

We the Athletes:  
A Proposal for a More Perfect Union in College Sports Following *O’Bannon v. NCAA*

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I. INTRODUCTION

“The National Collegiate Athletic Association (NCAA) is arguably the single most disliked entity in all of American sports. While the respective commissioners of the National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL) and Major League Baseball (MLB) receive their fair share of public criticism, they also receive praise at times from team owners, fans, the media and players. The NCAA is rarely so lucky. Criticism of the organization comes from all directions and seems to be almost universal. University presidents and board members, athletic directors and coaches, current and former

players, fans and the media, all have expressed their displeasure, if not outright disdain, for the practices and policies of the NCAA.<sup>1</sup>

So how does an organization, despised by the very entities from which it gains authority, continue to exist? Because it is founded on a false ideal, which it continues to tout and has come to be accepted by our society as necessary and beneficial to college athletics: amateurism. The NCAA exploits our society's false perception that amateurism in college sports is a favorable and attainable goal,<sup>2</sup> insisting that, while the association has its problems, its overall mission to protect "student-athletes" from the dangers of commercialism and corruption is a noble one.<sup>3</sup> It presents itself as the protector of higher education: the shield between the classroom and the playing field. In reality, the NCAA is a self-interested organization that perpetuates its own

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1. See Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sept. 7, 2011), [http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true). (This article provides much of my background information regarding current failures of the NCAA); see also Rachel Greg Bishop, *Tumultuous Days for NCAA's President as Calls for Reform Grow Louder*, N.Y. TIMES, Feb. 27, 2013, <http://www.nytimes.com/2013/02/28/sports/ncaafootball/calls-for-reform-grow-louder-for-ncaa-and-mark-emmert.html>. Additionally, Jay Bilas, a former Duke University basketball player and current ESPN analyst who also is an attorney, has repeatedly criticized the NCAA both on television and social media, advocating for college athletes to be paid. See, e.g., Matt Yoder, *Jay Bilas Exposes the NCAA Once Again with Joe Paterno Merchandise*, AWFULANNOUNCING.COM (Aug. 8, 2013), <http://www.awfulannouncing.com/2013/august/jay-bilas-exposes-the-ncaa-once-again-with-joe-paterno-merchandise.html> (explaining how Bilas exposed the NCAA's use of player names for searching merchandise on its website as well as selling shirts commemorating Joe Paterno's 400th win - a win that the NCAA recently had vacated).

2. It is important to note that the problem is not amateurism itself. Amateurism is ethically neutral; there is nothing wrong with someone doing something out of pure enjoyment, just like there is nothing wrong with someone receiving compensation for it. What is important is that the individual has made that decision as opposed to having amateurism imposed on him or her by some third party, like the NCAA.

3. See 2012-13 NCAA DIVISION I MANUAL art. 1, §1.2, at 1 (NCAA, 2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> [hereinafter NCAA Division I Manual].

existence by insisting without proof that it is acting in the best interests of “student-athletes.”<sup>4</sup> It assumes that the American people will continue to accept this falsehood despite mounting evidence to the contrary.

Its assumptions are false. A growing number of critics, some very influential, have begun to challenge the NCAA’s founding principal - some through media, others directly in court.<sup>5</sup> The most significant challenge to date is currently pending trial in California. *O’Bannon v. NCAA* may cast the stone that smites the NCAA.<sup>6</sup> The case is to date the biggest threat to the organization’s existence and, if successful, it will strike the NCAA where it hurts most: the

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4. I emphasize the term “student-athlete” throughout this Comment because it is actually an example of the NCAA’s doublespeak. The term was created by the NCAA in response to a few state court decisions, which had ruled that certain athletes were university employees for the purposes of workers’ compensation. Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1014-15 (2012). It served the purpose of conjuring the “nobility of amateurism, and the precedence of scholarship over athletic endeavor,” while also blurring the nature of the relationship between the university and the athlete. *Id.* at 1015.

5. An upcoming documentary film seeks to uncover and explain the mounting criticism. Darren Heitner, *Film Featuring Ed O’Bannon, Arian Foster and Jay Bilas Makes One Wonder: Is the NCAA Finally Facing 4th and Long*, FORBES (Sept. 8, 2013, 12:37 PM), <http://www.forbes.com/sites/darrenheitner/2013/09/08/film-featuring-ed-obannon-arian-foster-and-jay-bilas-makes-one-wonder-is-the-ncaa-finally-facing-4th-and-long/>. Additionally, Patrick Hruby, a journalist at SportsonEarth.com and long-time NCAA critic, continues to publish articles calling attention to the many shortcomings of the organization. *See, e.g.*, Patrick Hruby, *NCAA Laboratories of Hypocrisy*, SPORTSONEARTH.COM (May 2, 2013), <http://www.sportsonearth.com/article/46368934/>; Patrick Hruby, *United They Stand*, SPORTSONEARTH.COM (Sept. 24, 2013), <http://www.sportsonearth.com/article/61573892/>. Hruby’s colleague and *Chronicle of Higher Education* columnist, Brad Wolverton, interviewed several Division I conference commissioners and athletic directors in 2013 and discovered a change of opinion among some former proponents of amateurism. Brad Wolverton, *Which Is Worse, Overreacting to O’Bannon or Failing to Respond to It?*, CHRON. HIGHER ED. (Sept. 25, 2013, 11:43 AM), <http://chronicle.com/blogs/players/which-is-worse-overreacting-to-obannon-or-failing-to-respond-to-it/33643> (discussing how high-ranking athletic officials are even beginning to consider increasing player benefits).

6. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. C 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010). *O’Bannon* has been consolidated with other similar cases under the name *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*. 724 F.3d 1268 (9th Cir. 2013). For purposes of this Comment, it will still be referred to as “*O’Bannon*” due to the public’s continued association of the case with that name.

wallet. *O'Bannon* will destroy the NCAA, not because the ruling will find the organization unlawful in itself, but because it will require the NCAA to distribute revenues generated from the use of athletes' likenesses to the athletes themselves.<sup>7</sup> The NCAA is not a benevolent guardian of college sports. It is a nonprofit in name only. In reality, the NCAA is a business, and like any other business, its goal is to make money for the people who run it.<sup>8</sup> If *O'Bannon* wins, the NCAA will be forced to rethink its financial model and will no longer be able to exist in its current form.

The *O'Bannon* case is strong, and given the changes of attitude among those in the field and the general public, the plaintiffs have a chance to succeed where many have failed. Regardless of the outcome, however, the world of college sports confronts major changes. This Comment is intended to spark a discussion about what a fundamental change would mean for college athletics. Initially, the Comment will explain why the NCAA is founded on a false premise and how the organization came to adopt the premise. The Comment will then provide a brief history of the NCAA in terms of how it was able to become a powerful entity in today's world, and then detail how the *O'Bannon* case effectively will end the NCAA as it is currently known. Finally, the Comment provides three proposals for an improved system of college athletics as an alternative to the current NCAA.

