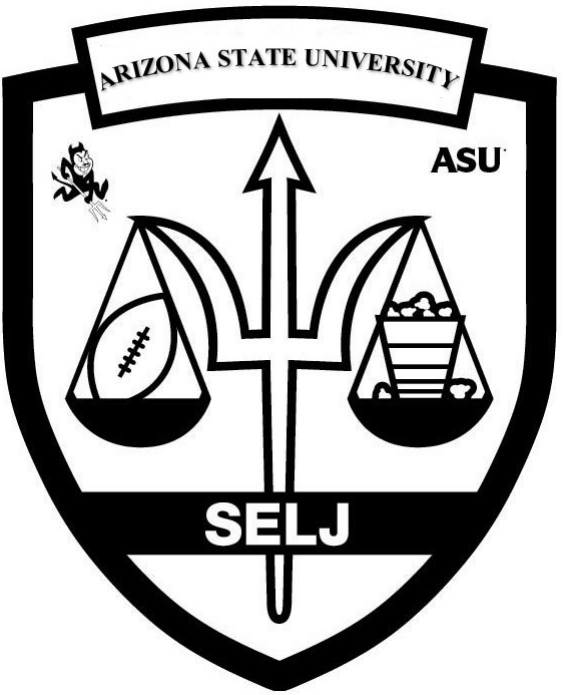

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THE RIGHT OF PUBLICITY:
Challenging the Underlying Rationale of a Limited Postmortem Term

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I. INTRODUCTION

During his lifetime, James Dean starred in three movies before coming to an untimely death at the age of 24. He was the first actor to receive an Academy Award nomination after his death. He has become an iconic figure known as the "Rebel Without a Cause," named after his 1955 movie distributed by Warner Brothers. Through his acting career, James Dean became known as the cultural icon of a disillusioned teen. The estate of James Dean has made more money from his publicity rights than he had ever made while he was alive.[1] Recently, the estate of James Dean brought a lawsuit in Indiana state court against the anonymous owner of the "@JamesDean" account and Twitter for trademark and publicity rights infringement.[2]

Deceased celebrities can earn millions from the licensing of their images to use on products, for services, as logos, and even for digital placement in television commercials or movies. Elvis Presley consistently brings in more than $50 million a year from licensing fees, although this is only a fraction of what Michael Jackson brought in

1. *See* GEORGE LUCAS, BLOCKBUSTING: A DECADE-BY-DECADE SURVEY OF TIMELESS MOVIES INCLUDING UNTOLD SECRETS OF THEIR FINANCIAL AND CULTURAL SUCCESS (2010) (in the three major movies that James Dean starred in, he earned a total of $327,400). *See also Top Earning Dead Celebrities 2014*, FORBES, http://www.forbes.com/pictures/mfl45elikj/james-dean-3/ (last visited Apr. 18, 2015) (according to Forbes' Annual List of the Highest Earning Dead Celebrities, the James Dean's estate earned $7 million in 2014).

2. Martha Neil, *Estate of James Dean Sues Twitter and Fan Over @JamesDean Account*, ABA JOURNAL (Feb. 11, 2014, 4:50 PM), http://www.abajournal.com/news/article/james_dean.

after his death.[3] Others who have made this exclusive list of top posthumous earners in the last few years include great entertainers such as Marilyn Monroe, Bob Marley, John Lennon, Albert Einstein, and Steve McQueen.[4] In the case of Marilyn Monroe, the estate was involved in litigation over Monroe's publicity rights with the owners of Marilyn Monroe photographs for more than seven years in three different federal district courts. Even after the Ninth Circuit ruled that the Monroe image had entered the public domain, the estate attempted to enter into a settlement agreement with the archives owners. The district judge refused to allow the settlement, stating that it would effectively erase the ruling of the court.[5]

The right of publicity is the right to control the commercial exploitation of a person's name or likeness.[6] The dead celebrity's estate can maximize earnings by aggressively marketing the image through licensing agreements that grant exclusive or nonexclusive rights to licensees. Publicity rights have evolved through state common law and, in some cases, through legislation. State legislatures have generally limited the time for which the

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3. Erik Heinrich, *Richest Dead Celebrity: Bob Marley*, FORTUNE (Nov. 20, 2009), http://archive.fortune.com/2009/11/20/news/companies/bob_marley.fortune/index.htm.

4. *Id.*

5. Kroll Panda, *Ruling for Copyright Owner Trumps Celebrity Rights Act, Marilyn Monroe Estate Settlement Rejected*, VENTURA CNTY BAR ASS'N (Feb. 25, 2014), http://www.vcba.org/2013/10/ruling-for-copyright-owner-trumps-celebrity-rights-act-marilyn-monroe-estate-settlement-rejected-by-panda-kroll-esq.

6. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (holding that "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross . . .'").

heirs exclusively control the right to publicity. Once the term expires, the name and likeness of the celebrity enter the public domain free for all, drastically reducing the earnings potential for the heirs. State legislatures have justified limiting the publicity rights term, analogizing the limitation to copyright and patent law.[7] The U.S. Constitution limits the time period that an owner of a copyright or patent has exclusive control over his or her intellectual property.[8] The analogy to federal copyright law by state legislatures may not be the most appropriate one, since no mention of publicity rights is found in the Constitution.[9] Even so, 21 states recognize the postmortem right of publicity: 14 states by statute, 6 states by common law, and 1 state by a combination of the two.[10] The postmortem right of publicity ranges from 10 years to 100 years and in one state there is no time limit.[11]

This article will begin in part II by discussing the history of the right of publicity and the doctrine of freedom of contract, which has been a cornerstone of the American society.[12] Part III of this article will discuss the state law treatment of the right of publicity and choice of law issues that may impair the obligation of contracts when term limits are placed on the right. Part IV will discuss the right of publicity in light of other similar intellectual property rights in our legal system and consider the practical and policy considerations and the relative weight of the conflicting interests of the contracting parties, including certain moral presuppositions that may deprive the parties of economic opportunity. Part V of the article concludes with the

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7. Lugosi v. Universal Pictures, 603 P.2d 425, 428-29 (1979).

8. U.S. CONST. art 1, § 8, cl 8.

9. *See generally* U.S. CONST.

10. *See* 2 J. THOMAS MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY § 9:17 (2d. ed. 2014)

11. *See id.*

12. *See generally* THE FALL AND RISE OF THE FREEDOM OF CONTRACT, (F. H. Buckley ed., 1999).

assertion that the heirs of publicity rights are entitled to the full bundle of rights indefinitely.

II. BACKGROUND

A. Right of Publicity

The U.S. Supreme Court defined "privacy" as one's right to the "control of information concerning his or her person."[13] The Court found that the law should protect the "dissemination of . . . allegedly private fact[s] and the extent to which the passage of time rendered [them] private."[14] The definition came from early privacy cases brought by private persons whose photographs were used in advertisements without their consent.[15] On the other hand, when a celebrity or otherwise public figure brought an invasion of privacy action, the courts were presented with attempts to make the images of individuals that were publically known private.[16] The celebrity plaintiffs did not want to *prohibit* the use of their identity; they only wanted to *control* its use.[17] Where

13. U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).

14. *Id.* at 763 (Justice Stevens, writing for the majority, notes the seminal law review article by Warren & Brandeis to support the individual right to determine the extent of personal information that is disclosed to others (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV.L.REV. 193, 198 (1890)).

15. The first privacy cases involved individuals attempting to control the use of a photograph in an advertisement. *See, e.g.*, Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902) (the defendant used the plaintiff's picture on a flier promoting the sale of boxes); Pavesich v. New England Life Insurance Co., 122 Ga. 190 (1904) (the defendant used a photograph of the plaintiff in a newspaper advertisement. Despite the defendant promoting the plaintiff as a picture of health, the plaintiff sought to enjoin the use).

16. *See* 1 J. THOMAS MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY § 1:10 (2d. ed. 2014) (discussing the "right to privacy" as a "right preventing truthful but intrusive and embarrassing disclosures by the press").

17. *See id.* at § 1:8.

privacy law focused on the "indignity and mental trauma" incurred by the use of one's identity, the right of publicity developed into its own category, to address commercial problems with the use of one's not-so-private image.[18]

Today, the right of publicity is a matter of state law created and regulated as if it were an intellectual property right.[19] It is a distinct legal right, "not just a 'kind of' trademark, copyright, false advertising or right of privacy" claim.[20] Infringement of such a right is a "commercial tort of unfair competition."[21] A claim against the right of publicity arises from the unauthorized exploitation of the name, image, or likeness of another for commercial gain.[22] In *Haelan Laboratories v. Topp Chewing Gum*, the Second Circuit was the first court to recognize the right of publicity as a right independent from the right of privacy.[23] Here, a baseball player entered into an exclusive licensing contract to allow a commercial merchandising company to use his name in connection with the sale of chewing gum.[24] Applying New York law, the court stated:

> This right might be called a "right of publicity" because it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in

18. *Id.* at § 1:7.
19. *See id.* at § 1:3.
20. *Id.*
21. *Id.*
22. *Id.* at § 1:7 (stating the "right to control the commercial use of one's identity first historically developed within the domain of privacy law").
23. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
24. *Id.*

> newspapers, magazines, busses, trains and subways.[25]

The court reasoned that having this right would not "yield money" unless the owner of such a right could prohibit others from using his or her likeness in photographs and other advertising efforts.[26] Since this landmark case, 31 states have decided to recognize the right to publicity,[27] either by statute or by common law, which was initially derived from the right of privacy, or the "right to be left alone."[28]

25. *Haelan Labs, Inc.*, 202 F.2d at 868.

26. *See id.*

27. *See* MCCARTHY, *supra* note 16, at § 6:3.

28. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

III. CALIFORNIA AND NEW YORK AT THE OPPOSITE ENDS OF THE POSTMORTEM DEBATE

A. State Treatment

Some state legislatures and courts have treated the right of publicity similar to that of intellectual property. The United States Constitution provides that the term of protection for copyrights and patents be set for a limited time, to promote progress and encourage innovation among the public.[29] The members of Congress are given the duty to create a term of years for protection, while keeping the underlying policy in mind.[30] Congress has enacted legislation that protects the owners of copyrights up to 70 years after the author has died.[31] Patents are protected for a shorter period, from 14 to 20 years.[32] However, copyrights and patents are not the only interests recognized as intellectual property in the United States.[33] It is well established that trademark and the newly recognized right of publicity are intellectual property rights, although neither was directly contemplated by the Constitution.[34] As a result

29. *See* U.S. CONST. art 1, § 8, cl 8.

30. *Id*.

31. *See* 17 U.S.C. § 302(a) (2012).

32. General FAQ, *How Long Does Patent Protection Last?*, USPTO [hereinafter USPTO General FAQ], http://www.uspto.gov/main/faq/p120013.htm (last visited Apr. 14, 2015).

33. *What is Intellectual Property?*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/about-ip/en/ (last visited Apr. 18, 2015).

34. *See, e.g.*, William L. Prosser, *Privacy*, 48 CALIF.L.REV 383 (1960). Dean Prosser's article on Privacy enumerates four types of privacy interest protections, against: (1) intrusion into one's private affairs; (2) public disclosure of private facts; (3) placement in a false light; and (4) misappropriation of one's name or likeness for commercial advantage. The fourth invasion of privacy tort recognized the value of one's image and the effort made by that individual to appropriate value in their name or likeness. Notions of the right of publicity were derived from the misappropriation of name and likeness tort. *Id.*

of congressional action, trademarks are federally protected;[35] however, the right of publicity has yet to reach this plane.[36] The right of publicity is therefore a purely state-regulated property interest. During the 20th century, the California Legislature expansively recognized the postmortem right of publicity through the enactment of several pieces of legislation.[37] Other states that recognize the right of publicity, such as New York, have taken a very different view on postmortem rights.[38]

1. California's Right of Publicity

California law recognizes a common law and statutory right of publicity. In 1971, the California Legislature enacted the statutory version of the right of publicity as Civil Code § 3344, prohibiting the unauthorized use of the name, likeness, voice, and image of an individual celebrity or non-celebrity. The statute provided a means to control the exploitation of a person's image in the public arena. The main provision of Civil Code § 3344 reads as follows:

> (a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling,

35. *See* The Lanham Act, 15 U.S.C. §§ 1051-1072, 1091-1096, 1111-1129, 1141-1142(n) (2012) (providing national system of trademark registration and protecting owners of federally registered marks against use of similar marks).

36. *See generally* Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 2010 DUKE L. & TECH. REV. 2 (2010) (arguing that Congress should enact a federal right of publicity statute).

37. Cal. Civ. Code § 3344.1 (West 2008).

38. *See, e.g.*, N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2015); *see also* Pirone v. MacMillian, Inc., 894 F.2d 579, 585-86 (2d Cir. 1990) (stating that under New York law, the right of publicity is a non-descendible statutory right).

> or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.

In 1979, the Supreme Court of California in *Lugosi v. Universal Pictures* officially recognized a common law right of publicity that was limited to the life of the individual.[39] Not until 1984, when the California Legislature amended the statute to include § 3344.1, did the right of publicity become descendible for a period of 50 years after death.[40] In 1999, the California Legislature enacted the Astaire Celebrity Image Protection Act, which inter alia, increased the protection period of the right of publicity to 70 years after death and noted that the term was consistent with a recent extension of the U.S. copyright term.[41] The entertainment industry heavily lobbied the California legislature to enact legislation that mirrored the term of protection under federal copyright law.[42]

The California Legislature looked to the U.S. Supreme Court case of *Zacchini v. Scripps-Howard Broadcasting* as guidance, defining the underlying policy for the protection of the right of publicity.[43] The Court found

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39. Lugosi v. Universal Pictures, 603 P.2d 425, 428-29 (1979).

40. 50 Comm. Rep. CA A.B. 585, at 1 (2009).

41. S.B. 209, 1999-2000 Reg. Sess., at 5 (Cal. 1999), *available at* ftp://leginfo.public.ca.gov/pub/99-00/bill/sen/sb_0201-0250/sb_209_cfa_19990907_110336_sen_floor.html.

42. *See id.* at 14-15.

43. *Id.* at 5-6; Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977). In Zacchini, the plaintiff brought an action against the local media, because they filmed his entire cannonball act at the county fair and broadcast it on the evening news. The defendant argued it was constitutionally privileged to include the act in the news because it was a matter of public interest. The Supreme Court disagreed, reasoning that the broadcast of the entire act posed a threat to the economic value of the performance and hence recognized the right of publicity distinct from the right of privacy.

that the state's interest in protecting the right of publicity is "closely analogous to the goals of patent and copyright law," because all three allow the individual to "reap the reward of his endeavors" and protect against "unjust enrichment by the theft of goodwill."[44] The Court went further to explain that, "No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[45] The Court recognized that, "sacrificial days devoted to such creative activities deserve rewards."[46] However, the Supreme Court so far has not addressed whether the term of protection for patents or copyrights and the right of publicity should be analogous.[47]

According to the California Legislature, the Astaire Celebrity Image Protection Act was enacted to address the "improper use of celebrities' hard-earned images once they are no longer here to protect themselves."[48] The opponents of the bill argued that the justification of a 20-year extension by analogizing the right of publicity to copyright law is "like comparing apples to oranges."[49] The Screen Actors Guild

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44. *Zacchini*, 433 U.S. at 573, 575. *See also* CA. S. B. 209, *supra* note 41.

45. *Zacchini*, 433 U.S. at 576.

46. *Id.*

47. *See generally* CA. S. B. 209, *supra* note 41; *see also Zacchini*, 433 U.S. at 576. In *Zacchini*, the Supreme Court relied on the economic incentive theory underlying copyright and patent law to protect the plaintiff's publicity rights. The Court referenced copyright and patent law only as a mechanism to differentiate the right of publicity from privacy rights. The Supreme Court did not comment on the validity of applying the analogy to the postmortem term. Thus far, *Zacchini* is the only case decided by the Supreme Court concerning the right of publicity.

48. CA. S. B. 209, *supra* note 41, at 4; *see also* Kathy Heller, *Deciding Who Cashes in on The Deceased Celebrity Business*, 11 CHAP. L. REV. 545, (2008).

49. CA. S. B. 209, *supra* note 41, at 14.

(SAG), a proponent of the bill, suggested that it was necessary to extend protection to recognize the "growing international movement towards the adoption of a longer term for intellectual property."[50] SAG went on to note that California was at the time a place where celebrity images, of both the living and deceased, were used in commercial advertisements. [51] Where these images were used improperly, the harm was irreversible and affected the potential economic gain of the heirs, who might rely on the compensation for their livelihood.[52] The pertinent part of the Act amended Civil Code § 3344.1 to read as follows:

> (g) An action shall not be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 70 years after the death of the deceased personality.

The 1997 Ninth Circuit case of *Astaire v. Best Film & Video Corp.* was the inspiration for the Astaire Celebrity Image Protection Act.[53] The widow of Fred Astaire brought suit against Best Film and Video Corporation (Best), alleging that Best used unauthorized dance instructional video clips of her late husband in their videotapes.[54] Mrs. Astaire argued that this use "violated her statutory right to control" her late husband's right of publicity.[55] The trial court found in Astaire's favor; however, the appellate court reversed, interpreting the statutory language in effect at the time to exclude liability where the use of a deceased person's publicity was in "film."[56] The author of the bill and the members of the California Legislature agreed that the court

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50. *Id.* at 15.
51. *Id.* at 10.
52. *Id.*
53. CA. S. B. 209, *supra* note 41, at 2; *see also* Astaire v. Best Films & Video Corp., 116 F.3d 1297 (9th Cir. 1997) amended, 136 F.3d 1208 (9th Cir. 1998).
54. *Astaire*, 116 F.3d at 1298.
55. *Id.*
56. *Id.* at 1300-02.

"elevated form over content" by finding that Mr. Astaire's image in the introductory portions of a video was different from placing his image on a T-shirt.[57] The Legislature sought to clarify the statutory language, expanding protection for the heirs of the deceased to include film.[58]

2. New York's Right of Publicity

The state of New York has an alternative view on whether to recognize a descendible right of publicity. New York's stance on the subject was established in the 1981 Second Circuit case *Factors Etc. v. Pro Arts Inc*., which concerned the well-known Elvis Presley.[59] During his lifetime, Mr. Presley assigned the exclusive ownership of his publicity right to Boxcar Enterprises, a corporation he formed.[60] A few days after Mr. Presley died, Boxcar executed an 18-month exclusive licensing agreement with the plaintiff, Factors, Etc., which was renewable for up to four years.[61] The license was for the use of Mr. Presley's right of publicity, where Factors would pay five percent of sales, with a minimum of $150,000 for the first 18 months.[62] The day after the agreement was signed, the defendant lawfully obtained the copyright of a photograph of Mr.

57. CA. S. B. 209, *supra* note 41, at 10.

58. CAL. CIV. CODE § 3344.1 (i) (West 2012) ("As used in this section, 'photograph' means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph if one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is.").

59. *See generally* Factors Etc. v. Pro Arts, Inc., 652 F. 2d 278 (2d Cir. 1981).

60. *Id.* at 279.

