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## THE CRIME OF AMATEURISM

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## THE CRIME OF AMATEURISM

William W. Berry III\*

*In the fall of 2017, the Department of Justice indicted a series of individuals—shoe executives, assistant coaches, runners, and financial advisors—alleging bribery and fraud. What made the actions of these individuals criminal was that they violated the NCAA’s amateurism rules, and in doing so, defrauded publicly funded universities of the benefit of an eligible amateur athlete.*

*NCAA rules have effectively created the crime of violating amateurism rules—a kind of federal amateurism fraud. While not unprecedented, the scope and extent of the prosecutions in these recent cases open the door to a novel set of implications for athletics boosters, coaches, and compliance units within athletic departments.*

*Having framed the issue, the Article explores the question of the proper scope of criminal liability in this context, hypothesizing that to some degree, the universities may not be such significant victims, while intercollegiate athletes in some contexts can be. The Article then advances its central claim—that the effect of the criminal prosecutions for violating amateurism rules has been, and will continue to be, a loosening of the amateurism rules. Further, this shift away from amateurism will inform the NCAA’s move toward allowing intercollegiate athletes to profit off of the use of their name, image, and likenesses.*

*In Part I, the Article introduces NCAA amateurism rules and how reform may be imminent. Part II describes the recent criminal cases. Part III presents the theory of amateurism fraud related to intercollegiate athletics. In Part IV raises questions as to the prudence of this increased criminality and challenges the theoretical framing of universities as victims and college athletes as accomplices. In Part V, the Article explores the immediate and wide-ranging implications of the criminalizing and prosecution of NCAA rule violations. Finally, Part VI argues that the consequence of the heightened criminality of amateurism fraud*

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\* Montague Professor of Law, University of Mississippi. The author would like to thank Jordyn Augustus for excellent research assistance, and the *Santa Clara Law Review* for their hard work on the article.

*has been and will continue to be a shift away from amateurism by the NCAA and its member institutions.*

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## I. INTRODUCTION

“There’s sunshine, fresh air, and the team’s behind us. Let’s play two.” –Ernie Banks<sup>1</sup>

Chicago Cubs Hall of Fame shortstop Ernie Banks captured the joy of playing sports with his famous response to a reporter’s question about an upcoming game; he loved baseball so much that he wanted to play a doubleheader.<sup>2</sup> The rhetoric of the National Collegiate Athletic Association (NCAA) concerning intercollegiate athletics mirrors Banks’ sentiments. College athletes play for the love of the game, as part of their education, and in order to further their personal growth, according to the NCAA narrative.<sup>3</sup> A recent advertising campaign—“a day in the life”—provides a window into the NCAA support of the pristine student-athlete experience it highlights.<sup>4</sup> And the NCAA has long trumpeted its athletes “going pro” in something besides sports.<sup>5</sup>

Over the past three decades, the NCAA has endeavored to protect<sup>6</sup> its version of amateurism.<sup>7</sup> While the NCAA definition has shifted over

1. MLB, *Ernie Banks is inducted into Baseball Hall of Fame*, YOUTUBE (Jan. 24, 2015), <https://www.youtube.com/watch?v=bmHETjTb7ks&feature=youtu.be>; *see also Ernie Banks*, NATIONAL BASEBALL HALL OF FAME AND MUSEUM, <https://baseballhall.org/hall-of-famers/banks-ernie> (last visited Oct. 13, 2020).

2. MLB, *supra* note 1; *see also Ernie Banks*, *supra* note 1; *see generally* DOUG WILSON, LET’S PLAY TWO: THE LIFE AND TIME OF ERNIE BANKS xi (2019); RON RAPOPORT, LET’S PLAY TWO: THE LEGEND OF MR. CUB, THE LIFE OF ERNIE BANKS 141 (2019).

3. *See generally* NCAA, <http://www.ncaa.org> (last visited Oct. 19, 2020).

4. *See, e.g.*, NCAA (@NCAA), TWITTER (Mar. 17, 2019, 2:00 PM), <https://twitter.com/ncaa/status/1107386124081811457?lang=en> (advertisement depicting a “day in the life” of a student-athlete). These advertisements received widespread criticism, including from current student-athletes. *See, e.g.*, Kristian Winfield, *Former and current student-athletes are calling out this NCAA ‘Day in the life’ video*, SBNATION (Mar. 20, 2019, 1:28 PM), <https://www.sbnation.com/college-basketball/2019/3/20/18274327/former-and-current-student-athletes-are-calling-out-this-ncaa-day-in-the-life-video>.

5. *See, e.g.*, NCAA, *NCAA Student-Athlete Commercial*, YOUTUBE (Apr. 2, 2011), <https://www.youtube.com/watch?v=9UzO4DJBoWw>; Dan Levy, *NCAA Is Looking for a Marketing Makeover, Here Are Some Terrible Ideas*, BLEACHER REP. (Apr. 12, 2012), <https://bleacherreport.com/articles/1143312-ncaa-is-looking-for-a-marketing-makeover-here-are-some-terrible-ideas>.

6. There has been extensive litigation concerning NCAA amateurism rules. *See, e.g.*, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2020); *Deppe v. NCAA*, 893 F.3d 498 (7th Cir. 2018); *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012); *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); *NCAA v. Lasege*, 53 S.W.3d 77 (Ky. 2001); *NCAA v. Smith*, 525 U.S. 459 (1999); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Bd. of Regents v. NCAA*, 468 U.S. 85 (1984).

7. *See* NAT’L COLLEGIATE ATHLETIC ASS’N, 2019-2020 DIVISION I MANUAL § 2.9 (2019) [hereinafter NCAA MANUAL]. The Principle of Amateurism: “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily

time, it now includes compensating students for tuition, room, board, books, and additional funds needed for the cost of attendance.<sup>8</sup> On the horizon, possible broadening of this definition to include other costs related to education seems likely.<sup>9</sup>

To date, remuneration from third parties, including incidental benefits, has been largely forbidden, although this too seems likely to change.<sup>10</sup> In response to recent litigation and legislation, the NCAA agreed in the fall of 2019 to allow intercollegiate athletes to receive compensation from third parties for use of the athletes' name, image, and likeness, but the exact parameters of such permission, including how the NCAA plans to regulate such remuneration, remains unclear to date.<sup>11</sup> A recent announcement indicated that the NCAA plans to allow such payments from third parties, not universities, within "guardrails" to be developed by the universities during the 2020-21 year before these new rules take effect in 2021-22.<sup>12</sup> These reforms presumably allow athletes to hire agents, receive money from their identity as an athlete, but preclude the use of the university's intellectual property and logos in doing so.<sup>13</sup>

In the fall of 2017, the Department of Justice indicted a series of individuals—shoe executives, assistant coaches, runners, and financial advisors—alleging bribery and fraud.<sup>14</sup> What made the actions of these individuals criminal was that they violated the NCAA's amateurism

by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *Id.* NCAA MANUAL, *supra*, §12 (amateurism section detailing all of the rules restricting third-party benefits).

8. *See id.* §15.2 (Financial Aid).

9. *See* discussion *infra* Part VI; *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d at 1265-66 (upholding an injunction restricting the ability of the NCAA to block "education-related" expenses).

10. *See* discussion *infra* Part VI.

11. *See* Press Release, NCAA, Board of Governors starts process to enhance name, image and likeness opportunities (Oct. 29, 2019), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities>.

12. Press Release, NCAA, Board of Governors moves toward allowing student-athlete compensation for endorsements and promotions (Apr. 29, 2020), <http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions>.

13. ESPN Staff, *Players getting paid? Video games returning? Answering your NCAA name, image and likeness questions*, ESPN (Apr. 29, 2020), [https://www.espn.com/college-football/story/\\_/id/29113592/players-getting-paid-video-games-returning-answering-your-ncaa-name-image-likeness-questions](https://www.espn.com/college-football/story/_/id/29113592/players-getting-paid-video-games-returning-answering-your-ncaa-name-image-likeness-questions).

14. *See generally* Cara Cristina Maines & Edward Popovici, *Corruption in Basketball: Understanding United States v. Gatto et. al.: What Comes Next?*, CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY (Mar. 21, 2019), [https://web.law.columbia.edu/sites/default/files/microsites/public-integrity/us\\_v\\_gatto-what\\_comes\\_next.pdf](https://web.law.columbia.edu/sites/default/files/microsites/public-integrity/us_v_gatto-what_comes_next.pdf) [hereinafter CAPI].

rules, and in doing so, defrauded publicly-funded universities of the benefit of an eligible amateur athlete.<sup>15</sup>

NCAA rules have effectively created the crime of violating amateurism rules—a kind of federal amateurism fraud.<sup>16</sup> While not unprecedented, the scope and extent of the prosecutions in these recent cases open the door to a novel set of implications for athletics boosters, coaches, and compliance units within athletic departments.