The first of these proposals calls for a reorganization of the governance structure in college athletics. The restructuring will provide greater autonomy and choice among member

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7. See Charles P. Pierce, *The O'Bannon Decision*, GRANTLAND.COM (Feb. 6, 2013), [http://www.grantland.com/story/\\_/id/8914700/ed-obannon-vs-ncaa](http://www.grantland.com/story/_/id/8914700/ed-obannon-vs-ncaa).

8. See Travis Waldron, *Why NCAA President Mark Emmert is Wrong About the Fundamentals of College Sports*, THINKPROGRESS.ORG (Sept. 17, 2013, 4:37 PM), <http://thinkprogress.org/sports/2013/09/17/2636161/student-employees-ncaa-president-mark-emmert-wrong-fundamentals-college-sports/>.

institutions as well as a less centralized governing body in the form of a confederation among similarly situated athletic conferences. The second proposal is focused on giving college athletes more input and control over their lives by creating a players union. The final proposal is intended to give college-aged athletes greater choice of where to develop and profit from their talents by calling for an expanded minor league system, especially for football and basketball.

Issues associated with the NCAA encompass myriad areas of law. The proposals are not meant to offer a comprehensive solution to the athletic, academic and cultural problems surrounding this issue, but rather seek to begin a dialogue about a relatively novel idea. Whereas most of the literature in this area has focused on *reforming* the NCAA, this Comment advocates abandoning it completely and imagining instead the contours of a post-NCAA world.

## II. THE COURSE OF HUMAN EVENTS

Article 1.3.1 of the NCAA's constitution states, "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>9</sup> Additionally, Article 2.9 states that one of the principles for conduct of intercollegiate athletics is amateurism, and that "Student-athletes" should primarily be motivated by education and other non-monetary benefits of playing sports.<sup>10</sup> There are fifteen other principles enumerated under Article 2.<sup>11</sup> One of them is "Student-Athlete

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9. NCAA Division I Manual, *supra* note 3, at 1.

10. "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." *Id.* at 4.

11. *Id.*

Well-Being,” which includes both physical and educational well-being.<sup>12</sup> This principle reflects the original purpose of the NCAA,<sup>13</sup> which has long been abandoned.

#### A. UNDER BRITISH RULES

The NCAA<sup>14</sup> formed in 1906 in response to 18 deaths and over 100 injuries in college football the previous year alone.<sup>15</sup> Its purpose, therefore, was to formulate rules that would make intercollegiate sports safer.<sup>16</sup> But concern over the commercialization of intercollegiate athletics also was increasing at the time.<sup>17</sup> In fact, commercialization and cheating in college sports had been a concern since the earliest days of intercollegiate competition in the United States, dating back to the 1840s.<sup>18</sup> Why were higher education officials and other members of the public so concerned with the commercialization of sport in the first place? There is nothing inherently, morally wrong with paying athletes for performing, and, at that time, the compensation would not have been as excessive as it is today.<sup>19</sup> The concern was whether any athlete should be paid at all.

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12. *Id.*

13. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

14. The NCAA originally was called the Intercollegiate Athletic Association. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 11.

18. One of the first major events was a rowing regatta between Harvard and Yale, which was sponsored by a railroad company. *Id.* During the competition, Harvard employed a non-student as a member of its crew team in order to gain an advantage. *Id.*

19. See, e.g., Michael Haupt, *MLB's Annual Salary Leaders, 1874-2012*, SABR.COM (Fall 2012), <http://sabr.org/research/mlbs-annual-salary-leaders-1874-2012> (comparing the highest paid baseball players from the nineteenth century through the present).

Colleges in the United States adopted the amateur model because they were mimicking their British counterparts.<sup>20</sup> The nineteenth-century British aristocracy essentially created the amateur ideal.<sup>21</sup> The upper class believed that doing something purely out of love for the activity, whether art, science or sport, was superior to being paid.<sup>22</sup> Of course, aristocrats could afford to do these things for fun and without pay. While they cited the tradition of the ancient Greeks, the aristocracy's real motivation for embracing amateurism was an attempt to exclude the working classes – who could not afford to partake in leisure activities – from competing.<sup>23</sup> Sport in Victorian England, much like higher education, was seen as an activity exclusively intended for the upper class.<sup>24</sup> Despite the fact that the British concept was diametrically opposed to American ideals of social mobility and liberty, American colleges and universities embraced their model.<sup>25</sup>

By the time the NCAA was formed in the early twentieth century, colleges still were struggling to enforce this distinctly un-American principle. Thus, in addition to athlete safety, enforcing the rules of amateurism became the job of the NCAA.<sup>26</sup> However, the organization was rarely successful in its early years because it had no real authority.<sup>27</sup> Member institutions were responsible for incorporating measures to prevent violations, but they often violated the

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20. ANDREW ZIMBALIST & ALLEN SACK, *DRAKE GROUP REPORT: THOUGHTS ON AMATEURISM, THE O'BANNON CASE AND THE VIABILITY OF COLLEGE SPORT*, at 2 (The Drake Group, Apr. 10, 2013), available at <http://thedrakegroup.org/2013/04/10/drake-group-report-obannon-amateurism-and-the-viability-of-college-sport/> (follow “click here” hyperlink).

21. *Id.*

22. *Id.*

23. Harry R. Lewis, *Amateurism On and Off the Field*, HARV. CRIMSON (April 21, 2006), <http://www.thecrimson.com/article/2006/4/21/amateurism-on-and-off-the-field/>. Ironically, ancient Greek athletes in fact did receive payment for participating in the ancient Olympic games. *Id.*

24. *Id.*

25. *Id.*

26. Zimbalist & Sack, *supra* note 20, at 3.

27. *Id.*

rules with impunity.<sup>28</sup> Following World War II, with the GI Bill allowing more widespread access to higher education and continuing instances of scandals, the NCAA became increasingly concerned with how to better control its member institutions.<sup>29</sup>

## B. INTOLERABLE ACTS

In 1948, the NCAA passed what is known as the “Sanity Code.”<sup>30</sup> The code, for the first time, allowed schools to compensate athletes in the form of scholarships.<sup>31</sup> These awards were based on need rather than athletic ability and could only cover the cost of tuition and incidental expenses.<sup>32</sup> The “Sanity Code” also created an enforcement mechanism, which allowed the NCAA’s Compliance Committee to terminate an institution’s membership.<sup>33</sup>

In 1951, led by new executive director Walter Byers, the NCAA “seized upon a serendipitous set of events to gain control of intercollegiate sports.”<sup>34</sup> That year, Byers was able to use two scandals – a grade counterfeiting scheme at The College of William and Mary and a point shaving conspiracy involving the University of Kentucky basketball team – as leverage for wresting control away from the member institutions.<sup>35</sup> Although the NCAA had no authority to penalize its members, Byers managed to convince Kentucky not to contest a one-year suspension

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28. *Id.*

29. Rodney K. Smith, *The National Collegiate Athletic Association’s Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 1059 (1987). The scandals included point shaving and game fixing incidents involving multiple schools. *Id.* at n.39.