61. *Id.*

62. *Id.*

Presley and began selling posters with the photograph on them.[63] Exercising diversity jurisdiction, the New York federal district court applied Tennessee law, because the wrong had occurred in that state.[64] Tennessee law recognized the right of publicity as a subset of the invasion of privacy, which would be extinguished at death, leading to the conclusion that Boxcar failed to assert a valid claim. As explained in the early New York case of *James v. Delilah Films Inc.*, the court found that the successors in interest to the right of publicity had no cause of action under the Civil Rights Law §§ 50 and 51, because the statutory rights do not survive death.[65]

Commentators argue that New York's decision to prohibit an assignable and descendible right of publicity increases the equitable concerns regarding the value of the asset, which cannot pass to the heirs of the person who "cultivated the image throughout his or her lifetime."[66] Because the right of publicity recognized in New York is rooted in privacy law and therefore is not transferable, the law limits the "economic creation incentives" that allow celebrities to "fully utilize their images to reap maximum commercial benefits."[67] The New York Civil Rights statute reads as follows:

> A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent

63. *Id.*

64. *Id.* at 280-81.

65. 544 N.Y.S.2d 447, 451 (1989).

66. Tara B. Mulrooney, *A Critical Examination of New York's Right of Publicity Claim*, 74 ST. JOHN'S L. REV. 1139, 1156 (2000).

67. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1169-70 (2006).

> of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.[68]

3. Choice of Law Issues: Impairing the Obligation of Contracts

To avoid forum shopping and to increase certainty when contracting, the right to publicity, as with other intangible property rights, should be uniformly alienable, devisable, and descendible.[69] The choice of law conflicts regarding the duration of publicity rights were demonstrably illustrated in the Marilyn Monroe cases filed in Indiana, California, and New York in 2005.

Marilyn Monroe was found dead in the bedroom of her California home on August 5, 1962, due to what was ruled an overdose of prescription drugs.[70] Monroe's last will and testament went to probate court less than two weeks after her death.[71] Among other things, the rest and residue clause of the will devised a valuable portion of her estate to her personal acting coach, Lee Strasberg.[72] When Mr. Strasberg died, his wife Anna Strasberg inherited Mr. Strasberg's portion of the Monroe estate. Over the years, Anna Strasberg took the position that this nheritance included the exclusive right to Monroe's right of publicity.[73]

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68. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2015).

69. Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, COMM. LAW., Aug. 2011, *available at* http://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/why_federal_right_publicity_statute_is_necessary_comm_law_28_2.authcheckdam.pdf.

70. Sam Kashner, *The Things She Left Behind*, VENEWS (Oct. 2008), http://www.vanityfair.com/culture/features/2008/10/marilyn200810.

71. *Id.*

72. *Id.*; Milton H. Greene Archives v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152, 1169 (C.D. Cal. 2008), *aff'd*, 692 F.3d 983 (9th Cir. 2012).

73. Kashner, *supra* note 70.

The bequest is said to have generated millions of dollars from the licensing of Monroe's publicity interest.[74]

After 40 years of generating royalties from licensing contracts, Mrs. Strasberg's claim to Monroe's right of publicity was challenged in federal court.[75] In 2001, Anna Strasberg and another 25-percent interest holder transferred their interests to their newly formed company Marilyn Monroe LLC (MMLLC). Strasberg hired CMG Worldwide as her licensing agent to market Monroe's image. In 2005, CMG Worldwide Inc., MMLLC, and Anna Strasberg filed suit in Indiana against several photographers to prevent the use of Marilyn Monroe photographs owned by the Shaw Family Archives.[76] The plaintiffs claimed that they owned Marilyn Monroe's right of publicity and that the defendants had infringed upon their right by using Monroe's name, image, and likeness without their consent "in connection with the sale, solicitation, promotion and advertising of products, merchandise goods and services."[77] In response, the defendants filed a motion for summary judgment, arguing that, inter alia, even if a posthumous right of publicity did exist, the plaintiffs could not show that they possessed the right.[78] Further, the defendants argued that at least one of the plaintiffs should be judicially estopped from arguing that Monroe was domiciled anywhere other than New York at the time of her death.[79]

At about the same time, the Shaw Family Archives brought its own lawsuit against CMG Worldwide and MMLLC in the Southern District of New York, seeking a declaratory judgment on the issue of postmortem publicity rights. The Indiana case was transferred to New York and

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74. *Id.*

75. *Milton*, 568 F. Supp. 2d at 1152.

76. *Id.* (noting that lawsuits were consolidated and adjudicated in California District Court).

77. *Id.* at 1155.

78. *Id.*

79. *Id.*

consolidated in the Southern District of New York. The New York District Court held that postmortem publicity rights are considered property that must pass by will at the time of death. Neither New York nor California recognized postmortem publicity rights in 1962 when Monroe died. Even though Indiana had enacted legislation to protect postmortem publicity rights in 1994, Monroe was not a domiciliary of the state and the statute did not allow for retroactive publicity rights through a testamentary document. The Indiana Legislature attempted to amend its statute prior to a final ruling by the court to allow for retroactive publicity rights but failed to do so. The Estate of Milton H. Greene Archives, owners of a Marilyn Monroe photo collection, filed against CMG Worldwide, MMLLC, and Anna Strasberg in the Central District of California, asserting its right to use Marilyn Monroe photographs. In 2007, the District Court for the Central District of California granted the Archives' motion for summary judgment.[80] The court found that Monroe could not have devised a common law right of publicity through her will to Strasberg, because in California, the common law right was extinguished at death and the statutory right that allowed descendibility was enacted some 20 years after her death.[81]

Recognizing the possible devastating effects of more than 40 years of contracting, the California Legislature responded to the decision just six weeks after the motion was granted.[82] In 2007, "to clarify the meaning of California's right of publicity statute," the Legislature amended the right of publicity statute so that it was deemed to exist at the time of Monroe's death and was "freely transferable, in whole or part, by contract or by means of trust or testamentary

80. *Id.*
81. *Id.* at 1156.
82. *Id.*

documents."[83] The amended California law reads as follows: "The rights recognized by this section are expressly made retroactive, including to those deceased personalities who died before January 1, 1985."[84]

To be clear, the Legislature stated that, in the absence of an express provision in the testamentary instrument, the right of publicity is deemed to pass with the "disposition of the residue of the deceased."[85] With the law now on their side, the plaintiffs filed a motion for reconsideration, which was granted.[86] On reconsideration, the court vacated its prior ruling that the plaintiffs lacked standing to assert Monroe's right of publicity and instead interpreted California's "clarified" law to mean that not only did Monroe transfer her right of publicity to Lee Strasberg through her residuary clause, but also Lee was able to transfer his interest in Monroe's publicity rights through his will to his wife, Anna Strasberg.[87]

The court made it clear, however, that its holding was conditional on finding that Monroe was a domiciliary of California.[88] In other words, the California law only applies to those domiciled in California, because in property cases the majority view is that the situs of intangible personal property is the legal domicile of its owner.[89] After considering several factors to determine the domicile of Monroe at death, including inconsistent evidence regarding a California inheritance tax proceeding in which Monroe claimed to be a domiciliary of New York at the time of her death, the District Court judicially estopped the plaintiffs from claiming that Monroe was domiciled in California and

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83. *Id.*
84. CAL. CIV. CODE § 3344.1(p) (West 2012).
85. *Milton*, 568 F. Supp. 2d at 1156.
86. *Id.*
87. *Id.* at 1157.
88. *Id.* at 1158.
89. *Id.*; Shaw Family Archives, Ltd. v. CMG Worldwide, Inc., 434 F. Supp. 2d 203, 210-11 (S.D.N.Y. 2006).

granted the defendants' motion for summary judgment again.[90] As a result of the findings in the California suit, CMG Worldwide, Marilyn Monroe LLC, and Anna Strasberg were estopped from continuing litigation in New York against another set of defendants for alleged infringement of Monroe's publicity rights.[91] There, the court found that the New York litigation raised "exactly the same issues" that were decided in California.[92] New York law does not recognize a descendible right of publicity, and Monroe was deemed to be domiciled in New York at the time of her death, terminating her publicity rights at death.[93]

Currently, the nature and scope of publicity rights upon death depends largely on which law would apply to a claim initiated by the decedent's estate.[94] This rationale has also been applied to determinations of which state law would apply when descendibility is at issue.[95] The differences in state law have caused substantial impairment of contractual

90. *Milton*, 568 F. Supp. 2d at 1198-99.

91. Shaw Family Archives, Ltd. v. CMG Worldwide, Inc., 589 F. Supp. 2d 331, 346 (S.D.N.Y. 2008).

92. *Id.* at 334.

93. *Id.* at 334-35.

94. Stanley Rothenberg & Eric P. Bergner, *Candle in the Wind: Would Elton John's Publicity Right Extinguish with His Death?*, 46 J. COPYRIGHT SOC'Y U.S.A. 75 (1998).

95. *Id.* at 76.

rights. As a result, a number of scholars have argued for either a uniform state law or a federal statute.[96]

IV. ANALYSIS: FULLY RECOGNIZING THE RIGHT OF PUBLICITY

Many scholars, commentators, and legislators have suggested the notion that the postmortem term should be limited to a defined number of years.[97] Three major arguments have been circulated through the literature as the foundation supporting a limited term, although there is no agreement as to the term of years.[98] The arguments in favor of a defined postmortem term of years first begin with the analogy to the copyright term.[99] The second major argument in favor of a limited postmortem term concerns the possibility of a remote ancestor claiming commercial rewards decades after the death of the celebrity, hindering

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96. *See* Jonathon L. Faber & Wesley A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana's Law as a Model, State-Based Right of Publicity is Ready to Move to the Federal Level*, 45 NOV. RES. GESTAE 31 (2001); *see also* Eric J. Goodman, Comment, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL LCS J. ART. & ENT. L. 227 (1999). Considering recent Supreme Court cases, it may be questionable to base a federal right of publicity on Congressional Commerce Clause authority. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (individual mandate under the Commerce Clause was held unconstitutional). *See also* Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity*, 40 CUM. L. REV. 499 (2010) (arguing for a uniform act adopted by state legislatures and outlining the provisions that should be included).

97. *See* MCCARTHY, *supra* note 10, § 9:16 ("Assuming that there should be a postmortem right of publicity, almost everyone agrees that it should have some fixed duration.").

98. *See id.* (noting that "ommentators and legislators have widely varying views" concerning the duration of a postmortem right of publicity).

99. C.A. S.B. 209, supra note 41, at 2. The California Legislature in 1984 enacted a term of 50 years after death, then in 1999 it increased the term to 70 years, to be consistent with Congressional enactment of the 70-year term for copyright. *Id.*

the commercial interests that have utilized the image. The third argument involves concerns of free speech and free competition.

Balancing several interests, the right of publicity should be treated separately from other limited-term intellectual property rights. In light of practical and policy considerations, including moral presuppositions, state legislatures should enact legislation to expand recognition of an individual's right of publicity beyond the death of the individual, to protect the value of the asset in a licensing agreement, where the value is contingent on the licensor and licensee's expectations of duration and exclusivity. This is especially important because the ownership of other real and personal property does not terminate until 70 years after the owner is deceased. Decades of case law have established that the right of publicity is a property right. Accordingly, there seems to be no public policy justification for limiting its ownership to a term of years.[100]

A. Treatment of Other Intangible Property Rights: Why Analogizing Publicity Rights to Copyrights is like comparing "apples to oranges"

The law should not compare the right of publicity with other limited-term intellectual property rights, even with the trend of extending terms. In the 2002 *Elder v. Ashcroft* decision, the Supreme Court upheld the lower court's judgment regarding the constitutionality of

100. *See* MCCARTHY, *supra* note 10, at § 9:16 ("Once the concept of a fixed term postmortem right of publicity is accepted, it is difficult to defend a particular number of years one selects. The choice is by nature almost arbitrary.").

Congress's 1998 extension of the copyright duration.[101] The Court stated that it would not place any limits on Congress's "authority to extend copyright terms."[102] The Court held that, although some petitioners may believe that it is bad public policy to continue to extend copyright terms, the Court will not second-guess Congress so long as it can be asserted that congress exercised its rational authority..[103] Here, the Court accepted that extension of copyright terms and reasoned that the trend toward having children later in life is justification to allow future generations to benefit from the economic reward of the protected work.[104] Moreover, commentators have noted that, "from an economic standpoint, the current copyright term 'has nearly the same present value as an infinite copyright term.'"[105]

Although Congress and the courts have recognized the economic value in the extended protection of intellectual property, drawing a comparison to copyright law to justify the term of protection for the right of publicity is not the best analogy. First, a copyright only protects a work of authorship that is fixed in a tangible medium of expression.[106] A work is fixed when "its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated."[107] This may include literary works, musical compositions, dramatic works, pantomimes, chorographic works, pictorials,

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101. Tom Braegelmann, *Copyright Law in and Under the Constitution: The Constitutional Scope and Limits to Copyright Law in the United States in Comparison with the Scope and Limits imposed by Constitutional and European Law on Copyright Law in Germany*, 27 CARDOZO ARTS & ENT. L.J. 99, 118-120 (2009).

102. *Id.*

103. *Id.*

104. *Id.*

105. Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 304 (2009).

106. *See* 17 U.S.C. § 102 (2012).

107. *Id.* at § 101.

graphics, and sculptural works, as well as motion pictures, sound recordings, and architectural works.[108] Secondly, the work must be original, requiring more than a "mere independent creation," and must possess some minimal degree of creativity, where even a slight amount will suffice.[109] With these requirements, two people may independently think up the exact same plot and words for a story, fix it in a tangible medium, and obtain protection of the law.[110] The likelihood of this actually occurring is a different question, but it is important to note that copyright law does not protect an idea, but rather protects the expression of that idea.[111] Furthermore, procedures, processes, systems, or methods of operation are not protected, regardless of their embodiment.[112] These requirements differ drastically from the protectable attributes of the right of publicity, because the right of publicity protects an individual's personhood, who they are, and not what they have created. The protection afforded copyright owners is the prohibition on any reproduction of the work created; whereas the protection afforded by the right of publicity is in preserving the commercial value associated with the name, image, or likeness of an individual. Preservation of the value of a copyright is a byproduct of the federal statute.

1. Limiting Postmortem Publicity Rights Does Not Promote Creativity

The policy for protecting copyrights also differs from the policy underlying publicity protection. Copyright protection is required so that society may encourage new

108. *See id.* at § 102.

109. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

110. *See* 17 U.S.C. §102 (1978).

111. *Id.*

112. *Id.*

works of authorship.[113] However, "society doesn't need to encourage more celebrities or more marketing of celebrity image."[114] More importantly, the pure rationale behind the recognition of the right of publicity is economic security.[115] The economic theory provides that granting property rights to persons is an efficient means of allocating resources.[116] The purpose is to *prohibit* those who did not endure the sweat of the brow from profiting from someone who did without that person's authorization.[117] Protection is for the goodwill of the toiling entertainers, performers, or celebrities who by their own doing created value in themselves — their names, images, likenesses, photographs, and overall personas.[118] Unlike copyright law, this interest may not always be fixed in a "tangible medium of expression," but is embodied in an individual. [119] The physical image of the individual may change due to aging, a complete makeover, or for other reasons, yet a copyright is limited to the protection of the original work.[120] The right of publicity is sufficiently versatile so that if celebrities

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113. U.S. CONST. art 1, § 8, cl 8.

114. Dogan & Lemley, *supra* note 67, at 1164. *See also* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 43-44 (2004) ("In the context of the right of publicity, any conceivable notion of development would take the form of providing incentives to invest in celebrity. But even assuming arguendo that this is a legitimate objective, there are many related reasons why the right of publicity would not be necessary to achieve this purpose."). Professor Carrier argues that the economic incentive is not the only rationale justifying the development of celebrity image and development is not a valid rationale to protect publicity rights. *Id.*

115. *See* MCCARTHY, *supra* note 10, at § 1:7.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. Under the Copyright Act, a copyright owner may create derivative works from the original and still receive copyright protection. A work consisting of "editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work." 17 U.S.C.A. § 101 (West 2010).

changed their image every day, then they would not lose protection. The right of publicity requires that a person truly be an original, as compared to a copyright, where originality may be slight.[121]

2. The Law Should Recognize the Difference Between Creating Something and Being Something.

Under federal law, copyright and patent terms must be limited. Where Congress has the authority to extend the copyright and patent terms, it may not create a limitless duration of protection. Although protection was sought to reward authors and inventors for their creations, the framers of the U.S. Constitution required that "authors and inventors" have only a "limited monopoly" to their creations, to promote progress and facilitate a robust public domain.[122] This is because works in the public domain may then be used to change, remake, or create new works or inventions that build upon those once-protected works or inventions. Limiting copyright and patent terms gives authors and inventors the incentive to create new works, but also eventually rewards the public with the opportunity to do the same.

The same cannot be said of placing someone's personhood into the public domain. The right of publicity of an individual may not be altered or changed to create a new

121. *See* Dogan & Lemley, *supra* note 67, at 1164.

122. U.S. Const. art 1, § 8, cl 8 ("To promote the Progress of Science and useful Arts by securing" copyrights and patents "for limited times."). However, some scholars have argued that the clause was drafted in the context of anti-monopolist sentiment. *See, e.g.*, Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909(2002).

"work."[123] Placing the right of publicity in the public domain only allows members of society the right to profit financially from the lifelong efforts of another. Giving general members of the public the opportunity to use another's publicity rights, which does not require the public to exert any effort — not even a minimal amount — is exactly what the right of publicity is meant to prevent. Because society cannot change, remake, or create new "works" based solely on one individual's right of publicity, allowing the public to profit from it would be the greatest form of misappropriation. Allowing the public the right to freely use the personhood or publicity rights of another does not serve the same or similar function as under patent or copyright law. Where there is no constitutional restriction on the right of publicity, it makes more sense to allow the heirs and descendants of the deceased the right to maintain the commercial legacy and image of their ancestors as they wish.

3. Not All Intellectual Property Is Created Equal

The courts have recognized that not all intellectual property rights are equal.[124] Protection of the right of publicity is in some ways more comparable to trademark law than to copyright and patent law; however, the law should treat all three interests distinctly. A trademark is meant to identify the source of a good, to protect the consumer from possible confusion, where copyright protection is there to

123. Although the California Supreme Court has curtailed publicity rights when a new work is "transformative," the court noted that publicity rights are not a right of "censorship" but a right to prevent others from misappropriating economic value. The transformative work must add significant expression such that it does not interfere with the economic interest protected by the right of publicity. *See* Comedy III Prod. v. Gary Saderup, Inc., 21 P.3d 797 (2001).

124. U.S. v. Giles, 213 F.3d 1247, 1252 (10th Cir. 2000).

protect the exclusive rights of the owner.[125] In *U.S. v. Giles*, the court drew clear distinctions between copyrights and trademarks — as the law should for the right of publicity.[126] Here, the court stated that "[c]opyright law gives the author the right to prevent copying of the copyrighted work in any medium. Trademark law prevents the use of a similar mark on such goods or services as would probably cause confusion. Thus, the scope of rights in copyrights and trademarks is defined quite differently."[127] Moreover, the court refused to "stretch the trademark statute into an area more appropriate to copyright law."[128] Although trademark is also a federally protected interest, Congress has created a potentially perpetual right as long as the owner of the interest continues to use the protected mark.[129] Provided there are other policy considerations contemplated in trademark law, such as fair use, genericism, dilution, scandalousness, and disparagement.[130] Because trademarks are meant to protect different persons — the consumer versus the owner of the interest — the law should also identify the duration necessary to afford those persons with adequate protection. Commentators have stated that, due to the enactment of anti-dilution statutes, the underlying rationale for protection seems to be shifting from the consumer interests in avoiding confusion to the interest of the owner of the mark's "business reputation" and the

125. *Id.*

126. *Id.*

127. *Id.* (quoting 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 6:14 (4th ed. 1996)); *see also* Prestonettes, Inc. v. Coty, 264 U.S. 359, 368 (1924) (opinion of Holmes, J.) ("[A trademark] does not confer a right to prohibit the use of the word or words. It is not a copyright. . . . A trade-mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his.").

