, *N.Y. Times*, Jan. 10, 1990, at B9, col. 5 [hereinafter Rhoden].

184. See Smith, *Sixth Special Convention*, *supra* note 32.

185. DeLoss Dodds, Athletic Director at Texas, argued against cutting the number of basketball games on economic grounds: "How can you make that [projected loss of \$150,000 per game] up?" Rhoden, *supra* note 183. See also Kelley, *PAC-10's Decision*, *supra* note 163.



demand a balanced athletics budget and an athletics program that provides access for women and others who participate in non-revenue producing sports; whereas, on the other hand, they take actions that significantly cut revenues available to run a broad-based athletics program on a balanced budget. Unfortunately, too often, by its very nature, the office of president demands that a president be a crisis manager, ever mindful of public pressures that ebb and flow. Presidents often are inclined to make hasty decisions, in moving from one crisis to another, seeking symbolic rather than substantive solutions. As President Slaughter recently acknowledged, "[n]o President or Chancellor can afford to spend the vast amounts of time and energy required to watch over any one part of the campus operation on a constant basis."<sup>186</sup> Consequently, complaints by conscientious athletic directors are often legitimate.

Presidents should exercise more oversight and should play a major role in reform efforts, by virtue of their position as academic leaders at their respective institutions,<sup>187</sup> although there are some structural changes that can assist them in doing so in a more reflective and coherent manner. Presidents, like all decisionmakers, are greatly assisted when they receive accurate information and are privy to ideas generated by those who have more time to reflect on the issues that are before them. As such, presidents should seek information and should develop structures within their respective institutions that would enhance the retrieval of such information. That could be done, in significant part, by use of the kind of questionnaire suggested in the preceding section.<sup>188</sup> Use of that questionnaire, together with more attention to the self-study process required by the NCAA,<sup>189</sup> should help generate necessary information. The president can also enhance his or her access to information and involvement in the daily operations of the athletics program by appointing a balanced athletic board<sup>190</sup> that can provide an informed counterpoint to the athletic director and by selecting an independent-minded and conscientious institutional representative to the NCAA itself.<sup>191</sup> Finally, the president should appoint someone in the general

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186. LAPCHICK AND SLAUGHTER, *supra* note 43, at 190.

187. See Schultz's State of the Association address in *The NCAA News*, Jan. 25, 1989, at 3, col. 3.

188. See *supra* notes 177-78 and accompanying text.

189. See NCAA CONST., art. VI, § 6.3, reprinted in NCAA MANUAL, *supra* note 16 at 40-41. The president should closely monitor the self-study process rather than treating it perfunctorily as just another minor administrative aggravation.

190. See NCAA CONST., art. VI, § 6.1.2, reprinted in NCAA MANUAL, *supra* note 16, at 39. An athletics board is not required under NCAA rules, but should be utilized. Administrative and/or faculty and staff members are to make up a majority of the board, and the president could do much to strengthen his or her oversight responsibility by appointing capable, independent faculty and staff to the board.

191. NCAA CONST., art. VI, § 6.1.3, provides that:

A member institution shall designate an individual to serve as faculty athletics representative. An individual so designated after January 12, 1989, shall be a member of the institution's faculty or an administrator who holds faculty rank and shall not hold an administrative or coaching position in the athletics department. Duties of the faculty athletics representative shall be determined by the member institution.

counsel's office to oversee intercollegiate athletics, both from a compliance point of view and for the sake of reviewing institutional planning efforts in the athletics area. Since the president cannot be immersed in what is going on in the athletics department on a daily basis, he or she must appoint individuals of differing views, all of whom adhere to the importance of academic values, to positions of authority in the institutional governance of intercollegiate athletics. In turn, those individuals can provide the president with helpful information and insight into the operation of the athletics program. Decisions, which necessarily must be made in the haste that characterizes the life of a college or university president, can then be made in an environment that enhances rather than detracts from thoughtful decisionmaking.

As presidents are held responsible, at the institutional, as well as the NCAA and state and federal levels,<sup>192</sup> for the operation of their athletics program, they will no doubt demand closer administrative ties between themselves and their athletics programs. Surprisingly, it may turn out that those closer ties will strengthen rather than weaken the relationship between the athletic directors and coaches and presidents, because channels of communication will have been opened. In this regard, it should be recalled that Coach Schembechler's concern with the action of the presidents in proposing to add Penn State to the Big 10 was based on the fact that the presidents never consulted the athletic directors before making their announcement. Such rash action on the part of the presidents indicates both a lack of communication and a paucity of planning. With a stronger institutional framework, and more sense of personal responsibility, the presidents may enhance rather than detract from their relationship with the athletics department.

To further enhance the relationship between the president and athletics personnel, the president should clearly delineate the responsibility of athletics personnel. There should be no hidden agenda<sup>193</sup> and the institutional expectations should be clearly stated and consistent with academic values.<sup>194</sup>

Finally, if such structural changes are to mean anything in the long run, at the institutional level, presidents must receive support from those within the institution, including the board, athletics personnel, faculty, and students, as well as those interested in but outside of the institution, including alumni, friends, media, etc.

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192. See Smith, *Death Penalty*, *supra* note 45, at 1026-36.

193. See, e.g., Looney, *The Ax Falls at Toledo*, *SPORTS ILLUSTRATED*, Jan. 1, 1990, at 32-33, for an article discussing the firing of a successful coach, successful both in terms of his winning record and in terms of the graduation rate of his players. In such a case, the hidden agenda is articulated less in words or contractual provisions and more in an implicit demand to win more games.

194. The contract between the coach and the university should be explicit and should be adhered to by the president as well as the coach. In the academic world, breach of or institutional refusal to comply with a contract may carry moral and educational as well as economic implications.

(7) *Athletic Directors*

In numerous instances, rather than working closely with their presidents to maintain academic integrity in the operation of their athletics program, athletic directors have taken a confrontational stance vis-a-vis their presidents. At times, the level of confrontation reaches a heated pitch and becomes public, as it did when the athletic directors and others closely tied to intercollegiate athletics departments did battle over issues regarding the length of the basketball season during the 1990 Convention<sup>195</sup> and over cost-containment issues during the NCAA's Sixth Special Convention held during the summer of 1987.<sup>196</sup>

As indicated in the preceding section, part of the fault for this continuing confrontation lies with the presidents who tend to be ill-prepared and fail to consider the ramifications of their actions for the overall athletics program. However, as the presidents make adjustments of a structural nature, at the institutional, conference and national levels, and as they develop more of a will to be general overseers of the athletics programs — assuming, of course, that they do so — athletic directors will increasingly be held accountable for what occurs within their departments. As Doug Single correctly concluded, “[i]n compliance matters, directors of athletics occupy the most important leadership position within intercollegiate athletics.”<sup>197</sup>

The presidents and governing boards must become more willing to engage in preventative, rather than after-the-fact punitive action. When they do so, it remains to be asked what they can do to ensure a better working relationship with athletic directors and compliance with rules and academic values in the operation of their athletics programs. To begin with, as has been previously noted, lines of responsibility can be strengthened by creating and enforcing more stringent reporting requirements and by contractual accountability.

In terms of reporting, the athletic director should be required to report on a regular basis to the president or his or her designate with regard to budgetary issues, coaching performance, peculiar time demands related to participation in the athletics program by student-athletes, academic progress of student-athletes, academic support for student-athletes, and items related to compliance with NCAA and conference rules. They should also report with regard to the institution's general or macro philosophy of athletics.

In reporting on coaching performance, athletic directors should have to treat the coaching profession much as academic chairs treat other teaching positions. Professors are evaluated with regard to their ability as teachers and scholars. Similarly, coaches should be evaluated with regard to their technical ability as coaches and their ability as teach-

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195. See Rhoden, *supra* note 183.

196. See Smith, *Sixth Special Convention*, *supra* note 32, at 430.

197. LAPCHICK AND SLAUGHTER, *supra* note 43, at 159.

ers. If we have *student*-athletes, then we ought to have *teacher*-coaches.<sup>198</sup> Unfortunately, coaches are often evaluated solely on the basis of their technical ability as coaches and recruiters and not on their ability as teachers. It is clear that many coaches may have excellent technical ability or the ability to recruit fine athletes, but it does not follow that they are equally as able in terms of their teaching ability. Of course, teaching is difficult to evaluate in any academic discipline,<sup>199</sup> but concrete effort is made to do so in other academic areas, as it should be. Developing criteria or standards for the teaching side of coaching will not be easy, but such efforts will help us to face certain issues, including the tension between teaching discipline and emotional abuse of players.<sup>200</sup> Like the head of any other department, the athletic director must be concerned about the quality of teaching within his or her department.

Athletic directors should also be required to report regarding time constraints placed on student-athletes. The director of athletics should assess time demands for the purpose of overseeing the scheduling of games during the season and practice times. In addition to overseeing practice demands during the season, athletic directors should also examine off-season demands for training and other purposes. Like his or her counterpart in other departments, the athletic director is ultimately responsible for insuring that demands placed on the student-athletes are reasonable.

