

**HE SHOULDN'T HAVE TO EAT RAMEN:
A MODEST PAY-FOR-PLAY PROPOSAL FOR NCAA STUDENT-ATHLETES
PARTICIPATING IN TRADITIONALLY PROFITABLE SPORTS**

*By William O. Kessler**

I. INTRODUCTION

Big-time college football and basketball equals big business, and has for quite some time now. Revenue is generated for and enjoyed by the academic institutions that field these teams, the people who coach them, and especially the many various merchants who capitalize on their popularity. The institutions sell game tickets and team/school paraphernalia by the gross. More importantly, media providers and the institutions ink valuable television and radio contracts. All the while the indispensable engine that drives this unique and wildly profitable branch of the entertainment industry, the on-field participant, receives woefully inadequate compensation for his contribution.

The NCAA and the academic institutions practice this blatant and novel form of exploitation in the name of the supposedly inherent good that is “amateurism.” However, the economic reality is that every year football and basketball become more profitable industries, the more egregious the exploitation of the on-field participant becomes. The general concept of amateurism, as it is modernly understood, arguably suits athletics well. However, any justification for restricting the student-athlete from enjoying even a remotely equitable portion of the considerable revenue he produces is merely a ruse to maintain the current unfair economic distribution – as measured by the sheer amount of dollars generated.

This article first examines the current financial circumstances facing collegiate student-athletes who are enrolled in Division I-A (hereinafter “I-A”) academic institutions governed by

* J.D. Candidate, Willamette University College of Law, 2006; B.A., University of Washington, 2000.

the National Collegiate Athletic Association (hereinafter “NCAA”),¹ and who participate in the two traditionally revenue-producing sports, football and men’s basketball.² It next describes the problems inherent in and arising from a student-athlete’s financial situation, and proposes improvements to the current system. These proposals would benefit student-athletes, the NCAA and its member institutions, and I-A football and basketball in general. Specifically, this piece promotes two elements. The first element classifies the student-athlete as an employee of his school by virtue of his participation in football or men’s basketball. The second element calls for compensating the student-athlete to the extent he can live comfortably, yet remain an amateur in the eyes of the NCAA. Finally, this paper addresses issues likely to arise as a result of implementation of the proposals set forth, such as the financial ramifications for unprofitable I-A teams, the modification of NCAA bylaws, workers’ compensation and vicarious liability.

II. THE STATUS QUO

College football is now a \$5 billion-per-year industry.³ In 2003, 40.6 million fans attended games, and a recent online Harris Poll revealed that college football is the fourth most popular spectator sport in America.⁴ In 1999, the average I-A football program that realized a profit netted \$6.7 million, an increase of approximately \$300,000 per year since 1985.⁵ At that pace, the average profitable program will net \$8.2 million in 2004. Men’s basketball (hereinafter

¹ NCAA CONST., art. 4.02.1, *reprinted in* the Nat’l Collegiate Athletic Ass’n 2004-05 NCAA Division-I Manual [hereinafter “NCAA Manual”], *available at* http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf (last visited Mar. 29, 2006) (describing the NCAA as “a diverse, voluntary, unincorporated Association of four-year colleges and universities, conferences, affiliated associations and other educational institutions”).

² US DEPT. OF EDUCATION, OFFICE OF POSTSECONDARY EDUCATION, EQUITY IN ATHLETICS DISCLOSURE, *available at* <http://ope.ed.gov/athletics/Search.asp> (last visited Mar. 29, 2006). With notable exceptions, such as women’s basketball at the University of Connecticut and the University of Tennessee, NCAA Division I-A football and men’s basketball are the only collegiate sports that average a profit year to year, a trend that continued through 2004.

³ Rick Horrow, *CollegeFootball: Search for Revenues, Protection for Athletes*, CBS SPORTSLINE.COM, Sept. 30, 2004, <http://cbs.sportsline.com/general/story/7741030> (last visited Mar. 29, 2006).

⁴ *Id.*

⁵ Chris Isidore, *College teams fail Econ 101*, CNN/MONEY, Nov. 13, 2001, *available at* http://money.cnn.com/2001/11/13/news/column_sportsbiz/ (last visited Mar. 29, 2006).

“basketball”) proves similarly lucrative, though on a smaller scale. Total I-A basketball attendance in 2003 topped 25 million,⁶ and the average profitable program in 1999 netted \$2.3 million, up by an average of \$111,000 per year since 1985.⁷ At that pace, the average self-sustaining program in 2004 will realize an annual profit of \$2.85 million.

Division I-A football and basketball enjoy a tradition of both long-standing and continuously increasing economic success, but the young men whose talents and efforts generate those millions of fans and billions of dollars subsist near the poverty line.⁸ The NCAA restricts these athletes’ “maximum institutional financial aid” to “the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution.”⁹ The NCAA defines the “Cost of attendance” as “an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.”¹⁰ Schools must calculate the cost of attendance using the same methods for student-athletes as they do for non-student-athletes.¹¹ Two case studies follow that demonstrate the depth of the deficiency of the NCAA’s maximum allowable grant-in-aid. The first case study is of the University of Arizona and the second is of University of Washington. Compared to national averages, the two case studies are representative of the financial situations of most NCAA I-A student-athletes.