30. Zimbalist & Sack, *supra* note 20, at 3.

31. *Id.*

32. *Id.*

33. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 333 (2007).

34. Branch, *supra* note 1.

35. *Id.*; see generally Joan Gosnell, *Kickoffs and Kickbacks: The 1951 Football Scandal at William and Mary* (April 1990) (unpublished M.A. thesis, The College of William and Mary), available at <https://digitalarchive.wm.edu/handle/10288/2072>.

of its basketball team.<sup>36</sup> Kentucky's acquiescence set a precedent that gave the NCAA the illusion of authority it needed to gain complete control of college athletics.<sup>37</sup>

The NCAA's transition to a more committed effort to enforce amateurism coincided with the rise of an even greater source of NCAA power: television revenue. The 1950s were the dawn of the television age. Out of fear that televised games would hurt gate proceeds, the 1951 NCAA convention voted 161–7 to allow for only a few specifically licensed televised games per week.<sup>38</sup> In actuality, there was more money to be made in television than anyone in 1951 could have imagined, and because of this vote, the NCAA owned the exclusive right to negotiate the contracts.<sup>39</sup> For the next three decades, with a monopoly on televised college sports – most importantly football – the NCAA reaped all of the benefits of the increased revenues while maintaining its tax-exempt status.<sup>40</sup> This stranglehold, however, would prompt the most successful challenge to the NCAA's authority to date.

*NCAA v. Board of Regents of University of Oklahoma* was an antitrust suit brought by the Universities of Oklahoma and Georgia.<sup>41</sup> These universities, among many others where football had become hugely popular, had realized that they could strike a better television deal if they negotiated with the networks directly.<sup>42</sup> By doing this, these universities would not be forced to share the profits of such a deal with the many NCAA member institutions whose teams were not

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36. Branch, *supra* note 1.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *NCAA v. Bd. of Regents of Univ. Okla.*, 468 U.S. 85, 88 (1984).

42. Branch, *supra* note 1.

in demand.<sup>43</sup> The United States Supreme Court agreed with the universities and struck down the NCAA's plan, finding that it unfairly restrained trade.<sup>44</sup> The holding meant that the individual institutions would control the television contracts and that they would earn most of the revenue.<sup>45</sup> The loss of football revenue was a substantial hit to the status quo, but the NCAA retained some rights that remained marketable, most notably the "March Madness" basketball tournament.<sup>46</sup>

The NCAA has managed to use the popularity of college basketball, coupled with licensing rights, to increase its revenues substantially over the years.<sup>47</sup> Since 2006, the organization's year-end net assets roughly have doubled, reaching \$566 million in fiscal year 2012.<sup>48</sup> The NCAA also had a \$71 million surplus after spending \$801 million of its \$872

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43. *Id.* Although the *Board of Regents* decision was a loss for the NCAA, it also contained some noteworthy dicta in the final paragraph of the opinion. The Supreme Court stated:

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable . . . **In order to preserve the character and quality of the "product," athletes must not be paid,** must be required to attend class, and the like . . . the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.

*Bd. of Regents*, 468 U.S. at 101-102 (emphasis added). The NCAA treats this language as law, against challenges to the legitimacy of its bar to player compensation. Patrick Hruby, *The End of Amateurism?*, SPORTSONEARTH.COM (July 2, 2013), <http://www.sportsonearth.com/article/52416070/>.

44. *Bd. of Regents*, 468 U.S. at 120.

45. In some cases, groups of institutions, acting through athletic conferences, have control over the television agreements and revenue sharing. *See, e.g.*, BIG TEN NETWORK, <http://www.btn.com> (last visited Oct. 25, 2013).

46. Branch, *supra* note 1. The men's basketball tournament quickly made up for the lost football revenue. *Id.*

47. The men's basketball tournament and the television rights accompanying it remain "overwhelmingly the NCAA's greatest revenue source." Steve Berkowitz, *NCAA Had Record \$71 Million Surplus in Fiscal 2012*, USA TODAY, May 2, 2013, <http://www.usatoday.com/story/sports/college/2013/05/02/ncaa-financial-statement-surplus/2128431/>.

48. *Id.*

million in revenues.<sup>49</sup> Notably, the expenses included \$38.3 million in management and general spending, which was up from \$35.7 million in 2011.<sup>50</sup> This 7.3% increase in management and general spending compared to the 5% increase in the distribution to Division I institutions over the same period means that the NCAA kept a comparatively higher percentage of revenues within the organization.<sup>51</sup>

Clearly, college sports always have had a commercial element to them. With the advent of television and mass media, the revenues generated became astronomical, and the NCAA positioned itself to be a primary beneficiary of the largesse. At the same time the NCAA was becoming an entertainment mogul, it abandoned its original purpose of protecting the pure amateur ideal by eventually allowing member institutions to award athletic scholarships.<sup>52</sup> In the face of charges of exploitation of student-athletes, the NCAA has argued that the scholarship money is sufficient compensation for student performance.<sup>53</sup> But these “financial inducements” are at odds with the original meaning of amateurism.<sup>54</sup> By changing the rules on player compensation and creating byzantine regulations, the NCAA has established that “amateurism is whatever the NCAA says it is.”<sup>55</sup> Amateurism, to the NCAA, is no longer simply an imaginary moral high ground. It is a facade, a word that evokes a false sense of moral right while lacking any real definition, used as a shield against charges of greed, corruption and hypocrisy.

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49. *Id.*

50. *Id.*

51. *Id.*

52. Zimbalist & Sack, *supra* note 20, at 6-7.

53. *Id.* at 7

54. *Id.*

55. *Id.*

### C. SEEDS OF REBELLION

Challenges to the NCAA have been present for decades. The most notable – at least from a legal standpoint – came in 1988, when University of Nevada at Las Vegas (UNLV) basketball coach Jerry Tarkanian challenged the NCAA on due process grounds before the Supreme Court.<sup>56</sup> Tarkanian alleged that the NCAA was a state-actor for the purposes of due process because it had essentially forced a state university to suspend him.<sup>57</sup> The Supreme Court found that the NCAA was not acting under color of state law, but was instead enforcing independently created rules, which UNLV had agreed to follow.<sup>58</sup> The Court felt that UNLV's option to withdraw from the NCAA was proof that it had not transformed NCAA regulations into state law<sup>59</sup> and dismissed Tarkanian's argument that the NCAA's power meant withdrawal was no option at all.<sup>60</sup> This case further strengthened the NCAA's authority to punish member institutions, but this authority did nothing to stop scandal.

Player compensation and academic scandals continue to occur,<sup>61</sup> and the NCAA's responses of stripping wins, banning bowl participation, imposing sanctions and suspensions

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56. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) [hereinafter Tarkanian].

57. *See generally id.*

58. *Id.* at 196-97.