This Article explores the question of the proper scope of criminal liability in this context, hypothesizing that to some degree, the universities may not be such significant victims, while intercollegiate athletes in some contexts can be. The Article then advances its central claim—that the effect of the criminal prosecutions for violating amateurism rules has been, and will continue to be, a loosening of the amateurism rules. Further, this shift away from amateurism will inform the NCAA's move toward allowing intercollegiate athletes to profit off of the use of their name, image, and likenesses.<sup>17</sup>

In Part II, the Article describes the recent criminal cases. Part III presents the theory of amateurism fraud related to intercollegiate athletics. Part IV raises questions as to the prudence of this increased criminality and challenges the theoretical framing of universities as victims and college athletes as accomplices. In Part V, the Article explores the immediate and wide-ranging implications of the criminalizing and prosecution of NCAA rule violations. Finally, Part VI argues that the consequence of the heightened criminality of amateurism fraud has been and will continue to be a shift away from amateurism by the NCAA and its member institutions.

## II. THE RECENT COLLEGE BASKETBALL FRAUD CASES

Beginning in 2015, the United States Department of Justice began investigating possible corruption and fraud in college basketball related to the compensation of prospective and current intercollegiate athletes.<sup>18</sup> This investigation involved court-authorized wiretaps of shoe executives, runners, and coaches.<sup>19</sup> In addition, federal agents posed as potential investors interested in funding prospective and current college

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15. *Id.* at 1-2; *United States v. Gatto*, 295 F. Supp. 3d 336, 336-37 (S.D.N.Y. 2018).

16. *See* discussion *infra* Part III.

17. Some have even hypothesized that these developments signal the beginning of the end for the NCAA itself. Nick Kosko, *After likeness ruling, Paul Finebaum thinks NCAA is going down*, 247SPORTS (Apr. 30, 2020, 10:09 AM), <https://247sports.com/college/alabama/Article/NCAA-likeness-ruling-student-athlete-compensation-Paul-Finebaum-thinks-NCAA-is-going-down-146655600/>.

18. *See* CAPI, *supra* note 14, at 1.

19. *Id.*

basketball players.<sup>20</sup> On September 26, 2017, the United States Attorney's Office for the Southern District of New York announced the arrests of ten individuals across several cases related to payments made in violation of NCAA rules.<sup>21</sup>

#### A. *The Shoe Company*

The first scheme involved paying prospective college basketball players to attend college basketball programs that had contracts with Adidas.<sup>22</sup> The indictment alleged that senior Adidas executive James Gatto, Adidas consultant Merl Code, and aspiring agent Christian Dawkins, conspired to funnel payments to star high school basketball players.<sup>23</sup> Adidas would benefit by having the star player wear its shoes and gear while playing college basketball, and hopefully after graduation. The aspiring agent would benefit by developing a financial relationship that would hopefully lead to the representation of the athlete upon graduation.

The *Gatto* case focused on the allegation that Gatto, Code, and Dawkins, along with financial advisor Munish Sood, had combined to secure \$100,000 from Adidas to pay the family of Brian "Tug" Bowen in exchange for Bowen's commitment to play basketball at the University of Louisville, an Adidas-sponsored school.<sup>24</sup> The FBI investigation discovered that the conspirators funneled the money to Bowen and similar athletes using third parties and non-profit institutions; this practice included making fake invoices and concealing their payments by using cash exchanges in remote parking lots.<sup>25</sup>

At trial, the government concentrated on showing that the defendants "obtained property" as required under the federal fraud statute<sup>26</sup>

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20. *Id.*

21. *Id.*

22. *Id.*; Press Release, United States Attorney's Office, Southern District of New York, U.S. Attorney Announces The Arrest Of 10 Individuals, Including Four Division I Coaches, For College Basketball Fraud And Corruption Schemes (Sept. 26, 2017), <https://www.justice.gov/usao-sdny/pr/us-attorney-announces-arrest-10-individuals-including-four-division-i-coaches-college> [hereinafter Arrest].

23. See CAPI, *supra* note 14, at 1; Arrest, *supra* note 22.

24. See CAPI, *supra* note 14, at 2; Marc Tracy, *Three Found Guilty in N.C.A.A. Basketball Recruiting Scheme*, N.Y. TIMES (Oct. 24, 2018), <https://www.nytimes.com/2018/10/24/sports/ncaa-basketball-adidas-guilty.html>.

25. See CAPI, *supra* note 14, at 2.

26. See 18 U.S.C. § 1341 (2008) ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme

through their scheme of bribing the athletes and their families, as well as concealing the payments.<sup>27</sup> The fraud allegedly perpetrated on the universities came in two forms—(1) the risk of economic loss related to possible NCAA sanctions and athlete ineligibility,<sup>28</sup> and (2) the deprivation of the universities’ “right to control” the disbursement of athletic scholarships, in restricting them to “amateurs”<sup>29</sup> under the NCAA definition.<sup>30</sup>

Emphasizing the clandestine nature of the payments and the overall scheme,<sup>31</sup> the government’s narrative consisted of showing that the university suffered the deprivation of an eligible and amateur scholarship athlete by making payments in violation of NCAA rules.<sup>32</sup> The government argued that disclosure of the defendants’ scheme would cause the university to refuse scholarships to the athletes in question, or as happened with Brian Bowen, revoke the athlete’s scholarship when the information became public.<sup>33</sup>

The defendants admitted to the conduct at issue, but questioned whether such conduct was actually criminal.<sup>34</sup> Contrary to the government’s claim that the defendants deprived the universities of amateur athletes, the defendants argued that their scheme helped the universities by bringing top athletes to their universities.<sup>35</sup> Specifically, the defense emphasized that the conduct in question would be legal if the NCAA rules did not exist.<sup>36</sup> Indeed, from the perspective of the defendants, they

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or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.”).

27. See CAPI, *supra* note 14, at 3.

28. As discussed below, these sanctions can be quite serious economically. See *infra* note 51 and accompanying text.

29. See NCAA MANUAL, *supra* note 7.

30. See CAPI, *supra* note 14, at 3; *United States v. Gatto*, 295 F. Supp. 3d 336, 340 (S.D.N.Y. 2018).

31. The government, for instance, produced the fake invoices generated by the defendants to mask the payments. See CAPI, *supra* note 14, at 3.

32. See CAPI, *supra* note 14, at 2; *Gatto*, 295 F. Supp. 3d at 339.

33. See CAPI, *supra* note 14, at 3.

34. CAPI, *supra* note 14, at 3; *Gatto*, 295 F. Supp. 3d at 340-41.

35. See CAPI, *supra* note 14, at 3; *Gatto*, 295 F. Supp. 3d at 341.

36. Gary Parrish, *Former Adidas exec on trial to claim he broke NCAA rules, not laws, and that’s bad news for lots of college basketball teams*, CBS SPORTS (Oct. 2, 2018), <https://www.cbssports.com/college-basketball/news/former-adidas-exec-on-trial-to-claim-he-broke-ncaa-rules-not-laws-and-thats-bad-news-for-lots-of-college-basketball-teams/>; Dan Greene, *Closing Arguments Wrap as Jury Deliberation Awaits in Complex College Basketball*



did not commit fraud because the university gave them no benefit.<sup>37</sup> Under the language of the statute, “there can be no ‘scheme to defraud’ where the scheme’s purpose is to benefit” the university, the alleged victim.<sup>38</sup>

Other aspects of the defendants’ arguments focused on the common nature of such arrangements<sup>39</sup> and the complicity of universities in such schemes.<sup>40</sup> The latter concept suggested that the universities had “unclean hands” in being aware of the payments, which the defendants argued, foreclosed the fraud claims.<sup>41</sup>

Following the three-week trial, the jury convicted Gatto, Code, and Dawkins of wire fraud and conspiracy to commit wire fraud.<sup>42</sup> The Court sentenced Gatto to nine months in prison, and Code and Dawkins to six months each in prison.<sup>43</sup> The Court also ordered Code and Dawkins each to pay restitution to the University of Louisville of \$28,000.<sup>44</sup> Gatto agreed to pay restitution to Louisville, North Carolina State, and Kansas in the total amount of just over \$342,000.<sup>45</sup>

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*Trial*, SPORTS ILLUSTRATED (Oct. 18, 2018), <https://www.si.com/college/2018/10/18/ncaa-corruption-trial-closing-arguments-christian-dawkins-adidas>.

