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“THE ARMY YOU CREATED”: COMBATING THE ISSUE OF SEXUAL ASSAULT IN COLLEGE AND QUASI-PROFESSIONAL SPORTS¹

*Nikki R. Breeland**

In the wake of Dr. Larry Nassar’s sentencing for sexual assault, it has become even clearer that there exists a culture of sexual assault in collegiate and quasi-professional sports. Preceding Nassar’s demise there were several cases that brought the nation’s attention to the problem of sex assault in America. The most notable example is that of Penn State’s Jerry Sandusky. Nassar and Sandusky represent people of authority using their positions to prey on minors and young adults within the confines of sports programs. Using Title IX and the Clery Act, as well as state laws, it is possible to push back against athlete assault. However, Title IX coordinators and SafeSport, the Olympic disciplinary body, leave gaps where a government-created agency could easily provide more stability, and ensure more positive outcomes during sex assault investigations. By amending the Amateur Sports Act to include amateur sports of all types, and by creating a Safe Athletics Commission (SAC) modeled after the Equal Employment Opportunity Commission (EEOC), the federal government can ensure that sex assault investigations are carried out in a more objective, swift, and professional manner—

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¹Nicole Chavez, *What Others Knew: Culture of Denial Protected Nassar for Years*, CNN, (Jan, 25, 2018), <https://www.cnn.com/2018/01/23/us/nassar-sexual-abuse-who-knew/index.html>, (quoting Tiffany Thomas-Lopez, an Olympic gymnast and patient of Larry Nassar).

regardless of the school or Olympic governing body. For the love of the game, it is time to protect our players at the expense of our coaches, athletic trainers, deans, and other sports authorities.

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INTRODUCTION

*“Abusers, your time is up. The survivors are here, standing tall, and we are not going anywhere.”*²

Imagine it: you have just celebrated your tenth birthday—double digits. Where most children your age spend their birthdays eating cake and ice cream and jumping in bounce castles, your birthdays are different: you are on a strict diet—there will be no cake or ice cream—and the bouncing you engage in happens in the gymnasium. You are an aspiring gymnast. You are ten.

One afternoon, your coach instructs you to perfect a move on the balance beam. You mount the beam, hearing the blood pulse in your ears. You repeat the assigned move over and over again for what you feel are hours. As you begin your dismount, someone shouts in the gymnasium and catches you off guard—you can feel yourself falling, the breath leaving your chest, as you brace for the impact of the floor.

Crunch.

You scream for your coach in pain, you do not know what happened. Your coach runs to your side and begins to quick-assess your injury. She determines the injury to be serious, and sends for the trainer. The trainer demands you be brought to his office for a thorough examination.

As you limp your way down the hall you stare at the tiles on the floor. You hear the trainer say to the coach, “possible anterior cruciate ligament tear...” and you don’t know what those words mean. You are crying in pain, hobbling down the hallway, wishing your mother was there. Once the trainer gets you to his office, he and your coach help you onto his examination table. It feels cold. The crunch of the sanitary paper below you feels coarse. The trainer checks on your knee and determines you do have an ACL tear. It will take several follow up visits to heal over the next few months.

To round out the examination, the trainer asks you to lie on your stomach so he can perform an important medical procedure.³

² Carla Correa And Meghan Louttit, *More than 160 Women Say Larry Nassar Sexually Abused Them. Here Are His Accusers in Their Own Words.*, N.Y. TIMES, (Jan. 24, 2018), <https://www.nytimes.com/interactive/2018/01/24/sports/larry-nassar-victims.html> (quoting Aly Raisman).

You roll your tiny frame onto your stomach as he performs this procedure, sticking his bare fingers inside you⁴—you are cold, alone, in pain, and scared.

You are ten.⁵

Alternatively, imagine you are a high school football player. You are used to the bright lights, the screams, music pouring out of loud speakers. You have accomplished a task many young men have only dreamed of: you have garnered national attention, and the recruiting eyes of several prestigious universities. You spend most of your days going to class, football practice, and watching film of your performance or opponent teams in order to perfect your talent. You are made of drive and passion. You are a determined young man who has the world at his feet.

One evening you receive a phone call from the university you have been pining for: your absolute dream school. The head football coach is on the other end of the receiver asking if you would like to come to campus for an official visit: see the town, tour the facilities, and meet the staff.⁶ You are overwhelmed with excitement.

The day comes for your visit and you walk up the hill to reveal the quad, the possible bustling center of your world for the next four or five years. You are in love. You determine at that moment that you have been correct all along: State is the university for you. As your guide walks you around you feel as though you are in a daydream. The guide suggests you walk through the locker room and adventure at your leisure.

Your heart stops.

³ Dwight Adams, *Victims Share What Nassar Did to Them under Guise of Medical Treatment*, INDYSTAR, (Jan. 25, 2018), <https://www.indystar.com/story/news/2018/01/25/heres-what-larry-nassar-actually-did-his-patients/1065165001/>.

⁴ *Id.*

⁵ *Victims of Larry Nassar Recount Sex Abuse as Young Gymnasts*, ABC13, (Jan. 18, 2018), <http://abc13.com/victims-of-larry-nassar-recount-sex-abuse-as-young-gymnasts/2963541/> (Some of Larry Nassar's victims were as young as six years old.).

⁶ It should be mentioned here, that while the introductory story is about a potential recruit, the coach is referring to Jerry Sandusky. Sandusky abused children from his philanthropy, *The Second Mile. TIMELINE: Jerry Sandusky sex abuse case*, CHICAGO TRIBUNE, (Oct. 9, 2012), http://articles.chicagotribune.com/2012-10-09/business/sns-rt-usa-pennstate-timeline-update-11e8l99cm-20121009_1_coaches-association-names-sandusky-university-police-interview-sandusky-jerry-sandusky.

One of the most legendary football coaches in the last hundred years is showering in the team's locker room.⁷ He urges you to join him, talk to him about football, and your choice of university. Unfortunately, he does not only want to talk about shared passions.⁸

You no longer want to go to State—your blissful daydream has become a nightmare.

These are not just hypotheticals for those who lived through the abuse and trauma of Larry Nassar and Jerry Sandusky. Young women were assaulted for decades⁹ at the hand of Dr. Larry Nassar who worked with Michigan State¹⁰ athletes as well as United States Olympic athletes—all under the guise of legitimate medical procedure and true physician care.¹¹ Similarly, young boys looking for a second chance in life were subjected to assaultive showers with Jerry Sandusky—a coach and eventual Penn State booster—who sullied the campus for decades using the promise of gifts and attendance at sporting events to his advantage.¹²

Both of these men used college campuses as their hunting ground. They attacked and abused vulnerable children who were

⁷ *Id.*

⁸ Ann O'Neill, "The Sandusky 8" Describe Seduction, Molestation and Betrayal, CNN, (June 17, 2012), <https://www.cnn.com/2012/06/17/justice/sandusky-trial-first-week-wrap/index.html>.

⁹ *Who Is Larry Nassar? A Timeline of His Decades-Long Career, Sexual Assault Convictions and Prison Sentences*, USA TODAY, <https://www.usatoday.com/pages/interactives/larry-nassar-timeline/> (last visited May 2, 2018).

¹⁰ I find it important to mention here that it has been announced that Nassar's former boss, William D. Strampel, the past dean of Michigan State University has also been charged with sexual assault violations. Although he is not the center of this paper as his job did not revolve around sports, he is nonetheless an important peg in the wheel of university sex assault and must be dealt with. He reportedly, "solicited nude photos from at least one student who had performed poorly on a medical school exam, and investigators found dozens of pornographic images and videos on a computer in his office, including many images that appeared to be of Michigan State students. Investigators also found 'a video of Dr. Larry Nassar performing "treatment" on a young female patient' on the computer. The charging documents suggest that Dr. Strampel targeted women who were struggling in their classes." Steve Friess and Mitch Smith, *Larry Nassar's Former Boss at Michigan State Faces Charges*, NY TIMES, (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/us/nassar-michigan-state-dean-strampel.html>.

¹¹ Adams, *supra*, note 3.

¹² O'Neill, *supra*, note 8.

at their mercy while on campus. These schools had Title IX policies in place,¹³ they were aware of how to perform investigations and they knew of the necessity of reporting. Unfortunately for the survivors of the sexual assault, the abusers held more power at these institutions than the students/children did. Both men were reported before they were arrested.¹⁴ Both schools failed in protecting and preventing further abuse after being informed of the assaults.

This Article seeks to address the problem of sexual assault on college campuses, specifically within the realm of athletics. It focuses on why athletes are being abused by their authority figures, and why others placed in positions of trust have failed them. Part I gives background on the Michigan State and Penn State scandals involving Larry Nassar and Jerry Sandusky, respectively. Part II provides the relevant Title IX protections

¹³ See, Michigan State and Penn States' Title IX Policies. *Title IX and Michigan State*, MICHIGAN STATE, (last viewed Apr. 27, 2018), <http://titleix.msu.edu>, ("It is the mission of the Title IX program at Michigan State University to cultivate a campus community that is free of sex discrimination and sexual harassment, including relationship violence and sexual misconduct. We do this by: Raising awareness through education and training programs, Encouraging individuals impacted to report incidents, Holding individuals accountable for violations of university policy, Providing students and employees with resources and supportive services to facilitate ongoing academic and professional success, Offering opportunities for community engagement."); AD85 Sexual and/or Gender-Based Harassment and Misconduct (Including Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking, and Related Inappropriate Conduct) (Formerly Discrimination, Harassment...), Penn State, (last viewed Apr. 27, 2018), <https://policy.psu.edu/policies/ad85#B>, ("The University is committed to equal access to programs, facilities, admission and employment for all persons. It is the policy of the University to maintain an environment free of harassment and free of discrimination against any person because of age, race, color, ancestry, national origin, religion, creed, service in the uniformed services (as defined in state and federal law), veteran status, sex, sexual orientation, marital or family status, pregnancy, pregnancy-related conditions, physical or mental disability, gender, perceived gender, gender identity, genetic information or political ideas. Discriminatory conduct and harassment, as well as sexual misconduct and relationship violence, violates the dignity of individuals, impedes the realization of the University's educational mission, and will not be tolerated. Gender-based and sexual harassment, including sexual violence, are forms of gender discrimination in that they deny or limit an individual's ability to participate in or benefit from University programs or activities.").

¹⁴ Tracy Connor and Sarah Fitzpatrick, *Gymnastics Scandal: 8 Times Larry Nassar Could Have Been Stopped*, NBC, (Jan. 25, 2018), <https://www.nbcnews.com/news/us-news/gymnastics-scandal-8-times-larry-nassar-could-have-been-stopped-n841091>; TIMELINE, *supra*, note 6.

extended to students on college campuses who believe they are the victims of sex-based discrimination or abuse, and the corresponding responsibilities undertaken by universities. Part III looks into state criminal statutes in relevant states where Olympic assault or college sport assault has occurred. Part IV provides the current attempts at creating safe campuses for athletes, attempts, which seem to have failed. Lastly, Part V dictates the purpose of this Article, which is to propose the creation of a new agency and to support that agency with more adequate policies.

I. COLLEGE SPORTS, THE OLYMPICS, AND THE CULTURE OF SEXUAL ASSAULT

While most athletes would prefer to spend their time going to class, watching game film, building trust and camaraderie with their teammates, and engaging in practice to hone their sport, unfortunately for some, the world of sports had something else in mind for them. There are several survivors of sexual abuse who were victimized at the hands of authority figures in sports programs.¹⁵ The most prominent and abhorrent examples of which are the Michigan State and Penn State scandals. Michigan State employed and protected convicted sexual assailant Larry Nassar,¹⁶ while Penn State maintained ties with convicted sexual assailant Jerry Sandusky.¹⁷ The Michigan State scandal is an example of collegiate as well as Olympic sports sex assault and institutional indifference, whereas the Penn State scandal is an example of sex assault on minors and institutional indifference. Both of these scandals are important because they both include victims that were not necessarily members of the university, but were assaulted on the university's property, by university employees.

a. Michigan State

The most recent example of college campus and Olympic sex assault is what happened at Michigan State University (MSU).¹⁸ Dr. Larry Nassar was an osteopathic doctor and athletic trainer at

¹⁵ Correa & Louttit, *supra*, note 8 and O'Neill note 2.

¹⁶ Who Is Larry Nassar?, *supra*, note 9.

¹⁷ *Penn State Scandal Fast Facts*, CNN, (Mar. 28, 2018), <https://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts/index.html>.

¹⁸ Who Is Larry Nassar?, *supra*, note 9.

MSU, and for the United States Olympic Gymnastics team.¹⁹ For several decades he used his position at MSU to prey on collegiate athletes as well as athletes who used MSU's facilities.²⁰ In his role as athletic trainer and physician to the Olympic gymnasts, Nassar was able to prey on young aspiring athletes at several camps and training sites across the country.²¹ Using kindness as his snare, Nassar would entice the young women with candy or other luxuries that the Olympic trainees or college athletes were not usually allowed, making himself their one ally during particularly difficult bouts of training and practice.²² When called upon to examine and give care to these young girls and women, Nassar would sexually assault them by attempting a medical procedure meant for pelvic issues without the use of lubricant or gloves.²³ Nassar was so brazen in his assault, he was able to do it in the presence of his victims' parents without their knowledge.²⁴ Although Nassar was reported several times over his decades of practice, it was not until the *Indianapolis Star* published an exposé on how MSU was handling their investigations that Rachael Denhollander was able to file criminal charges against Nassar in August of 2016—Nassar subsequently lost his job the next day.²⁵ In December of 2016, Nassar was also indicted for child pornography.²⁶ After several more charges and indictments, Nassar pled guilty to child pornography charges in July of 2017, and then in November of that year pled “guilty to seven counts of first-degree criminal assault.”²⁷ On December 7, 2017, Nassar was sentenced to federal prison for child pornography, and on January 24, 2018, Nassar was sentenced to 175 years for the

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² David Eggert And Mike Householder, *Larry Nassar, Former USA Gymnastics Doctor, Sentenced for 40 to 175 Years in Prison*, DENVER POST, (Jan. 24, 2018), <https://www.denverpost.com/2018/01/24/larry-nassar-sentenced/>.

²³ Adams, *supra* note 3.

²⁴ Kathleen Joyce, *Mom Says She Was in Exam Room When Larry Nassar Sexually Abused Daughter*, FOX NEWS, (Feb. 10, 2018), <http://www.foxnews.com/sports/2018/02/10/mom-says-was-in-exam-room-when-larry-nassar-sexually-abused-daughter.html>.

²⁵ Who Is Larry Nassar?, *supra*, note 9.

²⁶ *Id.*

²⁷ *Id.*

sexual assault charges.²⁸ Nassar will be in prison for the rest of his life for the previous sentences, as well as pending trials he has coming up.

b. Penn State

One of the most pervasive examples of assault on a college campus by an authority figure is that of Penn State and Jerry Sandusky.²⁹ Jerry Sandusky was the Penn State assistant football coach under Joe Paterno from 1969 to 1999 when he retired as the defensive coordinator.³⁰ After his retirement he stayed on as an important booster with special privileges regarding the use and access to facilities at Penn State.³¹ In 1977 Sandusky founded The Second Mile, which was a philanthropic organization intended to help disadvantaged children.³² In 1994, Sandusky plucks his first victim from The Second Mile, an eight-year-old boy who he molested in the football locker room showers.³³ In 1996, Sandusky finds another victim, this time a ten-year-old boy who he repeatedly molested.³⁴ Between 1996 and 2009, Sandusky repeated this story to at least eight known victims.³⁵ As if being able to abuse young boys for over a decade was not problematic enough, Sandusky was reported or confronted about the assaults several times between 1994 and 2009.³⁶ In 1998, Sandusky was investigated by Penn State police, and his promise to not shower with children anymore was accepted and the whole thing dismissed.³⁷ In 2000, a Penn State witnesses Sandusky orally assaulting a boy in the football locker room showers, who tells his supervisor and his colleagues, but no one else is informed of the

²⁸ *Id.* To make things even more infuriating, Nassar requested that he not have to be present for his victims' testimonies about his abuse, as it was "too hard to listen" to them. Tracy Connor, *Larry Nassar Complains it's Too Hard to Listen to Victim Stories*, NBC News, (Jan. 18, 2018), <https://www.nbcnews.com/news/us-news/larry-nassar-complains-it-s-too-hard-listen-victim-stories-n838731>.

²⁹ Penn State Scandal Fast Facts, *supra*, note 17.

³⁰ TIMELINE, *supra*, note 6.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ TIMELINE, *supra*, note 6.

³⁶ *Id.*

³⁷ *Id.*

assault.³⁸ A year later a Penn State student witnesses Sandusky actively raping a ten-year-old boy.³⁹ In 2009, one survivor's mother reported the abuse to authorities where an investigation begins and Sandusky is restricted from the victim's school district.⁴⁰ It was not until November of 2011 that Sandusky was finally indicted for his abuse of boys on Penn State's campus—the grand jury found cause to indict for 40 counts of molestation.⁴¹ Sandusky was eventually sentenced to 30 to 60 years in jail, with his first opportunity at parole when he is 98 years old.⁴²

II. TITLE IX PROTECTIONS

While most people who understand gender issues recognize Title IX of the Education Amendments of 1972 as the federal law prohibiting sex discrimination at college universities, Title IX provides and protects so much more.⁴³ Unfortunately, most Title IX scholarship that deals with sports refers only to the requirement of equal opportunity for sport options.⁴⁴ Title IX has a much broader scope, however, and it can be used to combat sex assault that occurs to a college athlete, which is perpetrated by a university employee, if there is negligence on behalf of the university.⁴⁵ The benefits of using Title IX are the mandatory provisions for reporting, and the university's vicarious liability for employees who commit or fail to report abuse.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ TIMELINE, *supra*, note 6.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Title IX of the Education Amendments of 1972*, DEPARTMENT OF JUSTICE, (last visited Apr. 25, 2018), <https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq>.

⁴⁴ See, Brandon Kai Golden, *Evaluating Opportunity in College Sports (Title IX)*, 22 *Cardozo J.L. & Gender* 313 (2016); Jessica Constance Caggiano, *Girls Don't Just Wanna Have Fun: Moving Past Title IX's Contact Sports Exception*, 72 *U. PITT. L. REV.* 119 (Fall 2010).

⁴⁵ *Alexander v. Yale University*, 459 F. Supp. 1 (D. Conn. 1977)(holding that if a school fails to adequately and promptly assign a remedy to any sexual harassment complained of by a student, it would be considered a civil rights violation under Title IX—it essentially made sexual harassment a sexual discrimination claim).

a. Sex Assault on College Campuses

Title IX claims that sexual assault of a student is considered a civil rights violation, so campuses are supposed to take Title IX reports extremely seriously.⁴⁶ When sex assault occurs on college campuses, there are policies and procedures in place to investigate and help the survivor.⁴⁷ To avoid or mitigate these occurrences, however, universities are also supposed to ensure that their campus is equipped with a statement of nondiscrimination (to include sexual assault violence), maintain an office for a Title IX Coordinator whose job it is to monitor gender discrimination on campus, and to create and make available, “grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.”⁴⁸ This, however, is a huge job for one person. To expect a Title IX coordinator to be able to handle all the gender discrimination reports on campus, all the while trying to keep a handle on sex assault violations, is a lot to ask. Title IX coordinators at state schools have received reports from approximately 23.1% of all undergraduate female students in the United States.⁴⁹ This is an even more baffling number when considering the fact that “only 20% of female student victims, age 18-24, report.”⁵⁰ We are asking Title IX coordinators to be university detectives for sexual assault for 23% of the entire student body nation-wide, as well as monitor gender nondiscrimination compliance.

Once a Title IX coordinator is told of the abuse, an investigation begins to determine, “(1) whether or not the conduct

⁴⁶ Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563, 569 (2014).

⁴⁷ Haley O. Morton, *License to Abuse: Confronting Coach-Inflicted Sexual Assault in American Olympic Sports*, 23 WM. & MARY J. WOMEN & L. 141 (2016)(citing, Russlynn Ali, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC. 2-3, 10, 19 (2011).) (“They include: invoking a school’s administrative hearing procedure, reporting to the police, submitting a complaint to an administrative agency like the [Office for Civil Rights], or filing a civil cause of action against the school if it had notice and remained deliberately indifferent.”).

⁴⁸ Russlynn Ali, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC. 6 (2011).

⁴⁹ RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited May 3, 2018).

⁵⁰ *Id.*

occurred; and (2) if [so], what actions the school will take to end sexual violence, eliminate the hostile environment, and prevent its recurrence.”⁵¹ This investigation is, according to the Office for Civil Rights, supposed to be a fair, swift, objective and unequivocal.⁵² In the cases of Sandusky and Nassar, these investigations were anything but. In fact, both were reported for several decades and in the spirit of camaraderie, their colleagues looked the other way.⁵³

Importantly, Title IX does not only protect enrolled students who are assaulted on college campuses.⁵⁴

Under the Clery Act, when a complaint involves sexual assault, institutions must disclose the finding(s), sanctions and rationale to the complainant...this provision is not student-specific, and therefore applies to all acts of sexual assault on campus, regardless of the status of the complainant or respondent.⁵⁵

This shows that in situations like Sandusky and Nassar, where the victims were either members of the community or

⁵¹ Russlynn Ali, *Questions and Answers on Title IX and Sexual Violence*, Office for Civil Rights, U.S. DEP'T OF EDUC. 1, 24-25 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁵² 34 C.F.R. PART 668 (“Summary of the Major Provisions of This Regulatory Action: The final regulations will...Require institutions to provide for a prompt, fair, and impartial disciplinary proceeding in which: (1) Officials are appropriately trained and do not have a conflict of interest or bias for or against the accuser or the accused; (2) the accuser and the accused have equal opportunities to have others present, including an advisor of their choice; (3) the accuser and the accused receive simultaneous notification, in writing, of the result of the proceeding and any available appeal procedures; (4) the proceeding is completed in a reasonably prompt timeframe; (5) the accuser and accused are given timely notice of meetings at which one or the other or both may be present; and (6) the accuser, the accused, and appropriate officials are given timely and equal access to information that will be used during informal and formal disciplinary meetings and hearings.”).

⁵³ John Barr and Dan Murphy, *Nassar Surrounded by Adults Who Enabled His Predatory Behavior*, ESPN, (Jan. 16, 2018), http://www.espn.com/espn/otl/story/_id/22046031/michigan-state-university-doctor-larry-nassar-surrounded-enablers-abused-athletes-espn; Steve Friess and Mitch Smith, *supra*, note 10.

⁵⁴ Title IX of the Education Amendments of 1972, *supra*, note 43.

⁵⁵ W. Scott Lewis, J.D. Sandra K. Schuster, J.D. Brett A. Sokolow, J.D. Daniel C. Swinton, J.D., Ed.D., *The Top Ten Things We Need to Know About Title IX (That the DCL Didn't Tell Us)*, ATAXIA.ORG, (Jan, 18, 2013), <https://atixa.org/wordpress/wp-content/uploads/2012/01/2013-NCHERM-Whitepaper-FINAL-1.18.13.pdf>.

aspiring Olympic athletes, Title IX still applies to protect them from sex assault.

b. Heightened Duty to Report by Staff

One of the responsibilities of a staff or faculty member of any university is to recognize the signs of sexual abuse and to report it.⁵⁶ As a member of the university's employee body, you become a Campus Security Authority under the Clery Act, which makes you responsible to report immediately any and all sexual assault that you come to know if it occurs on any of the university's property and if it involves and university-related individuals.⁵⁷ If a sexual assault occurs outside the parameters of that laid out in the Clery Act, it is still desirable that a CSA will report the incident anyway—as it is still an assault to a university-related individual.⁵⁸

Nassar's ability to sexually assault those children who attended sports camps at MSU,⁵⁹ or Sandusky's proclivity for molesting young boys in the locker room showers⁶⁰ are examples of how, although these survivors were only children and not athletes within the confines of Penn State's care, the abuse happened on the Penn State campus, and there was therefore a heightened duty to report it to authorities. This heightened duty to report sex assault by all employed individuals⁶¹ means that in the situations of Nassar and Sandusky, everyone who knew about the assaults and did nothing are in direct violation of federal law. By violating Title IX, and the Clery Act, CSAs open up the university to vicarious liability.