⁶ NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, MEN’S BASKETBALL ATTENDANCE, 2003 NAT’L COLLEGE BASKETBALL ATTENDANCE (2003), *at* http://www.ncaa.org/stats/m_basketball/attendance/2003_basketball_attend.pdf (last visited Mar. 29, 2006) (For All NCAA Men’s Varsity Teams).

⁷ Isidore, *supra* note 5.

⁸ UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE 2004 HHS POVERTY GUIDELINES (2004), <http://aspe.hhs.gov/poverty/04poverty.shtml> (last visited Mar. 29, 2006). The United States Department of Health and Human Services set the 2004 poverty line for a single-person household at \$9,310 per year.

⁹ NCAA CONST. art. 15.01.7, *supra* note 1, at 192.

¹⁰ *Id.* at art. 15.02.2.

¹¹ *Id.* at art. 15.02.2.1.

A. UNIVERSITY OF ARIZONA

A student-athlete with a full grant-in-aid at the University of Arizona (hereinafter “UA”) receives a check of \$750 per month, along with \$222 per month credited to a “meal card” that is redeemable only at on-campus cafeterias.¹² A study of the local classified advertisements reveals that the average two-bedroom apartment in the Central Tucson neighborhood (the neighborhood in which the university is located) rents for \$641 per month.¹³ Assuming a student-athlete finds a roommate, he is responsible for \$320 in rent. If his share equals \$40 per month for utilities (water/sewer/garbage/electricity), \$30 for a phone of some kind and \$20 for basic cable TV, then a liberal estimate of his remaining monthly funds is \$340 a month for transportation, entertainment and miscellaneous expenses.

In theory, none of this remainder should have to be spent on food because of the meal card. However, no student (athlete or otherwise) can be expected to consume every meal at university cafeterias, if for no other reason than logistics such as conflicting class or practice time with meal times. But even assuming that is possible, the funds on his meal card are insufficient. A conservative estimate of the average cost for a football or basketball player to eat one meal at a UA cafeteria is \$7.00.¹⁴ The problem is that the \$222 per month meal card stipend equals \$7.40 per day in a 30-day month, barely enough for one meal. If the average UA football or basketball student-athlete would eat \$21 worth of food per day on campus (\$7 per meal, 3 meals per day), his meal card should hold \$630 per 30-day month, or \$408 more than it currently

¹² Telephone Interview with Danny Espinosa, Student-Athlete, The University of Arizona (Oct. 25, 2004). Espinosa is a sophomore at the University of Arizona and is a center on the football team. He has received a full grant-in-aid. The check and meal card are in addition to tuition and books, which the university pays for separately.

¹³ TUCSON CLASSIFIED MARKETPLACE, Nov. 30, 2004, *available at* <http://www.tucson.com/rentals> (last visited November 30, 2004). Between Oct. 17, 2004 and Nov. 7, 2004, the average rent on this website for all two-bedroom apartments in the Central Tucson neighborhood was \$641.

¹⁴ Espinosa, *supra* note 12 (Espinosa is a 290-pound offensive lineman who regularly consumes \$9 to \$10 meals in order to maintain his football weight).

does. Assuming that the student-athlete makes up this \$408 deficiency using the aforementioned \$340 residuary from his monthly check, he is \$68 short of meeting his basic living expenses every month, before he buys toothpaste, toilet paper or laundry detergent.

B. UNIVERSITY OF WASHINGTON

At the University of Washington (hereinafter “UW”), the full grant-in-aid student-athlete fares slightly worse. An athlete receives an even \$900 per month in a check but no meal card money, though he may obtain and fund a card himself.¹⁵ The average two-bedroom apartment in Seattle’s University District rents for approximately \$942 per month.¹⁶ Assuming he finds a roommate, the student-athlete is responsible for \$471 in rent. Also assuming the same cost for utilities at UA applies in Seattle (\$90 per month) the student-athlete is left with \$339 per month with which he must pay for food and his remaining expenses. Seven dollars per meal, as at UA, is a conservative estimate for the price of an on-campus meal at the UW for either a football or basketball player.¹⁷ If he eats three average meals per day every day for a 30-day month, he falls \$291 short of meeting his basic needs every month... again, before purchasing such luxuries as dish soap, deodorant and Downey.

C. THE REST OF THE COUNTRY

The situations at UA and UW represent the NCAA Division I-A as a whole. In a survey conducted in the fall of 2002, 59% of I-A football players stated that they needed an additional \$200 *or more* per month in order to “meet necessary living expenses while attending college.”¹⁸

¹⁵ Telephone Interview with Jason Benn, Student-Athlete, The University of Washington (Oct. 29, 2004). Benn is in his fourth year at UW as a tight end on the football team. He has received a full grant-in-aid.

¹⁶ SEATTLE POST-INTELLIGENCER CLASSIFIEDS, Nov. 7, 2004, *available at* <http://classifieds.nwsourc.com/rent> (last visited November 7, 2004). Between Oct. 17, 2004 and Nov. 7, 2004 the average rent on this website for all two-bedroom apartments in Seattle’s University District was \$942.