The director of athletics should also exercise oversight and, perhaps, even direct efforts in the areas of academic progress and academic support for student-athletes.<sup>201</sup> In doing so, the athletic director should be concerned with the academic needs of student-athletes. The athletic director must insure that tutorial and other academic support programs are run with integrity, particularly given the potential conflict of interest that may exist between the coach who wants a particular athlete to be eligible and the student-athlete's academic needs. This may require that the academic support programs be wholly integrated with academic support programs within the university, or if an athletic director is accountable, personally and institutionally, it may be possible to have an academic support program with integrity within the athletics department that meets the special needs of student-athletes involved in big-time intercollegiate athletics.<sup>202</sup>

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198. The NCAA refers to athletes involved in intercollegiate athletics as student-athletes. They ought to begin to refer to coaches as teacher- or educator-coaches, as well.

199. See, e.g., Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. LAW ED. 167 (1986), for an analysis of the difficulty of assessing teaching methodologies in law school (and elsewhere).

200. One of my colleagues refers to the role of the coach as being analogous to the role of a drill instructor in the military — a molder of disciplined troops. This may be a legitimate role for a coach, but such a determination ought to be made thoughtfully.

201. See *infra* notes 301-18 and accompanying text, for a discussion regarding the need to direct academic resources to serve the educational needs of the student-athletes.

202. For an interesting discussion of this issue, see Stokes, *The Jan Kemp Case: No Penalty for Pass Interference*, 16 J. L. & EDUC. 257 (1987). See also LAPCHICK AND SLAUGHTER, *supra* note 43, at 157.

Finally, an athletic director must report and be held accountable for compliance with rules regulating the operation of intercollegiate athletics within his or her department. Under NCAA rules, the athletic director is held accountable for the actions of staff members within the athletics department.<sup>203</sup> Similarly, the athletic director should be held strictly accountable under conference rules and institutional procedures.

The athletic director's contract should be designed to hold the director responsible for the operation of his or her department in the areas of teacher-coach responsibility, time and related demands placed on student-athletes, academic progress and academic support, and basic rules compliance. Reporting specific information in each of these areas will help maintain clear lines of responsibility. Such reporting also should be combined with the delineation of the athletic director's specific duties, in these areas, in his or her contract with the institution.

Together with strengthening reporting and contractual responsibilities on the part of the athletic director, it is imperative that the athletics department budget be tied to the university budget.<sup>204</sup> With budgets in the millions of dollars,<sup>205</sup> athletics departments can be subjected to economic enticements that can lure them away from academic values. Budgetary responsibility and control must be invoked at the university-wide level to help insure that the institution's academic values are not compromised. If values were compromised under such a system, it would also be clear that the president and the board would be responsible, along with the athletic director. Additionally, by tying the athletics budget to the university budget, presidents and others will be more inclined to understand the budgetary constraints or ramifications that accompany some of their decisions.

#### (8) Coaches

As athletic directors have administrative responsibility for the operation of the athletics department as a whole, the individual coach has direct responsibility for his or her team members. Like the athletic directors, coaches have had conflicts with their presidents relative to the operation of their teams. Indeed, given their status as prominent public figures, coaches often are able to win public confrontations with a less-well-known president.<sup>206</sup> For example, when the President at the Uni-

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203. See Smith, *Death Penalty*, *supra* note 45, at 1036-50.

204. See Atwell's comments in *The NCAA News*, Feb. 15, 1989, at 4, col. 3.

205. See Smith, *Death Penalty*, *supra* note 45, at 989 and Wojcienchowski, *Notre Dame's Deal Shouldn't be a Shock*, *L.A. Times*, Feb. 8, 1990, at C1, col. 4, noting that Notre Dame recently signed a contract worth \$40 million for the televising of its football games. Notre Dame exerted control over the use of the television revenues and directed them to academic purposes, although it is sad to note that Notre Dame diverted those funds away from the academic needs of the student-athletes who generated them.

206. See, e.g., Lederman, *North Carolina State University Professors Debate Faculty Role in Basketball Scandal, Vow More Vigilant Oversight*, *The Chron. of Higher Educ.*, Sept. 13, 1989, at A39, col. 2 [hereinafter *N.C. State*]. (Following North Carolina State University's "scandal," Chancellor Bruce R. Poulton was forced to resign, while Coach Valvano was only asked to step down from his position as athletic director).

versity of Iowa recently indicated that he would unilaterally invoke a rule of freshman ineligibility at Iowa, Hayden Fry, the well-known football coach,<sup>207</sup> said that he would like to "redshirt" the president,<sup>208</sup> and Coach Fry was supported by the Governor of Iowa in his confrontation with the president.<sup>209</sup>

Assuming that the presidents, boards and athletic directors begin to exercise their offices more responsibly, what can be done, as a structural matter, to ensure that coaches maintain academic integrity at the individual team level? Whatever is done must deal directly with the problem of potentially conflicting demands placed on the coach of a team involved in heavily commercialized intercollegiate sports.

Coaches in big-time intercollegiate athletics programs have little job security and are subjected to varying and sometimes conflicting demands in terms of the performance of their responsibilities. There is an unsettling sense the following observation may be accurate: "In college athletics, there's a hypocrisy that reeks. There's a wear-it-on-your-shirt-sleeve attitude that what we are here for is to educate people. A lot of times that is just lip service. The bottom line in college athletics is you'd better win."<sup>210</sup> This demand that a coach in a big-time sport win or risk losing his or her job is tied,<sup>211</sup> no doubt, to the fact that big-time sports are heavily commercialized and are expected to provide revenues to fund their operation as well as the operation of many nonrevenue producing sports.<sup>212</sup> Winning teams simply bring in more revenue, revenue needed to fund other programs. At the same time, at least lip service is given to the need for the coach to further academic values in the operation of his or her team sport.<sup>213</sup> At times, these sometimes

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207. Coach Fry was the football coach at Southern Methodist University for a period of time in the 1970's, when the football program was riddled with infractions of the NCAA rules. SMU REPORT, *supra* note 71, at 14. He is a popular coach, however.

208. *See supra* note 129.

209. For a discussion of the conflict between Coach Fry and the President, *see* The Chron. of Higher Educ., April 19, 1989, at A1, col. 2 and TELANDER, *supra* note 7, at 190-91.

210. Lederman, *Season-End Firings Send Message to Football Coaches: 'You'd Better Win'*, The Chron. of Higher Educ., Jan. 3, 1990, at A33, col. 4 [hereinafter *Firings*].

211. *See also* Smith, *Death Penalty*, *supra* note 45, at 1038-39.

212. *See* Lederman, *Firings*, *supra* note 210, at A33, col. 4 (pressure placed on coaches in big-time revenue-producing sports to provide funds for operating other nonrevenue-producing sports).

213. *See, e.g.*, Dixon, *supra* note 44, at 397, for a discussion of Coach Curry's contract at the University of Alabama. Coach Curry's contract was tied, in part, to academic performance. Similarly, in moving from Michigan to Arizona State University, Coach Frieder received a contract that included an incentive of \$10,000 for graduation rates, but that incentive was dwarfed by incentives tied to winning and commercial success. The academic incentive in Coach Frieder's contract was miniscule in comparison to incentives related to winning basketball games. Coach Frieder received a salary of \$154,000; a guarantee of \$350,000 in annual income from summer camps, a sneaker company contract and television and radio deals; \$20,000 if his team finishes .500 or better or has a recruiting class in the top 20; \$20,000 if the Sun Devils win at least ten conference games; an extra week's salary if they win one game in the conference tournament or get a N.I.T. bid; two week's additional salary if they get an NCAA berth; three week's salary if they reach the NCAA regionals; four week's salary if they reach the "Final Four;" five week's salary if they win the National Championship; \$20,000 if the average attendance at home games is at

conflicting messages create confusion on the part of the coach as to his or her job responsibilities.

With pressures to win and produce revenues being given highest priority, there is a sense that intercollegiate athletics have become professionalized and resemble more an entertainment industry than an educational enterprise.<sup>214</sup> This professionalization of intercollegiate athletics is hardly new. With the risk, in terms of job security, that accompanies this professionalization of intercollegiate sports, select coaches who are able to win with regularity at major programs are rewarded economically. Indeed, a successful coach may make well in excess of \$300,000 per year from all athletics-related sources.<sup>215</sup> As such, coaching salaries often exceed those of the president and are the highest in all of higher education.

This professionalization of the coaching profession at the big-time level has led to a denigration, or at least confusion, as to the coach's role with regard to academic values in the coaching profession. A coach generally knows that he or she must "win," and reap a bounteous economic harvest, but the need to adhere to other values is far less clear.<sup>216</sup> It would appear that often the coach is called upon primarily to be a business person and coach and only secondarily, if at all, to be a teacher. Even though institutions may not emphasize the teaching side of coaching, it is clear that student-athletes are greatly influenced by their coaches.<sup>217</sup> Given this influence, an institution hypocritically abdicates its responsibility when it fails to place some emphasis on the coach as a teacher.

