THE DUKE MODEL: A PERFORMANCE-BASED SOLUTION FOR COMPENSATING COLLEGE ATHLETES

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I. INTRODUCTION

A man reaps what he sows,¹ or at least he should. The limit placed by the Ninth Circuit in the O’Bannon² case, regarding the damages college athletes can receive, unfairly prevents college athletes from earning compensation that is commensurate with their valuable efforts.³ The Ninth Circuit’s holding warrants a conversation between the NCAA, its member institutions, and college athletes to address the inequities flowing from a situation in which the multi-billion dollar business of college athletics continues to thrive and grow while those creating the product for that business—college athletes—remain undercompensated and exploited.⁴

In O’Bannon, plaintiffs consisting of current and former college football players and Division I men’s basketball players sought compensation for the use of their names, images, and likenesses in, among other things, video games.⁵ The district court held that the NCAA’s prohibition on athletes earning compensation for the use of their names, images, and likenesses violated anti-trust law under the Sherman Act.⁶ It ordered that the NCAA could not prevent its member institutions from providing full cost of attendance scholarships.⁷ The district court also ordered that the NCAA could not prevent its member institutions from providing college athletes up to $5,000 in shared revenue after graduation.⁸ A three-judge panel of the Ninth Circuit (hereinafter the “Ninth Circuit”) affirmed the district court’s holding that the NCAA’s prohibition on athletes earning compensation for their names, images, and likenesses constituted an anti-trust violation. The Ninth Circuit also affirmed the district court’s order allowing full cost of attendance scholarships, but it vacated the portion of the order that allowed the NCAA’s member schools to

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¹Galatians 6:7.
²O’Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).
³O’Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).
⁵O’Bannon, 802 F.3d 1049, 1052 (9th Cir. 2015).
⁷O’Bannon v. NCAA, 7 F. Supp. 3d 955, 989 (N.D. Cal. 2014). Traditional grant-in-aid scholarships cover tuition, room, books, and board. Full cost of attendance scholarships cover the gap between grant-in-aid scholarships and the full cost of attendance that can include transportation to and from school, miscellaneous personal expenses, administrative fees, which can range between $2,000 and $5,000. See Michelle B. Hosick, Autonomy Schools Adopt Cost of Attendance Scholarships: College Athletes’ Viewpoints Dominate Business Session Discussions, NCAA (Jan. 18, 2015, 6:58 AM), http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships (discussing the rule adopted through autonomy that allows schools to provide scholarships that cover the full cost of attendance); see also Brian Bennet, NCAA Board Votes to Allow Autonomy, ESPN (Aug. 8, 2014), http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences (stating “the full cost-of-attendance stipends . . . could be worth between $2,000 and $5,000 per player”).
⁸O’Bannon v. NCAA, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014).
pay its athletes deferred compensation up to $5,000 per year because those expenses were “untethered to educational expenses.”

The Ninth Circuit acknowledged how critical college athletes are to the product of major college athletics. “The labor of student-athletes is an integral and essential component of the NCAA’s ‘product,’ and a rule setting the price of that labor goes to the heart of the NCAA’s business.” Despite recognizing that college athletes serve as the first-hand suppliers of the NCAA’s business and product—i.e., the football and basketball games that the public consumes in droves—the Ninth Circuit limited the damages that college athletes could receive. In doing so, the Ninth Circuit decided to treat college athletes, who are adult citizens, differently than every other adult citizen. In the United States, an adult citizen, as well as children, are entitled to receive damages that are commensurate with their injuries.

One cannot dispute that education for college athletes possesses value. Nevertheless, some athletes contribute to a growing industry of major college athletics that generates billions of dollars of revenue. Those athletes who create such a valuable product should be able to earn compensation for their efforts as every other American is entitled to do. The contributions for some athletes to major college athletics go beyond the value of scholarships that players receive,

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9O’Bannon v. NCAA, 802 F.3d 1049, 1053, 1078 (9th Cir. 2015). Plaintiffs’ request for the Ninth Circuit to rehear the appeal en banc was denied. O’Bannon v. NCAA No.14–16601 (9th Cir. 2015) (order denying rehearing en banc).

10O’Bannon v. NCAA, 802 F.3d 1049, 1066 (9th Cir. 2015).


12O’Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).

13See, e.g., Wiltz v. Brothers Petroleum, LLC, 140 So. 3d 758, 787 (La. Ct. App. 2014) (awarding a teenage boy $3,000,000 in damages for suffering brain injury and paralysis in a driving and drinking car accident); Roy v. Deckman, 124 A.3d 169 (Md. 2015) (noting a teenage boy was awarded a sizeable amount in damages that he suffered from lead poisoning).

14See Val Ackerman & Larry Scott, College Athletes Are Being Educated, Not Exploited, CNN (Mar. 30, 2016), http://www.cnn.com/2016/03/30/opinions/college-athletes-not-exploited-ackerman-scott/ (contending college athletes are not being exploited by the millions they are generating for their respective schools because they are students and are receiving an education); see also Howard P. Chudacoff, Let’s Not Pay College Athletes, WALL ST. J. (Mar. 28, 2016, 7:15 PM), http://www.wsj.com/articles/lets-not-pay-college-athletes-1459206949 (arguing the perks of being a college athlete provides them with the opportunity to live opulent lifestyles in college and it is unfair for them to be allowed to live so lavishly while also receiving a free education).

and that value beyond scholarships is what college athletes ought to receive regardless of their designations as both students and athletes.

The time has long come for the NCAA, its member institutions, and college athletes to sit down and discuss compensating college athletes for playing. Rather than continue a war of words with increasing animosity between college athletes and the NCAA, the parties should take advantage of the existing infrastructures, where fora already exist for college athletes to voice their concerns, to devise a plan to compensate college athletes. For instance, a student-athlete advisory committee (SAAC) consists of college athletes who “provide insight on the student-athlete experience. The SAAC also offers input on the rules, regulations, and policies that affect student-athletes’ lives on NCAA member institution campuses. NCAA legislation mandates that all member institutions . . . and conferences have SAACs.” The existence of SAACs and other infrastructure provide an opportunity for college athletes, the NCAA, and member institutions to engage in meaningful dialogue regarding the issue of compensation for playing.

Once the parties begin that conversation about compensation for college athletes above their scholarship amounts, this article sets forth a proposal, the “Duke Model,” that serves as an archetype for how to pay college athletes. The Duke Model provides a detailed and comprehensive compensation structure for athletes that the parties might agree on if they discussed a compensation system for athletes in men’s college basketball and football.

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16 See, e.g., Cardale Jones (@CJ12_), TWITTER (Apr. 11, 2016, 11:57 AM), https://twitter.com/CJ12_/status/719569962134847488 (commenting by a former star player at Ohio State University, Cardale Jones, on how the NCAA’s rules and regulation exploit college athletes); Cardale Jones (@CJ12_), TWITTER (Apr. 11, 2016, 12:07 PM), https://twitter.com/CJ12_/status/719572562179661826 (alleging “[t]he NCAA control[s] [college athletes’] lives with insane and unfair rules”).


18 I purposefully refuse to refer to athletes (except in quotes by others) in college as student-athletes based on the history of the phrase “student-athlete.” Professors Robert and Amy McCormick traced the roots of the NCAA’s phrase “student-athlete” to a Colorado Supreme Court holding in 1953, noting that:

[In University of Denver v. Nemeth, the Colorado Supreme Court upheld a determination by the state Industrial Commission that Ernest Nemeth, a football player at the University of Denver, was an ‘employee’ within the meaning of the Colorado workers’ compensation statute. Thus, the university was obligated to provide workers’ compensation for his football injuries. Stunned by the Nemeth decision, the NCAA responded by coining the term ‘student-athlete’ and requiring its exclusive use thereafter. By emphasizing the identity of athletes as ‘students,’ the NCAA endeavored to diminish any tendency to characterize them as ‘employees’ . . . . ‘[The NCAA] crafted the term student-athlete, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes. [The NCAA] told college publicists to speak of “college teams,” not football or basketball “clubs,” a word common to the pros. The NCAA adopted and mandated the term “student-athlete” purposely to buttress the notion that such individuals should be considered students rather than employees.’


19 The phrase “Duke Model” comes from the author’s law school alma mater. The Duke University men’s basketball team represents one of the most prestigious, successful, and profitable college basketball programs in the country. Since men’s college basketball is one of the two major sports (along with football) included in the payment model, the title is apropos.
Section I briefly discusses the NCAA and the existing structures that would facilitate implementation of the Duke Model. Section II provides the legal background, including a discussion of the O’Bannon case, along with the NCAA’s most effective defense to date of its policy against compensating college athletes above their scholarship amounts—amateurism. Section III discusses the Duke Model for football and men’s basketball, which includes the following: (1) base compensation; (2) athletic bonuses; and (3) academic bonuses. Section IV discusses the counterarguments to the Model and responses thereto.

This article provides a starting point, if not a complete model, to discuss how to compensate college athletes.20

II. OVERVIEW OF THE NCAA AND EXISTING INFRASTRUCTURE

Before discussing the Duke Model, this article briefly discusses the NCAA as it exists today, as well as the existing infrastructure that allows for college athlete interaction with the NCAA, conference administrators, and university presidents and chancellors.

A. The NCAA and Division I Governance Structure

The NCAA, which is an unincorporated non-profit organization, regulates and oversees college athletics on a national level.21 It includes more than 1,200 member institutions spanning three divisions: (1) Division I, Division II, and Division III.22 Division I offers full scholarships to college athletes, and this division represents “the highest level of competition in most sports.”23 Division II uses a partial-scholarship model,24 and it competes at an intermediate level.25 Division III does not offer scholarships and represents the lowest level of competition for these divisions.26 In the late 1970’s, the NCAA divided Division I college football teams into Division I-A and Division I-AA.27 In 2006, the NCAA re-branded Division I-A as the Football Bowl Subdivision

20Although other legal commentators and scholars have discussed models for paying college athletes, those models lack the specificity and breadth that this model includes. Robert Grimmett-Norris, Roadblocks: Examining Title IX & the Fair Compensation of Division I Intercollegiate Student-Athletes, 34 ST. LOUIS U. PUB. L. REV. 435, 448–54 (2015). The other models include the following: pay-for-play, revenue sharing, free market, and trust fund. Id. A pay-for-play model would compensate college athletes for their participation in various athletic programs by giving them a monthly stipend. Id. at 448–50. A revenue sharing model entails requiring universities to share, with student-athletes, a percentage of the revenues generated by their respected teams. Id. at 450–52. A free market system allows the market to set appropriate compensation for each athlete depending on their skill level. Id. at 452–53. The trust fund model involves athletes receiving compensation for athletic competitions, as well as outside incidental activities, but the revenue would be entered into a trust fund where the athletes would be permitted to withdraw funds. Id. at 453–56.
(FBS) and Division I-AA as the Football Championship Subdivision (FCS). The FBS falls under Division I athletics. Division I schools typically consist of the most numerous student bodies, the largest athletic budgets, and the greatest number of athletic scholarships awarded.

The NCAA’s governance structure consists of legislative bodies—made up of volunteers from [its] member schools—that govern each division, as well as a group of committees that set association-wide policy. These committees manage topics affecting sports rules, championships, health and safety, matters impacting women in athletics, and opportunities for minorities. The NCAA Board of Governors is a NCAA-association wide committee that represents the highest governing body of the NCAA. The Board of Governors consists of twenty members, including the NCAA president, chairs of the Division I Council and the Division II and Division III Management Councils, and chancellors or presidents from Division I, II and III schools who serve on other NCAA committees.

In 2014, Division I “redesigned its governing system to create a structure that is nimble and streamlined and to be more responsive to membership needs. Members adopt bylaws governing Division I through two legislative processes, which include Autonomy and Council Governance.”

Both processes—Council Governance and Autonomy—which are discussed below, include input from presidents, chancellors, directors of athletics, athletics administrators, coaches, faculty representatives, conference personnel, and, critical for purposes of the Duke Model, college athletes. NCAA committees are populated by membership personnel that conduct the division’s day-to-day business and establish strategic direction for the future. The membership receives assistance in this regard from staff at the NCAA national office.