59. *Id.*

60. *Id.* at 198-99.

61. *See, e.g.,* Jon Solomon, *D.J. Fluker, Oklahoma State Scandals Raise Questions About NCAA Amateurism Rules*, AL.COM (Sept. 13, 2013), [http://www.al.com/sports/index.ssf/2013/09/post\\_525.html](http://www.al.com/sports/index.ssf/2013/09/post_525.html) (discussing scandals at the University of Alabama and Oklahoma State University); Jon Solomon, *NCAA Faces Uphill Climb for Credibility After Botched Miami Investigation*, AL.COM (Jan. 24, 2013), [http://www.al.com/sports/index.ssf/2013/01/ncaa\\_faces\\_uphill\\_climb\\_for\\_cr.html](http://www.al.com/sports/index.ssf/2013/01/ncaa_faces_uphill_climb_for_cr.html) (discussing scandal at University of Miami).

have not had a deterrent effect.<sup>62</sup> In fact, they have encouraged more clandestine attempts to funnel money to players via underground networks of boosters, alumni, agents and other “friends of the program.”<sup>63</sup> They also have led to a startlingly high percentage of athletes who are seriously underprepared for college courses.<sup>64</sup> Yet, sometimes the NCAA will actually punish coaches who are trying to help certain athletes attain educational goals.<sup>65</sup> These “scandals” occur out of view of NCAA oversight, making them seem wrong, but what really creates this black market is the NCAA’s insistence on not paying players.<sup>66</sup>

A scandal that gained significant attention in 2013 was the friction between the NCAA and Texas A&M University quarterback Johnny Manziel. In 2013, Manziel, a Heisman Trophy winner, was accused of accepting payment in exchange for signing autographs.<sup>67</sup> When his actions were brought to the attention of the NCAA, it launched an investigation, the results of which were inconclusive, but nevertheless led to Manziel being suspended for the first half of his team’s first game of the season.<sup>68</sup> Manziel responded by throwing three touchdown passes in the second half of that game and mocking the NCAA with his celebrations.<sup>69</sup> Normally, one might expect Manziel to receive condemnation from the media and fans for his perceived arrogance

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62. Dan Wetzel, *Latest College Scandals Again Reveal Folly of NCAA Rules*, YAHOO SPORTS (Sept. 11, 2013), <http://sports.yahoo.com/news/ncaaf--latest-college-scandals-again-reveal-folly-of-ncaa-rules-210822795.html>.

63. *Id.*

64. Sara Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th-graders*, CNN.COM (Jan. 8, 2014), [http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html?hpt=hp\\_t1](http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html?hpt=hp_t1) (finding that 7% to 18% of football and basketball players at major athletic universities are poor readers).

65. Jonathan Mahler, *The NCAA Is Even More Evil Than You Think*, BLOOMBERG.COM (Dec 19, 2013 5:27 PM), <http://www.bloomberg.com/news/2013-12-19/the-ncaa-is-even-more-evil-than-you-think.html>.

66. Wetzel, *supra* note 62; *see also* Branch, *supra* note 1.

67. Sean Gregory, *A Cut for College Athletes*, TIME, Sept. 16, 2013, at 38.

68. *Id.*

69. *Id.*

and blatant disrespect for authority. Surprisingly, many in the media and public at large showed support for Manziel against the organization.<sup>70</sup> The fact that many people backed Manziel is indicative of society's growing lack of respect for the NCAA. More people are becoming aware of the shortcomings of the NCAA and are no longer blindly accepting the protection of amateurism as an excuse for those shortcomings.<sup>71</sup>

#### D. THE CASE HEARD 'ROUND THE SPORTS WORLD

Despite the NCAA's absolute objection to the concept of player compensation, the day that college athletes receive pay may be here soon because of Ed O'Bannon.<sup>72</sup> O'Bannon, among other former college athletes, filed suit in 2009 against the NCAA alleging that the organization is engaged in anti-competitive practices, namely fixing the price of student-athlete images at zero and creating a monopoly over the collegiate licensing market.<sup>73</sup> These men were not current college athletes, yet the NCAA licensed images of them from their college careers without paying them, and claimed a right to continue licensing the images indefinitely.<sup>74</sup>

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70. For instance, the *Time* article advocates for players being paid using Manziel as the centerpiece. *Id.*

71. See generally Christian Dennie, *Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15 (2012) (listing and discussing several recent lawsuits challenging the NCAA's amateur model).

72. Ed. O'Bannon played basketball for UCLA from 1991 to 1995. O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010).

73. *Id.* at 1. The case was later consolidated with Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010), *aff'd sub nom.* In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013).

74. See generally William D. Holthaus, Jr., *Ed O'Bannon v. NCAA: Do Former NCAA Athletes Have a Case Against the NCAA for Its Use of Their Likenesses?*, 55 ST. LOUIS U. L.J. 369 (2010).

While defending the lawsuit already has cost the NCAA a significant amount of money, it became even more threatening when six current college athletes joined the suit in the summer of 2013.<sup>75</sup> Judge Claudia Wilken certified the following class of plaintiffs in November of 2013:

All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as “University Division” before 1973) college or university men’s basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I–A until 2006) men’s football team and whose images, likenesses and/or names may be, or have been, included in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees after the conclusion of the athlete’s participation in intercollegiate athletics.<sup>76</sup>

The plaintiffs are alleging violations of their right to publicity as well as anti-competitive conduct by the NCAA.<sup>77</sup> If successful, the plaintiffs would force the NCAA to pay enormous damages and enjoin the NCAA from freely using player likenesses in video games.<sup>78</sup>

More significantly, however, the suit could bring into question the NCAA’s right to current players’ likenesses as they appear in live sporting events.<sup>79</sup> If the NCAA should lose that right, it will be unable to exist, at least not in the way it has for the past sixty-plus years.<sup>80</sup> The NCAA

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75. Tom Farrey, *6 Current Players Join NCAA Lawsuit*, ESPN (July 22, 2013), [http://espn.go.com/espn/otl/story/\\_id/9491249/six-current-football-players-join-ed-obannon-ncaa-lawsuit](http://espn.go.com/espn/otl/story/_id/9491249/six-current-football-players-join-ed-obannon-ncaa-lawsuit).

76. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327 (N.D. Cal. Nov. 8, 2013), *aff’d* 724 F.3d 1268 (9th Cir. 2013).

77. *Id.*

78. Charles P. Pierce, *The O’Bannon Decision*, GRANTLAND.COM (Feb. 6, 2013), [http://www.grantland.com/story/\\_id/8914700/ed-obannon-vs-ncaa](http://www.grantland.com/story/_id/8914700/ed-obannon-vs-ncaa).