Structurally, action must be taken to help redirect the focus of the coaching profession. On the economic side, presidents are right when they assert the need for cost-containment to help in this effort, although cost-containment initiatives often seem to be ill-conceived in terms of their capacity to further academic values directly.<sup>218</sup> However, there are numerous other actions that may produce even more effective results: placing emphasis on responsibility of the coach as a teacher; increasing job security at the same time that an institution engages in cost-containment; and, providing for stricter enforcement of ethical standards and rules compliance on the part of the coach.

In the previous section, I discussed the importance of emphasizing

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least 7,500; \$30,000 if the average attendance is at least 11,000. See *Extra extra Incentive*, The National Sports Daily, Feb. 1, 1990, at 28, col. 3.

214. Telander argues, for example, that, "[m]oney, received for providing vicarious thrills to viewers, is what drives college football these days." TELANDER, *supra* note 7, at 25.

215. See, e.g., Poskanzer, *Spotlight on the Coaching Box: The Role of the Athletics Coach Within the Academic Institution*, 16 J.C. & U.L. 1, 2 (1989) and a report that Coach Curry at Alabama received \$500,000 per year in salary and side benefits. N. Y. Times, Jan. 6, 1990, at 30, col. 1.

216. See Lederman, *N.C. State*, *supra* note 206.

217. See, e.g., Polodoro, *Survey Examines Coaches' Concerns About Ethics*, The NCAA News, Nov. 20, 1989, at 4, [hereinafter Polodoro] and The NCAA News, Feb. 15, 1989, at 12-17.

218. See Smith, *Sixth Special Convention*, *supra* note 32.

the coach's responsibility as a teacher, both in terms of reporting and in terms of the coach's contractual responsibility. Of course, there are those who assert that big-time coaches are not teachers.<sup>219</sup> However, athletes involved in big-time sports view their coaches as teachers although they often feel that their coaches are little concerned with academic values.<sup>220</sup>

Given that student-athletes view their coaches as teachers, an institution acts hypocritically when it fails either to disabuse the student-athlete of that conception or to change the attitude of the coach. Since I contend that intercollegiate athletics should be reformed to further academic values, I will only look at ways in which the attitude of the coach and others may be changed to conform to the model of coach as teacher.

At the outset, in changing attitudes and direction, one must face the issue of what is effective teaching on the part of the coach. For example, some individuals in the coaching profession believe that Bobby Knight, the head basketball coach at Indiana-Bloomington, engages in "dehumanizing" behavior in handling his players.<sup>221</sup> Indeed, based on a recent NCAA study, student-athletes in many big-time athletics programs feel that they are often emotionally abused by their coaches.<sup>222</sup> Nevertheless, there are those, including someone as thoughtful as Wilford Bailey, President of the NCAA, who feel that it would be inappropriate to conclude too quickly that coaches are engaged in emotional abuse or dehumanization of their players.<sup>223</sup> It is true that standards regarding teaching, particularly within the coaching profession, are not easy to formulate. There have been efforts to articulate standards in the past,<sup>224</sup> but it might be worthwhile for coaches to develop their own contemporary standards. They could then deal with the issue of what constitutes dehumanization or emotional abuse, as they deal with other less troublesome issues related to the coach's responsibility as a teacher.

In addition to their teaching function in the coach-athlete relationship, coaches also perform a teaching function as emissaries of their institutions. Unfortunately, with increasing media attention and rising

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219. TELANDER, *supra* note 7, at 86.

220. See Polidoro, *supra* note 217.

221. J. FEINSTEIN, A SEASON ON THE BRINK (1986). See also *The Chron. of Higher Educ.*, Jan. 20, 1988, at A37, col. 1 (Comments of Coach Dale Brown).

222. *The NCAA News*, Feb. 15, 1989, at 13.

223. *Id.* at 15.

224. In August of 1952, the American Football Coaches' Association adopted the following code of ethics:

The distinguishing characteristic of a profession is that its members are dedicated to rendering a service to humanity. Personal gain must be of lesser consideration. Those who select football coaching must understand the justification for football is that it provides spiritual and physical values for those who play it, and the game belongs, essentially, to the players.

The welfare of the game depends on how the coaches live up to the spirit and letter of ethical conduct and how coaches remain ever mindful of the high trust and confidence placed in them by their players and by the public.

Coaches unwilling or unable to comply with the principles of the Code of Ethics have no place in the profession.

*Cited in* LAPCHICK AND SLAUGHTER, *supra* note 43, at 138.



tempers in the heat of athletic battle, many coaches have engaged in angry theatrics that detract from their teaching function. Anyone who has observed the antics of some coaches, from the throwing of chairs to profusions of public profanity, is well aware that coaches sometimes provide a negative image. As public representatives of their respective institutions, coaches necessarily are teachers and must be held to higher standards. Like other teaching standards, standards of public conduct ought to be included in the coach's contract. In my view, such standards would do little to chill the coach's capacity to perform his or her legitimate coaching and teaching responsibilities or their right of expression, although they might detract from the coach's role as an entertainer.<sup>225</sup>

Focus on the coach's role as a teacher can be enhanced by clearly spelling out that responsibility in his or her contract. The contract should focus on academic values. Coaches' contracts can and often do include incentives for or requirements that the coach further certain academic values, including matters such as academic progress, graduation rates, academic support, monitoring of class attendance.<sup>226</sup> Even where present, however, incentives are often minimal<sup>227</sup> and requirements often remain unenforced if the coach can manage to win.<sup>228</sup> Relatedly, even when a coach is quite successful in terms of academic performance, jobs can rarely be retained unless wins on the court or field accompany even the most startling academic success.<sup>229</sup>

Thus, there is little hope for much progress on the academic or teaching front, unless it is included in a package consisting of some cost-containment and job security for coaches, to reduce pressures placed on coaches in big-time sports. To enforce academic and teaching values in coaching, many have advocated that coaches be tenured.<sup>230</sup> Others have argued for rolling long-term contracts for coaches,<sup>231</sup> that would

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225. Indeed, Bylaw 11.1.1 of the NCAA rules requires that:

Individuals employed by or associated with a member institution to administer, conduct or coach intercollegiate athletics shall deport themselves with honesty and sportsmanship at all times so that intercollegiate athletics as a whole, their institutions and they, as individuals, represent the honor and dignity of fair play and the generally recognized high standards associated with wholesome competitive sports.

Reprinted in NCAA MANUAL, *supra* note 16, at 46.

226. Dixon, *supra* note 44, at 396-97.

227. Payments for production of wins and revenues far exceed payments for academic achievements in the contracts of coaches involved in big-time revenue-producing sports. See *supra* note 213.

228. See *N.C. State*, *supra* note 206.

229. See LAPCHICK AND SLAUGHTER, *supra* note 43, and statement made in 1989 by the President of Miami University of Ohio that "we don't fire coaches because we lose," followed by the firing of their football coach in 1990, after a losing season. The Chron. Higher Educ., Nov. 29, 1989, at A43, col. 1, and Lederman, *Firings*, *supra* note 210.

230. See, e.g., Coach Raymond's call for the tenuring of coaches in *Opinions*, The NCAA News, Nov. 13, 1989, at 5, col. 2.

231. A "rollover clause" in a coach's contract essentially provides that:

[A] coach always has a commitment from the university for a specific number of years — a tenure clause for coaches. At the end of each year (or other period), unless one party notifies the other of the intention not to rollover, the contract's term extends for another like term so that the total term of the contract is, once again, x years.

give them time to develop a program and also would provide them with job security sufficient to permit them to focus on academic values as well as the economics of their program. Perhaps the most significant of the alternatives offered is one proposed by Richard Schultz, the Executive Director of the NCAA. He suggests that coaches be given "tenure," in the form of a 5-year rolling contract that can be terminated only for a major rules infraction on the part of the coach.<sup>232</sup> Such a contract, even if it were widened to provide for dismissal on grounds related to academic or other purposes, would provide substantial security for a teacher-coach. The concept has been followed. Coach Bowden, the football coach at Florida State University, for example, recently was given just such a contract.<sup>233</sup>

The contract could be designed to further other academic and cost-containment objectives, as well. It could limit the time spent by coaches on outside ventures designed to provide the coach with additional income, but which detract from their efforts as a teacher. It could include academic progress and support provisions, designed to force the coach to focus on academic values in handling his or her players. It could even require that all or a significant portion of outside funds generated by a coach be used to fund academic support or related programs designed to assist student-athletes within the athletics program. Laudably, both Bobby Knight and Dean Smith, basketball coaches at Indiana-Bloomington and North Carolina-Chapel Hill, respectively, allocate all or a significant portion of the funds generated from their shoe contracts to academic, as opposed to personal, uses.<sup>234</sup> The University of Virginia requires that dollars received for shoe contracts be used for academic purposes.<sup>235</sup> Such rules regarding the academic use of funds generated by a coach in the performance of his or her responsibilities as an employee of the institution could be mandated by the NCAA.<sup>236</sup> Indeed, the NCAA could do much to further such a redirection of funds generated by a coach's relationship with the athletics program to academic purposes, although it might be contended that such action constitutes an antitrust violation, in that it restrains competition by limiting compensation for coaches.<sup>237</sup> Tenure, in any form, will no doubt put pressure on institutions to extract an economic or related quid pro quo from

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Stoner and Nogay, *The Model University Coaching Contract ("MCC"): A Better Starting Point for Your Next Negotiation*, 16 J.C. & U.L. 43, 47 (1989).