Division I’s committee structure oversees everything from championships administration and sport oversight to strategic planning and the overall health of Division I. According to the
NCAA, “[t]he student-athlete voice is an important component of the Division I governance structure,” and the 2014 restructuring gave “more emphasis to student-athlete voice at every level of decision-making.”

i. Council Governance & the Division I Council

The Council Governance includes the Division I Council, which is “responsible for day-to-day operations of the division” and constitutes the division’s primary policy-making body. The Division I Council is comprised of forty members who are “athletics administrators (e.g., athletics directors, senior woman administrators, conference administrators, compliance administrators and other senior level administrators), faculty athletics representatives and student-athletes.” Two members of the Division I Student-Athlete Advisory Committee participate and vote in meetings of the Division I Council. The Student-Athlete Advisory Committee also has a voting college athlete on each of the eight standing committees of the Council. The Division I Council committees create legislation on a variety of topics relating to the well-being of college athletes. The other major governing process in Division I, Autonomy, also includes college athletes in the decision-making processes.

ii. Autonomy

In 2014, the new governance model also “grant[ed] flexibility to schools in the Atlantic Coast, Big 12, Big Ten, Pac-12 and Southeastern conferences[,] the Power Five conferences[,] to change [or pass] rules for themselves in a list of specific areas within Division I.” This structure is referred to as autonomy, and college athletes participate actively in the autonomy governance
structure. Conferences choose fifteen (15) college athletes to be part of the eighty votes cast on autonomy legislation.\footnote{Division I Committees, NCAA, http://www.ncaa.org/governance/committees?division=d1 (last visited Jan. 23, 2017). The other votes are institutional votes consisting of the members of the Power Five conferences.}

The areas of autonomy for the Power Five conferences include, among others, financial aid and “awards, benefits and expenses for enrolled student-athletes and their families and friends.”\footnote{Division I Manual, NCAA, § 5.3.2.1.2 (Aug. 1, 2016), http://www.ncaapublications.com/productdownloads/D117.pdf. Some of the other areas of autonomy include time demands, meals and nutrition, recruiting restrictions, health and wellness, insurance, career transition, and academic support. Division I Manual, NCAA, § 5.3.2.1.2 (Aug. 1, 2016), http://www.ncaapublications.com/productdownloads/D117.pdf.}

Non-Power Five conference schools may, but are not required to, follow any of the autonomy legislation passed by the Power Five conferences.\footnote{Division I Manual, NCAA, § 5.3.2.1.2 (Aug. 1, 2016), http://www.ncaapublications.com/productdownloads/D117.pdf.} In addition to the new governance structure of Division I that allows college athletes to interact with university leaders and the NCAA, student-athlete advisory committees provide similar opportunities nationally and conference-wide.

iii. SAAC

A student-athlete advisory committee (SAAC) consists of college athletes who “provide insight on the student-athlete experience” and the “rules, regulations and policies that affect student-athletes’ lives.”\footnote{See Michelle B. Hosick, Autonomy Schools Adopt Cost of Attendance Scholarships: College Athletes’ Viewpoints Dominate Business Session Discussions, NCAA (Jan. 18, 2015, 6:58 AM), http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships (discussing the rule adopted through autonomy that allows schools to provide scholarships that cover the full cost of attendance); Brian Bennet, NCAA Board Votes to Allow Autonomy, ESPN (Aug. 8, 2014), http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences (stating “the full cost of attendance stipends . . . could be worth between $2,000 and $5,000 per player”).} The NCAA requires “all member institutions . . . and conferences have SAACs.”\footnote{NCAA Student-Athlete Advisory Committees (SAACs), NCAA, http://www.ncaa.org/student-athletes/ncaa-student-athlete-advisory-committees-saacs (last visited Jan. 23, 2017). See NCAA Student-Athlete Advisory Committees (SAACs), NCAA, http://www.ncaa.org/student-athletes/ncaa-student-athlete-advisory-committees-saacs (last visited Jan. 23, 2017) (defining National and Campus SAACs, along with student representative number requirements for Division I, II, and III); SAAC Web Information, NCAA, http://www.ncaa.org/sites/default/files/SAAC%20Web%20Information.pdf (last visited Jan. 23, 2017) (listing one of SAAC’s duties as “[s]tudy issues [and] make policy [and] legislative recommendations regarding amateurism, recruiting, financial aid, awards [and] benefits”).} The work of SAACs provide an opportunity for college athletes, the NCAA, and member institutions to discuss a variety of topics, which should include the issue of compensation for playing.

Each conference typically allows for each academic institution to send two representatives to the conference SAAC, which includes male and female athletes.\footnote{See Big 12 Conference Student-Athlete Advisory Committee, BIG 12 SPORTS, http://www.big12sports.com/ViewArticle.dbml?ATCLID=1523127 (last visited Jan. 23, 2017) (listing the members of the Big 12 SAAC and their representative schools); Student-Athlete Advisory Committee (SAAC), ACC, http://www.theacc.com/page/SAAC (last visited Feb. 11, 2017) (providing a short history of the ACC’s SAAC); Chris} Also, each conference SAAC
includes a chair and vice chair, who are elected by their peers.50 The SAAC from each Division I Conference selects one representative to represent the college athletes’ interests, from their conference, on the NCAA SAAC.51

A conference SAAC “serve[s] as a medium of communication through which student-athletes, conference administrators, institutional representatives, NCAA representatives and coaches discuss and take action on issues relating to rules and regulations, student-athlete welfare, and community service.”52

Conference SAACs have the power to do the following: vote on new rules or changes to existing rules; recommend potential legislation in their respective conference; and recommend potential NCAA legislation.53 They also “review, react, and comment to the governance structure on legislation, activities, and subjects of interest.”54 Some recent subjects of interest have been the time demands of Division I college athletes, the NCAA Division I shared governance, and financial literacy (i.e., talking to athletes about financial issues, including ways to best “manage increased money provided through cost of attendance”).55

In addition to these topics of conversation, SAACs vote members onto the Division I Board of Directors, Council, and various committees (competition oversight committee, football oversight committee, men and women’s basketball oversight committee, etc.).56 They also vote members onto their own committees to fill void spots.57

B. Opportunities for Conversations

The NCAA emphasizes the new governing structure for Division I gives a “voice” to college athletes, particularly in voting on legislation that affects college athletes at every level of decision-making.58 The governing structure and SAACs allow for productive discourse between college athletes, representatives of the universities and conferences, athletic directors, and representatives of the NCAA. The discussions can and should address the O’Bannon decision, which places a limit on what athletes can receive as compensation.59 This conversation remains

Taylor, Taylor Serves as ACC SAAC Representative, Go DUKE (July 18, 2015), http://www.goduke.com/ViewArticle.dbml?ATCLID=210224587 (describing his experience as the SAAC representative for Duke University);
51Student-Athlete Advisory Committee (SAAC), ACC, http://www.theacc.com/page/SAAC (last visited Feb. 11, 2017) (“There will be one student-athlete from the SAAC who will represent the ACC on the NCAA SAAC.”).
55See, e.g., Report of the NCAA Division I Student-Athlete Advisory Committee, NCAA (July 2015).
56Id.
59O’Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).
critical as revenues from major college athletics continue to rise with, among other things, television contracts for football and men’s basketball games, as well as the popularity of the college football playoff system.  

Stakeholders involved in the existing infrastructure of the NCAA, from the conference SAACs to the autonomy participants to the Division I Council, can and should engage in meaningful dialogue about how college athletes can receive compensation for their efforts in creating the lucrative product of college athletics. Practically speaking, the council governance structure, which includes the Division I Council and the autonomy mechanism, can be used to seek reform of the NCAA rules that prohibit compensation for playing one’s sport. The autonomy mechanism and conference SAACs could then facilitate the discussion on how to compensate college athletes in a fair manner. The Duke Model proposed within this article serves as an excellent starting point for that discussion. Furthermore, because of the detail in the Duke Model, the parties might choose to adopt the entire Duke Model, or agree upon aspects of it, in the amounts stated herein or whatever reduced amounts the universities could afford.

III. RELEVANT LEGAL BACKGROUND

This section provides background on the Sherman Act, the O’Bannon case (which applied the Sherman Act), the NCAA’s leading defense against compensation for college athletes (that it argued for in O’Bannon), amateurism, and labor law.

A. The Sherman Act and the Board of Regents

The Sherman Act, Section 1, makes it illegal to form any “contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.” Since every contract restrains trade to a certain extent, “the Supreme Court has limited the restrictions contained in section 1 to bar only ‘unreasonable restraints of trade.’”

A plaintiff bringing a claim under Section 1 of the Sherman Act must show “(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a Rule of Reason analysis; and (3) that the restraint affected interstate commerce.”

A Rule of Reason analysis includes a burden-shifting test “the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition.” A plaintiff can show the “anticompetitive effect by proving that the defendant possessed the requisite

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63 Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996).
64 Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir. 1998).
market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price.”65 If the plaintiff satisfies this initial burden, then the burden shifts to the defendant.66 The defendant must then establish a procompetitive justification of the challenged restraint for the anticompetitive effect on the free market.67 This is a heavy burden for the defendant who must provide only legitimate procompetitive justifications that, on balance, actually show “the challenged restraint enhances competition.”68 For example, “mere profitability or cost savings have not qualified as a defense under the antitrust laws.”69

If the defendant satisfies its burden, the burden then shifts again to the plaintiff who “must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner.”70 Once each of “these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is reasonable.”71

The United States Supreme Court in Board of Regents applied a Rule of Reason analysis to college athletics, and courts continue to do so.72 Board of Regents involved the NCAA’s

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65Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998); see also Fortner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969) (defining “market power” as “the ability of a single seller to raise price and restrict output”); Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012) (defining “market power” as “the ability to raise prices significantly without going out of business”).


70Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998); accord Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); Hairston v. Pac. 10 Conf., 101 F.3d 1315, 1319 (9th Cir. 1996); Orson Inc. v. Miramax Film Corp., 79 F.3d 1358, 1368 (3d Cir. 1996); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993).

71Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998). Courts sometimes use the quick-look approach under the Rule of Reason. Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998). The quick-look approach applies when the challenged restraint involves an obvious anticompetitive effect, such as an agreement not to compete in terms of price (price-fixing) or output. If that is the case, then “the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under the ‘quick look’ analysis.” Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998).

72NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 86–135 (1984); see also Am. Needle, Inc. v. Nat’l Football League, 560 U.S. 183, 186 (2010) (“The legality of that concerted action must be judged under the Rule of Reason.”); Agnew v. NCAA, 683 F.3d 328, 343 (7th Cir. 2012) (“[E]ither a more searching Rule of Reason analysis will be necessary to convince us of its procompetitive or anticompetitive nature, or a quick look at the rule will obviously illustrate its anticompetitiveness.”); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829 (3d Cir. 2010) (“[T]he court required the jury to analyze the alleged restraint under full rule of reason principles.”); Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 294 (2d Cir. 2008) (“MLBP’s operations should be analyzed under the rule of reason.”); Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998) (“We find it appropriate to adopt such a quick look rule of reason in this case.”); Chicago Prof’l Sports P’ship v. Nat’l Basketball Ass’n, 95 F.3d 593, 596 (7th Cir. 1996) (“We concluded in 1992 that the district court properly condemned the NBA’s superstation rule under the quick-look version of the Rule of Reason.”); United States v. Brown Univ., 5 F.3d 658, 672 (3d Cir. 1993) (“We thus agree with the district court that Overlap must be judged under the rule of reason.”); McCormack v. NCAA,
previous restrictions in the 1980s concerning televising college football games. The NCAA capped the number of college football games that could be televised and the number of games that a school’s team could appear on television. Also, any contracts between television networks and universities needed approval from the NCAA. The Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association sued the NCAA, claiming that these restraints violated the Sherman Act. The Supreme Court applied a Rule of Reason analysis and held for the plaintiffs, striking down the NCAA’s restrictions as anticompetitive without any procompetitive justifications, which violated the Sherman Act.

B. O’Bannon

The plaintiffs in O’Bannon, comprised of current and former college football players and Division I men’s basketball players, sought relief for the licensing of their names, images, and likenesses in videogames, archival game footage, live game telecasts, and re-broadcasts. The district court held the NCAA’s compensation rules that prohibit college athletes from receiving compensation for the use of their names, images, and likenesses violates the Sherman Act and constitute an unlawful anticompetitive effect. As a result, the district court ordered two permanent injunctions: (1) the NCAA could not prevent its member institutions from providing full cost of attendance scholarships; and (2) the NCAA could not prohibit its member institutions from providing their athletes up to $5,000 from the shared revenue that would be placed in trust for athletes, which could be collected by the athletes after graduation. The Ninth Circuit affirmed the district court’s ruling that the NCAA violated the college athletes’ rights under the Sherman Act. The Ninth Circuit upheld the first permanent injunction against the NCAA that allows member institutions to provide athletes full cost of attendance scholarships, but it vacated the second injunction that allows member institutions to pay athletes up to $5,000 per year of deferred compensation, reasoning that the $5,000 compensation was “untethered to educational expenses.”