⁵⁶ 34 C.F.R. PART 668, *supra*, note 52 (defines the term Campus Security Authority [all faculty and staff except physical and mental healthcare professionals] and their mandatory duty to report campus sex assault).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Alanna Vagianos, *140 Women Have Accused Larry Nassar Of Abuse. His Victims Think We Don't Care.*, HUFFINGTON POST, (Jan. 14, 2018), https://www.huffingtonpost.com/entry/larry-nassar-abuse-victims-public-outrage_us_5a58f619e4b03c4189654efe.

⁶⁰ TIMELINE, *supra*, note 6.

⁶¹ Except, of course, physical and mental health professionals.

c. Vicarious Liability for Universities

Since employees of the university are an extension of the university, when they fail to report sex assault against students, the university itself becomes liable under the implied theory of vicarious liability in Title IX and the Clery Act.⁶²

In *Gebser et al. v. Lago Vista Independent School District*, a student in middle school was sexually assaulted by her teacher while on a field trip.⁶³ The student and her mother brought a suit against the school district alleging that because the teacher was an extension of the school district, under a Title IX analysis, his actions should be absorbed by the district.⁶⁴ Unfortunately, the Fifth Circuit Court of Appeals decided that a vicarious liability claim under Title IX was not the same as that under Title VII.⁶⁵ Instead, the *Gebser* court found that, vicarious liability, and therefore damages, cannot be found for sexual harassment in school under Title IX unless the situation was reported to someone with a modicum of authority who had actual knowledge and acted with complete indifference to the situation.⁶⁶

This sounds vaguely familiar to the examples of Nassar and Sandusky. The various administrators and colleagues that knew of their behavior on their respective campuses had a heightened duty to report their behavior under Title IX, and because after

⁶² Title IX of the Education Amendments of 1972, *supra*, note 43 and 34 C.F.R. PART 668, *supra*, note 52.

⁶³ *Gebser et al. v. Lago Vista Independent School District*, 524 U.S. 274 (5th Cir. 1998).

⁶⁴ *Id.*

⁶⁵ *See*, CIVIL RIGHTS ACT OF 1964 § 703(a) (1), 42 U.S.C.A. § 2000e-2(a)(1) (2016); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *Title VII of the Civil Rights Act of 1964*, <https://www.eeoc.gov/laws/statutes/titlevii.cfm>, (“Under antidiscrimination provisions of Title VII, employer is subject to vicarious liability to victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over employee; when no tangible employment action is taken, employer may raise an affirmative defense to liability or damages, subject to proof by preponderance of evidence and comprising two necessary elements: (a) that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise.”).

⁶⁶ *Gebser et al. v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

receiving actual knowledge from the victims,⁶⁷ they refused to do anything about the situation, both Michigan State and Penn State should have been found vicariously liable under Title IX.⁶⁸

III. STATE LAWS AND CHILD SEX ASSAULT

As a society, we have determined that protecting our citizens from sexual assault is imperative. Further, we have deemed that the sexual assault of a child is one of the worst types of assault. Subsequently, each state in the union has enacted their own laws prohibiting and codifying the repercussions for perpetrating sexual assault on minors.⁶⁹ As many training Olympic athletes are not college students, and most are not at the age of majority,⁷⁰ state statutes that prohibit the sexual assault of minors are particularly important, as any assault which occurred in a particular state's jurisdiction is now subject to its sexual assault statutes.⁷¹ Essentially, if the trainee is moving across state lines with their abuser, they are able to pick the state with the longer statute of limitations, as long as the sexual assault was committed within that state's borders.⁷²

⁶⁷ John Barr and Dan Murphy, *supra*, note 53; Jonathan Oosting, *Nassar Victims Push Changes to Michigan Law*, (Feb. 26, 2018), <https://www.detroitnews.com/story/news/politics/2018/02/26/nassar-victims-sexual-assault-legislation/110876874/>.

⁶⁸ Mitch Smith and Anemona Hartocollis, *With Larry Nassar Sentenced, Focus Is on What Michigan State Knew*, NY TIMES, (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/larry-nassar-michigan-state-investigation.html>.

⁶⁹ *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, NCSL, (May 20, 2017), <http://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx>.

⁷⁰ The average age for an Olympic competitor is 26 years old. *Could You Be An Athlete? Olympics 2012 By Age, Weight and Height*, THE GUARDIAN, <https://www.theguardian.com/sport/datablog/2012/aug/07/olympics-2012-athletes-age-weight-height> (last visited May 4, 2018). More importantly, however, is that most Olympians begin their training by age 4-7. Sarah Fielding, *What Age Do Most Olympians Start Training? Many Are Children When They Begin Learning Their Sport*, BUSTLE, (Feb. 2018), <https://www.bustle.com/p/what-age-do-most-olympians-start-training-many-are-children-when-they-begin-learning-their-sport-7935404>.

⁷¹ *Statutes of Limitations for Sexual Assault: A State-by-State Comparison*, NATIONAL CENTER FOR VICTIMS OF CRIME, (Aug. 21, 2013), <https://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check-chart---final---copy.pdf?sfvrsn=2>.

⁷² Sam Walker, *Forum Shopping for Stale Claims: Statute of Limitations and Conflict of Laws*, 23 AKRON L. REV. 19 (Summer 1989).

The following sex assault statutes deal with both minor and adult sexual assault in Michigan, Texas, Colorado, and Pennsylvania. These may seem like arbitrary locations, but in reality these are some of the most important locations for the college and Olympic sex assault conversation. Michigan, as previously stated, is where Larry Nassar used Michigan State as a hunting ground for minor and college-aged athletes to assault;⁷³ Texas is where the Karolyi Ranch is located, a U.S. Olympic training site where many survivors allege they were assaulted;⁷⁴ Colorado is the location of one of the most prominent Olympic training centers in the country;⁷⁵ and lastly, Pennsylvania, as previously stated, is where Jerry Sandusky used Penn State as a location to bring underprivileged boys to assault them in the locker room showers or trade gifts and sports game tickets for sexual favors.⁷⁶

a. Michigan

Under Michigan state law, criminal sexual conduct in the first degree is defined as the sexual penetration of another person when they are under 13 years old; between the ages of 13 and 16 if the perpetrator is an authority figure, is a member of a school, a government employee working for or within a school; or if the perpetrator acted in concert with at least one other person and uses physical force or coercion.⁷⁷ This statute brings with it a sentence of:

⁷³ Mitch Smith and Anemona Hartocollis, *supra*, note 68.

⁷⁴ *USA Gymnastics Agrees to Purchase Karolyi Ranch Gymnastics Facilities*, USAGYM.ORG, (July 25, 2016), <https://usagym.org/pages/post.html?PostID=18960>; ERIC LEVENSON, *USA Gymnastics Cuts Ties With Karolyi Ranch and Its Memories of Abuse*, (Jan. 19, 2018), <https://www.cnn.com/2018/01/18/us/usa-gymnastics-karolyi-ranch/index.html>.

⁷⁵ *About the Colorado Springs Olympic Training Center*, TEAMUSA.ORG, <https://www.teamusa.org/about-the-usoc/olympic-training-centers/csotc/about> (last visited May 1, 2018).

⁷⁶ *TIMELINE*, *supra*, note 6.

⁷⁷ MICH. COMP. LAWS ANN. § 750.520b (“Sexual penetration with another person and if any of the following circumstances exists: That other person is under 13 years of age; That other person is at least 13 but less than 16 years of age and any of the following: The actor is a member of the same household as the victim; The actor is related to the victim by blood or affinity to the fourth degree. The actor is in a position of authority over the victim and used this authority to coerce the victim to submit; The actor is a teacher, substitute teacher, or administrator of the public school, nonpublic

Imprisonment for life or for any term of years.

For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation committed against an individual less than 13 years of age.⁷⁸

Therefore, anyone who commits sexual assault against either a minor or an adult (with the help of others and the use of coercion—like holding someone’s Olympic career over their heads) is subject to this sentence.

Thankfully, under criminal sexual conduct in the first degree, Michigan has enacted no statute of limitations. This means that while it may take years and years for survivors to come forward with their stories, they are protected and allowed to bring their claims.⁷⁹ Unfortunately, however, for anything falling below the criminal sexual conduct in the first degree charge, the statute of

school, school district, or intermediate school district in which that other person is enrolled; The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person; or

The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home in which that other person is a resident, and the sexual penetration occurs during the period of that other person’s residency; Sexual penetration occurs under circumstances involving the commission of any other felony; The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists: The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless; [or] The actor uses force or coercion to accomplish the sexual penetration.”).

⁷⁸ *Id.*

⁷⁹ MICH. COMP. LAWS §767.24.

limitations runs at 10 years or by the “victim’s 21st birthday.”⁸⁰ In light of Nassar, one positive has arisen: survivors have fought to change Michigan law to extend statute of limitations for sex crimes falling under first degree criminal sexual conduct.⁸¹

b. Texas

In Texas, the sexual assault statute is similar but more flexible than that in Michigan.⁸² In order to commit sex assault in Texas, a perpetrator must intentionally penetrate the victim in any way, including forced oral sex actions, without the consent of the victim.⁸³ There is no consent for children under the age of 17

⁸⁰ *Id.* For example, if Larry Nassar’s six-year-old victim and neighbor had suppressed the memories of his abuse, she would only be allowed to bring the claim until her 21st birthday, even though it may take decades for her to come to terms with the ordeal. CNN WIRE, *Victims Confront Larry Nassar in Court: “Little Girls Don’t Stay Little Forever,”* WGNTV, (JAN. 16, 2018), [HTTP://WGNTV.COM/2018/01/16/VICTIMS-CONFRONT-LARRY-NASSAR-IN-COURT-LITTLE-GIRLS-DONT-STAY-LITTLE-FOREVER/](http://wgntv.com/2018/01/16/victims-confront-larry-nassar-in-court-little-girls-dont-stay-little-forever/).

⁸¹ Jonathan Oosting, *supra*, note67 (There is an attempt to “extend the statute of limitations for victims to pursue criminal charges against their assailants. Prosecutors could file second-degree charges at any time and file third-degree charges within 30 years — or the survivors’ 48th birthday — against someone identified by DNA evidence. Sexual assault victims would also have up to 30 years to file civil lawsuits against the individuals or institutions that harmed them, and minors would have up to 30 years beyond their 18th birthday. Current law only allows suits by the victim’s 19th birthday or three years after the alleged abuse. The proposed changes to the civil statute of limitations would provide retroactive address for assaults dating back to 1993 — ‘when Larry Nassar got his medical license.’”).

⁸² TEXAS PEN. CODE § 22.011.

⁸³ *Id.* (“(a) A person commits [Sex Assault] if the person:

- (1) intentionally or knowingly:
 - (A) causes the penetration of the anus or female sexual organ of another person by any means, without that person’s consent;
 - (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person’s consent; or
 - (C) causes the sexual organ of another person, without that person’s consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or
- (2) intentionally or knowingly:
 - (A) causes the penetration of the anus or female sexual organ of a child by any means;
 - (B) causes the penetration of the mouth of a child by the sexual organ of the actor;
 - (C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
 - (D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
 - (E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

when the perpetrator is not the child's spouse.⁸⁴ This statute has two differing time frames for the statute of limitations. If the sex assault was perpetrated against a child, there is no statute of limitations.⁸⁵ However, all other sex assault has a statute of limitations of ten years.⁸⁶ Texas has prescribed a "Maximum of life in prison and/or a maximum fine of \$10,000," for sex assault found in TEXAS PEN. CODE § 22.011.⁸⁷

If Larry Nassar had committed any of his sexual assault at the training facility in Texas, which there are claims that he did, he would be liable under Texas law for the abuse of all victims under 17 as well as those older than 17, and could be sentenced to life.

c. Colorado

In Colorado, sex assault is defined as any intentional sexual penetration or sexual intrusion against a victim where the victim is coerced, the victim can't understand what is happening, the victim is between fifteen years old and seventeen and the perpetrator is ten years older, the perpetrator under the false pretense of offering medical services to the victim actually molests them.⁸⁸ For child sex assault in Colorado, a perpetrator must

(b) A sexual assault under Subsection (a)(1) is without the consent of the other person if:

(8) the actor is a public servant who coerces the other person to submit or participate;

(9) the actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor.").

⁸⁴ *Id.* ("(c) In this section: (1) 'Child' means a person younger than 17 years of age who is not the spouse of the actor.").

⁸⁵ TEX. CODE CRIM. PROC. ART. 12.01.

⁸⁶ *Id.* (It should be noted that it does not qualify ten years from the date of the act, or from the date of majority—this is because any act performed on a minor automatically does not have a running statute of limitations.).

⁸⁷ *Supra*, n. 82.

⁸⁸ COLO. REV. STAT. § 18-3-402 (2016) ("(1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if:

(a) The actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will; or

(b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or

(c) The actor knows that the victim submits erroneously, believing the actor to be the victim's spouse; or

fondle a child (or force a child to fondle them) who has not yet turned fifteen, and the perpetrator must be four years older than the victim.⁸⁹ For sex assault on an adult, the statute of limitations is 10 years, but for a sexual crime against a child, there is no statute of limitations.⁹⁰ The sentence available for adult sex assault is wholly dependent on the fact in the case, but can range anywhere between one year and life imprisonment.⁹¹ The sentence for child sex assault is “2-6 years in prison, and/or a fine of \$2,000-\$500,000...”⁹² If the offense is representative “of a pattern of sexual abuse... [in which case the sentence is] 4-12 years in prison, and/or a fine of \$3,000-\$750,000.”⁹³

As for someone like Nassar who was present at the Colorado training camps, this law would make his assault on any trainee under the age of fifteen subject to 4-12 years in prison, because as the evidence shows, it would have been in the course “of a pattern of sexual abuse.”⁹⁴

d. Pennsylvania

In Pennsylvania, there are two courses for sex assault as are relevant to this paper: sex assault and sexual abuse of children.⁹⁵

(d) At the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or

(e) At the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim; or

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority to coerce the victim to submit, unless the act is incident to a lawful search; or

(g) The actor, while purporting to offer a medical service, engages in treatment or examination of a victim for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices; or

(h) The victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented.”).

⁸⁹ 18-3-405 C.R.S.

⁹⁰ COLO. REV. STAT. § 16-5-401.

⁹¹ Jessika Shipley, *Laws Governing Sex Offenders in Colorado*, COLORADO LEGISLATIVE COUNCIL, (Nov. 2008), <http://www.law.du.edu/images/uploads/library/CLC/574.pdf>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ PENN. ANN. CODE § 3124.1; PENN. ANN. CODE § 6312.

Sex assault occurs, “When the offender engages in sexual intercourse or deviate sexual intercourse with a victim without the victim’s consent.”⁹⁶ The other option is sexual abuse of children, which occurs when sex assault is committed against children, or when child pornography is involved.⁹⁷ The statute of limitations for sex crimes involving an adult is twelve years, while the statute of limitations for sex crimes against a minor last until the survivor turns 50 years old.⁹⁸ Sex assault carries with it a sentence of “[a] maximum of 10 years in prison and up to \$25,000 in fines.”⁹⁹ While the first offense under the sexual abuse of a child is “[a] maximum of 7 years in prison and up to \$15,000 in fines,” and for a second offense, or for child pornography charges, “[a] maximum of 10 years in prison and up to \$25,000 in fines.”¹⁰⁰

Jerry Sandusky’s main place of perpetuating abuse was Penn State, and therefore, abusers like him can expect to be awaiting justice for 32 years after their minor victims become adults—and will face 10 years in prison for each act they performed.

These are the most notable locations for college and Olympic sex assault in the United States, where an authority figure, like a coach, booster, or doctor abused minors and collegiate athletes alike. Although state laws against sex assault only protect those willing to come forward with their story, there are several solutions currently in place to mitigate the damage of sex assault on college campuses and in the Olympics. The success or failure of their initiatives remain to be fully seen.

IV. CURRENT SOLUTIONS

With all the problems surrounding college and Olympic sports, an honest criticism of current solutions seems appropriate. The Michigan State and Penn State scandals came to light in the last decade—which means that the current system does not

⁹⁶ *Sexual assault - Pennsylvania Sexual Assault Laws*, AGEOFCONSENT, <https://www.ageofconsent.net/laws/pennsylvania/sexual-assault> (last visited May 3, 2018)(citing PENN. ANN. CODE § 3124.1).

⁹⁷ *Sexual abuse of children Crime & Punishment in Pennsylvania*, AGEOFCONSENT, <https://www.ageofconsent.net/laws/pennsylvania/sexual-abuse-of-children> (last visited May 3, 2018)(citing PENN. ANN. CODE § 6312).

⁹⁸ 42 PA. CONS. STAT. § 5552.

⁹⁹ *Sexual assault - Pennsylvania Sexual Assault Laws*, *supra*, note 96.

¹⁰⁰ *Sexual abuse of children Crime & Punishment in Pennsylvania*, *supra*, note 97.

work.¹⁰¹ That current system of combating sexual assault in sports includes: Title IX policies and procedures,¹⁰² the advent of Olympic clinics,¹⁰³ and a new education and prevention organization—SafeSport.¹⁰⁴

a. University Policies

Title IX policies on university campuses have been in place since 1972, with the advent of The Education Amendments,¹⁰⁵ but were most stringently applied after 1977 and *Alexander v. Yale University*.¹⁰⁶ As previously discussed, these policies are an attempt to put in place a plan to adequately and quickly get to the bottom of sexual assault on campuses, involving those with ties to the university.¹⁰⁷ Instead of rehashing what these policies are comprised of, and what they are intended to accomplish, it is important instead to discuss whether or not they are working.

The Office for Civil Rights (OCR) follows and reports which schools are under investigation for mishandling sexual assault allegations in Title IX situations.¹⁰⁸ The OCR has never instituted punishment for any school, even those that were “found [to have] acted indifferently or even retaliated against students who reported that they had been raped or otherwise sexually assaulted on campus.”¹⁰⁹ Essentially, the requirements laid out in Title IX, are repercussion-less, with campuses performing Title IX

¹⁰¹ *People v. Nassar*, DN: 341004 (Mich. Ct. App. 2017); *Commonwealth v. Sandusky*, 77 A.3d 663 (Pa. Super. Ct. 2013).

¹⁰² Michigan State and Penn States’ Title IX Policies, *supra*, note 13.

¹⁰³ Willa Frej, *Sexual Assault Clinics Offered at Winter Olympics for the First Time*, HUFFINGTON POST, (Feb. 16, 2018), https://www.huffingtonpost.com/entry/sexual-assault-clinics-olympics_us_5a82950fe4b0892a03526a8d.

¹⁰⁴ SafeSport, (last visited Apr. 25, 2018), <https://safesport.org>.

¹⁰⁵ Title IX of the Education Amendments of 1972, *supra*, note 43.

¹⁰⁶ *Alexander v. Yale University*, 459 F. Supp. 1 (1977) (holding that if a school fails to adequately and promptly assign a remedy to any sexual harassment complained of by a student, it would be considered a civil rights violation under Title IX—it essentially made sexual harassment a sexual discrimination claim).

¹⁰⁷ *Supra*, Part II, Subsection a.

¹⁰⁸ *Title IX: Tracking Sexual Assault Investigations*, THE CHRONICLE OF HIGHER EDUCATION, <https://projects.chronicle.com/titleix/> (last viewed Apr. 28, 2018).

¹⁰⁹ Diana Moskovitz, *Why Title IX Has Failed Everyone on Campus Rape*, DEADSPIN, (Jul. 7, 2016), <https://deadspin.com/why-title-ix-has-failed-everyone-on-campus-rape-1765565925>.

compliance duties in every which way they prefer, with little to no actual oversight or reprimand.

Also, while Title IX coordinators are trained, they are still employees of the university. There are very few loyal employees who would seek to endanger their jobs by going against the interest of their employer.¹¹⁰ On this point, it seems unlikely that Title IX coordinators can be expected to be wholly loyal to the interests of Title IX compliance, when in reality, they are bombarded by pressures from the schools that retain them as employees.¹¹¹

At its most basic point: policies can only work as well as those who are assigned to implement them. Without specialized investigators with specific sex assault-based employment scopes, and by allowing the universities to employ them, Title IX coordinators are left in a sea of work, institutional pressure, and the lack of wherewithal to successfully and adequately resolve Title IX measures.

b. Olympic Clinics

During the 2018 Winter Olympics in Pyongchang, South Korea, the International Olympic Committee (IOC) implemented clinics for athletes to report alleged sexual assault or harassment.¹¹² These clinics included approximately ten medical professionals to help any athlete that may need to report any sexual misconduct—to include mental health professionals.¹¹³ The IOC ensured the clinics were open for eight hours every day, and when closed, a number was provided for athletes with operators

¹¹⁰ *Declining Employee Loyalty: A Casualty of the New Workplace*, WHARTON UNIVERSITY OF PENNSYLVANIA, (May 9, 2012), <http://knowledge.wharton.upenn.edu/article/declining-employee-loyalty-a-casualty-of-the-new-workplace/>.

¹¹¹ Tyler Kingkade, *For Years, Students Have Accused Virginia Universities Of Botching Sexual Assault Cases*, HUFFINGTON POST, (July 1, 2014), https://www.huffingtonpost.com/2014/07/01/virginia-universities-sexual-assault_n_5545486.html; AMANDA EPSTEIN, *Student Says College Botched Her Assault Investigation*, THE PHOENIX, (Jan. 23, 2014), <http://swarthmorephoenix.com/2014/01/23/college-botched-investigation/>.

¹¹² Willa Frej, *supra*, note 103.

¹¹³ *Id.* (“For athletes, medical clinics are equipped with a team of 10 psychologists and psychiatrists prepared to respond to any complaints of abuse.”).

speaking thirteen different languages.¹¹⁴This sparked the beginning of a more sex-assault prevention focused Olympics.¹¹⁵

These clinics, however, are not present in the Olympic training centers; they're not present on the college campuses. If the way to prevent and to immediately combat sex assault, according to the IOC was to implement these clinics, then why are they not involved in our current system of athletics in America? It seems as though a disinterested location for athletes who have been victims of sexual abuse would be an excellent idea in locations where Olympic as well as university sports exist.

c. SafeSport

SafeSport is an organization whose main mission is to, ensure the “well-being the centerpiece of our nation’s sports culture[, because a]ll athletes deserve to participate in sports free from bullying, hazing, sexual misconduct or any form of emotional or physical abuse.”¹¹⁶ SafeSport uses both outreach and education to decrease the chances of sex assault in the culture of sports.¹¹⁷ It engages in trainings at Olympic training centers, and provides an online training option for those in the Olympic Committee body as well.¹¹⁸

SafeSport sounds like a wonderful tool in the fight against athlete sex assault—except when confronted with the fact that it is only available to those involved with the Olympics. The United States Olympic National Governing Body gave SafeSport full autonomy to be the one in charge of sexual assault disputes and reports.¹¹⁹ The policies of SafeSport require that all sexual assault

¹¹⁴ *Id.*

¹¹⁵ While there is currently no available information regarding use of these clinics, the Olympics have a history of sex-offense issues, and to see the IOC take such a serious step toward eradicating, or at the very least, mitigating the prevalence of sex assault is promising.

¹¹⁶ WHO WE ARE, SAFESPORT, <https://safesport.org/who-we-are> (last visited Apr. 14, 2018).

¹¹⁷ WHAT WE DO, SAFESPORT, <https://safesport.org/what-we-do> (last visited Apr. 14, 2018).

¹¹⁸ *SafeSport Online Training Request*, SAFESPORT, <https://docs.google.com/forms/d/e/1FAIpQLSfqmzLocEJO-ghJs11WqHaHswbK0cZZ4Ujye5QPVLsiPc3ajA/viewform> (last visited Apr. 14, 2018).