232. *Prepared Text of Schultz's Convention Address*, The NCAA News, Jan. 10, 1990, at 6, col. 3.

233. Coach Bowden recently was given a lifetime contract, after having held a 5-year rollover contract. *As reported in Columbus Dispatch*, Jan. 5, 1990, at 8, col. 1.

234. Brown, *Rubber Sole: Should College Basketball Coaches Accept Sneaker Money?*, ENT. & SPORTS LAW. No. 2, at 5.

235. *Id.*

236. The NCAA already regulates coaches' contracts in a significant way. See NCAA MANUAL, *supra* note 16, at 48-50. It would take little effort, but perhaps a great deal of support, to revise those sections of the Manual to deal with the use of funds. The NCAA also might require institutions involved in big-time sports to offer coaches a *quid pro quo* in the form of designated 5-year rollover contracts.

237. See, e.g., discussion in WEISTART AND LOWELL, THE LAW OF SPORTS, at 759-76 (1979).

the coach.<sup>238</sup> As such, it might result in cost savings that would limit the economic risks to both the coach and the institution related to the "win-at-all-costs" mentality that has pervaded contemporary big-time intercollegiate sports. If combined with revenue-sharing for academic purposes,<sup>239</sup> it would surely have that effect.

The contract with the coach might also include a covenant not to compete, or a liquidated damages provision to provide the institution with compensation for a breach of the contract by the coach. Such a covenant would limit the attractiveness to an ambitious coach of abandoning his players and a program that has provided a long-term contract. This would also help the institution to do better budget planning, because it could rely on the term of the contract.

Such reforms to assure academic integrity in the coaching profession will be of little practical impact, even if enacted, unless the institutions have the will to enforce them. For example, North Carolina State University had a contract provision with Coach Valvano, their basketball coach, that provided that he could be dismissed and a \$500,000 buyout waived, if major infractions of the NCAA rules occurred in the operation of his basketball program. However, they lacked the will to enforce these provisions when it became evident that improprieties had occurred in his program.<sup>240</sup> Thus, as has been the case with many of the reforms suggested in this article, a redirection of priorities with regard to coaches and others in the operation of big-time intercollegiate athletics can come to fruition only when a game plan, rather than a single play, for reform is initiated.

### (9) Faculty

For such reforms to be viable, faculty must also get more involved in the operation of intercollegiate athletics at their institutions. Historically, faculty once exercised extensive control over the operation of their athletics program.<sup>241</sup> The shift of authority for the operation of intercollegiate athletics away from faculty came in part as a result of a certain haughtiness and hostility that developed in academic circles for athletics and athletes.<sup>242</sup> However, there is a growing and welcome sense on some faculties that the faculty must be more involved in the day-to-day operation of their athletics programs to ensure that academic integrity is

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238. See Golenbock, *Jumping Through Hoops: A Quick Course in College Sports Hypocrisy — And 11 Ways to Deal With It*, Wash. Post, Sept. 10, 1989, at C1.

239. See *supra* note 113 and accompanying text, for a brief discussion regarding the need for revenue-sharing.

240. Lederman, *N.C. State*, *supra* note 206.

Since this article was written, Coach Valvano and North Carolina State have ended a 10-year relationship with a settlement of \$238,509.24 on his contract. Coach Valvano can potentially earn an additional \$250,000 to \$375,000 off a separate agreement with the booster club.

*Valvano Leaves N.C. State as Sutton joins Okla. State*, USA Today, April 9, 1990, at 7C, col. 4.

241. See Smith, *Death Penalty*, *supra* note 45, at 989.

242. LIPSKY, *supra* note 26, at 6.

maintained.<sup>243</sup>

A recent American Association of University Professor's Report (AAUP) has urged more faculty involvement in the governance of intercollegiate athletics.<sup>244</sup> In that report, the committee suggested that faculty take a more active role regarding athletics budgets, selection of athletics council members, and related matters.<sup>245</sup> In a somewhat similar vein, the faculty should be more directly involved in the preparation and analysis of the self-study that must be prepared by the athletics department and should demand an oversight role with regard to academic support programs operated by the athletics department.<sup>246</sup>

Unfortunately, as was the case with the faculty at SMU, passivity with regard to the governance of an institution's intercollegiate athletics program can result in some loss of prestige for an institution's academic reputation.<sup>247</sup> While an otherwise strong institution can regain its reputation, it cannot do so without suffering some lingering tarnish to its academic image and without actually addressing structural problems that can become endemic in an athletics program if they are not addressed early enough. As with experience in other areas, preventive measures are far less costly than measures relied upon after the damage has been done. Additionally, as educators, faculty members must be concerned as an ethical or moral matter as to what is being done in other departments at their institution relative to the education of their student body. The athletics department should not be exempt from faculty scrutiny.

#### (10) *Student-athletes*

Support has increasingly been developing for having more student involvement in the governance of intercollegiate athletics.<sup>248</sup> With further evidence that student-athletes want to be successful academically, as students,<sup>249</sup> this development is most welcome and represents a significant change from the 1950's, when student-athletes were routinely discouraged from "blowing the whistle" on errant athletics programs.<sup>250</sup>

At the national level, Schultz has been a supporter of increased student involvement since assuming the position of Executive Director with

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243. See, e.g., Lederman, *N.C. State*, *supra* note 206, and SMU REPORT, *supra* note 71.

244. Lederman, *AAUP Report Urges Bigger Faculty Role in Governing Sports*, *The Chron. of Higher Educ.*, Jan. 10, 1990, at A1, col. 2 [hereinafter *AAUP Report*].

245. *Id.*

246. See Stokes, *supra* note 202, at 270, indicating that the lesson to be drawn from the Jan Kemp case is that there is a need for academic professionals to oversee tutorial and academic support programs.

247. See SMU REPORT, *supra* note 71, at 43.

248. See, e.g., THIRD FORUM, *supra* note 17, at 30; Wilford Bailey's call for incorporating more effective voice for student-athletes in NCAA processes, *id.* at 63; and Smith, *Death Penalty*, *supra* note 45, at 1052.

249. Former Indiana University President John Ryan has indicated that research has shown that the "athletes want to be students." *The NCAA News*, Feb. 15, 1989, at 17, col. 3, summarizing and discussing AIR research regarding student-athletes.

250. Oliva, *supra* note 20, at 11.

the NCAA.<sup>251</sup> With Schultz's support, the NCAA recently established a Student-Athlete Advisory Committee, to be made up of 16 students and 3 members of the NCAA Council.<sup>252</sup> This Committee is designed to provide student-athletes with input into NCAA governance.

While a student-athlete advisory committee falls far short of suggestions that student-athletes be appointed personal representation before the Infractions Committee of the NCAA, a model based on the public defender system used in our criminal system,<sup>253</sup> and be permitted to be directly involved in the NCAA legislative and staff processes,<sup>254</sup> it is certainly a step in the right direction. Further involvement by student-athletes in the governance process, either directly or by representatives selected to defend their interests, would help to ensure that academic interests of student-athletes would be considered in the legislative and enforcement processes.

Increased involvement on the part of student-athletes at the conference and institutional levels is also recommended. Student-athletes should be represented on the athletics and other boards or groups involved in making athletics policy at the institutional level. They also should take an active role in the institutional self-study process and should participate on search committees for coaches and other athletics personnel. Finally, if my prior recommendations regarding accreditation and academic impact statements are adopted, students should be involved in those processes, as well. Student input need not be dispositive, from a policy-making standpoint, but it should be given weight in the decision-making process. Not surprisingly, given the lack of representation on the part of student-athletes in the NCAA governance process, glaring inequities in the treatment of student-athletes have developed. Institutions have been protected in their relationship with student-athletes but student-athletes lack parity with their institutions.

Student-athletes should be given more security in terms of their scholarship status. Currently, under NCAA rules, a student-athlete has only a one-year "contract," which is terminable at will by the institution after the expiration of that one-year period.<sup>255</sup> While a student-athlete is to be afforded a hearing opportunity before having his or her scholarship terminated,<sup>256</sup> that hearing can be before either "the university's athletics department or its faculty athletics committee,"<sup>257</sup> and the stu-

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251. Early in his tenure, Director Schultz began to argue that student-athletes should be assembled in regional meetings. See remarks of President Bailey in *THIRD FORUM*, *supra* note 17, at 63.