Under the Rule of Reason, both the district court and also the Ninth Circuit held that the plaintiffs satisfied their initial burden by showing that the NCAA’s prohibition on athletes receiving compensation for the use of their names, images, and likenesses constituted a significant anticompetitive effect on the relevant market. In particular, the courts deemed the relevant market

845 F.2d 1338, 1344 (5th Cir. 1988) (“The essential inquiry under the rule-of-reason analysis is whether the challenged restraint enhances competition. Applying this test, we have little difficulty in concluding that the challenged restrictions are reasonable.”); In re NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013) (“Plaintiffs’ claims in this case must be analyzed under the rule of reason.”); Metro. Intercollegiate Basketball Ass’n v. NCAA, 337 F. Supp. 2d 563, 571 (S.D.N.Y. 2004) (“The summary judgment evidence must be examined in accordance with "rule of reason" analysis.”); Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 585 (E.D. Pa. 2004) (“I find that there is no per se restraint and will apply rule of reason analysis.”).

80O’Bannon v. NCAA, 802 F.3d 1049, 1053, 1078 (9th Cir. 2015).
as the college education market where “colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities.”81 If the NCAA prohibition did not exist, then the NCAA’s member institutions would compete with each other by paying the college athletes for their names, images, and likenesses as a part of obtaining the services of college athletes; instead, the prohibition functions as a price-fixing mechanism where the member institutions agree to pay the college athletes nothing for their names, images, and likenesses.82 Also, “[a]bsent the NCAA’s compensation rules, video game makers would negotiate with student-athletes for the right to use their NILs [i.e. names, images, and likenesses].”83

The district court’s analysis then shifted to the second part of the Rule of Reason analysis, where the defendant must show a procompetitive justification for the restraint of trade. The NCAA argued there were four purported procompetitive justifications—amateurism, integrating athletics and education, maintaining competitive equity, and increasing output. The district court and the Ninth Circuit both accepted the first two justifications, but the district court found that the compensation rules “play a limited role in integrating student-athletes with their schools’ academic communities.”84 The Ninth Circuit did not disturb that finding.85

The analysis then shifted to the last part of the Rule of Reason analysis regarding less restrictive alternatives. The district court identified two: “(1) allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance; and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs.”86 The Ninth Circuit held “that the district court did not clearly err in finding that raising the grant-in-aid cap would be a substantially less restrictive alternative, but that it clearly erred when it found that allowing students to be paid compensation for their [names, images, and likenesses] is virtually as effective as the NCAA’s current amateur-status rule.”87 The Ninth Circuit prohibited compensation for college athletes above their scholarship amounts opining that compensation tied to college athletes’ educational expenses is much different from compensation for college athletes “untethered” to educational expenses.88

C. Amateurism

The NCAA’s argument regarding amateurism boils down to this: if college athletes are paid to play, then they are no longer amateurs, which will change the nature of the product—i.e., the games—resulting in less consumer demand, meaning fewer people watching the games. The NCAA commissioned a study in O’Bannon to try to demonstrate that consumers generally oppose payment for college athletes.89

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81 O’Bannon v. NCAA, 802 F.3d 1049, 1070 (9th Cir. 2015).
82 O’Bannon v. NCAA, 802 F.3d 1049, 1052, 1069 (9th Cir. 2015).
83 O’Bannon v. NCAA, 802 F.3d 1049, 1067 (9th Cir. 2015).
84 O’Bannon v. NCAA, 802 F.3d 1049, 1072 (9th Cir. 2015).
85 O’Bannon v. NCAA, 802 F.3d 1049, 1072 (9th Cir. 2015).
86 O’Bannon v. NCAA, 802 F.3d 1049, 1074 (9th Cir. 2015).
87 O’Bannon v. NCAA, 802 F.3d 1049, 1074 (9th Cir. 2015).
88 O’Bannon v. NCAA, 802 F.3d 1049, 1060 (9th Cir. 2015).
89 See Transcript of Record at 2603–605, O’Bannon v. NCAA, 2014 WL 6907634 (N.D. Cal. June 24, 2014) (No. C–09–3329 CW) (showing Dr. Michael Dennis’ survey results on how the paying of student athletes affect demand, particularly in “viewing and attending college football games and basketball games”).
The relevant finding of the study showed that consumers, regardless of whether they self-identified as sports fans or simply members of the general public, tended to approve less of payment for college athletes the higher the potential payment amount rose for athletes. For instance, 38% of the general public said they would be less likely to view or attend games if college athletes were paid $20,000 a year. 57% of the general public indicated they would feel no more or less likely to view or attend games. About 5% of the general public showed they would be more likely to view or attend games if college athletes were paid $20,000. Disapproval rates increased as payment levels increased as follows: (1) disapproval rate at the $20,000 level: 38% for the general public and 36% for the fans; (2) disapproval rate at the $50,000 level: 47% for general public and 52% for the fans; and (3) disapproval rate at the $200,000 level: 53% for general public and 62% for fans.

The study suffered from a major flaw as “the survey’s initial question skewed the results by priming respondents to think about illicit payments to student-athletes rather than the possibility of allowing athletes to be paid.” In fact, the district court in O’Bannon found the study unpersuasive.

The study suffered further criticism from plaintiff’s expert witness, Dr. Daniel Rascher, who discussed previous surveys regarding consumer demand. Those respective surveys involved expected consumer demand in anticipation of professional baseball players’ salaries skyrocketing in the 1970’s and professional athletes competing in the Olympics. In both surveys, consumers indicated they would watch baseball and the Olympics less once the salaries increased in baseball and once professionals were allowed to compete in the Olympics, but viewership actually increased after the players’ salaries rose and once professional athletes began participating in the Olympics.

The district court also attacked the NCAA’s argument that amateurism served as a proper procompetitive justification. Judge Wilkins of the Northern District of California found that “the NCAA has revised its rules governing student-athlete compensation numerous times over the years, sometimes in significant and contradictory ways.” Judge Wilkins noted that the NCAA’s
“current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism.”

Despite its harsh criticism, the district court noted that “some restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball,” finding however that there were less restrictive means to achieve this procompetitive justification.

The Ninth Circuit embraced the procompetitive justification of amateurism stating, “[T]he amateur nature of collegiate sports increases their appeal to consumers.” Quoting the Supreme Court in the Board of Regents, the Ninth Circuit opined that amateurism allows the “market for college football” to remain “distinct from other sports markets and must be ‘differentiated’ from professional sports lest it become ‘minor league [football].’”

Courts, including in the O’Bannon case, show incredible deference to the NCAA in overseeing all competitive college athletics. In Board of Regents, the United States Supreme Court stated that the NCAA must establish:

[R]ules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.

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101 O’Bannon v. NCAA, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014). The district court explained:

A Division I tennis recruit can preserve his amateur status even if he accepts ten thousand dollars in prize money the year before he enrolls in college. A Division I track and field recruit, however, would forfeit his athletic eligibility if he did the same. Similarly, an FBS football player may maintain his amateur status if he accepts a Pell grant that brings his total financial aid package above the cost of attendance. But the same football player would no longer be an amateur if he were to decline the Pell grant and, instead, receive an equivalent sum of money from his school for the use of his name, image, and likeness during live game telecasts. Such inconsistencies are not indicative of ‘core principles.’

102 O’Bannon v. NCAA, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014) (acknowledging that ‘maximiz[ing] consumer demand for the product’ is a legitimate procompetitive justification” (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984)).

103 O’Bannon v. NCAA, 802 F.3d 1049, 1073 (9th Cir. 2015).

104 O’Bannon v. NCAA, 802 F.3d 1049, 1076 (9th Cir. 2015).

105 O’Bannon v. NCAA, 802 F.3d 1049, 1076–77 (9th Cir. 2015).

106 See NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 86 (1984) (giving deference to the NCAA); see also O’Bannon v. NCAA, 802 F.3d 1049, 1050 (9th Cir. 2015) (deferring to the NCAA); Agnew v. NCAA, 683 F.3d 328, 347–48 (7th Cir. 2012) (affirming the district court’s dismissal of the plaintiffs case because they failed to find “a relevant market for student-athlete labor”); Rock v. NCAA, 928 F. Supp. 2d 1010, 1021–22 (S.D. Ind. 2013) (holding “[p]laintiff’s proposed market is impermissibly narrow” and “not legally cognizable”); Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ari. 1983) (showing deference to the NCAA’s rulemaking activity since “the NCAA’s action does not constitute an unreasonable restraint under the Sherman Act”).

The Court noted that the NCAA attempts to sell to the public a product brand of football, college football, which includes an academic tradition. The Supreme Court believed that “to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.” According to Board of Regents, “[T]he NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.”

D. Labor Law

The conversations advocated for in this Article that may take place between college athletes, athletic administrators, and others may resemble aspects of collective bargaining. The National Labor Relations Act Section 8(d) provides that collective bargaining between labor and management entails negotiating in good faith on topics of “wage, hours, and other terms and conditions of employment ... but such obligation does not compel either party to agree to a proposal or require the making of a concession.” These topics provide the essential terms for discussions between college athletes and conferences to determine how college athletes should be paid.

Professor Robert Berry and the late Professor William Gould’s article, “A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes,” comprehensively chronicles the rise of professional sports associations and unions in professional football, basketball, baseball, and hockey. The rise of these players’ associations and collective agreements resulted from, among other things, “a growing sentiment among the players that their grievances were being ignored and that unanimity was needed.” College athletes from the Northwestern football team felt the same way and sought to unionize to protect their interests.

In the Northwestern case, a regional director of the NLRB, Peter Ohr, ruled that football players from Northwestern University were primarily employees. The Northwestern football players called themselves the College Athletes Players Association (CAPA). Ohr, thus, called for an election wherein each current Northwestern football player with eligibility remaining would vote on whether the player wanted CAPA to represent him for collective bargaining purposes.

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111 National Labor Relations Act, § 8(d); 29 U.S.C. § 158(d).
When the full board of the NLRB reviewed the case, however, it declined to exercise jurisdiction stating that it maintains jurisdiction over only private entities, while many of the schools competing in the Big Ten conference against Northwestern are public entities.\textsuperscript{117} The full Board did not address the issue of whether college athletes are employees or primarily athletes.\textsuperscript{118}

On January 31, 2017, Richard Griffin, Jr., General Counsel of the NLRB (“General Counsel”), sent a memorandum to regional directors and officers of the NLRB, resolving the issue of whether Division I FBS scholarship football players at private institutions are considered employees pursuant to the NLRA.\textsuperscript{119} General Counsel determined unequivocally that these football players are employees under the NLRA.\textsuperscript{120}

The General Counsel’s memorandum is not a binding ruling or decision, but it provides guidance for “employers, labor unions, and employees that summarizes [NLRB] law . . . and explains how the office of the General Counsel will apply these representational decisions in the unfair labor practice arena.”\textsuperscript{121}

The General Counsel stated that Division I FBS scholarship football players at private colleges and universities are employees under Section 2(3) of the NLRA and the common-law test of agency which defines employees “any person ‘who perform[s] services for another and [is] subject to the other’s control or right of control.’”\textsuperscript{122} Section 2(3), for example, includes a broad definition of employee, and none of its enumerated exceptions include “university employees, football players, [or] students.”\textsuperscript{123} Under the common-law test, according to the General Counsel,

\textsuperscript{119}NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT (2017), https://apps.nlrb.gov/link/document.aspx/09031d4582342bfc (“This Report also addresses the question left open in Northwestern University, and sets forth the General Counsel’s position on whether scholarship football players at NCAA Division I Football Bowl Subdivision (‘FBS’) private colleges and universities are employees under the NLRA.”).
\textsuperscript{120}NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 16 (2017), https://apps.nlrb.gov/link/document.aspx/09031d4582342bfc (“We conclude that scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act.”).
\textsuperscript{121}NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 1 (2017), https://apps.nlrb.gov/link/document.aspx/09031d4582342bfc: Old Harbor Native Corp. v. Comm’r on Internal Revenue, 104 T.C. 191, 206–07 (1995) (“First, a general counsel memorandum is not binding precedent on this Court. A general counsel memorandum is a legal opinion from one division of the Commissioner’s Office of Chief Counsel to another.”).
\textsuperscript{123}NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 18 (2017), https://apps.nlrb.gov/link/document.aspx/09031d4582342bfc. Section 2(3) of the NLRA reads as follows:
Most notably, the General Counsel indicates that Division I FBS football players at private institutions are afforded the protections of Section 7 of the NLRA even if they never choose to form or support a union.127 Section 7 provides employees with the “right to engage in concerted activities ‘for mutual aid or protection.’”128 The General Counsel goes even further stating that these football players “should be protected by Section 7 when they act concertedly to speak out about aspects of their terms and conditions of employment [, which includes actions to . . .] reform NCAA rules so that football players can share in the profit derived from their talents.”129

Not only is the General Counsel of the NLRB stating that scholarship football players at Division I FBS private institutions are employees, but he is also paving the way (if not

The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.