¹⁷ Benn, *supra* note 15.

¹⁸ AMERICAN FOOTBALL COACHES ASSOCIATION, 2003 AFCA PLAYER Survey (2003), http://www.afca.com/pdf/2003_Player_Survey.pdf (last visited Mar. 29, 2006). The survey was released in 2003 and was the fifth survey conducted by the American Football Coaches Association (AFCA) since 1981. AFCA is

Another 30% reported that they needed an additional \$101-\$200.¹⁹ Only 6% of the respondents claimed they needed anywhere from \$0-\$50 extra per month to meet their minimum expenses.²⁰

That survey, when combined with the pure economic realities described above, unmasks the inadequacy of the full grant-in-aid. This is despite the fact that the survey stipulates that the players respond after having taken into account any Pell Grant funds they might receive.²¹ A Pell Grant is a federally-funded, need-based award (not a loan) usually only available to undergraduate students who are in the process of working towards a bachelor degree.²² A student's need is determined by subtracting his "expected family contribution" from the "cost of attendance" at his given school.²³ According to its bylaws, the NCAA explicitly permits student-athletes to receive Pell Grant funds *in addition to* full grants-in-aid based on athletic talent.²⁴ Thus, the NCAA implicitly admits that full grants-in-aid are not even *designed* to meet the basic needs of their recipients, as a student-athlete may receive a full grant-in-aid and still qualify for a Pell Grant.

III. PROBLEMS RESULTING FROM THE CURRENT STRUCTURE

As stated above, the average I-A student-athlete cannot subsist on a full grant-in-aid alone. Assume, however, that the NCAA acknowledges this fact and responds by stating that a full grant-in-aid is not intended to meet all the basic needs of the student-athlete. The NCAA might very well contend that a prospective student-athlete should, before enrolling, consider

comprised of football coaches who coach teams ranging from the high school level to the professional level. The 2003 survey polled NCAA football student-athletes from all 117 D-I schools. AFCA received 5,474 responses, representing 66 schools.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² U.S. DEPARTMENT OF EDUCATION, THE STUDENT GUIDE: FINANCIAL AID FROM THE U.S. DEPT. OF EDUCATION (2003-2004), *available at*

http://www.studentaid.ed.gov/students/publications/student_guide/2003_2004/english/types.htm (last visited Mar. 29, 2006).

²³ *Id.*

²⁴ NCAA CONST. art. 15.2.5.1(e), *supra* note 1, at 196-197.

whether the combination of his grant-in-aid, his “expected family contribution,” and any grants for which he may be eligible will meet his needs while he attends college. If the student-athlete decides he cannot meet his needs, he should not enroll, and if once enrolled he makes this realization, he should drop out.

A. INEQUITY

The answer to the NCAA’s potential argument is that it is inequitable and unnecessary for an individual who serves as irreplaceable cog in a highly profitable, multi-billion dollar industry to resort to his family’s generosity or to the American taxpayer to purchase his groceries. Granted, the NCAA’s argument might make sense in the context of unprofitable businesses. After all, from a pure market perspective, an employee of unprofitable business X is only employed at the pleasure of the entity floating X while it operates in the red. From that perspective, athletes who participate in unprofitable sports receive gratuitous grants-in-aid from their given schools. Assuming gratuitous scholarships, it logically follows that the extent of the gratuity is subject to whatever financial limitation the NCAA sees fit to apply.

In contrast, the facts show that profitable football and basketball programs, on average, operate in the black to the tune of millions of dollars per annum per school. Scholarships given to student-athletes who participate in profitable sports are not gratuitous. On the contrary, they are investments in the expected future profitability of the sport. The facts show that revenue is being generated but not being equitably distributed. The party responsible for this inequity, the NCAA, has the responsibility to remedy the problem.

B. THE RIPPLE EFFECT

Three collateral problems have arisen and will continue to arise due to the ripple effect of the economic strain placed upon football and basketball student-athletes. We can summarize

these problems as harm to the popularity of college football and basketball, harm to the individual student-athletes, and harm to the NCAA's rule-enforcement ability.

First, inadequate grants-in-aid adversely affect I-A football and basketball as a whole. Student-athletes in the position to choose between playing college ball and taking a shot at the pros are encouraged to select the latter option when the former means living at or below the poverty line. In an effort to play professionally, the best players in basketball and football have the opportunity to leave college early, and after only one year in the case of basketball. Though a difficult statistic to measure with any degree of accuracy, marquee players, compared to their non-marquee contemporaries, are presumably the biggest revenue-generators for their schools. When a marquee player leaves school for the professional ranks the popularity of his school and thus the revenue generated for his school declines. When marquee players across the country opt for the pros, the overall quality of competition at the college level declines, the public enjoyment of collegiate athletics declines, and the revenue generated by the industry also as a whole declines.