252. Sixteen student-athletes were selected (eight from Division I and four each from Divisions II and III, respectively) to serve with three members of the Council on the Student-Athlete Advisory Committee. The student-athletes are to serve for up to two years after they have used up their eligibility and are to react to NCAA legislation and legislative proposals. See *NCAA Selects Student-Athlete Advisory Committee*, *The NCAA News*, July 19, 1989, at 1.

253. See Smith, *Death Penalty*, *supra* note 45, at 1050-53.

254. *Id.*

255. NCAA Bylaw § 15.3.5, reprinted in *NCAA MANUAL*, *supra* note 16, at 143.

256. NCAA Bylaw § 15.3.5.1.1, reprinted in *id.*

257. *Id.*

dent-athlete is provided no substantive protection should the coach want to replace the student-athlete with another athlete. Procedurally, the hearings process should be amended to provide for a hearing before a board that is not dominated by the athletics department and that includes student-athletes as voting members. Substantively, schools should be limited in terms of when they can "run off" a student-athlete or take away the student-athlete's scholarship, by a set of standards related to the student-athlete's academic performance and his or her involvement in practice and fulfillment of legitimate responsibilities as a member of the team. Existing procedural and substantive infirmities are exacerbated by an inequality of bargaining power between the student-athlete and the institution. It is not surprising, therefore, that the institution may terminate the student-athlete's contract essentially at will after any academic year, while the student-athlete has no comparable right to terminate. Indeed, the student-athlete can be precluded from participating in intercollegiate athletics at another institution for a one-year period, even in instances when the institution has unilaterally terminated its scholarship agreement with the student-athlete.<sup>258</sup>

To help insure that student-athletes are not exploited by this one-sided process, changes should be made to provide for equity. The student-athlete should be permitted to transfer and receive a scholarship to play at another institution, without having to sit out a year. Bylaw 14.6.5 expresses the rationale for the rule against transferring, when it notes that the prohibition is directed to limit contacts of a student-athlete at one institution by representatives of another institution, without the permission of the first institution.<sup>259</sup> Given this rationale, the proper penalty for transfers induced by a contact from another institution should be to take action against the institution inducing the transfer, not against the under-represented student.<sup>260</sup>

Of course, if the institutions were willing to give four- or five-year scholarships, the rules limiting transferees would be defensible, because neither side would have the capacity to terminate at will. Lengthier scholarship agreements also would seem to further academic objectives, in that they permit an athlete to continue in the academic program of one institution, without the threat of losing hours through a transfer. Institutions should be required to bear more of the risk if they erred in recruiting an athlete who does not prove to have the talent or ability to

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258. Bylaw § 14.6.1, reprinted in NCAA MANUAL, *supra* note 16, at 119. See also § 14.6.5, dealing with four-year college transfers, *id.* at 124-27, and § 13.1.1.3, *id.* at 72, restricting contacts by another institution's athletics staff with a student-athlete when that student-athlete is attending another four-year institution. However, contact may be made if the institution that the student-athlete currently attends deigns to permit such a contact.

259. *Id.* Contact may be made if the student-athlete's home institution, the institution where he or she is matriculating or as to which the student-athlete has signed a letter of intent, gives its consent to such a contact.

260. Bylaw § 13.1.1.3 provides that such a contact would constitute an infraction of the NCAA rules. *Id.* at 72. Indeed, under that rule, the second institution may not provide aid to the student-athlete who transfers for a one-year period. See G. Schubert, R. Smith & J. Trentadue, SPORTS LAW 99 (1986) [hereinafter Schubert], for a discussion of potential legal infirmities related to such restrictive transfer rules and limitations.

fit into their program that the recruiter believed they would have. The recruiter has access to more information regarding the fit of the student-athlete with the institution's athletic program. The institution, therefore, should bear the risk of a poor fit rather than the student-athlete.

In a somewhat related sense, institutions should be penalized for or otherwise prevented from "running players off." Whenever an institution terminates a student-athlete's scholarship, that institution forces the student-athlete to transfer, with all that entails in terms of adverse academic impact, and may deprive the student-athlete of the funds necessary to continue his or her education. To help deal with this inequity, at a minimum, institutions should be given only a limited number of scholarships each year. For example, if a basketball program has 16 scholarships, it should only be permitted to offer 4 or perhaps at the most 5 scholarships in any given year. Such a rule would create a disincentive for an institution inclined to "run off" players who do not turn out to be as good a fit, in terms of talent and temperament, with the institution's athletics program and philosophy as the coaching staff anticipated. Incidentally, such a rule would have another positive academic impact: it would require the institution to work with student-athletes who have academic problems and whose academic eligibility might be limited unless they are supported in their academic efforts. The number of scholarships overall might be increased, if the NCAA declared freshmen ineligible and permitted institutions to give athletes a fifth year scholarship and, perhaps, even a sixth year of competition, as recommended elsewhere in this article.<sup>261</sup>

Student-athletes have little input in the governance of intercollegiate athletics. Therefore, it should not be surprising that they have been subjected to numerous procedural and substantive inequities. Student-athlete involvement in the governance process at all levels should be increased, and they should be afforded more equitable treatment in a substantive sense, as well.

c. *The Role in Reforming Big-Time Sports of Entities Outside the Traditional Intercollegiate Athletics Governance Process*

In addition to the NCAA, conferences and institutions, all of which are directly related to intercollegiate athletics, governmental and private entities sometimes get involved in the movement to reform big-time intercollegiate athletics.

(1) *The Federal Government*

The federal government has exercised some indirect oversight over intercollegiate athletics during most of this century. Indeed, the NCAA was organized, in part, as a response to a call by President Theodore Roosevelt in 1906 for the reform of intercollegiate football, after a

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261. See discussion *infra* notes 316-18 and accompanying text.

number of deaths had occurred during 1905.<sup>262</sup> Thereafter, government activity was relatively sparse for over 50 years, but beginning in the 1970s, involvement on the part of the federal government intensified.<sup>263</sup> The Supreme Court's recent decision in *NCAA v. Board of Regents of the University of Oklahoma*,<sup>264</sup> has had a significant effect on intercollegiate athletics. While Congressional activity has not resulted in the passage of federal legislation, it nevertheless has had a significant effect on the governance of intercollegiate athletics.

In its 1990 Convention, the NCAA passed graduation disclosure legislation,<sup>265</sup> in direct response to proposed Congressional legislation calling for such disclosure.<sup>266</sup> That bill, S. 580, which had been sponsored by Senator Bill Bradley and which would have required graduation rate disclosure, had been voted out of committee favorably, by a vote of fifteen to one.<sup>267</sup> The NCAA, however, was able to hold off floor action on the legislation, by promising that they would consider and presumably pass such legislation during the 1990 Convention, to be held in the coming January.<sup>268</sup> In responding to the Committee's report regarding the disclosure of graduation rates, Chancellor Tucker of Texas Christian University was quoted as having said, "[w]e either take this action for ourselves or we'll have it done for us. If it is done for us, it will be done to us."<sup>269</sup>

In their support of S. 508, the Senators asserted that the NCAA had neglected academic values and had offered only "fitfull progress" in its reform effort.<sup>270</sup> Similar complaints surface from time to time in Congress,<sup>271</sup> and tend to spur on reform of intercollegiate athletics. Thoughtful Congressional action has had a positive influence in stimulating the process of reform with the NCAA.

Given the positive influence of federal governmental activity in furthering reform of intercollegiate athletics, a game plan for reform could be supported by conscientious action in the halls of Congress and within

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262. See Smith, *Death Penalty*, *supra* note 45, at 990-91.

263. *Id.* at 993-94.

264. 468 U.S. 85 (1984). This decision, which limited the NCAA's power relative to the televising of football games, has had the effect of making the NCAA almost entirely dependent on revenues generated from basketball games to fund its operations, including enforcement and compliance in all sports, and its reform efforts.

265. See Lederman, *NCAA Adopts 3 Major Rules Changes Endorsed by Presidents' Panel*, *The Chron. of Higher Educ.*, Jan. 17, 1990, at A1.

266. S. 580 would require institutions of higher education receiving federal financial assistance to provide certain information with respect to graduation rates of student-athletes at such institutions. See SENATE REPORT, *supra* note 1.

267. *Id.* at 3.

268. Schultz *Offers Views on Pending Legislation*, *The NCAA News*, Nov. 20, 1989, at 1, col. 4. Schultz argued that the legislation was unnecessary because the NCAA would act and that governmental interference in the governance of intercollegiate athletics was undesirable.

269. *The Columbus Dispatch*, Jan. 9, 1990, at C1, col. 4.