37. See CAPI, *supra* note 14, at 3; *Gatto*, 295 F. Supp. 3d at 340-41.

38. See CAPI, *supra* note 14, at 3; *Gatto*, 295 F. Supp. 3d at 342; see Tracy, *supra* note 26. From the defendants’ perspective, the presence of the athletes on their basketball teams would provide an economic benefit to the university, in terms of ticket sales and post-season revenues. See CAPI, *supra* note 14, at 3; *Gatto*, 295 F. Supp. 3d at 342.

39. See CAPI, *supra* note 14, at 3; Nike and Under Armour, for instance, allegedly engage in similar schemes. *Id.*; see also Matt Vautour, *Zion Williamson lawsuit: Duke, Nike and Adidas broke NCAA benefit rules alleges former marketing agency (report)*, MASS LIVE (May 10, 2020), <https://www.masslive.com/sports/2020/05/zion-williamson-lawsuit-duke-nike-and-adidas-broke-ncaa-benefit-rules-alleges-former-marketing-agency-report.html>; Matt Norlander, *How Maryland, Under Armour roped into investigation of Kansas recruit*, CBS SPORTS (Apr. 11, 2018, 3:47 PM), <https://www.cbssports.com/college-basketball/news/how-maryland-under-armour-were-roped-into-fbi-investigation-of-kansas-recruit/>.

40. See CAPI, *supra* note 14, at 3; *Gatto*, 295 F. Supp.3d at 342 (describing the participation of coaches in the scheme).

41. CAPI, *supra* note 14, at 3.

42. *Id.* at 1, 3; Emily Caron, *Christian Dawkins, Jim Gatto, Merl Code Sentenced in NCAA Basketball Corruption Trial*, SPORTS ILLUSTRATED (Mar. 5, 2019), <https://www.si.com/college-basketball/2019/03/05/ncaa-corruption-trial-sentencing-jim-gatto-christian-dawkins>.

43. CAPI, *supra* note 14, at 1; Adam Zagoria, *Here’s what latest federal sentencing could mean for Book Richardson, Arizona’s Sean Miller*, ARIZ. DAILY STAR (Mar. 6, 2019), [https://tucson.com/sports/arizonawildcats/basketball/here-s-what-latest-federal-sentencing-could-mean-for-book/article\\_5e685ac7-69b1-55c1-824c-aa53e09f9fad.html](https://tucson.com/sports/arizonawildcats/basketball/here-s-what-latest-federal-sentencing-could-mean-for-book/article_5e685ac7-69b1-55c1-824c-aa53e09f9fad.html).

44. Zagoria, *supra* note 43.

45. Mark Schlabach, *Gatto to pay back \$342K to NC State, Kansas*, ESPN (Apr. 8, 2019), [https://www.espn.com/mens-college-basketball/story/\\_id/26473901/gatto-pay-back-342k-nc-state-kansas](https://www.espn.com/mens-college-basketball/story/_id/26473901/gatto-pay-back-342k-nc-state-kansas). This amount included over \$200,000 in legal fees plus the repayment of four scholarships. Jesse Newell, *Jim Gatto to pay KU about \$200,000 in restitution; school had requested \$1.1 million*, KANSAS CITY STAR (Apr. 8, 2019, 8:21 PM),

*B. The Assistant Coaches*

In a separate trial in the spring of 2019, Code and Dawkins also were tried for bribing assistant coaches Tony Bland of USC, Emanuel “Book” Richardson of Arizona, and Lamont Evans of South Carolina and Oklahoma State.<sup>46</sup> As in the first case, the jury convicted Code and Dawkins, but not on all counts, finding that Dawkins did not bribe Bland and Richardson.<sup>47</sup> The court sentenced Dawkins to one year and one day, in addition to his six-month sentence from the first case.<sup>48</sup> Code received a three-month sentence in addition to the six-month sentence from his first trial.<sup>49</sup>

Rather than go to trial, the three college basketball assistant coaches pled guilty to federal charges.<sup>50</sup> Coach Evans pled guilty to receiving \$22,000 in bribes from handlers and was sentenced to three months in prison.<sup>51</sup> Coach Richardson pled guilty to one count of bribery for facilitating payments through Dawkins to Arizona players and received a sentence of three months in prison.<sup>52</sup> Coach Bland received two years of probation for the receipt of a \$4,000 bribe from a handler to steer an athlete to his university.<sup>53</sup>

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<https://www.kansascity.com/article228995599.html>; Nicole Feyh, *Gatto agrees to pay restitution to KU, NC State, Louisville*, 13 WIBW (Apr. 8, 2019, 7:29 PM), <https://www.wibw.com/content/news/Gatto-agrees-to-pay-KU-NC-State-Louisville-508298001.html>.

46. Jeff Borzello & Mark Schlabach, *Dawkins, Code convicted in college hoops trial*, ESPN (May 8, 2019), [https://www.espn.com/mens-college-basketball/story/\\_/id/26701792/dawkins-code-convicted-college-hoops-trial](https://www.espn.com/mens-college-basketball/story/_/id/26701792/dawkins-code-convicted-college-hoops-trial).

47. *Id.*

48. Jeff Borzello, *Christian Dawkins sentenced for role in college basketball bribery scandal*, ESPN (Oct. 3, 2019), [https://www.espn.com/mens-college-basketball/story/\\_/id/27760964/christian-dawkins-sentenced-role-college-basketball-bribery-scandal](https://www.espn.com/mens-college-basketball/story/_/id/27760964/christian-dawkins-sentenced-role-college-basketball-bribery-scandal).

49. Emily Saul, *Ex-Adidas consultant Merl Code gets 3 months for NCAA scandal*, N.Y. POST (Oct. 4, 2019, 1:58 PM), <https://nypost.com/2019/10/04/ex-adidas-consultant-merl-code-gets-3-months-for-ncaa-scandal/>.

50. See CAPI, *supra* note 14, at 1; ESPN News Services, *Lamont Evans pleads guilty to bribery charge*, ESPN (Jan. 30, 2019), [http://www.espn.com/mens-college-basketball/story/\\_/id/25885440/lamont-evans-pleads-guilty-bribery-charge](http://www.espn.com/mens-college-basketball/story/_/id/25885440/lamont-evans-pleads-guilty-bribery-charge).

51. Associated Press, *Lamont Evans sentenced, still may be deported*, ESPN (June 7, 2019), [https://www.espn.com/mens-college-basketball/story/\\_/id/26921190/lamont-evans-sentenced-deported](https://www.espn.com/mens-college-basketball/story/_/id/26921190/lamont-evans-sentenced-deported).

52. Dave Clark, *Book Richardson sentenced to prison in college basketball federal bribery case*, CIN. ENQUIRER (June 6, 2019, 12:54 PM), <https://www.cincinnati.com/story/sports/college/othercolleges/2019/06/06/book-richardson-sentenced-prison-ncaa-basketball-bribery-case/1367437001/>.

53. Tim Daniels, *Ex-USC Basketball Coach Tony Bland Gets 2 Years' Probation in Bribery Scandal*, BLEACHER REP. (June 5, 2019), <https://bleacherreport.com/articles/2839573-ex-usc-basketball-coach-tony-bland-to-be-sentenced-in-ncaa-bribery-scandal>.

### C. Financial Advisors

Chuck Person, an Auburn assistant coach, was part of a different kind of scheme.<sup>54</sup> This conduct involved financial managers and advisors paying assistant coaches in return for the coaches pressuring star college players to sign contracts with the financial managers and advisors.<sup>55</sup> Specifically, Person received \$91,500 from a Pittsburgh-based financial advisor to steer his former players to the advisor.<sup>56</sup> The government charged this conduct as bribery, conspiracy to commit bribery, honest services wire fraud, wire fraud, and Travel Act conspiracy.<sup>57</sup> Person pled guilty to a single conspiracy charge and was able to avoid prison time, receiving community service instead.<sup>58</sup>

Coach Person's co-defendant, Rashan Michel, also pled guilty to bribery.<sup>59</sup> Michel had helped support and facilitate the relationship between the financial advisors, Person, and Auburn basketball players.<sup>60</sup> Like Person, Michel was able to avoid prison time.<sup>61</sup>

### III. THE THEORY OF AMATEURISM FRAUD

The amateurism fraud cases discussed above are not the first. In two prior high-profile cases, the federal government has prosecuted individuals for fraud related to amateurism. The prior cases, as explored below, involved agents seeking to profit and gain an advantage by circumventing NCAA rules, not realizing that their actions might have criminal consequences.

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54. See CAPI, *supra* note 14, at 1; Arrest, *supra* note 22.

