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NIL "Reform" Fails to Address the NCAA's Biggest Issue

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On June 30, 2021 the National Collegiate Athletic Association announced what appeared to be a "major" change in its business model when it permitted college athletes to commercially exploit their names, images and likenesses (NILs) (Hosick, 2021). For the last 10 years the NCAA's business model has been under significant legal and public relations pressure from current and former athletes, academics, politicians, media members and even current and former coaches. However, the college sport enterprise has continued to generate billions of dollars in revenue while also capping Football Bowl Subdivision (FBS) and Division-I men's basketball players' compensation at levels well below market value (Huma et al., 2020). While the NCAA's "allowing" college athletes to endorse commercial products and services was hailed as "revolutionary," what went seemingly unnoticed was that – just as when grants-in-aid (GIA) (i.e., athletic scholarships) were first introduced in 1956 – NCAA national office and athletic department administrators consistently stayed on message, insisting that NIL endorsements were not "pay for play." In an expanding endorsement marketplace, industry insiders have continued to squelch any talk that profit-athletes[1] are employees who should share in the revenue generated from their labor. Instead, NCAA members have used NIL to rebrand themselves as forward-thinking protectors of "student-athlete well-being" (Henry, 2021, para. 3). A misinformed media and public have dutifully bought into the "NIL-as-revolution" narrative, accepting the need for restrictive NIL "guardrails" "...to prevent exploitation of student-athletes or abuses by individuals or organizations not subject to the authority of the student-athlete's school" (NCAA Constitution, 2021, p. 10).

The NCAA rebranding strategy, and the subsequent near universal acceptance of changes to their long-standing core principles as gospel, is nothing new. Past examples can be found from the late 1950s to the present day. As these cases and situations demonstrate, the NCAA has historically sought to prevent significant change to its collegiate model by implementing smaller, less-significant changes and convincing a willing media and fan base that these largely insignificant changes (in relation to the overall revenues generated) reflect an ever-evolving collegiate model of athletics that is responsive to athletes' rights.

1980's - 2000's

In the mid-1980s, Congressional hearings and media exposes revealed several high-profile college athletes were functionally illiterate and unable to perform basic college-level work. In response, a 1990 federal law required all schools to collect data regarding 6-year graduation rates of full-time students

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[1] A profit-athlete is a college athlete whose market value is greater than the value of an awarded grant-in-aid (GIA). According to this definition, profit-athletes are almost exclusively Power-5 football and D-I men's basketball players.

(Federal Graduation Rate – FGR). Instead of embracing the FGR and working to improve athletes' academic performance on the new metric, the NCAA created and disseminated its own graduation scoring system – the Graduation Success Rate (GSR) – that resulted in an almost-automatic 10-15% graduation-rate improvement when compared to the FGR. In addition, the NCAA has consistently hailed the GSR as a mechanism to "more accurately reflect student-athlete graduation outcomes" ("Why the GSR is a better…," n. d, para. 6.). However, the NCAA often downplays or even ignores the inconvenient truth that the GSR overestimates athlete graduation rates, treating all athletes meeting minimal eligibility requirements (but who leave college before graduation) as transfers who graduate, discounting that many transfers drop out and never graduate. The NCAA usually ignores that the GSR cohort is different than the FGR. The GSR will almost-always return a higher graduation rate. This "success" is so common, that it's included in the name of the metric. The NCAA has so effectively rebranded academic success that 20-yers later prominent media outlets unfailingly ignore the FGR, announce GSR rates, and celebrate in the continual improvement in college athletes' graduation "success" rates (Southall, 2014).

In 2003, under pressure from a variety of stakeholders, the NCAA announced additional educational reforms, including a new graduation metric, the Academic Progress Rate (APR). First tabulated in 2007, the APR was designed to track and punish individual teams that failed to reach prescribed graduation rate levels over a 4-year period. The required 930 APR score, which translated to a 50% GSR, was hailed as the remedy for educational failures, since it banned failing teams from postseason play. The NCAA often triumphantly announced APR team failures, and subsequent penalties, to media members who rarely checked the APR methodology and underlying reasons for potential non-compliance. Unfortunately, the vast majority of the punished Division I programs were "under resourced" lower funded schools, most of which were Historically Black Colleges and Universities (HBCUs). Since most Power-5 athletic departments had financial and human resources to manage APR compliance, the NCAA's educational reform was racialized, having a disparate impact on athletes of color at HBCUs.