270. SENATE REPORT, *supra* note 1, at 7.

271. See discussion regarding prior efforts in Congress to regulate or initiate reform in intercollegiate athletics, Smith, *Death Penalty*, *supra* note 45, at 1035-36.



the Executive Branch, for that matter.<sup>272</sup> In that regard, Congress should hold hearings in support of a broader reform package, like the one espoused in this article. Unfortunately, Congress has a tendency to act on a piecemeal or single play basis, offering suggestions for limited reform, like the graduation disclosure bill, rather than acting in a more coherent and broadbased manner. At a minimum, the federal government might put pressure on the NCAA to establish accreditation standards and an academic impact requirement for all legislation. In these areas, the federal government could regulate by denying financial aid funds to schools that do not accredit or otherwise promote academic values in their athletics programs.

Such action by the federal government might induce significant reform on the part of the NCAA and would constitute just the kind of support needed by those within the NCAA who favor major reform to ensure academic integrity. Of course, such a dynamic is not without risk — if the federal government threatens regulation and the NCAA fails to respond, the federal government would either have to respond by acknowledging that their action was but an idle threat or by passing some legislation or initiating regulation, thereby entering the realm of intercollegiate athletics regulation.

National legislative pressure is preferable to state or local pressure, because it provides for uniform application of the rules, and would not run afoul of the equal competition or level playing field principle. It might be argued, as well, that national legislative action is less likely to be subject to the provincial biases that sometimes afflict state and local governmental action.<sup>273</sup>

In addition to holding hearings on legislation that would provide for a major reform package, Congress might consider exempting the NCAA from antitrust law. In *Board of Regents*, the Supreme Court has previously held that the NCAA violated antitrust law when it exercised control over the football television package offered by its members.<sup>274</sup> The Supreme Court's decision in that case has been criticized.<sup>275</sup> Whether that criticism is justified or not, Congress should consider exempting the NCAA from antitrust law if the NCAA acts in a manner that furthers academic values and integrity in sharing the revenues received from its \$1 billion television contract for basketball. If the NCAA comes up with a revenue-sharing plan that allocates funds in a way that furthers academic values, Congress should permit it to control television revenues attributable to football, as well, since the CFA, which recently

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272. See Schubert, *supra* note 260, at 100-13, for a discussion of sources of federal regulatory authority related to the governance of intercollegiate athletics.

273. But see *Senator Wants Athletes to Stay in School*, *The NCAA News*, May 3, 1989, at 16, col. 1, for an analysis of Senator Johnston's (D-La.) legislative proposal designed to prevent college athletes from signing professional contracts while attending school. Although introduced at the federal level, Johnston's bill was provincial in that it was designed to protect a Louisiana university from losing one of its best athletes to the professional ranks.

274. *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

275. See, e.g., Grauer, *supra* note 64 at 95-99.

signed a \$210 million television contract with ABC,<sup>276</sup> has done little or nothing to reform athletics in furtherance of academic values.

(2) *State and Local Government*

State governments, in particular, have been increasingly active in passing legislation that regulates intercollegiate athletics.<sup>277</sup> They have also engaged in significant judicial activity.<sup>278</sup> Of particular interest for an analysis of structural reforms, are recent legislative efforts in Florida<sup>279</sup> and Nevada<sup>280</sup> that would hold individuals liable if they engage in activities that cause an institution of higher education in that state to be punished by the NCAA for a major infraction. That type of legislation, if applied to board members, presidents, athletics directors, coaches and others, may help to support academic accountability in the governance of intercollegiate athletics at institutions in those states.

Similarly, Boards of Regents in various states have taken actions that could help further academic values in the governance of intercollegiate athletics in their states. For example, the Florida regents have established a class attendance policy for athletes<sup>281</sup> and have considered a requirement that public universities in Florida share bowl revenues.<sup>282</sup> Illinois has adopted legislation that facilitates the University of Illinois in its efforts to gain control over its athletics budget.<sup>283</sup> Finally, Washington has adopted legislation to help ensure equity, particularly for women, in intercollegiate athletics.<sup>284</sup>

Not all state governmental action is equally laudable, however. For example, the Oklahoma regents recently passed guidelines for athletes that would make a player charged with a crime ineligible to participate in intercollegiate athletics.<sup>285</sup> That legislation is designed to help clean up the athletics program at the University of Oklahoma, but it is poorly focused. It would punish student-athletes, in effect finding them guilty until proven innocent, and fails to address real academic needs. As out-

276. N.Y. Times, Jan. 18, 1990, at 45, col. 3.

277. See, e.g., The NCAA News, July 5, 1989, at 16, col. 1 listing pending legislation.

278. See, e.g., Kansas cases, *supra* notes 28-29 and accompanying text, and cases discussed in Schubert, *supra* note 260.

279. Florida H. 1110 provides that persons involved in the violation of NCAA rules and regulations must compensate for damages incurred by a university or college penalized by the NCAA. The NCAA News, July 5, 1989, at 16, col. 1.

280. See *supra* note 173 and accompanying text, and The NCAA News, July 5, 1989, at 17, for a discussion regarding Nevada A. 563 that provides for a similar cause of return.

281. The NCAA News, Aug. 30, 1989, at 3, col. 4.

282. *Florida CEOs Control Funds*, The NCAA News, Dec. 20, 1989, at 4, col. 4. Such revenue-sharing should be tied to academic purposes. The Regents also acted to give CEOs control over spending at the University to ensure that all income for coaches is directed through the university. *Id.*

283. 1989 Ill. Legis. Serv. 86-6 provides that "[a] domestic corporation which carries on athletic sports and promotes athletic interests among students of a state university with which it is affiliated may be merged into a body corporate and politic which manages and governs the state university."

284. The NCAA News, July 5, 1989, at 18, col. 3. H. 2020 would provide state funds for scholarships for women student-athletes to help promote gender equality in intercollegiate athletics.

285. The NCAA News, Feb. 15, 1989, at 22, col. 1.

lined in this article, a state like Oklahoma could do much to reform its athletics programs, without unduly and inequitably impacting on student-athletes. For example, the Regents might create reporting and accreditation standards for its universities.

State legislators and other governmental officers often are reluctant to move in the direction of reform for fear that they will jeopardize the ability of their institutions' athletics programs to compete with institutions outside the state that are not similarly governed. For example, the Governor in Florida recently called for the establishment of a statewide athletics control office, but he cautioned that Florida could not act unilaterally in a way that would compromise the ability of the state's institutions of higher education involved in big-time intercollegiate athletics to compete with schools outside the state.<sup>286</sup> Thus, while state and local action to stimulate reform should be applauded, it would be naive to anticipate that local or statewide reform will be very significant.

### (3) *Private Entities*

Private entities also play a role in stimulating reform in intercollegiate athletics. Foundations and other entities concerned with the operation of intercollegiate athletics can be a positive force in reform efforts.

The Knight Foundation recently has funded a blue-ribbon committee to study big-time intercollegiate athletics and to offer suggestions for reform.<sup>287</sup> The study is due during the summer of 1991. The makeup of this committee almost guarantees that its suggestions will be thoughtful and helpful.<sup>288</sup>

Other foundations and entities could provide support for studies and for programs initiated at the institutional or conference levels designed to promote academic values in the operation of big-time athletics programs. For example, foundations and groups familiar with academic support and related issues could offer economic support and expertise to institutions that conscientiously desire to provide academic assistance to their student-athletes and to ground their athletics programs in academic values.

Finally, as the NCAA considers how it will spend the revenues generated by the \$1 billion television contract, consideration should be given to providing significant funds for research and development of programs, at the institutional and conference levels, to further academic values in intercollegiate athletics. A foundation might be created or funded for precisely that purpose.<sup>289</sup>

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286. The NCAA News, Nov. 6, 1989, at 3, col. 5.

287. See Lederman, *Reform Panel*, *supra* note 72, at A1, col. 1.

288. *Id.* Father Hesburgh, former President of Notre Dame, and President Friday, President Emeritus of the University of North Carolina system, are both respected and knowledgeable figures in the area of intercollegiate sports.

289. The NCAA Foundation "was formed by the Association for the purpose of receiving and administering funds to advance scientific, educational and charitable purposes of the NCAA." NCAA Executive Regulation 31.9.4, *reprinted in* NCAA MANUAL, *supra* note 16,

(D) *Summary*

With a focus on academic values, structural reforms could be effectuated at numerous levels that would improve intercollegiate athletics. In turn, those reforms can be most meaningful when they are considered as a package, rather than as parts of a reluctant, piecemeal reform effort. If, indeed, the 1991 Convention of the NCAA is to be reform-oriented in a major way, it should consider a package of structural reforms. The NCAA's structural reform effort could be supplemented or stimulated by prompt and thoughtful governmental demands and foundational support.