128. *Giles*, 213 F.3d at 1253.

129. *Id.*

130. *Id.*

"distinctive quality of the mark."[131] However, Congress maintains that the primary objective of trademark law is to protect the consumer. States should enact publicity laws that focus primarily on protecting the interests of the individual, which is the primary purpose that the law was created to protect and may also include the contracting parties in a licensing agreement.

State legislatures would find greater consistency in the law of trademark protection and publicity rather than federal copyright law.[132] In *Allen v. National Video, Inc*., the plaintiff, Woody Allen, brought a Lanham Act lawsuit against the defendant for using a look-alike in an advertisement for its video rental business. [133] The advertisement was published in several magazines featuring Boroff, the Allen look-alike, merely standing at the video store rental counter. The court recognized that the underlying purpose of the Lanham Act was to protect a trademark in cases of misrepresentations where a product or a service has been endorsed by a public figure.[134] The court acknowledged that an endorsement by a public figure can be valuable and consumers may be confused if there is a false

131. Harding, *supra* note 105, at 306 (2009).

132. The Tennessee Legislature enacted the Tennessee Protection of Personal Rights statute, which treats publicity rights similarly to the rights protected under trademark law. Under the statute, publicity rights are protected as long as they are being used by the individual or his/her heirs. The Tennessee code states: "The exclusive right to commercial exploitation of the property rights is terminated by proof of the non-use of the name, likeness, or image of any individual for commercial purposes by an executor, assignee, heir, or devisee to such use for a period of two (2) years subsequent to the initial ten (10) year period following the individual's death." Tenn. Code Ann. § 47-25-1104 (West).

133. Allen v. Nat'l Video, Inc., 610 F. Supp.612 (S.D.N.Y. 1985).

134. *Id.* at 626. *See also* Geisel v. Poynter Prod's, Inc., 283 F.Supp. 261 (S.D.N.Y. 1968).

designation of origin.[135] The court reasoned that the plaintiff's mark, name, and likeness were well known to the public and that he had built up considerable investment in a unique, positive image. The court applied Standard & Poor's six-factor likelihood of confusion analysis.[136] The first factor of Standard & Poor's test is the strength of the plaintiff's mark and name. The court concluded as to Allen's likeness that the plaintiff's "mark, to analogize from trademark law, is a strong one."[137] After considering all six factors, the District Court held that the defendant had violated the Lanham Act and issued an injunction against the use of Boroff's photograph in future advertising, because a likelihood of confusion existed over the plaintiff's endorsement or involvement.[138]

The underlying principle of the Lanham Act is the protection of the trademark owner's economic interest. This is carried out through prohibiting the use of false designations that cause consumer confusion. Because trademark law indefinitely protects the trademark holders' economic interest and is premised on the protection of consumers from deceptive advertising, so should state publicity laws.

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135. *Id.* at 625 ("Another interest, which provides plaintiff with standing, is that of the 'trademark' holder in the value of his distinctive mark . . . . A celebrity has a similar commercial investment in the 'drawing power' of his or her name and face in endorsing products in marketing a career.").

136. Standard & Poor's Corp. v. Commodity Exchange Inc., 683 F.2d 704 (2d Cir. 1982) (involving the use of the S&P 500 stocks as a basis for the defendant's futures trading contracts. S&P brought a cause of action for Lanham Act violation, attempting to enjoin the defendant from calling its index the Comex 500. The court upheld the injunction of the lower court and applied the six factors of the likelihood of confusion test.).

137. *Allen*, 610 F.Supp. at 627.

138. *Id.* at 628, 632.

B. The Remote Heir Argument is a Myth

Some commentators and scholars assert that a fixed postmortem term is necessary to avoid the problem of a remote heir inheriting the publicity rights of a distant ancestor.[139] A remote heir is an heir of a famous ancestor who could appear on courthouse steps claiming his or her financial rewards, decades after commercial interests have used the publicity rights.[140] An illustration of the argument is as follows: The heirs of John Hancock bring a cause of action against the John Hancock Insurance Company for a violation of their postmortem publicity rights. The insurance company could argue that the policy interests in protecting postmortem publicity rights decline as the public's interest in free speech increases.[141] Sometimes this distant relative is called the "laughing heir," because he or she had nothing to do with the decedent and has now received a windfall.

Consider the Marilyn Monroe case involving her acting instructor Lee Strasberg. Monroe died suddenly in 1962 at the age of 36, and left behind a will that did not specifically bequeath her right of publicity. Lee Strasberg inherited Monroe's right of publicity under the residue clause of the will. Lee Strasberg passed the publicity rights

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139. *See* MCCARTHY, *supra* note 10, at § 9:16. *But see* Richard E. Fikes, Comment, *The Right of Publicity: A Descendible and Inheritable Property Right*, 14 CUMBERLAND L. REV. 347, 367 (1984). Fikes contends that a right of publicity should descend without any durational limitation, similar to any other property right. *Id.* Fikes argues that the public's right to receive information is only minimally impacted, because the First Amendment will prevail when a societal value has been met. *Id.*

140. *See, e.g.*, Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity*, 40 CUMB. L. REV. 499 (2009-2010).

141. Nicholas J. Jollymore, *Expiration of the Right of Publicity -- When Symbolic Names and Images Pass Into the Public Domain*, 84 TRADEMARK REP. 125, 129 (1994) (arguing that, at the point that the celebrity's persona becomes a symbol in society, the publicity rights should expire, in order to promote a greater exchange of ideas).

to his wife, Anna, by his will when he died. When the photographers who owned pictures of Monroe in three different states sued Anna Strasberg and CMG (the licensing agent) over the Monroe publicity rights, the federal district court determined that Monroe was domiciled in New York at the time of her death, and thus the Monroe publicity rights perished with the decedent in the state of New York. In states like New York and Wisconsin, the possibility of a remote heir is nonexistent, since they do not recognize postmortem publicity rights.[142] Nineteen states have not recognized the postmortem right of publicity either judicially or by statute.[143] Some states have enacted statutes that provide postmortem publicity rights to the heirs irrespective of the domicile of the celebrity at death.[144]

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142. MCCARTHY, *supra* note 10, §§ 9:31, 9:41.

143. *See id.* at § 9:17.

144. *See* Experience Hendrix, LLC v. HendrixLicensing.com Ltd, 766 F.Supp. 2d 1122 (W.D. Wash. 2011). The Washington Legislature enacted the Personality Rights Act of 1998. The Act created a statutory right of publicity for life, plus 75 years after the individual's death. The Act applies to all persons who have died since 1948. The heir of Jimi Hendrix assigned his publicity rights to two companies in 1995. Jimi Hendrix died in 1970 outside the United States. The assignee brought a lawsuit in 2005 in the state of Washington under the Act. The district court held that Hendrix was domiciled in New York at the time of his death and that New York applied, thus the heir inherited no publicity rights. The Ninth Circuit affirmed the lower court decision. After the decision, the Washington legislature amended the Act to apply to all persons, irrespective of where the decedent was domiciled at death. After the amended statute went into effect, Experience Hendrix sued Hendrix Licensing.com. During the course of the litigation, the amendments to the Act were at issue. The district court held that the Act was unconstitutional in violation of the Commerce Clause, Due Process Clause, and Full Faith and Credit Clause of the Constitution. *Id.* The case was appealed to the Ninth Circuit, which affirmed in part, reversed in part, and vacated in part, holding that the Washington Personality Rights Act was constitutional. Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd, 762 F.3d 829 (9th Cir. 2014).

If Monroe did not have a will at the time of her death, then her property would have passed by intestate succession. And if she were domiciled in California at the time of her death, then her publicity rights would pass to blood relatives at her death. Under the amended California statute, Monroe's heirs could inherit the publicity rights going back to her death in 1962. Without the California amendment in 2007, Monroe's publicity rights would have died with her, since the original statute was enacted in 1985, 28 years after her death. In California, through the amended statute, a remote heir would have to inherit after 1915. The right of publicity was first judicially recognized in the *Haelan* decision of 1953. In the case of enacted legislation recognizing the postmortem right of publicity, 13 of the 14 postmortem publicity statutes were enacted during the latter half of the 20th century. With the exception of California, Texas, Oklahoma, and Washington, the effective date for postmortem rights goes back to 1973.[145] It is only within the last several decades that heirs have been allowed to claim the publicity rights of a distant ancestor, because the right was not descendible until a state legislature enacted a statute or the courts upheld the right. The possibility of a remote heir of the nth generation arriving on the scene to collect the publicity rights of a long-lost ancestor is slight, because the recognition of the postmortem right of publicity is a relatively recent development in the law. The remote heirs of George Washington and John Hancock would be precluded from claiming the publicity rights of their distant

145. *See* MCCARTHY, *supra* note 10, at § 9:17. The effective year for postmortem rights in each state is as follows: California 1915, Illinois 1999, Indiana 1994, Kentucky 1984, Nebraska 1979, Nevada 1989, Ohio 1998, Oklahoma 1936, Pennsylvania 1973, Tennessee 1984, Texas 1937, Utah 1990, Virginia 1977, and Washington 1948. *Id.* at §§ 6:39-6:126.

relatives, because no publicity rights existed, either judicially or legislatively, at the time of their deaths.[146]

C. The Free Speech Argument

The argument has been made that allowing a descendible and unlimited right of publicity will create a "chilling effect" as to the "free and open exchange of information about the celebrity."[147] This argument has primarily evolved out of the *Memphis Development Foundation v. Factors* case, where the court stated that the "memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system."[148] The court asserted that fame and celebrity status is actually created by the public and press, due to their desire to hear more about a person's bad and good conduct.[149] Therefore, the court was reluctant to exclude the public from obtaining an interest in such a right that they helped to create, finding that excluding the public "somehow seems contrary to moral presuppositions."[150] Further, the court reasoned that there is no indication that allowing heirs to control the use of the

146. John Hancock died Oct. 8, 1793 in Boston. To date, Massachusetts does not protect postmortem publicity rights. However, in 2014, a bill was introduced in the legislature that would allow postmortem rights for individuals domiciled in the state at the time of death. *See* Bill S.2022: An Act Protecting the Commercial Value of Artists, Entertainers and Other Notable Personalities, The 189th Court of the General Commonwealth of Ma., https://malegislature.gov/Bills/188/Senate/S2022 (last visited Apr. 18, 2015).

147. Kenneth E. Spahn, *The Right Of Publicity: A Matter of Privacy, Property, or Public Domain?*, 19 NOVA L. REV. 1013, 1029 (1995).

148. Memphis Dev. Found. v. Factors, 616 F.2d 956, 960 (6th Cir. 1980).

149. *Id.* at 958.

150. *Id.*

deceased publicity rights will increase the "efficiency or productivity of our economic system."[151]

The problem with the criticism discussed above is that it fails to adequately acknowledge the intent and reasonable expectations of contracting parties prior to the death of the licensor of the publicity rights.[152] It is unreasonable to allow a legally executed contract to terminate due to the expected or unexpected death of one of the contracting parties. It is also unreasonable to allow the public to "reap the rewards" because they "helped" make a person famous by wanting information and images about an individual.[153] Any statute that allows the lifespan of a person to determine the duration and exclusivity of a property right should be found to "substantially impair" a contract, because it significantly alters the reasonable expectations of the contracting parties and intrudes upon the bargaining relationship.[154] Consider an up-and coming-actress who has been able to secure a leading role in a major film. As her career progresses, she accumulates a significant amount of assets while becoming a household name.[155] At the height of her career, the actress dies suddenly. The actress leaves her publicity rights to a friend and the friend contracts with an agency to license the actress's image. A licensee may invest a great deal of time, money, and energy into the advertisement and merchandising of a publicity interest.[156] The licensee may have established his livelihood around the actress' image. At the death of the actress, depending on the domicile of the decedent, postmortem publicity rights may exist or the right of publicity may be completely

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151. *Id.*

152. *See id.*

153. *Id.*

154. Hodges v. Rainey, 533 S.E.2d 578, 585-86 (2000) (citing U.S. CONST. art 1, § 10, cl 1).

155. *See generally* Milton H. Greene Archives v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152, 1169 (C.D. Cal. 2008), *aff'd*, 692 F.3d 983 (9th Cir. 2012).

156. *Id.*

extinguished. If no postmortem publicity right is recognized in the state, the public would instantly have a "free and open exchange" of the celebrity's image.[157] Therefore, the "chilling effect" would actually be felt by potential licensees of publicity rights, who must weigh their possible gain against the need to somehow attempt to "police" the domicile of the licensor or protect the licensor from the risk of an accidental death, in order to shield themselves from the loss.[158]

According to the court in *Gionfriddo v. Major League Baseball,* the First Amendment requires that the right of publicity be "balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press."[159] To consider both interests, the California Court of Appeals has stated that it must "determine the public interest in the expression" and then weigh it against the economic interests of the plaintiff.[160] In *Gionfriddo,* retired baseball players brought an action for the common law tort of unauthorized appropriation of their publicity rights against those persons and companies responsible for disseminating statistics about the plaintiffs in programs at baseball games and on the defendant's website.[161] The information regarding the players was factual data about their statistics, video clips of their performances, and verbal commentary.[162] The court

157. *Id.*

158. *Id.*

159. Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 409 (Cal. Ct. App. 2001) (plaintiff baseball players alleged Major League Baseball association appropriated their names and likenesses in violation of common law and that they were entitled to relief pursuant to Cal. Civ. Code § 3344 (a)(d) (1995)).

160. *Id*. at 410.

161. *See id.* at 409.

162. *See id.* at 410-11.

found that the plaintiff's economic interest was far outweighed by the public's interest of having the ability to freely disseminate information regarding the history of baseball.[163] This reasoning is aligned with the notion that baseball is a national pastime, and therefore the league's use of the retired players' names, images, and likenesses fits within the "public affairs use" exception, recognized in the California right of publicity statute.[164] The statute found that certain uses in connection with news, public affairs, and sports broadcasts shall not constitute a wrongful appropriation.[165] This exception fit the case at bar, because major league baseball is followed by millions of people daily and fans have an interest in the history of the sport.[166] The court found that the statistics and records set by the players create the standard of measurement of players for years to come.[167] More important, the court found that this information is owed constitutional protection, because the information is fact-based, historical data and is not presented in a commercial context, as suggested in the argument advanced by the plaintiff.[168]

Publicity rights only deter the free and open exchange of a celebrity's image for commercial exploitation. Courts have consistently held that the news media may use the name, image, and likeness of a celebrity to illustrate the quality and content of the news periodical.[169] On the contrary, an advertiser might intend to attract attention to his product through the image of a famous person. The advertiser is not intending to inform the public about the famous person, and instead only intends to use the image as a conduit to make a profit. Where there has been no First

163. *See id.* at 415; *see also* Cal. Civ. Code § 3344 (a)(d).

164. *See Gionfriddo*, 94 Cal. App. 4th at 412-16; *see also* Cal. Civ. Proc. Code § 3344 (a)(d).

165. *See Gionfriddo*, 94 Cal. App. 4th at 409-10.

166. *See id*. at 411.

167. *See id.* at 409-10.

168. *See id.* at 414-15.

169. *See id.* at 414.

Amendment concern regarding public interest, the rationale for providing the public with rights of publicity should not prevail.[170] Therefore, if the law does not allow the public to use a person's right of publicity during his lifetime where the use is not protected by the First Amendment, the law should not assume that the right should one day ultimately belong to the public at large without justification.

In addition, when considering the potential for publicity rights to restrict the dissemination of celebrity information involving various forms of entertainment, the courts have broadly held on the side of free speech. In *Hicks v. Casablanca Records,* the Southern District of New York upheld the free speech rights of the defendants, who had produced a movie about the famous mystery writer Agatha Christie.[171] The movie was based on a real event that occurred in Agatha Christie's life. The mystery writer had gone missing for 11 days, and it was never revealed what had actually happened. The movie created a fictional story explaining the 11 days as a time when Christie was plotting to kill her husband's mistress. The heirs of Christie brought action for defamation and violation of her publicity rights. The court held in favor of the defendant on First Amendment grounds.[172] The court stated:

> Since the cases at bar are more factually similar to the Notre Dame case, [i.]e., there were no

170. Keller v. Electronic Arts, Inc., No. C 09–1967 CW, 2010 WL 530108 (N.D.Cal. Feb. 8, 2010) (distinguishing the public interest defense of factual news reporting from commercial misappropriation).

171. Hicks v. Casablanca Records, 464 F.Supp. 426 (S.D.N.Y. 1978).

172. *Id.* at 430 (holding that, under New York law at the time, publicity rights survived the descendent, and stating: "Thus, it seems clear as it pertains to the present motions that her right of publicity survived her death and was properly transferred to the plaintiffs as her heirs and assignees.").

> deliberate falsifications alleged by plaintiffs, and the reader of the novel in the book case by the presence of the word "novel" would know that the work was fictitious, this Court finds that the [F]irst [A]mendment protection usually accorded novels and movies outweighs whatever publicity rights plaintiffs may possess and for this reason their complaints must be dismissed.[173]

The court went on to hold that the right of publicity did not attach where a fictionalized account of a celebrity was depicted in a movie or a novel.

D. Balancing Practical and Policy Considerations of an Unlimited Duration

Take the case of James Dean, who has regularly made the Highest Paid Dead Celebrities list. The James Dean Estate generates $5 to $10 million from postmortem publicity rights annually. James Dean was born in Marion, Ind., in 1931 and died outside Palm Springs in an auto accident in 1955. Presently, CMG Worldwide markets James Dean's publicity rights. Indiana passed its publicity rights statute in 1994, providing retroactive rights prior to 1994 and a 100-year postmortem duration. If Dean was a domicile of Indiana at his death, then his postmortem rights would have continued until 2055. In February of 2014, CMG brought an action in Indiana against Twitter for using the handle "@JamesDean."[174] In *Dillinger LLC v. Electronic Arts, Inc.*, a federal judge refused to apply the Indiana publicity statute retroactively.[175] Because the court refused to give the statute retroactive effect, the James Dean image and name became part of the public domain in the year of

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173. *Id.* at 433.

174. Neil, *supra* note 2.

175. 795 F.Supp.2d 829 (S.D.Ind. 2011). The estate of John Dillinger sued the publisher Electronic Arts for using Dillinger in *The Godfather* video games. The district court held that the Indiana statute was not passed until 1994 and as such should not be applied retroactively. *Id.*

James Dean's death, effectively eliminating the potential for licensing income.

1. Economic Incentives

In *Zacchini*, the United States Supreme Court recognized that at least one state interest in recognizing the right to publicity includes allowing individuals to "reap the reward of his endeavors." [176] The courts have also recognized that the right of publicity "creates a powerful incentive for expending time and resources to develop the skills or achievements prerequisite to public recognition."[177] To develop these skills and reap such rewards, those who have a valuable right of publicity license their interest to persons or companies that may assist in increasing the value and generating a considerable return through advertising and merchandising.[178] For example, the Bob Marley estate in 2009 was able to license 50 percent of Marley's publicity rights for an estimated $20 million.[179] This deal was possible only after a 2002 decision in Jamaica that established the common law jurisprudence allowing the disposition of publicity rights by will.[180] As the Marley estate recognized and the licensee, Hilco Consumer Capital, affirmed, "Bob Marley has become a global legend with a legacy of music that has captured audiences worldwide. Marley's evocative messages remain timeless, universal, and continue to appeal

176. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 563 (1977).