Second, the student-athletes themselves are harmed when factors outside their probability of success at the professional level weigh in favor of their departing school in an attempt to succeed at the professional level. While the NCAA cannot control a student-athlete's family's financial situation (often an element of a marquee player's decision), it can allow for the stabilization of the student-athlete's own financial situation. If student-athlete A weighs the probability of leave-school-early professional success against post-graduation professional success, he should properly consider various factors. Three such factors include (1) his likelihood of success in relation to other potential draftees if he leaves school early; (2) his likelihood of success in relation to other future potential draftees if he stays in school; and (3) if

he stays in school, whether likelihood of injury will decrease his chances of professional success to a point below his leave-school-early chances.

Because a student-athlete's personal, short-term financial situation while in college artificially encourages him to select the leave-school-early option, a student-athlete who falls into the gray area between "marquee" and "not yet good enough for the pros" is more apt to try for the pros than if he were not broke. On average, he is more likely to fail in his endeavor than he would have had he considered only factors pertaining to his likelihood of success. Moreover, failure to succeed at the professional level after foregoing collegiate eligibility leaves the student-athlete worse off than had he failed professionally after obtaining his bachelor's degree, because one's chance of succeeding financially in a profession other than sports is better with a college degree.²⁵ Even if an athlete succeeds as a professional athlete, he will almost certainly have to find work after his career is over. In the NFL, for example, the average career lasts only 3.8 years and 90% of former players work after their playing careers end.²⁶ The current system encourages the student-athlete to leave school before graduation and reduces his chance of earning a college degree, thus reducing his chance of financial success outside sports, regardless of whether or not he ever ends up playing a professional sport.

Third, the NCAA's current restrictions on player compensation compromise the effectiveness of its rules. Near the beginning of the Division I Manual, the NCAA sets forth its "Principle of Amateurism," which is based on participation motivated by education and other personal benefits, and protection against financial exploitation:

²⁵ Russ Wiles, *College Degree Pays Off Big- Not Just in Income, Study Concludes*, THE ARIZONA REPUBLIC, Oct. 19, 2004, available at <http://www.azcentral.com/families/education/articles/1019collegebenefits19-ON.html> (last visited Mar. 29, 2006).

²⁶ Jeffrey Zaslow, *Athletes Must Tackle Big Career Transitions*, CAREERJOURNAL.COM: THE WALL STREET JOURNAL EXECUTIVE CAREER SITE, at <http://www.careerjournal.com/columnists/movingon/20020628-movingon.html> (last visited Mar. 29, 2006).

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and *student-athletes should be protected from exploitation by professional and commercial enterprises* (emphasis added).²⁷

From a market perspective, a vacuum exists in the student-athlete's wallet that encourages just such exploitation and improper motivation. Combining an under-compensated worker whose production has an imminent, substantial and tangible economic impact on an industry with rules proscribing additional compensation for that worker encourages parties financially interested in that industry to motivate him, logically via additional (and, in the case of the NCAA, proscribed) compensation. That is the state of I-A football and basketball today: people interested, for whatever reason, in the success (or, worse, in the failure) of State University's team will naturally encourage their desired result by providing the determiner of that result with something for which he wants. Today's I-A student-athlete wants badly for money, and the current system makes him more susceptible to the offers of the various parties interested in his team's performance than if his want were not so great. When instances of rule-breaking increase to the point that such conduct become the norm, punishment becomes less likely. This is the current situation the NCAA faces, and it is causing the NCAA to lose credibility and control over the conduct of those within its jurisdiction.

C. MAURICE CLARETT

A recent example of the NCAA's failings due to its strict compensation restrictions is the dilemma that Ohio State University (hereinafter "Ohio State") has endured with its erstwhile tailback, Maurice Clarett. As a freshman in 2002, Clarett was a star running back, leading the Buckeye football team to the national championship in a thrilling, improbable Fiesta Bowl victory over the University of Miami. Following that season he left Ohio State in an attempt to

²⁷ NCAA CONST. art. 2.9, *supra* note 1, at 5.

play in the National Football League (“NFL”). However, he had to first sue for admittance to the NFL draft because the NFL does not allow its teams to draft a person until he has been out of high school for at least three years.²⁸ Clarett ultimately lost his lawsuit and was thus ineligible for the draft until 2005.²⁹ Following his courtroom defeat, Clarett made allegations in November 2004 that while at Ohio State he received benefits in violation of NCAA rules. The alleged benefits ranged from cash received from boosters in amounts based on his on-field performance to cars his head coach arranged for him to use.³⁰ An NCAA investigation of Clarett’s allegations fizzled when Clarett refused to cooperate with investigators.³¹ In April 2005, the Denver Broncos drafted Clarett as the final pick of the third round.³² However, in August of 2005, with Clarett having not played a down of football in over two and a half years, Denver cut him from the team³³ and he is no longer in the NFL.³⁴ On a final note, prosecutors have recently asked a grand jury to charge Clarett for robbing a couple at gunpoint outside a bar in Columbus, Ohio on January 1, 2006, almost three years to the day after the Buckeyes’ national championship.³⁵

The Clarett scenario presents all three ripple effect problems. First, college football would have been better off had Clarett decided to stay in school and help Ohio State repeat as national champions. Clarett would likely have entered the 2003 season (and possibly 2004) as the frontrunner to win the famous Heisman Trophy, awarded each year to “the best collegiate

²⁸ NATIONAL FOOTBALL LEAGUE (NFL) CONST. § 12(E) (“[f]or college football players seeking... eligibility [for the NFL draft], at least three NFL seasons must have elapsed since the player was graduated from high school”).

