

PLAYOFF PROFITS FOR ACADEMIC PROGRAMS

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Intercollegiate athletics has enjoyed unprecedented success in recent years, with popularity, television revenue, and public interest in college football and men’s basketball at an all-time high.¹ And yet, the growing revenue has raised a cacophony of criticism, with increasing calls for sharing some of the financial largesse with student-athletes.²

Some athletic directors reject this notion and point to statistics that show that most athletic departments *lose* money annually.³ Indeed, most athletic departments use revenue from

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¹ See, e.g., Eric Chemi, *The Amazing Growth in College Football Revenues*, BLOOMBERG BUSINESS (Sept. 26, 2013), <http://www.bloomberg.com/bw/articles/2013-09-26/the-amazing-growth-in-college-football-revenues>; Sara Bibel, *2013 NCAA Final Four is Highest-Rated and Most-Viewed in Eight Years*, ZAP2IT (Apr. 7, 2013), <http://tvbythenumbers.zap2it.com/2013/04/07/2013-ncaa-final-four-is-highest-rated-and-most-viewed-in-eight-years/176862>; Michael Humes, *Hundreds of Millions of Fans Tune to Record-Setting College Football Coverage Across ESPN Networks*, ESPN MEDIAZONE (Dec. 10, 2013), <http://espnmediazone.com/us/press-releases/2013/12/hundreds-of-millions-of-fans-tune-to-record-setting-coverage-across-espn-networks>.

² See, e.g., Michael Wilbon, *College Athletes Deserve to be Paid*, ESPN (July 18, 2011), http://espn.go.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid; see also Joe Nocera, *Let’s Start Paying College Athletes*, N.Y. TIMES MAGAZINE (Dec. 30, 2011), http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?_r=0.

³ See Steve Berkowitz et al., *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY (July 1, 2013), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443>.

football and basketball to fund the other sports at the university.⁴ In many cases, the university further subsidizes its athletic program by requiring students to pay activity fees.⁵

The National Collegiate Athletic Association (“NCAA”) likewise has held steadfast to its claim that intercollegiate athletics remain amateur competitions, and compensating student-athletes would undermine the integrity of the entire enterprise.⁶ To allow student-athletes to receive remuneration for participating in athletic competitions would, for the NCAA, fundamentally alter the character of intercollegiate athletics in a negative and irreversible way.⁷

The NCAA and its member institutions have demonstrated an increased willingness to allow additional benefits to student-athletes, like increasing the value of scholarships to provide the cost of attendance and removing regulations on the provision of food to student-athletes by universities, but only because such benefits fall under the umbrella of expenses related to education.⁸ Interestingly, these benefits have threatened to divide the NCAA

⁴ See, e.g., Kristi Dosh, *Does Football Fund Other Sports at College Level?* FORBES SPORTSMONEY (May 5, 2011, 9:02 PM), See, e.g., <http://www.forbes.com/sites/sportsmoney/2011/05/05/does-football-fund-other-sports-at-college-level>.

⁵ See, e.g., *College Sports 101: A Primer on Money, Athletics, and Higher Education in the 21st Century: Chapter 3: Revenue*, KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS (2009), <http://www.knightcommission.org/collegesports101/chapter-3>; see also Center for College Affordability and Productivity, *Athletic Spending Alert: How Students Are Subsidizing Wannabe Power House Schools*, FORBES EDUCATION (Nov. 20, 2014), <http://www.forbes.com/sites/ccap/2014/11/20/athletic-spending-alert-how-students-are-subsidizing-wannabe-power-house-schools>.

⁶ See, e.g., Sarah Ganim, *Paying College Athletes Would Hurt Traditions, NCAA Chief Emmert Testifies*, CNN (June 19, 2014), <http://edition.cnn.com/2014/06/19/us/ncaa-obannon-lawsuit-trial>. To be clear, the NCAA’s decision making results directly from college and university presidents that comprise its membership.

⁷ *Id.*

⁸ Some challenge this notion, arguing that intercollegiate athletes in fact receive remuneration, and the relationship of the remuneration to the provision of education is immaterial. See *Nw. Univ. Emp’r and Coll. Athletes Players Ass’n*, 198 L.R.R.M. (BNA) 1837 (N.L.R.B. Mar. 26, 2014) (finding that student-athletes are employees).

membership between the schools able to afford such additional costs from those that cannot.⁹

Further complicating the picture is the growing perception that the academic experience of student-athletes has become increasingly compromised, and in some cases, is a complete sham.¹⁰ Clustering of majors by student-athletes, the overwhelming time demands of participating in intercollegiate athletics, and low graduation rates all raise questions about the legitimacy of the academic experience for student-athletes, particularly in the revenue sports.¹¹ Academic scandals provide additional fodder for this narrative.¹²

Given this landscape, some current and former student-athletes and their representatives are seeking to force the issue. Currently, a series of antitrust law and labor law litigation strategies seek to alter the status quo and require universities to pay their athletes.¹³ It remains to be seen whether these efforts will accomplish their intended goal. Many, though, believe that the answer lies not in a courtroom, but in the adoption of a revised model of intercollegiate sports.¹⁴

⁹ See Sharon Terlep, *Colleges Don't Need to Pay Athletes Beyond Attendance Costs*, WALL ST. J. (Sept. 30, 2015), <http://www.wsj.com/articles/colleges-dont-need-to-pay-athletes-beyond-attendance-costs-1443628911>.