79. *Id.*

80. *See generally* Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17 (2010) (explaining the viability of the *O’Bannon* plaintiffs’ claims and the ramifications of a successful outcome); Dennie, *supra* note 71 (discussing the impact of *O’Bannon* and other recent lawsuits on the NCAA). *But see* Mary Catherine Moore, *There is No “I” in NCAA: Why College Sports Video Games Do Not Violate College Athletes’ Rights of Publicity Such to Entitle Them to Compensation for the Use of Their Likenesses*, 18 J. INTEL. PROP. L. 269 (2010) (taking the position that the *O’Bannon* claims will not succeed).

could still market large sporting events, but would be required by law to compensate the athletes performing on live television, thus destroying the current amateur model. While it could still generate some revenue, the NCAA would be forced to spend a significant amount on player remuneration, giving the organization less to pay its own executives. This is the sea change that the NCAA fears and the *O'Bannon* case makes possible.

### III. THE MORE PERFECT UNION

Although there is always a chance that the plaintiffs will not succeed, or the NCAA will settle out of court,<sup>81</sup> the growing controversy surrounding the NCAA and college athletics – as brought to national attention by the *O'Bannon* case – requires a reassessment of priorities and a discussion about viable alternatives, regardless of which side ultimately prevails.<sup>82</sup>

Much of the discussion of reform proposals has focused on fitting some sort of player compensation mechanism within the current framework of the NCAA.<sup>83</sup> Other proposals have focused on making changes to the structure or rules of the NCAA so as to improve the

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81. Many believe both sides are willing to take the case as far as possible. *See, e.g.,* Nicole Auerbach & Steve Berkowitz, *Big Ten's Delany Sees No Settlement in O'Bannon Case*, USA TODAY (Oct. 31, 2013), <http://www.usatoday.com/story/sports/ncaab/bigten/2013/10/31/jim-delany-big-ten-ed-obannon-lawsuit-no-settlement/3329665/> (stating commissioner of the Big Ten does not believe there will be a compromise).

82. *Id.*

83. *See* Julia Brighton, *The NCAA and the Right of Publicity: How the O'Bannon/Keller Case May Finally Level the Playing Field*, 33 HASTINGS COMM. & ENT L.J. 275 (2011) (proposing a trust system that will allow players to be compensated for the use of their likenesses after they graduate); Stephen F. Ross, *Radical Reform of Intercollegiate Athletics: Antitrust and Public Policy Implications*, 86 TUL. L. REV. 933 (2012) (proposing that institutions cease subsidizing non-economically viable sports with revenue from other sports and provide a subsidy to athletes beyond the value of their scholarship, among other related proposals); Gregory Sconzo, *They're Not Yours, They Are My Own: How NCAA Employment Restrictions Violate Antitrust Law*, 67 U. MIAMI L. REV. 737 (2013) (advocating the removal of NCAA restrictions on athletes' employment outside of their sport as well as restrictions on athletes profiting from the use of their own likenesses).

organization's effectiveness.<sup>84</sup> This Comment takes the position that the NCAA is broken beyond repair, because it is too self-interested and married to the status quo to participate meaningfully in any kind of reform, and seeks to imagine an alternative regime without the presence of the NCAA. The following proposals are not meant to be comprehensive; they do not address all of the problems and concerns of the current systems, nor do they consider every new potential problem facing the proposed alternatives. However, they are nonetheless an important starting point for a discussion that will become unavoidable following the *O'Bannon* decision.

#### A. SELF-DETERMINATION

My first proposal involves decentralizing the decision-making in regard to the role of athletics within institutions. A major problem with the NCAA is that it attempts to apply the same standards to a variety of institutions and sports.<sup>85</sup> Institutions vary in size as well as purpose and the rules concerning some sports are not applicable to others. Individual colleges and universities have differing norms and expectations and should not all be governed the same way in terms of athletics. Rather than impose a blanket organization to govern all intercollegiate athletics, I propose a system of smaller, more focused bodies that are created by institutions with similar expectations. Many of the cultural differences already are present under the current

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84. See Matthew J. Mitten et. al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779 (2010) (proposing that Congress provide the NCAA with immunity from anti-trust liability conditioned on the implementation of reforms focused on furthering higher education objectives and increasing benefits to players).

85. See Rachel Bachman, *Criticism of the NCAA Grows*, THE WALL ST. J. (July 22, 2013), <http://online.wsj.com/article/SB10001424127887324783204578622072850811066.html>; Brad Wolverton, *Faculty Leaders Endorse New Division for Richest NCAA Programs*, CHRON. HIGHER ED. (Sept. 11, 2013), <http://chronicle.com/blogs/players/faculty-leaders-endorse-new-division-for-wealthiest-ncaa-programs/33627>.

regime.<sup>86</sup> The proposed system would embrace and encourage these differences rather than ignore them.

Some universities desire big-time athletics and are willing to accept the concomitant commercialism.<sup>87</sup> The current system is not any less commercialized than would be a system where players are allowed to be compensated.<sup>88</sup> The only major change is how the money is divided. In light of the *O'Bannon* decision, some of the money would necessarily end up with the players whose likenesses and performances actually create the demand for college sports.

Certain institutions would be particularly interested in pursuing commercialized sports.<sup>89</sup> To these colleges and universities, sports are an enormous revenue generator and marketing tool for attracting prospective students.<sup>90</sup> For most of these institutions, the mere fact that athletes may be receiving compensation beyond the value of a scholarship will not cause them to shy away from maintaining large football or basketball programs.<sup>91</sup> The major change will be how topics like rules of competition and eligibility are governed.<sup>92</sup>

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86. See Bachman, *supra* note 85; Wolverton, *supra* note 85.

87. See Wolverton, *supra* note 85 (lending support to creation of new division of bigger schools within NCAA).

88. See Waldron, *supra* note 8 (explaining the commercial nature of Division I athletics).

89. See *id.* More accurately: institutions that wish to *continue* embracing commercialized sports.

90. See Gregory, *supra* note 67 (discussing the enormous revenues generated by college sports and stating that college presidents are “fond of calling sports the ‘front porch’ of their campuses . . .”).

91. See Wolverton, *supra* note 85; Patrick Hruby, *Court of Illusion*, SPORTSONEARTH.COM (Oct. 10, 2013), <http://www.sportsonearth.com/article/62747894/>.

92. See Wolverton, *supra* note 85; Hruby, *supra* note 91.

Hopefully, *O'Bannon* will abrogate the myth of amateurism so that players will be allowed to reap some kind of monetary benefit from their skills.<sup>93</sup> However, there will still be a need for some kind of body that will promulgate uniform rules and organize competitions among the various institutions. One option for filling this void would be the major athletic conferences.<sup>94</sup> Intercollegiate athletic conferences are a natural fit to replace the NCAA at the highest level of college sports.<sup>95</sup> Recently they have gained more prominence through expansion and have even begun challenging the NCAA's authority in certain instances.<sup>96</sup> Though often times they come down on the same side as the NCAA in terms of perpetuating the status quo,<sup>97</sup> they will be forced to adjust to the new rules following the *O'Bannon* decision. And because they oversee a smaller number of institutions, they will be more able to adjust and better suited to meeting the needs of the institutions as well as the athletes.<sup>98</sup>

Obviously, the conferences can create rules for their member institutions but will be unable to govern inter-conference competitions, which are a big part of college football and basketball, especially in the post-season. In order to confront that problem, I propose the creation

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93. See Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, (2004) (proposing some possible ways to compensate players); see also Gregory, *supra* note 67, at 41-42.