²⁹ *Clarett v. National Football League*, 369 F.3d 124 (2d Cir. 2004).

³⁰ Tom Friend & Ray Hockensmith, *Clarett Claims Cash, Cars Among Benefits*, ESPN THE MAGAZINE, Nov. 9, 2004, at <http://sports.espn.go.com/nfl/news/story?id=1919059> (last visited Mar. 29, 2006).

³¹ Mark Kreidler, *Clarett Could Have Been Somebody*, ESPN.COM, Nov. 16, 2004, at http://sports.espn.go.com/nfl/columns/story?columnist=kreidler_mark&id=2279255 (last visited Mar. 29, 2006).

³² See DRAFT TRACKER, <http://www.nfl.com/draft/drafttracker/round/round3> (last visited Mar. 29, 2006).

³³ John Clayton, *Broncos to Release Maurice Clarett*, ESPN.COM, Aug. 29, 2005, at <http://sports.espn.go.com/nfl/news/story?id=2145372> (last visited Mar. 29, 2006).

³⁴ See NFL PLAYERS INDEX, at <http://www.nfl.com/players/playerindex/C> (last visited Mar. 29, 2006).

³⁵ ASSOCIATED PRESS, *Clarett Opts Against Preliminary Court Hearing*, MSNBC.MSN.COM, January 11, 2006, at <http://msnbc.msn.com/id/10810884/from/RL.4/> (last visited Mar. 29, 2006).

football player in the United States.”³⁶ Clarett’s on-field exploits would have raised public awareness and enjoyment of college football to an even higher level, and increased revenues for Ohio State, the Big 10 Conference, the NCAA and the industries that thrive off college football’s popularity would have coincided with that increased enjoyment and excitement.

Second, Clarett himself would likely have been better off had he stayed in school. Based on his production as a freshman, barring major injury, and assuming even moderate physical improvement, he would have been one of the highest picks in the 2005 draft. He would have also had an opportunity to develop emotionally and psychologically in Ohio State coach Jim Tressel’s regimented program. However, Clarett proved unprepared in more ways than one for his pursuit of NFL riches. As it stands, Clarett’s future as a free man, let alone as a wealthy professional athlete, appears bleak. What is more, had Clarett stayed in school even until only his third year, he would have left school just one year shy of completing his undergraduate degree. Under NCAA rules, he would have had three more years during which he could have applied his grant-in-aid toward pursuing his degree.³⁷ Now, Clarett has at least three full-time years remaining to obtain his degree and is no longer entitled to apply his grant-in-aid toward his pursuit of it.³⁸

Third, assuming any of Clarett’s allegations are even partially accurate, the conduct of the offending parties diminishes the NCAA’s credibility as a rule-enforcing body in that it raises the suspicion that similar conduct is occurring at other member institutions. After all, Ohio State would probably not have been caught had Clarett not blown the whistle. If similar shenanigans are prevalent around the country, faith in the NCAA’s ability to uphold its own rules decreases,

³⁶ Press Release, Heisman Memorial Trophy, Ballots Distributed for Heisman Memorial Trophy Award (Nov. 17, 2004), at <http://heisman.collegesports.com/sports/m-footbl/spec-rel/111704aae.html> (last visited Mar. 29, 2006).

³⁷ NCAA CONST. art. 15.3.1, *supra* note 1, at 200-201.

³⁸ *Id.*

the integrity of collegiate athletics comes into question, and the popularity of collegiate sports dwindles.

Finally, as Section IV explains, the NCAA could assuage the multiple problems associated with the current financial woes of student-athletes if it eased its restraint on the student-athletes' allowed compensation. More student-athletes would stay in school longer and more would receive college degrees, to the benefit of the individuals. The popularity and financial success of college football and basketball would increase. The frequency with which NCAA rules violations occurred, as well as their severity, would diminish. While rules may always be broken and greed may always get the best of people, the NCAA should nonetheless take steps to mollify the problem of inequitable economic distribution and the ripple effect problems stemming from that inequitable distribution.

IV. A MODEST PROPOSAL

The NCAA should modify its bylaws to allow football and basketball student-athletes compensation for their on-field/on-court performances, as employees of their respective academic institutions. Grants-in-aid should remain unaltered to the extent they are limited to the cost of attendance as currently defined by the NCAA,³⁹ and the NCAA's current method of calculating the cost of attendance should remain the same.⁴⁰ The student-athlete's monthly employment compensation should simply be added on to his monthly scholarship check.⁴¹

This is not a proposal to make every high school graduate a professional, unrestricted "free agent," at liberty to sell his talents to the highest bidder should he so choose. The proposal does not suggest allowing collegiate basketball and football programs to dig into their pockets as

³⁹ NCAA CONST. art. 15.01.7, *supra* note 1, at 192; *Id.* at art. 15.02.2.

⁴⁰ *Id.* at art. 15.02.2.1.