127 TUL’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 21 (2017), https://apps.nlrb.gov/link/document.aspx/09031d4582342bfc) (“Section 7 protections [are] afforded to all unorganized private sector employees who may never elect to form or support a union.”).
encouraging) these football players to advocate for increased compensation based on the profit they generate.\textsuperscript{130}

This memorandum certainly opens the door for “future labor complaints on behalf of football players at the seventeen FBS private universities.”\textsuperscript{131}

What is most alarming for the NCAA and its member institutions about this memorandum is that Section 7 activity, which the memorandum says the football players are protected doing, includes the right to strike.\textsuperscript{132}

If the college athletes from any or all of the private Division I FBS decided to strike, then those strikes could lead to the cancellation of not only inter-conference games (i.e., games against teams who play in different conferences such as Southern California, USC, in the Pac 12 and the University of Texas in the Big 12), but also intra-conference games (i.e., games against teams in the same conference, such as the Big Ten, which include both public schools, such as Ohio State, and private schools, such as Northwestern).

Thus, despite the similarities between college athlete and member institution conversations and labor unions and ownership negotiations in professional sports, the NCAA and its member institutions would much rather prefer that college athletes do not proceed under the NLRA where the strike weapon would be possible.\textsuperscript{133}

Moreover, scholarship college basketball players fit into the definitions of employee set forth in the General Counsel’s Memorandum because basketball players at private Division I schools “perform services for their colleges and the NCAA, subject to their control, in return for compensation.”\textsuperscript{134} In fact, scholarship basketball players spend nearly 40 hours per week dedicated to their sport,\textsuperscript{135} which brings publicity and revenues to their respective schools.\textsuperscript{136} As


\textsuperscript{132}The Right to Strike, NRLB, https://www.nlrb.gov/strikes (“Strikes are included among the concerted activities protected for employees by [section 7].”) (last visited Feb. 15, 2017).


\textsuperscript{136}See, e.g., Darren Rovell, ACC on Track to Shatter Record for Money Earned in NCAA Tournament, ESPN (Mar. 26, 2016) http://espn.go.com/mens-college-basketball/story/_/id/15071018/atlantic-coast-conference-set-
a result, college basketball players at Division I schools might bring a successful labor complaint and avail themselves of the protections afforded by the NLRB, which includes the right to strike.\(^\text{137}\)

The potential for the NLRB to declare college athletes primarily employees rather than students in a formal opinion or ruling if a football or basketball player(s) brought a labor complaint, along with the threat of labor complaints brought in conformity with the General Counsel’s memorandum, remain daunting possibilities for the NCAA.

The NCAA and member institutions would prefer to avoid dealing with labor complaints and possibly unions, which might be formed at school, conference, and/or a national level. The NCAA and member schools would likely rather allow conferences and college athletes, with NCAA oversight and coordination, to determine college athlete compensation in a collaborative and cooperative setting, which is now possible via the current governance structure and SAACs.

IV. THE DUKE MODEL: A PERFORMANCE-BASED SOLUTION

The Duke Model for compensating college athletes in football and men’s basketball focuses on how an athlete performs. The model includes a base compensation, bonuses for athletic performance, and bonuses for academic performance. Prior to discussing each of these compensation areas, some of the rationale in developing the model must be explained.

A. Basic Structure

i. NCAA Oversight

Under the Duke Model, the NCAA would serve as the purveyor of information regarding all finances of the conferences and schools. The NCAA would work with each conference to determine appropriate amounts of compensation based on the revenues generated by each conference, the ability of each school in the conference to pay, and the priorities of the conference with regard to payment. The priorities of certain conferences, for example, might be to compensate college athletes based solely on academic bonuses, while other conferences may choose to compensate college athletes using only athletic bonuses, while others still may choose to compensate using all three areas—base compensation, athletic bonuses, and academic bonuses.

Each school would need to submit its financial data to the NCAA to help facilitate this process, which would include all of the revenue streams and expenses for each school, such as revenue from television contracts, ticket sales, and expenses for athletic directors’ and coaches’ salaries, facilities, and staff salaries. The NCAA already maintains the NCAA fund that is based on its multi-billion contract and extension with CBS Sports (“CBS”) and Turner Broadcasting...
System Inc. ("TBS") that allows CBS and TBS to broadcast the men’s NCAA Basketball Tournament.\textsuperscript{138}

The NCAA would serve as a fact-finding instrument that works with all of the conferences to help determine how much a conference and its individual schools could pay athletes, while still attempting to keep the compensation at a level in line with the NCAA’s purported issue with consumer demand concerns.

ii. Conference-Wide

Implementation of the Duke Model would most likely occur at the conference level for several reasons. First, the university’s payment of its athletes should be based on how much money the university has available to pay its athletes, understanding that money may be reallocated from coaches’ salaries, athletic department personnel salaries, and money spent on facilities. Each university generates a different amount of revenue, some of which includes monies that are earned and shared based on conference-wide television contracts, performance in the men’s NCAA basketball tournament, and the college football playoff system. For example, conferences such as the Pac 12, Big 10, SEC, and ACC share in the revenue from television contracts for football in their respective conferences.\textsuperscript{139}

Also, the NCAA pays out money from its basketball fund based on, among other things, how well the conferences’ schools perform in the NCAA tournament.\textsuperscript{140} Each game played in the 2016 NCAA Tournament was worth $265,791.\textsuperscript{141} The conferences split the money earned amongst its members.\textsuperscript{142} The ACC, by virtue of so many of its teams advancing extremely far in the tournament, earned nearly $40,000,000.\textsuperscript{143} The basketball fund comes from the NCAA’s original $10.8 billion dollar television contract with CBS Sports ("CBS") and Turner Broadcasting.


\textsuperscript{140}See Will Hobson, Fund and Games, WASH. POST (Mar. 18, 2014), https://www.washingtonpost.com/graphics/sports/ncaa-money (providing that NCAA payouts increase the better a team performs).


System Inc. ("TBS"). Those parties reached agreement on the extension of that contract at $8.8 billion for CBS and TBS to broadcast the tournament through 2032. 

Similarly, the college football playoff system rewards conferences in the Power Five conferences with a set amount (for 2016–2017 it is $55 million for each conference), as well as conferences whose teams qualify for the four-team college playoffs (for each team that makes it in a conference receives 2016–2017 in $6 million) and a non-playoff bowl game under this system (for 2016–2017 it is $4 million). Several other five conferences, known as the Group of Five, also receive a set amount (for 2016–2017 it is approximately $83.5 million in aggregate), but it is far less than the Power of Five’s payout.

Other payments under the college football playoff system include: (1) a set amount for each conference (for 2016–2017 it is $300,000) for each of its school’s football team that meets the NCAA’s APR (Academic Progress Rate) for participation in a post-season football game, and each independent institution also receives a set amount (the $300,000 in 2016–2017) when its football team meets that standard; (2) a set amount (for 2016–2017 it is $2.16 million) for each conference whose teams play in the semifinal or national championship game to cover expenses for those games; (3) Notre Dame will receive $2.83 million if it meets the APR standard, and the other three independents will share $930,462; and (4) “certain conferences in the Football Championship Subdivision conferences will receive $2.43 million in aggregate.” Notably, the college football playoff pays out approximately $500,000,000 total.

Conferences, in any event, generate varying amounts of revenue. For example, the Southeastern Conference generated $122,517,029.00 in revenue for football in 2014–2015, and

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148Academic Progress Rate Explained: What Is the APR and How Is It Calculated?, NCAA, http://www.ncaa.org/aboutresources/research/academic-progress-rate-explained (last visited Feb. 15, 2017) (defining “Academic Progress Rate” as a system in which to hold institutions accountable for the academic progress of their student-athletes through a team-based metric that accounts for the eligibility and retention of each student-athlete for each academic term).
the Pac-12 Conference generated $81,255,208.00 in revenue in football in that same year. The Power Five conference school revenues are “five times greater than the revenues of these mid-major institutions,” which stem primarily from the extraordinary differences in ticket sales, rights, and licensing. The annual ticket revenue for the athletic department at the University of Texas, for instance, brings in almost one hundred times the revenue of the athletic department at Troy University.

Thus, a conference that generates more revenue can afford to pay its players more than a conference that generates less revenue. As a result, in football, the SEC would likely have a higher base compensation and higher bonuses than Conference USA, a non-Power Five conference. Opponents of differentiated pay scales might argue that this would lead to high school athletes wanting to play in the SEC or Big 10 instead of Conference USA. This, however, is already the case. High school athletes want to, and typically do, play at high-profile schools in the Power Five conferences to give themselves the most exposure, which will give them the best opportunity to make it to the professional ranks.

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See *Division I Committees*, NCAA, (denoting the Power Five to include Atlantic Coast, Big 12, Big Ten, Pac-12, and Southeastern conferences) (last visited Jan. 18, 2017).


Second, each conference has a SAAC where college athletes collaborate interactively with athletic directors, coaches, and players from other schools, to discuss and make rules and policies affecting college athletes’ lives. Similarly, autonomy legislation allows college athletes to work alongside athletic directors, coaches and players from amongst the Power Five conferences to make policies affecting college athletes’ lives. Mechanisms, therefore, already exist to enable these conversations and changes to take place on a conference-wide scale.

A one-size-fits-all base compensation and bonus structure might be affordable to some universities, but not others, or it may be too little for some schools that could readily afford more. If all schools were required to pay a certain base compensation, for example, then some schools might not be able to afford it, potentially forcing some schools to withdraw from competition. By using a basic structure with varying amounts based on how much revenue each conference generates and how much schools in each conference can actually provide to its athletes, the Duke Model allows for consistency, a level of uniformity, predictability, and opportunity for every university to participate.

Also, some conferences may place greater value on academics, choosing to adopt only the academic bonuses and not the base compensation or athletics bonuses. Compensation accomplished on a conference-level allows each conference to promote and reward the performance that its institutions value most.

B. Rationale Behind the Starting Base Compensation

The Duke Model includes a base compensation to protect every player, which is akin to what the NFL and NBA utilize through minimum salaries. Thus, if a player falls out of favor with a coaching staff for defensible or indefensible reasons, then that player still maintains some level of security that he will receive something. Also, the rigor of playing in Division I sports—which includes Division I basketball and the Football Bowl Subdivision (FBS), which represent the “highest level of intercollegiate athletics sanctioned by the NCAA”—in conjunction with the extraordinary revenues generated, warrants some form of compensation.

The highest base compensation for football players in a Power Five conference who start every game is set at $40,000 in the Duke Model. This number is based on the NCAA’s argument that amateurism requires college athletes to forgo payment above their scholarships, and if college athletes receive payment above their scholarships, then supposedly less consumers would watch games.

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157 See NCAA Student-Athlete Advisory Committees (SAACs), NCAA, (listing the functions of the committees) (last visited Jan. 18, 2017).
Indeed, as discussed supra, the NCAA commissioned a study in the *O’Bannon* case regarding consumer attitudes regarding college athlete payment. The study appeared biased and unpersuasive because, among other reasons, “the survey’s initial question skewed the results by priming respondents to think about illicit payments to student-athletes rather than the possibility of allowing athletes to be paid.” Even though the study was flawed, the NCAA might argue the study tended to show that the more a college athlete would be paid, the more disapproving the consumer (both the general public and fans) would be of payment. Although this contention is highly questionable and lacking reliable evidentiary support, the Duke Model placates the NCAA’s consumer demand argument by choosing a relatively low number for the highest base salaries with a number, $40,000, that falls between the two lowest numbers used in the survey (i.e., $20,000 and $50,000).

Moreover, the Duke Model sets the base compensation at a number that is considered (according to some methods) at the top of the lower class income range and below middle class income. According to the Pew Research Center, which defines middle class as “two-thirds to two times the national median income for your household size,” the range for middle class income is between $46,960 and $140,900. A reasonable consumer would likely understand that a college athlete serves as the direct producer of a product that generates billions of dollars, and that consumer would likely not stop watching college sports simply because that college athlete earns a base compensation in the lower class range.