177. Spahn, *supra* note 147, at 1028.

178. *See Fifty Percent of Bob Marley's Right of Publicity and Related IP Sells for $20 Million,* RIGHT OF PUBLICITY (Feb. 20, 2009), http://rightofpublicity.com/bob-marley-heirs-sell-portion-of-intellectual-property-rights.

179. *See id.*

180. *See* Phillip D. Howard, *Comparative Views on a Commercial Right to Publicity: Should There Be Durational Limitations?*, 8 REV. BUS. RESEARCH 58 (2008).

to music fans, both young and old."[181] Marley has been deceased for more than 30 years; however, this prominent investment firm recognized the value in the right to Marley's name, image, and likeness.[182]

However, some argue that the incentive theory is only applicable to an individual while he or she is alive, because the "primary incentive" is to derive profit from the individual's fame or fortune during his or her lifetime and is not concerned with the ability to pass on such assets to the estate.[183] Even if this is true, courts and commentators fail to recognize that this argument may be made about every property interest that has the potential to increase in or sustain its value. For example, a homeowner who maintains his yard and the exterior of the structure will likely realize appreciation in the value of the property. Homeowners have an incentive to preserve their property for future sale or inheritance by their heirs. Furthermore, the owner of a valuable painting or vehicle keeps the asset safe so that it may continue to increase in value, thereby giving the owner increased wealth during his or her life. However, the law does not fail to recognize that even though the real and personal property owner's "primary objective" may not be to ensure that his or her heirs have a valuable asset at the owner's death, the owner may freely pass such property onto heirs with little restraint.

2. Freedom of ConDonetract

181. *See Bob Marley Family Partners With Hilco Consumer Capital for Exclusive Product Licensing Representation and Management*, PR NEWSWIRE (Feb 10. 2010), http://www.prnewswire.com/news-releases/bob-marley-family-partners-with-hilco-consumer-capital-for-exclusive-product-licensing-representation-and-management-65712037.html.

182. *See id.*

183. Spahn, *supra* note 147, at 1028-29.

The freedom to contract is a right firmly embedded in and protected by the United States Constitution.[184] Limiting the duration of postmortem publicity rights significantly limits the ability and value of contracts involving publicity rights. In the 1819 landmark decision *Dartmouth College v. Woodward*, the U.S. Supreme Court had to decide whether a contract that granted a private charter to the Trustees of Dartmouth College was one that the state could not impair by subsequent legislation.[185] The Supreme Court found that Dartmouth College was a private, charitable corporation and the state's regulation could not unilaterally amend the existing contract.[186] The court reasoned that the framers of the Constitution added the Contract Clause specifically to "restrain the legislature in [the] future from violating the right to property."[187] The Contract Clause, which prohibits states from passing any law "impairing the obligation of contracts," was in reference to "contracts respecting property, under which some individual could claim as a right to something beneficial to himself."[188] In *Fletcher v. Peck,* the Marshall Court reiterated the importance of private contracting and the limitation on a state legislature's power to interfere.[189] In *Fletcher*, the Georgia Legislature repealed a law that annulled legally executed conveyances of land in Georgia.[190] The Court found that the repeal of the law was unconstitutional, because the repeal impaired the obligation of the contracting persons, i.e., the grantor and grantee of the

184. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 589 (1819) (citing U.S. CONST. art 1, § 10).

185. *Id.* at 552-557.

186. *Id.* at 711-12.

187. *Id.* at 628.

188. *Id*.

189. Fletcher v. Peck, 10 U.S. 87 (1810).

190. *Id.*

property, because the "law in its nature is a contract" and a "repeal of the law cannot divest those rights."[191]

Although the language of the Contract Clause appears facially absolute, it is also well established that the right to contract is not free of governmental regulation when the public interest is involved.[192]

> There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.[193]

The Contract Clause must be "accommodated to the inherent police power of the State to safeguard the vital interests of its people."[194] The state therefore is able to enact laws affecting contracts to maintain "peace and security" and to promote the health, safety, and welfare of its citizens.[195] In *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, the Supreme Court laid out the test to determine whether a state law that impacts the right to contract is ultimately a proper exercise of a state's police power.[196] First, the court must determine "whether the state law has, in fact, operated as a substantial impairment of a

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191. *Id.* at 135.

192. *See generally* West Coast Hotel v. Parrish, 300 U.S. 379 (1973).

193. Chi. B & Q. R. Co. v. McGuire, 219 U.S. 549, 567 (1911).

194. Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 410 (1983) (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434(1934)).

195. *Chicago*, 219 U.S. at 568.

196. *Energy Reserves*, 459 U.S. at 411.

contractual relationship."[197] The legislature will be held to an increased level of scrutiny depending on the severity of the impairment.[198] Where there is minimal impairment, the inquiry may end there.[199] However, a "careful examination of the nature and purpose of the state legislation" will be conducted where the legislation is found to severely impair a contractual relationship.[200]

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.[201]

If the state regulation is found to substantially impair, the state must justify the regulation by showing that there is a "significant and legitimate public purpose*"* for the enactment of the law.[202] The Court found that the requirement for a legitimate purpose ensures that the state is "exercising its police powers, rather than providing a benefit to special interests."[203] The final step in the inquiry is determining whether the regulation "adjusting the rights and responsibilities of contracting parties" is reasonable and appropriate to the legislature's purpose for its adoption.[204] In

197. *Id.*; *see also* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978).

198. *Energy Reserves*, 459 U.S. at 410; *see also Allied*, 438 U.S. at 245.

199. *Energy Reserves*, 459 U.S. at 412.

200. *Allied*, 438 U.S. at 245; *Energy Reserves*, 459 U.S. at 410.

201. *Allied*, 438 U.S. at 245.

202. *Energy Reserves*, 459 U.S. at 411.

203. *Id.* at 412.

204. *Id.* (quoting U.S. Trust Co. v. N.J., 431 U.S. 1, 22 (1977)).

its review of economic and social regulation, the Court will "defer to legislative judgment" as to the need and reasonableness of the regulation.[205] Despite "the customary deference" given to the state legislature, the Court has recognized a violation of the Contract Clause and a need to limit the state's power when "its exercise affects substantial modifications of private contracts" and is found to be "neither necessary nor reasonable."[206]

The freedom to contract is a highly important right.[207] Generally, the making of a contract "shall be free from government interference."[208] Contracting parties are able to engage in terms to their liking, so long as the provisions of the contract are not void for being against public policy or procured as a result of fraud.[209] The freedom to contract allows parties to integrate terms of the agreement that are "mutually satisfactory."[210] These terms may be in regards to how and when to end the agreement and what each party will receive if the other party does not uphold its end of the bargain.[211]

V. CONCLUSION

Distinct from state privacy law, the right of publicity is the right to control the exploitation of one's name or image.[212] This right provides an incentive for people to work throughout their lifetimes to create valuable assets in their name or image. They may use these assets to create wealth for themselves and possibly for their families. Creating this wealth may entail contracting with other individuals and companies who may use the profitable image in

205. *Id.* at 413.

206. *Allied*, 438 U.S. at 244.

207. *See, e.g.*, Palm Beach Mobile Homes, Inc. v. Strong, 300 So. 2d 881, 883 (Fla. 1974).

208. 16 C.J.S. *Constitutional Law* § 720 (1984).

209. *Id.*

210. *Id.*

211. *Id.*

212. *See* MCCARTHY, *supra* note 16, at § 1:7.

merchandising and advertising of products and services. A licensee to another person's right of publicity likely values the contract based on the term of duration and exclusivity of the right.

The traditional rationale for limiting the term of postmortem publicity rights has been accepted by legislatures and some courts. The analogy of a right to publicity with copyright law has been a popular one. However, when an in depth consideration is conducted between the two property interests, the analogy breaks down. Unlike copyright and patent law, where authors or inventors are granted limited protection of their works or inventions to promote societal progress,[213] the policy rationale for the right of publicity is to protect the owner and potential licensor of such a right from wrongful commercial appropriation. Furthermore, trademark law is also used to prevent wrongful appropriation; the underlying policy rationale is to protect the owner's economic interest as well as the consumer. After balancing other policy concerns, trademark protection may warrant a limitless duration. Because the right of publicity contains a distinct rationale for protection, it should not be analogized to other intellectual property rights when durational limits are established. Doing so may lead to inequities for the persons the law is meant to protect and may ultimately lead to the substantial impairment of one's contractual obligations. In particular, having the duration of the right based on a life term creates great uncertainty as to the value of the right. State legislatures should not enact laws that allow the public to reap the rewards of others without promulgating underlying policy considerations that justify such a transfer of rights. As state courts and legislatures during the 20th century began to recognize the right of publicity separately and distinctly from the right of privacy, so should the right

213. U.S. CONST. art 1, § 8, cl 8.

of publicity be recognized separately and distinctly from copyright and patent laws that come under constitutional purview.

The concern over a remote heir appearing on the scene generations later is also moot, because remote heirs likely do not have proper claims. Because most publicity statutes were enacted in the latter half of the 20th century, the right of publicity did not exist before the statutes' effective dates. Only heirs inheriting after the effective date of the statutes may claim publicity rights of the decedent.

The First Amendment argument attempts to assert that a serious chilling of free speech would occur if an unlimited term were allowed. The only free speech that might be lessened is commercial speech, because general publicity statutes only apply to the advertisement of a product or a service. Free speech to disseminate truthful information about a dead celebrity when there is a newsworthy item is fully protected by the First Amendment. Authors are completely protected in publishing biographies about celebrities, making movies about celebrities' lives, or even creating fictional stories about celebrities.

Attempting to justify the evisceration of significant contract rights at the death of a celebrity or within some arbitrary number of years after death does not seem warranted without a paramount policy rationale in support of the limitation. If society lacks such an overriding policy rationale, the heirs or licensees of the right of publicity should be able to maintain the legacy of a celebrity's personhood for a limitless duration, to protect the value of the asset, and the right of all parties to contract.

PRIVACY ISSUES AND THE PAPARAZZI

Devan Orr*

We live in an increasingly digital and invasive world, where privacy is being lessened with every Facebook post or Instagram hashtag. The ease of accessibility to technology, particularly camera equipment, has increased photography as both a hobby and a side profession, leading to an increase in paparazzi and disturbance of human lives. To combat these disturbances, several states have passed or proposed anti-paparazzi statutes that limit what the paparazzi can do and when. However, these statutes run up against First Amendment protections, even though they are protecting the very important privacy rights of celebrities and their children.

California recently made waves by passing three anti-paparazzi bills to amend criminal and civil statutes. The bills make changes that protect not only celebrities but also their children and protect privacy interests in the face of potential First Amendment opposition because of celebrities' status as public figures. However, the children may not be considered public figures, because they are not the actual celebrity. This means the childrens' privacy rights may not exist outside of their parents' profession, and so this law may not effectively protect their rights. This paper explores the three newest amendments to California statutes used mainly as a protection from paparazzi activity, statutes that protect celebrities and now their children from invasions of privacy, and argues the newest amendments are effective in protecting privacy interests regardless of the First Amendment implications.

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First, Senate Bill 606, supported by many celebrity parents, such as Halle Berry and Jennifer Garner,[1] amended Section 11414 of the California Penal Code, the title regarding child abuse and harassment fines and penalties.[2] Halle Berry supported the bill because she had multiple negative paparazzi interactions, both when alone and when with her child.[3] The statute was amended to increase punishment from the previous maximum of six months in jail to a maximum of one year for first and subsequent offenses.[4] The statute was also amended to create a civil course of action allowing celebrity parents to bring suit on behalf of "an aggrieved child or ward."[5]

Second, Assembly Bills 1356 and 1256 amended the California Civil Code sections dealing with stalking and civil harassment.[6] The two assembly bills amended California Civil Code sections 1708.7, 1708.8, and 1708.9.[7] In passing Assembly Bill 1356, which amended Civil Code section 1708.7, regarding stalking, the California Legislature reasoned:

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1. Natalie Finn, *Halle Berry Thanks Jennifer Garner, Adele, & More Celeb Parents After Paparazzi-Deterrent Bill Passes*, E! ONLINE (Sept. 24, 2013, 5:00 PM), http://www.eonline.com/news/462847/halle-berry-jennifer-garner-supported-law-to-protect-celeb-kids-from-paparazzi-passes-in-california.

2. CAL. PENAL CODE § 11414 (West 2014).

3. *See, e.g.*, Andrea Watson, *A History of Violence: Celebrities vs. Paparazzi*, JET (Jul. 24, 2013), http://www.jetmag.com/entertainment/a-history-of-violence-celebrities-vs-paparazzi/.

4. CAL. PENAL CODE § 11414(c) (West 2014).

5. *Id.* at (d).

6. A.B. 1256, 2014 Legis., Reg. Sess. (Cal. 2014); A.B. 1356, 2014 Legis., Reg. Sess. (Cal. 2014).

7. A.B. 1256, 2014 Legis., Reg. Sess. (Cal. 2014); A.B. 1356, 2014 Legis., Reg. Sess. (Cal. 2014).

> [t]he bill would permit the plaintiff to show, as an alternative to the plaintiff reasonably fearing for his or her safety or that of a family member, that the pattern of conduct resulted in the plaintiff suffering substantial emotional distress, and that the pattern of conduct would cause a reasonable person to suffer substantial emotional distress.[8]

Assembly Bill 1256, amending Civil Code sections 1708.8 and 1708.9, was also passed with a purpose. The Legislature wanted to:

> recast these provisions to instead provide that a person is liable for a physical invasion of privacy when the defendant knowingly enters onto the land of another person without permission or otherwise commits a trespass with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person. The bill would define "private, personal, or familial activity," as specified, and provide that this definition applies to physical and constructive invasion of privacy.[9]

Both bills seem to focus on safety of celebrities' children as the top priority. This reinforces any current tort protections, while limiting potential arguments of over

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8. Assemb. B. 1356, 2013-14 Leg., Reg. Sess. (Cal. 2014), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1356&search_keywords=.

9. Assemb. B. 1256 2013-14 Leg., Reg. Sess. (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1256&search_keywords=.

breadth with definitions and specificity in drafting the amendments to the statutes.

The three bills are a significant development, because they represent the first time the law has established children's privacy rights based on their parents' professions. In order to understand the current statutes and their implication for privacy issues, Part I explores the history of the paparazzi and their invasion into the lives and privacy of celebrities as a safety concern. Part II reviews the history of both California Penal Code 11414 and California Civil Code 1708.8. Part III examines the text of California Penal Code 11414 and California Civil Code 1708.7, 1708.8, and 1708.9, as amended by the three bills. Part IV analyzes how the statutes as amended interact with the common law torts of intrusion and trespass and discusses how the statutes interact with the common law defenses of assumption of risk and waiver. Part V compares the current version of the California privacy statutes and how they compare to the developments taken in other states and countries. Part VI concludes the paper with a brief analysis of potential First Amendment arguments against the statute.

I. THE HISTORY OF THE PAPARAZZI

In order to understand why laws like this are so important, it is necessary to look at how celebrity culture has evolved in this country and how the paparazzi have gone from simple photographers to what can be construed as a menace to society, both for celebrities and normal people. "Paparazzi" is an Italian term coined by Federico Fellini, director of *La Dolce Vita*, or *The Sweet Life*.[10] The term

10. *Paparazzi*, BREWER'S DICTIONARY OF PHRASE AND FABLE (2012), *available at* https://login.ezproxy1.lib.asu.edu/login?url=http://literati.credoreference.com.ezproxy1.lib.asu.edu/content/entry/brewerphrase/paparazzi/0.

started in an Italian travel journal[11] but also mimics the sound of the word mosquito in Italian.[12] The paparazzi started in the early 1950s in Rome[13] and followed the movie craze over to the United States, with one paparazzo in particular, Ron Galella, famously hounding celebrities and public figures such as Audrey Hepburn and Jackie Kennedy during the 1960s and 1970s.[14]

Galella's work illustrates why celebrities are worried for the safety and privacy of their children, and his work led to the amendment of the current California statutes. Galella chased down celebrities such as Richard Burton, Sean Penn, and Marlon Brando.[15] Galella and the celebrities were both terrified and injured at different points; Galella was beaten by bodyguards, and Marlon Brando broke Galella's jaw, resulting in Brando's hand getting infected.[16] Galella was not deterred, however. Instead, he took precautions, such as wearing a football helmet.[17] Jackie Onassis (formerly Jackie Kennedy) even filed a restraining order against Galella, even before the adoption of statutes to protect her privacy interests.[18]

Since the 1960s and 1970s, the interest in celebrity photos has only skyrocketed. An anonymous photographer gave potential prices for photos, ranging from mere cents as payment for pictures of common couples, all the way up to

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11. *Id.*

12. Gaby Wood, *Camera, Movie Star, Vespa… It All Began on the Via Veneto: The Origins of the Paparazzi and What a Hot Snap Fetches Nowadays*, THE GUARDIAN (Sept. 23, 2006, 7:39 PM), http://www.theguardian.com/media/2006/sep/24/pressandpublishing1.

13. Ray Murray, *Keeping the Paparazzi an Arm's Length Away*, 46 J. POPULAR CULTURE, 868, 869 (2013).

14. Wood, *supra* note 12.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*; *see also* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).

tens of thousands of dollars for big-ticket photos, such as those featuring George Clooney with his newest girlfriend.[19] In the past 10 years, there is a well-documented history of several celebrities having violent or dangerous run-ins with the paparazzi.[20] For example, a paparazzo died in 2013 in a chase after Justin Bieber.[21] This increase of violent interactions may be due to the uptick in modern technology, particularly with paparazzi able to use cell phones and more mobile equipment, rather than needing to set up giant cameras and stage everything. It may also be due to an increase in demand. The value of the shots has gone up in recent years as society has become more obsessed with celebrity culture. Even Halle Berry frustratingly yelled at paparazzi while carrying her daughter, and Ms. Berry's fiancé lunged at photographers in an attempt to protect the child.[22]

Because of these concerns, California made a legislative push to protect celebrities as well as their children. With two famous women, Jennifer Garner and Halle Berry, at the helm, the California Legislature came together and passed a bill extending coverage of several key provisions to the children of famous celebrities.

II. PRIOR VERSIONS OF THE AMENDED STATUTES

Between the three recently passed bills, four separate statutes either were amended or will be amended soon. For purposes of clarity, only California Penal Code 11414 and

19. *Id.*

20. *See* Watson, *supra* note 3.

21. Greg Risling, *Christopher James Guerra's Death Moves Justin Bieber to Call for Stronger Paparazzi Laws in California*, HUFF POST LOS ANGELES (Jan. 23, 2014 6:58 PM), http://www.huffingtonpost.com/2013/01/03/christopher-james-guerra-justin-bieber_n_2403256.html.

22. *See* Watson *supra* note 3.

California Civil Code section 1708.8 will be discussed. California Penal Code 11414 will be discussed because it is the only penal code section that was amended to deal with paparazzi and was amended with these bills, and Civil Code section 1708.8 will be discussed because it has the most history and revisions over time.