94. These would likely include: the Big Ten, Pac 12, Big 12, SEC and ACC, with the possible addition of some others.

95. There is already movement by these conferences to gain more autonomy from the NCAA. Brad Wolverton, *NCAA Plan Would Give New Powers to Biggest Conferences*, CHRON. HIGHER ED., Jan. 24, 2014, at A14.

96. See Andy Staples, *Forget Expansion – It's time for Full-Blown Conference Realignment*, SI.COM (Feb. 17, 2010), [http://sportsillustrated.cnn.com/2010/writers/andy\\_staples/02/16/conference-realignment/index.html](http://sportsillustrated.cnn.com/2010/writers/andy_staples/02/16/conference-realignment/index.html) (discussing conference realignment and a proposal for the most powerful football schools to withdraw from the NCAA and form their own system); see also Wolverton, *supra* note 85 (discussing Division 1 faculty leaders' proposals to leave the NCAA).

97. See Hruby, *supra* note 91.

98. The idea is that the money is kept closer to the athletes themselves. These conferences oversee a small number of institutions and could distribute revenues more equitably than a large national organization like the NCAA.

of an inter-conference agreement between the major conferences that creates a body resembling a confederation. This confederation would be made up of representatives from the major conferences and be responsible for creating uniform rules and developing schedules, among other related tasks. Though it may sound similar to the current NCAA, it would be important to limit the confederation's role in order to avoid it becoming too centralized and powerful. To that end, these confederations would exist only to govern one sport and would have no independent broadcast or licensing rights. They also could be used to establish uniform academic eligibility requirements and have oversight to investigate allegations of cheating that would disrupt competitive balance. Importantly, eligibility would not require any kind of amateurism; however, the confederation board would also have oversight to ensure that players are being fairly compensated and protected. The goal is to avoid recreating the arbitrary rules and centralized power of the NCAA while giving the confederations sufficient ability to maintain intercollegiate competition on a national level.

The current NCAA also governs colleges and universities that are much less focused on maintaining major athletics. Ivy League institutions and some smaller, regional liberal arts colleges already downplay athletics in favor of higher academic standards.<sup>99</sup> This arrangement has nothing to do with amateurism; it is merely a choice by these institutions to focus more on academics. This preference would not change once players in major conferences start making money beyond their scholarships. These institutions also could enter into agreements with other,

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99. Allen Sack, *Should College Athletes be Paid?*, CHRISTIAN SCIENCE MONITOR (Mar. 7, 2008), <http://www.csmonitor.com/2008/0307/p09s01-coop.html>.

similarly situated colleges and universities to maintain similar standards to what they have now.<sup>100</sup>

Some institutions may choose to drop certain athletic programs or convert them to club sports.<sup>101</sup> Others may try to find a middle ground, with more prohibitive rules regarding hours of practice or number of available scholarships than the major conferences, while still maintaining substantial intercollegiate competitions. What is important is to let the colleges and universities decide for themselves in order to avoid the blanket NCAA regulations that do not make sense at every institution and that are often enforced arbitrarily and to the detriment of the athletes. By creating a system with more freedom, the individual institutions will be better suited to confront the problems associated with their athletic programs.

#### B. NO EXPLOITATION WITHOUT REPRESENTATION

Giving the institutions themselves more direct control over athletics solves the problem of a central organization like the NCAA becoming despotic. However, placing the power closer to the institutions could lead to the conferences or individual colleges and universities taking advantage of the athletes. For that reason, the athletes themselves will need to have a check on the power of the institutions. This check would come in the form of a union.

This proposition is not necessarily novel.<sup>102</sup> In fact, attempts at organizing college athletes are ongoing and are gaining momentum as the *O'Bannon* case moves forward.<sup>103</sup> The

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100. For instance, the NCAA's amateurism model generally works better at the Division III level. *Id.*

101. By "club sports" I mean self-funded, student-run teams, operating outside of the institution's athletic department. *See generally* Ross, *supra* note 83 (discussing the differences between Division I athletic programs and Club level and Division III programs).

102. *See* Fram & Frampton, *supra* note 4 (suggesting that student athletes have the right to unionize and that allowing them to do so may be the best way to reform college athletics); Rohith A. Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727 (2007); J. Trevor Johnston, *Show Them the Money: The Threat of NCAA Athlete*

National Collegiate Players Association (NCPA) is the leading candidate for assuming this role.<sup>104</sup> The NCPA began as an advocacy group and not a formal union, and is currently leading several initiatives designed to provide college athletes with greater rights.<sup>105</sup> The NCPA goals include allowing athletes to be employed outside of athletics as well as profit from the use of their likeness.<sup>106</sup> They also focus on protecting athletes' safety and health and furthering educational goals.<sup>107</sup> In late January 2014, the NCPA, with the support of the United Steelworkers, took the first steps toward organizing an actual players' union by filing a petition with the National Labor Relations Board on behalf of the football players at Northwestern University.<sup>108</sup> If formalized, the union, which will be called the College Athletes Players

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*Unionization in Response to the Commercialization of College Sports*, 13 SETON HALL J. SPORT L. 203 (2003).

103. Scott Soshnick, *NFL Free-Agent Lawyer to Unlock \$16 Billion in NCAA Athletes*, BLOOMBERG.COM (Oct 2, 2013, 9:05 AM), <http://www.bloomberg.com/news/2013-10-02/nfl-free-agent-lawyer-set-to-unlock-16-billion-in-ncaa-athletes.html>. Lawyers at major law firms, who helped unionize professional sports, are taking a serious interest in representing college athletes. *Id.*

104. From the NCPA website:

“The National College Players Association (NCPA) is a 501c3 nonprofit advocacy group launched by UCLA football players that serves as the only independent voice for college athletes across the nation. Since its first press conference on Jan. 18, 2001, the NCPA has been featured in countless media outlets including CBS *60 Minutes*, ESPN, CNN, ABC News, *Sports Illustrated*, Yahoo Sports, *USA Today*, and the *Wall Street Journal*. Today, the NCPA has over 17,000 members from over 150 Division I campuses nationwide.”

The NATIONAL COLLEGIATE PLAYERS ASSOCIATION, <http://www.ncpanow.org/about/> (last visited Nov. 23, 2013).

105. One of the NCPA's initiatives is called “All Players United,” which involves current athletes wearing the letters “APU” during competition, as well as a social media campaign to raise awareness. Hruby, *United They Stand*, *supra* note 5.

106. See The NATIONAL COLLEGIATE PLAYERS ASSOCIATION, *Mission & Goals*, <http://www.ncpanow.org/more?id=0004> (last visited Nov. 23, 2013).