55. See Arrest, *supra* note 22.

56. See CAPI, *supra* note 14, at 1 n.x; Larry Neumeister, *Ex-Auburn assistant coach Chuck Person to plead guilty*, ASSOCIATED PRESS (Mar. 15, 2019), <https://www.ap-news.com/75244cf242a548be80e691884d542202>.

57. See CAPI, *supra* note 14, at 1; Mark Schlabach, *Charges from FBI's college corruption investigation to remain*, ESPN (Jan. 3, 2019), [http://www.espn.com/mens-college-basketball/story/\\_/id/25677971/federal-charges-college-corruption-probe-go-forward](http://www.espn.com/mens-college-basketball/story/_/id/25677971/federal-charges-college-corruption-probe-go-forward).

58. Kyle Boone, *College basketball corruption trial: Ex-Auburn assistant Chuck Person avoids prison time*, CBS SPORTS (July 17, 2019, 2:36 PM), <https://www.cbssports.com/college-basketball/news/college-basketball-corruption-trial-ex-auburn-assistant-chuck-person-avoids-prison-time/>.

59. Scott Phillips, *Former NBA referee Rashan Michel accepts plea deal in third college hoops corruption case*, NBC SPORTS (May 7, 2019, 6:50 PM), <https://collegebasketball.nbcsports.com/2019/05/07/former-nba-referee-rashan-michel-accepts-plea-deal-in-third-college-hoops-corruption-case/>.

60. *Id.*

61. Associated Press, *Rashan Michel avoids prison time in college basketball corruption case*, ESPN (Oct. 17, 2019), [https://www.espn.com/mens-college-basketball/story/\\_/id/27866211/rashan-michel-avoids-prison-college-basketball-corruption-case](https://www.espn.com/mens-college-basketball/story/_/id/27866211/rashan-michel-avoids-prison-college-basketball-corruption-case).

Payments to prospective or current intercollegiate athletes—outside of tuition, room, board, books, and cost of attendance<sup>62</sup>—have historically violated NCAA rules.<sup>63</sup> The economic consequences of NCAA sanctions related to such violations can be significant, including the loss of participation in postseason competition as well as postseason money from bowl games and the March Madness basketball tournament.<sup>64</sup>

#### A. Historical Precedents

In the 1990s, the federal government charged music executive Norby Walters, along with his partner Lloyd Bloom, with conspiracy, RICO violations, and mail fraud<sup>65</sup> for signing college athletes to an agency contract prior to the completion of their eligibility.<sup>66</sup> Walters' initially booming business signed fifty-eight players using the enticements of cars and money, banking on his ability to recoup his investment as their agent, receiving a commission of their pro contracts that he would negotiate.<sup>67</sup>

To preserve athlete eligibility, Walters would post-date the contracts he signed to the date at the end of the athlete's eligibility and locked them in a safe.<sup>68</sup> He also promised to lie to the universities in

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62. The cost of attendance is a recent addition to this list, a result from the Ninth Circuit's decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

63. These rules may expand further, both in light of *Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.)*, 958 F.3d 1239, 1265-66 (9th Cir. 2020), recently decided by the Ninth Circuit, which would allow payments related to education, and the NCAA's current move to allow remuneration from third parties for use of name, image, and likeness, although such parameters remain unclear. *See, e.g.*, ESPN Staff, *Players getting paid? Video games returning? Answering your NCAA name, image and likeness questions*, ESPN (Apr. 29, 2020), [https://www.espn.com/college-football/story/\\_/id/29113592/players-getting-paid-video-games-returning-answering-your-ncaa-name-image-likeness-questions](https://www.espn.com/college-football/story/_/id/29113592/players-getting-paid-video-games-returning-answering-your-ncaa-name-image-likeness-questions).

64. Indeed, the recent sanctions against the University of Mississippi cost its athletic department over \$20 million. Nick Suss, *NCAA releases verdict of Ole Miss' probation appeal*, CLARION LEDGER (Nov. 1, 2018, 4:47 PM), <https://www.clarionledger.com/story/sports/college/ole-miss/2018/11/01/ole-miss-football-learns-verdict-ncaa-sanctions/1846245002/>; SEC Staff, *SEC Announces 2018-19 revenue distribution*, SEC SPORTS (Jan. 30, 2020), <https://www.secsports.com/article/28600022/sec-announces-2018-2019-revenue-distribution>.

65. Similarly worded to the statute in *Gatto*, the federal mail fraud statute requires a deprivation of property. *See* 18 U.S.C. § 1343 (2008) ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.").

66. *United States v. Walters*, 997 F.2d 1219, 1221 (7th Cir. 1993).

67. *Id.*

68. *Id.*

response to any inquiries so the athletes would not lose their eligibility.<sup>69</sup> Unfortunately for Walters, fifty-six of the fifty-eight athletes he bribed ultimately signed with other agents, even though they kept his cars and money.<sup>70</sup>

As the court explained, the mail fraud at issue was as follows:

The fraud: causing the universities to pay scholarship funds to athletes who had become ineligible as a result of the agency contracts.

The mail: each university required its athletes to verify their eligibility to play, then sent copies by mail to conferences such as the Big Ten.<sup>71</sup>

Under this theory, a jury convicted Walters and Bloom of mail fraud.<sup>72</sup> The Seventh Circuit reversed based on a procedural error and required Walters and Bloom to be tried separately.<sup>73</sup> In exchange for the government dropping the RICO and conspiracy charges, Walters entered an Alford plea, and the Seventh Circuit reviewed the merits of the mail fraud conviction.<sup>74</sup>

The Court again reversed and dismissed Walters' conviction of mail fraud, reasoning that to the degree a fraud was perpetrated, it did not require use of the mail.<sup>75</sup> The Court explained, "Forms verifying eligibility do not help the plan *succeed*; instead they create a risk that it will be discovered if a student should tell the truth."<sup>76</sup> Further, "[n]o evidence demonstrates that Walters *actually* knew that the colleges would mail the athletes' forms."<sup>77</sup>

The Seventh Circuit also explored the fraud theory later adopted by the Second Circuit in *Gatto* because, on its face, Walters was not depriving the universities of any property.<sup>78</sup> The court found that Walters may have been incidentally causing economic damage to universities; he was not directly receiving money from the universities, so he was not committing fraud against them.<sup>79</sup> As the court explained, "[n]ot until today have we dealt with a scheme in which the defendants' profits were to

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Walters*, 997 F.2d at 1221.

73. *Id.*

74. *Id.* at 1221-22.

75. *Id.* at 1222, 1227.

76. *Id.* at 1222.

77. *Id.* at 1223.

78. *Walters*, 997 F.2d at 1224; *see supra* text accompanying note 64 (explaining the application of the fraud statute in the *Gatto* case).

79. *Walters*, 997 F.2d at 1224.

come from legitimate transactions in the market, rather than at the expense of the victims.”<sup>80</sup>

Foreshadowing the Ninth Circuit cases in *O’Bannon*<sup>81</sup> and *Alston*,<sup>82</sup> the *Walters* court suggested that the federal statute at issue might really be the Sherman Act and its proscription of antitrust violations, not the mail fraud statute.<sup>83</sup> As the court opined, “[i]nconsistent federal laws also occur; the United States both subsidizes tobacco growers and discourages people from smoking. So if the United States simultaneously forbids cartels and forbids undermining cartels by cheating, we shall shrug our shoulders and enforce both laws, condemning practical jokes along the way.”<sup>84</sup> Unfortunately for Gatto, Code, and Dawkins, the federal district courts did not share the views of the Seventh Circuit in *Walters*.

### *B. The Act of Defrauding Academia*

Before going further, it is instructive to look again at the fraud alleged and convicted in the cases discussed previously. The United States Attorneys bring these cases as violations of the federal prohibitions against fraud, and in some cases, bribery.

The fraud statute in question, 18 U.S.C. §1341, proscribes “any scheme or artifice to defraud, or for obtaining money or property” by fraudulent means.<sup>85</sup> In order to convict an individual of fraud under the statute, the government must demonstrate that the actions of the defendant somehow defraud the victim, whether the victim is an individual or an institution.<sup>86</sup> In the amateurism fraud cases, the government has theorized that the actions of the defendants have defrauded one or more universities.<sup>87</sup>

Specifically, the defendants have deprived the universities the benefit of an amateur athlete, as well as the economic consequences of the athlete playing while ineligible and/or becoming ineligible.<sup>88</sup> In other words, the defendants have acted in a way in which the athlete no longer is eligible under NCAA rules because they have paid the athlete, thus making the athlete no longer an amateur. To be clear, the victims in these cases under the relevant statutes are the institutions. Without the NCAA

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80. *Id.* at 1227.