2010's

During the 2014 NCAA March Madness Division-I Men's Basketball Tournament Final Four, University of Connecticut (UConn) basketball star Shabazz Napier told the media that he often went to bed hungry. Clearly aware of the terrible optics of Napier's revelation taking place during the billions-of-dollars national extravaganza that is March Madness, within days the NCAA changed its 3-meals-a-day policy to allow players unlimited food (Hosick, 2014). Even though a number of pundits had previously noted the cap on food, which included the infamous "Bagel Rule" where a bagel with a spread was considered a meal (Anderson, 2013), few media members pressed the NCAA on why it took a prominent athlete complaining to a national audience to change a rule that would directly affect college athletes' health and well-being.

Also in 2014, Northwestern University's football team sought union status (Koba, 2014), Then, in 2015, Ed O'Bannon successfully litigated that the NCAA violated the Sherman Act. Within this environment, the Power-5 conferences, which were in the midst of demanding and being granted governance autonomy by the NCAA, began earnestly considering altering their "full-ride scholarship" compensation model. Though former NCAA President Myles Brand had previously advocated that full-GIA athletes be eligible to receive a cost-of-attendance (COA) stipend (typically between $2,000-$5,000 in the mid-2010s) as part of their GIA (Staples, 2011), the NCAA membership had refused to alter its stance…until public pressure and a negotiated settlement in White v. NCAA (2006) resulted in Power-5 members adding COA to scholarships that were marketed as already being "full-ride." In addition, in late 2014 some Division I conferences announced they would offer 4-year GIAs, something they had done in the 1960s but had restricted to 1-year renewables in the 1970s to cut costs and grant coaches greater control of athletes (Byers and Hammer, 1995; Strauss, 2014).

NIL Rebranding Efforts

Unfortunately, NIL rebranding efforts have effectively limited profit-athletes' full access to the endorsement market, while also successfully preventing them from being classified as employees. Though in a few cases college athletes have reportedly received significant endorsement compensation (Rodak, 2021), available contract data do not indicate a fundamental change to the collegiate model. Despite the media's infatuation with college athletes' NILs, the vast majority of such endorsement deals have little value. In addition, the reported value of many "lucrative" endorsement deals is likely inflated by value-in-kind (VIK) elements that provide discounts on goods and services rather than money. As any sport management student learns, VIK inflates the "stated price tag" of a sponsorship or endorsement. In addition, the actual-cash-value of most deals is most likely reported in "retail" terms, which does not reflect the actual cost of the goods or services to the sponsor, or the actual cash received by an athlete.

While college-athlete endorsement deals have been discussed by coaches (e.g., In July, 2021, Alabama's Nick Saban speculated – without attribution – that Crimson Tide quarterback Bryson Young had already earned close to $1 million in endorsement deals [Rodak, 2021]), contract specifics are difficult to verify. According to Opendorse, the average compensation per college athlete by division was $1,256.00 (Division I), $75.00 (Division II), and $35.00 (Division III) as of November 30, 2021 (Opendorse, 2021)[2]. Another endorsement platform, INFLCR, reported that since July 1, 2021 the median transaction value was $51, with an average deal value of $1,306 (Blinder, 2021). The market seems to have been inflated by a few large Power-5 football players' endorsement deals, since according to July 2021 Opendorse data, the average Division I NIL transaction was $471, with the median Division I NIL deal having been just $35 (Davis, 2021). Despite these meager sums of money (in relation to the multi-billion-dollar FBS and Division I men's basketball landscape), with the expansion of college athletes' ability to sign endorsement deals and otherwise monetize their names, images and likenesses, many college sport reformers tacitly accept the college-sport paradigm, and its continual changes, encapsulated in the NCAA's collegiate model. They truly believe the NCAA is an educational organization that prioritizes academics.