⁴¹ To eliminate unnecessary restrictions on where student-athletes eat and how much money they spend on meals, institutionally-funded grant-in-aid meal card programs, such as UA's program, should be discontinued. Instead, the funds should be distributed directly to the student-athletes, similar to UW's practice.

deeply as possible, disregarding the widely-varying depths of those pockets. Rather, it is a call for the NCAA to institute a highly structured, heavily regulated pay-for-play system, with violations drawing penalties similar to those outlined in the current bylaws.⁴² Recognizing that there is much financial disparity between the haves and have-nots in I-A,⁴³ there should be a uniform salary for all I-A players, encouraging competitive parity based on factors other than a given school's willingness or ability to spend money.

The NCAA must decide on a reasonable monthly salary for I-A student-athletes. To set that amount, providing a student-athlete with the ability to live comfortably (taking into account his grant-in-aid) must be balanced against two levels of harm. The first is the level of economic harm that will inevitably befall low revenue-producing schools as a result of the dollar amount chosen. The second is the level of potential competitive harm to I-A college football as a whole as a result of the dollar amount chosen.

For cost of living reasons only, salaries at each school should not be identical. For example, a student-athlete at the University of California, Los Angeles would receive more compensation than a student-athlete at Kansas State University because living in the Westwood neighborhood of Los Angeles is more expensive than living in Manhattan, Kansas. Therefore, as they do now in the case of calculating "cost of attendance,"⁴⁴ the NCAA would slate individual institutions with the task of determining and proving their own town's cost of living in relation to the NCAA-determined base salary.

A reasonable mandatory average income for I-A football and basketball players (grant-in-aid check plus compensation, before cost of living adjustment) is in the neighborhood of \$1,800

⁴² NCAA CONST. art. 19.5, *supra* note 1, at 336-340.

⁴³ US DEPT. OF EDUCATION, OFFICE OF POSTSECONDARY EDUCATION, EQUITY IN ATHLETICS DISCLOSURE, *supra* note 2 (for example, the University of Tennessee football program netted over \$33.9 million in 2003, while its in-state rival, Vanderbilt University, realized only \$1.1 million in football revenues).

⁴⁴ NCAA CONST. art. 15.02.2.1, *supra* note 1, at 192.

per month, the equivalent of \$11.25 per hour for 160 hours/four 40-hour weeks. Assume for the purposes of this piece that this is the figure the NCAA adopted for 2005.⁴⁵ Assume further that the average I-A school currently pays \$800 per month to full scholarship student-athletes without a meal card. In order to make up the difference, the 85-man⁴⁶ football team would be responsible for \$1.02 million per year in additional expenses (\$1,000/month/player x 85 players x 12 months). The 13-man⁴⁷ basketball team would be responsible for an additional \$156,000 per year in expenses (\$1000/month/player x 13 players x 12 months). This additional burden represents 12.4% of the profit of the average football team⁴⁸ and 5.5% of the profit of the average basketball team⁴⁹ in 2004.⁵⁰

V. OVERCOMING POTENTIAL OBSTACLES TO SUCCESSFUL IMPLEMENTATION

Instituting the salary proposal would raise unusual and challenging questions for the NCAA and its member institutions. These include questions of vicarious liability, workers' compensation insurance, modification of NCAA rules, and inability and/or unwillingness of some schools to pay the additional expense.

A. VICARIOUS LIABILITY

An employer may be vicariously liable via the principle of *respondeat superior* "for the torts that his servants committed while acting in the scope of their employment."⁵¹ What constitutes "scope of employment" involves a heavily fact-based analysis and is a question for

⁴⁵ Of course, the NCAA's figure is likely to rise slightly every year or so due to national cost of living increases and inflation.

⁴⁶ NCAA CONST. art. 15.5.5.1, *supra* note 1, at 206 (the NCAA limits the maximum number of scholarship players on any one D-I football team at any one time to 85).

⁴⁷ *Id.* at art. 15.5.4.1 (the NCAA limits the maximum number of scholarship players on any one D-I basketball team at any one time to 13).

⁴⁸ Isidore, *supra* note 5.

⁴⁹ *Id.*

⁵⁰ A separate argument could be made to pay basketball players a higher salary than football players because basketball players generate more revenue per student-athlete. However, that analysis is outside the scope of this article.

⁵¹ RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

the factfinder “unless the matter is so clear that reasonable people could not differ.”⁵² An example is *Hackbart v. Cincinnati Bengals*, where one NFL player intentionally hit the back of another player’s head out of frustration during the end of a play of which neither player was instrumental.⁵³ The court found that no law prevented the application of tort concepts to football.⁵⁴ With the doors open to *respondeat superior* claims against employer-schools, one can easily envision the countless shades of gray potentially submitted to a factfinder for determining vicarious liability: is a Ron Artest-style foray into the stands by an NCAA student-athlete within the scope of employment? A football player who decks an opposing team’s fan who has stormed the field after the game, à la Nebraska Cornhusker Kellen Huston in 2003?⁵⁵ An after-the-whistle, facemask-to-earhole hit by a 280-pound defensive end on a 190-pound quarterback? The potential fact patterns are limitless.