81. *See supra* text accompanying note 61.

82. *See supra* text accompanying note 62.

83. *Walters*, 997 F.2d at 1225.

84. *Id.*

85. 18 U.S.C. §1341 (2008).

86. *Id.*

87. *Id.*; *United States v. Gatto*, 295 F. Supp. 3d 336, 336 (S.D.N.Y. 2018); *Walters*, 997 F.2d at 1221.

88. *See Gatto*, 295 F. Supp. 3d at 339.

amateurism rules, payments to prospective college athletes or current college athletes would not constitute criminal behavior.

At its core, what the fraud claim really seems to be about here is the right to control college athletes pursuant to the NCAA's amateurism scheme. Universities want the right to control athletes, at least with respect to their remuneration. Federal prosecutors have made interfering with that control by compensating athletes, criminal.

Certainly, there may be good policy reasons for wanting to keep third-party boosters from interfering in intercollegiate athletics, and even further with respect to those involved in organized and now legalized gambling. At the same time, the criminalizing of NCAA rule violations may open the door to unforeseen consequences, dependent, of course, on the appetite for United States attorneys to pursue such payments to athletes.

#### IV. THE "CRIME" OF AMATEURISM?

In reflecting upon the decision of United States Attorneys to prosecute violations of NCAA rules as frauds perpetrated upon universities, it begs the larger question concerning the equity and fairness of the amateurism model itself. Over sixty years ago,<sup>89</sup> the adoption of the "student-athlete" model contemplated that athletics was an avocation that comprised part of the education one would receive in college.<sup>90</sup> Further, athletics provided a way to help individuals from disadvantaged backgrounds to enjoy the experience of intercollegiate competition while earning a college degree that otherwise might not have been a possibility.

Along the way, however, the corporatization of intercollegiate athletics, at least in the revenue sports of football and basketball in the Power Five conferences, has literally changed the game.<sup>91</sup> Athletic departments with \$100 million budgets run a professional operation in which athletes train on a full-time schedule in addition to their often heavily-tutored academic pursuits.<sup>92</sup> An epic arms race over the past

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89. Jon Solomon, *'Schooled: The Price of College Sports' is a movie worth the NCAA history lesson (review)*, AL.COM (Jan. 14, 2019), [https://www.al.com/sports/2013/10/schooled\\_the\\_price\\_of\\_college.html](https://www.al.com/sports/2013/10/schooled_the_price_of_college.html).

90. NCAA MANUAL, *supra* note 7, § 2.9.

91. *See, e.g.*, Alston v. NCAA (*In re* NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1244-45 (9th Cir. 2020) (describing the lucrative multi-billion dollar industry of Power Five conference intercollegiate athletics).

92. *See, e.g.*, Peter Jacobs, *Here's The Insane Amount Of Time Student-Athletes Spend On Practice*, BUS. INSIDER (Jan. 27, 2015, 8:44 AM), <https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1#:~:text=Officially%2C%20the%20NCAA%20restricts%20student,or%20four%20hours%20per%20day.>

decade has led to a proliferation of elegant facilities,<sup>93</sup> coach salaries that dwarf those of college presidents,<sup>94</sup> conference television networks,<sup>95</sup> and lucrative sponsorship deals with Fortune 500 corporations and apparel companies.<sup>96</sup> College football and college basketball are both billion-dollar enterprises. Even the non-revenue sports at the Power Five universities enjoy the largesse and benefit of this culture, with teams often traveling extensively to compete against conference rivals hundreds of miles away.

#### *A. Why Universities May Not Be the Victims*

From an economic vantage point, university athletic departments profit in significant ways off of college basketball. The revenues from the NCAA tournament each spring exceed \$1 billion,<sup>97</sup> and help make athletic departments into financial juggernauts, at least at Power Five conference universities. Many of these athletic departments depend on the success of their teams both in terms of ticket sales and conference post-season revenue to fund other non-revenue sports.

In the sport of basketball, even one superstar player can be enough to change a team's fortunes, both in terms of fan enthusiasm and on the court success. The extent to which a particular player can increase revenue may be quite significant. As a result, if the third party—whether handler, shoe executive, agent, or assistant coach—works to compensate the athlete to play for the university, it can significantly boost the finances of the athletic department, unless the NCAA imposes sanctions for such payments.

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93. See, e.g., Jessica S. Lee, *LSU's football team has a new \$28 million locker room – complete with sleep pods, a pool, and a mini theater*, BUS. INSIDER (Aug. 30, 2019, 1:03 PM), <https://www.businessinsider.com/louisiana-state-university-football-locker-room-athletic-facility-2019-8>.

94. Zach Barnett, *Study: The 25 highest-paid university presidents vs. their coaches*, FOOTBALL SCOOP (May 19, 2014), <https://footballscoop.com/news/salary-study-the-25-highest-paid-university-presidents-vs-their-coaches/>.

95. See, e.g., SEC ESPN NETWORK, <https://www.secsports.com/watch> (last visited Oct. 12, 2020).

96. See, e.g., SI Wire, *How Adidas, Nike and Under Armour Have Divvied Up Major College Basketball*, SPORTS ILLUSTRATED (Oct. 2, 2017), <https://www.si.com/college/2017/10/02/adidas-nike-under-armour-contracts-schools-conferences>.

97. See Andrew Lisa, *The Money Behind the March Madness NCAA Basketball Tournament*, YAHOO! FIN. (Mar. 9, 2020), [https://finance.yahoo.com/news/money-behind-march-madness-ncaa-194402803.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce\\_referrer\\_sig=AQAAAKhZK1SkxEZnrCTt\\_ebaAwzbc1afVd-0fsMMpQQdKorG3Ms18s4hII-MTbc3dFZxY94pbLDQ54QEeqSEBW3qGileFASGjc1dJUUVVQNuHq4c7rw-iZoqEdqW0cURNzWePgkkBd5G5MoaFOtcI0vVdr6umqS6PJiifQBAs0wFoL0u](https://finance.yahoo.com/news/money-behind-march-madness-ncaa-194402803.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAKhZK1SkxEZnrCTt_ebaAwzbc1afVd-0fsMMpQQdKorG3Ms18s4hII-MTbc3dFZxY94pbLDQ54QEeqSEBW3qGileFASGjc1dJUUVVQNuHq4c7rw-iZoqEdqW0cURNzWePgkkBd5G5MoaFOtcI0vVdr6umqS6PJiifQBAs0wFoL0u).



In other words, the criminal behavior at issue—the crime of amateurism fraud—actually benefits the university unless the NCAA punishes the behavior. Unlike the federal government, however, the NCAA lacks subpoena power. This makes enforcement cases less likely to succeed.

Ironically, the most significant benefit of all relates to the public relations side of college athletics.<sup>98</sup> As state universities become increasingly dependent on tuition revenue in light of depressed state legislative higher education contributions, athletics serves as a consistent advertisement for the institution, with athletics success correlating in many cases to admissions success and increases in enrollment.<sup>99</sup>

Certainly, it might offend one's sensibilities to the extent one buys the amateurism rhetoric of the NCAA. But as discussed below, the NCAA continues to move further and further away from the concept of amateurism. Indeed, it seems to be drawing the line now at pay from the institution to the athlete, even though the athlete already receives tens of thousands of dollars annually in the form of tuition, room, board, books, and cost of attendance, plus whatever other educational compensation becomes mandated by the *Alston* case.

### *B. Why Athletes Might Be*

Unlike the corporate nature of Power Five conference intercollegiate athletics, many revenue sport athletes “live below the poverty line.”<sup>100</sup> In basketball, these athletes generate over \$1 billion annually from the March Madness tournament alone. While the amateurism benefits of tuition, room, board, books, and cost of attendance are significant, as is the opportunity for an education, much of the revenue generated by these athletes does not flow to them. The coaches, the facilities, the non-revenue sport athletes all receive money generated by the college football and basketball players.

The amounts criminalized in the *Walters* and *Gatto* cases were \$100,000 or less per athlete, and in most cases, much less. Counting payments to poor individuals as fraudulent behavior—depriving a large institution with significant resources of their amateurism—does not seem to align with the economic realities in place. In essence, payments by

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98. See generally KRISTI DOSH, SATURDAY MILLIONAIRES: HOW WINNING FOOTBALL BUILDS WINNING COLLEGES (2013).

99. See Michael Mitchell, Michael Leachman & Kathleen Masterson, *Funding Down, Tuition Up*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 15, 2016), <https://www.cbpp.org/research/state-budget-and-tax/funding-down-tuition-up>.