¹¹⁹ *Supplemental Rules for Arbitration*, SAFESPORT, <https://safesport.org/files/index/tag/policies-procedures> (last viewed Apr. 14, 2018).

reports be concluded by arbitration, which also includes requirements of confidentiality, requests for discovery, review of evidence, a hearing, and an appeal.¹²⁰ It is important to recognize that SafeSport is doing good work in the Olympic Committee, but they could be doing more to help advance the fight against sports sex assault. For one thing, the members of the board only meet four times a year.¹²¹ It seems like an increase in the meeting of such an important organization might increase its flexibility and effectiveness.

While SafeSport is important, it is not the answer, as it is an organization, much like the National Collegiate Athletic Association (NCAA) in that, it only has jurisdiction and power where other submit to it. Instead, it seems imperative that an organization that is investigating sex assault must have government-mandated power to ensure that justice is both swift and accomplished.

V. PUBLIC POLICY DICTATES A GOVERNMENTAL AGENCY MUST BE CREATED TO MONITOR AND IMPLEMENT SEXUAL ABUSE ALLEGATION POLICIES IN UNIVERSITIES AND SPORTS ORGANIZATIONS

As previously discussed, the current model of prevention of college and Olympic sex assault does not work. The best solution to this problem is to create an agency like the Equal Employment Opportunity Commission (EEOC)¹²² to monitor, report, investigate, and deter sexual assault on college campuses. Such an organization would draft and enforce regulations, as well as monitor and conduct investigations. Such regulations would include policies outlining the procedure for sexual assault reporting including: education and training for both athletes and employees, sporadic interviewing and counseling for athletes, mandatory and immediate reporting to the university and state and local officials, and immediate removal of alleged abusers. One way this organization might be enacted is by amending the

¹²⁰ *Id.*

¹²¹ WHO WE ARE, *supra*, note 116.

¹²² EEOC, (last visited Apr. 25, 2018), <https://www.eeoc.gov>.

Amateur Sports Act (ASA)¹²³ to include collegiate sports (and potentially all other sports programs), and to create under that act the Safe Athletics Commission (SAC). While the ASA has been used solely for the creation and maintenance of the United States Olympic Committee, the text of the Act states that it was enacted “[t]o promote and coordinate amateur athletic activity in the United States [and] to recognize certain rights for United States amateur athletes.”¹²⁴ The language in the ASA directly ties to collegiate and other sports programs that fall short of professional status.¹²⁵

Alternatively, there have been propositions of just strengthening SafeSport into its own agency and allowing it to regulate and investigate sex-assault in sports.¹²⁶ In Morton’s article, *License to Abuse: Confronting Coach-Inflicted Sexual Assault in American Olympic Sports*, she claims just that—however, she only seeks to investigate Olympic sex assault, and resigns college sex assault to Title IX.¹²⁷ However, as has been previously discussed, Title IX is not doing the best job of protecting college athletes from sex assault, just as SafeSport is not fulfilling the need under quasi-professional sports like the Olympics.¹²⁸ The freedom of being employed by the federal government will alleviate the stress of working for a university or governing body under the Olympic Committee, which would likely

¹²³ AMATEUR SPORTS ACT, 92 STAT. 3045 (Nov. 8, 1978) (The Amateur Sports Act created the United States Olympic Committee and the national governing bodies for sports involved in the Olympics, as well as rights and eligibility for Olympic athletes).

¹²⁴ *Id.*

¹²⁵ While there have been heated debates recently surrounding college amateurism status for sports, it currently still stands that college sports are considered amateur endeavors, and thereby they are directly tied to the preamble of the ASA. For some amateurism opinions, see, William W. Berry, *Employee-Athletes, Antitrust, and the Future of College Sports*, 28 STANFORD L. & POL’Y. REV. 245 (2017); William W. Berry III, *Amending Amateurism: Saving Intercollegiate Athletics Through Conference-Athlete Revenue Sharing*, 68 ALABAMA L. REV. 551 (2016); Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE WESTERN RESERVE L. REV. 61 (2013).

¹²⁶ Haley O. Morton, *supra*, note 47 (arguing that converting SafeSport into an independent agency to investigate national governing bodies in the Olympics world would better suit fighting sex assault in the Olympics).

¹²⁷ *Id.* at 147-150.

¹²⁸ *Supra*, Part II subsection a, and Part IV subsection c.

result in more objective and fair resolutions to sports sex assault cases—especially those types of cases that arise under Title IX.

Since the creation of SAC would be the best solution to the problem of rampant sports sexual assault, originating from the ASA, the government would be able to better combat sexual assault in collegiate and Olympic sports. Just as the EEOC is able to draft policies and regulations regarding the practice of fair and just employment practices, the SAC would be able to draft more unifying and concrete regulations regarding sex assault in amateur sports situations.¹²⁹ SAC would also have subpoena power, as well as the ability to bring suits against universities and national governing bodies under the Olympic Committee.

SAC would mandate universal annual education and training, allowing for its investigators to be up-to-date on the newest and best ways to combat sex assault. It would also need to implement a program of monitoring university campuses as well as Olympic sports. Monitoring can take many forms, but the most affective is to observe, ask, listen, reinforce, and assure those survivors of sports sex assault.¹³⁰ This might look like a SAC investigator periodically attending a practice or training at a university or Olympic training center. Once there, the SAC investigator can watch the interactions between the athletes and their authority figures; she can ask if any of the athletes have experienced anything that made them uncomfortable; actively listen to their responses with a plan in mind; and lastly reinforce to the athletes that SAC is an agency on their side, and assure them that the investigator will immediately open an investigation into the situation.

In addition to objective monitoring, SAC would implement a system of mandatory reporting to both the entity involved with the athlete as well as any state and local officials with jurisdiction into the matter. This will insure that if a university's investigation

¹²⁹ There is no denying that SafeSport has created a viable model for dealing with Olympic sex assault. Their procedures for investigation and arbitration would be excellent models for SAC.

¹³⁰ These factors arise from a military primary care directive to combat depression in active duty soldiers and veterans. *Depression in Primary Care: A Military Healthcare Perspective*, BRAINLINE: ALL ABOUT BRAIN INJURY AND PTSD, (Sept. 26, 2011), <https://www.brainline.org/article/depression-primary-care-military-healthcare-perspective>.

fails, or the SAC investigator misses something, state and local officials will also be investigating the matter. This will help stamp out the problem of ineffective Title IX coordinators, or those Campus Security Agents (CSAs) that fail to mandatorily report as they are supposed to under the Clery Act.

Lastly, in conjunction with implementing policies of monitoring and mandatory reporting, SAC will also create a powerful system of enforcement. By creating it as a government agency, it will have subpoena power under the ASA. This will give it a better chance to get to the truth of the alleged assault, and to ensure that investigations are quickly and positively resolved. Enforcement would include an immediate removal of alleged abusers while the investigation occurred—this will both put a temporary stop to the abuse that is alleged, and will incentivize those investigating the matter to do so quickly as either the alleged abuser will be receiving pay during their suspension, or will be without pay and pressuring the agency for an immediate resolution to the investigation. If there is found to be any truth to the allegations of sex assault made by an athlete, SAC will work directly with state and local officials to ensure criminal charges are filed against the abuser, ensuring that the statute of limitations does not run out, and that the case is not quietly dismissed by way of a non-disclosure agreement or any other settlement.¹³¹

By creating a governmental agency that regulates all amateur sports under the ASA, the United States Government can effectively and substantially combat sex assault on athletes. In the cases of Nassar and Sandusky, if there had just been a disinterested, objective investigator sooner, many athletes would have been saved the horror of being abused by them. With mandatory monitoring, reporting, and enforcement, SAC can effectively protect both children and young adults that are involved in the Olympics, college athletics, or just use college athletic facilities.

¹³¹ Nikki R. Breeland, *"All the Truth I Could Tell": A Discussion Of Title VII's Potential Impact On Systemic Entertainment Industry Victimization*, 25 UCLA WOMEN'S L. J. 135, 168 (forthcoming 2018) ("While many industries and markets use NDAs to protect their intellectual property, trade secrets, or any other necessary information, the [Sports] Industry has perverted the NDA into a way to protect its sexual assailants by way of contract law.").

CONCLUSION

Sexual assault is committed regardless of age, race, color, education, clothing, or sex.¹³² Sexual assault can happen to anyone in any circumstance where there is an imbalance of power.¹³³ The college and Olympic sports arenas lend themselves to this power imbalance by matching young athletes with coaches, doctors, teachers, boosters, who wield authority over them in both their personal and athletic lives.

The Michigan State and Penn State scandals prove that athletes in both the university system as well as the Olympics are susceptible to being taken advantage of by those in positions of authority. Larry Nassar, celebrated Olympic doctor and Michigan State employee, used the authority found in the letters “M.D.” to convince both young athletes as well as their parents that his assault was legitimate treatment¹³⁴—showing that it does not matter what age a victim is, they are willing to believe someone in a position of authority. He used his position at Michigan State to assault dozens of young women¹³⁵ who were university, Olympic, or camp athletes.¹³⁶ Compounding fault, Nassar was reported several times in his tenure at Michigan State—this indifference to sexual assault by an employee is seen at Michigan State as well. Jerry Sandusky, a retired coach, Penn State booster, and philanthropist used his organization to seek out vulnerable young boys and assault them.¹³⁷ Sandusky traded gifts and sports game tickets, as well as using coercion and cornering minors for sex.¹³⁸ Similar to Nassar, Sandusky was reported for the first time in 1994, and several times thereafter, but an investigation did not

¹³² *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited May 3, 2018).

¹³³ Willa Frej, *supra* note 103 (“Sport’s an odd place fraught with some of the nuances of abuse,” Dieffenbach said. “You have a whole realm of issues related to just the power dynamic and what constitutes abuse—is it screaming at an athlete, pushing them to be their best? There are a lot of people who would debate where that line is.”).

¹³⁴ Kathleen Joyce, *supra*, note 24.

¹³⁵ *First Male Victim of Disgraced Gymnastics Doctor Larry Nassar Speaks Out*, TIME, (Mar. 6, 2018), <http://time.com/5187441/larry-nassar-male-victim-jacob-moore/>.

¹³⁶ Alanna Vagianos, *supra*, note 59.

¹³⁷ TIMELINE, *supra*, note 6.

¹³⁸ *Id.*

ensue until 2009, and charges were not filed until November 5, 2011.¹³⁹

While Title IX policies and procedures were put in place to combat these exact situations, both Michigan State and Penn State failed to take appropriate measures to promptly remove Nassar and Sandusky, and instead, actually protected them from those who sought to report them.¹⁴⁰ State laws only came into effect once police were notified, and then both Nassar and Sandusky were convicted for sexual assault.¹⁴¹ Nassar received approximately 175 years for his sexual assault crimes spanning several decades,¹⁴² and Sandusky received 30 to 60 years in prison.¹⁴³

Current solutions to the problem of sports sex assault are not fully solving the problem. University policies that have been enacted for 40 years are not effective when Title IX coordinator loyalty lies with the university they are employed by. Additionally, Olympic clinics may have been effective during the Olympic Games, but they do little to aid in sex assault that occurs daily either on university campuses or at Olympic training centers. And further, while SafeSport provides a commendable attempt to regulate and protect athletes when it comes to sex assault, their status as a non-government entity and their minimal scope of only dealing with the Olympic Committee makes them an incomplete solution.

Therefore, the best way to combat the ever-increasing issue of sex assault in both collegiate and quasi-professional sports is to create a government agency under the Amateur Sports Act that will act as a sister organization to the EEOC. This will affectively allow such an organization the freedom and flexibility to use a subpoena power to quickly get to the bottom of sex assault investigations, as well as give them the power to enforce their anti-sex assault regulations.

¹³⁹ *Id.*

¹⁴⁰ John Barr and Dan Murphy, *supra*, note 53 and Steve Friess and Mitch Smith, *supra*, note 10.

¹⁴¹ Eric Levenson, *Larry Nassar Sentenced to up To 175 Years in Prison for Decades of Sexual Abuse*, (Jan. 24, 2018), <https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html>; TIMELINE, *supra*, note 6.

¹⁴² *Id.*

¹⁴³ TIMELINE, *supra*, note 6..

As a society, we cannot continue to allow men like Nassar and Sandusky a hiding place in inefficient and inept college Title IX offices, and the back halls and shady non-disclosure deals of the Olympic Committee. By creating a government agency, there is at least a hope and presumption that such a body would be able to objectively, promptly, and professionally snoop out abusers within our sports programs through regulated systems of monitoring, reporting, and enforcement. One thing is absolutely for certain, amateur sports cannot maintain itself on its current path.

*“The abuse that happened to us survivors is something that will affect us for the rest of our lives... others need to know we aren’t just Jane [or John] Does — we are individuals with feelings.”*¹⁴⁴

¹⁴⁴ Alanna Vagianos, *supra*, note 59 (quoting Christine Harrison, a Michigan State dancer).

THE MISTAKEN VICTIM

Robert Carson¹

“Cheating in college football is a tradition as old as the sport itself. In fact, it’s hard to imagine one without the other. Scandal is almost as much a part of the sport’s culture as tailgating and fight songs.”²

The same goes for college basketball, if sports agents, grassroots basketball and apparel companies are combined. The NCAA³ has historically bereaved just compensation from those most creditable for its success: the players. In today’s world of unprecedented TV contracts, college athletics is a multi-billion dollar industry.⁴ Eighty-six percent of student-athletes live below the federal poverty line, yet, in the eyes of the NCAA, the players are worth only the insignificant price of a scholarship.⁵

The current NCAA composition breeds the commercial exploitation of its athletes. Students who participate in major college sports such as football and basketball dedicate over 80 hours per week to training and competition in their sport.⁶ Athletes who unfortunately lack sustainable financial means are not afforded the opportunity to seek alternative income such as a

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² Stewart Mandel, SI.com. (did this come from an article? If it’s just from SI generally, it needs to start with *See generally*.)

³ National Collegiate Athletic Association [hereinafter “NCAA”].

⁴ Marc Tracy, *N.C.A.A. Extends Basketball Deal With CBS Sports and Turner Through 2032*, NEW YORK TIMES (April 16, 2016), <https://www.nytimes.com/2016/04/13/sports/ncaabasketball/ncaa-extends-basketball-deal-with-cbs-sports-and-turner-through-2032.html> (last visited April 21, 2018).

⁵ Ramogi Huma and Ellen J. Staurowsky, National College Players Association, *The Price of Poverty In Big Time College Sport* 19 (2011); *see also* 2017-2018 NCAA DIVISION I MANUAL, Article 12, *available at* <https://www.ncaapublications.com/p-4511-2017-2018-ncaa-division-i-manual-august-version-available-august-2017.aspx> [hereinafter *NCAA Manual*].

⁶ Armstrong Williams, *The Exploitation of College Athletes*, THE WASHINGTON TIMES (April 6, 2014), <https://www.washingtontimes.com/news/2014/apr/6/williams-the-exploitation-of-college-athletes/> (last visited May 6, 2018).

part-time job. This arrangement leaves kids with two options: live in poverty while those in their periphery gain wealth as a direct result of the students' athletic ability, or accept money under the table from those willing to circumvent NCAA rules. The scandal that has consumed the college basketball world over the past eighteen months is a story about future NBA players, sports agents, apparel company executives, and their system of righting this wrong.

According to the FBI's investigation, Jim Gatto,⁷ Chris Dawkins,⁸ and Munish Sood,⁹ along with others, conspired to funnel cash payments to elite high school basketball players in an attempt to influence them to sign and play for universities sponsored by Adidas.¹⁰ The overall purpose of the conspiracy was to compensate elite players in exchange for their promise to retain Chris Dawkins and Munish Sood as professional counsel upon entering the National Basketball Association (NBA), who would then, in turn, attempt to persuade the athletes to sign apparel sponsorship contracts with Adidas.¹¹ The prosecution's theory is this behavior constituted criminal fraud.¹² Specifically, the result of the payment scheme caused universities to provide athletic scholarships to players who were ineligible to compete per NCAA rules, and which, if revealed, would have exposed the universities to substantial economic harm at the hands of NCAA sanctions.¹³ The premise of the prosecution's case portrays the universities as victims.

The intention of this paper is to dispute the prosecution's criminal theory with the application of sound, logical reasoning and perspective. Section I of this paper addresses the question of

⁷ James "Jim" Gatto is a senior marketing executive for Adidas. See Superseding Indictment at 6, *United States v. James Gatto et al.*, No. S1 17 Cr. 686 (LAK), 2018 WL 1756907 (S.D.N.Y. Apr. 10, 2018) [hereinafter "Indictment"].

⁸ *Id.* Chris Dawkins was an unregistered sports agent.

⁹ Munish Sood was a financial advisor. See Matt Norlander, *Ultimate college basketball corruption scandal primer: Explaining the latest with the FBI probe*, CBS SPORTS (April 12, 2018, 7:16 pm), <https://www.cbssports.com/college-basketball/news/ultimate-college-basketball-corruption-scandal-primer-explaining-the-latest-with-the-fbi-probe/> (last visited May 7, 2018).

¹⁰ Indictment, *supra* note 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

whether these universities honestly satisfy the definition of “victim” as a result of the conspiracy. Section II inquires into the potential problems of affording legal weight to NCAA bylaws. Section III challenges the Justice Department on their decades-long delay of enforcing this type of behavior in college athletic recruiting. Section IV brings to light the NCAA’s true motive behind its regulation of college sports. Lastly, Section V keys in on just a few of the many problems of the NCAA’s governing structure in need of reformation in light of the current climate of college athletics.

I. ARE THE UNIVERSITIES TRULY VICTIMS?

Throughout its pontification of college basketball’s black-market underworld, federal prosecutors have failed to show how these sports agents and apparel company executives benefitted at the universities’ expense. While their overall objective was to compensate the players in exchange for a simple promise to retain their professional consulting services, the agents profited in no way unless the player upheld his end of the bargain.¹⁴ For instance, documents seized from the office of Chris Dawkins’ former agency revealed former North Carolina State basketball star Dennis Smith was paid roughly \$117,000 through a series of payments.¹⁵ Despite the generous contribution, Dennis declined to sign with Dawkins after leaving school and instead signed an endorsement contract with Under Armour.¹⁶

According to the details of the operation, the agents clearly never intended to injure the universities. If anything, this recruiting system directly and immediately benefitted everyone involved but the agents. That includes the universities, the

¹⁴ Indictment, *supra* note 6.

¹⁵ Pat Forde and Pete Thamel, *Exclusive: Federal documents detain sweeping potential NCAA violations involving high-profile players, schools*, YAHOO SPORTS (Feb. 23, 2018, 4:33 am), <https://sports.yahoo.com/exclusive-federal-documents-detail-sweeping-potential-ncaa-violations-involving-high-profile-players-schools-103338484.html> (last visited April 15, 2018).

¹⁶ *Id.*; see also Michael D. Sykes, II, *Dennis Smith spurns Adidas and Nike to join Under Armour. Here’s why that’s a big deal.*, SB NATION (Aug. 8, 2017, 12:36 pm), <https://www.sbnation.com/2017/8/8/16112342/dennis-smith-ir-under-armour-shoe-deal> (last visited April 15, 2018).

players, and the NCAA through March Madness TV revenue.¹⁷ In the event these agents realized any profit at all, it would occur long after the player had left campus.

If the intent of preventing criminal activity is to serve and protect the greater public good, then what public harm is the Justice Department attempting to prevent?¹⁸ Considering the schools involved in the FBI's investigation have yet to be punished by the NCAA, what damages have the universities suffered? If the "harm" the prosecution alleges came in the form of additional wins, excess TV exposure, escalated ticket sales, increased student applications, and enhanced alumni donations, then this case is a lock for the U.S. Attorney. In the era of one-and-done basketball in the NCAA, blue-chip athletes are a coveted commodity. Not only do these stars cultivate a healthy win column, their mere presence on campus snowballs their program into a money-making machine.

By way of example, consider the revenue generated by one of college basketball's most adored blue-blood programs, the University of Kentucky, who consistently dresses out future NBA first round draft picks.¹⁹ The 2012 national champion Kentucky Wildcats generated approximately \$20.8 million in revenue.²⁰ Kentucky's national title, along with its mountain of cash, came about to the tune of four first-round draft picks.²¹ Most notably

¹⁷ Tracy, *supra* note 3.

¹⁸ Michael McCann, *The 'Crime' of Paying College Basketball Stars: Form over Substance?*, HARV. L. REV. BLOG (Mar. 20, 2018), <https://blog.harvardlawreview.org/the-crime-of-paying-college-basketball-stars-form-over-substance/> (last visited April 15, 2018); see also Hanna Cheryl, *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849 (1996), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1276830 (last visited April 15, 2018).

¹⁹ Real GM, Kentucky NBA Draft Pick, <https://basketball.realgm.com/ncaa/conferences/Southeastern-Conference/8/Kentucky/258/nba-draft> (last visited April 15, 2018).

²⁰ Glenn Logan, *Kentucky Football: What's Worth More, UK Basketball or Football?*, SBINATION (Sept. 18, 2012, 7:34 PM), <https://www.aseaofblue.com/2012/9/18/3354632/kentucky-football-whos-worth-more-uk-basketball-or-football> (last visited April 15, 2018).

²¹ Basketball Reference, 2012 NBA Draft, https://www.basketball-reference.com/draft/NBA_2012.html (last visited April 15, 2018).

Anthony Davis and Michael Kidd-Gilchrist²², the first and second overall picks.²³

Revenue generated by Kentucky's basketball program continues to grow with each passing season. The Wildcat's 2016-2017 squad raked in approximately \$28 million in revenue.²⁴ That team, led by AAU standouts De'Aaron Fox and Malik Monk²⁵, also made a deep tournament run until it lost to North Carolina in the Elite Eight.²⁶ Choosing to forfeit their remaining three years of NCAA eligibility, Fox and Monk declared for the NBA draft shortly afterward.²⁷ As what has become custom among Big Blue nation, they too were first round draft picks.²⁸

History has clearly revealed how success in athletics triggers not only a substantial escalation in revenue but will improve the overall quality of a university's campus. The most direct evidence of such is displayed by the effect Nick Saban has had on the

²² Both players have earned Nike sponsorships after leaving Nike-sponsored Kentucky. See <http://hoopshype.com/category/sneakers/> (last visited April 15, 2018); see also SI Wire, *How Adidas, Nike and Under Armour Have Divvied Up Major College Basketball*, SPORTS ILLUSTRATED (Oct. 02, 2017), <https://www.si.com/college-basketball/2017/10/02/adidas-nike-under-armour-contracts-schools-conferences> (last visited April 15, 2018).

²³ *Id.*

²⁴ *University of Kentucky: Revenue and Expenses*, U.S. DEPT EDU., <https://ope.ed.gov/athletics/#/institution/details> (last visited April 15, 2018).

²⁵ Jenny Dial Creech, *De'Aaron Fox, Justin Jackson part of Houston AAU team for the ages*, CHRON (June 26, 2017), <https://www.chron.com/sports/rockets/article/De-Aaron-Fox-Justin-Jackson-part-Houston-AAU-team-11239382.php> (last visited April 15, 2018); see also Future 150, Malik Monk, <https://future150.com/hs/basketball-profiles/malik-monk-pg-2016> (last visited April 15, 2018).

²⁶ Associated Press, *Kentucky Falls to UNC in Elite Eight Battle*, SEC SPORTS, <http://www.secsports.com/article/19011124/kentucky-falls-unc-elite-eight-battle> (last visited April 15, 2018).

²⁷ Kyle Boone, *Kentucky's Malik Monk joins De'Aaron Fox in declaring for 2017 NBA Draft*, CBS SPORTS (April 4, 2017), <https://www.cbssports.com/college-basketball/news/kentuckys-malik-monk-joins-deaaron-fox-in-declaring-for-2017-nba-draft/> (last visited April 15, 2018).