A. California Penal Code 11414

The original Code read largely the same as the new one. The old version penalized "any person who intentionally harass[ed] the child or ward of any other person because of that person's employment" with a misdemeanor.[23] Child or ward was defined as anyone under 16 years old, and harassment was defined as:

> [the] knowing and willful conduct directed at a specific child that seriously alarms, annoys, torments, or terrorizes the child, and that serves no legitimate purpose.[24] The conduct must be such as would cause a reasonable child to suffer substantial emotional distress, and actually cause the victim to suffer substantial emotional distress.[25]

The law also allowed for an increase in punishment for second and third offenders, but not as much of an increase as allowed for in the newest iteration of the statute.[26] While this original statute did not differ much from the new 2014 version, the 2014 version strengthened the punishments and allowed for further protection of children, making it seem radical and unenforceable to some.

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23. A.B. 3592, 1994 Leg., Reg. Sess. (Cal. 1994).
24. CAL. PENAL CODE § 11414(b)(1), (2) (West 2014).
25. *Id.* at (b)(2).
26. *Id.* at (c); A.B. 3592, 1994 Leg., Reg. Sess. (Cal. 1994).

B. California Civil Code 1708.8

The civil law version of the California paparazzi law, codified in California Civil Code 1708.8, was first passed in 1998, but has since been amended several times. California most recently expanded its legislation to cover the children of celebrities, as well, in an attempt to expand privacy rights and protect celebrity safety. The Legislature was concerned with new technology encroaching upon privacy beyond the ability of common law torts to suffice as a remedy.[27] Thus, the California State Legislature passed Senate Bill 262 to address the loss of privacy due to technology.[28] This statute was codified as California Civil Code § 1708.8; instead of protecting traditional privacy, it actually acts to protect non-legal regulation, to avoid problems of enforcement and constitutional rights infringement that come along with traditional privacy protections.[29] This statute also "allow[ed] individuals to sue for 'constructive' trespass, or trespass to obtain, by way of an electronic enhancing device of a visual or auditory nature, an image that the photographer could not have obtained otherwise without physically trespassing."[30]

The law was amended in 2006 and lasted until 2009. The 2006 statute codifies assault. The statute says "an assault committed with the intent to capture any type of visual image, sound record, or physical impression of the plaintiff" is subject to general and special damages,

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27. *See* Note, *Privacy, Technology, and the California "Anti-Paparazzi" Statute*, 112 HARV. L. REV. 1367, 1377 (1999).

28. *See id.*

29. *See id.*

30. *New Anti-Paparazzi Law Broadens Tort Liability for "Trespass"*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (OCT. 19, 1988), http://www.rcfp.org/browse-media-law-resources/news/new-anti-paparazzi-law-broadens-tort-liability-trespass#sthash.9WMcRhdA.dpuf.

including punitive damages.[31] This law was targeted at the paparazzi and was written for the general population. It did not, however, address what occurs if paparazzi assault children or other people associated with the plaintiff.[32]

However, in 2010 California passed another law aimed at the paparazzi. This time, the law was directed at punishing the act of driving dangerously to obtain a photograph or other image of a celebrity. The statute protects celebrities by fining a "person who directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate any provision of subdivision (a), (b), or (c) is liable for any general, special, and consequential damages resulting from each said violation."[33] This is broader than the 2006 version, because it extends liability beyond the person taking the photo.[34] The law also retains any other common law tort claims for the plaintiff, including defamation in either slander or libel form.[35] Even though this provision of the law was struck down for being overly broad,[36] there is a failsafe in that anyone needs actual knowledge prior to purchasing the paparazzi image before being persecuted. It also protects those who re-distribute or sell the photo.[37]

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31. Assemb. B. 381, 2005-06 Leg., Reg. Sess. (Cal. 2005), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060AB381&search_keywords=.

32. This extension was added in 2014 and has yet to be struck down, despite potential First Amendment arguments.

33. A.B. 524, 2009 Leg., Reg. Sess. (Cal. 2009).

34. *See* Assemb. B. 381, *supra* note 31.

35. *See id.* at (f).

36. Risling, *supra* note 21.

37. *Supra* note 31at (3).

III. THE AMENDED STATUTES

A. California Penal Code 11414

California Penal Code 11414 expands on the coverage of the original statute. It still designates child or ward as being under 16 years of age, which means that many famous celebrity siblings and children, such as Kylie and Kendall Jenner,[38] are beyond the scope of the statute.[39] The statute redefined harassment and employment. Harassment has been expanded to list various forms

> including, but not limited to, that conduct occurring during the course of any actual or attempted recording of the child's or ward's image or voice, or both, without the express consent of the parent or legal guardian of the child or ward, by following the child's or ward's activities or by lying in wait.[40]

It also requires that "[t]he conduct must be such as would cause a reasonable child to suffer substantial emotional distress, and actually cause the victim to suffer substantial emotional distress."[41] Employment is also now defined as "job, vocation, occupation, or profession" of the caretaker of the child.[42] The statute allows the caretaker to bring a *civil* suit on behalf of the child or ward in the case of a child being harassed.[43] In order to limit a challenge on over breadth or false blame, the statute states "the act of

38. This could be for several reasons. One may be that those older than 16 are probably able to bring their own suits without the help. Another may be that, at that age, the children either are celebrities in their own right who assume this risk with their jobs or are no longer of any interest to paparazzi trying to get exclusive pictures.

39. CAL. PENAL CODE § 11414(b)(1) (West 2014).

40. *Id.* at (b)(2).

41. *Id.*

42. *Id.* at (b)(3).

43. *Id.* at (d) (emphasis added).

transmitting, publishing, or broadcasting a recording of the image or voice of a child does not constitute a violation of this section,"[44] which arguably is a preemptive attempt to keep the law from infringing on any First Amendment rights.

B. California Civil Code

Assembly Bill 1356 amends California Civil Code section 1708.7, the section on stalking.[45] As amended, the statute specifically allows celebrities to bring suit on behalf of their children against paparazzi (and magazines supporting those paparazzi) that are potentially endangering children.[46] The statute holds a person liable of stalking if the person engaged in a "pattern of conduct" causing a plaintiff to fear for his or her own safety or the safety of an immediate family member, including a child.[47]

Assembly Bill 1256 amends California Civil Code section 1708.8, the section regarding physical invasion of privacy. The bill amends the section to define physical invasion of privacy as when the defendant photographs private matters in addition to personal and familial matters.[48] It defines "private, personal, and familial activity" as "interaction with the plaintiff's family or significant others under circumstances in which the plaintiff has a reasonable expectation of privacy."[49] Assembly Bill 1256 also adds section 1708.9 to the Civil Code. Section 1708.9 makes it unlawful for any person to interfere, physically or nonphysically, with any person attempting to enter or exit a facility as defined in the code.[50] While the statute does not

44. *Id.* at (e).
45. A.B. 1356, 2014 Leg., Reg. Sess. (Cal. 2014).
46. *Id.* at § 1, 1708.7.
47. *Id.*
48. A.B. 1256, 2014 Leg., Reg. Sess. (Cal. 2014).
49. *Id.*
50. *Id.*

specifically name children, it does imply that situations such as children trying to get into or out of schools or other public and private places could bring suit against paparazzi who effectively trap them with intimidation tactics.

IV. HOW THE STATUTES ADDRESS TORT LAW

Both the criminal statute, California Penal Code 11414,[51] and the California Civil Code sections, 1708.7-1708.9, address two torts: the tort of intrusion and the tort of trespass.

A. The Tort of Intrusion, or Invasion of Privacy

In order to understand the newest bill, this paper first looks at the general tort of intrusion and how the statute interacts with the current requirements for the common law tort. The tort of intrusion is considered the typical "invasion of privacy" claim.[52] Invasion of privacy is considered to encompass an intrusion on seclusion and an appropriation of the person's name or likeness.[53] In *Shulman v. Group W. Productions*, the plaintiffs, Ruth and Wayne, were injured when their car went off the highway and overturned, trapping them inside.[54] A rescue helicopter crew came to help the plaintiffs.[55] Along with the rescue crew, however, was a video camera operator, told to follow the helicopter crew and record everything.[56] The cameraman catalogued the scene and the rescue before being placed in the

51. While crimes are not the same as torts, the statute is grounded in tort principles and criminalizes similar behavior.

52. Shulman v. Grp. W. Prods., Inc., 955 P.2d 469, 474 (Cal. Super. Ct. 1998).

53. Karl A. Menninger, II, J.D., *Media Outrage: Privacy Torts (D)*, AM. JUR. PROOF OF FACTS 3d.

54. *Shulman*, 955 P.2d at 474.

55. *Id.*

56. *Id.* at 475.

helicopter, and he continued the filming on the roof of the hospital when the helicopter carrying Ruth landed.[57] The nurse had a wireless microphone on that captured her conversations with Ruth and other rescue workers.[58] In capturing the sounds, the cameraman picked up various snippets of conversations with Ruth.[59] When the show aired, Ruth felt her privacy was violated, because of the things she said and the parts of her body that were seen.[60] Ruth and Wayne sued the producers of the television program for invasion of privacy due to unlawful intrusion by videotaping the rescue.[61]

The court used a reasonable person standard to determine whether at the various stages of the incident the plaintiffs had an "objectively reasonable expectation of privacy": when in the car at the time of the accident, during transportation to the hospital, and upon arrival at the hospital.[62] The court explicitly found that the cameraman's mere presence was not enough to create an invasion of privacy.[63] Rather, the court distinguished the scene of the accident, where media coverage may be expected, from the actual rescue and transport of the plaintiffs, stating that it was "aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent."[64] The court also held that the plaintiff had a reasonable expectation of privacy in not having the conversations regarding medical information recorded.[65] Again, the court made sure to distinguish

57. *Id.*
58. *Id.*
59. *Id.*
60. *See id.* at 476.
61. *Id.*
62. *Id.* at 490.
63. *See id.*
64. *Id.*
65. *See id.* at 491.

between the cameraman as a bystander and the cameraman as a hired videographer for this program, reasoning that it would have been acceptable if the cameraman had just picked up some audio as a result of filming the scene.[66] However, because he hooked up the nurse with a microphone and purposefully captured audio with sensitive medical information, he invaded the plaintiffs' privacy.[67]

1. The tort of intrusion as dealt with under California Penal Code 11414

Technically, the penal code deals with crimes, rather than civil tort actions. This section of the code is unique, because it was amended to allow guardians of children affected to bring a civil case against anyone who gained "any compensation from the sale, license, or dissemination of a child's image or voice received by the individual who, in violation of this section, recorded the child's image or voice."[68] When a photographer violates this section of the code, in addition to criminally harassing a child, he is also committing the civil tort of intrusion, because he is capturing images or recordings of the child that are within a reasonable person's expectation to privacy.

2. The tort of intrusion as dealt with under California Civil Code section 1708.7

Shulman, as discussed above, is a departure from the subject matter of the California celebrity statute on several levels. It is distinguishable from the case of celebrities and the statutes discussed here, however, on several grounds. First, *Shulman* deals with private people and a matter of

66. *See id.*
67. *See id.*
68. CAL. PENAL CODE § 11414(d) (West 2014).

private concern, rather than celebrities who may be considered public figures. Second, *Shulman* deals with invasion of privacy when dealing with sensitive medical information, which does not seem to be at issue specifically in the statutes being examined here. Despite this, the case still serves as a good example of what the typical tort of intrusion, or invasion of privacy, looks like in California.

Shulman explains the framework for the law in California, creating an objectively reasonable expectation of privacy standard. The law also takes into account what the reasonable expectation is in light of changes in technology and culture.[69] This means that even though Jackie Onassis successfully limited Galella and got a restraining order against him when he jumped out of the bushes and followed her to a nightclub,[70] a celebrity today may not be able to get a restraining order for the same activities.

California Civil Code 1708.7 builds off of the *Shulman* framework and codifies stalking, which is a form of the tort of intrusion. To be liable for the tort of stalking, the plaintiff must prove that the defendant "engaged in a pattern of conduct the intent of which was to follow, alarm, place under surveillance, or harass the plaintiff."[71] Because of the conduct, one of several events must occur, one of which is "the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family

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69. *See* 2 RIGHTS AND LIABILITIES IN MEDIA CONTENT § 7:9 (2d ed. 2014).

70. *See id.* (discussing Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973), where Jacqueline Kennedy Onassis was successful in limiting the activities of Galella, a freelance photographer who had fashioned himself as a so-called paparazzo).

71. Assemb. B. 1356, at 1708.7(a)(1), 2013-14 Leg., Reg. Sess. (Cal. 2014), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1356&search_keywords=.

member."[72] The statute has a large definition section that creates clarity.[73] The statute also allows for general, special, and punitive damages, and allows the court to grant equitable relief when necessary.[74] The amended statute codifies the reasonable expectation of privacy discussed in *Shulman* by ensuring that celebrity parents have a way to bring suit based on paparazzi actions that the celebrities feel put their children in danger. It is also likely easier to bring suit under the statute rather than at common law, because of the specific definitions that make it easier for the plaintiff to build a full case. One helpful definition is "substantial emotional distress," because the requirements as defined are not as high of a burden to meet as the standard for the separate tort of intentional infliction of emotional distress.[75]

B. Trespass

Trespass falls under two categories: real property and chattels. Trespass to real property is defined as interference with possession of property by entering it, and liability may be imposed for intentional, reckless, negligent, or extremely dangerous activity.[76] Trespass against personal property, or chattels, occurs when intentional interference with personal property caused injury.[77] Trespass to chattels differs from conversion because conversion requires "substantial exercise of dominion or control" over the personal property, and trespass is merely "any wrongful interference or exercise of dominion."[78]

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72. *Id.* at (a)(3)(A)(i).
73. *See id.* at (b)(1)-(b)(7).
74. *See id.* at (c)-(d).
75. *Id.* at (b)(7).
76. *See* 59 KIMBERLY C. SIMMONS, CALIFORNIA JURISPRUDENCE 3d § 1 (2014).
77. *See* 14A LESLIE LARSON, CALIFORNIA JURISPRUDENCE 3d § 74 (2014).
78. *Id.*

1. Trespass under California Penal Code 11414

California Penal Code 11414 as amended by Senate Bill 606 does not mention trespass specifically but implicates it when it defines harassment as "following the child's or ward's activities or by lying in wait."[79] This behavior can be analogous to trespass to land, because the photographers may be waiting somewhere, such as outside the child's school or home, in order to snap a photo. With that, celebrities can bring suit on behalf of their children, particularly if the trespass causes a child severe emotional harm, or if the child fears the photographers because of what is occurring. However, the civil action stemming from Section 11414 of the Penal Code has more to do with the emotional distress of the child when the trespass is occurring rather than the actual trespass. But the harassment and cause of action would not be possible without the photographer trespassing into the child's personal space to the point where the child feels scared or threatened, and so this law serves to make that invasion of personal privacy not only into a criminal harassment action, but also into a civil tort of trespass.

79. CAL. PENAL CODE § 11414(b)(2) (West 2014).

2. Trespass under California Civil Code 1708.8

The first version of the Civil Code that dealt with the paparazzi specifically highlighted trespass, and it has only been strengthened with the new sections. Implemented in 1998 after the Screen Actors Guild (SAG) lobby was influenced by Princess Diana's death in 1997, this version of the Civil Code made

> photographers liable for invasion of privacy when an individual trespasses on private property with "the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person."[80]

The 2014 California Assembly Bill 1356, one of two bills passed to amend the California Civil Code titles dealing with paparazzi activity, showcases a shift from privacy interests to fear of physical injury. This comports with the escalating violence between paparazzi and celebrities in the news. The California Assembly extended the coverage that was previously only available for celebrities to their family members, especially their children. The Assembly said:

> This bill would include a pattern of conduct intended to place the plaintiff under surveillance within those elements defining the tort of stalking. The bill would permit the plaintiff to show, as an alternative to the plaintiff reasonably fearing for his or her safety or that of a family member, that the pattern of conduct resulted in the plaintiff suffering substantial emotional

80. *New Anti-Paparazzi Law Broadens Tort Liability for "Trespass"*, *supra* note 30.

> distress, and that the pattern of conduct would cause a reasonable person to suffer substantial emotional distress. The bill would require the plaintiff to show that the person has either made a credible threat with the intent to place the plaintiff in reasonable fear for his or her safety, or that of an immediate family member, or, reckless disregard for the safety of the plaintiff or that of an immediate family member. The bill would relieve the plaintiff, under exigent circumstances, as specified, of the requirement to demand that the defendant cease his or her behavior. The bill would also define the terms "follows," "place under surveillance," and "substantial emotional distress" for purposes of these provisions.[81]

This proposed amendment to California Civil Code 1708.7 aimed to extend stalking to persistent unauthorized surveillance,[82] such as when paparazzi are camped outside of a celebrity's home for days, waiting for him or her to make an appearance with a new child.

The other bill, California Assembly Bill 1256, also shows an expansion of privacy interests for safety reasons. It amended existing law to extend privacy and buffer zones around the children of celebrities by expanding trespass on property, such as private and public school grounds or health facilities.[83] California Civil Code 1708.8 holds a person

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81. Assemb. B. 1356, 2013-14 Leg., Reg. Sess. (Cal. 2014), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1356&search_keywords=.

82. *See California Assembly Bill 1356 (AB 1356) – Stalking Reform*, THE PLAN (Apr. 18, 2013), http://wertheplan.wordpress.com/2013/04/18/california-assembly-bill-1356-ab-1356-stalking-reform/.

83. *See* Assemb. B. 1256, 2013-14 Leg., Reg. Sess. (Cal. 2013), *available at*

liable for "physical invasion of privacy when the defendant knowingly . . . committed a trespass to capture any type of . . . impression of the plaintiff engaging in a private, personal, or familial activity."[84] That has been defined to mean "interaction with the plaintiff's family or significant others under circumstances in which the plaintiff has a reasonable expectation of privacy" or any other aspects of the plaintiff's life where the plaintiff can have a "reasonable expectation of privacy."[85] The Legislature reasoned:

> This bill would provide that it is unlawful for any person, except a parent or guardian acting toward his or her minor child, to, by force, threat of force, or physical obstruction that is a crime of violence, intentionally injure, intimidate, interfere with, or attempt to injure, intimidate, or interfere with any person attempting to enter or exit a facility, or to, by nonviolent physical obstruction, intentionally injure, intimidate, interfere with, or attempt to injure, intimidate, or interfere with any person attempting to enter or exit a facility. The bill would define "facility" for purposes of these provisions as any public or private school grounds, or any health facility. The bill would authorize a person aggrieved by a violation of these provisions to bring a civil action to enjoin the violation, for compensatory and punitive damages, for injunctive relief, and for the cost of suit and reasonable attorney's and expert witness' fees, or with respect to compensatory damages, to elect, in lieu of actual damages, an award of statutory damages, as specified. The bill would also authorize the Attorney General, a district attorney, or a city attorney to bring a civil action

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http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1256&search_keywords=.

84. CAL. CIV. CODE § 1708.8(a) (West 2014).

85. *Id.* at (B).

> to enjoin a violation of these provisions, for compensatory damages to persons and entities aggrieved by the violation, and for the imposition of a civil penalty, as specified.[86]

While this bill did not get as much publicity as SB 606, it did more regarding torts of trespass. Even though the statutes framed out stalking, they really represent a course of action for trespass on celebrities' land. Even though this bill may not comport with traditional common law trespass to land, as the act can potentially occur on public property, the law extends that trespass definition while still protecting the First Amendment rights of the photographer.