100. Devon Greene, *It's time to pay college athletes*, WESTERN COURIER (Mar. 7, 2018), <https://westerncourier.com/40606/sports/its-time-to-pay-college-athletes/>.

third parties in excess of the salary cap imposed by a cartel constitute criminal fraud, despite the possibility that the cartel itself violates federal antitrust law.

At its core, this issue is more about control than anything. While an initial impulse of the NCAA and its member institutions may have related to a desire to limit the cost of its workforce—the athletes generating the revenue and goodwill—the more imminent concern is the ability to control the economic landscape. As discussed below, the NCAA seems to be working at all costs to preserve the billion-dollar golden goose of March Madness.

The lack of control, even more than the economic limitations on college athletes, seems to be where the athletes can appear to be more a victim of the crime of amateurism. The deprivation of the right to participate in the marketplace, whether through individual sale of one's name, image, and likeness, or through a collectively bargained system of educational conditions, ultimately might be the cost of this criminalization of third party payments.

The ironic consequence of *Gatto* and the other cases described above, is a shift away from amateurism. This “indentured servant” type arrangement—with “amateur” intercollegiate athletics being the predominant path to a career in professional sports—may be facing extinction.

#### V. POSSIBLE IMPLICATIONS OF AMATEURISM FRAUD

Before exploring the longer-term implications of amateurism fraud, it is instructive to examine the immediate, near-term consequences. In light of the convictions of Gatto, Code, and Dawkins, the question now becomes whether there might be broader consequences to these successful prosecutions. This section explores a number of possible consequences related to broadening the scope of criminality under the federal fraud law, possible limits on such prosecutions, and related consequences for university compliance departments.

##### *A. Broadening the Scope of Criminality*

To date, the defendants in the federal fraud cases have been agents, runners, shoe executives, and assistant coaches. Under the fraud theory explained above, though, a much broader group of individuals might also fall under the statute. If the fraud at issue is depriving a university of an amateur athlete by acting in a way that undermines the athlete's amateur status, then anyone violating NCAA rules in such a way as to make the athlete ineligible—for receiving proscribed economic benefits—might be guilty of fraud.

### 1. Boosters

The obvious category of individuals that United States attorneys could prospectively target is university boosters. Under the NCAA definition, a booster is anyone that supports a university's athletic team.<sup>101</sup> And the NCAA rules clearly proscribe providing athletes with impermissible benefits.<sup>102</sup>

Read expansively, the fraud statutes can encompass behavior by boosters in providing benefits—anything more than de minimis compensation. This is because such behavior can threaten the eligibility of a college athlete and thus defraud the university of an amateur.

Given the volume of NCAA infractions self-reported annually,<sup>103</sup> a cottage industry could emerge for prosecutors. On one hand, this approach might bolster efforts to remove third-party booster payments from college athletics in a way that the NCAA enforcement committee could never achieve. Armed with subpoena power, federal prosecutors could conduct their own war on money in college athletics akin to the thirty-year war on drugs started in the Reagan era.<sup>104</sup>

The influence of the prosecutors could also help reduce the economic cost of university compliance departments armed with the impossible task of monitoring all of the behavior surrounding its hundreds of athletes. The economic savings there alone might support the fraud theory advanced in the amateurism fraud cases.<sup>105</sup>

### 2. Coaches

Coaches would also be obvious targets of such investigations. The extent to which federal prosecutors actively continue such prosecutions

101. *Role of Boosters*, NCAA, <http://www.ncaa.org/enforcement/role-boosters> (last visited Oct. 10, 2020); see also NCAA MANUAL, *supra* note 7, § 6.4.2 (explaining the institution's responsibility for the behavior of third-party boosters).

102. See, e.g., *Role of Boosters*, *supra* note 101; NCAA MANUAL, *supra* note 7, § 16.02.3 (defining impermissible benefits); NCAA MANUAL, *supra* note 7, § 12.01 (explaining the concept of amateurism).

103. This is a common practice. See, e.g., Andy Anders, *Ineligibility And Personalized Itineraries: Ohio State's Self-Reported NCAA Violations From January Through September 2019*, LANTERN (Jan. 15, 2020), <https://www.thelantern.com/2020/01/ineligibility-and-personalized-itineraries-ohio-states-self-reported-ncaa-violations-from-january-through-october-2019/>; Charlie Potter, *University of Alabama self-reports six minor NCAA violations*, 247SPORTS (July 2, 2020, 5:20 PM), <https://247sports.com/college/alabama/Article/Alabama-Crimson-Tide-Athletics-self-reports-six-minor-NCAA-violations-for-2019-20-148774290/>.

104. Of course, this could have drastically negative consequences. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS* (2010).

105. See, e.g., *Finances of Intercollegiate Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (last visited Oct. 10, 2020) (exploring the costs of intercollegiate athletics).

could alter the risks related to college coaching. No longer is cheating merely risking a show cause order from the NCAA, it also would be risking criminal liability.

An important caveat here related to coach criminal liability is worth noting. All of the assistant coaches involved in the prosecuted cases received money from third parties. Interestingly, the first round of cases filed by the prosecutors in the Southern District of New York did not target any head coaches. This was despite clear evidence of head coaches at Kansas, Arizona, and LSU allegedly having information about and perhaps even participating in the payments from third parties to their players.<sup>106</sup> It is possible the prosecutors distinguished between receiving bribes and facilitating them.

It seems possible that a coach could commit fraud against his employer by depriving the university of an amateur athlete; it is not clear why his position would necessarily differentiate him from third parties like runners or agents. At the same time, such a prosecution might raise the same kinds of issues that led the Seventh Circuit to reverse Walters' conviction.

The economic benefit, or property, that a coach would be receiving would be the benefit of the athlete playing and the team winning. This "profit" would be the indirect benefit of a new contract or meeting contractual incentives based on wins and team performance. As with the Walters case, it is not clear that the success of the team would injure the university. To the contrary, it might benefit it. This of course assumes that the NCAA does not catch the coach arranging for payment for the player.

### *B. Limits on Prosecution*

Even so, a rush to prosecute boosters and coaches seems unlikely. The optics of these prosecutions certainly enter into the calculus of resource allocation. The public reputation of runners, handlers, and individuals inhabiting the AAU basketball culture does not endear such figures to the public. The decisions of the juries in the cases of Code and Dawkins might indicate as much. Even shoe executives like Gatto can be portrayed as predators worth punishing.

Exuberant fans—the average boosters—do not fall into this category. The big money donors might rise to this level, but probably do not

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106. See Billy Witz, *Who's on Trial in the College Basketball Scandal? Not the Big Names*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/sports/college-basketball-trial-arizona-lsu.html>; Dave Skretta, *NCAA calls alleged Kansas basketball violations 'egregious'*, STAR TRIB. (May 11, 2020, 9:43 AM), <https://www.startribune.com/ncaa-calls-alleged-kansas-basketball-violations-egregious/570286972/>.

rest so high on the hierarchy of possible criminals worth federal government prosecutorial resources. In addition, the growing public view that college athletes should receive compensation for playing sports also suggests that the public may be less than supportive of a war against boosters.

A similar sentiment would likely exist with respect to head coaches. Fans care most about whether a coach wins. It is reasonable to think that fan dismay with NCAA sanctions is less about the coach involved and more about the negative impact on the team. In the minds of many, cheating may be unacceptable, but is likely not criminal.

Further, these cases do not lead to lengthy prison sentences. The longest sentence to date is Dawkins' one year and one day. As a result, the crime of amateurism fraud does not seem to be one worth resources beyond that expended by the Southern District of New York.

### C. NCAA Compliance

The NCAA Committee on Infractions lacks subpoena power. In other words, the Committee is unable to make individuals testify in cases related to potential NCAA rules violations. As a result, the NCAA and the Committee have established the self-reporting principle.<sup>107</sup> Under this principle, university athletic departments have a responsibility of self-reporting rules violations, and report on a regular basis to the conferences and the NCAA.<sup>108</sup>

To the extent that rules violations threaten athlete eligibility, those violations constitute acts of criminal fraud, even if the likelihood of prosecution is low. As a result, other considerations previously not relevant may become more important. The compliance office of a university might find itself caught between the reporting requirement of the NCAA and the knowledge that it is reporting criminal activity if it discloses impermissible benefits. When the individual providing the benefit is an employee, the university may not want to report the behavior, particularly if the individual is a coach. With the exception of sexual assault, the institution does not necessarily have a duty to report criminal behavior of its employees.

Where the provider of the impermissible benefit is a booster, the university similarly might not want to report the behavior for similar reasons. As universities increasingly depend on alumni contributions,

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107. NCAA MANUAL, *supra* note 7, § 19.2.2.