²⁸ Josh Moore and Dennis Varney, *NBA Draft recap: Fox, Monk and Bam picked in the lottery; other Cats enter free agency*, KENTUCKY SPORT (June 23, 2017, 12:01 PM), <http://www.kentucky.com/sports/college/kentucky-sports/ex-cats/article157703229.html> (last visited April 15, 2018); Like previous Kentucky basketball lottery picks, both Fox and Monk signed sponsorship contracts with Nike. See Slam Staff, *De'Aaron Fox Reportedly Signs with Nike*, SLAM (June 01, 2017), <http://www.slamonline.com/kicks/deaaron-fox-reportedly-signs-with-nike/> (last visited April 15, 2018); see also Hoops Hype, <http://hoopshype.com/2017/07/16/which-2017-nba-rookies-have-shoe-deals-with-nike-adidas-and-more/> (last visited April 15, 2018).

University of Alabama.²⁹ Athletic department revenue has nearly doubled since his arrival in 2007.³⁰ Thanks to Alabama's amplified national exposure under Saban's tenure, out-of-state student level increases have resulted in a 126% increase in overall tuition revenue, and alumni donations have reached its highest levels ever totaling \$600 million and counting.³¹ The recent spike in student applications has allowed Alabama's admissions office to choose more quality caliber students.³² A consequence of Alabama's higher standard for admissions is its 241 National Merit Scholars, the most of any other public university.³³

The vital point of this illustration is that Nick Saban was not dressed out to play in any of his six national titles. He did not throw a single pass, rush for a single yard, or kick a single field goal. His success, and ultimately the University of Alabama's success, rested on the backs of his nine top-five ranked recruiting classes.³⁴

In short, federal prosecutors have set forth insufficient evidence to plausibly show how the defendant agents and apparel company executives benefitted, or intended to benefit, at the universities' peril. Their conduct simply persuaded high-caliber athletes with whom to sign their letters of intent. Universities blessed with the opportunity to have such program-changing athletes model their school colors to a nation-wide audience cannot accurately be portrayed as "victims."

²⁹ Tom Van Riper, *The Magic of Nick Saban: Everyone Wants To Go To Alabama*, FORBES (May 13, 2013, 11:50 AM), <https://www.forbes.com/sites/tomvanriper/2013/05/13/the-magic-of-nick-saban-everyone-wants-to-go-to-alabama/#2ec823a6393a> (last visited April 15, 2018).

³⁰ *Id.*; see also *University of Alabama: Revenue and Expenses*, U.S. DEP'T EDU., <https://ope.ed.gov/athletics/#/institution/details> (last visited April 21, 2018).

³¹ Riper, *supra* note 28.

³² *Id.*

³³ *Id.*

³⁴ Michael Casagrande, *Ranking Alabama's best recruiting classes in the Nick Saban era*, AL.COM (February 02, 2017, 8:25 AM), http://www.al.com/alabamafootball/index.ssf/2017/02/ranking_alabamas_best_recruiti.html (last visited April 15, 2018).

II. SHOULD EVADING A PRIVATE ORGANIZATION'S BYLAWS BE ILLEGAL?

A formal description of the NCAA is it is a voluntary organization made up of its member academic institutions, and its purpose is to implement and enforce its athletically focused bylaws and regulations.³⁵ In other words, the NCAA is merely a “club,” which decided it wanted some club rules.

The club’s official rulebook establishing its governing bylaws is published annually, and included among these bylaws are rules and regulations concerning the recruitment of athletes, along with promulgating its commitment to the principle of amateurism.³⁶ Specifically, NCAA bylaws prohibit recruits, current student athletes, and their families from accepting anything of value from agents or financial advisors.³⁷ According to the NCAA, an “agent” is “any individual who, directly or indirectly...seeks to obtain any type of financial gain or benefit from securing a prospective student-athlete’s enrollment at an educational institution or from a student-athlete’s potential earnings as a professional athlete.”³⁸

Through its indictment, the prosecution has effectively criminalized circumventing NCAA rules and regulations.³⁹ Embedded within the government’s criminal theory is the idea these universities were defrauded when they allocated financial aid to student-athletes who were ineligible according to NCAA bylaws.⁴⁰ Specifically, the federal government allocated funds to these universities who then theoretically used a portion of those funds to finance athletic scholarships to ineligible student-athletes.⁴¹ In effect, the government would have an indirect, quasi-stake in the harm if any economic punishment were handed down to these institutions for breaking club rules.⁴² Although the prosecution’s argument is compelling, it cannot be ignored the Supreme Court’s holding that an institution’s choice to adopt

³⁵ Over 1,100 member academic institutions. NCAA, www.ncaa.org (last visited April 10, 2018).

³⁶ NCAA MANUAL, *supra* note 4.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Indictment, *supra* note 6.

⁴⁰ *Id.*

⁴¹ McCann, *supra* note 17.

⁴² *Id.*

NCAA bylaws does not “transform” them into law.⁴³ On that basis, why here should the NCAA’s rules and regulations be afforded the guardianship of the U.S. Justice Department?

Furthermore, how can these sports agents be prosecuted for circumventing bylaws of a private organization of which they were not members? Granting legal teeth to rules drafted by members of a voluntary, private association may breed potentially adverse consequences. By way of example, consider the recent displays of protest that has engulfed the National Football League (NFL).⁴⁴ In opposition to police brutality and racial inequality, NFL players have been kneeling as opposed to standing while the national anthem plays prior to games.⁴⁵ Suppose the NFL implemented a league wide rule that players were prohibited from kneeling for the national anthem, and any player who does will be subject to punishment from the league office. Likewise, any team that allows this behavior to occur will also be risking sanction from the NFL.

Moreover, what if behind the scenes a political activists group influenced various players to kneel in protest despite the newly founded rule? If the sanctions handed down by the NFL generated any economic harm to the penalized teams, have these protests subjected the acting parties to criminal liability? Even though these political activists are not subject to NFL bylaws, are they criminals for influencing players who are under the NFL’s jurisdiction to circumvent league rules? According to the prosecution’s case against Jim Gatto and Chris Dawkins, the answer is yes. As a society we must ask ourselves, is this the standard we are willing to set?

⁴³ NCAA v. Tarkanian, 109 S.Ct. 454, 455 (1988) (“UNLV’s decision to adopt the NCAA’s rules did not transform them into state rules and the NCAA into a state actor, since UNLV retained plenary power to withdraw from the NCAA and to establish its own standards”).

⁴⁴ Lauren Cook, *NFL players kneeling during national anthem: How Colin Kaepernick started a movement and why*, AM NEW YORK (December 14, 2017, 3:04 pm), <https://www.amny.com/news/nfl-players-kneeling-during-national-anthem-how-colin-kaepernick-started-a-movement-and-why-1.14287523> (last visited April 15, 2018).

⁴⁵ *Id.*

III. WHY HAS THE FBI CHOSEN TO ENFORCE THIS BEHAVIOR NOW?

It is a secret to no one that for decades boosters and agents have used what the NCAA calls “impermissible benefits”⁴⁶ to persuade talented high school athletes of where to attend college. Not only is this fact well known among those associated with the college athletics underworld, such behavior has been thoroughly documented by the NCAA through its droves of infractions cases.⁴⁷ Three of the more famous infractions cases involved the football programs of Southern Methodist University (SMU), University of Southern California (USC), and the University of Miami (“Miami”).⁴⁸ In each case the NCAA found that either boosters or agents had compensated star players for these programs in numerous ways including money, cars, and homes.⁴⁹ As a result, the NCAA charged each school with “lack of institutional control,” and handed down sizeable penalties in the form of scholarship loss along with a ban from postseason play.⁵⁰ Penalties of this magnitude can foist substantial economic harm upon a university. If the postseason ban includes forfeiting the university’s share of postseason conference revenue, the cost could be millions of dollars.⁵¹

In light of the before mentioned misconduct, why did the FBI refrain from imposing its role as the watchdog of justice? With

⁴⁶ NCAA MANUAL, *supra* note 4 at Bylaw 13.2.

⁴⁷ NCAA Legislative Services Database (LSDBi), <https://web3.ncaa.org/lsdbi/search?types=major&q=> (last visited April 15, 2018).

⁴⁸ *Id.*

⁴⁹ Fatima Ahmed-Farouta, *A Brief History of College Cheating Scandals*, History News Network (May 28, 2013), <https://historynewsnetwork.org/article/152053> (last visited April 15, 2018).

⁵⁰ Dennis Dodd, *30 years later: the legacy of SMU’s death penalty and six team nearly hit with one*, CBS SPORTS (Feb. 22, 2017), <https://www.cbssports.com/college-football/news/30-years-later-the-legacy-of-smus-death-penalty-and-six-teams-nearly-hit-with-one/> (last visited April 15, 2018); see also *Lack Of Institutional Control Is Gateway To Severe Penalties*, CBS MIAMI (Feb. 20, 2013, 11:14 am), <http://miami.cbslocal.com/2013/02/20/lack-of-institutional-control-is-gateway-to-severe-penalties/> (last visited April 15, 2018).

⁵¹ Mark Schlabach, *Ole Miss football self-imposes one-year postseason ban for 2017*, ESPN (Feb. 23, 2017), http://www.espn.com/college-football/story/_/id/18743461/ole-miss-rebels-self-impose-1-year-postseason-ban-2017 (last visited April 15, 2018) (“Ole Miss would have to forfeit its share of SEC postseason revenues for this coming season, which could be as much as \$7.8 million”).

SMU, USC, and Miami, it appears that criminal fraud was present just as it's portrayed in the current NCAA basketball scandal.⁵² In each case the booster or agent's conduct caused the university to agree to issue athletic scholarships to players who were ineligible to compete per NCAA rules.⁵³ As a result, their behavior deprived the university of its right to decide how to allocate its athletic scholarships.⁵⁴ Unlike the current situation, concrete, economic harm to the universities had actually materialized. Of all the universities named in the indictment, not one has been reprimanded by the NCAA.

An interesting element of the NCAA's enforcement procedures is its definition for "lack of institutional control." The NCAA Constitution states that member institutions are responsible for the compliance of its athletic department staff, student-athletes, and any other individuals or organizations "representing the institution's athletics interest."⁵⁵ Institutional responsibility encompasses the oversight of apparel corporate entity conduct.⁵⁶ The trigger point for this responsibility is when any member of the institution's executive or athletic department's staff knew or should have known such an individual or organization was assisting in the recruitment of an athlete or otherwise was "involved in promoting the institution's athletics interest."⁵⁷ Given that most top-tier universities have enormous collegiate sponsorship contracts with Adidas, Nike, and the like, coupled with the indictment's allegation that coaches arranged these impermissible payments, the above-mentioned standard is undoubtedly satisfied.⁵⁸

Placing the burden on the university to prevent improper recruiting tactics is the fundamental pillar of NCAA enforcement. And when the NCAA finds the university has failed to do so, the

⁵² Indictment, *supra* note 6.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ NCAA MANUAL, *supra* note 4 at Article 2.8.1.

⁵⁶ NCAA MANUAL, *supra* note 4 at Article 6.4.2.

⁵⁷ *Id.*

⁵⁸ Carly Benjamin, *The 65 Most Valuable College Sports Apparel Deals*, FORBES (Jul. 12, 2016, 3:34pm), <https://www.forbes.com/sites/carlybenjamin/2016/07/12/the-65-most-valuable-college-sports-apparel-deals/#9e4eb308f6df> (last visited April 20, 2018); see also Indictment, *supra* note 6. .

wrath is unleashed on its athletic program.⁵⁹ Being that NCAA policies and bylaws are the bedrock of the prosecution's criminal theory, the NCAA's stance that universities possess comprehensive responsibility for the actions both inside and outside its athletic department is in stark contrast with the prosecution's premise that these universities are the victims.

IV. WILLFUL BLINDNESS SHOULD NOT BE REWARDED.

While the FBI was investigating Chris Dawkins and his fellow confidants, where was the NCAA? Any college sports fan knows the NCAA enforcement staff does not make a practice of letting rule violations go unpunished.⁶⁰ Perhaps instead of deploying the guardians of amateurism to clean up college basketball, Mark Emmert⁶¹ was at home counting money.

The deceitful intermingling of apparel companies with college basketball recruiting was once the worst kept secret in college sports. As documented in ESPN's *30 for 30: Sole Man*, shoe company finances have been pouring into college basketball programs since the 1970's.

Sonny Vaccaro, the "God Father of Basketball Sneaker Culture," organized the first Dapper Dan Roundball Classic in 1965.⁶² This nationwide, all-star basketball game for high school players eventually led to what is known today as grassroots basketball, which has served as the incubator for underground, black-market recruiting.⁶³ Whether it has been displayed through

⁵⁹ NCAA COMM. ON INFRACTIONS, UNIVERSITY OF MISSISSIPPI PUBLIC INFRACTIONS DECISION (2017), http://www.ncaa.org/sites/default/files/Dec2017COI_MississippiIIIInfractionsDecisionPUBLIC_20171201.pdf; see also Doug Lederman, *The Rule Breakers*, INSIDE HIGHER ED (Jan. 11, 2016) ("96 Division I colleges violated major NCAA rules in the last decade"), <https://www.insidehighered.com/news/2016/01/11/96-division-i-colleges-violated-major-ncaa-rules-last-decade> (last visited April 15, 2018).

⁶⁰ Lederman, *supra* note 58.

⁶¹ Mark Emmert is the current president of the NCAA. NCAA, <http://www.ncaa.org/about/who-we-are/office-president/ncaa-president-mark-emmert> (last visited April 20, 2018).

⁶² Brandon Edler, *Who Is Sonny Vaccaro? A Guide to the Godfather of Basketball Sneaker Culture*, COMPLEX (April 16, 2015), <http://www.complex.com/sneakers/2015/04/who-is-sonny-vaccaro/> (last visited April 20, 2018).

⁶³ The term "grassroots basketball" refers to the current state of elite high school basketball in the United States. High school basketball has become a year-round

published journalism, an ESPN short film, or a top player's eyebrow-raising choice of school, the comprehensive proof of shady recruiting in college basketball has been broadcasted for decades.⁶⁴

Despite its quest to impede commercial exploitation in college athletics, the NCAA's blueprint for doing so, in turn, gave birth to the current pay-for-play culture.⁶⁵ To demonstrate, consider the cash mammoth that is college sports. Intercollegiate athletics generates approximately \$11 billion per year.⁶⁶ The 2018 NCAA basketball tournament alone pocketed \$875 million, and is estimated to generate more than \$1 billion annually in years to

commitment. Starting as early as age 14, teams are formed by accumulating the most highly talented players in a city, state, or region. These teams then travel to different cities to play in tournaments against other all-star teams. Tournaments take place during the spring, summer, and fall months when the regular school team basketball season is on break. There are various grassroots basketball leagues to choose from, nearly all of which are sponsored and administered by different apparel companies (i.e. Nike, Adidas, and Under Armour). The American Athletic Union ("AAU") is often mistakenly used to refer to "grassroots basketball" in its entirety. AAU is an additional organization within the grassroots basketball structure, but is not sponsored by apparel companies. Culturally, the term "AAU" is to grassroots basketball what "Kleenex" is to tissue paper. Grassroots basketball gives players the opportunity to display their skills on a national scale against the most elite talent in the country each and every weekend. See Scott Phillips, *A college basketball fan's guide to the current grassroots basketball scene*, NBC SPORTS (Jul. 8, 2014, 9:00am), <http://collegebasketball.nbcsports.com/2014/07/08/a-college-basketball-fans-guide-to-the-current-grassroots-basketball-scene-2/> (last visited April 21, 2018); see also Joel Blank, *Corruption in basketball is nothing new, but latest scandal touches all levels*, SPORTS MAP (Feb. 26, 2018), <https://houston.sportsmap.com/joel-blank-corruption-basketball-is-nothing-new-latest-scandal-touches-all-levels/> (last visited April 21, 2018).

⁶⁴ *30 for 30: Sole Man* (ESPN television broadcast April 16, 2015); see also Edler, *supra* note 61; see also Chris Johnson, *Malik Newman could be key piece in revival at Mississippi State*, SPORTS ILLUSTRATED (April 24, 2015), <https://www.si.com/college-basketball/2015/04/24/malik-newman-mississippi-state-bulldogs> ("One of the top prospects in the country will attend a school that has not reached the NCAA tournament this decade and made a coaching change just last month.") (last visited April 21, 2018).

⁶⁵ Jay Bilas, *Why the college basketball scandal won't get fixed until the NCAA pays athletes*, ESPN (Sept. 28, 2017), http://www.espn.com/mens-college-basketball/story/_/id/20841877/until-ncaa-solves-money-problem-pays-athletes-problems-continue (last visited April 21, 2018).

⁶⁶ Andrew Syrios, *The NCAA Racket: \$10 Billion 'Non-Profit' Organization*, VALUEWALK (Sept. 16, 2014, 7:38 pm), <https://www.valuewalk.com/2014/09/ncaa-business/> (last visited April 21, 2018).

come.⁶⁷ Further, economists value the current basketball sneaker market at approximately \$950 million per year.⁶⁸

When an industry reaps more than a billion dollars per year, and the primary components of the product are not adequately compensated, the natural outcome is the formation of a secondary, black-market.⁶⁹ Elite basketball talents in this country are worth millions of dollars to everyone involved: the universities, coaches, agents, and apparel companies. Yet, with 86% of college athletes living below the federal poverty line, the NCAA expects them to continue on as free advertising for the before mentioned powers that be.⁷⁰

In the spirit of institutional responsibility, its irrefutable the NCAA “should have known” of this beneath the surface recruiting system. Nevertheless, in order for Mark Emmert to craft a near \$20 billion TV contract with Turner and CBS Sports,⁷¹ he needed to protect the product. The circumstantial evidence needed to justify opening an investigation into college basketball was low-hanging fruit for the NCAA, yet that stone was left unturned. “If your decisions reveal your priorities, the NCAA’s first priority is money.”⁷² This investigation perceives the NCAA as victims. Willful blindness should not be rewarded.

V. THE CURRENT NCAA STRUCTURE IS INCOMPATIBLE WITH PRESENT-DAY COLLEGE ATHLETICS.

For any industry, change is both natural and inevitable. As evolution takes its course, those involved must decide to change with it. The inability to deviate will undoubtedly result in a disruption of the status quo. As the tide continues to shift in

⁶⁷ Alex Kirshner, *Don't miss the point about all the money the NCAA tournament makes—The players involved get exceptionally little.*, SB NATION (Mar. 7, 2018, 3:19 pm), <https://www.sbnation.com/college-basketball/2018/3/7/17093112/ncaa-tournament-revenue-tv-athletes-2018> (last visited April 21, 2018).

⁶⁸ Will Hobson and Jesse Dougherty, *Is the FBI cleaning up college basketball, or wasting its time?*, WASHINGTON POST (Mar. 9, 2018), https://www.washingtonpost.com/sports/is-the-fbi-cleaning-up-college-basketball-or-wasting-its-time/2018/03/09/9a77a868-22a3-11e8-badd-7c9f29a55815_story.html?utm_term=.4251fab81904 (last visited April 21, 2018).

⁶⁹ Bilas, *supra* note 64.

⁷⁰ Huma and Staurowsky, *supra* note 4; *see also* Bilas, *supra* note 64.

⁷¹ Tracy, *supra* note 3.

⁷² Bilas, *supra* note 64.

college athletics, those in power have become hesitant to adjust. Industry leaders should not tolerate the NCAA's reluctance for change while the FBI taints its product on a national scale. If universities hope to sufficiently address the problems surrounding college sports today, they must acknowledge the flawed ways of the past and collectively set rules and regulations more appropriate for the current climate.

Prior to 2006, high school basketball players were eligible to enter the NBA draft.⁷³ Currently, the NBA requires players be at least one year removed from high school graduation before becoming draft-eligible.⁷⁴ If the new NBA collective bargaining agreement opts to change back its draft eligibility criteria, the college game will have to appropriately adjust its rules as well. For instance, college basketball's recruiting guidelines should be aligned with those governing college baseball. High school baseball players drafted by a Major League Baseball (MLB) club are permitted to hire agents to assist them in negotiating a contract between the player and the team who they were drafted by.⁷⁵ After the contract-negotiating phase has commenced, and in the event the player decides to forego playing professional baseball, his college baseball eligibility remains intact, and he is able participate in college athletics free of penalty.⁷⁶ The same should be true for high school basketball recruits. Choosing whether to turn pro or go to college is a life-altering decision. Being that nearly all recruits are teenagers, and 86% of college athletes live below the federal poverty line, they are exactly the class of people who need professional guidance most.

In its quest to preserve the integrity of college sports, the NCAA has imposed the narrative that agents and apparel

⁷³ Yannis Koutroupis, *The History of the 'One-And-Done' Era*, BASKETBALL INSIDERS (March 9, 2014), <http://www.basketballinsiders.com/the-history-of-the-one-and-done-era/> (last visited April 21, 2018).

⁷⁴ Khadrice Rollins, *Report: Adam Silver Wants to Improve NBA's Relationship With Elite High School Players*, SPORTS ILLUSTRATED (March 5, 2018), <https://www.si.com/nba/2018/03/05/adam-silver-elite-high-school-player-one-and-done-change-g-league> (last visited April 21, 2018).

⁷⁵ Gregg E. Clifton, *NCAA Changes Course: High School Baseball Draftees Allowed To Hire Agents*, COLLEGIATE & PROF. SPORTS L. BLOG (Jan. 19, 2016), <https://www.collegeandprosportslaw.com/uncategorized/ncaa-changes-course-high-school-baseball-draftees-allowed-to-hire-agents/> (last visited April 21, 2018).

⁷⁶ *Id.*

company executives are to blame for the exploitation of elite high school athletes. By uncovering the truth of college basketball's pay-for-play culture, Justice Department officials have aimed to grant that assertion legitimacy. Be not deceived, for the NCAA methodically and deliberately molded intercollegiate sports into the multibillion-dollar industry it is today.⁷⁷ Moreover, while it's undeniable the current college basketball recruiting structure breeds exploitation of young athletes and their families, the root of such abusive conduct stems from the actions of those tasked with its oversight.

The antique notion of placing academics above athletics has gradually been suffocating. Millions of dollars trickle through Division I football stadiums and basketball arenas every year as universities have placed an unprecedented priority on enhancing their athletic departments' artillery.⁷⁸ As the volume of money in college sports continues to expand, the argument that players should be paid has become more and more compelling. To illustrate, the University of Alabama's football program generated approximately \$108 million during the 2016-2017 fiscal year.⁷⁹ If NCAA rules permitted, the University of Alabama had enough money left over to pay every player on the team approximately \$540,000.⁸⁰ Likewise, if the University of North Carolina were forced to pay its basketball players 50% of the team's revenue—as required in the NBA—then each scholarship player would have earned roughly \$824,000 for winning the national championship in 2017.⁸¹ Instead, the NCAA precludes player compensation from

⁷⁷ *Id.*

⁷⁸ Will Hobson and Steven Rich, *Colleges spend fortunes on lavish athletic facilities*, CHICAGO TRIB. (Dec. 23, 2015, 6:40 am), <http://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html> (last visited May 7, 2018).

⁷⁹ University of Alabama: Revenue and Expenses, *supra* note 29.

⁸⁰ *Id.* Total expenses for the 2016-2017 Alabama football program was \$62,252,389. The NCAA allows each Division I FBS football program to have a maximum of 85 scholarship players. Subtracting expenses from revenue and then dividing by 85 equals approximately \$540,000. *See also* NCAA MANUAL, *supra* note 4 at Article 15.5.6.1.

⁸¹ A similar calculation was used here as was used in note 79. *University of North Carolina at Chapel Hill: Revenue and Expenses*, U.S. Dep't Edu., <https://ope.ed.gov/athletics/#/institution/details> (last visited April 21, 2018); *see also* NCAA MANUAL, *supra* note 4 at Article 15.5.5.1; *see also* David J. Berri, *Paying NCAA Athletes*, 26 Marq. Sports L. Rev. 2 479, 487 (2016).

exceeding that of a mere scholarship.⁸² Capping player compensation to such low figures yields a healthy cut of the winnings for the NCAA and its member athletic departments. The pie is too large for the players not to eat.