Among a number of prominent reform groups, The Drake Group – an organization whose original mission was "…to defend academic integrity in higher education from the corrosive aspects of commercialized college sports" (The Drake Group, 2021, para. 1). – have recently called for Congress to grant the NCAA a "limited" antitrust exemption, which would include allowing the NCAA to:

(4) impos[e] limits on athletes' use of their own names, images, and likenesses (NILs), including levels of compensation, appropriateness of activities and third-party businesses which are pay ing for the NILs, and time demands relating to the NIL payment, and

(5) [prohibit] the remuneration of athletes for their participation in institutional athletic activities other than the award of scholarships and other payments tethered to educational costs and benefits (The Drake Group, 2019, p. 3).

Unfortunately, The Drake Group is not alone among "reformers" who hope for change that would never involve profit athletes actually having full access to the fruits of their labor in a capitalistic system. Instead of top college athletes truly being "paid," most reformers hold out hope that college sport can be saved by everyone "truly embracing" the NCAA's amateurism mythology (Sack & Staurowsky, 1998). Reformers conveniently overlook the fact that amateurism violates the constitutional and human rights of the collegiate model's profit-athlete labor force, inflicting long-term financial, intellectual and emotional harm upon these athletes.

[2] The average per-athlete NIL compensation by division is total NIL compensation for all athletes divided by total athletes with at least one facilitated deal or disclosed activity since July 1, 2021 according to anonymized transactions facilitated by Opendorse Deals, and disclosures submitted via Opendorse Monitor.

Most reform groups, and "reform-minded" media members, choose to ignore that big-time college sport is a commercial enterprise that enriches athletic administrators, coaches, sponsors, and media partners. This commercial enterprise also provides predominately middle-to-upper class, White college athletes who compete in "Olympic sports" in all three NCAA divisions, a subsidized "collegiate athletic" experience. Most reformers conveniently overlook the economic reality that such "loss" athletes have little-to-no market value, but still often receive athletic scholarships, compete in events requiring extensive travel, and participate in national championship competitions. Therefore, their GIA compensation and their overall college-athlete experience is – in many ways – a highly favorable exchange. Not surprisingly, many reform organization documents are replete with NCAA language, customs, and principles that ignore the exploitative nature of big-time college sport. In addition, almost without exception, reformers contend that a priori college sport supports and contributes to universities' educational mission and provides valuable life lessons for athletes and consumers alike.

What seems clear is that most reformers want to polish and refurbish the NCAA's Blue Disk. Most reformers, if pressed, would agree with NCAA president Mark Emmert's declaration that:

> Student-athletes are students. They're not professionals. And we're not going to pay them. And we're not going to allow other people to pay them to play. Behaviors that undermine the collegiate model, wherever they occur, are a threat to those basic values, and we can't tolerate them (Moltz, 2011, para. 5, 11).

Almost without exception, reformers do not advocate paying profit-athletes a negotiated market wage. Instead, their idea of reform is returning to a bygone era when college sport was "pure" and players played for "love of game and college." Reformers do not want to grant basic economic rights to profit-athletes; instead, they want to legalize current illegal cartel behaviors, while allowing college athletes limited access to their NILs. Notably, many reformers want to enact "guardrails" that limit such access – effectively allowing college athletes access only to the college sport industry's economic crumbs.

While college athletes are now allowed to access a small amount of money from NIL deals, the billions of dollars from the College Football Playoff and March Madness remain largely out of the players' reach. The players' new access to NILs involves no sharing of the most important college-sport revenues, nor access to long-term medical care, pensions, or workers compensation. Unfortunately, it seems as if reformers, and members of the media, are more interested in chasing an amateur mythology that never was rather than fundamentally fixing what ails big-time college sport.

True reform requires a college-sport revolution in which previously "normal" beliefs are discarded and replaced with ideas that seem radical in college sport but are commonplace in nearly every other aspect of American life. As United States' Supreme Court Justice Brett Kavanaugh recently noted,

Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate…And under ordinary principles of antitrust law, it is not evident why college sports should be any different…The NCAA is not above the law. (Myerberg, 2021, paras. 5-6).

Unfortunately, as long as the NCAA's collegiate model is college sport's paradigm, meaningful "reform" cannot occur. The first revolutionary building-block is the recognition of profit-athletes as employees. The recent recognition of this reality by the National Labor Relation Board (NLRB) General Counsel Jennifer Abruzzo is an important first step. However, what is unclear is whether college sport stakeholders have the intellectual and moral courage to abandon the familiar and financially successful, but morally bankrupt and exploitative, collegiate model.

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