For that same reason, consumers would likely not oppose college athletes earning more than minimum wage for their efforts given the billions of dollars the athletes generate. Using the hours detailed in the Northwestern case, paying football players minimum wage (the federal minimum wage is $7.25) based on the hours they spend devoted to football (approximately 1,750 hours) equals approximately $12,687.50. Under the Duke Model, even a scholarship

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161 *O’Bannon* v. NCAA, 802 F.3d 1049, 1078 n.22 (9th Cir. 2015) (stating that student athletes play for “the love of the game” and if they were to be paid it would “jeopardize” the public’s view of college sports and result in less viewership).

162 *O’Bannon* v. NCAA, 802 F.3d 1049, 1059 (9th Cir. 2015). In that case, Dr. Daniel Rascher testified about similar surveys conducted in the past about consumer behavior that turned out to be false. See *O’Bannon* v. NCAA, 802 F.3d 1049, 1081 (9th Cir. 2015) (Thomas, S., concurring in part and dissenting in part) (regarding viewership increasing for major league baseball and the Olympics after consumers in surveys opposed rising salaries in major league baseball and professional athletes competing in the Olympics).

163 For example, the survey used three amounts, $20,000, $50,000, and $200,000. Both members of the general public and also sports fans increased their disapproval as the payment levels increased. *O’Bannon* v. NCAA, 802 F.3d 1049, 1077, 1083 (9th Cir. 2015).


167 See Nw. Univ. Employer & C. Athletes Players Ass’n, No. 13-RC-121359, 2014 WL 1246914, at *5-6, 8-9 (N.L.R.B. Mar. 26, 2014) (detailing the amount of time players devote to football); William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENTR. L. REV. 1, 1 (2015) (finding that football college athletes spend fifty to sixty hours per week during training camp prior to school, forty to fifty hours per week during the season, and twelve to twenty-five hours per week during the spring
athlete who was not on the first or second team in football would make a base compensation
($10,000 for the third team or $5,000 for being on the team a scholarship athlete) lower than
minimum wage, despite playing on a team that produced millions of dollars of revenue.

As a result, the highest base compensation of $40,000 represents a number that reasonable
consumers would likely not oppose.

C. Forms of Compensation

i. Base Compensation

a. football

The Duke Model will be explained using a Power Five conference example to illustrate
how the model works. Non-Power Five conferences might agree on a percentage of the Power
Five conference proposal, and that concept will be discussed below. In any event, universities and
college athlete representatives could arrive at different numbers, or the same numbers as the Duke
Model, but the structure provides a functional method to compensate college athletes.

In football, the base compensation in any conference would be based on how many games
a player started on offense or defense.\footnote{In football, every team uses a depth chart to determine
who is the starter, the second team player, and the third team player. \footnote{A depth chart is a common tool used to map out the placement of starting players, second team players, third team
players, and the remainder of players. The chart will typically list starting players on top of a row and list the
subsequent back-up players to that position below. \textit{See e.g.,} Appendix A 2016–2017 LSU Tigers Depth Chart.} The starters (i.e., the first

\footnote{Eleven players participate on every play for each team. \textit{Beginner’s Guide to Football, NFL},
consist of linemen who block for the running backs and quarterback, the latter of which typically throws the
football, runs with the football, or hands the ball off to the running backs who then run with the ball or catch the
16, 2017). Wide receivers and tight ends, who are also on offense, typically catch the ball or block. \textit{Beginner’s
goal of the offense is to advance the football into the opponent’s end zone, which is referred to as a touchdown and
visited Feb. 16, 2017). Otherwise, the offense wants to move the ball close enough to the opponent’s end zone
where the team can then try a field goal, which is discussed below. \textit{Beginner’s Guide to Football, NFL},
consist of linemen, who attempt to tackle the running back and quarterback, linebackers who try to do the same, as
well as prevent wide receivers and running backs from catching the ball, and defensive backs who typically cover
the wide receivers and tight ends to prevent them from catching the ball. \textit{Football 101: Football Positions & Their
Roles, DICK’S PRO TIPS}, http://protips.dickssportinggoods.com/sports-and-activities/football/football-101-football-
positions-and-their-roles (last visited Feb. 16, 2017). The defense wants to prevent the offense from moving the ball
toward the defense’s end. \textit{Football 101: Football Positions & Their Roles, DICK’S PRO TIPS},
(last visited Feb. 16, 2017).}
team) typically play in a majority of the plays, while a second team person plays in a minority of plays, and third team players participate, if at all, even less than second team players in the game.

The base compensation for an individual in a Power Five conference school that started all twelve regular season games on offense or defense would be $40,000. An individual that served as a second-team player in all twelve regular season games would earn a base compensation of $20,000. A third-team player would receive $10,000. And a scholarship player that does not fall within one of those three teams would receive $5,000.

Fig. 1: Power Five Conference School Football Offensive and Defensive Player Base Compensation

<table>
<thead>
<tr>
<th>Depth Chart Ranking</th>
<th>Base Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Team</td>
<td>$40,000</td>
</tr>
<tr>
<td>Second Team</td>
<td>$20,000</td>
</tr>
<tr>
<td>Third Team</td>
<td>$10,000</td>
</tr>
<tr>
<td>On Roster</td>
<td>$5,000</td>
</tr>
</tbody>
</table>

Thus, if player X started all twelve games, then he would earn $40,000. If player Y played on the second team the entire season, then he would earn $20,000, and so on. If a player did not start every game, but started some, then the compensation would be pro-rated based on how many games the player served on the respective teams.

Fig. 2: Power Five Conference School Football Player Pro-Rated Base Compensation

<table>
<thead>
<tr>
<th>Depth Chart Ranking</th>
<th>Compensation Per Game Equation (Assuming a 12 Game Equation)</th>
<th>Compensation Per Game</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Team</td>
<td>$40,000 ÷ 12</td>
<td>$3,333.33</td>
</tr>
<tr>
<td>Second Team</td>
<td>$20,000 ÷ 12</td>
<td>$1,666.67</td>
</tr>
<tr>
<td>Third Team</td>
<td>$10,000 ÷ 12</td>
<td>$833.33</td>
</tr>
<tr>
<td>On Roster</td>
<td>$5,000 ÷ 12</td>
<td>$416.67</td>
</tr>
</tbody>
</table>

For example, if John Smith started half of the games, but was demoted halfway through the season to second team for not playing well enough to start, then his compensation would be pro-rated as a first and second-teamer based on how many games he served in those roles. $40,000 divided by twelve (12) equals the amount a starter makes for each game, or $3,333.33 a game. $20,000 divided by twelve (12) equals the amount a second team player makes for each game, or $1,666.67 a game. If John started half of the twelve games ($3,333.33 x 6 = $20,000) and served as a second team player the other half ($1,666.67 x 6 = $10,000), then his compensation for that year would be his starter compensation earned, $20,000, plus his second team compensation earned, $10,000, for a total of $30,000.
Fig. 3: Power Five Conference School Football Player Base Compensation Scenario A

<table>
<thead>
<tr>
<th>Player John Smith</th>
<th>Amount of Games</th>
<th>Compensation Per Game Equation</th>
<th>Compensation Earned</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Team</td>
<td>6</td>
<td>($40,000 ÷ 12) x 6</td>
<td>$20,000</td>
</tr>
<tr>
<td>Second Team</td>
<td>6</td>
<td>($20,000 ÷ 12) x 6</td>
<td>$10,000</td>
</tr>
<tr>
<td>Third Team</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>On Roster</td>
<td>0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total Compensation $30,000

This same approach would be applied to any scenario that might arise for any player, such as a player serving as a third-team player for three games ($833.33 multiplied by three games equals $2,500), earning a second-team spot and playing in that capacity for three games ($1,666.67 x 3 = $5,000), and then taking over for the last six regular season games as a starter because the starter at his position suffers injury ($3,333.33 x 6 = 20,000), resulting in a compensation for that year of $27,500 (i.e., $20,000 + $5,000 + $2,500).

Fig. 4: Power Five Conference School Football Player Base Compensation Scenario B

<table>
<thead>
<tr>
<th>Player John Smith</th>
<th>Amount of Games</th>
<th>Compensation Per Game Equation</th>
<th>Compensation Earned</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Team</td>
<td>6</td>
<td>($40,000 ÷ 12) x 6</td>
<td>$20,000</td>
</tr>
<tr>
<td>Second Team</td>
<td>3</td>
<td>($20,000 ÷ 12) x 3</td>
<td>$5,000</td>
</tr>
<tr>
<td>Third Team</td>
<td>3</td>
<td>($10,000 ÷ 12) x 3</td>
<td>$2,500</td>
</tr>
<tr>
<td>On Roster</td>
<td>0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total Compensation $27,500

If a team went to the postseason for either a conference playoff championship game, a bowl game, or the college football playoffs, then the base compensation would be calculated using a thirteen, fourteen or fifteen game schedule (for the national finalists), meaning the base compensation for each player would be divided by thirteen, fourteen or fifteen to determine how much each game would be worth. The compensation for reaching and winning a conference championship, bowl, or college football playoff game would be disseminated as an athletic bonus, which is discussed below.

The special team players170 would also be eligible for a bonus based on athletic performance, which is discussed below, but the base compensation for special team players include

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170Special teams refer to plays in a football game where the ball is being kicked, which include a kickoff, field goal, and punt. Beginner’s Guide to Football, NFL, http://www.nfl.com/rulebook/beginnersguidetofootball (last visited Feb. 16, 2017). In a kickoff, the kicker begins the play by kicking the ball to the other team off of a tee, and the other team includes the kick returner who will catch the kickoff and run the ball forward. James Alder, Football 101-Positions on Special Teams, ABOUT SPORTS, http://football.about.com/cs/football101/a/positionspec.htm (last visited Feb. 17, 2017). The team kicking off will run down the field to try to tackle the kick returner, while the kick returner’s teammates will block for him. Beginner’s Guide to Football, NFL,
the following: the starting placekicker would receive $20,000; and the kick-off specialist, punter, snapper, kick returner, and punt returner would receive $10,000 each. The placekicker can sometimes play a crucial role in determining the outcome of the game through field goals and extra points, while the punter, kick-off specialist, snapper, kick returner, and punt returner each play a key role in dictating field position throughout the game. The placekicker, given his potentially critical role, would receive more than these other special teams players. The placekicker does not, however, play as much as the offensive and defensive players and, therefore, would not warrant the same amount of base compensation as those individuals.

Fig. 5: Power Five Conference School Football Special Teams Player Base Compensation

<table>
<thead>
<tr>
<th>Special Teams Position</th>
<th>Base Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Placekicker</td>
<td>$20,000</td>
</tr>
<tr>
<td>Kick-off Specialist</td>
<td>$10,000</td>
</tr>
<tr>
<td>Punter</td>
<td>$10,000</td>
</tr>
<tr>
<td>Snapper</td>
<td>$10,000</td>
</tr>
<tr>
<td>Kick returner</td>
<td>$10,000</td>
</tr>
<tr>
<td>Punt returner</td>
<td>$10,000</td>
</tr>
</tbody>
</table>

The total compensation amount for starters would be $40,000 multiplied by 22 players ($880,000), $20,000 multiplied by 22 ($440,000), $10,000 multiplied by 22 ($220,000), and $5,000 multiplied by 19 ($95,000), which equals $1,635,000. After adding in the special teams


171Lisa Horne, Just How Special are Special Teams in College Football?, BLEACHER REPORT (Mar. 26, 2013), http://bleacherreport.com/articles/1580902-just-how-special-are-special-teams-in-college-football (statistically showing that “special teams . . . can and will impact the final score of [a] game”).

172Football teams typically have eighty-five scholarship athletes. NCAA Division 1 Manual, § 15.5.6.1 (Aug. 1, 2016), http://www.ncaapublications.com/productdownloads/D117.pdf. Whereas men’s basketball teams can have thirteen scholarship athletes. NCAA Division 1 Manual, § 15.5.5.1 (Aug. 1, 2016),
players base compensation for the placekicker ($20,000), punter, kick-off specialist, snapper, kick returner and punt returner (each $10,000), the total base compensation amount equals $1,705,000 ($70,000 from special teams plus $1,635,000 for offense and defense).