Thus, NCAA member institutions (like the Cincinnati Bengals in *Hackbart*) could be liable as employers for the tortious misconduct of their respective employee/student-athletes, so long as that misconduct occurred within the scope of employment. The NCAA and its member institutions would have to determine their respective levels of exposure to this sort of liability to decide the economic feasibility of the proposal.

B. WORKERS’ COMPENSATION

Second, as employers, schools would be subject to workers’ compensation statutes. “Workers’ compensation requires employers to pay benefits for disability caused by accidental injuries arising out of and in the course of employment...”⁵⁶ Significantly, most statutes provide

⁵² DAN B. DOBBS, *THE LAW OF TORTS* 911 (2000).

⁵³ *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 519 (10th Cir. 1979).

⁵⁴ *Id.* at 526-527.

⁵⁵ Terry Douglass, *Tigers, Fans Should Share Punch Blame*, *THE GRAND ISLAND INDEPENDENT*, Oct. 15, 2003, at http://www.theindependent.com/stories/101503/Hus_douglass15.shtml (last visited Mar. 29, 2006).

⁵⁶ Dobbs, *supra* note 52, at 1098.

that the employer is strictly liable for employee injuries occurring within the scope and course of employment, and the employer must purchase insurance to guarantee compliance with the statute.⁵⁷ Due to the employer-employee relationship created by the proposal, schools would have to consider the present and probable future costs of these insurance premiums before deciding their ability and/or willingness to comply with the proposal.⁵⁸

C. MODIFYING THE NCAA MANUAL

In order to successfully implement the above proposal, the NCAA must not only add new rules but also must amend some of its existing wording to square it with the new rules. Specifically, the NCAA must reconsider its current view of amateurs and professionals in order to continue to define football and basketball student-athletes as amateurs. However, upon examination of the current NCAA manual, this modification proves entirely practicable.

First, the NCAA rules set forth an amendment procedure. Amendments to I-A bylaws are adopted after initial approval by a majority vote of the Division-I Management Council (consisting of both athletics administrators and faculty athletics representatives) and consideration and adoption by a majority of the Division-I Board of Directors (consisting of member-institution CEOs).⁵⁹ The Management Council consists of both athletics administrators and faculty athletics representatives. The Board of Directors consists of member-institution CEOs.

Second, the necessary NCAA redefinitions would neither be unprecedented nor unreasonable. The original notion of “amateurism” began in England and remained intact in the

⁵⁷ *Id.*

⁵⁸ While an in-depth analysis of the probable impact of vicarious liability and workers’ compensation on NCAA member institutions is outside the scope of this article, such an analysis would be critical to determining, school by school, the feasibility of the proposal.

⁵⁹ NCAA CONST. art. 5.3.2.2.1, *supra* note 1, at 38; NCAA CONST. art. 5.3.2.2.2, *supra* note 1, at 38.

United States through the Civil War.⁶⁰ The purpose of amateurism at that time was to distinguish between the elite leisure class, amateurs, and the working class, professionals.⁶¹ Modernly, amateurism has nothing to do with social class distinctions. Rather, in the minds of many, amateurism is associated with money. Those who receive compensation for play are professionals, while those who participate for free are amateurs.⁶² Because the definition of amateurism has changed so drastically over time, it is not unreasonable to suggest slight alterations to the current common understanding. After all, full grant-in-aid student-athletes today do not, in fact, participate for free. Over the course of four or five years student-athletes receive tuition, books, room and board, in some cases worth more than \$185,000.⁶³ Simply compensating student-athletes more than they are already compensated is not nearly so drastic a change to the definition of “amateurism” as the change that occurred between the end of the Civil War and the modern era.

Furthermore, the modern dictionary definition of “amateur” suggests that student-athletes could maintain amateur status despite NCAA-authorized compensation. The American Heritage Dictionary defines the term “amateur” as “[a]n athlete who has never accepted money, *or who accepts money under restrictions specified by a regulatory body*, for participating in a competition” (emphasis added).⁶⁴ Under this definition, if the NCAA adopted the proposal and specified restrictions under which student-athletes could accept money, those student-athletes would remain amateurs. Moreover, the NCAA itself implicitly entertains the possibility of future authorization of increased compensation for student-athletes. It first specifies that “[o]nly

⁶⁰ Benjamin A. Menzel, Comment, *Heading Down the Wrong Road? Why Deregulating Amateurism May Cause Future Legal Problems for the NCAA*, 12 MARQ. SPORTS L.J. 857, 858 (2002).

⁶¹ *Id.* (referring to the NCAA D-I Amateurism Deregulation Proposals 2 (2002)).

⁶² *Id.* at 858.

⁶³ PEPPERDINE UNIVERSITY: SEAVER COLLEGE, OFFICE OF FINANCIAL ASSISTANCE (2005-2006), at <http://seaver.pepperdine.edu/financialassistance/generalinfo/budget-costs.htm> (detailing the cost of attendance for 2005-2006 at Pepperdine University in Malibu, California) (last visited Mar. 29, 2006).