¹⁰ The University of North Carolina is perhaps the most egregious in this category. See Andy Staples, *UNC's Notice of Allegations Brings Up Problematic State of the NCAA Model*, SI.COM (last updated June 5, 2015), <http://www.si.com/college-football/2015/06/04/north-carolina-academic-scandal-notice-allegations>.

¹¹ Doug Lederman, *Concerns about Clustering*, INSIDE HIGHER ED (Nov. 20, 2008), <http://www.insidehighered.com/news/2008/11/20/cluster>; Jodi Upton & Kristen Novak, *College Athletes Cluster Majors at Most Schools*, USA TODAY http://usatoday30.usatoday.com/sports/college/2008-11-18-majors-graphic_N.htm?csp=34 (last updated Nov. 18, 2008); Mark Dent et al., *Do Colleges Drop the Ball with Student-Athletes?*, PITTSBURGH POST-GAZETTE (May 31, 2014, 10:58 PM), <http://www.post-gazette.com/sports/college/2014/06/01/Do-colleges-drop-the-ball-with-student-athletes/stories/201406010120>.

¹² See Staples, *supra* note 10.

¹³ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015); see also Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), <http://www.nytimes.com/2015/08/18/sports/ncaafball/nlrbsays-northwestern-football-players-cannot-unionize.html>; see also Nw. Univ. Emp'r and Coll. Athletes Players Ass'n, 362 NLRB No. 167 (N.L.R.B., filed Aug. 17, 2015).

¹⁴ See Matthew Mitten & Stephen F. Ross, *College Sports Would be Better Reformed Through Federal Regulation Than Lawsuits (essay)*, INSIDE HIGHER ED (June

To that end, this short essay proposes a step towards re-legitimizing the cooperative relationship between the university and athletics. For too long, the university has enabled the athletic enterprise to profit and grow, while it received only tangential, albeit in some cases significant, benefits.¹⁵ This essay, then, argues that the NCAA and university presidents should demonstrate that the university really controls intercollegiate athletics, and not vice-versa, by having academic programs directly profit from the financial success of intercollegiate athletics. Specifically, this essay proposes the creation of “postseason revenue earmarks”—a set aside of profits from postseason football and basketball competitions to benefit and grow academic programs.

I. THE ECONOMIC PROBLEM

At the heart of the financial success of intercollegiate sports are the competitive nature of the athletic contests, and the hope that one’s team can “win.” The pressure from university administrations, alumni, and fans for success, and the financial support that often follows success, drive much of the intercollegiate athletic enterprise. Athletic departments sink significant financial resources into recruiting the best student-athletes possible. Indeed, an important part of the recruiting process is the quality of the facilities on campus. This has led, in recent years, to an arms race of sorts, with universities spending

10, 2014, 3:00 AM), <http://www.insidehighered.com/views/2014/06/10/college-sports-would-be-better-reformed-through-federal-regulation-lawsuits-essay#sthash.oWNiNHZB.dpbs>.

¹⁵ Indeed, many have noted the positive effects of such success on colleges and universities. See, e.g., Doug G. Chung, *The Dynamic Advertising Effect of Collegiate Athletics* (Harvard Bus. Sch., Working Paper No. 13-067, Jan. 25, 2013), available at http://www.hbs.edu/faculty/Publication%20Files/13-067_86a0b712-f29e-423f-b614-0165b770dd65.pdf (study measuring the “Flutie Effect”) (on file with author); Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, 75 S. ECON. J. 750 (2009) (noting the positive impact of football and basketball); Devin G. Pope & Jaren C. Pope, *Understanding College Application Decisions: Why Sports Success Matters*, 15 J. SPORTS ECON. 107 (2014).

large amounts of money, often from donors, to build beautiful facilities designed to attract top athletes.¹⁶

Coaches, particularly in the revenue sports, have also profited in this environment, with their salaries—including those for assistants—growing dramatically. This open market has resulted in football or basketball coaches often being the highest-paid public employee in their respective states.¹⁷

At least from a financial perspective, the income and expenditures of athletic departments continue to become a bigger part of the university's overall financial budget. This would not be an unwelcome development were athletic departments self-supporting. The pressure to spend to keep up with competitors, however, has often required the university to subsidize, in part, the expenditures of the athletic department. Universities impose "student fees" as a way to reallocate funds from education to athletics.

While many decry this seeming imbalance in financial resources between the athletic department and the educational departments within the university, there does not seem to be any end in sight. The peer pressure among institutions continues to drive coach salary increases, improved facilities, and recruiting expenditures. The recent infusion of increased revenue from new television contracts and the addition of the intercollegiate football playoffs has covered costs for now, but in the end only opened the door to continued spending and growth.

The practical consequence of the increased revenue has been the increased pressure to pay intercollegiate athletes. Rather than allow the paternalistic use of increased funds to increase coach salaries and expand stadiums, some argue that the intercollegiate athletes should share in the increased revenue.