A non-Power Five conference school, whose revenues fall well short of a Power Five conference’s revenues, would use the same basic structure, except that the compensation would be a certain percentage of the Power Five conference amounts. For example, a non-Power Five conference might agree to pay half of the amounts that the Power Five conferences would pay. If so, the first team players in the non-Power Five conference would earn $20,000, second team $10,000, third team $5,000, and players on the roster would receive $2,500. The base compensation in this scenario would total $817,500 for offensive and defensive players. The starting placekicker would earn $10,000, and the kick-off specialist, punter, snapper, kick returner and punt returner would receive $5,000 each. The total base compensation, including the special teams’ players, under the Duke Model using half of the proposed values would equal $852,500.

This system of performance-based compensation aligns with the interests of the players who want to start and play as much as possible. This system also aligns with the teams’ interests as well, which include encouraging competition amongst the players and rewarding those players who earn starting spots on the roster and those who make advancements on the depth chart.

b. Basketball

In men’s college basketball, the base compensation under the Duke Model would depend on how many minutes each player averaged throughout the course of the season. Five players are in the game for each team, and, like football, coaches can substitute in other players throughout the game. Men’s college basketball games currently consist of two twenty-minute halves for a total of forty minutes. In a Power Five conference, a player would receive a base compensation equating to the average of minutes played per game over the course of the season assuming the player played in a sizeable number of games. For example, if a player averaged thirty-five minutes per game in a season, then the player’s base compensation would be $35,000.

Using the University of Kentucky (a Power Five conference team) men’s basketball team as an example, the players played the following amount of minutes:


Fig. 6: University of Kentucky Men’s Basketball Team Games Played and Minutes Per Game During the 2015–2016 Season

<table>
<thead>
<tr>
<th>Player</th>
<th>Games Played</th>
<th>Minutes Per Game</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tyler Ulis</td>
<td>35</td>
<td>36.8</td>
</tr>
<tr>
<td>Jamal Murray</td>
<td>36</td>
<td>35.2</td>
</tr>
<tr>
<td>Isaiah Briscoe</td>
<td>34</td>
<td>32.2</td>
</tr>
<tr>
<td>Alex Poythress</td>
<td>31</td>
<td>23.6</td>
</tr>
<tr>
<td>Marcus Lee</td>
<td>36</td>
<td>21.8</td>
</tr>
<tr>
<td>Derek Willis</td>
<td>32</td>
<td>18.6</td>
</tr>
<tr>
<td>Skal Labissiere</td>
<td>36</td>
<td>15.8</td>
</tr>
<tr>
<td>Charles Matthews</td>
<td>36</td>
<td>10.3</td>
</tr>
<tr>
<td>Dominique Hawkins</td>
<td>26</td>
<td>9.6</td>
</tr>
<tr>
<td>Isaac Humphries</td>
<td>23</td>
<td>9.1</td>
</tr>
<tr>
<td>Mychal Mulder</td>
<td>23</td>
<td>3.9</td>
</tr>
<tr>
<td>E.J. Floreal</td>
<td>11</td>
<td>1.5</td>
</tr>
<tr>
<td>Jonny David</td>
<td>9</td>
<td>1.2</td>
</tr>
</tbody>
</table>

During the 2015–2016 season, under the Duke Model, Tyler Ulis would have earned $36,800, Jamal Murray $35,200, Isaiah Briscoe $32,200, Alex Poythress $23,600, and so forth. The total base compensation for the University of Kentucky team in 2015 would have totaled only $219,000.

Players in a non-Power Five conference would receive an agreed upon fraction of their minutes, whether it was 75% of their total minutes played, 50%, or 25%, depending on what the relevant parties agreed. If a Conference USA team averaged the same minutes as Kentucky’s players above, and the parties agreed to compensation worth 75% of minutes played, then a player averaging 35.2 minutes would receive $26,400 (75% of $35,200). The total base compensation for the entire team would have been just $164,250 (75% of $219,000).

This approach again aligns with the interests of the players and the teams as players want to play as many minutes as possible, and coaches want their best players on the floor as much as possible. In basketball, the first person to come off the bench in the game is referred to as the “sixth man.” Sometimes the sixth man is critical to the success of a team and plays more minutes than a starter or some of the starters. Thus, minutes played in basketball represents the best measure to determine a base compensation for these athletes.

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175 Basketball U on the Sixth Man, NBA (Oct. 8, 2003, 11:40 AM), http://www.nba.com/canada/bu_sixth_man.html (stating the Sixth Man as a player “who is not a part of a team’s starting five” but is first off the bench after the game begins).
176 Mike Prada, The Revenge of the Sixth Man: Why They’re More Valuable Than Ever in Today’s NBA, SB NATION (Feb. 7, 2012), http://www.sbnation.com/nba/2012/2/7/2782025/nba-sixth-man-james-harden-al-harrington-leandro-barbosa (showing a revival of the Sixth Man spot and concluding players in this position are invaluable as they can change the outcome of games).
It must be noted that a player in football will be much more likely to earn a full $40,000 base compensation than a basketball player as basketball players simply do not play all forty minutes of every game over the course of a season. Also, the base compensation totals for the teams are disparate between football and basketball, with football team base compensation totals much higher than basketball team base compensation totals. The disparate treatment in both of those instances—i.e., higher individual and team compensation in football than in basketball—makes sense financially and equitably because football programs tend to generate considerably more revenue than their basketball programs, and football teams typically include eighty-five scholarship athletes while basketball only includes thirteen scholarship athletes.177

ii. Bonuses—Athletic

The conferences and player representatives may agree that base compensation is sufficient to compensate college athletes. They may, however, also agree to pay bonuses based on athletic performance. Employers, particularly professional sports teams, often employ bonuses in their employees’ contracts to incentivize the employees to perform at their maximum levels.178 The following are the proposed bonuses that align with the interests of the athlete and the university.

a. statistical leaders

Under the Duke Model, in football, statistical leaders for the season on each team would receive a $5,000 bonus. Those statistical categories include yards passing, yards rushing, yards receiving, total touchdowns, total scoring, sacks, defensive tackles, tackles for losses, interceptions, pass break-ups, special teams tackles, kickoff return yardage, and punt return yardage. Each university would pay a total of $65,000 for statistical bonuses.

In basketball, statistical leaders for the season on each team would also earn $5,000, and those categories would include points per game, rebounds, assists, blocked shots, and steals. The total statistical bonuses per team would amount to $25,000.

The flexibility of the Duke Model also allows the conferences and players to select for compensation only certain statistical bonuses, such as passing yards, rushing yards, total touchdowns, sacks, defensive tackles, pass break-ups, and interceptions.

b. external honors

Earning external honors aligns with the interests of the players, who want recognition for their efforts, and the schools because they benefit from the additional, positive exposure based on

177See Division 1 Manual, NCAA, §§ 15.5.6.1, 15.5.5 (Aug. 1, 2016), http://www.ncaapublications.com/productdownloads/D117.pdf (restricting football teams to eighty-five total scholarships and basketball teams to thirteen). See also NCAA Finances, USA TODAY, http://sports.usatoday.com/ncaa/finances (reporting that in 2014–2015 the Texas A&M football program had the highest revenue of any football or basketball program) (last visited June 29, 2016).
the athletic feats of their athletes. The Duke Model includes the following bonuses for external honors, meaning honors bestowed by organizations or entities outside of the university, as opposed to team awards given weekly (e.g., Rice University’s Football Team’s Top Special Teams Player in the Previous Game) or at the end of the year (such as Rice University’s Most Outstanding Offensive Player for the Year).

The Duke Model would provide bonuses for Associated Press (“AP”) All-American Honors and official All-Conference Honors, with differing levels based on the team one made, such as first team, second team or third team. The amounts would range from $10,000 to $2,500 for All-American honors and $5,000 to $1,000 for All-Conference honors. Winning the Heisman Trophy, which is awarded annually to the best football player in college football, would earn a player $25,000. When Robert Griffin III won the Heisman Trophy while playing for Baylor University, “Baylor estimate[d] the Heisman win was worth $250 million in extra donations, increased ticket sales, licensing fees, sponsorship deals, an expanded deal with Fox Sports Southwest, and higher corn dog sales.”179

The following chart illustrates the external honors bonuses, and the same numbers could be used for football and basketball.

**Fig. 7: Individual External Honors Bonuses**

<table>
<thead>
<tr>
<th>Honor</th>
<th>Bonus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Heisman Trophy Winner</td>
<td>$25,000</td>
</tr>
<tr>
<td>National Player of the Year</td>
<td>$15,000</td>
</tr>
<tr>
<td>Conference Player of the Year</td>
<td>$10,000</td>
</tr>
<tr>
<td>Conference Offensive Player of the Year</td>
<td>$7,500</td>
</tr>
<tr>
<td>Conference Defensive Player of the Year</td>
<td>$7,500</td>
</tr>
<tr>
<td>Conference Freshman/Newcomer of the Year</td>
<td>$2,500</td>
</tr>
<tr>
<td>All-American First Team</td>
<td>$10,000</td>
</tr>
<tr>
<td>All-American Second Team</td>
<td>$7,500</td>
</tr>
<tr>
<td>All-American Third Team</td>
<td>$6,000</td>
</tr>
<tr>
<td>All-Conference First Team</td>
<td>$5,000</td>
</tr>
<tr>
<td>All-Conference Second Team</td>
<td>$2,500</td>
</tr>
<tr>
<td>All-Conference Third Team/Honorable Mention</td>
<td>$1,000</td>
</tr>
</tbody>
</table>

Reaching a conference championship game, bowl game, or the college football playoffs would warrant an additional bonus payable to each member of the football team to reinforce the notion that success on the team level takes an entire roster.180 The same rationale applies to basketball.

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180Michael Aiello, *Compensating the Student-Athlete*, 23 SPORTS L.J. 157, 168 (2016) (stating that post season bonuses given to coaches “should be diverted to student-athletes” because “spectators attend sporting events to watch the players play, not to watch the coaches coach”).
Fig. 8: Football Bonuses Per Player Based on Team Success

<table>
<thead>
<tr>
<th>Postseason Game</th>
<th>Bonus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conference Championship Game Participant</td>
<td>$1,000</td>
</tr>
<tr>
<td>Conference Championship Game Winner</td>
<td>$2,000</td>
</tr>
<tr>
<td>Bowl Game Participant</td>
<td>$2,500</td>
</tr>
<tr>
<td>Bowl Game Winner</td>
<td>$5,000</td>
</tr>
<tr>
<td>National Semifinalist</td>
<td>$7,500</td>
</tr>
<tr>
<td>National Runner-Up</td>
<td>$10,000</td>
</tr>
<tr>
<td>National Champion</td>
<td>$20,000</td>
</tr>
</tbody>
</table>

Fig. 9: Basketball Bonuses Per Player Based on Team Success

<table>
<thead>
<tr>
<th>Postseason Game</th>
<th>Bonus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conference Championship Game Participant</td>
<td>$1,000</td>
</tr>
<tr>
<td>Conference Championship Game Winner</td>
<td>$2,000</td>
</tr>
<tr>
<td>NCAA Tournament 1st Round Participant</td>
<td>$2,500</td>
</tr>
<tr>
<td>NCAA Tournament 2nd Round Participant</td>
<td>$5,000</td>
</tr>
<tr>
<td>NCAA Tournament Sweet 16 Participant</td>
<td>$7,500</td>
</tr>
<tr>
<td>NCAA Tournament Elite 8 Participant</td>
<td>$10,000</td>
</tr>
<tr>
<td>NCAA Tournament National Semifinalist</td>
<td>$20,000</td>
</tr>
<tr>
<td>NCAA Tournament National Runner-Up</td>
<td>$25,000</td>
</tr>
<tr>
<td>NCAA Tournament National Champion</td>
<td>$30,000</td>
</tr>
<tr>
<td>NIT Participant</td>
<td>$2,000</td>
</tr>
<tr>
<td>NIT Champion</td>
<td>$4,000</td>
</tr>
</tbody>
</table>

With the base compensation and athletic bonuses described, an examination of two cases might serve useful. We will examine two different hypothetical players who play for the same Power Five conference school to see if the results appear equitable.

Case Study 1: The star running back. In this case study, the star running back starts every game, leads the team in rushing yards and total touchdowns. He earns Conference Offensive Player of the Year, First Team All-Conference and First Team All-American honors. His team reaches the National Semifinal game in the college football playoffs after winning its conference championship game. His total pay would be $40,000 in base compensation, $10,000 in bonuses for being a statistical leader in two categories, $22,500 in individual athletics honors bonuses, and $9,500 in team athletics honors bonuses, equaling $82,000. This represents a modest amount given the likely publicity he has garnered for his team and university, the innumerable highlights of him on SportsCenter, and the use of his image by the university and networks to promote the games.