108. See, e.g., TEX. A&M U.—KINGSVILLE, COMPLIANCE POLICIES AND PROCEDURES MANUAL 7-8 (2012), [http://www.ncaa.org/sites/default/files/C\\_TAMUK\\_ComplianceManual.pdf](http://www.ncaa.org/sites/default/files/C_TAMUK_ComplianceManual.pdf); see also NCAA MANUAL, *supra* note 7, § 6.4 (explaining the institution's responsibility for the behavior of third-party boosters).

institutions will not be eager to turn over their alumni to federal prosecutors for committing amateurism fraud in the name of helping the team win.

Even if a university has no issue with releasing such information, the possibility of criminal liability could cut strongly against the culture of self-reporting the NCAA compliance scheme depends upon to regulate institutions. The aggravator in compliance cases—the lack of institutional control—often results from a failure to disclose cheating *before* the enforcement division of the NCAA discovers it.<sup>109</sup> The incentive to disclose potentially could diminish where the consequence is a felony conviction for an employee of the university or a friend of the institution.

These considerations may seem to lie at the lower end of the risk spectrum. As one prosecutor in the Southern District of New York has demonstrated, however, it only takes one motivated prosecutor to make the considerations raised herein a set of serious challenges for compliance departments.

#### VI. THE IRONIC SYSTEMIC CONSEQUENCES OF THE AMATEURISM FRAUD CASES

Viewing these cases from a global perspective, one might expect that criminalizing violations of the NCAA's amateurism rules would have the effect of strengthening them. Prosecuting third-party payments to college athletes in the name of protecting the right of the university to amateur athletes and restoring the power of institutions to frame the student-athlete paradigm, in theory, advances the cause of the NCAA. By marshaling resources, including subpoena power, that the NCAA lacks, the federal prosecutors would seem to be serving as the cavalry needed to curb bribery and fraud. The consequence has been, and will continue to be, the exact opposite.

##### *A. Diminishing Amateurism*

The effect of the prosecutions by the Southern District of New York has been to diminish amateurism, at least the NCAA's version of it. To understand why, one must begin by looking at the NCAA itself.

The March Madness basketball tournament that generates over \$1 billion annually provides almost all of the NCAA's revenue. As such, the NCAA must protect the tournament and its revenue at all costs. The effect of the prosecutions publicly was to threaten the NCAA in creating a clear association between college basketball and criminality.

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109. See *Role of Boosters*, *supra* note 101.

The consequence of this association should it become ensconced in the public consciousness is not merely the risk that it poses to attendance, but also to viewership. The high television ratings of the tournament<sup>110</sup> certainly contribute to the desire of companies to spend large amounts of money on advertising. The corporate sponsors, in effect, fund the entire NCAA through the revenue provided to the tournament. These companies benefit not only from the effectiveness of the advertising to large audiences that then purchase their products, but also by the positive association they have with the tournament. In light of all of these intersecting interests, the image of the tournament and the NCAA remains intimately tied to their future success.

The immediate reaction of the NCAA to the announcement of the indictments reflected this reality. The NCAA took action in the fall of 2017 subsequent to the September 2017 announcement of the indictments by installing the Commission on College Basketball.<sup>111</sup> Condoleezza Rice, the widely-respected former Stanford provost and Secretary of State, headed the Commission, which was charged with proposing changes to remedy the problems with college basketball exposed by the indictments.<sup>112</sup>

As the NCAA rules served as the basis for what made the payments to college basketball players criminal, the Commission, whether consciously or not, proposed a number of reforms that softened the amateurism rules.<sup>113</sup> The NCAA has adopted many of their proposals to date.<sup>114</sup>

The three-pronged approach of the Commission focused on (1) basketball, (2) accountability, and (3) outside voices.<sup>115</sup> The first pillar sought to increase “freedom and flexibility” of athletes while

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110. Steven Impey, *NCAA March Madness ratings second highest in 29 years*, SPORTSPRO (Mar. 26, 2019), <https://www.sportspromedia.com/news/ncaa-march-madness-ratings-second-highest>.

111. *See Committed to Change*, NCAA, <http://www.ncaa.org/about/committed-change> (last visited Oct. 10, 2020).

112. *Condoleezza Rice*, STAN. U., <https://politicalscience.stanford.edu/people/condoleezza-rice> (last visited Oct. 10, 2020); Matt Norlander, *Mark Emmert picks Condoleezza Rice to lead new committee to fix NCAA basketball*, CBS SPORTS (Oct. 11, 2017), <https://www.cbssports.com/college-basketball/news/mark-emmert-picks-condoleezza-rice-to-lead-new-committee-to-fix-ncaa-basketball/>.

113. *See generally* COMM’N ON COLLEGE BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL (2018) [hereinafter COMM’N ON COLLEGE BASKETBALL], [https://www.ncaa.org/sites/default/files/2018CCBReportFinal\\_web\\_20180501.pdf](https://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf).

114. *See Committed to Change*, *supra* note 111; *see also* Associated Press, *NCAA adopts college basketball reforms for NBA draft, agents, more*, NBC SPORTS PHILA. (Aug. 8, 2018), <https://www.nbcsports.com/philadelphia/ncaa/ncaa-adopts-college-basketball-reforms-nba-draft-agents-more>.

115. *Committed to Change*, *supra* note 111.

“minimiz[ing] the leverage of harmful outside influences.”<sup>116</sup> The increasing of the freedom and flexibility led to the changing of the no-draft and no-agent rules.<sup>117</sup> College basketball players would be allowed to have agents, as well as enter the NBA draft and return to college if not drafted.<sup>118</sup> These changes were significant departures from the prior NCAA approach. Hiring an agent was the sin that Walters committed by signing players that led to the ineligibility of athletes and allegations of mail fraud. Once an athlete hired an agent, the NCAA’s long-held view was that the athlete had abandoned his or her amateur status by entering into an agent contract.<sup>119</sup> Similarly, entering the draft was a clear sign that the athlete had irrevocably crossed the line from amateur to professional, from eligible to ineligible.<sup>120</sup> The NCAA had allowed athletes to declare for the draft and engage in pre-draft evaluations, but the athlete had to announce a return to college prior to the actual draft.<sup>121</sup>

While the draft rule change clearly added flexibility, it is not clear that allowing agents to sign college basketball players while in high school constitutes a way to minimize harmful outside influences. Christian Dawkins, to the extent he can be considered a criminal influence, would now be able to sign players prior to college. The NCAA is making efforts to regulate both the individuals who can serve as agents through this process, as well as limit the ability to sign with an agent to a subsection of elite players, but it still is a significant shift from its former “amateurism” position.

Another recommendation of the Commission, albeit outside the NCAA’s power, would be to eliminate the NBA’s one-and-done rule.<sup>122</sup> The NBA is considering returning to its former approach of allowing

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116. *Id.*

117. *Id.* (Flexibility For Going Pro And Getting a Degree). The Seventh Circuit previously denied antitrust challenges to these rules. *See Banks v. NCAA*, 977 F.2d 1081, 1082 (7th Cir. 1992).

118. *Committed to Change*, *supra* note 111 (Flexibility For Going Pro And Getting A Degree). University of Virginia star Mamadi Diakite was a beneficiary of this rule. Paul Kasabian, *Mamadi Diakite Returning to Virginia After Declaring for 2019 NBA Draft*, BLEACHER REP. (May 29, 2019), <https://bleacherreport.com/articles/2838621-report-mamadi-diakite-returning-to-virginia-after-declaring-for-2019-nba-draft>.

119. Marc Tracy, *N.C.A.A. Alters Rules for Agents and Draft in Wake of Basketball Corruption Scandal*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/sports/ncaa-basketball-agents.html>.

120. *Id.*

121. Tyler Conway, *NCAA Proposes New Rule to Allow Early NBA Draft Entrants to Return to School*, BLEACHER REP. (June 24, 2015), <https://bleacherreport.com/articles/2505462-ncaa-proposes-new-rule-to-allow-early-nba-draft-entrants-to-return-to-school>.

122. *Tough talk on corruption, one-and-done, but commission misses the mark*, ESPN (Apr. 25, 2018), [https://www.espn.com/mens-college-basketball/story/\\_/id/23304802/con-dolezza-rice-commission-recommendations-one-done-nba-draft-corruption-recruiting](https://www.espn.com/mens-college-basketball/story/_/id/23304802/con-dolezza-rice-commission-recommendations-one-done-nba-draft-corruption-recruiting).



high school athletes to enter the draft.<sup>123</sup> Part of the idea would be to eliminate players that might be more susceptible to taking cash payments because they had no real interest in NCAA basketball.