A remodeling of the college athletics landscape is certainly on the horizon. And when that day comes, those with a seat at the table must ask, “Is the NCAA necessary?” Is it efficient to have a governing body like the NCAA place so much red tape on an industry that is crying out for deregulation? Meaningful structure reform by the universities must take place in response to the oppressive behavior of the monster they helped create. Uprooting families and sending fathers and husbands to jail cannot, and should not, be the price for saving the good ole days of amateurism.

⁸² NCAA MANUAL, *supra* note 4.

THE JUSTICIABILITY OF CHALLENGING THE NCAA RESTITUTION RULE

*Jonathan Seil Kim**

I. INTRODUCTION

Before the 1996 college football season, Joel Casey Jones (“Jones”), a football player at Texas Tech University (“Texas Tech”), was declared ineligible for the season.¹ Texas Tech reported the ineligibility to the National Collegiate Athletic Association (“NCAA”), but Jones alleged that he relied on representations by Texas Tech to enroll in certain classes to remain eligible when, in fact, he would be ineligible.² Jones filed a declaratory action against the NCAA and Texas Tech in Texas state court.³ The trial court issued a temporary injunction that (1) enjoined Texas Tech and the NCAA from taking any action that would prevent Jones from participating in football and, more importantly to this Article, (2) enjoined the NCAA from enforcing its Restitution Rule to punish either Jones or Texas Tech.⁴ The NCAA Restitution Rule (NCAA Bylaw 19.12), the subject of this Article, provides that if an athlete obtains an injunction from a trial court preventing the NCAA from keeping the athlete off the court or field, but then an appellate court reverses said injunction, the NCAA may punish the athlete, team, and university.⁵ The NCAA filed an appeal challenging the two part temporary injunction.⁶ The central question here is whether a court *can*

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¹ NCAA v. Jones, 1 S.W.3d 83, 85 (Tex. 1999).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ NCAA, 2017–18 NCAA Division I Manual art. 19.12, at 345–46 (2007), available at <http://www.ncaapublications.com/productdownloads/D118.pdf> [hereinafter NCAA Manual].

⁶ *Jones*, 1 S.W.3d at 85.

adjudicate a challenge to the validity or enforceability of the Restitution Rule or, in other words, is the issue justiciable.

Unsurprisingly, the Restitution Rule has been a subject of controversy. It has been criticized for interfering with the judiciary by denying access to the courts, or at least discouraging athletes from seeking judicial relief, and for encouraging institutions to disregard injunctions favoring athletes out of fear of being punished by the NCAA if the injunction is reversed, stayed, or vacated on appeal.⁷ The Restitution Rule has been effective at “curtailing [NCAA] members’ and college athletes’ injunctive claims, and the success of those claims, against the NCAA.”⁸ One court has even characterized the Restitution Rule as “a direct attack on the constitutional right of access to the courts.”⁹

Despite these valid constitutional concerns, under the typical circumstances, an injunction seeking to prohibit the NCAA from enforcing the Restitution Rule should be dismissed because it does not meet Article III’s case or controversy requirement under the U.S. Constitution.¹⁰ In other words, the issue is not justiciable. Much like Jones’s case above, the typical circumstances include the following steps: 1) an athlete is first deemed ineligible to play; 2) the athlete sues the NCAA to enjoin it from enforcing the eligibility ruling and also from enforcing the infamous Restitution Rule; 3) the athlete wins the injunction at the trial court; and 4) the NCAA appeals its decision to an appellate court. It is important to note that at this point, the NCAA has not and cannot enforce the Restitution Rule because an appellate court has not yet vacated, stayed, or reversed the lower court’s decision.¹¹

This Article argues that, in Jones’s case or under the typical circumstances, an athlete seeking an injunction prohibiting the NCAA from enforcing its Restitution Rule fails the case or controversy requirement in two ways under the federal court’s

⁷ Brian L. Porto, *The NCAA’s Restitution Rule: Bulwark Against Cheating or Barrier to Appropriate Legal Remedies?*, 20 Roger Williams U. L. Rev. 335, 337 (2015).

⁸ Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Court . . . Until Oliver v. NCAA*, 11 Fla. Coastal L. Rev. 459, 520 (2010).

⁹ *Oliver v. NCAA*, 920 N.E.2d 203, 216 (Ohio C.P. 2009).

¹⁰ U.S. CONST. art. III.

¹¹ See NCAA Manual, *supra* note 5, at 345.

justiciability doctrine and, therefore, should be dismissed. First, an opinion on the Restitution Rule's validity or enforceability would constitute an advisory opinion, which is prohibited by Article III, because it adjudicates an issue that has not arisen in actual litigation and it is a hypothetical scenario.¹² Second, in the alternative, an injunction brought by an athlete is nonjusticiable because the plaintiff has not shown an injury-in-fact to sustain standing as required by Article III.¹³ The U.S. Supreme Court requires that a plaintiff have an injury or "an invasion of a legally protected interest" that is "concrete and particularized[.]"¹⁴ If a plaintiff is seeking an injunction, the threat of injury must be "real and immediate, not conjectural or hypothetical."¹⁵ In Jones's case and under the typical circumstances, as explained above, an athlete cannot allege facts that the NCAA will enforce the Restitution Rule and cannot show that the injury is "certainly impending."¹⁶

This Article proceeds as follows. Part II will cover the Restitution Rule text, the major U.S. Supreme Court cases defining the justiciability doctrines of advisory opinions and standing, and the cases that have closely examined the justiciability of an injunction against the NCAA from enforcing the Restitution Rule. While justiciability doctrines in state courts may be different than in federal courts, the focus of this Article will be on how athletes may challenge the Restitution Rule in federal court or any state court with a similar justiciability doctrine like Texas. Part III will take the typical circumstances of an athlete, described above, and argue that courts should dismiss challenges to the Restitution Rule on advisory opinion and injury-in-fact grounds. Part IV provides a recommendation to student-athletes to help meet the justiciability requirements. Finally, Part V briefly concludes.

¹² See *infra* Part III.

¹³ See *id.*

¹⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

¹⁵ *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks omitted).

¹⁶ *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original).

II. BACKGROUND

A. The NCAA Restitution Rule

The Restitution Rule, the subject of this Article, is the NCAA Bylaw 19.12.¹⁷ It is a long rule that authorizes the NCAA Board of Directors of the NCAA to punish individual athletes, teams, and institutions in a variety of different ways.¹⁸ The NCAA can erase individual performances, records, and awards, and it can vacate team victories, records, and awards.¹⁹ Perhaps the most severe penalty is that the NCAA can even go as far as fining institutions and prohibiting them from participating in postseason play or national championships.²⁰ Any one of these punishments can deter athletes from seeking judicial relief, or, at least, the athlete will have second thoughts before suing in court. The full rule is reproduced below from the 2017–18 NCAA Division I Manual.

If a student-athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the Board of Directors may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions: (Revised: 4/26/01 effective 8/1/01, 11/1/07 effective 8/1/08)

(a) Require that individual records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;

¹⁷ NCAA Manual, *supra* note 5, at 345–46.

¹⁸ *Id.*

¹⁹ *Id.* at 345.

²⁰ *Id.* at 345–46.

(b) *Require that team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;*

(c) *Require that team victories achieved during participation by such ineligible student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;*

(d) *Require that individual awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;*

(e) *Require that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;*

(f) *Determine that the institution is ineligible for one or more NCAA championships in the sports and in the seasons in which such ineligible student-athlete participated;*

(g) *Determine that the institution is ineligible for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;*

(h) *Require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Board of Directors concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program; and*

(i) *Require that the institution that has been represented in an NCAA championship by such a student-athlete shall be assessed a financial penalty as determined by the Committee on Infractions.²¹*

²¹ *Id.*

It is quite telling that the Restitution Rule has been in effect since 1975, but the NCAA has only enforced it once.²² The Restitution Rule has had a vast impact: trial courts have been reluctant to grant injunctions in athlete ineligibility disputes, and universities have decided to not follow a valid injunction issued by a trial court out of fear that a possible reversal on appeal would lead to retributive penalties by the NCAA under the Restitution Rule.²³ The next Section will review the case law on what is constitutionally required to bring justiciable issues to a court.

B. Justiciability Doctrines: Advisory Opinions and Standing

Justiciability means that a court may appropriately resolve some disputes and not others. The source of this constitutional limitation is Article III, which limits federal courts from adjudicating “Cases” and “Controversies.”²⁴ And “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”²⁵

Courts cannot simply adjudicate any issue; there must be some requirements, and courts must ask several questions. What matters are justiciable by a federal court? Who is the right litigant to sue in a federal court? When is the appropriate time for a federal court to step in? By asking these questions, federal courts do not actively seek out social disputes to resolve. Instead, federal courts act passively and allow specific litigants to bring specific disputes to them. The what question can be answered by the prohibition of advisory opinions, and the who question can be answered by the doctrine of standing.

1. Advisory Opinions

One of the questions courts must ask is what matters are justiciable by a federal court. More fittingly, the question should be what matters are not justiciable. An advisory opinion is one

²² See *Shelton v. NCAA*, 539 F.2d 1197 (9th Cir. 1976).

²³ See *Porto*, *supra* note 7, at 349–50.

²⁴ U.S. CONST. art. III.

²⁵ *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (internal quotation marks omitted).

matter that courts cannot adjudicate. “[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.”²⁶ This rule began in a letter from Chief Justice John Jay to President George Washington concerning the legality of treaties with France:

*[T]he lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments.*²⁷

Chief Justice John Jay advised the President to turn to his executive department for legal advice to help preserve the separation of coequal branches of government.²⁸ The Court since has consistently held that if no actual case or controversy exists between adverse litigants, then an opinion by the court would be nothing more than an advisory opinion.²⁹ Texas, as we will later see, is one example of a state that also prohibits advisory opinions.³⁰

The U.S. Supreme Court, in *MedImmune v. Genentech*, examined the advisory opinion prohibition in a declaratory judgment case involving a license agreement on a respiratory treatment drug patent.³¹ While MedImmune did pay royalties to Genentech under the license agreement, MedImmune still sought a declaratory judgment that the underlying patent was invalid, unenforceable, or not infringed.³² The Court emphasized that

²⁶ C. WRIGHT & M. KANE, LAW OF FEDERAL COURT 65–66 (7th ed. 2011).

²⁷ Letter from John Jay, Chief Justice, to George Washington, President (Aug. 8, 1793) (available at http://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html).

²⁸ *See id.*

²⁹ *See, e.g.*, *Muskrat v. United States*, 219 U.S. 346, 361 (1911).

³⁰ *See infra* Section II.C.

³¹ 549 U.S. 118 (2007).

³² *Id.* at 121.

Article III still required that the dispute be “definite and concrete, touching the legal relations of parties having adverse legal interests’; and that it be ‘real and substantial’[.]”³³ What the dispute cannot be is “an opinion advising what law would be upon a hypothetical state of facts.”³⁴ The Court held that MedImmune’s royalty payment did not extinguish the case or controversy because Article III did not require MedImmune to break the license agreement, thereby subjecting itself to further liability, to sustain a case or controversy and the payment did not make the dispute hypothetical or abstract in nature.³⁵ The Court explained that a “rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III.”³⁶

There are two major policy considerations in support of a rule that prohibits issuing advisory opinions. One is a “fitness” concern, that courts are best equipped to act when they have an actual controversy between adverse parties, and the other is a “separation of powers” concern, that courts lack the policymaking expertise and should not resolve constitutional questions until it is necessary to resolve a concrete dispute.³⁷

2. Standing

The U.S. Supreme Court has developed the doctrine of standing to answer the who question: who the right litigant is to sue. “[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”³⁸ The doctrine of standing requires a showing of an injury-in-fact, meaning “an invasion of a legally protected interest” that is “concrete and particularized[.]”³⁹ The Court has explained that “particularized” means that “it must affect the plaintiff in a personal and individual way[.]” and that “concrete” means “real,

³³ *Id.* at 127 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)).

³⁴ *Id.*

³⁵ *Id.* at 131, 137.

³⁶ *Id.* at 134.

³⁷ MICHAEL L. WELLS ET AL., *CASES AND MATERIALS ON FEDERAL COURTS* 282 (3d ed. 2007).

³⁸ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

³⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

and not abstract.”⁴⁰ A plaintiff must put forth more than “general averments’ and ‘conclusory allegations’ . . . [and] speculative ‘some day’ intentions[.]”⁴¹ If a plaintiff is seeking an injunction, the threat of injury must be “real and immediate, not conjectural or hypothetical.”⁴²

The U.S. Supreme Court case, *City of Los Angeles v. Lyons*, is illustrative of the injury-in-fact requirements for a prospective injunctive remedy.⁴³ In 1976, the plaintiff, an African American male, was stopped by Los Angeles police officers for a traffic violation, and although the plaintiff offered no resistance, he was seized and was put in a chokehold or neck restraint, rendering him unconscious and causing damage to his larynx.⁴⁴ The plaintiff did seek retrospective (damages) and prospective (injunction) relief, but to have standing for an injunction, he would have had to made the “incredible assertion” that all polices officers always choke any citizen or that the City authorized police officers to act in this manner, which he did not do.⁴⁵ The Court held that his allegation that police officers routinely apply chokeholds “falls far short of the allegations that would be necessary to establish a case or controversy between these parties.”⁴⁶ In sum, the plaintiff failed to “establish a real and immediate threat that he would again be stopped[.]”⁴⁷

The U.S. Supreme Court continued to refuse to find standing where the risk of a future injury is speculative in *Clapper v. Amnesty Int’l USA*.⁴⁸ *Clapper* involved a challenge to § 1881(a), an amendment to the Foreign Intelligence Surveillance Act (“FISA”), which allowed the Foreign Intelligence Surveillance Court to authorize surveillance of non-U.S. persons located abroad without

⁴⁰ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (internal quotation marks omitted).

⁴¹ *Friends of the Earth, Inc. v. Laidlaw Env’tl Servs., Inc.*, 528 U.S. 167, 184 (2000) (internal citations omitted).

⁴² *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks omitted).

⁴³ *Id.*

⁴⁴ *Id.* at 97–98.

⁴⁵ *Id.* at 106.

⁴⁶ *Id.* at 105.

⁴⁷ *Id.*

⁴⁸ 568 U.S. 398 (2013).

demonstrating probable cause that the target is a foreign power or agent of a foreign power.⁴⁹ The government merely needed to show that the person was reasonably believed to be located outside the U.S.⁵⁰ The plaintiffs, a group of organizations and attorneys whose clients were located abroad, alleged that the amendment required them to engage in sensitive international communications with their foreign clients whom they believed were likely targets of surveillance.⁵¹ The plaintiffs sought a declaration that § 1881(a) is unconstitutional but also a prospective injunction against § 1881(a)-authorized surveillance.⁵²

The *Clapper* Court held that the plaintiffs did not establish an injury-in-fact sufficient for Article III standing.⁵³ “Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending.”⁵⁴ The Court further emphasized that “[a]llegations of possible future injury” is not enough for Article III injury-in-fact.⁵⁵ The *Clapper* Court held there was no injury-in-fact because it was “speculative whether the Government will imminently target communications to which [plaintiffs] are parties.”⁵⁶ In support, the Court found that the plaintiffs did not have actual knowledge of the Government’s targeting practices.⁵⁷ Instead, the plaintiffs assumed that their communications with their foreign contacts will be surveilled.⁵⁸ The Court also found that § 1881(a) of the statute authorizes, but does not mandate or direct, the surveillance that the plaintiffs feared.⁵⁹ “Simply put, [plaintiffs] can only speculate as to how the Attorney General and the Director of National Intelligence will

⁴⁹ *Id.* at 404.

⁵⁰ *Id.* at 404–05.

⁵¹ *Id.* at 401.

⁵² *Id.*

⁵³ *Id.* at 411.

⁵⁴ *Id.* at 409 (internal quotation marks omitted) (emphasis in original).

⁵⁵ *Id.* (internal quotation marks omitted) (emphasis in original).

⁵⁶ *Id.* at 411 (emphasis added).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 412.

exercise their discretion in determining which communications to target.”⁶⁰

C. Cases on the Justiciability of Challenging the Restitution Rule

Because of the deterrent nature of the Restitution Rule, there are few cases where the Restitution Rule is the prominent subject matter.⁶¹ There are even fewer cases where courts discussed the justiciability of challenging the NCAA Restitution Rule. Two examples concerned the same litigation in the Court of Appeals of Texas⁶² and later reversed by the Supreme Court of Texas.⁶³ To clarify, while Article III only binds federal courts, many states like Texas have substantially similar justiciability doctrines.⁶⁴

As described in the Introduction, Jones was a Texas Tech football player who was declared ineligible for academic reasons and sought an injunction against the NCAA from enforcing its Restitution Rule.⁶⁵ The trial court granted the injunction, and the NCAA appealed.⁶⁶ The Court of Appeals of Texas ruled that the injunction was inoperative because “there was no justiciable controversy or pending action between Jones and the NCAA or the NCAA and [Texas] Tech concerning the validity or enforcement of the restitution rule.”⁶⁷ The court considered the issue—whether the Restitution Rule is valid or enforceable—as “hypothetical, ‘iffy’ and contingent.”⁶⁸ An opinion by the court regarding that specific

⁶⁰ *Id.*

⁶¹ For a review of court opinions about the Restitution Rule, see Porto, *supra* note 7, at 343–58.

⁶² NCAA v. Jones, 982 S.W.2d 450 (Tex. App. 1998), *rev’d*, 1 S.W.3d 83 (Tex. 1999).

⁶³ NCAA v. Jones, 1 S.W.3d 83 (Tex. 1999).

⁶⁴ *See, e.g.*, Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 774 (Tex. 2005) (“Standing to assert a constitutional violation depends on whether the claimant asserts a particularized, concrete injury.”); Texas Ass’n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993) (“Thus we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department.”).

⁶⁵ *Jones*, 1 S.W.3d. at 85.

⁶⁶ *Id.*

⁶⁷ *Jones*, 982 S.W.2d at 452.

⁶⁸ *Id.* (quoting Firemen’s Ins. Co. of Newark, New Jersey v. Burch, 442 S.W.3d 331, 333 (Tex. 1968)).

issue would be “purely advisory and beyond . . . [its] well-defined jurisdiction.”⁶⁹

The issue was further appealed to the Supreme Court of Texas, which ~~then~~ held that the court of appeals erred by concluding that the injunction became “inoperative merely because the NCAA had no pending action against either Texas Tech or Jones to enforce its restitution rights or to establish the validity of the Restitution Rule.”⁷⁰ Instead, the injunction would only be inoperative if Jones or the NCAA “ceased to have a legally cognizable interest in the outcome of the appeal.”⁷¹ The court found that the NCAA had an interest in having the injunction invalidated so that it could impose penalties under the Restitution Rule.⁷² The court also found that Jones still had a tangible interest, relying on Jones’s representation to the trial court that he would be adversely affected if the NCAA were not enjoined from enforcing the Restitution Rule, such as erasing Jones’s individual performances.⁷³ Thus, the Supreme Court of Texas reversed the court of appeal’s judgment because both parties had a tangible interest with respect to the injunction enjoining the NCAA from enforcing the Restitution Rule.⁷⁴ The majority opinion placed great emphasis on whether both parties had “a legally cognizable interest[.]”⁷⁵

Four of the nine justices on the Supreme Court of Texas, however, dissented—“The issue of this injunction’s validity is now moot; to determine its validity, the court of appeals must issue an impermissible advisory opinion.”⁷⁶ The dissent points to the fact that the Restitution Rule is contingent upon determining the validity of the injunction against enforcement of the rule and that the condition has not been met yet.⁷⁷ Specifically, the injunction against the NCAA’s enforcement of the Restitution Rule has not

⁶⁹ *Id.* (internal citations omitted).

⁷⁰ *Jones*, 1 S.W.3d at 87.

⁷¹ *Id.* (internal citations omitted).

⁷² *Id.*

⁷³ *Id.* at 88.

⁷⁴ *Id.*

⁷⁵ *Id.* at 87.

⁷⁶ *Id.* at 88 (Abbot, J., dissenting).

⁷⁷ *Id.* at 89 (Abbot, J., dissenting).

been vacated, stayed or reversed.⁷⁸ Thus, the dissent followed closely with the court of appeals, arguing that the issue regarding the validity of the temporary injunction was no longer a live controversy and to render an opinion would constitute an impermissible advisory opinion.⁷⁹

III. ANALYSIS

As described in the Introduction, critics of the Restitution Rule have raised valid constitutional concerns regarding the rule. Under the typical circumstances, however, if an athlete seeks an injunction to preemptively prohibit the NCAA from enforcing its Restitution Rule, such a challenge must be dismissed. It does not meet Article III's case or controversy requirement because (1) an opinion on the issue would be an advisory opinion and (2) the plaintiff lacks an injury-in-fact to sustain standing.

First, an opinion on the validity of an injunction prohibiting the NCAA from enforcing the Restitution Rule would be an impermissible advisory opinion. In *MedImmune*, the U.S. Supreme Court held that the license agreement dispute was definite and concrete and not hypothetical or abstract.⁸⁰ The Court further stated that requiring a plaintiff to “destroy a large building, bet the farm, or (as here) risk treble damages . . . finds no support in Article III.”⁸¹ Making royalty payments did not transform the definite and concrete license dispute into one that was hypothetical.⁸² In contrast to *MedImmune*, the issue as to whether the Restitution Rule is enforceable and valid, under the typical circumstances, is not a definite and concrete dispute but instead is hypothetical and contingent.

Again, the typical circumstances include: 1) an athlete is first deemed ineligible to play, 2) the athlete sues the NCAA to enjoin it from enforcing the eligibility ruling and from enforcing the Restitution Rule, 3) the athlete wins the injunction at the trial court, and 4) the NCAA appeals its decision to the appellate court.

⁷⁸ *Id.* (Abbot, J., dissenting).

⁷⁹ *Id.* at 90 (Abbott, J., dissenting).

⁸⁰ *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).

⁸¹ *Id.* at 134.

⁸² *Id.* at 127.

If the injunction prohibits the NCAA from enforcing the Restitution Rule before it ever is possible to enforce, the dispute is hypothetical. As four out of nine justices of the Supreme Court of Texas in dissent in *Jones* points out, the Restitution Rule specifically does not allow the NCAA to enforce it until an injunction is vacated, stayed, or reversed.⁸³ Under the typical circumstances and under Jones's circumstances, this condition has not been met. A court is, therefore, asked to resolve a question—the validity or enforceability of the Restitution Rule—before the concrete dispute ever arises. Such a scenario is one that the *MedImmune* Court warned courts to not resolve: one that is hypothetical or contingent and not definite and concrete.⁸⁴ While the plaintiff did not have to risk treble damages by breaking a license agreement, there was still a definite concrete dispute between the litigants over the license agreement in *MedImmune*.⁸⁵ In contrast, under the typical circumstances or Jones's circumstances, the definite concrete dispute never arose, because the Restitution Rule was never enforced. In fact, the NCAA could not enforce the Restitution Rule even if it wanted to.⁸⁶ Opinions on the validity or enforceability of the Restitution Rule, thus, would be an impermissible advisory opinion.

Second, even if courts find that the dispute is not an advisory opinion, they should still dismiss challenges to the validity of an injunction prohibiting the NCAA from enforcing the Restitution Rule because there would be no injury-in-fact, and, therefore, the plaintiff would lack standing under Article III.

In *Jones*, the Supreme Court of Texas reversed the lower court and held that both Jones and the NCAA had “a legally cognizable interest in the outcome of the appeal.”⁸⁷ Therefore, the Supreme Court of Texas held that an injunction prohibiting the NCAA from enforcing its Restitution Rule was operative and the appeal should not have been dismissed.⁸⁸ The U.S. Supreme Court, however, has reiterated many times that an injury-in-fact must not only be “an invasion of a legally protected interest[.]” but

⁸³ *Jones*, 1 S.W.3d at 89 (Abbott, J., dissenting).

⁸⁴ *MedImmune*, 549 U.S. at 127.