V. DEFENSES: ASSUMPTION OF RISK AND WAIVER

Valid defenses to the civil cause of action under this statute may exist in the common law defenses of assumption of risk and waiver. Celebrities and their children, simply by being out and about running errands, may be held responsible for an implied assumption of risk. An implied assumption of risk can occur when voluntarily entering into a relationship with a defendant and "being fully aware that the defendant will not be responsible for protecting [the person assuming risk] from known future risks."[87] For example, the primary assumption of risk may occur when a celebrity voluntarily engages with paparazzi taking pictures of him or her outside a restaurant. There is also a primary assumption of risk that exists when the plaintiff assumes future risks "inherent in a particular activity or situation . . . [and t]he risks assumed are not those created by defendant's

86. A.B. 1256, 2014 Leg., Reg. Sess. (Cal. 2014).

87. 1 COMPARATIVE NEGLIGENCE MANUAL § 1:37 (3d ed. 2014).

negligence, but rather by the nature of the activity itself." [88] This can be risk from a sport or from employment. [89] This could be, for example, when the celebrity knows there are going to be paparazzi at an event and goes to it anyway.

While both the primary assumption of risk model and the implied assumption of risk may be relevant in the paparazzi and celebrity situation, neither defense is likely to be successful. First, the primary assumption of risk will not be applicable to celebrities, because the employment of a celebrity neither is inherently dangerous nor does it carry the risk of harassment. The real employment of a celebrity is whatever he or she does as a job, whether it is acting or singing; celebrity is just a perk or drawback to being an actor or musician. A celebrity's contract with a studio or record company is to act or sing; that is how celebrities make money. Part of being a celebrity may be endorsement deals, either individually or as part of a contract with an employer. Endorsement deals may include public appearances, such as when Kim Kardashian goes to 1Oak in Las Vegas and gets paid to host the party. This brings in business to the club, and it creates a place for Kim Kardashian to go and make sure that her brand does not get diminished. If paparazzi take pictures of her there, then they are well within their rights to use the assumption of risk defense and actually win. Even if she were to bring her child and then sue under this new statute, the paparazzi might still prevail, because, again, she was going to the club to be seen and photographed for money and publicity. The primary assumption of risk is not generally applicable, however, because it would only relate to instances where the celebrity is certain the paparazzi will be there but brings a child anyway. If the celebrity did not expect the paparazzi to be present, and the paparazzi takes

88. *Id.*
89. *Id.*

pictures of the celebrity's child, then the statute would protect the celebrity and the primary assumption of risk defense would not be valid.

Second, an implied assumption of risk is not applicable, because the celebrity is not voluntarily entering into any relationship with a paparazzo photographer. The theory of liability is that the celebrity is being pursued, harassed, and photographed without his or her consent. The lack of consent extends to the celebrity's child, who is being harassed because of the parent and who legally cannot enter into a consenting relationship, anyway. Because the parent can bring civil suit for the child under the California Penal Code 11414 as amended by SB 606, it is reasonable to argue that the child cannot assume any of the risk on his or her own.

Waiver is usually considered as an express assumption of risk. In these cases, a person would sign a waiver, or contract, releasing the other party from wrongdoing, should harm come to the plaintiff. Express waiver is not available here, unless celebrities are at press releases or other events where they are aware cameras will be present and either they or their agents have signed documents releasing the photographers of liability. For example, an express waiver may occur at a children's film premiere, where a celebrity brings his or her child onto a red carpet and knows photographers will be cataloguing the event. More often than not, however, the argument from defendants under these statutes will be an implied waiver because the celebrity is out in public and knows he or she is notable and likely to get photographed. This defense likely cannot be applied to children, especially in mundane or ordinary situations, such as when the celebrity is merely walking a child to school or out and about running errands. While the photographer may want to rely on a waiver that exists solely because of the celebrities publicity

requirements in order to maintain their status, that certainly can't relate to the children.

The language in the statutes also precludes waiver. In California Penal Code 11414, the language of the statute accounts for express waiver, defining covered conduct to include "conduct occurring during the course of any actual or attempted recording of the child's or ward's image or voice, or both, without the express consent of the parent or legal guardian of the child or ward."[90] This takes away an argument of implied waiver linked to the children and allows for express waiver as a defense. More often than not, however, these photographers will not have the direct consent or express waiver of celebrities, because of the almost guerilla tactics of photography they employ.

Regardless of the defenses available to photographers, public policy will dictate against allowing assumption of risk or a waiver. Assumption of risk will not be available or preferred, because of the children. With the issues that occurred with Princess Diana[91] or Jacqueline Kennedy,[92] it is highly unlikely that any judge would strike down the law, based on the strong public policy interests. It is in the state's best interest to protect children. It is especially important to protect children who may be harassed because of their parents, particularly when that harassment can create lasting impressions. Because of that public policy, both the Penal Code and the Civil Code appear to extend protection to the children of celebrities and adequately protect privacy interests without offending the

90. CAL. PENAL CODE § 11414(2) (West 2014).

91. *See* Craig B. Whitney, *Diana Killed in a Car Accident in Paris*, N.Y. TIMES (Aug. 31, 1998), http://www.nytimes.com/learning/general/onthisday/big/0831.html.

92. Wood, *supra* note 12.

First Amendment interests of the photographers and tabloids.

VI. CALIFORNIA STATUTES VERSUS OTHER STATES AND COUNTRIES

In the United States, California has done the most to protect celebrity rights. The federal government attempted to pass a law to protect celebrities after Princess Diana's tragic death in a car chase with paparazzi in Paris.[93] Hawaii also recently attempted to pass a law protecting celebrities, but it was unsuccessful.[94]

While many criticize the California statute as too restrictive and as offensive to First Amendment rights and freedom of the press, it does not go nearly as far as laws in the European Union. Generally, privacy laws in the EU are much stricter than those in America; some feel this is a legacy of the Holocaust, while others say it is because Europeans actually trust their government more. In some cases, paparazzi even come to America from Europe because they have criminal records there, due to stricter paparazzi restrictions.[95] Whatever the case, this is helping countries like France pass anti-paparazzi laws that can protect more broadly than their American peers.[96] France offers much stricter protections than any state can in the

93. *See* Privacy, Technology, And The California "Anti-Paparazzi" Statute, 112 Harv. L. Rev. 1367.

94. Anita Hofschneider, *Steven Tyler Act Stalls in Hawaii as Lawmakers Say Privacy Bill Has "Zero Support"*, HUFF POST ENTERTAINMENT (May 21, 2013, 5:12 AM), http://www.huffingtonpost.com/2013/03/21/steven-tyler-act-stalls-hawaii_n_2924542.html.

95. Murray, *supra* note 13.

96. Bob Sullivan, *"La Difference" is Stark in EU, U.S. Privacy Laws*, NBCNEWS.COM (Oct. 19, 2006, 11:19 AM), http://www.nbcnews.com/id/15221111/ns/technology_and_science-privacy_lost/t/la-difference-stark-eu-us-privacy-laws/#.VDtR0kv4vwI.

United States. The laws protect celebrities and their children, like California's. However, France is very strict with the children, and French tabloids "regularly blur out the faces of celebrities' children or simply pull the photos" to avoid lawsuits.[97]

Recently, the European Union also ruled on Google searches. In May, the European Court of Justice, the highest court in Europe, ruled that internet users have the right to be forgotten and have their information taken down from Google after a certain amount of time "unless there are 'particular reasons' not to."[98] The court reasoned that search engines such as Google should play an active role as information controllers, rather than just be pipelines to information.[99] The court also reasoned that protecting the privacy of citizens should be more important than any access to information,[100] an idea that is impossible to implement in the United States. In compliance with that ruling, Google set up a department within its legal team to review requests to decide if links meet the privacy requirements.[101] Should the requests meet Google's standards, links will be removed from searches in 28 countries in Europe — but only from the

97. Angela Doland, *French Paparazzi Laws Favor Celebrities; Jolie, Pitt Latest Couple to Benefit*, THE SEATTLE TIMES (June 11, 2008, 12:00 AM), http://seattletimes.com/html/nationworld/2004470054_brangelina11.html.

98. David Streitfield, *European Court Lets Users Erase Records on Web*, N.Y. TIMES (May 13, 2014), http://www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html.

99. *See* Mark Scott, *Google Ready to Comply with "Right to be Forgotten" Rules in Europe*, N.Y. TIMES (June 18, 2014, 12:42 PM), http://bits.blogs.nytimes.com/2014/06/18/google-ready-to-comply-with-right-to-be-forgotten-rules-in-europe/?_r=0.

100. *See* Streitfield, *supra* note 98.

101. *See* Scott, *supra* note 99.

domain links specific to those countries.[102] Experts argue over the severity of this ruling and how much it affects already common practices in Europe,[103] but in America this would be unheard of, because of how much American jurisprudence favors freedom of information and protecting the right to free speech. Given the worry over the newest California paparazzi statutes infringing upon First Amendment rights, something like this decision would never stand in an American court.

VII. CONCLUSION

The most recent iteration of the California paparazzi statutes protects privacy interests for both celebrities and their children. First, these laws were necessary because of the history of paparazzi intrusion into privacy and the physical safety concerns in California and elsewhere. The statutes extend the torts of intrusion and stalking to apply to scenarios where celebrities and their children are out in public and the child is being harassed or frightened by paparazzi actions. The statues adequately provide privacy support and actionable language for celebrities, because they deal with assumption of risk and waiver by implicitly and explicitly waiving those defenses. While they do not protect celebrities as much as privacy laws in the European Union, and specifically France, they protect enough, especially given the parameters of the First Amendment. The California paparazzi statutes, in all of their iterations, protect the privacy interests of celebrities without being too intrusive on the First Amendment and while dealing with waiver, assumption of risk, and trespass in a manageable way.

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102. *Id.* For example, Google in Germany will remove links from the google.de domain but not from the general google.com page. *Id.*

103. *See id.*

Many critics are skeptical of the protections the statutes can actually afford, because of expansive First Amendment coverage in this country. One problem is that the statutes use vague and overbroad terms to limit the freedom of the press in taking pictures of these children.[104] For example, California Penal Code 11414 requires that one "seriously alarm" a child to violate the code, but it does not explain how to apply that term in comparison to an annoyance or other actions where the value of the speech outweighs the potential harm as an invasion to privacy that the child may face.[105] Further, it may be overbroad because it keeps paparazzi from photographing the newsworthy adults when they are with children, thus severely limiting speech.[106] While those issues are important, they are not discussed in this paper, because this paper focuses solely on the privacy protections. Given the extent of Photoshop and computer technology, however, it is safe to assume the paparazzi could find a way around the children's faces in a shot, such as pixelating or blurring the image, and then paparazzi may not feel as though their First Amendment rights are being infringed, because their work is being seen.

Furthermore, both the civil and criminal statutes have explicit restrictions that attempt to ensure the state cannot infringe upon the First Amendment rights of paparazzi. First, California Civil Code 1708.7 affirmatively states that the statute "shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly,"[107] or all enumerated

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104. *See* Jenny M. Brandt, *Anti-Paparazzi Law Effectively Meaningless*, ABOVE THE LAW (Feb. 25, 2014, 2:30 PM), http://abovethelaw.com/2014/02/anti-paparazzi-law-effectively-meaningless/.

105. *Id.*

106. *Id.*

107. Assemb. B. 1356, at 1708.8(f), 2013-14 Leg., Reg. Sess. (Cal. 2014), *available at*

rights of the First Amendment. While private actors cannot infringe upon First Amendment rights, section 1708.7 allows the state to perform an act of "police power . . . for the protection of the health and welfare of the people" of California. If the state acts for a private actor under the civil statute, the language above keeps it from violating free speech principles in punishing those who allegedly stalk celebrities. Second, California Penal Code 11414 prevents those who publish or broadcast the image from being punished under that section,[108] which means news outlets can facilitate free speech without fear of individual criminal liability under the statute.

Additionally, coverage must be newsworthy in order to be protected by the First Amendment.[109] Newsworthiness is defined as current events, commentary on public affairs, information about human activity, and information "appropriate so that individuals may cope with the exigencies of their period." [110] However, while most celebrities are intriguing and fascinating, and it is nice to see how the rich live, that does not fall into the "exigencies of their period" and this does not mean that the celebrities', or their children's, activities are newsworthy. As such, California Penal Code 11414 and California Civil Code sections 1708.8 and 1708.9 all protect the privacy interests of celebrities and their children, known in common law as the tort of intrusion and trespass to land and chattels, without materially infringing upon the First Amendment rights of paparazzi.

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http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1356&search_keywords=.

108. CAL. PENAL CODE § 11414(e) (West 2014).

109. *See* Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980).

110. *Id.*

UNDERSTANDING THE DEFINITION OF "CELEBRITY:"

A Response to the Proposed Public Policy Rationales for Enhanced Celebrity Protection Against Paparazzi and Invasion of Privacy

Annelise Dominguez*

It is important to understand author Devan Orr's definition of "celebrity" in the article *Privacy Issues and the Paparazzi*. Orr indicates that the increased privacy that California's legislation provides to celebrities is an appropriate step to address celebrities' privacy concerns. Orr focuses on the fact that the legislation amendments that increase privacy protection are intended to remedy safety concerns, especially Assembly Bill 1356, which explicitly states "the plaintiff reasonably fearing for his or her safety."[1] Next, recall that Orr goes on to state that the use of the primary assumption of risk defense would most likely be ineffective in this context. This is because, the author argues, being a celebrity is not inherently dangerous and thus does not justify an assumption of risk on the celebrity's part when he or she is photographed or recorded by the paparazzi.

It is that statement with which this note takes issue. Though the article focuses much of its attention on the relationship between the status of celebrity parents and its effect on the privacy of their children, this note does not address that concern. This note instead contests the definition of "celebrity" utilized in the article and thus argues against one of the primary public policy rationales

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1. Assemb. B. 1356, 2013 Leg., Reg. Sess. (Cal. 2014), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1356&search_keywords= (last visited May 19, 2015).

put forward in favor of increased privacy protection for celebrities.

The Oxford English Dictionary defines "celebrity" as "a person of celebrity; a celebrated person: a public character."[2] In contrast, the author, though not explicitly, indicates that a celebrity is defined by what he or she does for a career. Those professions could include acting or singing. However, that is not what is indicated by the Oxford definition of celebrity, which only indicates that celebrities are individuals who possess public personas.[3]

In fact, one example is President Obama and his family, whose images are often photographed and followed, though neither he nor his family hold themselves out as singers or actors. A president's celebrity status is further evidenced by the fact that Black's Law Dictionary acknowledges a president's status in its section on the Executive Branch when it states that "[t]he president is not only the celebrity of celebrities, he is a man of enormous and growing power."[4] Though it can be argued that President Obama is not always photographed for stereotypical magazines that utilize paparazzi photographs, one must recall August of 2014, when the President was photographed and criticized for one of his most famous fashion choices, sparking memes and tweets across the Internet.[5] To be sure,

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2. *Celebrity*, OXFORD ENGLISH DICTIONARY (2d ed.1989).

3. *See id.*

4. *Executive Branch*, BLACK'S LAW DICTIONARY (10th ed. 2014).

5. *See* Snejana Farberov & Lydia Warren, *Yes We Tan! Obama Ridiculed for Wearing a 'Used Car Salesman' Suit to Discuss Crises in Iraq and Ukraine – but White House 'Stands Squarely Behind His Decision'*, DAILY MAIL (Aug. 28, 2014), http://www.dailymail.co.uk/news/article-2737288/The-audacity-taupe-Obama-sparks-uproar-Twitter-wearing-tan-suit-press-conference-ISIS-Ukraine.html (speaking about how much criticism the President received after wearing a tan suit while discussing the crises in Iraq and Ukraine).

it can be acknowledged that a president may more appropriately fit into the category of "politician," but the definition of celebrity encompasses individuals of public recognition, including politicians. Because of this definition, these celebrities are individuals who have put themselves in the public eye.[6] As Orr acknowledges, many celebrities have endorsement contracts or movie deals, which necessitate extensive public relations and appearances.

Some individuals criticize celebrities — or, essentially, public figures — when they do insist on increased privacy, because the celebrities "make their living in the public eye."[7] Considering this fact, the same individuals also question how much privacy celebrities should even expect.[8] To be sure, some individuals indicate that celebrities' presence in the public eye should not alone make them susceptible to constant surveillance; but if a celebrity goes out seeking media attention and the media turns on him or her, it is a lot more difficult to keep the media out of his or her business from that point forward.[9] In fact, media commentator Mark Borkowski stated that celebrities should realize that, to a certain extent, they are public property and must strive for a delicate balance between promotion and maneuvering through their personal lives.[10]

Additionally, celebrities enjoy their celebrity status and all of the benefits that accompany their status as a result of media attention. Sometimes termed a symbiotic

6. *See* Genevieve Hassan, *Can Celebrities Expect Privacy?*, BBC NEWS (July 15, 2011), http://www.bbc.com/news/entertainment-arts-14151678.

7. *Id.*

8. *See id.*

9. *See id.*

10. *See id.*

relationship or a "vicious cycle,"[11] much attention has been paid to the mutually beneficial relationship that the media and celebrities enjoy. For example, in April of 2014, Rolling Stone published an article that detailed the author's ride in the passenger seat alongside a paparazzo for two weeks while he was on the hunt for celebrities to photograph.[12] Some of the candid comments that the paparazzi provided indicate a suspicion of how the celebrities utilize the media attention in their favor. For example, one paparazzo criticized celebrities who travel to popular places in West Hollywood accompanied by their children, and who are equipped with the knowledge that many celebrities are photographed there.[13] The paparazzo stated that celebrities who guard their kids' privacy, like Matt Damon, "simply don't take [their children] to pap hot zones."[14] Ironically, Halle Berry, a noted advocate for the increased privacy legislation in California,[15] was accused of taking her own child to a popular pumpkin patch in West Hollywood, known for its heightened paparazzi activity.[16] Alternatively, another paparazzo revealed that there are instances where celebrities hire paparazzi to conduct fake photo shoots or even to join the celebrity on vacation so that they can receive a portion of the funds that the photographs

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11. Christina Anderson, *Are the Paparazzi Just Doing Their Job or Are They Overstepping Their Boundaries?*, HUFFINGTON POST (Jan. 16, 2013, 12:02 PM), http://www.huffingtonpost.com/2013/01/16/paparazzi-boundaries_n_2473951.html.

12. Stephen Rodrick, *Attack of the Paparazzi*, ROLLING STONE (April 17, 2014), http://www.rollingstone.com/culture/news/attack-of-the-paparazzi-20140417.

13. *Id.*

14. *Id.*

15. *See* Luchina Fisher, *Halle Berry Lauds New Paparazzi Law Protecting Stars' Kids*, ABC NEWS (Sept. 25, 2013), http://abcnews.go.com/blogs/entertainment/2013/09/halle-berry-lauds-new-paparazzi-law-protecting-stars-kids/.

16. Rodrick, *supra* note 12.

generate.[17] One could question whether the celebrities themselves are partially to blame for their decreased personal privacy in both their professional and personal lives.

Another issue with the underlying policy rationale provided by the author's definition of "celebrity" is why celebrities and their children should be entitled to more privacy protection than other individuals. Celebrities, by definition, are atypical individuals, due to their well-known status in society. This is a fact that the author acknowledges when she textually identifies celebrities as separate from "normal people." However, it must be emphasized that celebrities, too, are subject to the Constitution. It should be of concern that California's recently enacted amendments to civil and criminal statutes may violate the equal protection that is afforded to every individual.[18] The Equal Protection Clause of the Constitution emphasizes that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*."[19] Critics initially note that the law may be unconstitutional because it specifically targets photographers while they are doing something that is potentially constitutionally protected.[20]

However, another concerning constitutional issue that may be a result of the California laws is how the laws affect citizens as a whole. The cited amendment, when

17. *See* Anderson, *supra* note 11.