107. *Id.*

108. Tom Farrey, *Kain Colter Starts Union Movement*, ESPN.COM (Jan. 28, 2014), [http://espn.go.com/espn/otl/story/\\_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union](http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union).

Association, will give college athletes a real chance to influence policy and no longer be at the mercy of NCAA officials.<sup>109</sup>

Ultimately, providing the athletes with an actual voice is the most important component of the union. Currently, the NCAA sanctions Student Athlete Advisory Committees, which are supposed to offer athletes an opportunity to influence the rules and regulations that affect their lives.<sup>110</sup> In reality, these bodies do not get a vote in the NCAA legislative process and the needs of the athlete are consistently ignored.<sup>111</sup> By creating an actual union, where players can use their collective strength as leverage against the institutions and conferences, the athletes truly can affect policy. Unionization may not necessarily lead to player salaries. It could be that the athletes also support a form of amateurism, with certain restrictions that allow them to gain the most of their education. Or they may simply want scholarships that actually cover the full cost of being a college athlete, or guaranteed health coverage for injuries. The important part is that *they* are making these choices, not the NCAA.

### C. A FREE EXERCISE OF THEIR INDUSTRY

In addition to creating replacements for the necessary roles of organizing and governing competitions and giving the institutions more choice in that regard, as well as establishing a players' union, I also propose giving the players more choice as to where and how they earn their money by offering alternatives to college sports. In sports such as baseball and hockey, young athletes have the option of pursuing a professional career either playing in college or by playing in their sport's minor leagues. Players can be drafted directly out of high school and then spend time growing and improving in the "farm" system before entering the major league in their sport.

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109. *Id.* The NCAA, as expected, released a statement reaffirming its position that "student-athletes" are not employees and therefore cannot qualify for a labor union. *Id.*

110. Hruby, *United They Stand*, *supra* note 5.

111. *Id.*

This proposal is specifically aimed at expanding existing minor league or “farm” systems for the NFL and NBA.<sup>112</sup>

Creating a more developed minor league system for the NFL and NBA solves several problems. It gives athletes the option to hone their skills and prepare for the major leagues without being forced, legitimately or illegitimately, to meet academic standards. This in turn should reduce the amount of academic fraud among collegiate programs. While the *O’Bannon* case should allow some athletes to profit from the use of their likenesses, that does not necessarily mean that all of them will be able to do so, and some universities might decide not to pay their players a salary. A minor league system would give athletes, especially less visible athletes, another avenue by which to profit from their skills while they are in their athletic prime. Additionally, athletes that have exhausted their college eligibility but are only on the borderline skill-wise of entering the NFL or NBA could spend some time playing in the minors, giving them an opportunity to improve their skills and extend their window of profitability.

I focus on football and basketball because they are the two largest sources of revenue under the current system, and, not surprisingly, these sports often are where most of the controversies arise. Interestingly, these sports also are unique because the NFL and NBA both require that players spend some amount of time removed from high school before becoming professionals.<sup>113</sup> These rules are in place ostensibly to protect young players from injury and

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112. I say expanding because both the NBA Developmental League and the proposed new United States Football League (USFL), which is slated to begin in the spring of 2015, see themselves as minor league farm systems for basketball and football respectively. See NBA DEVELOPMENTAL LEAGUE, *NBA D-League 101*, [http://www.nba.com/dleague/news/nba\\_dleague\\_101.html](http://www.nba.com/dleague/news/nba_dleague_101.html) (last visited Feb. 6, 2014); THEUSFL.COM, *About*, <http://www.theusfl.com/about.html> (last visited Feb. 6, 2014).

113. Athletes must be nineteen years old and one year removed from high school in order to play in the NBA and three years removed from high school for the NFL. Michael A.

allow them to develop their skills before entering the professional leagues.<sup>114</sup> Player safety is an extremely important issue and these rules are admirable in that regard. However, while these rules are not promulgated by the NCAA, there is an argument that the age restrictions are designed to preserve college football and basketball by ensuring that the best athletes spend some time playing in college.<sup>115</sup> The restrictions give athletes no choice but to accept the NCAA's amateur model because the majority of professional football and basketball players are drawn from the college ranks and high school athletes generally see playing in college as the clearest, if not the only path to becoming a professional. Thus college sports are really just an incubator for NFL and NBA prospects until the time at which the prospects are allowed to enter a professional draft.<sup>116</sup>

Without having an alternative route to a professional career, some athletes enroll in institutions with no intention – or at least only a secondary intention – of obtaining a college education.<sup>117</sup> For this group of athletes, sports come first. Yet the NCAA ignores this reality and

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McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 732-33 (2006).

114. This is probably truer in football where the physical development of NFL players in a violent sport poses serious risks to younger, less-developed players.

115. See, e.g., Allen Barra, *Both the NBA and the NCAA Want to Keep Athletes in College for Too Long*, THE ATLANTIC (Apr. 6, 2012), <http://www.theatlantic.com/entertainment/archive/2012/04/both-the-nba-and-the-ncaa-want-to-keep-athletes-in-college-for-too-long/255535/>; see also, Gordon Monson, *NFL and NBA Minimum Age Rules Discriminate, and Should Be Changed*, SALT LAKE TRIBUNE (Feb. 23, 2013), <http://www.sltrib.com/sltrib/sports/55887465-77/college-players-nfl-nba.html.csp> (arguing that age restrictions are in place to benefit both the professional leagues and the NCAA and that such restrictions do not benefit individual athletes).

116. Some critics have argued that the NFL in particular tacitly supports the NCAA's model because it provides a no-cost minor league system. See, e.g., Monson, *supra* note 115.

117. This problem is larger than athletes simply choosing to focus less on academics; A recent study by CNN revealed that a large number of athletes at major institutions are not only underqualified, but are in some cases illiterate. Ganim, *supra* note 64. These players have little hope of attaining a college degree and would likely be better served if they could profit from their athletic strengths.

perpetuates the myth of the “student-athlete.” It forces athletic departments to make sure students are meeting academic standards whether the “student-athlete” cares about his or her education or not. The NCAA’s standards also lead to problems like academic fraud, which has been pervasive for decades. Forcing academically disinterested athletes to attend classes and study, or fraudulently adjusting grades of underprepared athletes, does not serve the purpose of promoting higher education. A more logical solution to increasing athletes’ focus on academics would be to enroll athletes who truly want to pursue an education in addition to sports. If aspiring professionals are given another option, many of them may choose not to attend college in favor of playing in the minor leagues.<sup>118</sup> These leagues would give them another opportunity to profit from their skills, while hopefully decreasing the instances of academic fraud.