⁸⁵ *Id.* at 127, 134.

⁸⁶ See NCAA Manual, *supra* note 5, at 345–46.

⁸⁷ *Jones*, 1 S.W.3d at 87.

⁸⁸ *Id.* at 87–88.

also is one that is “concrete and particularized[.]”⁸⁹ The Supreme Court of Texas only examined if each party had a tangible interest in the outcome of the appeal; the court must also examine if the threat of injury was concrete or real.⁹⁰

If Jones or another athlete seeks a prospective injunction prohibiting the NCAA from enforcing the Restitution Rule, the plaintiff must allege facts that support a threat of a real and imminent injury. In *Jones*, the plaintiff alleged that he would be adversely affected if the NCAA was not restrained from enforcing the Restitution Rule by possibly erasing individual performances.⁹¹ Under the typical circumstances, an athlete would similarly seek to enjoin the NCAA from enforcing the Restitution Rule based on the fear that the NCAA may punish the athlete.

Both *Lyons* and *Clapper* tell us that these allegations are not enough for a plaintiff to cross the injury-in-fact threshold. Like *Lyons*, in which the plaintiff could not show facts that the Los Angeles police department *will* use the chokehold against him, Jones or another athlete cannot “establish a real and immediate threat” that the NCAA *will* enforce the Restitution Rule.⁹² The NCAA has only enforced the Restitution Rule once in its history.⁹³ It is entirely unclear how many times the NCAA *could* have enforced the Restitution Rule in the past but chose not to enforce. I personally emailed an attorney at the NCAA and was told that the NCAA’s Restitution Rule enforcement policy would not be disclosed to individuals, even for academic research.⁹⁴ Specifically, I was unable to obtain information on how the NCAA determines when to enforce the Restitution Rule or how many opportunities the NCAA could have enforced the Restitution Rule but chose not to enforce.⁹⁵ By not knowing if and when the NCAA will choose to

⁸⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁹⁰ *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016).

⁹¹ *Jones*, 1 S.W.3d at 88.

⁹² *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

⁹³ *See Shelton v. NCAA*, 539 F.2d 1197 (9th Cir. 1976).

⁹⁴ Email from Christopher Termini, Managing Director of Championships and Alliances, NCAA, to Jonathan Kim, University of Illinois College of Law (Apr. 10, 2018, 03:56 CST) (on file with the author).

⁹⁵ Email from Jonathan Kim, University of Illinois College of Law, to Christopher Termini, Managing Director of Championships and Alliances, NCAA (Apr. 08, 2018, 04:54 CST) (on file with the author).

enforce the Restitution Rule, Jones or another athlete cannot “establish a real and immediate threat” that the NCAA *will* enforce the Restitution Rule.⁹⁶

The *Clapper* case is even more on point than *Lyons* to an athlete’s situation. In *Clapper*, the plaintiffs’ allegations that their communications with foreign contacts *will* be surveilled did not demonstrate an injury-in-fact because the allegations were merely speculative assumptions and did not show that the injury was “*certainly* impending.”⁹⁷ The plaintiffs did not have actual knowledge of the government’s targeting practices.⁹⁸ Similarly, as explained in the previous paragraph, Jones or other athletes do not have actual knowledge of the NCAA’s Restitution Rule practices. I could not get this information after asking an attorney from the NCAA.⁹⁹ Jones or an athlete simply does not know whether the NCAA will enforce the Restitution Rule and, thus, cannot show the injury was “*certainly* impending.”¹⁰⁰ Deterrence in filing suit against the NCAA, by itself, is not enough to show the threat of injury is real. In addition to *Clapper*, where the FISA statute authorized, but did not mandate or direct, surveillance that the plaintiffs feared, the Restitution Rule states that “the Board of Directors *may* take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions[.]”¹⁰¹ Just like § 1881(a) of FISA, the Restitution Rule authorizes or allows, but does not mandate or require, the Board of Directors of the NCAA to punish the individual, team, or institution.¹⁰²

Both *Lyons* and *Clapper* show that allegations of the NCAA’s enforcement of the Restitution Rule against athletes are speculative assumptions, are not based on actual knowledge of the NCAA’s enforcement practices, and therefore cannot “establish a real and immediate threat”¹⁰³ of an injury or establish the injury

⁹⁶ *Lyons*, 461 U.S. at 105.

⁹⁷ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks omitted) (emphasis in original).

⁹⁸ *Id.* at 411.

⁹⁹ *See supra* notes 94–95.

¹⁰⁰ *Clapper*, 568 U.S. at 409.

¹⁰¹ NCAA Manual, *supra* note 5, at 345 (emphasis added).

¹⁰² *Id.*; *Clapper*, 568 U.S. at 409.

¹⁰³ *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

is “*certainly* impending.”¹⁰⁴ In sum, a prospective injunction prohibiting the NCAA from enforcing the Restitution Rule would not sustain the Article III requirements because an opinion on the validity of the injunction would be an impermissible advisory opinion and the plaintiff cannot show an injury-in-fact.

IV. RECOMMENDATION

All is not lost to an athlete who wishes to challenge the NCAA Restitution Rule in court. This part provides a recommendation to athletes on what steps to take to sufficiently meet the justiciability requirements. There are two main methods to meet these requirements.

First, the clearest way to ensure meeting the justiciability requirements is to wait until the NCAA enforces the Restitution Rule against the athlete. If the NCAA erases an athlete’s individual performances, records, or awards, the athlete will have a definite concrete dispute with the NCAA. It will no longer be an issue that is hypothetical or contingent because the NCAA has, in fact, punished the athlete. Therefore, the athlete will show that the concrete dispute is outside the prohibition of advisory opinions. In addition, the athlete sustained an injury-in-fact, meeting Article III’s standing requirements. In contrast to *Lyons* and *Clapper*, in which the plaintiffs were unable to show that the Los Angeles police *will* use the chokehold and that the government *will* surveille communication with foreign contacts, an athlete can show a real and tangible injury already sustained personally.¹⁰⁵ The athlete will not have to show any assumptions or speculations because the injury-in-fact occurred by the NCAA’s actions. Therefore, by waiting until the NCAA enforces the Restitution Rule against the athlete individually, the athlete can clearly show that the dispute is outside the prohibition of advisory opinions and that the athlete sustained a tangible, real injury-in-fact.

Second, although more difficult to show, the athlete may seek a prospective injunction to prohibit the NCAA from enforcing the

¹⁰⁴ *Clapper*, 568 U.S. at 409.

¹⁰⁵ *Id.*; *Lyons*, 461 U.S. at 105.

Restitution Rule if the athlete can show that the NCAA *will* enforce it. To avoid the prohibition on advisory opinions, the athlete must show that there is a dispute that is definite and concrete and not hypothetical or abstract.¹⁰⁶ The athlete can do this, for example, if the NCAA informs the athlete that it will enforce the Restitution Rule if the injunction that the trial court issued is eventually reversed, stayed, or vacated by an appellate court. If the athlete alleges these facts, the athlete has made the dispute less hypothetical or contingent and more definite and concrete. The *MedImmune* Court reiterated that it cannot issue “an opinion advising what law would be upon a hypothetical state of facts.”¹⁰⁷ By alleging that the NCAA *will* enforce its Restitution Rule, the athlete has shown that this dispute is no longer a hypothetical state of facts but a state of facts that will occur.

In addition, to showing an injury-in-fact, the athlete must “establish a real and immediate threat”¹⁰⁸ that the NCAA *will* enforce the Restitution Rule and that the injury is “*certainly* impending.”¹⁰⁹ Again, the athlete may show a sufficient injury-in-fact if the NCAA informs the athlete that it will enforce the Restitution Rule against the athlete. Distinguishable from *Clapper*, in which the plaintiffs did not have actual knowledge of the government’s targeting practices,¹¹⁰ the athlete *does* have actual knowledge of the NCAA’s Restitution Rule enforcement practices as it pertains to him or her. The athlete knows that the NCAA will enforce the Restitution Rule against him or her. By alleging this actual knowledge, the athlete has shown that the threat of injury is real and impending and enough to sustain an injury-in-fact.

If an athlete chooses to challenge the Restitution Rule on constitutional grounds, there are other hurdles such as showing that the NCAA is a state actor.¹¹¹ For purposes of just meeting the

¹⁰⁶ *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).

¹⁰⁷ *Id.*

¹⁰⁸ *Lyons*, 461 U.S. at 105.

¹⁰⁹ *Clapper*, 568 U.S. at 409.

¹¹⁰ *Id.* at 411.

¹¹¹ For an argument on recognizing the NCAA as a state actor in some circumstances, see Vikram David Amar, *The NCAA as Regulator, Litigant, and State Actor*, 52 B.C. L. REV. 415 (2011) (arguing that courts should adopt a functionalist approach to determine if the NCAA is a state actor).

justiciability requirements, however, an athlete can allege enough facts in two ways. The best and easiest way is to wait until the NCAA enforces the Restitution Rule and punishes the athlete. A riskier but still possible way is if the NCAA informs the athlete that it *will* enforce the Restitution Rule against him or her.

V. CONCLUSION

Under Jones's circumstances or the typical circumstances, an adjudication of the validity of an injunction prohibiting the NCAA from enforcing its Restitution Rule should be dismissed because it fails Article III's case or controversy requirement in two respects. First, because the circumstances are hypothetical and contingent, before the NCAA ever can enforce the Restitution Rule, an opinion on the rule's validity is an impermissible advisory opinion. Because the NCAA has only enforced the Restitution Rule once in its history,¹¹² such a dispute will likely remain hypothetical and not concrete. Second, even if the dispute is not advisory, it fails the injury-in-fact requirement of standing. Jones, nor another athlete, can allege the necessary facts to sustain a real and immediate threat of injury. It cannot be conjectural, hypothetical or "speculative 'some day' intentions[.]"¹¹³ Under Jones's circumstances and the typical circumstances, the plaintiff cannot show that the NCAA *will* enforce the Restitution Rule if the injunction was reversed, stayed, or vacated. Because an appellate court has not yet ruled that the injunction is reversed, stayed, or vacated, the NCAA *cannot* even enforce the Restitution Rule at that point.¹¹⁴

To meet the justiciability requirements laid out in this Article, an athlete will likely have to wait until the NCAA enforces the Restitution Rule against the athlete. An athlete can also seek a prospective injunction preventing the NCAA from enforcing the Rule if it already informed the athlete that it *will* enforce the Rule, but this method is riskier because a tangible concrete injury is easier to show than the threat of a future injury. If an athlete is

¹¹² See *Shelton v. NCAA*, 539 F.2d 1197 (9th Cir. 1976).

¹¹³ *Friends of the Earth, Inc. v. Laidlaw Envtl Servs., Inc.*, 528 U.S. 167, 184 (2000) (internal citations omitted).

¹¹⁴ See NCAA Manual, *supra* note 5, at 345–46.

unwilling to wait until the NCAA enforces the Restitution Rule and there are no special circumstances that show the NCAA *will* enforce it, under the typical circumstances, there is no live case or controversy under the meaning of Article III on two grounds: (1) advisory opinion reasons and (2) lack of injury-in-fact reasons. Litigants can put the cart before the horse by failing to consider the justiciability requirements to even bring the suit in the first place. This Article provides some guidance to Jones and other student-athletes who wish to challenge the validity and enforceability of the NCAA Restitution Rule.

A MUCH NEEDED TRAVEL CALL: USING THE G LEAGUE AS THE NBA'S KEY TO INTERNATIONAL EXPANSION

*Allison Slusher**

INTRODUCTION

Larry Bird once said, "Once you are labeled the best you want to stay up there, and you can't do it by loafing around. If I don't keep changing, I'm history."¹ Although Larry Bird's words were directed toward himself and his career as a forward in the National Basketball Association, his words ring true for the NBA as a whole. The NBA is arguably the most profitable and popular professional basketball league in the world, but as the NBA's success and popularity continue to rise, if it doesn't keep progressing, its future as one of the best leagues in the world is not secure.²

The time is ripe for the NBA to make changes. The NCAA cannot provide a place for all its athletes who want to make money now; therefore, the NBA should take advantage of the NCAA's rules as they are. The NBA itself, in order to avoid stagnation, needs to expand and grow. The key to expansion and becoming the hero to both players and fans in an arguably tragic tale of collegiate athletics lies in an existing component of the NBA: minor league basketball.

The NBA is known primarily for its 30 professional teams; however, the organization also operates the G League, the NBA's official minor league.³ The G League is designed to give players,

* You should write an about the author section here.

¹Simran Khurana, *Know Your Favorite Basketball Players with Famous Basketball Quotes*, THOUGHT CO. (Jan. 9, 2018), <https://www.thoughtco.com/know-your-favorite-basketball-players-2832291>.

² Sam Amick, *NBA's Massive Growth in China 'Beyond What Anybody Could have Anticipated,'* USA TODAY (Oct. 4, 2017, 5:03 PM), <https://www.usatoday.com/story/sports/nba/2017/10/04/nba-massive-growth-china-beyond-what-anybody-could-have-anticipated/732025001/>.

³ *What You Need to Know About the NBA G League*, NBA G LEAGUE, <http://gleague.nba.com/about/>.

coaches, officials, trainers, and front-office staff the opportunity to develop their skills for the NBA.⁴ The G League currently has 26 teams, each with a one-to-one NBA affiliate;⁵ however, NBA Commissioner Adam Silver said the NBA is looking to expand the G League by adding one new G League team that is set to start in the 2018-2019 season and by adding a developmental team for each of the three remaining NBA teams unrepresented in the G League.⁶ The G League teams are in various locations throughout the U.S. and Canada – often in different cities than their professional counterparts.⁷ Adding four more teams would be beneficial to the NBA and collegiate athletes alike as it would allow for more growth and preparation between NBA teams and their affiliates; however, adding four teams only scratches the surface of the opportunities the G League could provide the NBA.

This author proposes the NBA look beyond the status quo of professional basketball in the United States and its minor league system as an answer to addressing the NCAA's short-comings and the NBA's desire for international growth. The solution lies in building the G League's international presence in order to build the NBA's international presence. As such, the NBA should selectively acquire basketball leagues around the world and reconfigure those leagues to be part of the G League, with each team having an affiliation to an NBA team and NBA teams having multiple affiliate teams, much like Major League Baseball's farm system.

This author expounds on this solution in four parts. First, I will examine the NBA's current problems in greater detail. Second, I will explore the current international landscape of professional basketball leagues. Third, I will explain this proposal in further detail, and fourth, I will analyze the implications of this idea and the potential benefits it provides the NBA.

⁴ *Id.*

⁵ *Id.*

⁶ Jack Maloney, *Obama: NBA Should Strengthen G League So NCAA Isn't Serving as a 'Farm System'*, CBS SPORTS (Feb. 27, 2018), <https://www.cbssports.com/nba/news/obama-nba-should-strengthen-g-league-so-ncaa-isnt-serving-as-a-farm-system/>.

⁷ *NBA G League Franchise Map*, NBA G LEAGUE, <http://gleague.nba.com/franchise-map/>.

CURRENT NBA PROBLEMS

Despite its success and popularity, the current state of the NBA is riddled with various problems that stem from struggles within the NBA and a call on the NBA to offer solutions to the NCAA's existing issues. Although the NCAA could make changes within its own organization to prevent scandal, its reach and power are limited. This section will explain in further detail the difficulties the NBA is facing both internally and externally so as to best understand the need for reform in this current system. These difficulties include critiques regarding the one-and-done rule, the FBI investigation in many collegiate basketball programs, the saturation of the NBA in the U.S. market, and the expenses and logistics associated with expanding the organization's international market.

The NBA's current rule regarding draft eligibility states: "A player shall be eligible to be signed a (G League) Player Contract only if he has satisfied all applicable requirements of Section (a) below, and one of the requirements of Section (b) below:

a. The players (i) is or will be at least eighteen (18) years of age during the calendar year in which the Player Draft is held, and (ii) with respect to a player who is not an International player has graduated from high school (or if the player did not graduate from high school, the class with which the player would have graduated had he graduated from high school has graduated); and

b. Either (i) the player has NOT attended a college or university in the United States or Canada during the academic year that takes place during all or any part of the season; (ii) the player has attended a college or university in the United States or Canada during the academic year that takes place during all or any part of the season but is no longer eligible in the current academic year (including by enrolling) to play basketball for the college or university during the season at the time of signing the Player Contract; or (iii) the player has no remaining intercollegiate basketball eligibility."⁸

⁸ Jonathan Givony, *Top NBA Prospects Denied Eligibility by G League*, ESPN (Jan. 11, 2018), http://www.espn.com/nba/story/_id/22046425/top-nba-prospects-denied-eligibility-g-league.

Michael McCann writes, the idea that recent high school graduates are immature, ill-advised, and unprepared to play in the NBA is a myth, citing data that proves the contrary to be true.⁹ Other critics believe the NBA's rule is an unnecessary restriction, especially considering a player's decision to leave college early or bypass it entirely might be based on a number of factors.¹⁰ For example, players like USC's De'Anthony Melton and Louisville's Brian Bowen left their respective schools after being named as players involved in the current FBI investigation.¹¹ Other players, such as LiAngelo Ball, choose to leave college voluntarily.¹² And still others, looking to have an income upon high school graduation, go overseas to play professionally since they cannot do so under the current NBA eligibility rule.¹³

While it is easy to assume that an American basketball player is opting to play overseas due to a desire to kick start a professional career, that is not always the case. Players leave for a myriad of reasons such as higher pay and different cultural experiences. For example, Brandon Jennings, point guard for the Milwaukee Bucks, considered playing for the University of Arizona to bide his time before entering the NBA Draft but decided to play overseas after signing a \$1.65 million contract with an Italian professional team; however, Jennings's overseas venture offered much more for him than money as he had never been outside the United States before signing with the international team.¹⁴

Jennings and other players credit their success in the NBA to their time playing abroad. While a college basketball career would have helped them develop their skills in the game, these players say their time spent playing in a professional league acclimated them to the hostility that can come from fans in a professional

⁹ Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. J. SPORTS & ENT. L.J. 113 (2004).

¹⁰ Givony, http://www.espn.com/nba/story/_id/22046425/top-nba-prospects-denied-eligibility-g-league.

¹¹ *Id.*

¹² *Id.*

¹³ Max Blau, *Brandon Jennings, Kyle Singler, and Others Talk about Playing Basketball Overseas*, GRANTLAND (Dec. 7, 2012), <http://grantland.com/the-triangle/brandon-jennings-kyle-singler-and-others-talk-about-playing-basketball-overseas/>.

¹⁴ *Id.*

environment and the demands of a professional basketball player's schedule that collegiate athletes do not experience in a college basketball career.¹⁵ As Robbie Hummel, former collegiate and NBA player who had multiple stints in foreign basketball leagues put it, "In college, basketball is like a job, but you have class, social activities, and homework to take up all your time, as well, and also in the NBA, it's your job to work at basketball and be the best player you can be."¹⁶

The one-and-done rule serves more like a blanket rule that does not take into consideration a player's reasoning or purpose for seeking draft eligibility immediately after high school or for leaving their universities mid-season. One NBA team's general manager made a point to say society does not limit what a person may do once they graduate high school so long as they are qualified for their chosen work and argued the NBA should be no different.¹⁷ Although this rule is not necessarily an obstacle for the NBA, other than the fact that it has the potential to keep talented players from entering the draft at a younger age, it does spark controversy and criticism amongst its fans and observers especially with a growing sentiment that the NCAA should pay college athletes. It also could serve as the impetus for some coaches to attempt to compensate players in order to build their programs at the risk of violating NCAA rules and, in some cases, federal law.¹⁸

This year, perhaps more than most, has placed the NBA under particular scrutiny as disgruntled college basketball fans have called upon the NBA to offer solutions that will prevent or resolve problems and debates concerning paying college athletes.¹⁹

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Givony, http://www.espn.com/nba/story/_/id/22046425/top-nba-prospects-denied-eligibility-g-league.

¹⁸ Mitch Sherman, *Everything You Need to Know About the College Basketball Scandal*, ESPN (February 23, 2018), http://www.espn.com/mens-college-basketball/story/_/id/22555512/explaining-ncaa-college-basketball-scandal-players-coaches-agents.

¹⁹ Dave McMenamin, *LeBron James Calls NCAA 'Corrupt' in Wake of Scandals*, ESPN (FEB. 27, 2018), http://www.espn.com/nba/story/_/id/22596036/lebron-james-calls-ncaa-corrupt-says-nba-give-alternative; Maloney, <https://www.cbssports.com/nba/news/obama-nba-should-strengthen-g-league-so-ncaa-isnt-serving-as-a-farm-system/>.

The most blatant and pressing problem for the NCAA is the FBI investigation concerning allegations that executives at shoe companies were funneling money to schools through financial advisors in order to pay players to attend those institutions and ultimately promote certain shoe brands.²⁰ Although this problem does not implicate or affect the NBA directly, it does put more pressure on the NBA to offer a solution that will prevent such scandals from recurring.

The third problem the NBA is facing is that it is quickly approaching, if it has not already reached, a saturation of the U.S. market.²¹ NBA officials have discussed creating new teams, and, despite the appearance of saturation, Silver is still throwing out ideas regarding expansion of the League in the U.S.²² Finding a desirable location for an additional team would require extensive research to determine which geographic area would be the most beneficial to the NBA, but it would also require a restructuring of the league to allow for even distribution of teams in the conferences.²³

The fourth problem the NBA faces arises from the financial and logistical difficulties associated with expanding the NBA. There is no doubt the NBA has pulled in a large fan base from countries around the world, but the international market expansion is miniscule compared to what it could be. Silver has expressed interest in placing a future NBA team in a foreign city,

²⁰ Sherman, http://www.espn.com/mens-college-basketball/story/_/id/22555512/explaining-ncaa-college-basketball-scandal-players-coaches-agents.

²¹ The Associated Press, *Column: US Leagues are on the Verge of Going International*, THE NEW YORK TIMES (Apr. 27, 2018, 5:31 PM), <https://www.nytimes.com/aponline/2018/04/27/sports/ap-paul-newberry-going-international.html>.

²² Matt Bonesteel, *Adam Silver Says NBA Expansion Discussion is 'Inevitable,' Specifically Mentions Seattle*, THE WASHINGTON POST (July 26, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/07/26/adam-silver-says-nba-expansion-discussion-is-inevitable-specifically-mentions-seattle/?utm_term=.273f3e084c5d.

²³ Tom Ziller, *The NBA Might Really Add New Teams. Here's What It Would Take*, SB NATION (Feb. 13, 2017, 10:49 AM), <https://www.sbnation.com/2017/2/13/14596586/nba-expansion-louisville-seattle-adam-silver>.

most likely Mexico City.²⁴ He explained that starting a team in Mexico City would allow the NBA to further its reach in the Latin American market while simultaneously choosing a location that would allow feasible travel during the season.²⁵

Silver and other League officials have considered expanding to other international markets such as China or Europe but explain that until the speed of air travel increases, the logistics of placing one team in a distant location would not be realistic.²⁶ They went on to explain, not only does it take too much time to travel from those places to the U.S., but the extensive travel would also put too much wear on the athletes.²⁷ As a result, the NBA has settled with having teams take part in the NBA Global Games, traveling to and hosting teams from other countries, each year.²⁸

So long as these problems persist, the NBA will continue to fight an uphill battle when it comes to appeasing fans who are looking to the NBA to resolve a number of issues their policies have created in collegiate basketball, growing the NBA's profitability, as well as expanding its international reach. The NBA cannot afford to turn a blind eye to the problems plaguing the NCAA. Rather, it should capitalize on the opportunity by offering solutions. By doing so, the NBA might also find answers to its own problems of market saturation and limited international expansion.

CURRENT INTERNATIONAL LANDSCAPE

Although the NBA is the most well-known basketball league in the world, there are a number of international leagues that

²⁴ Timothy Rapp, *Adam Silver Talks 82-Game Season, Possible International Franchises in NBA*, BLEACHER REPORT (Oct. 5, 2017), <http://bleacherreport.com/articles/2737101-adam-silver-talks-82-game-season-possible-international-franchises-in-nba>.