⁶⁴ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 55 (4th ed. 2000).

an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”⁶⁵ It does not, however, define “amateur.” Instead, it defines “Professional Athlete” as “one who receives any kind of payment, directly or indirectly, for athletics participation *except as permitted by the governing legislation of the Association*” (emphasis added).⁶⁶ The manual’s definition of “pay” includes a similar qualifier. The NCAA defines the term “pay” as “the receipt of funds, awards or benefits *not permitted by the governing legislation of the Association for participation in athletics*” (emphasis added).⁶⁷ Therefore, should the NCAA exclude the aforementioned salary from its definition of “pay,” a student-athlete could avoid the NCAA’s “professional athlete” tag and retain his eligibility as an amateur.

The 2004-05 NCAA Division I Manual is 488 pages in length and, should the proposal take effect, might require at least minor modification of many bylaws. However, simply modifying a few definitions would eliminate the need for extensive modification of the entire manual. For example, Section 12.1.1 outlines seven different methods by which an individual may lose his amateur status and thus his eligibility.⁶⁸ Specifically, under a subsection of that rule a student-athlete loses his amateur status if he or she “[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport....”⁶⁹ If however, the NCAA modified the definition of “pay,” subsection (a) would not apply to the salary and would require no modification.

In sum, while the current NCAA rules will require amendment in order to implement the proposal, those rules clearly allow for amendment and provide a procedure to do so.

Furthermore, the perceived logistical difficulty of implementing those amendments is not as great as it may at first appear.

⁶⁵ NCAA CONST. art. 12.01.1, *supra* note 1, at 69.

⁶⁶ *Id.* at art. 12.02.3.

⁶⁷ *Id.* at art. 12.02.2.

⁶⁸ *Id.* at art. 12.1.1.

⁶⁹ *Id.* at art. 12.1.1(a).

D. INSTITUTIONAL INABILITY OR UNWILLINGNESS TO PAY ADDITIONAL EXPENSES

Approximately 38% of the 117 I-A football programs and a slightly lower percentage of basketball programs showed a net loss in 2004.⁷⁰ For schools losing money, the average loss for football was about \$1.2 million and for basketball was about \$340,000.⁷¹ Under the proposal, and even if the NCAA includes a grace period between adoption and implementation, it is likely that some schools will be unable or unwilling to afford the increased expenses and will drop out of I-A. The NCAA has stated that one of its main concerns is minimizing competitive inequity.⁷² Some might argue that the proposal, despite the salary's uniformity, will prove harmful to competition. However, I-A membership is already conditioned upon compliance with manifold rules, from a minimum amount of scholarship money each member school must award annually, to minimum amounts of games each member school must play annually in given sports.⁷³

Furthermore, despite its own concerns about maintaining competition, the NCAA has recently demonstrated a willingness to constrict I-A eligibility in basketball and football. As of 1994, all D-I men's basketball programs were required to play at least one-third of their games at home.⁷⁴ More significant, however, are the recent restrictions on I-A football eligibility. As of the 2004 season, in order to be I-A eligible, football programs are required to satisfy three conditions. Football programs must (1) play at least 4 home games against I-A opponents,⁷⁵ (2) draw at least 15,000 fans per home game,⁷⁶ and (3) increase their minimum number of football scholarships awarded annually and increase the minimum total amount of money awarded

⁷⁰ Isidore, *supra* note 5.

⁷¹ *Id.*

⁷² Menzel, *supra* note 60, at 862 (citing the NCAA D-I Amateurism Deregulation Proposals 3 (2000)).

⁷³ NCAA CONST. art. 20.9, *supra* note 1.

⁷⁴ *Id.* at art. 20.9.5.2.

⁷⁵ *Id.* at art. 20.9.6.2.

⁷⁶ *Id.* at art. 20.9.6.3.

annually in athletics grants-in-aid.⁷⁷ Charles Wethington, President of the University of Kentucky and chair of the NCAA's Football Study Oversight Committee, which initiated the changes, stated that "[o]ur goal is to provide stability in Division I-A but also to redefine criteria to assure that institutions that are participating at the Division I-A level make the commitment to provide the programs necessary for a high quality of competition."⁷⁸ Indeed, the NCAA viewed potentially shrinking I-A membership as pro-competitive, not anticompetitive.

The proposal may drive some football and basketball teams out of I-A. However, this possibility is already within the contemplation of the NCAA, and the NCAA has deemed potential contraction pro-competitive. Possibly shrinking I-A membership would not prevent implementing the proposal.

VI. CONCLUSION

The current grant-in-aid structure for NCAA Division I-A football and basketball players is inequitable and is detrimental to the individual student-athletes, to the NCAA's ability to enforce its own rules, and to the competitiveness and financial success of I-A football and basketball. In an effort to alleviate those problems the NCAA should institute a uniform, mandatory salary for all I-A basketball and football players in addition to their current grants-in-aid. Problems associated with the implementation of that proposal, while significant, do not warrant its demise on the drafting table.

⁷⁷ *Id.* at art. 20.9.6.4.

⁷⁸ Gary T. Brown, *Football Study Group Eyes I-A Requirements*, THE NCAA NEWS, June 4, 2001, at <http://www.ncaa.org/news/2001/20010604/active/3812n01.html> (last visited Mar. 29, 2006).