Because the NBA Developmental League already exists and the United States Football League (USFL) is the leading candidate to become an NFL farm league,<sup>119</sup> the important part of this proposal is how to generate more interest in these leagues so that players will be willing to choose the minor leagues over playing in college. Critics will argue that upstart leagues are unable to compete with college football and basketball, citing the lack of popularity of the NBA Developmental league as an example.<sup>120</sup> But other minor leagues like the Canadian Major-Junior leagues<sup>121</sup> and minor-league baseball are able to coexist with college hockey and baseball while

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118. For example, many young hockey players face this decision as teenagers. *See* Paul Brownfield, *Top Prospects Decide if Path to N.H.L. Runs Through College*, N.Y. TIMES, Dec. 19, 2013, <http://www.nytimes.com/2013/12/20/sports/hockey/youth-and-the-ice-siren.html?partner=rss&emc=rss&smid=tw-nytimes>.

119. *See* NBA, *supra* note 112; USFL.com, *supra* note 112;

120. *See* Eamonn Brennan, *Is the D-League a Viable Alternative?*, ESPN.COM, (May 6, 2011), <http://sports.espn.go.com/ncb/news/story?id=6490719>.

121. Known collectively as the Canadian Hockey League (CHL), these consist of the Ontario Hockey League (OHL), Western Hockey League (WHL) and Quebec Major Junior Hockey League (QMJHL). CANADIAN HOCKEY LEAGUE, <http://www.chl.ca/> (last visited Nov. 23, 2013). These leagues also include some teams from the United States. *Id.*

providing roughly the same level of competition. The challenge is creating an environment that will allow minor-league football and basketball to gain popularity over time.

In order to create such an environment, these leagues will require the cooperation of the NFL and NBA. First, the NFL and NBA should loosen age requirements by giving players an appeal process, which will allow players younger than the minimum age to make a case for why they should be allowed to enter the professional draft. Additionally, as the NBA has begun doing with the Developmental League, NFL teams should seek an affiliation with a minor league, USFL team and be able to draft younger players and send them to their minor league affiliate for skill development and maturation. The level of competition and physical disparity will be lessened in the minor leagues, giving players a chance to improve their skills without as much risk of injury. Furthermore, players will be allowed to move between the major and minor league teams during the season, as often happens in professional baseball and hockey. Finally, players should not fear losing their remaining college eligibility simply because they chose to enter a professional league and therefore should be allowed to return to college in between seasons until they have exhausted their four years of eligibility. Hopefully, these aspects will encourage more athletes to choose minor leagues over college.

Arguably, the largest obstacle to an expanded minor league system is getting the NFL and NBA to share some of their earnings in order to bolster the minor leagues. This would be necessary for these teams to compete initially with the more popular and well-established college game. Recently, more NBA teams have been willing to invest in the Developmental League, but it will take a more concerted effort and better marketing to increase its prominence among both

players and fans. The NFL, with its \$10 billion revenue,<sup>122</sup> certainly has enough money to consider investing in the USFL and the investment could also benefit the NFL in a number of ways. For instance, it could give the league a chance to experiment with rule changes in the USFL before implementing them, or create demand by scheduling minor league games on certain days of the week.<sup>123</sup> In addition to creating a new and potentially popular aspect to the NFL, a minor-league affiliation would allow NFL teams to invest in their future because they could directly control the development of their prospects and cultivate players to fit their system so that the players are better equipped to make the transition to the NFL when the time comes. They also would be able to better evaluate talent within their own organization as opposed to watching video recordings and scouting college players. An NFL affiliation could also encourage other investors to finance teams, as well as generate more fan interest than there has been with previous attempts at minor-league football. The NFL and NBA will need to assist in selling these minor leagues – to both players and fans – as viable alternatives to college football and basketball.

This proposal is not to downplay the importance of higher education. Most athletes will not become professionals because there are so few opportunities at the professional level.<sup>124</sup>

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122. Brent Schrottenboer, *NFL Takes Aim at \$25 Billion, But at What Price?*, USA TODAY (Jan. 30, 2014), <http://www.usatoday.com/story/sports/nfl/super/2014/01/30/super-bowl-nfl-revenue-denver-broncos-seattle-seahawks/5061197/>.

123. The NFL is constantly looking to promote its product and gain more exposure despite its already massive popularity. *Id.* Instead of scheduling more NFL games throughout the week, an idea which is generally unpopular amongst players, See, Ashley Dunkak, *Many NFL Players Want Thursday Games to Disappear*, CBS DETROIT, (Dec. 4, 2013), <http://detroit.cbslocal.com/2013/12/04/many-nfl-players-want-thursday-games-to-disappear-reggie-bush-says-its-like-a-car-crash/>, the NFL could schedule minor league games featuring the NFL stars of tomorrow.

124. For football and basketball, the NFL and NBA realistically are the only significant employers of professional athletes in the United States. Though foreign options exist, the salaries offered by teams abroad are significantly lower. See Casey Jacobsen, *The NBA vs.*

These athletes will benefit from some level of higher education when trying to find careers after they can no longer play professionally. However, because athletic ability has a shelf life, athletes reasonably should desire to profit from that ability while they can. Many athletes will not play beyond college and be unable to profit from their talents after that time.<sup>125</sup> These athletes will never be as valuable as they are during those years. Perhaps academics are not as important to these athletes, but while they can go back to college at any age, they cannot always compete athletically at a profitable level. Therefore, athletes and higher education are better served when there is an alternative to college sports; football and basketball players can have such an alternative if minor leagues in those sports become further developed.

#### IV. CONCLUSION

While this Comment's proposals still would require addressing other persisting problems as well as confronting new problems, they are a modest starting point for a discussion that will become very important in the wake of the *O'Bannon* decision. The *O'Bannon* case has brought to the fore the fallacy of amateurism as defined by the NCAA. It is a false ideal both in principle and in practice. The NCAA is not protecting college athletes from the dangers of commercialism; it is merely not allowing these athletes to profit from a highly commercialized sport. The organization's main purpose is self-preservation. The *O'Bannon* case and other movements, such as conference realignment and player unionization, threaten the very existence of the NCAA; and considering the constant and growing criticism of the organization from all

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Europe, SlamOnline.com (Aug. 31, 2009, 5:17 PM), <http://www.slamonline.com/online/nba/2009/08/the-nba-vs-europe/>; Adriano Valente, *Average CFL Player Makes Only \$80,000 Per Year*, THERICHEST.COM (Nov. 25, 2013), <http://www.therichest.com/sports/football-sports/average-cfl-player-makes-only-80000-per-year/>.

125. Under the current NCAA rules, athletes that do not play beyond college effectively will never profit from their talents because they are forced to compete as amateurs.

angles, the public will either allow the NCAA to expire or force the organization to change dramatically.

A world without the NCAA does not mean the end for college sports, but without the organization pushing its own agenda, society will be able to better analyze how college sports should be organized and what purpose sports should serve. These proposals – confederations of conferences, player unionization, and minor league professional alternatives – allow the institutions and individuals most closely associated with college athletics to have flexibility in answering these questions. They are an important first step in restructuring college sports in a world without the NCAA.