²⁵ *Id.*

²⁶ Sam Amick, *As NBA Shoots for the Stars in Growing Game, China and Europe are a "One-Off" – for Now*, USA TODAY (Oct. 5, 2017, 7:31 AM), <https://www.usatoday.com/story/sports/nba/columnist/sam-amick/2017/10/05/nba-overseas-china-europe-regular-season-technology/734611001/>.

²⁷ *Id.*

²⁸ Rapp, <http://bleacherreport.com/articles/2737101-adam-silver-talks-82-game-season-possible-international-franchises-in-nba>.

have relatively strong fan bases and receive international attention. In one article, Fran Fraschilla listed the top 14 basketball leagues beyond the NBA.²⁹ These leagues include the EuroLeague, EuroCup, Spain's Liga ACB, Turkish Basketball Super League, Russia's VTB United League, Italy's Lega Basket Serie A, France's LNB Pro A, The Greek Basket League, Germany's Basketball Bundesliga, FIBA's Basketball Champions League, Adriatic League, Australia's National Basketball League, Israeli Basketball Premier League, and the Chinese Basketball Association.³⁰ These leagues have various histories, structures, and growth opportunities similar to the NBA.

European basketball leagues tend to take a tiered approach in which teams compete in certain leagues only after they have met performance expectations in smaller national leagues. The EuroLeague, for example, manages premier basketball tournaments in Europe including the Turkish Airlines EuroLeague and the 7DAYS EuroCup.³¹ The member teams play in EuroLeague games on weekdays and games for their national leagues on weekends.³² The EuroCup falls under the EuroLeague's umbrella but operates using different teams than are in the EuroLeague tier.³³ Teams' qualifications for the tournament are based on their successes in their domestic leagues and other competitions as well as their invitation to compete from the EuroLeague. Teams that perform well at the EuroCup are eligible to move up to the EuroLeague the following season.³⁴

The structure of these leagues, although not perfectly comparable to the NBA's structure, is what makes many of these leagues an excellent opportunity for NBA acquisition. Their concept of promotion based on strong performances throughout the year is a parallel to the theory behind the G League in which

²⁹ Fran Fraschilla, *Top Basketball Leagues in the World outside the NBA*, ESPN (Dec. 7, 2017), http://www.espn.com/nba/story/_id/21691644/fran-fraschilla-ranks-world-top-basketball-leagues-nba.

³⁰ *Id.*

³¹ *About Euroleague Basketball*, EUROLEAGUE BASKETBALL, <http://www.euroleaguebasketball.net/euroleague-basketball/about>.

³² Fraschilla, <https://abcnews.go.com/Sports/top-12-basketball-leagues-world-nba/story?id=44826666>.

³³ *EuroCup 2017-2018 Teams*, EUROCUP, <http://www.eurocupbasketball.com/eurocup/competition/teams>.

³⁴ *Id.*

players and coaches must perform well enough to be considered eligible to play in the NBA. This organizational structure is not only similar to the G League's theory of promotion but it has also prepared its fan bases to cheer on their teams with hopes of seeing them promoted to a top-tier league. In the NBA's case, teams themselves will not be promoted, but the athletes will have the opportunity to do so, and having fans attached to those athletes as they move up the ranks in the NBA would be beneficial to the League.

These leagues are also familiar with the idea of welcoming players from outside Europe as many of them have hosted American athletes seeking to play at a professional level that, for various reasons, could not play in the NBA.³⁵ Some leagues, however, put certain restrictions on the number of foreign players they allow on their teams.³⁶ Italy's Lega Basket Serie A is one such league as it requires a team's roster to have five Italian players at all times.³⁷ The remaining slots can either be filled by five players from outside the European Union or three players from outside the European Union and four players from the European Union.³⁸

Some leagues outside Europe, on the other hand, have a more similar structure to the NBA such as Australia's National Basketball League (NBL).³⁹ Unlike many of the European leagues, the NBL is not a tiered system whose teams are constantly competing for a spot in the top-tiered leagues. Rather, the NBL is simply composed of eight teams, seven in Australia and one in New Zealand, that compete amongst each other during the regular season and ultimately compete to win the league's championship.⁴⁰ Likewise, the Chinese Basketball Association does not use a tiered system but has a regular season culminating

³⁵ Jesse Kramer, *Eight Former One-and-Dones Who Found Pro Success Overseas*, SPORTS ILLUSTRATED (May 10, 2016), <https://www.si.com/nba/draft-past-one-and-dones-overseas-daequan-cook-donte-greene>.

³⁶ Fraschilla, <https://abcnews.go.com/Sports/top-12-basketball-leagues-world-nba/story?id=44826666>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

in playoffs with no further advancement beyond the league's championship.⁴¹

The Chinese Basketball Association is different than other foreign leagues in that it is highly regulated by the government.⁴² Iraq's Superleague also operates under similar regulations.⁴³ This variation is perhaps the most unlike the NBA as it is not merely a structural difference in the league's operation. Rather, government control alters the core of the league's operation and leadership. As such, this structure is likely incompatible with the NBA's operation.

Each of these leagues presents similarities and differences that should be considered when deciding which leagues might be viable options for the NBA to acquire. Additionally, exploring the similarities and differences between these leagues provides the NBA with a case study, if you will, of what makes basketball leagues profitable and successful across the globe.

THE BEST SOLUTION FOR THE NBA'S PROBLEMS

One of the NBA's greatest problems, a saturated U.S. market, could be one of its greatest assets.⁴⁴ In order to continue growing, as well as resolve the other issues discussed above, the NBA must think of a realistic solution. The NBA has already expressed an interest in using the G League as part of its international expansion, suggesting the possibility of placing a G League team in Mexico City;⁴⁵ however, the better solution is not to place one or two G League teams overseas but, rather, to use the G- League as an opportunity for economic growth. This author proposes the NBA combine its international expansion and G

⁴¹ Frascilla, <https://abcnews.go.com/Sports/top-12-basketball-leagues-world-nba/story?id=44826666>.

⁴² Ben Baden, *Re-Thinking the Game Plan*, CHINA BUSINESS REVIEW (Oct. 1, 2011), <https://www.chinabusinessreview.com/re-thinking-the-game-plan/>.

⁴³ Peter Holley, *Why These Pro Players are Willing to Play Basketball in Iraq for \$20k a Month*, THE WASHINGTON POST (Mar. 17, 2015) https://www.washingtonpost.com/news/early-lead/wp/2015/03/17/why-these-pro-players-are-willing-to-play-basketball-in-iraq-for-20k-a-month/?noredirect=on&utm_term=.5a4ad2fc727b.

⁴⁴ The Associated Press, <https://www.nytimes.com/aponline/2018/04/27/sports/ap-paul-newberry-going-international.html>.

⁴⁵ Maloney, <https://www.cbssports.com/nba/news/obama-nba-should-strengthen-g-league-so-ncaa-isnt-serving-as-a-farm-system/>.

League development by acquiring foreign basketball leagues and restructuring them as additional G League teams. This solution will allow the NBA to continue to expand without having to reconfigure the NBA as a whole.

Expanding the G League will allow the NBA to develop a true farm league. Although the G League currently gives players, coaches, and officials opportunities to hone their skills before advancing to NBA clubs, the program is too small to provide the best opportunities for development of the NBA and future players alike. Major League Baseball's minor league system is the best example for the NBA to follow and ultimately mirror in developing the G League. MLB's minor league has five subgroups: Triple-A, Double-A, Class A (also known as Single-A), Class A Short Season, and Rookie.⁴⁶ Additionally, each subgroup is divided into its own league.⁴⁷ All of these teams have affiliation contracts with MLB teams even though a majority of the minor league teams are not owned by Major League clubs.⁴⁸ These affiliations are established through Player Development Contracts (PDC) between a Major League club and minor league team and can change for a variety of reasons including the teams' facilities and desired geographic locations.⁴⁹ Players are usually sent to a minor league team to develop their skills before they are called up to the Major League. As such, players from the Double-A and Triple-A systems are regularly called up to the Major League.

The NBA should look beyond athletics and see how other brands have successfully tackled global expansion. Two powerhouse businesses that are known world-wide and have experienced economic growth while staying true to their brands are the Coca-Cola Company and Apple. The Coca-Cola Company's success can be attributed to a combination of branding and franchising as well as the business practices implemented by Coke overall.⁵⁰ Coke started in the U.S. in 1886 and is now present in

⁴⁶ *Overview of Baseball's Minor League Organization*, THE SPORTS ADVISORY GROUP <http://www.thesportsadvisorygroup.com/resource-library/business-of-sports/overview-of-baseballs-minor-league-organization/>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Richard Feloni, *7 Strategies Coca-Cola Used to Become One of the World's Most Recognizable Brands*, BUSINESS INSIDER (Feb. 19, 2016, 2:09 PM),

more than 200 countries.⁵¹ Although Coke's products are consumable products as opposed to the NBA's product of entertainment, the NBA can apply a number of the Company's globalization and franchising practices to its own product in order to achieve similar results.

Coke has used seven strategies to expand its brand worldwide. These strategies include having a unique, market-tested formula; using a timeless font for its logo; distributing its product in a proprietary bottle; holding retailers responsible for maintaining its high standard; keeping its consumer price fixed for 70 years; using word-of-mouth advertising and developing a voice; and adopting a franchise model.⁵² While some of these strategies apply strictly to the beverage such as a market-tested formula, other strategies are applicable to the NBA's growth as well. For example, if the NBA were to place G League teams overseas, the NBA would need to monitor those teams and make sure they are held to the NBA's standards. Further, the NBA can even take a lesson from the "New Coke" fiasco in the 1980s by learning to stay true to its product.⁵³ Additionally, and perhaps most importantly, the NBA should ultimately view placing branches of the G League overseas as a franchising opportunity. The NBA does not need to reinvent the wheel when building basketball programs overseas. The League has already proven its international success and ability to adapt to new markets by garnering fans from around the world; thus, it does not need to alter the game itself or even how the operation is run logistically. It merely needs to expand its services so that fans around the world can have a more personal experience with the NBA.

The NBA can learn from Apple as well. Apple is ranked as the number one company by brand value internationally at \$184 billion.⁵⁴ One article noted the peculiarity in Apple's international popularity in that the product has not changed to adapt to

<http://www.businessinsider.com/strategies-coca-cola-used-to-become-an-iconic-brand-2016-2#7-it-adopted-a-franchise-model-7>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Aimee Picchi, *These are the World's Most Valuable Brands*, CBS NEWS (Sep. 25, 2017, 1:11 PM), <https://www.cbsnews.com/news/brands-most-valuable-in-the-world-interbrand/>.

regions.⁵⁵ Rather, as the author put it, “The thing about going global is not just about offering a product to several markets around the world. It’s also about finding the denominator for a particular product that is region-blind.”⁵⁶ This is not to say that Apple does not use any localization practices. In fact, the article goes on to give four methods Apple has used to personalize its products in various regions including opening stores around the world, choosing carefully the countries in which it is going to do business, and making a standard website that is translated into the local languages of the countries in which it has stores.⁵⁷ The author’s final remark regarding Apple’s success internationally is the overarching argument that the company doesn’t change its product to match various cultures.⁵⁸ Instead, by remaining true to its product, Apple becomes the culture, and people adapt to the product as opposed to the product matching the people.⁵⁹

In the game of basketball and professional sports overall, there is no reason the NBA cannot grow in popularity like Apple and set the pace for the market. The best way for the NBA to set the pace is to focus on other areas of its brand outside the NBA teams. One author explained Coca-Cola’s method of achieving that goal by saying, “The Coca-Cola Company isn’t one giant company; it’s a system of small companies.”⁶⁰ As it stands now, the NBA has smaller companies in its G League teams, but these companies are incredibly overshadowed by the NBA teams. The NBA would be best served by building the G League internationally using Coke’s model, while using the globalization and localization practices of Apple. The NBA should choose carefully the countries in which it will expand as well as make language specific websites and streaming services for each of these countries to get the most benefit from expansion. Applying these techniques to the already

⁵⁵ Francoise Hovivian, *Globalization: Apple’s One-Size-Fits-All Approach*, BRAND QUARTERLY (Dec. 19, 2014), <http://www.brandquarterly.com/globalization-apples-one-size-fits-approach>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Feloni, <http://www.businessinsider.com/strategies-coca-cola-used-to-become-an-iconic-brand-2016-2#7-it-adopted-a-franchise-model-7>.

popular sport of basketball will allow the NBA to develop in ways that would not be possible by simply creating a couple of new NBA teams in foreign countries.

The NBA should implement these business practices in its minor league system in order to achieve similar results. This implementation would best take place in three phases: addressing the logistical issues associated with expanding the G League, maintaining and improving the current development league in the United States, and selecting leagues in which to expand internationally.

I. Addressing the Logistical Issues Associated with Expansion

The first logistical issue of this proposal addresses player acquisition. The NBA currently holds one draft each year in which each team has the potential to select two players to add to their rosters if they have not traded their draft picks. The athletes are then considered part of the NBA team and are not required to spend any time in the G League. Filling multiple NBA affiliate team rosters with players would require the NBA to expand the number of players teams draft each year. G League teams currently have their own methods of acquiring players that are, for the most part, not associated with the Draft. Its two biggest methods for acquiring players with no previous affiliation with the NBA are the G League Draft and local tryouts.⁶¹ In order to sustain successful, potentially multiple, development teams, the NBA should extend its Draft procedures.

The most effective way to do this would be to create a bifurcated draft in which each team would select a total of four players instead of two. The first phase of the draft should be specifically for the G League and limited to athletes graduating from high school. The second phase of the draft should be like that of the current NBA Draft; however, in order to alleviate the problems associated with the one-and-done rule, the NBA should raise the requirements to limit this draft to athletes finishing their junior or senior years in college as opposed to their freshman and sophomore years as well. Of course, this bifurcated system

⁶¹ *NBA G League 101: How Rosters are Built*, NBA G LEAGUE, <http://gleague.nba.com/how-rosters-are-built/>.

would be most successful if the NCAA addressed its eligibility rules. The G League draft would lose its appeal if recent high school graduates weren't drafted but still lost their amateur status simply from entering the draft. Therefore, if an athlete declares for the G League draft upon high school graduation but is not drafted, that athlete should still be afforded the opportunity to play basketball in college until he can declare for the NBA Draft; however, the NBA's alterations are not dependent on NCAA action.

The only caveat to entering the G League draft is that if a player is drafted, he will be required to play in the G League at some level for two years before having the opportunity to move up to the NBA. This would guarantee the NBA that the players they draft will still receive the training and development they claim to seek by the implementation of the one-and-done rule. Aside from the mandatory two years in the G League, the players will still be considered professional basketball players and under the NBA umbrella. For example, the players will still receive a salary, albeit smaller than that of an NBA player. The player would also be subject to the rules and regulations of the NBA such as trades wherein the NBA affiliate would conduct the trade of their player to another development team.

The second logistical issue that would have to be addressed is the contractual agreement the G League teams and would have with their NBA affiliates. The MLB's model seems most successful in how it does not require an affiliate team to be owned by its counterpart, rather the two need only a contractual agreement that, once expired, would allow a team to renew the contract or seek affiliation with another program.⁶² The NBA and G League offices would be responsible for overseeing such contracts; however, the teams, like in the MLB, should have the freedom to negotiate their affiliations amongst themselves.⁶³ Once these logistical issues are addressed the NBA can then focus on the structure of the G League expansion.

⁶² THE SPORTS ADVISORY GROUP, <http://www.thesportsadvisorygroup.com/resource-library/business-of-sports/overview-of-baseballs-minor-league-organization/>.

⁶³ *Id.*

II. Maintaining and Improving the Current Development League in the U.S.

First, this paper is in no way suggesting the NBA completely uproot its developmental league and move it overseas. Rather, this proposal offers a method of expansion for the NBA. Current G League teams should remain in place, giving fans in the U.S. the opportunity to observe players before they get called up. Realistically, the G League in the U.S. would be best served as the top tier of the system. Players in the minor league's Triple-A are most-often the players called to the big leagues.⁶⁴ As such, it would be more practical to keep the players who are most likely to be called to the NBA in the U.S. because they would have less distance to travel and less complications adjusting to an NBA schedule while making the transition. The remaining leagues are the teams that should be placed overseas seeing as those players would most likely be in the farm system longer as they work their way up to the NBA.

III. Selecting Leagues in Which to Expand Internationally

The G League offers the NBA growth for a number of reasons. First, it provides fans an opportunity to experience professional basketball even if they are not able to attend an NBA game. Second, it provides brand expansion for the NBA. Third, it gives the NBA an opportunity to observe players and for players to grow as athletes all while under the NBA umbrella. This growth, however, does not have to be limited to the borders of the U.S. Instead, growth would be more likely if these development leagues were placed throughout the world.

In this case, the NBA does not need to completely recreate the G League nor does it need to establish a new league overseas. Instead, the NBA should acquire one international basketball league at a time, using the league's current structure and teams to become the new G League teams. The G League would then operate as it does in the U.S. but with exposure to new fans, more

⁶⁴ *What is Minor League Baseball and Other Frequently Asked Questions about the MiLB*, PRO BASEBALL INSIDER (2014), <http://probaseballinsider.com/what-is-minor-league-baseball/>.

learning opportunities for the athletes, and more affordable, practical solutions to the NBA's market expansion.

There are a number of factors the NBA should consider when choosing which leagues to purchase. These factors include the stability of the leagues, the potential profit these leagues offer, and the legal implications of expanding the G League to these geographic regions.⁶⁵ Moving the G League abroad would require the NBA to adapt their business operations to the political climate and economic structure in the regions in which these leagues are located. For example, if the NBA were to acquire a league in China, it would most likely have to alter its structure so as to fall in line with the demands of the country's governmental and economic structures.

Another consideration in choosing which teams to acquire is exposure. Although there are a number of professional basketball leagues overseas, some are strictly national leagues whereas other leagues are comprised of teams from multiple countries. One of these leagues would be best for the NBA to buy in order to accomplish its goal of exposing its brand and reaching a broader fan base. Taking these factors into consideration, the best league for the NBA to purchase to begin its expansion would be the Adriatic League, also known as the ABA League.

The ABA League has been ranked the eighth league in the world outside the NBA.⁶⁶ The ABA League currently has twelve teams located in five countries.⁶⁷ This league has funneled players to the NBA and has focused on player development.⁶⁸ Further, the teams in this league are not considered to be in the top half of European teams, so the club owners would be more likely to sell some of the players, once developed, to higher ranking European teams, thus turning a profit.⁶⁹

As such, the ABA League appears to be one of the best leagues the NBA could buy. With only 12 teams, there would not

⁶⁵ Marc Edelman & Brian Doyle, *Antitrust and 'Free Movement' Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 405 (2009).

⁶⁶ Fraschilla, <https://abcnews.go.com/Sports/top-12-basketball-leagues-world-nba/story?id=44826666>.

⁶⁷ *Club Information*, ABA LIGA, <http://www.aba-liga.com/KK.php?id=12>.

⁶⁸ Fraschilla, <https://abcnews.go.com/Sports/top-12-basketball-leagues-world-nba/story?id=44826666>.

⁶⁹ *Id.*

be enough franchises to have an affiliate for each NBA team, and it would take time to establish more teams within this league to provide enough teams for every NBA team to have an affiliate.⁷⁰ Such growth is likely, however, and the ABA League appears to present the greatest likelihood of doing so. Further, the ABA League's presence in five European countries presents an incredible opportunity for the NBA as it would have a wide market observing NBA prospects. The ABA League appears to be the most sensible option when it comes to acquiring a league that would be the best investment, providing exposure to the NBA, and giving athletes and coaches opportunities to develop their skills. The ultimate goal is for the NBA to select a league that would allow for expansion and growth while providing exposure.

THE SOLUTION IN ACTION

As mentioned previously, the NBA faces a number of obstacles when it comes to appeasing its fans, growing its profits, and expanding its international reach. If the NBA were to expand the G League by purchasing select foreign basketball leagues, the NBA would be able to resolve many of its current expansion issues. Additionally, placing G League teams overseas would allow for expansion and growth that is not available with the NBA's current structure. This section revisits each of those obstacles and addresses how this proposal would provide a solution to these problems.

First, moving the G League could give the NBA reason to eliminate the one-and-done rule and, thus, appease the critics who find the rule to be unnecessary and counterproductive. Expanding the G League internationally would not only make fans happy, but it would also meet the NBA's reasons for its current rules which are that it would give the athletes an opportunity to mature and better their skills before playing in the NBA. Any player who is drafted immediately after high school would be required to spend two years in the G League, playing in front of crowds, developing their basketball skills by playing against other athletes who are on a professional track, and acclimating themselves to a schedule

⁷⁰ *Club Information*, ABA LIGA, <http://www.aba-liga.com/KK.php?id=12>.

structured more like a professional athlete's schedule than a student athlete's schedule.

Second, expanding the G League internationally could prevent some of the illegal enticements plaguing the NCAA. Eliminating the one-and-done rule and moving the G League overseas would give recent high school graduates the opportunity to play for pay even if they were not receiving big contracts like those of the NBA athletes. Receiving such payments as well as receiving exposure in a professional league on an international stage could make illegal offers to play at particular universities less appealing. Ultimately, this solution not only benefits the NBA but it also benefits the NCAA as it would protect them from these scandals as well.

Third, purchasing a foreign basketball league would be an incredibly beneficial solution to the NBA's currently saturated market. Basketball fans in the countries in which G League teams would be placed would likely be drawn to attend G League games because it would give them the opportunity to watch soon-to-be-basketball greats. The fans would also likely follow their favorite G League team's counterpart in the U.S., thus adding to the NBA fan base. This would also alleviate the NBA's concerns for needing to start more teams in Mexico City or another foreign city because it would provide international exposure while maintaining the structure of the NBA teams, preventing the NBA from worrying about conference realignment or finding another city in which to create another team to keep the number of teams even.

The NBA should be methodical in how it moves forward. Instead of compartmentalizing G League development and NBA expansion, it should couple the two and expand the G League overseas. Combining these efforts is not only practical but it is also efficient as building the G League overseas and in the United States will automatically bring more attention to the NBA as a whole. While the G League is not widely popular now, pouring resources and talent into the program will increase the amount of time and attention fans will dedicate to its teams, and making an expansion effort of this magnitude will ensure the NBA follows Larry Bird's advice to keep changing in order to remain the best.

DAMN DANIELS! BACK AT IT AGAIN WITH THE FANTASY SPORTS

Publicity Rights in the Realm of Fantasy Sports

*Elizabeth Thornburg **

INTRODUCTION

Fantasy Sports evolved from a pastime amongst friends in a deli to a worldwide, internet phenomenon. With the increase in exposure and change in format, comes many challenges. This paper will attempt to navigate those difficulties and provide possible solutions suitable for the current landscape. Part I of this paper discusses the evolution of the landscape of fantasy sports from its inception to the present. Part II discusses the format of a typical fantasy sports league. Part III of this paper discusses the publicity rights of professional and collegiate athletes surrounding fantasy sports. Part IV suggests a solution to the federal publicity rights problem.