The perception likewise is that the academic programs of the university become increasingly detached from the pursuits of

¹⁶ See Peter Berkes, *Incredible Photos and Video of Oregon's New Football Facility*, SBNATION (Jul. 31, 2013, 10:00 AM), <http://www.sbnation.com/college-football/2013/7/31/4574556/oregon-football-building-new>.

¹⁷ See Drew Sharp, *College Football Reeks of Hypocrisy with Coach Salaries*, DETROIT FREE PRESS (Oct. 10, 2015), <http://www.freep.com/story/sports/columnists/drew-sharp/2015/10/10/college-football-salaries/73719568>.

intercollegiate athletics, such that the concept of the “student-athlete” has lost its meaning.

The NCAA and its member institutions insist that this is not the case, that the academic component of “student-athlete” remains robust. A recent ad campaign showed that NCAA athletes predominately “go pro” in other things beside athletics, touting the creation of professional opportunities that higher education can generate.¹⁸

And yet, NCAA rules do little to make the pursuit of both academics and athletics a realistic one, particularly as revenue sports become full-time jobs for student-athletes during the season.¹⁹ To the extent that the critical views are incorrect—that “student-athlete” really means robust academics and athletics—the role of the NCAA should be to facilitate academic achievement for athletes.

Accordingly, the capital expenditures of the NCAA and universities ought to reflect as much. There needs, however, to be some overt requirement of capital expenditures on academics to stem the tide of what will otherwise continue to be a race toward increased spending on athletics. The next section sketches an initial proposal in that direction.

II. POSTSEASON REVENUE EARMARKS

The most high profile aspect of intercollegiate football and basketball are the athletic contests themselves, particularly in the postseason. It is not a surprise that these contests generate an immense amount of revenue for athletic conferences and higher education institutions. Most of these profits, however, go directly into the athletic department budget. Indeed, many universities

¹⁸ See <http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/NCAA%2BLaunches%2BLatest%2BPublic%2BService%2BAnnouncements%2BIntroduces%2BNew%2BStudent-Focused%2BWebsite.html> (link to press release).

¹⁹ Elsewhere, I have argued for expansion of scholarships to six years and reduction of required credits in-season to 3 hours in order to create a better opportunity to balance the demands of academics and athletics. See William W. Berry III, *Educating Athletes: Re-Envisioning the Student-Athlete Model*, 81 TENN. L. REV. 795 (2014).

even suffer financial losses through participating in football bowl games.

With athletic departments often spending all of their revenue (and overspending in many cases), the availability of excess funds for academics seems unlikely. But if one contextualizes this as an arms race in which all competitors will exhaust their funds to succeed, then reallocating funds to academics equally should not impair the endeavor, but instead balance it.

As a result, the NCAA (and the conferences and their constituent universities) should set aside a share of their overall postseason income—including revenue from television and ticket sales—to be used for academic programs and student welfare. Specifically, if the NCAA and conferences are serious about the “student-athlete” and not just the “athlete,” then some of the income from the postseason contests in revenue sports should be allocated to academic programs in the university for all students.²⁰

A start could be taking one-tenth of the revenue from the NCAA basketball tournament and the college football bowls and playoffs and separating it into a fund for the purposes of strengthening the academic programs within the universities. The presidents would possess complete discretion to use the funds however they see fit, as long as the funds are for academic purposes.²¹

Setting aside a portion of income prior to it reaching athletic departments would help to slow this race to spend on athletics. In addition, as the NCAA has suggested in recent litigation, the value related to the athletic teams stems, at least in part, to their relationship with the university. Returning some of the largesse back to the university would be a good start in helping to restore the balance between academics and athletics.

²⁰ There is no magic to the ten percent figure—it perhaps should be more. As an initial proposal, however, it would help to rebalance the financial picture, and the percentage might resonate in the Bible Belt of the Southeastern Conference, which seems to be driving much of the future of intercollegiate sports. LEVITICUS 27:30 (“A tithe of everything from the land, whether grain from the soil or fruit from the trees, belongs to the Lord; it is holy to the Lord.”).

²¹ An initial reaction might be that some universities might try to “game” the system by funneling funds through academic programs back into athletics. The NCAA Infractions Committee, however, would have no problem policing this issue.

It would also demonstrate to non-athlete students and faculty that athletics contributes in a tangible, financial way (and not just in an intangible, emotional way) to the larger endeavor of the university. Such a contribution might go a long way toward mending internal rifts in institutions where the faculty and staff do not fully support the university's commitment to athletics.

Finally, as the NCAA has suggested in the *O'Bannon* litigation, the value of the intercollegiate athletics as an enterprise lies in its relationship to the university. Outside of the university, these sports would become minor league exhibitions. If this is true, then surely sharing some of the profits with the academic side of the campus would help further the concept of *student-athlete*.

CONCLUSION

This short paper has advanced the modest proposal of allocating ten percent of playoff profits to academic parts of the university. The hope here is that this proposal will generate some careful thought concerning the degree to which the amateurism experiment championed by the NCAA truly values academics.