Case Study 2: The back-up cornerback. In this case study, the second-team cornerback plays solidly, but his face is never used on any commercials, billboards, or media items (such as press releases or game day materials). He does not earn any All-American or All-Conference honors or lead the team in any statistical categories. His team reaches the National Semifinal game in the college football playoffs after winning its conference championship game. Despite being a
productive member of a team that generates considerable revenue, his total pay would be just $29,500 ($20,000 base compensation plus $9,500 in team athletics honors bonuses), which is considered a lower class income.

Given these outcomes—a star player earning a total of $82,000 for playing and a back-up player earning $29,500—it is highly unlikely that a reasonable consumer will be outraged or offended by these numbers. An average consumer may understand that a player who helps generate millions of dollars and considerable positive exposure for his school, while starring in games and appearing on television commercials that promote the games and highlights, could earn $82,000. While $82,000 may be more than that average consumer makes himself, that average consumer likely does not directly generate millions of dollars of revenue in whatever field the consumer works. Also, a reasonable consumer would likely accept a back-up player earning a lower class salary despite serving as a solid contributor to a team that generates millions of dollars of revenue. Consumer demand would likely not suffer.\footnote{Even today the consumer demand for college football is extremely high. ESPN broadcasts a number of spring practice games. \textit{FBS (I-A) Schedule-2016}, ESPN, http://www.espn.com/college-football/schedule (last visited Jan. 16, 2017). In the spring of 2016, Ohio State broke its own record for attendance at a spring practice game with 100,189 fans attending the game. Austin Ward, \textit{Ohio State Breaks Own Record for Attendance in Spring Game}, (Apr. 16, 2016).}

The total for a team that included one first team all-American ($10,000), six all-conference players on the first team (6 x $5,000 equals $30,000), six all-conference players on the second team (6 x $2,500 equals $15,000), and a national semifinal finish (85 players x $7,500 equals $637,500), including all of the statistical athletic bonuses ($65,000) and base compensation ($1,705,000), would be $2,462,500. This type of year would be phenomenal and would reap millions of dollars in revenue, some of which could be allocated to pay the players for achieving those successes for the school.

\textit{c. sources of reallocation}

Before moving to academic bonuses, given that this Article just provided a sum total for the compensation expenses for base compensation and athletic bonuses under the Duke Model, and those are the most probable areas of compensation for Power Five conferences, this Article briefly discusses potential sources to reallocate money to compensate college athletes. As just stated, a football team that enjoyed an incredibly successful season from both a team and also individual players’ standpoint, would need to compensate its players with a total of $2,462,500 under the Duke Model. There are various sources of money, such as revenue from the college football playoff system, coaches’ salaries, and facility expenses, that could be reallocated to cover that expense.

For example, the Big 10 conference saw one of its teams, Ohio State, make the college football playoff’s semifinal game but lose (which equals $55,000,000 for the Big 10 conference) and three of its other teams (Michigan, Wisconsin, and Penn State) participate in non-playoff bowl games that are part of the New Year’s Six games (which is $4,000,000 multiplied by three teams
equals $12,000,000) of the college football playoff system. In total, the Big 10 would split that $72,000,000 ($55,000,000 plus $12,000,000) amongst its fourteen schools, meaning each school would receive $5,142,857.14. Thus, a team that enjoyed an outstanding year (e.g., totaling $2,462,500) could compensate its athletes by using only some of the money received from the college football playoff system alone (e.g., $5,142,857.14).

Even when looking at the traditionally less successful football teams in the Power Five conferences, coaches’ salaries could be reallocated to compensate college athletes. For instance, Kentucky’s head football coach, Mark Stoops, received $3,250,000 as salary from the university for 2016, and his football staff received an additional $3,002,700, for a total salary for coaches (not including athletic director or athletic department staff) at the University of Kentucky of $6,252,700.183

With regard to facilities, Kansas State, another school in a Power 5 Conference, enjoyed the grand opening of its new football facility in 2015 that cost $68,000,000.184 Universities can reallocate money from coaches’ salaries or money spent on facilities to compensate its players.

Schools in non-power five conferences, such as Conference USA schools, could also reallocate money to compensate student athletes, even if their compensation model included only a fraction of what Power Five conferences would pay. For example, Larry Coker, the head coach of Conference USA’s University of Texas at San Antonio received a salary of $425,000 in 2015, with an additional $808,681 of salary going to his staff, totaling $1,233,681.185 Rice University, another Conference USA university, invested over $30,000,000 in building a sports facility.186 Universities and athletics departments can reallocate money in many instances from money spent on facilities or coaches’ salaries to player compensation.187 Recall that the total base compensation for a non-Power Five conference school that decided to compensate its players at half the rate under the Duke Model would only amount to $852,500.

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187Money from NCAA executive salaries could also be reallocated to compensate college athletes. The President of the NCAA reportedly made $1,800,000 in 2013, and a number of other NCAA executives made over $500,000 each. See Steve Berkowitz, NCAA’s Mark Emmert Made More Than $1.8 Million in 2013, USA TODAY (June 30, 2015, 3:57 PM), rk-emmert-compensation-tax-return-990-form/29516401/. Reallocation of coaching salaries only represent “a fraction of the expenses” that university athletic departments spend. Michael Aiello, Compensating the Student-Athlete, 23 SPORTS L.J. 157, 165 (2016).
The Group of Five conference schools could also use money received from the college football playoff system to compensate its players.\textsuperscript{188}

As for basketball, if a team that paid its base salary (for instance, $219,000 from the example above with Kentucky University), all of its statistical leaders ($25,000), won its conference championship ($2,000 \times 15 \text{ players} = \$30,000), made it to the national semifinal game of the NCAA tournament ($20,000 \times 15 \text{ players} = \$300,000), saw one of its players win National Player of the Year ($15,000), Conference Player of the Year ($10,000), make First Team All-American ($10,000), and earn First Team All-Conference Honors ($5,000), along with a teammate ($5,000), then the total compensation owed the players would be $619,000. By all standards, this would be a wildly successful year for a basketball program. John Calipari, the head coach of the Kentucky men’s basketball team, received a base salary of $6,580,000 in 2015–2016.\textsuperscript{189} A reallocation of the head coach’s salary by itself, which was over six and a half million dollars, would have easily covered the entire compensation for the players’ entire season, which would have totaled just $619,000.

Also, money received from the men’s NCAA basketball tournament, which the NCAA doles out to conferences based on how many games the conferences’ teams win in the NCAA tournament, could also be used to compensate players. In 2016, the Atlantic Coast Conference (ACC) reportedly received almost $40,000,000, which divided by its fifteen teams would equal a total of over $2,600,000 per school.\textsuperscript{190} Again, the total compensation for a highly successful team and individual players on that team might amount to $619,000—the money received from the NCAA basketball tournament alone could compensate the players who garnered all of that success for the school and the program.

iii. Bonuses—Academic

Conferences and player representatives may also agree to bonuses based on academic performance. Bonuses based on academic performance would further encourage college athletes to perform well in the classroom and to graduate, which are in accord with the universities’ missions and the long-term success of college athletes.\textsuperscript{191}

\textsuperscript{189}Steve Berkowitz et. al, NCAAB Tournament Coaches’ Pay, USA TODAY, http://sports.usatoday.com/ncaasalaries/mens-basketball/coach (last visited June 28, 2016).
\textsuperscript{191}The Knight Commission on Intercollegiate Athletics formed “in October 1989 in response to highly-visible scandals in college sports . . . promotes reforms that support and strengthen the educational mission of college sports.” Amy Perko, Knight Commission Calls for NCAA to Transform its Guidelines for March Madness Revenues to Better Support College Athletes and Protect Financial Integrity, KNIGHT COMMISSION FOR INTERCOLLEGIATE ATHLETICS (May 10, 2016), http://knightcommission.org/resources/press-room/965-may-10-2016-knight-commission-calls-for-ncaa-to-transform-its-guidelines-for-march-madness-revenues-to-better-support-college-athletes-and-protect-financial-integrity. The Commission makes recommendations to the NCAA, some of which the NCAA adopted. \textit{Id}. The Commission consistently recommends that the NCAA use its basketball fund to reward academic success and positive academic outcomes of college athlete rather than just reward universities based on their success in the NCAA tournament. \textit{Id}. 
The following are the proposed bonuses based on academic performance: Dean’s List, Capital One Academic All-American Team, Academic All-Conference Team, and graduation. The differing levels of success within those categories are demonstrated below in table form and range from $500 (third team academic all-conference) to $20,000 if a college athlete makes the Dean’s List for a semester or graduates summa cum laude.

**Fig. 10: Bonuses Based on Academic Performance**

<table>
<thead>
<tr>
<th>Honor</th>
<th>Bonus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dean’s List per semester</td>
<td>$20,000</td>
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<tr>
<td>Academic All-American First Team</td>
<td>$10,000</td>
</tr>
<tr>
<td>Academic All-American Second Team</td>
<td>$7,500</td>
</tr>
<tr>
<td>Academic All-American Third Team</td>
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<tr>
<td>Academic All-District Team</td>
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<tr>
<td>Academic All-Conference</td>
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<td>Graduation</td>
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<tr>
<td>Graduation cum laude</td>
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</tr>
<tr>
<td>Graduation magna cum laude</td>
<td>$15,000</td>
</tr>
<tr>
<td>Graduation summa cum laude</td>
<td>$20,000</td>
</tr>
</tbody>
</table>

D. Advantages of the Duke Model

The advantages of the Duke Model are plentiful, starting with the flexibility relating to the different forms of compensation, as well as the varying amounts, that conferences and players can choose to adopt.

The NCAA itself benefits from a system of payment created with the players, conferences, and the NCAA for several reasons. First, the NCAA avoids the negative press and costs of continuing anti-trust litigation brought on behalf of college athletes. Second, if college athletes prevailed in any of those anti-trust cases, then the amount of money that could change hands in a free market might be much more than in a controlled, Duke Model. This approach also forestalls any efforts by the NLRB to rule officially that college athletes are employees, and it would likely prevent Division I FBS scholarship athletes at private colleges and universities from bringing a labor complaint.

Moreover, the NCAA avoids any potential government pressure through legislation requiring member institutions to pay college athletes or through Department of Justice investigations involving anti-trust laws. For example, in 2011, “the United States Justice Department announced an investigation to determine whether the NCAA’s prohibition on scholarships violates antitrust laws. Spontaneously, the NCAA changed the bylaw prohibiting multi-year scholarships in 2011 before the Justice Department completed its investigation.”

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192See, e.g., Jenkins v. NCAA, Case No.3:33-av-0001 (D. N.J. filed Mar. 17, 2014) (involving football and men’s basketball players seeking a free market system of payment for college athletes beyond their scholarship amounts).

193See Randy Haight, Alleging an Anticompetitive Impact on a Discernible Market: Changing the Antitrust Landscape for Collegiate Athletics, 21 JEFFREY S. MOORAD SPORTS L.J. 19, 32 (2014) (finding suspicion in the abrupt change in...
Furthermore, some members of Congress have already shown great interest in college athletics in the past, even going so far as to introduce legislation that would have created a college football playoff and removed the now-defunct Bowl Championship Series (the “BCS”). Eventually, the BCS did give way to the college football playoff. The first ever college football playoff began with controversy when top-tier teams Baylor University and Texas Christian University failed to receive a bid to play in the national semifinal college playoff. Republican Joe Barton of Texas, who “previously used his perch as chairman of the House Energy and Commerce Committee to convene hearings on the much-maligned BCS, even pushing legislation to prod the NCAA to ban it in favor of a playoff system,” wanted further hearings on the new system to add more teams to the four-team playoff.