18. *See* Christopher Zara, *In Pursuit of the Paparazzi: Is Harassing Justin Bieber Constitutionally Protected?*, INT'L BUS. TIMES (July 21, 2012, 2:24 PM), http://www.ibtimes.com/pursuit-paparazzi-harassing-justin-bieber-constitutionally-protected-730059.

19. U.S. CONST. amend. XIV, § 1 (emphasis added).

20. *See* Zara, *supra* note 18.

paired with the now common knowledge of Internet and mobile phone surveillance of the networked world,[21] begs the question whether California should permit this increased protection of celebrities' privacy even though other individuals do not share in that same privilege. After all, the Constitution does not distinguish between individuals who spend their lives in the public eye; instead, the Constitution focuses on the language of "any person."[22]

Though it is commendable that the members of the California Legislature are turning their attention to the safety concerns of some of their most famous residents, it is possible that the focus on increased privacy legislation for celebrities is misplaced. Instead, the issue of paparazzi harassment should perhaps be addressed through legislation that targets the restless demand for news, photographs, video recordings, and audio recordings of celebrities.[23] The increased demand for celebrity journalism could be what is fueling the aggressive tactics that the paparazzi employ, especially the potential monetary gain.[24] It is commonly understood that paparazzi target those with whom the public has a fascination, and that seems to be the main problem.[25] It is more likely than not that removing the market for celebrity media and the demand of its consumers would eradicate the presence of paparazzi altogether, and alleviate

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21. *See* John Naughton, *Don't Trust Your Phone, Don't Trust Your Laptop – This is the Reality that Snowden Has Shown Us*, THE GUARDIAN (Mar. 8, 2015, 3:00 PM), http://www.theguardian.com/commentisfree/2015/mar/08/edward-snowden-trust-phone-laptop-sim-cards.

22. U.S. CONST. amend. XIV, § 1.

23. *See, e.g.*, Kim McNamara, *The Paparazzi Industry and New Media: The Evolving Production and Consumption of Celebrity News and Gossip Websites*, 14 INT'L J. CULTURAL STUD. 515, 515-17 (2011).

24. Rodrick, *supra* note 12.

25. Jamie E. Nordhaus, *Celebrities' Rights to Privacy: How Far Should the Paparazzi Be Allowed to Go?*, 18 REV. LITIG. 285, 286 (1999).

safety as well as privacy concerns. One must ask the question: Would the paparazzi be so keen on following and documenting the lives of celebrities if there were no benefits of doing so?

NCAA DIVISION III ATHLETIC DIRECTORS:
An Analysis of the Responsibilities, Qualifications, and Characteristics

Glenn M. Wong* & Joseph R. Pace†

I. INTRODUCTION

The role of college athletics across institutions in the United States varies significantly. At the highest level of competition and media coverage, Division I athletics take the limelight. With millions of viewers watching the BCS Football Championship and postseason bowl games[1] and the men's basketball's "March Madness" postseason

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1. *See Bowl Championship Series FAQ*, BCSFOOTBALL.ORG (Oct. 1, 2013, 6:46 PM), http://www.bcsfootball.org/news/story?id=4809793.

tournament,[2] the landscape of big-time college athletic programs has more dollars at stake than ever before. Institutional leadership at nationally prominent athletic powerhouses increasingly seeks out experienced businesspeople to serve as athletic directors — the leaders of college athletic departments — and manage the complex commercial aspects of running a college sports program.[3] Although large programs receive the vast majority of media coverage, thousands of student-athletes dedicate significant time and effort to their respective sports to compete at far less publicly followed levels of NCAA competition. The role college athletics plays in the college experience is distinct at the various divisions of intercollegiate competition, and expectations of athletic directors vary accordingly.

The athletic director plays an extremely important role in college athletics. Although jobs vary, all collegiate athletic directors are concerned with providing an exceptional experience for student-athletes, developing successful teams across the athletic department, and

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2. Andy Fixmer, *CBS Says 'March Madness' Final Drew 23.4 Million Viewers*, BLOOMBERG (Apr. 9, 2013, 11:19 AM), http://www.bloomberg.com/news/2013-04-09/cbs-says-march-madness-final-drew-23-4-million-viewers.html (in 2013, CBSSports reported 23.4 million viewers for the Men's Basketball championship, capping a 19-year high of average March Madness viewership); Andrew Giangola, *BCS Era Ends on a High Note,* IMG College, Jan. 9, 2014, http://www.imgcollege.com/news/2014/bcs-era-ends-on-a-high-note (the BCS finale — ranking as the third-most viewed cable television program of all time — averaged 25.6 million viewers and a 14.4 U.S. household fast national rating, according to Nielsen).

3. *See, e.g.*, *University Vice President/Director of Athletics*, NOTRE DAME FIGHTING IRISH ATHLETICS, http://www.und.com/genrel/swarbrick_jack00.html (last visited Feb. 12, 2015) (University of Notre Dame Athletic Director Jack Swarbrick was previously a partner at Indianapolis law firm Baker & Daniels, a member of the Indiana Sports Corporation, and general counsel for numerous national governing bodies of Olympic sports).

maintaining a positive workplace for all employees within the athletic department. A closer look at the mission of different divisions among the National Collegiate Athletic Association (NCAA) competition[4] reveals the duties and responsibilities of athletic directors vary significantly. For example, Division III athletic directors are highly concerned with orchestrating a uniquely balanced college experience for student-athletes and development efforts, while the focus of Division I athletic directors ranges from student-athlete experiences to more objective performance indicators, such as revenue.

A. Purpose of Article

The purpose of this paper is to explore the role and profile of current Division III athletic directors and to provide context and comparison. Job responsibilities of athletic directors at the Division III level will be compared to their Division I counterparts using a complementary article: *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications, and Characteristics*.[5] The complementary article focused on Division I athletic directors, while the scope of this article is to offer the same depth of research with respect to Division III athletic directors. This paper aims to provide a foundational understanding of Division III athletic competition to develop a thorough understanding of the expectations of athletic directors at this level. In addition to exploring the Division III philosophy and the job responsibilities of athletic directors, this paper also discusses the various legal issues faced by Division III athletic departments, by presenting

4. *Who We Are*, NCAA, http://www.ncaa.org/about/who-we-are (last visited Feb. 17, 2015).

5. Glenn M. Wong & Christopher R. Deubert, *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, 22 JEFFREY S. MOORAD SPORTS L.J. (forthcoming Spring 2015).

specific examples of how the results of past litigation may impact the ongoing decisions of athletic directors within the framework of their job responsibilities.

II. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Before discussing individual athletic departments and, more specifically, the roles of athletic directors, it is important to first understand the unique environment in which athletic departments operate. The NCAA consists of roughly 1,300 member institutions[6] and is designed to oversee intercollegiate athletic competition across the United States.[7] Founded in 1906, the NCAA now has more than 470,000 student-athletes participating across 23 sports.[8] According to the NCAA Manual, the NCAA's purpose is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."[9] The NCAA divides its membership into three divisions: Division I, Division II, and Division III. Division III is further divided based on certain criteria.

6. *2008-09 NCAA Membership Report*, NCAA.ORG 5 (Jan. 2009), http://www.ncaapublications.com/productdownloads/MR0809.pdf.

7. STUDENT-ATHLETE PARTICIPATION: 1981-82—2013-14 NCAA SPORTS SPONSORSHIP AND PARTICIPATION REPORT, NCAA, 8-11 (2014) [hereinafter NCAA PARTICIPATION REPORT], *available at* http://www.ncaapublications.com/productdownloads/PR1314.pdf.

8. *Id.*

9. NAT'L COLLEGIATE ATHLETIC ASS'N, 2011-2012 NCAA DIVISION I MANUAL § 1.3.1 (2014) [hereinafter NCAA DI MANUAL] *available at* https://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx.

A. Division III Athletics

Division III athletics are rooted in tradition and pioneering efforts within the realm of collegiate athletics. From a historical perspective, Amherst and Williams College, two prominent and athletically successful Division III institutions, competed in the first intercollegiate baseball game in 1859. Baseball was the second sport to hold intercollegiate competition.[10] The history of Division III athletics is a relatively short one, as the competitive distinction did not become official until 1973.[11] However, institutional resistance to "big-time" athletics began long before Division III, as particular schools deemphasized the importance of the growing trend of seeking national athletic prominence. For example, in 1946 the University of Chicago decided to leave the Big-10 Conference amid growing professionalism and commercialization of football.[12] Collective Division III ideals were first formalized with 10 small New England colleges. These schools created the New England Small College Athletic Conference (NESCAC) in 1971 and enacted self-policing measures to ensure an academic focus.[13] With early policies such as no postseason competition and no financial aid based on the merit of athletics, the NESCAC enforced its unique academic focus to the extent of expelling an original member-institution, Union College, after determining that the College planned

10. PRINCIPLES AND PRACTICE OF SPORT MANAGEMENT 164 (Lisa Pike Masteralexis, Carol A. Barr & Mary Hums eds., 4th ed. 2011).

11. *DIII 40th Anniversary*, NCAA, http://www.ncaa.org/diii-40th-anniversary (last visited Feb. 17, 2015).

12. JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE, 72 (2003).

13. JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES 17 (2002).

more intense athletic pursuits than the rest of the conference.[14]

Although Division III athletic competition does not garner the same game attendance or national television broadcast coverage as seen at the Division I level, Division III athletics are widespread and involve the efforts of many people and student-athletes. Division III includes more than 180,000 student-athletes from 448 institutions under the jurisdiction of 43 distinct conferences, making it the largest NCAA division in terms of both participation and number of schools, with 148 more institutions than Division I.[15] To put these figures in perspective, 39 percent of all NCAA student-athletes participate at the Division III level, while 37 percent participate at the Division I level. Division III is organized similarly to Division I: Member institutions compete within conferences comprised of individual teams striving for conference championships and national championships sponsored by the NCAA.[16] A growing distinction between Division I and Division III conferences is that the geographic area composing Division III conferences is generally more compact than Division I conferences, and travel necessities are managed on a smaller scale, with buses and vans rather than air travel.[17]

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14. *Id.*

15. Jack Copeland, *Celebration of 40th Anniversary Highlights Division III Week*, (April 7, 2014, 2:19 PM) http://www.ncaa.org/about/resources/media-center/news/celebration-40th-anniversary-highlights-division-iii-week; *NCAA Division III*, NCAA, http://www.ncaa.org/about?division=d3 (last visited Feb. 17, 2015).

16. NCAA PARTICIPATION REPORT, *supra* note 7, at 75-76

17. *See, e.g.*, *State University of New York Athletic Conference*, SUNYAC, http://www.sunyac.com (last visited Feb. 17, 2015); *University Athletic Association*, UAA, http://www.uaa.rochester.edu/Association_Links/About_the_UAA.htm (last visited Feb. 17, 2015); *Become a Division III Student-Athlete*,

Division III states a ubiquitous mission: participating schools will provide student-athletes with a rounded college experience in addition to their athletic endeavors. Supporting the concept of the student-athlete experience mission, the first sentence of the Division III Philosophy Statement is as follows:

> Colleges and universities in Division III place highest priority on the overall quality of the educational experience and on the successful completion of all students'tacademic programs.[18]

Division III member institution athletic departments generally put more emphasis on the combined academics-athletics experience and high academic achievement by implementing policies such as shorter practices and playing seasons, regional competition and travel, and full integration into the campus community to maintain student primacy.[19] This academic focus is also carried into financial aid considerations. In stark contrast to scholarship-laden Division I athletic programs, [20] Division III athletic departments do not have the ability to offer athletics-based scholarships, [21] which conveys the academic-focus to prospective students and their parents from the onset. With financial and marketing constraints on drawing top-tier athletic talent, the primary emphasis is placed on regional

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NCAA, http://www.ncaa.org/student-athletes/become-division-iii-student-athlete (last visited Feb. 17, 2015).

18. *Division III Philosophy Statement*, NCAA, http://www.ncaa.org/governance/division-iii-philosophy-statement (last visited Feb. 7, 2015); NCAA DIII MANUAL, *supra* note 16, at § xiv.

19. *NCAA Division III*, *supra* note 15.

20. NAT'L COLLEGIATE ATHLETIC ASS'N: 2004-2013 NCAA DIVISION I REVENUES AND EXPENSES REPORT § Table 3.9 (2014) [hereinafter NCAA DI REVENUES AND EXPENSES REPORT] *available at* http://www.ncaapublications.com/productdownloads/2012RevExp.pdf.

21. *Division III Philosophy Statement*, *supra* note 18.

in-season and conference competition rather than broader goals of national championships.[22] Additionally, the elimination of athletics scholarships creates a unique relationship between Division III student-athletes and head coaches when compared to the same dynamic at the Division I level. Rather than having more utilitarian experiences where student-athletes and coaches may experience subordinate-superior relationships, Division III student-athletes and their coaches may develop more equitable relationships.[23]

Median Division I Fiscal Year 2012 Grant-In-Aid Expenses by Subdivision ($MM)[24]

	Public	Private	Overall
Division I FBS Institutions	7.4	13.6	8.2
Percent of Total Ath. Dept. Expenses	14%	21%	15%
Division I FCS Institutions	3.8	5.1	4.0
Percent of Total Ath. Dept. Expenses	27%	25%	26%
Division I Institutions without Football	2.8	4.9	3.8
Percent of Total Ath. Dept. Expenses	24%	33%	29%

Conference and individual athletic department mission statements echo the Division III mission statement. The NESCAC mission statement is a strong example of forming a conference in a manner that regulates athletic competition to best supplement academic pursuits:

> The primary mission of the Conference is to organize, facilitate, support, and regulate

22. *Principles and Practice of Sport Management*, *supra* note 10, at 172.

23. Rebecca A. Zakrajsek , Christiaan G. Abildso , Jennifer R. Hurst, & Jack C. Watson II, *The Relationships Among Coaches' and Athletes' Perceptions of Coaching Staff Cohesion, Team Cohesion, and Performance*, 9 ONLINE J. SPORTS PSYCHOL. , 11 (Sept. 2007), http://www.athleticinsight.com/Vol9Iss3/CoachingStaffCohesionPDF.pdf.

24. NCAA DI REVENUES AND EXPENSES REPORT, *supra* note 20, at § Table 3.9.

> intercollegiate athletic competition among member institutions in a manner consistent with our commitment to academic excellence and our core values.[25]

Wesleyan University, a member institution of the NESCAC, exemplifies the ideals of Division III and the NESCAC in the following excerpt from its athletic department mission statement:

> Athletics, as an integral part of the overall educational process, is uniquely positioned to enhance a liberal arts education. Wesleyan coaches share the same goal as the entire Wesleyan community: to transform the lives of our students.[26]

On average, individual Division III and Division I institutions are very similar in terms of total sports sponsored and the number of student-athletes participating in intercollegiate athletics. Division III and Division I institutions on average sponsor 18 total sports, while the average student-athlete population is roughly 550 per school in Division III and 775 per school in Division I.[27] However, participation rates, or the percentage of student-athletes within the total undergraduate student body, at Division III schools are far higher than their Division I counterparts. In

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25. *New England Small College Athletic Conference Mission Statement*, NESCAC.COM, http://www.nescac.com/about/mission_statement (last visited Feb. 17, 2015); *see also University Athletic Association*, UAA, http://www.uaa.rochester.edu/Association_Links/About_the_UAA.htm (last visited Feb. 17, 2015).

26. *Mission Statement*, WESLEYAN UNIV., http://www.wesleyan.edu/athletics/deptinfo/index.html (last visited Feb. 12, 2015).

27. *NCAA Recruiting Facts*, NCAA (Aug. 2015), http://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf.

terms of average participation rates, Division III institution student-athletes represent, on average, roughly 21 percent of their respective student bodies.[28] At Division I institutions, the average participation rate is far lower, at approximately 6 percent.[29] In comparison to Division I campuses, Division III institutions tend to have smaller overall student bodies, as the average overall student body of Division III schools is roughly 2,600. In contrast, the average undergraduate enrollment at Division I schools is about 13,000.[30]

Student-Athlete Participation and Student Enrollment Across NCAA Divisions[31]

	Division I	Division II	Division III
Colleges and Universities	346	300	450
Student-Athletes	173,500	109,100	183,500
Average Enrollment	12,900	4,200	2,600
Average Number of Sports	18	15	18
Average Percent of Student Body Participating in Sports	6%	14%	21%
Average Number of Student-Athletes	774	588	546

Academics are at the core of the Division III approach to implementing policies on intercollegiate competition, and the topic of academics will be discussed in greater detail throughout the paper. However, to build a clearer picture of the structure of Division III institutions, it may be helpful to provide an overview of the academic reputations across member schools. From a selectivity standpoint, 54 percent of Division III schools admit 70 percent or more of their applicants, while only 12 percent of Division III schools admit less than 50 percent of

28. *Division III Facts and Figures*, NCAA, http://www.ncaa.org/sites/default/files/Facts%20and%20Figures%202014_FINAL_.pdf (last visited Apr. 15, 2015) .

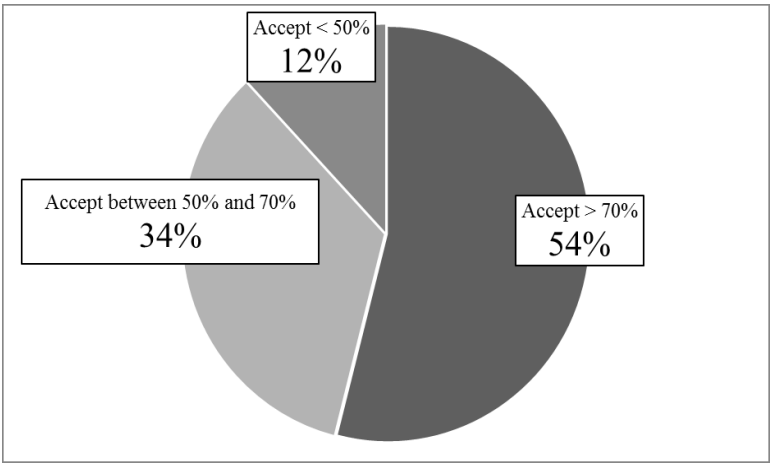
29. *NCAA Recruiting Facts*, *supra* note 27.

30. *Id.*

31. *Id.*

applicants.[32] There is a wide range of selectivity across institutions at all levels of athletic competition, yet many highly selective schools are Division III schools. In *U.S. News & World Report's* 2014 National Liberal Arts College Rankings, Division III institutions took 22 positions within the top 25.[33]

NCAA Division III Institutional Distribution by Admissions Selectivity[34]



32. *National Liberal Arts College Rankings*, U.S. NEWS, http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-liberal-arts-colleges (last visited Feb. 17, 2015).

33. *Id.*

34. Richard A. Rasmussen, *NCAA Division III Profile of Institutions and Conferences*, 7, http://www.uaa.rochester.edu/administrative/Form_and_Document_Library/Division_III_Profile.pdf (last visited Feb. 17, 2015).