IV. EFFECTUATING ACADEMIC VALUES: A BRIEF LOOK AT SOME CONTEMPORARY SUBSTANTIVE ISSUES

Placing one's focus on academic values in evaluating reform efforts related to the governance and operation of big-time intercollegiate athletics suggests and casts light upon significant substantive reforms, as well as structural ones. In this part of this article, I will briefly examine two substantive issues of contemporary significance and will suggest how a focus on academic values can inform one's analysis of those issues. This analysis is not intended to be exhaustive either as to the breadth of the issues covered or as to the depth of analysis as to the issues discussed. It is, nevertheless, intended to outline an appropriate analytical approach to such issues.

A. *A National Championship in Football*

The issue of whether or not there ought to be a national championship in football was raised with some furor again this year, in part due to lingering doubts with regard to who should be declared the national champion in 1989. Numerous academics, including Gordon Gee, President of the University of Colorado,<sup>290</sup> are joined by many coaches in opposing the idea of holding a national championship in football.<sup>291</sup> If created, such a playoff would no doubt be modeled in some fashion after the national championships at the Division II and III levels and the national championship in basketball, although it is unlikely that the field of participants would be as large in football as basketball because football teams play far fewer games and need more time to prepare physically for a game.

In offering his thoughtful piece opposing a national championship, President Gee asserted that, "it is clear that calls for a national playoff game are marked by disregard for academic identity and values and by

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at 351. This Foundation provides the shell for such activity and ought to be utilized more effectively.

290. Gee, *A College Superbowl: The Ultimate Sellout*, N.Y. Times, Jan. 1, 1990, at 19, col. 2 [hereinafter Gee].

291. In a recent survey of Division I-A football coaches, it was revealed that 28 of 67 of the coaches responding were opposed to a national playoff in any form. Columbus Dispatch, Jan. 5, 1990.

unseemly commercialism."<sup>292</sup> Later in that same article, Gee opined that, "[t]he drive for success-at-all-costs would only be accelerated if we added a national playoff game. We in higher education have no business entertaining such notions, for a championship would take us one step further toward the complete commercialization of collegiate athletics."<sup>293</sup> Finally, he relates his argument to the needs of student-athletes when he states that, "[w]e have a responsibility to our students and to society to seek cost containment and reduction. Even if additional revenue were to be directed to academic programs, those programs would then become inappropriately dependent upon commercial interests completely unrelated to academic values or the public interest."<sup>294</sup>

At first blush, President Gee's argument seems to indicate that a national championship in football necessarily runs counter to academic values. However, upon further reflection, his argument appears to be superficial. Broken down into a simple syllogism, Gee's argument runs something like this: a national championship in football would result in further commercialization of big-time intercollegiate football; commercialization is contrary to academic values; therefore, a national playoff is contrary to academic values. Each step in this syllogism is suspect.

First, it is not clear that a national championship would result in further commercialization of football. With the College Football Association obtaining a \$210 million, five year television package, and with the vast sums of money earned by teams involved in football bowl games,<sup>295</sup> it is not clear that revenues or commercialization would be increased if a national championship were to be held. The bowl field is much wider than the playoff field would have to be. A national playoff, therefore, might result in a reduction of revenues.

Second, it is hardly clear that commercialization or revenue production<sup>296</sup> is contrary to academic values. Gee argues that, even if the dollars generated from a playoff were used for academic purposes or in furtherance of academic values, the end result of such a playoff would be contrary to academic values. Gee seems to be implying that since funds would not be received on a consistent basis, schools would be induced to try to win-at-all-costs to avoid losing the funds that would go to the winners in any given year. This reasoning is faulty because: (1) the concept of a national championship could be combined with a revenue-shar-

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292. Gee, *supra* note 290.

293. *Id.* at col. 4.

294. *Id.* at col. 6.

295. See, e.g., Lederman, *Bowl Game Revenue May Top \$57 Million*, *The Chron. of Higher Educ.*, Dec. 6, 1989, at A29.

296. See, e.g., discussion in Smith, *Sixth Special Convention*, *supra* note 32. In particular, Donna Lopiano, Associate Athletics Director at the University of Texas, argued that commercialization is neutral. She added, however, that:

We must agree with [those] . . . who support the notion that the NCAA must control distribution of NCAA championship profits to benefit all institutions, in the same way that a multiinstitutional research consortium equitably distributes profits among all members regardless of the institutional affiliation of the researcher who makes a commercially viable discovery.

*Id.* at 451-52.

ing package that would share funds among schools at that level and direct the vast majority of funds to academic purposes on an annual basis; and (2) even if there were not such revenue-sharing package, it is not clear that the sporadic receipt of funds would denigrate academic purposes, if funds were used to create an endowment to benefit student-athletes or were otherwise spent wisely.<sup>297</sup> Indeed, President Gee is no doubt involved in fundraising on a regular basis at the University of Colorado and it is unlikely that he would be inclined to turn down a one-time gift of seven figures, simply because receipt of that gift would whet the appetite of the academic program receiving it. Thus, it would seem to follow, contrary to Gee's reasoning, that receipt of the funds is, if anything, neutral, and focus must be directed to how it is spent. Furthermore, if a national championship in football could be tied to academic values and revenue-sharing for such purposes, it might be a beneficial reform.

What steps should be taken to tie a national championship to academic values? First, to maximize the academic values furthered, such a championship should be tied to a revenue-sharing program that would direct revenues or a substantial proportion of the revenues received to academic purposes. Second, care would have to be taken not to extend the season in a manner that increased the academic impact on the student-athlete's academic program or progress. In this regard, if the championship could be tied to a shorter season, as it effectively is in Divisions II and III,<sup>298</sup> academic values might be furthered. Of course, if the number of games in a team's season were cut, it might place the student-athlete in the classroom with more regularity, a fact that seems to be directly related to his academic performance,<sup>299</sup> but it might entail some loss in revenue to the institution. Where revenue currently is used for academic purposes, such losses might indirectly inhibit the furtherance of academic values.

If a national championship were included in a reform package, and was tied to significant revenue-sharing for academic purposes, it might be a boon to academic values. Indeed, given the sporadic commitment of dollars to academic purposes and programs by the CFA and others involved in big-time football, as it is currently organized, a national championship might be warranted. However, before a playoff is inaugurated, I would want to be assured that it could be tied to academic val-

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297. President Gee seems to be arguing that the receipt of one-time or sporadic funding taints intercollegiate athletics. While receipt of such funds no doubt whets the academic appetite, it need not taint the operation of intercollegiate athletics any more than the receipt of a one-time grant or gift would taint the operation of another academic department. The funds are not the problem. The way they are monitored and administered, however, might create problems, particularly if unfair demands are placed on athletics personnel regarding the need to win-at-all-costs to generate more funds in the future.

298. The Division II and III playoffs end before many of the bowl games are played by Division I-A schools. Indeed, the season could be structured to have the playoff end before final exams in the fall semester. Of course, to do so might require a reduction in conference games, but such reductions certainly are feasible.

299. See Bohrnstedt comments regarding the AIR Report dealing with the performance of student-athletes in *The NCAA News*, Feb. 15, 1989, at 14, col. 2.

ues. This might be achieved through federal legislation exempting the NCAA from antitrust liability for televising big-time football on the condition that a substantial portion of the funds generated are used for a set of clearly delineated academic purposes.<sup>300</sup> If such legislation were introduced in Congress, it might also stimulate the CFA to use a portion of its funds for academic purposes, in an effort to sidetrack the legislation. At any rate, such legislation could stimulate meaningful reform.

### B. *Paying Athletes*

For the past several years, there has been repeated support for the proposition that student-athletes participating in revenue-producing intercollegiate sports should be paid for their efforts.<sup>301</sup> Even some of the presidents of major universities are now calling for compensation for athletes involved in revenue-producing sports.<sup>302</sup> The President of the University of Washington, for example, recently argued that athletes should be paid since major revenue-producing sports were little more than "farm clubs for the NFL and NBA."<sup>303</sup> Other commentators have argued that a semi-professional or minor league should be established, either within higher education or under the auspices of a separate, noneducational entity.<sup>304</sup> These arguments for paying college athletes draw support from the notion that the athletes are more like entertainers than students and, as such, should be compensated for the entertainment they provide.

Short of the actual establishment of a minor league or outright payment of salaries to the athletes, steps already have been taken to increase the value of the scholarships received by student-athletes, at least where need is evident.<sup>305</sup> In his 1990 State of the Association address, Director Schultz recently advocated even more aid for student-athletes involved in big-time sports:

Let's permit institutions to provide athletes all supplies required for a course by a professor and approved by the faculty athletics representative, and let's provide financial aid in Division I up to the cost of attendance, regardless of need. Let's

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300. Director Schultz has said that he "would like to get back to where we just play for the championship and the trophy. If we're going to achieve reform in college sports, we need to change the model, and the distribution plan is a good place to start." Lederman, *TV Bonanza*. If the NCAA initiates such revenue-sharing of basketball revenues for academic purpose, it should be given power, through relaxation of antitrust laws, over television revenues for football as well.