The NBA's investment in the G League also complicates the picture, as it may now offer a real alternative to the NCAA as a path to the NBA.<sup>124</sup> The NCAA is open to the success of such an alternative so long as it does not diminish the talent pool in such a way as to undermine March Madness. The NCAA's gamble, though, is that the attraction of fans to the tournament rests more in the competitiveness of the games, the buzzer beater outcomes, and the unpredictability, including upsets by underdog teams. Eliminating a few elite players could actually enhance these goals; eliminating a large class of quality players could have a more dramatic negative effect.

The second pillar of the Commission, accountability, related to more strict compliance enforcement with a more efficient process that sets stronger penalties.<sup>125</sup> The suspension of Memphis star James Wiseman for moving expenses received while in high school<sup>126</sup> was a step in this direction, but it is not clear what the ultimate goal is, as others involved in the cases above, including the head coaches at Arizona and Kansas, have, to date, avoided any penalty despite ongoing investigations. To be sure, the NCAA's compliance enforcement remains a lightning rod for criticism such that its goals reflect overall perception rather than efficient, equal-handed justice. On the other hand, the lack of subpoena power is a key impediment in this context.

The third pillar of including outside voices also was achieved by the diversity of the Commission, which included a wide range of people.<sup>127</sup> The NCAA also wants to reduce what it perceives as corruption by expanding downward to create its own alternative to AAU basketball.<sup>128</sup> The idea here is to influence the culture of runners by offering a regulated path from middle school to March Madness. By participating in the business of basketball extended downward, the NCAA is in a way

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123. Khadrice Rollins, *Adam Silver Expects One-and-Done Rule to End in Time for 2022 Draft*, SPORTS ILLUSTRATED (May 12, 2019), <https://www.si.com/nba/2019/05/12/adam-silver-end-one-and-dones-2022-draft>.

124. *Id.*; *What You Need to Know About the NBA G League*, NBA G LEAGUE, <https://gleague.nba.com/about/> (last visited Oct. 11, 2020).

125. *Committed to Change*, *supra* note 111.

126. Billy Witz, *James Wiseman of Memphis Can Return From Suspension in January*, N.Y. TIMES (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/sports/ncaabasketball/james-wiseman-of-memphis-can-return-from-suspension-in-january.html>.

127. *Committed to Change*, *supra* note 111.

128. *See, e.g.*, Ricky O'Donnell, *The NCAA is trying to destroy AAU basketball*, SBNATION (June 26, 2018, 11:01 AM), <https://www.sbnation.com/college-basketball/2018/6/26/17501458/aau-changes-college-basketball-fbi-investigation>.

professionalizing lower levels of basketball, another step away from amateurism.

*B. Name, Image, and Likeness?*

The other significant recommendation of the Commission in this regard is to allow college athletes the ability to profit off of the uses of their names, images, and likenesses (NILs).<sup>129</sup> The *O'Bannon* case had provided the first meaningful attack on this restriction, but the NCAA had not yielded in response.<sup>130</sup> The Ninth Circuit in *O'Bannon* found that the NCAA's cartel violated the Sherman Act, but that violation did not entitle college athletes to use of their NILs.<sup>131</sup>

The Commission, which again was a direct response to the amateurism fraud cases detailed above, *recommended* this change. Unlike some of the other recommendations, the NCAA did not immediately implement the freedom to use NILs; its stated reason for waiting was the pending *Alston* case,<sup>132</sup> which the Ninth Circuit recently decided.<sup>133</sup> While it may have been inevitable, there is no question that the cases filed by the Southern District of New York kept the issue of NIL in the public discourse after *O'Bannon* was decided in 2015.

State legislatures, however, have essentially forced the NCAA's hand on this issue. In the fall of 2019, the California legislature passed a law entitling all college athletes the right to use their NILs, and prohibited institutions from punishing such uses with a loss of eligibility.<sup>134</sup> The California law goes into effect in 2023.<sup>135</sup> Initially, the NCAA stated its opposition to the California statute, and suggested it might sue to enjoin the law on grounds that it is unconstitutional.<sup>136</sup>

Other states followed suit, with a wide variety of proposals in state legislatures related to NIL as well as possible compensation for college

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129. COMM'N ON COLLEGE BASKETBALL, *supra* note 113, at 38.

130. There have been other challenges to the NCAA's amateurism rules as well, *see supra* note 6, but *O'Bannon* made the first inroads on name, image, and likeness. *O'Bannon v. NCAA*, 802 F.3d 1049, 1049 (9th Cir. 2015).

131. *O'Bannon*, 802 F.3d at 1079.

132. COMM'N ON COLLEGE BASKETBALL, *supra* note 113, at 37-38.

133. *Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.)*, 958 F.3d 1239, 1265-66 (9th Cir. 2020) (upholding an injunction restricting the ability of the NCAA to block expenses for "education-related benefits").

134. Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12#>.

135. *Id.*

136. Editorial Board, *California is making the NCAA extremely angry. Good.*, WASH. POST (Oct. 3, 2019, 4:02 PM), [https://www.washingtonpost.com/opinions/california-is-making-the-ncaa-extremely-angry-good/2019/10/03/20321534-e606-11e9-a6e8-8759e5c7f608\\_story.html](https://www.washingtonpost.com/opinions/california-is-making-the-ncaa-extremely-angry-good/2019/10/03/20321534-e606-11e9-a6e8-8759e5c7f608_story.html).

athletes.<sup>137</sup> In October 2019, the NCAA decided it was a better idea to make its own rule first, at the very least to avoid what it deemed as the daunting proposition of complying with fifty different state laws on the issue.<sup>138</sup>

In April 2020, the NCAA announced that it would allow NILs with respect to all college athletes, as long as the universities did not play any role in interacting with third parties to secure such endorsements or remuneration.<sup>139</sup> Part of the worry is to prevent direct payments from boosters through athletic departments to athletes.

In addition, athletes can use their identity as an athlete, but cannot use logos or intellectual property of their university.<sup>140</sup> The NCAA has charged the respective divisions of its member institutions to develop additional rules—guardrails—to protect against abuse by third parties.<sup>141</sup> The plan is to develop these rules during the fall of 2020, and vote on them in January 2021, so that they go into effect for the 2021-22 academic year.<sup>142</sup>

The move to allow NIL compensation cuts against the NCAA's traditional view of amateurism in deep and profound ways. So much of its compliance rules have focused on preventing third parties from giving benefits to athletes. Now such behavior will be acceptable on some level.

Indeed, it will be interesting to determine how the NCAA and its member institutions will distinguish between endorsements, which will be permissible, and third-party payments, which will presumably still violate the principle of amateurism. The NCAA has made clear that the universities may not pay athletes directly under this new scheme, but drawing lines beyond that seems to be quite challenging.

One likely result of this move will be an increase in power for the conferences. As more money enters into intercollegiate athletics from external sources, the interests of the NCAA institutions, between the

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137. Charlotte Carroll, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS ILLUSTRATED (Oct. 2, 2019), <https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws>.

138. Press Release, NCAA, Board of Governors starts process to enhance name, image and likeness opportunities (Oct. 29, 2019), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities>.

139. Press Release, NCAA, Board of Governors moves toward allowing student-athlete compensation for endorsements and promotions (Apr. 29, 2020), <http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions>.

140. *Id.*

141. *Id.*

142. Zac Al-Khateeb, *NCAA NIL rules, explained: What recommended updates mean for student-athletes, and what comes next*, SPORTINGNEWS (Apr. 30, 2020), <https://www.sportingnews.com/us/ncaa-football/news/ncaa-nil-rules-updates-explained-student-athletes/118otm673eogy1mmrl0q7f4yev>.

sixty or so schools in the Power Five conferences and the hundreds that are not, could threaten the existence of the NCAA itself. The basketball tournament, and the need to include hundreds of schools as potential participants, seems to be the only glue currently holding the NCAA together.

## VII. CONCLUSION

This Article has explored the concept of the crime of amateurism—third parties committing fraud against universities by paying intercollegiate athletes and depriving universities of amateur athletes. After describing the recent proliferation of cases out of the Southern District of New York, the Article questioned the efficacy of the theory in its possible overstating of the damage suffered by universities and its potential collateral consequences for college athletes.

The Article next explored the immediate consequences of these cases, including a broader scope of criminality for boosters and coaches, the likelihood of further prosecutions, and the possible impact on compliance departments.

The Article then moved to its core claim—that the consequence of criminalizing amateurism has ironically been to diminish the concept of amateurism significantly, and move the NCAA in a direction toward extinction. It is clear that the concept of amateurism continues to shift; it remains to be seen whether the NCAA can restructure it in a way that will preserve its role in intercollegiate athletics.