As the push for college athlete compensation continues to gain steam and shows no signs of slowing, particularly when revenues and television deals (such as the $8,800,000,000 that the NCAA bylaws); Which Schools Offer Multi-Year Athletic Scholarships?, GOBIGRECRUITING.COM (Sept. 19, 2014), https://www.gobigrecruiting.com/blog/2014/09/schools-offer-multi-year-athletic-scholarships/ (stating a common complaint of student-athletes is the restriction of scholarships).


extension of the NCAA’s and CBS and TBS’s agreement for the men’s NCAA tournament) continue to soar, the government may feel compelled to intervene, making the Duke Model a favorable option for the NCAA.\footnote{See Eric Brady, NCAA Extends Tournament Deal with CBS, Turner Through 2032 for $8.8 Billion, USA TODAY (Apr. 12, 2016) http://www.usatoday.com/story/sports/ncaab/2016/04/12/ncaa-contract-extension-cbs-turner-ncaa-tournament-march-madness/82939124/ (discussing the $8.8 billion extension).}

Also, the NCAA avoids any type of secession by the Power Five conferences from the NCAA system.\footnote{See Ralph D. Russon, Will 5 Power Conferences Break Away From FBS?, ASSOCIATED PRESS: C. FOOTBALL (Jul. 23, 2013, 7:45 PM), http://collegefootball.ap.org/article/will-5-power-conferences-break-away-fbs (discussing the possibility of power five conferences leaving the NCAA because those conferences would like more flexibility in running their programs, which the NCAA does not allow).}

The member institutions also benefit from this system for the same reasons that the NCAA does as conferences of the member institutions find themselves as defendants in these anti-trust cases with the NCAA.\footnote{See, e.g., Complaint and Jury Demand-Class Action Seeking Injunction and Individual Damages, Jenkins v. NCAA, No. 3:33–av–0001 (D. N.J. Mar. 17, 2014).}

The players obviously benefit from this model because they earn based on their performances and contributions to a multibillion dollar industry. There are a number of advantages, both direct and indirect, stemming from compensating college athletes above their scholarship amount. First, fairness and equity dictate that the laborers and direct providers of a product that generates billions of dollars should be compensated properly. Second, college athletes may stay longer in school if they were receiving compensation and bonuses while in school.\footnote{O’Bannon v. NCAA, 802 F.3d 1049, 1730 (9th Cir. 2015).}

College athletes could earn money for their families and themselves, which may be extremely attractive for athletes from disadvantaged backgrounds or with lower socioeconomic statuses.\footnote{See Jay Bilas, It’s Time to Pay College Athletes: College, TIME (Sept. 16, 2013), http://content.time.com/time/subscriber/article/0,33009,2151167,00.html; Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015) (on file with author).} If the college athlete did stay in school longer, then he would benefit by maturing during that time. Also, if the school paid bonuses for graduation, then that might also incentivize athletes to stay in school.

Also, the Duke Model could be applied to Division II and III conferences as well. Conferences in those divisions could choose to adopt any aspects of the Duke Model at whatever fraction of the original amounts that those conferences could afford. Moreover, the conferences and players could revisit the amounts detailed in the Duke Model every five years to adjust, if necessary, for drastic increases or decreases in the revenues and sources of reallocation. This periodic review ensures that colleges and universities are able to compensate athletes in a fiscally responsible manner that is fair to the athletes, which will depend on whether the revenues are increasing, decreasing, or staying relatively constant, and, if there are changes, the amount of those changes.
By relying on the existing infrastructures that facilitate conversations between college athletes, school and conference representatives, and NCAA personnel, the stakeholders can discuss other issues, which are mentioned below, that would naturally flow from the compensation discussion, such as medical support, the continued expectations of universities, taxes, and Title IX.

i. Medical Support

During the conversations between the athletes, universities, and the NCAA, the topic of athletes receiving financial support for medical expenses resulting from injuries incurred while playing college sports might also be addressed. College athletes, particularly football players, risk incredible injury when playing for their universities. Financial security for athletes injured while playing would show strong, long-term support for the overall well-being of college athletes by universities and the NCAA.

ii. Continued Expectations of Universities

Earning compensation for playing would not change the universities’ expectations that college athletes maintain academic eligibility to receive compensation. Also, athletes would need to conduct themselves in a manner that comports with the athletic program’s and university’s standards. College athletes, on the other hand, might seek “independent verification of [their] grades” to avoid being removed from the team for non-academic or athletic performance issues.

iii. Taxes

The compensation above their scholarships that college athletes would receive would be subject to taxation as income. The athletes, schools, and NCAA could discuss the possibility of trying to make the net income received comparable given states without state taxes while keeping in mind that the cost of living will vary dramatically from Palo Alto, California, to Norman, Oklahoma.

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202 See Georgetown Hoyas Football: RB Ty Williams Breaks Neck, Could Be Paralyzed, SPORTS ILLUSTRATED (Sept. 6, 2015), http://www.si.com/college-football/2015/09/06/georgetown-hoyas-ty-williams-broken-neck (reporting that running back for Georgetown broke 5 bones in his neck and vertebrae); Mark Viera, Rutgers Player is Paralyzed Below the Neck, N.Y. TIMES (Oct. 17, 2010), http://www.nytimes.com/2010/10/18/sports/ncaafootball/18rutgers.html?r=0 (stating a Rutgers University defensive tackle was paralyzed after colliding with another player).

203 Academic eligibility under the NCAA requires athletes in their second year to have a minimum grade-point average “that equals at least 90 percent of the institution’s overall cumulative grade-point average required for graduation.” An athlete in their fourth or later year must have a “minimum grade-point average that equals 100 percent of the institution’s overall cumulative minimum grade-point average required for graduation.” Division I Manual, NCAA, § 14.4.3.3 (Aug. 1, 2016), http://www.ncaapublications.com/productdownloads/D117.pdf.

204 Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015) (on file with author).

205 Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015) (on file with author).

The universities may decide to provide support for its athletes in filling out their tax returns, just as Volunteer Income Tax Assistance (VITA) provides tax assistance to low-income individuals and families. Universities already provide extensive academic support for athletes with tutors and study hall; assistance with filing taxes would simply be another form of support.

iv. Title IX

The SAACs include not only male athletes, but also female athletes. The stakeholders could discuss ways to continue to improve college athletics for women in conjunction with paying male athletes in college football and men’s college basketball. Some conferences, such as the American Athletic Conference where the University of Connecticut women’s basketball team resides, may determine that revenues in female athletics would enable female sports teams to receive compensation under a variation of the Duke Model. The stakeholders might determine that the academic bonuses or athletic bonuses, or both, as opposed to base compensation, are feasible financially and best reflect the excellence sought by female athletes in certain conferences. Another possibility is that universities spend more money on female athletic programs in proportion to the increase in spending on base compensation and/or bonuses for football and men’s basketball, which would improve women’s college athletics. Regardless, opportunities for participation amongst female athletes would not decrease just because football and men’s basketball players earned compensation.

V. COUNTER-ARGUMENTS TO THE DUKE MODEL

In addition to the arguments against the Duke Model that are addressed above, this Article also addresses two other major arguments against the Duke Model: (1) this compensation model further devalues education from the perspective of college athletes; and (2) the model should account for the value of education that college athletes receive. Each of these counterarguments are addressed below.

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207 IRS VITA Grant Program, IRS, https://www.irs.gov/individuals/irs-vita-grant-program (last updated Oct 5, 2016) (explaining that VITA is an initiative designed to help “low- to moderate-income individuals . . . file their taxes each year”).

208 See e.g., Academic Support Services, U. OF SOUTHERN CAL., http://saas.usc.edu/academic-support-services/ (last visited Jan. 16, 2017) (providing “academic counseling services, priority scheduling, study hall, tutorial services, computer labs, travel laptops, excused absence letters, OASIS (Online Academic Student Information System), and disability testing” for all of their student athletes to make sure “they have a successful and delightful college career while engaging in their competitive sports”); Academics for Student Athletes, OR. STATE U., http://oregonstate.edu/studentathlete/ (last visited Jan. 16, 2017) (offering, among other services, a “Bridge Summer Program” designed to “helps student athletes transition to the academics . . . through learning skill development, academic course credit and University orientation programs”); Longhorn PRIDE Program, TEXAS SPORTS, http://texassports.com/sports/2013/8/28/academics_0828134433.aspx (last visited Jan. 16, 2017) (discussing a student-athlete academic program called PRIDE (Personal Responsibility in Developing Excellence) as “a comprehensive life skills program committed to the welfare of student-athletes” and has been recognized as one of the best life skills program in the nation).

209 One of the purposes of Title IX is to ensure and promote equal participation for men and women in college athletics. 34 C.F.R. § 106.41(a)(b) (2010) (stating that “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis”).
A. The Duke Model Further Devalues Education for College Athletes

One might argue that the over-commercialization of major college sports devalues the education portion of college athletes. One might also argue that if colleges and universities compensate college athletes for playing their respective sports, then education will be valued even less by college athletes. As an initial matter, this argument fails if conferences choose to adopt the academic bonuses to compensate college athletes for their academic achievements.

Second, whether education is valued or devalued for each college athlete depends on how each institution approaches academics with its players, as well as how each player values his education.

As for the NCAA, it already appears to value money over education as a large amount of the NCAA’s distributions are made based on athletic success. Moreover, the NCAA allows the scheduling of football and basketball games on weekdays, including Monday through Thursday, which seems counterproductive if the NCAA truly wants college athletes to study during the week while staying fresh for class and practice.

Reallocating the monies from college football and men’s college basketball will not change the fact that people are receiving money from college athletics; it will simply redirect some of the money to those producing the product of major college sports, the athletes. Nevertheless, a reallocation of money does not dictate that a player, individual school, or conference value or stress academics less or more—each athlete, school, and conference are free to prioritize academics as they want.

B. The Duke Model Should Account for the Value of Athletic Scholarships

Some may argue that the Duke Model should compute in the value of the education/scholarship that athletes receive because the education they receive possesses value.

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210 See Nick Desal, College Should be About Education First, HUFFINGTON POST (Sept. 11, 2014, 6:30 PM), http://www.huffingtonpost.com/nick-desal/colleges-should-be-about_b_5669998.html (stating that not only would paying athletes devalue the athletes education it would also create an “imbalance between a student athletes and just a student” and devalue every students education).

211 Rick Burton, College Athletes are Already Plaid with Their Education, US NEWS (Apr. 2, 2013, 12:21 AM), http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/college-athletes-are-already-paid-with-their-education (“higher education is often (and falsely) assumed to have no value for athletes”).


214 College football and men’s college basketball has evolved into a multibillion-dollar business over the years through television contracts, increased ticket sales, and now the college football playoff system. See, e.g., William B. Gould IV, Glenn M. Wong & Eric Weitz, Full Court Press: Northwestern University, A New Challenge to the NCAA, 35 Loy. L.A. ENT. L. REV. 1, 8–9 (2015) (recounting the evolution of the college sports business).

This argument fails for several reasons. One, it is true that the scholarship represents a value, but the compensation that athletes receive should not be capped arbitrarily at the value of the scholarship. There is no cap on how much coaches can be paid, how much schools can devote to improving facilities, NCAA executive pay, or athletic director salaries, and there should not be a cap based on the scholarship value for athletes.

Second, this argument ignores the fact that ever since the 1950s universities provided scholarships to its athletes, well before college athletics became a multibillion dollar industry. Thus, universities have been able to afford athletic scholarships for over half a century, and they can continue to do so. Now that college athletics generates billions of dollars, though, the direct producers of that product—the athletes—should receive some of the revenue they generate.

Finally, as discussed above, universities and colleges have the ability to pay college athletes by reallocating the money generated by college athletics that is currently given to others (e.g., coaches and athletic directors).

VI. CONCLUSION

College athletes should reap what they sow. They create a product in a multibillion dollar business that relies on their skill, dedication, and performance to thrive. The Duke Model provides a system for compensating college athletes in a fair and reasonable manner. The existing infrastructures in the NCAA allow for the conversations to take place regarding athlete compensation, and those conversations should start with the Duke Model.

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athletes are not being exploited by the millions they are generating for their respective schools, because they are students and are receiving an education); Howard P. Chudacoff, *Let’s Not Pay College Athletes*, WALL ST. J. (Mar. 28, 2016), http://www.wsj.com/articles/lets-not-pay-college-athletes-1459206949 (arguing that the perks of being a college athlete permit them the opportunity to live opulent lifestyles in college and that it is unfair for them to be allowed to live so lavishly and also receive a free education).

216 See Law v. NCAA, 134 F.3d 1010, 1024 (10th Cir. 1998) (striking down the NCAA rule capping compensation for assistant, entry-level college coaches’ salaries).

APPENDIX A

2016–2017 LSU TIGERS DEPTH CHART
### 2016–2017 LSU Tigers Depth Chart

**OFFENSE**

<table>
<thead>
<tr>
<th>Position</th>
<th>No.</th>
<th>Player 1</th>
<th>No.</th>
<th>Player 2</th>
<th>No.</th>
<th>Player 3</th>
<th>No.</th>
<th>Player 4</th>
<th>No.</th>
<th>Player 5</th>
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<td>Teuhera, Macea SO/1</td>
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<td>Brumfield, Garrett SO/1</td>
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<td>LT</td>
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**DEFENSE**

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**SPECIAL TEAMS**

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