301. See, e.g., Smith, *Death Penalty*, *supra* note 45, at 1053-54, for a discussion of a number of such proposals.

302. See, e.g., *The NCAA News*, Nov. 6, 1989, at 5, col. 1 (Comments of the President at the University of Washington).

303. Cited in *Freshman Ineligibility: Whose Interests Are Served?*, *The NCAA News*, Nov. 6, 1989, at 5.

304. See, e.g., TELANDER, *supra* note 7, at 212-21, and Rush, *supra* note 42, at 589-91.

305. During 1980's, the amount of actual aid received by needy student-athletes has increased as has the relative value of a college degree. See Vobeja, *Relative Value of a College Degree Soared in 1980's*, *Wash. Post*, May 3, 1989, at A12 [hereinafter Vobeja] and NCAA Bylaw § 15.2.4, reprinted in *NCAA MANUAL* *supra* note 16, at 139, indicating increased support for student-athletes from government grant sources.

establish an emergency loan system for needy athletes and transportation expenses home for those who are required to forgo vacations for reasons of athletics participation.

We should continue to review rules that pertain to elite and Olympic athletes, including trust funds that would be administered by a national governing body. And we should consider an endowment fund that would permit a small cash bonus for an athlete graduating within five years.<sup>306</sup>

With actual moves to increase existing aid and with growing support for further compensation, it is inevitable that student-athletes involved in major, revenue-producing sports will be receiving additional compensation, but the form that such payments will take is quite important.

The focus of such compensation should not be on the athlete as an entertainer but rather should be on the athlete as a student. Compensation should further educational values and objectives. As one former athlete has noted, "[f]or 99% of scholarship athletes in revenue-producing sport, college education is the primary value desired."<sup>307</sup> This observation receives corroboration in the recent independent study of college athletes prepared for the NCAA — student-athletes, even in revenue-producing sports, want to receive an education.<sup>308</sup>

Nevertheless, there are advocates of academic values who still argue that leagues should be formed using players who are not full-time college students, in recognition of the athlete's right to choose.<sup>309</sup> In my view, if such minor leagues are established, they should be sponsored by entities outside higher education. Indeed, if there really is a market for a "minor league" in football and basketball, that talented athletes would choose over athletic opportunities tied to educational institutions, that market ultimately should generate such a league in response to existing demand. In such a league, rather than being compensated with educational opportunity, the athletes could receive actual salaries or compensation.

Higher educational institutions should not compromise their educational purposes by creating such leagues. Nevertheless, they should do nothing to prevent an athlete from choosing to leave school to participate in professional sports.<sup>310</sup> Institutions of higher education should focus the thrust of additional compensation packages on educational values. Thus, while I agree that student-athletes involved in major, revenue-producing sports should receive more compensation, because they are responsible for the generation of that revenue and ought to receive

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306. The NCAA News, *supra* note 90, at 6, col. 4.

307. David Meggyesy in LAPCHICK AND SLAUGHTER, *supra* note 43, at 120.

308. See NCAA News, Feb. 15, 1989, at 17, and *supra* note 249.

309. Weistart, *supra* note 22, at 59.

310. See article regarding the National Football League's relaxation of its rules related to undergraduate access to the NFL's draft. N.Y. Times, Jan. 16, 1990, at 1, col. 4. Student-athletes who desire to go professional should be permitted to do so, although it is arguable that the NFL team drafting the athlete should provide him with a scholarship should he decide to return to school.



the just fruits of their labors, that compensation can and should be directed to educational purposes.

To begin with, the institutions ought to recognize and share with the student-athlete the fact that there is value related to the education they supply.<sup>311</sup> Furthermore, they should recognize the fact that student-athletes have significant demands on their time and, therefore, typically take at least five years to graduate.<sup>312</sup> Given this fact, institutions should be required to provide a five-year scholarship to their athletes.<sup>313</sup> In 1982, an independent Committee established by the NCAA recommended that student-athletes be given a fifth year scholarship after having used up their four years of eligibility.<sup>314</sup> Such a suggestion is laudable and could be made even more practical, from a cost-containment point of view, by permitting the student-athlete to have five rather than four years of eligibility. If a rule requiring freshmen ineligibility is warranted, the scholarship could be for five, or perhaps even six years, based on some definite academic progress requirements tied to graduation in a timely fashion. Evidence seems to indicate that student-athletes do as well or better academically during the season when they are participating in their sport,<sup>315</sup> thus there would seem to be little harm to the student-athlete, if we were to extend his or her compensation an additional year, in exchange for another year of participation.

I opt for this practical approach, that acknowledges the need for cost-containment, because I agree with Professor Weistart's observation that reform proposals need to be accompanied by "efforts to reduce and equalize athletic expenditures among institutions."<sup>316</sup> I would also provide for further cost-containment by limiting scholarships in minor, non-revenue-producing sports to aid based on need. In my view, there simply is no reason why well-to-do athletes in minor nonrevenue-producing sports should receive compensation out of a pool largely generated by student-athletes in revenue-producing sports. Put more bluntly, it hardly seems right to take dollars generated by basketball and football players at the Division I level, a large number of whom are minorities and individuals from lower socio-economic backgrounds, to support athletes in minor sports who come from more privileged backgrounds. The only possible exception to this need-based limitation would be major women's sports, which could be subsidized on the basis that such assistance is designed to remedy past discrimination, although one must wonder as to whether it is appropriate to fund women's sports out of the efforts of basketball and football players, many of whom are from disad-

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311. See Vobeja, *supra* note 305.

312. Given time demands on the student-athlete, five years of study are typically required. See, e.g., The NCAA News, Feb. 15, 1989, at 12, col. 1, for a discussion of the AIR Report that tends to confirm this fact.

313. Some schools, including Big 10 institutions, voluntarily give an athlete a fifth year scholarship after he has completed his athletic eligibility. This voluntary practice should be made mandatory.

314. 1982 REPORT, *supra* note 75, at 22.

315. See *supra* note 249.

316. Weistart, *supra* note 22.

vantaged or minority backgrounds. The money saved by reforming scholarship or financial aid rules in this manner could be used to fund additional scholarship aid for needy athletes and for academic and related support for these athletes.

Previously, I have argued that student-athletes should be given a scholarship over the period of their anticipated time of eligibility, rather than for the one-year period provided for under current rules.<sup>317</sup> Extending eligibility for an additional year would provide for five years of scholarship assistance and a five-year educational "contract" between the student-athlete and the institution. From the student-athlete's point of view, the only conditions subsequent placed on the term and enforcement of the contract should be that: (1) he or she meets rather stringent academic progress requirements — these rules should reflect progress toward a degree on a five, or perhaps, six-year timetable; and (2) he or she complies with reasonable team rules.

The mandatory five or six-year scholarship, as additional compensation, should be accompanied by further aid or compensation in the form of academic support. Since the student-athletes generate substantial revenue, and take considerable time out of their study week to do so,<sup>318</sup> they should be supplied with academic assistance, in the form of tutors supplied and overseen by academic as opposed to athletics department personnel and study aids such as computer access and training. Meaningful academic compensation could be supplied if study and computer rooms for athletes were designed that rivaled weight and training facilities currently provided. Indeed, expenditure of funds for such purposes would send a significant signal to the athletes and others that academics are important. In extending such academic assistance, care should be taken to ensure that student-athletes are not entirely separated from the remainder of the student body; however, such need for integration should not and need not take precedence over the student-athlete's special academic needs.

By focusing on academic values in compensating student-athletes, and by coupling that focus with attention on equitable cost-containment, institutions could help their academic image without incurring additional costs. If revenue-sharing at the national level were designed to support such an effort, great strides could be taken to limit costs, while strengthening the academic image of intercollegiate athletics. Such moves would not detract from either the macro or the micro educational values that must be central to the operation of intercollegiate athletics programs and would do much to strengthen those values.

## V. CONCLUSION

The push for the reform of intercollegiate athletics continues. However, reform efforts have been sporadic and lacking in a coherent

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317. See *supra* notes 312-15 and accompanying text.

318. See, e.g., AIR Report discussed in *The NCAA News*, Feb. 15, 1989, at 12, col. 1.

philosophy or theme. No self-respecting coach would ever enter a significant game with a game plan as ill-conceived as the one heretofore espoused by reformers of intercollegiate athletics. It is little wonder, then, that reform efforts have seemed almost laughable at times. If the 1990s are to be the era of major reform in intercollegiate athletics, and institutions of higher education are to retain their academic integrity, a game plan for reform based on academic values must be established and implemented.

In this article, I have discussed the nature of just such a game plan. It is certainly beyond the scope of this article to discuss every aspect of such reform in detail, but it is hoped that this effort is sufficiently specific to provide a meaningful game plan for reform efforts in early 1990's. Even the best devised game plans are revised during the course of the game, but they nevertheless provide the foundation for what ensues. It is just such a foundation that has been lacking in reform efforts to date. Perhaps, educators have something to learn from their coaching counterparts with regard to game plans, and surely everyone in education can benefit from participation in learning experiences.