I. The Origins of Fantasy Sports

A. Rotisserie Leagues to the Internet Age

Since the beginning of professional sports, fans have been drawn to the idea of simulating their own team.¹ From the 1920s to the 1960s various games were introduced to allow fans to use player stats to run their own team and participate in head to head matchups.² The earliest origins of what we know today as fantasy sports can be traced back to the 1960s when a professor created a structure to draft major league baseball players for a \$10 entry

¹ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 5 (2012)

² *Id.*

fee.³ The Rotisserie League, named for the deli where the first meetings were held, grew from the professor's model into the eventual "father" of today's fantasy sports model.⁴ Each participant paid a \$260 entry fee which was then used by the participants to bid on players from Major League Baseball's National League rosters.⁵ Points were earned based on real life player statistics.⁶ The member with the most points at the end of the season received a cash prize.⁷

The popularity of the Rotisserie League grew through word of mouth, coverage by the media, and a book written to "introduce the game to the masses,"⁸ The game grew amongst statistically minded fans and was modified per group to fit their needs with some even adding an additional category for pitching statistics or moving scoring from a points based system to a head-to-head format.⁹ Even with all of the individual modifications the core rules of the Rotisserie League remained the same and were eventually adopted by the online fantasy sports leagues we know today.¹⁰

B. The Internet Age and Beyond

Before the internet, fantasy sports leagues were viewed by outsiders as "activities for outcasts and engaged in by those presumed to be overly bookish and socially challenged" due to the amount of paperwork involved in compiling team and player statistics.¹¹ The internet boom of the 1990s brought a whole new

³ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 5-6 (2012)

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 7-8 (2012)

⁸ *Id.*

⁹ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 8-9 (2012)

¹⁰ *Id.*

¹¹ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 9-10 (2012)

breath to fantasy sports. Suddenly statistics were readily available to the masses in their most updated format.¹² The internet age also greatly expanded the player pool. Suddenly a variety of players were available at your fingertips and the stress of finding a league of like-minded players seemed to vanish.¹³ Now instead of seeking out neighbors or coworkers within a specific zip code you can set up a league with anyone around the world with an internet connection. Knowing the popularity of fantasy sports was about to explode numerous sports and entertainment companies began to create their own hosting platforms with ESPN being the first in 1995.¹⁴

Since the 1990s fantasy sports have grown to a five-billion-dollar industry and have expanded to include most sports and even television shows, such as the Bachelor and RuPaul's Drag Race, have some sort of fantasy set up.¹⁵ The most popular fantasy sport today is football with approximately twenty million players per year and generates revenue that exceeds the rest of the fantasy sports world combined.¹⁶

C. Fantasy Sports v. Daily Fantasy Sports

Along with traditional fantasy sports leagues there is also Daily Fantasy Sports (DFS). Daily Fantasy Sports operate in many of the same ways as a traditional fantasy season except for the "season" length.¹⁷ Participants will select players, choose their starting lineup, pay fees, and collect prize money all in the span of a single day.¹⁸ According to the founder of DFS site, DraftStreet.com, DFS "appeal to aggressive fantasy sports players looking for more instant gratification than traditional fantasy leagues can offer."¹⁹

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 10-11 (2012)

¹⁶ *Id.*

¹⁷ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 16 (2012)

¹⁸ *Id.*

¹⁹ *Id.*

II. How to Set Up a Fantasy Sports League

A. Player Selection

Even with the introduction of the internet into the fantasy sports world, the format for drafting players onto your fantasy team remains largely unchanged. Taken from the earliest days of the Rotisserie League, participants may bid on a player to fill their roster.²⁰ The participant with the highest bid wins.²¹ This continues until the participant's roster is full of "purchased" players.²²

The most common format of selecting players for a fantasy team is a draft.²³ A fantasy draft operates similarly to a league draft. Each participant selects a player in rounds sometimes set up in a "snake format".²⁴ Snake formats usually operate with the participant who selected first in the prior round selecting last in the following round and so on until each participant has a full roster.²⁵

The rarest player selection format is done by random software allocation based on the leagues host site.²⁶ ESPN includes an "Autopick Draft Option" on its site which will "automatically draft players to each team in the league on a scheduled draft date" based on ESPN's computer program.²⁷

B. Season Length

Participants in fantasy sports also have the option to choose a season length. The most popular length coincides with the

²⁰ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 13-15 (2012)

²¹ *Id.*

²² *Id.* The auction format may be "true", as described above, or "modified". Modified Auctions are popular in shorter season leagues because multiple participants may bid on the same player.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

length of the professional sports season.²⁸ Known as seasonal fantasy sports, the start of the fantasy season, or draft day, would coincide with the first day of the sports season and would conclude on the final day of the regular season.²⁹ None of the player rosters or other information carries over from one season to the next.³⁰

Participants can also set up perennial leagues where rosters will carry over from one year to the next.³¹ Rather than the season ending the league just goes into an “off season” where, in a similar fashion to the professional leagues, participants can make trades or “keep” members to carry over to the roster of the next season.³² Holes in the roster can be filled prior to the start of the next season with a new draft or auction.³³

C. Choosing a Host Site

Fantasy leagues cannot be held online without a host site. Host sites are classified as websites where participant data is stored, player statistics are updated, and participants can make changes to their roster or edit their “starting lineup” for the week.³⁴ Some host sites offer free play, while others charge an entry fee.³⁵ The type of league a participant joins is up to what that particular individual or their league wants from the experience.

Free host sites include the likes of ESPN, Yahoo, CBS Sports, and others.³⁶ While Yahoo and ESPN only host basic, no fee fantasy sports, CBS has multiple formats from free to a Premium

²⁸ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 15-17 (2012)

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 19-21 (2012)

³⁵ *Id.*

³⁶ *Id.*

service for up to \$500 per team.³⁷ CBS Premium controls disbursing of any prize money, anywhere from 50% to 70% of the leagues entry fees, and collecting entry fees for the participants.³⁸ CBS' middle tier selection, CBS Commissioner, also charges entry fees, up to \$180 per league, and allows participants access to live scores and "complete control of... rules, scoring, and overall setup".³⁹ Most professional leagues also host some form of fantasy sports on their own site.⁴⁰

D. Participants

Any person who takes part in fantasy sports is a participant. The average participant is a male, in his 30s, with a bachelor's degree, has an income of around eighty-thousand-dollars, primarily competes against his real-life friends, and spends close to \$500 a year on fantasy sports.⁴¹ Some participants in the league are simply there to participate in the fantasy sport while others have specific jobs, such as treasurer or commissioner.

The treasurer is tasked with collecting and distributing any entry fees or prize money amongst the league members.⁴² In large or high stakes leagues this job and others may be assigned to a third party, such as LeagueSafe.⁴³ LeagueSafe allows members to move money directly from their bank account to LeagueSafe who then deposits all the funds into an FDIC insured bank account that gathers interest.⁴⁴ At the end of the season LeagueSafe disburses the fund in accordance with the league rules for a fee of \$3 per transaction.⁴⁵

The commissioner is tasked with setting and enforcing the rules for the league along with settling any disputes amongst

³⁷ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 19-21 (2012)

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 17-19 (2012)

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

participants over the rules.⁴⁶ Like the treasurer this role has moved towards outsourcing to a third-party.⁴⁷ The results of the third party's decision are not legally binding unless explicitly stated in the league rules.⁴⁸

III. Publicity Rights Issues Associated with Fantasy Sports

A. Publicity Rights of Professional Players

Athletes' whose image and likeness are used in fantasy sports have a right to publicity. Publicity rights evolved from the property and tort privacy laws.⁴⁹ Black's Law Dictionary defines publicity rights as, "the right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent."⁵⁰ The Supreme Court has summarized publicity rights as, "an economic incentive for [one] to make the investment required to [perform a skill] of interest to the public."⁵¹ While many federal circuits and the Supreme Court have ruled on publicity rights, the statutes argued over are state law. There are no federal rights to publicity statutes.

While there are no federal right to publicity statutes, many publicity rights cases end up in federal court based on diversity jurisdiction or a first amendment defense.⁵² The First Amendment, which creates the concept of free speech, has been used by some federal circuits to limit publicity rights.⁵³ In *Cardtoons v. Major League Baseball Players Association*, a baseball trading card manufacturer began to sell trading cards

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 42-45 (2012)

⁵⁰ BLACK'S LAW DICTIONARY (9th ed. 2009)

⁵¹ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1976)

⁵² Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 42-45 (2012)

⁵³ Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 2 *Duke Law and Technology Review*, 11-13 (2010)

depicting caricatures of Major League Baseball players.⁵⁴ The manufacturer sued the players' association for a declaration the association released that stated the manufacturer was violating the players' rights to publicity.⁵⁵ The Tenth Circuit ruled that application of a state statute was enough in an action between private parties to raise a claim on the restriction of freedom of expression.⁵⁶

Publicity rights have been addressed in the realm of fantasy sports with *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*.⁵⁷ In this case, Major League Baseball's media arm, Major League Baseball Advanced Media, was sued by C.B.C Distribution because they refused to license players identity and likeness⁵⁸ to C.B.C for use in C.B.C's fantasy sports game.⁵⁹ Instead C.B.C. was only allowed to use the players to advertise the MLB Advanced Media's competing platform in exchange for a share of the revenue.⁶⁰ Originally the claim was filed in federal court and contained elements of the Lanham Act plus a Missouri publicity rights claim, but eventually the federal claims were dropped leaving on the Missouri publicity rights claim.⁶¹ The elements of publicity rights in Missouri are:

“(1) That defendant used plaintiff's name as a symbol of his identity

(2) without consent

(3) and with the intent to obtain a commercial advantage.”⁶²

The court held that the first amendment protection trumped professional athletes' rights to publicity in the assignment of their names and statistics.⁶³ The First Amendment trumped the

⁵⁴ *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 962 (10th Cir. 1996)

⁵⁵ *Id.*

⁵⁶ *Id.* at 968

⁵⁷ *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 821 (8th Cir. 2007)

⁵⁸ *Id.* MLB Advanced Media was granted exclusive rights by the Major League Baseball Players Association, whom players assign the rights to license their image and likeness or to enter into any other contracts involving three or more players, to use players' names and statistics.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 822

⁶³ *Id.*

athletes' publicity rights for three reasons. First, the information of professional athletes was already in the public domain.⁶⁴ Second, players who appeared in these games "are already rewarded separately for their labors".⁶⁵ Lastly, consumers of fantasy sports services are not confused by the use of player information as the athlete endorsing the fantasy sport service.⁶⁶

1. *Can states regulate publicity rights on the internet for those outside of their state?*

The Commerce Clause, found in Article 1, Section 8, Clause 3 of the United States Constitution, gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."⁶⁷ Powers not granted to the federal government are given to the states under the 10th Amendment.⁶⁸ Since the Constitution gives Congress the power to regulate commerce, the states are over stepping by regulating commerce, such as fantasy sports online.

Since the internet is not confined by geographical boundaries, it is unconstitutional to hold one state to the legal standards of another when the parties at fault may have little to no connections to that state. As we saw in the *C.B.C. Distribution* case, the federal government was asked to use Missouri law to rule on an issue of a site's infringement of players' publicity rights when that site operated online and, by default, across the globe. This case was decided in federal court, based on diversity jurisdiction, which holds at a minimum the states in Missouri's federal circuit to the ruling and creates persuasive case law for the other federal districts all based solely off the law of one state.

a *Are Fantasy Sports Host Sites Commercial?*

According to the Court in, *Gridiron.com, Inc. v. National Football League, Players' Association* a website is purely

⁶⁴ *Id.* at 823

⁶⁵ *Id.* at 824 Noting, in separate paragraphs, the athletes' compensation through their salaries and compensation through other endorsement opportunities.

⁶⁶ *Id.* at 824.

⁶⁷ U.S. CONST. art. 1 § 8 cl. 3

⁶⁸ U.S. CONST. amend. 10,

commercial.⁶⁹ Gridiron.com was devoted to statistical information surrounding professional football and its athletes. Gridiron.com linked to other websites, Gridiron's fantasy football game, and third-party advertisements.⁷⁰ Gridiron.com secured the use of 150 athletes through contracts and licensing agreements.⁷¹ The NFL Players' Association sued for violation of the NFL Players' Contract and Licensing Agreement.⁷² The court held that a website was not a "product" under the agreement⁷³ and was not entitled to First Amendment protection because it was purely commercial unlike "novels, movies, music, magazines, and newspapers."⁷⁴ Because fantasy sports host sites fall very closely in line with the website in *Gridiron*, they are commercial in nature. This distinction does not necessarily extend to the rest of the websites on the internet, but this argument is crucial for professional athletes and sports leagues to get around the first amendment defense.

2. *In light of C.B.C. Distribution, can the athletes successfully counter a First Amendment Defense?*

The most compelling arguments are found in two cases related to publicity rights in video games. The first, *Palmer v. Schonhorn Enterprises, Inc.*,⁷⁵ professional golfers argued that the use of their statistics and images in a video game violated their publicity rights.⁷⁶ The court made a distinction between the use of statistics and other factual information and the use of the image of a professional athlete to sell products.⁷⁷ The court believed it was unjust for the producer of the game to exploit and profit from

⁶⁹ *Gridiron.com, Inc. v. Nat'l Football League, Players Ass'n, Inc.*, 106 F. Supp. 2d 1309 (S.D. Fla. 2000).

⁷⁰ *Id.* at 1313

⁷¹ *Id.*

⁷² *Id.* at 1311

⁷³ *Id.* at 1314

⁷⁴ *Id.* at 1315

⁷⁵ *Palmer v. Schonhorn Enter., Inc.*, 232 A.2d 458 (N.J. Super. Ct. 1967).

⁷⁶ *Id.* at 459

⁷⁷ *Id.* at 461 "While one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information." (quoting *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. Ct. App. 1952)).

the successes of another merely because their accomplishments were highly publicized.⁷⁸ The second case, *Uhlaender v. Henricksen*,⁷⁹ revolved around a board game that used the name and statistics of over 500 Major League Baseball players.⁸⁰ The court in *Uhlaender* relied heavily on the court in *Palmer* and found the use of the players' names and statistics was infringing the players' rights.⁸¹

This distinction can also be made for fantasy sports. Fantasy sports leagues draw in membership based on the performance of specific athletes in sports. If those athletes do not perform well then no one will want to choose them to be on their team. The participant will then choose to capitalize on the success of another athlete. The draw of fantasy sports is to act as manager of a professional sport team and has been since its earliest days. Capitalizing off the success of another merely because their successes are highly publicized forms the backbone of fantasy sports.

B. Publicity Rights of Collegiate Players

The Court in *C.B.C. Distribution* reasoned that using athletes' name and likeness was partially okay because, "players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements."⁸² Collegiate athletes are not compensated the same as professional athletes due to NCAA guidelines. According to the NCAA's guidelines for participation, college athletes must fit into their definition of amateurism.⁸³ These guidelines include accepting a salary for athletics, accepting prize money, participation with professionals and professional teams, and any financial assistance based on athletic skill or participation.⁸⁴ This means that collegiate athletes are not compensated on the same level as professional athletes. Based on

⁷⁸ *Id.* at 462

⁷⁹ *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1278 (D. Minn. 1970).

⁸⁰ *Id.*

⁸¹ *Id.* at 1282-1283

⁸² *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 824 (8th Cir. 2007)

⁸³ See *Amateurism*, NCAA, <http://www.ncaa.org/amateurism>

⁸⁴ *Id.*

the court's reasoning in *C.B.C. Distribution* future courts could rule in favor of the collegiate athletes.

Currently the Indiana Supreme Court is deciding this exact matter in *Daniels v. Fanduel, Inc.*⁸⁵ Originally the case was filed in the United States Court for the Southern District of Indiana.⁸⁶ Three former collegiate athletes, including Daniels, sued FanDuel and DraftKings, operators pay for play fantasy sports host sites, for use of their image on the site.⁸⁷ The three players were assigned fictitious salaries and statistics for their entries on the site.⁸⁸ Since the players were never professional athletes commentary on their likely performance to justify the fictitious salaries was also included.⁸⁹ The three athletes claim a violation of Indiana's publicity rights statute.⁹⁰ Indiana publicity rights cover,

“a personality's property interest in the personality's: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9) mannerisms.”⁹¹

FanDuel and DraftKings argued the information on their site met four exceptions laid out in Ind. Code. §32-36-1-1(c).⁹² The first

⁸⁵ *Daniels v. FanDuel, Inc.*, 2018 Ind. LEXIS 279 (Ind. 2018) The case is still in litigation with the Supreme Court. No final ruling on the question has been issued.

⁸⁶ *Daniels v. FanDuel, Inc.*, 2017 U.S. Dist. 162563 (S.D. Ind. 2017)

⁸⁷ *Id.* at 4

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Indiana Code Section 32-36-1-1 *et seq.* The court specifically focused on the exceptions found in this section on applicability to address the plaintiffs' claims under Ind. Code § 32-36-1-8(a)

⁹¹ Ind. Code §32-36-1-8

⁹² Ind. Code § 32-36-1-1(c)

1. The use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in material that has **political or newsworthy value** Ind. Code § 32-36-1-1(c)(1)(B) (emphasis added).

2. The use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in connection with the broadcast or reporting of an event or a **topic of general or public interest**. Ind. Code § 32-36-1-1(c)(3) (emphasis added).

3. The use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in **literary works**. Ind. Code. § 32-36-1-1(c)(1)(A) (emphasis added).

4. The use of a personality's name to truthfully identify the personality as the **performer of a recorded performance**. Ind. Code § 32-36-1-1(c)(2)(B) (emphasis added)

exception for newsworthiness⁹³ was accepted by the court. The district court concluded that given the popularity and growing outlets from which to gather sports news that the information was of public concern and fit the definition of newsworthy.⁹⁴ The Plaintiffs argued that this exception does not apply because the sites are not a news organization and they included the fictitious information which is not newsworthy.⁹⁵ The fictitious information, according to the court, does not constitute a violation of publicity because it is not a personality's name or likeness.⁹⁶ The second exception for public interest⁹⁷ applies to fantasy sports because the host sites provide factual data and they can be used as reference sources for player information to play fantasy sports or to just gather data.⁹⁸ The court also made a distinction between player likeness in video games and on fantasy sports sites by stating that video games were purely for entertainment and did not provide updated statistics on athletics.⁹⁹ Exception three is for literary works.¹⁰⁰ The court declined to rule on this exception partly because to side with the fantasy host sites argument, that their services are similar enough to video games and video games have been ruled as literary works, would conflict with the court's opinion on the public interest exception, and also because the issue of if fantasy sports and video games are similar is a finding of fact which the host sites had not proven to the court at this stage.¹⁰¹ The final exception, performers of recorded

⁹³ Ind. Code §32-36-1(c)(1)(B),

⁹⁴ *Daniels v. FanDuel, Inc.*, 2017 U.S. Dist. 162563, 9-20

⁹⁵ *Id.* at 15-19

⁹⁶ *Id.* at 19

⁹⁷ Ind. Code § 32-36-1-1(c)(3)

⁹⁸ *Daniels v. FanDuel, Inc.*, 2017 U.S. Dist. 162563, 19-25

⁹⁹ *Id.* at 23 Citing *In re NCAA Student- Athlete Name and Licensing Litig.*, 724 F. 3d 1268, 1283 "EA is not publishing or reporting factual data. EA's video game is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games. ... Put simply, EA's interactive game is not a publication of facts about college football; it is a game, not a reference source. These state law defenses, therefore, do not apply." The court in *In re NCAA* also stated, "But there is a big difference between a video game like *NCAA Football* and fantasy baseball products like those at issue in *C.B.C.* Those products merely 'incorporate[d] the names along with performance and biographical data of actual major league baseball players.' *NCAA Football*, on the other hand, uses virtual likenesses of actual college football players." *Id.*

¹⁰⁰ Ind. Code. § 32-36-1-1(c)(1)(A)

¹⁰¹ *Daniels v. FanDuel, Inc.*, 2017 U.S. Dist. 162563, 26

performances,¹⁰² does not apply.¹⁰³ The court found the host sites used information protected in the statute in ways other than to identify them as performers in a performance.¹⁰⁴

The plaintiffs appealed the case to the United States Court of Appeals for the Seventh Circuit who found that the District Court erred in their decision¹⁰⁵ and sent the question to the Indiana Supreme Court to decide:

“Whether online fantasy-sports operators that condition entry on payment, and distribute cash prizes, need the consent of players whose names, pictures, and statistics are used in the contests, in advertising the contests, or both.”¹⁰⁶

While the question currently before the Indiana Supreme Court may not end this case completely it could provide a clearer picture of where collegiate athletes publicity rights stand in the fantasy sports world.¹⁰⁷ The answer will also create a distinction between pay for play fantasy sports and the free sites potentially impacting fantasy sports stance as a legal form of gambling. If the distinction is created Daniels and future plaintiffs could more easily draw a distinction between fantasy sports and video games thus opening the door to arguments based around the opinion in *O’Bannon v. NCAA*.¹⁰⁸ Sites that operate for a fee, and found to be distinctly different from their free counterparts, would have damning precedent against them in regards to their stance as commercial in nature.

*IV. Creating a Solution to the Publicity Rights Problem*¹⁰⁹

Without a federal publicity rights statute there is not uniform way to approach publicity rights on the internet and therefore in online Fantasy Sports. To solve this problem, I have two solutions. The first is to revise the Lanham Act which governs Trademarks to include publicity rights or the ability to allow public figures to hold trademarks in their name, image, and

¹⁰² Ind. Code § 32-36-1-1(c)(2)(B)

¹⁰³ *Daniels v. FanDuel, Inc.*, 2017 U.S. Dist. 162563, 27-28

¹⁰⁴ *Id.* at 28

¹⁰⁵ *Daniels v. FanDuel, Inc.* 884 F.3d 672, 674 (7th Cir. 2018)

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 675

¹⁰⁸ *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015)

¹⁰⁹

likeness. Publicity rights do for the rich and famous what trademarks do for business: differentiate the sources of goods in commerce.

Trademark infringement provides relief when,
“a person uses (1) any reproduction ... of a mark;
(2) without the registrant’s consent;
(3) in commerce;

(4) in connection with the sale, offering for sale, distribution or advertising of any goods;

(5) where such use is likely to cause confusion, or to cause mistake or to deceive.”¹¹⁰

On the flip side, publicity rights are infringed when,

“(1) That defendant used plaintiff’s name as a symbol of his identity

(2) without consent

(3) and with the intent to obtain a commercial advantage.”¹¹¹

Both call for using an identifier, whether a trademark or a public figure’s name, image, or likeness, without consent for commercial gain. The major difference between the two is that Trademark infringement calls for a likelihood of confusion. The court in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*¹¹² struck down the players’ claim based partly on the fact that no consumer, or participant of fantasy sports, would not be confused by the use of the player’s image and likeness as an endorsement of the service.¹¹³ Since the two already serve the same purpose but for different types of parties it only makes sense to join the two in a revision of the Lanham Act. Public figures use their names and images to endorse products the same way trademarks “endorse” their products.

The second option is to create a separate federal right to publicity statute based around Black’s Law Dictionary’s definition

¹¹⁰ Marc Endelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 *Harvard Journal of Sports and Entertainment Law* 1, 40 (2012)

¹¹¹ *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007) Using a Missouri Statute.

¹¹² *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818 (8th Cir. 2007)

¹¹³ *Id.* at 824

of publicity rights.¹¹⁴ My federal right to publicity statute would contain at least four elements: use of plaintiff's name, image, or likeness by defendant, without consent, for a commercial advantage, and is likely to cause confusion. The first three elements we already see in Missouri's publicity rights statute. The fourth draws from trademark law and the court's reasoning in *C.B.C. Distribution* to further protect athletes and other public figures from those instances outside of commerce where a party may use another's image to create the illusion of approval.

Creating some sort of federal right of publicity statute will bring the law in line to an age where infringement of publicity rights is no longer controlled by geography, but instead can transcend all bounds. Our media, advertising, and communication is broader than ever before. National advertising campaigns are the norm and it is much easier for information to spread from one city to the next much less from state to state or even nation to nation. It would also relieve confusion amongst parties as to what law governs and erases any dormant commerce clause issues from allowing state law to control the internet. Federal courts would no longer have to tiptoe around the backlash of broadening or narrowing state law beyond the intent of the legislators.

CONCLUSION

Fantasy Sports touch every portion of Intellectual Property. While most of the areas of Intellectual Property surrounding fantasy sports are fairly settled publicity rights in fantasy sports are not. This is partly due to the lack of a federal publicity statute. With a federal publicity rights statute, the courts would not be subjected to applying state law to matters on the internet thus avoiding dormant commerce clause issues. The publicity rights between collegiate and professional athletes also is not settled despite the two categories of athletes receiving vastly different levels of compensation, a key point in the *C.B.C. Distribution* ruling.

¹¹⁴ BLACK'S LAW DICTIONARY (9th ed. 2009) "the right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent".