III. THE DUTIES OF A DIVISION III ATHLETIC DIRECTOR AND LEGAL ISSUES ACROSS DIVISION III ATHLETICS

When considering the role of Division III athletic directors, it is important to identify their overall goal. In general, revenue considerations are significant at the Division III level, yet these considerations are not a primary concern as in Division I athletic departments. Major television networks do not broadcast the vast majority of Division III sporting events, event admission is generally free or inexpensive, and members of on-campus teams operate concession stands as fundraisers. When compared to high-profile Division I events distributed by mass media, which are expected to generate significant working capital for the participating universities on the whole, the Division III mindset may seem enigmatic and somewhat unique to the average college athletics fan. With revenue as a marginalized indicator of athletic department performance, athletic directors measure success in accordance with the mission of Division III athletics. They focus on providing a unique experience for student-athletes both on and off the field, particularly vis-à-vis competitor Division III programs. However, with limited annual revenue and fixed levels of funding, athletic directors often find themselves wearing many hats in their athletic departments. They act as managers of the athletic department and coaches, financial managers of the budget, media relations representatives, fundraising representatives, compliance officers, and dedicated sports fans. More specifically, when looking at

first-quarter 2014 job descriptions for Division III athletic directors,[35] the roles break down into the following areas:

- **Leadership:**[36] overall leadership of the athletic department consistent with College, Conference and NCAA Division III mission;
- **Vision and Philosophy:** developing goals and policies consistent with athletic department mission and managing the department to achieve these goals and enforce policies;
- **Employment:** hiring, training, supervising and evaluating all athletic department staff;
- **Cross-Functional Work:** promoting and maintaining cooperative relationships with the deans, department chairs, and area supervisors in areas such as admissions, student life, and wellness;
- **Financials:** managing athletic department fiscal resources and budgeting;

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35. *Current Searches*, ALDEN & ASSOC'S, http://www.aldenandassoc.com/executive-search/current-searches.html (last visited Feb. 18, 2015).

36. *NACWAA Leadership Minute: Erin McDermott*, YOUTUBE (Feb. 24, 2014), https://www.youtube.com/watch?v=bs6rbvVELEo (Recent University of Chicago Athletic Director hire Erin McDermott said of the transition from DI Senior Associate to DIII AD, "In many ways it's a similar kind of role. Operationally, the kinds of things I'm dealing with every day, the internal piece of it all, even the campus connections for the department are similar to the role I had, especially as Deputy Director and Senior Associate. The difference, which I think would be true in any case of that type of a jump, is just really being the Athletic Director that's making the final decision, needing to really provide the vision, the leadership, which are the reasons why I felt I wanted to be in that role.").

- **Compliance:** acting as primary administrator of compliance to conference and NCAA rules, planning and implementing rules education programs for athletic staff and student-athletes, and holding responsibility for all compliance reporting;
- **Title IX:** ensuring compliance with Title IX regulations in all aspects of the intercollegiate program;
- **Marketing and Public Relations:** promoting and marketing athletic programs in the college and region, while representing the college in public relations and media outlets;
- **Alumni and Fundraising:** working with booster clubs and other alumni groups to reinforce community around the athletic department and develop fundraising levels;
- **Staff Work:** working on a day-to-day basis with head coaches on scheduling, recruiting, NCAA compliance, game management, equipment management, and financing;
- **Community Sponsorship:** developing and maintaining sponsorship opportunities with local and regional businesses;
- **Outreach:** providing a vision for charitable support made by the athletics department;
- **Miscellaneous:** overseeing all on-campus athletics-related events, including summer camps.

As shown above, because the needs of every athletic department differ and because athletic directors must set their priorities accordingly, the day-to-day workload for a Division III athletic director can take many forms.

A. Personnel Responsibilities

The job of a Division III athletic director is almost entirely based on interpersonal relationships. In some ways, athletic directors are at the center of the campus community because they must maintain quality working relationships with their superiors — the deans and president of the college — as well as their colleagues within the athletic department.[37] These relationships build the foundation for offering opportunities to stakeholders on campus (e.g., student-athletes) and off campus (e.g., alumni and prospective student-athletes and their families). Although athletic directors must maintain many relationships, the most important relationships they maintain are with coaches. Division III athletic directors' core function lies in managing, hiring, evaluating, terminating, mentoring, and advising coaches.

1. Coaching Staffs

Division III athletic departments are organized with athletic directors as the superior to both head and assistant coaches of all sports. Head coaches report directly to the athletic director, while assistant coaches report directly to the respective head coach. This system differs vastly from large Division I athletic departments where a small number of head coaches, generally in high-profile sports, will report to the athletic director, while others will report to one of several associate athletic directors. The distinctions between these systems serves as an example of how Division III athletic directors will spend a high proportion of their time serving the needs of their coaches, while Division I athletic

37. *Id.* (McDermott said her biggest success in her first 100 days as Chicago AD was "the relationships [she was] able to cultivate").

directors focus more time on operational and financial responsibilities.[38]

Successful Division III athletic programs begin with high-quality, dynamic coaching staffs who carry significant experience in their particular sport, a passion for sports in general, and an ability to recruit and attract prospective student-athlete talent. Division III athletic directors are faced with a three-fold challenge in regards to managing coaches. These challenges include: (1) hiring skilled coaches for vacant positions, (2) managing the existing coaching staff and promoting professional development within their roles, and (3) supporting coaches within various constituencies across the campus. At the typical Division III institution, an athletic director will expect to manage 18 distinct sports with perhaps slightly fewer coaches due to the fact head coaching crossover will occur where there could be one coach for both men's and women's track and field and cross-country, and a single head coach for the swimming, diving, and water polo teams. [39] However, at many prominent Division III institutions, the number of sports and coaches can reach levels well above the norm. For example, Julie Soriero, the athletic director at Massachusetts Institute of Technology, manages the most comprehensive sports program in all of Division III, with 33 sponsored varsity-level sports and 25

38. Brent Schrotenboer, *Downsizing: Some College Execs Prefer Division III*, USA TODAY, http://usatoday30.usatoday.com/sports/college/story/2012/09/24/some-division-i-college-administrators-pull-out-of-the-big-time-for-a-happier-life/57838352/1 (last updated Sept. 24, 2012, 7:34 PM).

39. *See, e.g.*, *Inside Athletics*, POMONA-PITZER ATHLETICS, http://www.pe.pomona.edu/information/directory/index (last visited Feb. 13, 2015) (assigning multiple cross-overhead coaches, including Jean-Paul Gowdy for Men's and Women's Swimming, Kirk Reynolds for Women's Cross Country and Track and Field, Tony Boston for Men's Cross Country and Track and Field, and Alex Rodriguez for Men's and Women's Water Polo).

distinct head coaches.[40] In addition to the management of head coaches, athletic directors' personnel responsibilities also extend to all levels of assistant coaches, including full-time, part-time, graduate, and volunteer, and their interactions with student-athletes.[41]

In a form of professional development for head coaches, athletic directors hold the primary responsibility of conducting head coach performance reviews and evaluations following each academic year.[42] In this function, athletic directors have the opportunity to serve as mentors to their head coaches and provide guidance related to careers, personal growth, and other professional issues. Part of the mentoring process that athletic directors provide head coaches includes giving clear instruction on how to evaluate their assistant coaches and reviewing their performance assessments.[43]

Head coaches handle the majority of the hiring of assistant coaches, but athletic directors will often have sign-off authorization or final approval in this process.[44] Many athletic directors will determine the level at which assistant coaches are hired (full-time or part-time) and often develop

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40. *See DAPER 2013-14 Quick Facts*, MIT ATHLETICS, http://mitathletics.com/genrel/DAPERQuickFacts_FY14.pdf (last visited Feb. 13, 2015); *see also Julie Soriero,* MIT ATHLETICS, http://www.mitathletics.com/information/directory/soriero_julie00.html (last visited Apr. 15, 2015).

41. *Springfield College Executive Search Profile: Director of Athletics*, ALDEN & ASSOC'S, 11, http://www.aldenandassoc.com/images/pdf/springfield_college_director_of_athletics_executive_search_profile.pdf (last visited Apr. 15, 2015).

42. *Id.*

43. *Id.*

44. *Emerson College Executive Search Profile*, ALDEN & ASSOC'S, http://www.aldenandassoc.com/images/pdf/emerson_college_director_of_athletics_and_recreation_executive_search_profile.pdf (last visited Feb. 18, 2015).

creative employment statuses in the form of graduate, volunteer, and part-time assistantships.[45] This methodology allows the department to maintain a cost-effective position in terms of assistant coach employment while also attracting talented candidates. For example, the vast majority of Smith College (Massachusetts) assistant coaches are graduate assistants and coach for course credit toward a graduate degree in Exercise and Sports Studies offered at the school.[46]

Division III athletic directors must also manage relationships with deans, department chairs, and area supervisors responsible for the academic and non-academic assignments of coaches.[47] With coaches taking on roles beyond their coaching responsibilities — such as teaching physical education or other academic classes, leading extracurricular student groups, and working as liaisons in various departments across campus — the athletic director

45. *See, e.g.*, *Staff Directory*, AUGSBURG COLL., http://athletics.augsburg.edu/staff.aspx?tab=staffdirectory (last visited Feb. 13, 2015); *Staff Directory*, CHICO STATE, http://www.chicowildcats.com/staff.aspx (last visited Feb. 13, 2015); *Athletics Staff*, OREGON TECH., http://www.oit.edu/athletics/inside-athletics/staff (last visited Feb. 13, 2015); *Staff Directory*, RAMAPO COLL. ROADRUNNERS, http://www.ramapoathletics.com/staff.aspx (last visited Feb. 13, 2015); *Rollins Staff Directory*, ROLLINS COLL., http://www.rollinssports.com/StaffDirectory.dbml (last visited Feb. 13, 2015); *Staff Directory*, THE SUNY CORTLAND RED DRAGONS, http://www.cortlandreddragons.com/staff.aspx?tab=staffdirector (last visited Feb. 13, 2015); *Staff Directory*, UNIV. OF MOUNT UNION PURPLE RAIDERS, http://athletics.mountunion.edu/information/directory/index (last visited Feb. 13, 2015).; *Staff Directory*, WHEATON ATHLETICS, http://athletics.wheaton.edu/staff.aspx?tab=staffdirectory (last visited Feb. 13, 2015).

46. *Master of Science in Exercise & Sport Studies*, SMITH COLL., http://www.smith.edu/gradstudy/degrees_ess.php (last visited Feb. 13, 2015).

47. *Springfield College Executive Search Profile: Director of Athletics*, *supra* note 41.

must also maintain transparency and high levels of communication with the coaches, faculty, administrators, and staff on campus.

2. Responsibilities to Superiors and Communities

While Division III athletic directors have many people to supervise, they are generally not at the top of institutional leadership. In most cases they too have superiors — either the school president or deans of the college and other administrators — depending on the institution. At some schools, athletic directors will report directly to the president, while at other schools they will report to deans of the college, often those with responsibilities related to student life.

In addition to maintaining open communication with on-campus superiors, athletic directors will often function as the athletic department's public relations representative in speaking engagements and digital communication initiatives targeted toward the local community and various off-campus groups such as alumni, friends, and fans of the athletic department. In this capacity, athletic directors have an opportunity to engage with the off-campus community to maintain their connection with the institution and keep the community informed about general athletics-related news and more publicized issues that may occur under the athletic directors' supervision. In many ways, public appearances allow athletic directors to embody the athletic department and speak on behalf and in the interest of the school's athletics staff and student-athletes.

3. Delegation of Responsibilities across Athletic Department

In addition to responsibilities related to specific head coaches, athletic directors must organize and fulfill strategic plans for various roles within the athletic department, including administration, strength and conditioning coaching, event coordination, and other specific athletics-related responsibilities. Under the guidance of superiors, athletic directors are tasked with determining the structure of their support staff of administrators. In an effort to effectively manage financial resources, athletic directors will often appoint coaches to serve dual roles within the athletic department, with each having a formal role as a head coach as well as an athletic administrator. For example, often a tenured female head coach in an athletic department will also serve as the school's Senior Women's Administrator (SWA) as seen with Kim Kelly, Carnegie Mellon head volleyball coach, and Nancy Fahey, Washington University at St. Louis head basketball coach.[48] In a more unusual example, the Wesleyan University head football coach also served as athletic director.[49]

Aside from serving in formal administrative roles, athletic directors will consider the strengths of coaches within the athletic department and assign duties beyond coaches' team responsibilities that complement their skill set. These tasks are often in the form of teaching physical education classes at the college or handling a less formal administrative task, such as facilities management,

48. *UAA Senior Woman Administrators*, UNIV. ATHLETIC ASS'N, http://www.uaa.rochester.edu/administrative/UAA_Directory/SWAs.htm (last visited Feb. 18, 2015).

49. *Coaching & Administrative Staff Directory*, WESLEYAN ATHLETICS, http://www.wesleyan.edu/athletics/deptinfo/staff_directory.html (last visited Feb. 13, 2015).

intramurals supervision, game management, or event coordination.[50] At Denison University, every coach has multiple duties, including the head football coach.[51] Athletic directors must also determine the level of emphasis and financial commitment the department will make in terms of strength and conditioning. With varying philosophies of — and levels of — resources committed to strength and conditioning, there is no consensus on strength and conditioning staffing and programming across Division III athletic departments. Some schools carry a full-time strength and conditioning coach,[52] while others have part-time coaches or utilize an existing, qualified head or assistant coach.[53]

4. Hiring and Employment Practices

Hiring coaches is another important part of being a Division III athletic director. While head coaches frequently pick their own assistant coaches, the athletic director has the final approval in all personnel decisions. Athletic directors carry the ultimate responsibility for the employment environment provided to the athletic department staff and, in

50. *Staff Directory*, HAVERFORD ATHLETICS, http://haverfordathletics.com/information/directory/index (last visited Feb. 13, 2015) (showing head coaches serving multiple roles across the department).

51. SHULMAN & BOWEN, *supra* note 13, at 236.

52. *See, e.g.*, *Central Strength and Conditioning*, CENTRAL COLL., http://www.central.edu/athletics/strength (last visited Feb. 13, 2015); Staff Directory Profile of Steve Murray, MACALESTER COLL. ATHLETICS, http://athletics.macalester.edu/staff.aspx?staff=69 (last visited Feb. 13, 2015).

53. *See, e.g.*, *Paul Michalak*, TRINITY UNIV. FOOTBALL, http://www.trinitytigers.com/sports/fball/coaches/Paul_Michalak?tmpl=/information/directory/bio-template (last visited Feb. 13, 2015); *Strength and Conditioning Staff Profile of Jonathan Dean*, CHRISTOPHER NEWPORT UNIV. ATHLETICS, http://www.cnusports.com/sports/2012/12/12/GEN_1212125309.aspx (last visited Feb. 13, 2015).

many hiring decisions, must consult the college human resources staff in order to accord with employment law. With relatively small operating budgets and a large supply of candidates interested in working in athletics, athletic directors will often utilize non-traditional hiring practices by hiring employees on an internship or graduate assistantship basis. However, as in any workplace environment, athletics staff members hold the right to file suit for any and all employment violations made by hiring representatives of the college. For example, in 2013, Benjamin Kozik, an assistant coaching intern with the Hamilton College football and women's basketball teams, filed a complaint against the college, alleging that the college classified him and other assistant coaches as interns to avoid paying them a "regular wage." In case documentation, Kozik claims that he and his associates, as interns, were required to fulfill the duties of regular full-time assistant coaches despite being paid only a meager stipend and working up to 100 hours per week, equating to *pay per hours worked* inconsistent with both the federal and state minimum wage.[54] According to the case docket, the class-action suit was dismissed by reason of settlement between the two parties on January 28, 2014. [As of writing, there are no official reports as to the details of the settlement.][55]

Although not an implicated party in the case, the athletic director at Hamilton College is noted in case documentation as a department employee involved with creating the pay structure and responsibilities of coaching interns, in addition to carrying the ultimate responsibility for the entire Hamilton College athletics staff. Prior to the filing

54. Abigail Rubenstein, *Even Paid Interns May Cause Wage-Hour Woes, Suit Shows*, LAW360 (Jan. 30, 2013, 7:22 PM), http://www.law360.com/articles/411439/even-paid-interns-may-cause-wage-hour-woes-suit-shows.

55. Collective & Class Action Complaint, Kozik v. Hamilton College (U.S.D. N. Dist. N.Y. Dec. 20, 2012) (No. 6:12-cv-01870).

of the case, Hamilton Athletic Director Jon Hind made attempts to increase the pay for interns and the department's budget, but he did not receive approval from the Board of Directors to do so.[56] However, as noted above, the athletic director was not a defendant in the case, as the plaintiff pursued the college instead of individuals within the athletic department.

5. Employment Considerations to Protected Classes

Athletic directors and athletic department hiring representatives at all levels must monitor their own and the department's decision-making as it relates to hiring decisions associated with protected classes. As in any workplace environment, discrimination of any protected class in hiring practices is a paramount concern in the Division III athletic department, as significant litigation has taken place in this area. For example, in 2006, the Brandeis University athletic director recommended the termination of the head softball coach, who had served 32 years as the school's first and only head softball coach at the time. The decision was made to fire the coach, and three months after the termination, the coach filed a lawsuit claiming that the termination was part of the university's strategic plan to replace older coaches with younger candidates. Brandeis responded and cited the coach's ineffectiveness as a recruiter and prevailing poor winning percentage. [57] The

56. Marlene Kennedy, *Interns Sue Hamilton College in Class Action*, COURTHOUSE NEWS SERVICE (Dec. 27, 2012, 10:25 AM), https://www.courthousenews.com/2012/12/27/53437.htm.

57. Greg Scholand, *A Solid Defense*, ATHLETIC MGMT. MAG. (Apr.–May 2011), *http://www.athleticmanagement.com/2011/04/03/a_solid_defense/index.php*; Gordon T. Davis, *Investigation Disposition*, BOSTON.COM (Jul. 15, 2009, 4:17 PM), http://boston.com/multimedia/community/yourtown/sullivanruling.pdf.

Massachusetts Commission Against Discrimination investigator found probable cause against Brandeis and no probable cause against the former head softball coach.[58] There is no further information available on the case.

Diversity in leadership positions within Division III athletic programs is limited, with white head coaches leading 93 percent of all men's teams and 92 percent of all women's teams, both of which are higher rates than in Divisions I and II.[59] Gender differences also exist at the head and assistant coaching levels with respect to compensation, employment status, and overall representation.[60] Although ideal hiring practices in staffing for diversity and gender equity may be difficult to achieve, athletic directors must be aware of and develop internal systems to account for protected class disparities existing in their athletic department.

Due to the lack of diversity among Division III college coaches, particular athletic departments have developed diversity strategies to attract top-level talent across all backgrounds. Carleton College is a leader in supporting diversity initiatives within its Division III athletic department. In Leon Lund's final year as Carleton athletic

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58. Investigative Disposition, Mary Sullivan v. Brandeis Univ. & Sheryl Sousa, MCAD Docket No. 06BEM02314, EEOC Docket No. 16C-2006-02236 (2009), *available at* http://boston.com/multimedia/community/yourtown/sullivanruling.pdf.

59. Richard E. Lapchick, *Sense of Urgency Needed to Address Collegeso Lack of Diversity*, SPORTS BUSINESS J. (Dec. 22, 2008), http://m.sportsbusinessdaily.com/Journal/Issues/2008/12/20081222/Opinion/Sense-Of-Urgency-Needed-To-Address-Colleges-Lack-Of-Diversity.aspx.

60. NICOLE M. BRACKEN & ERIN IRICK, 2004-2010 GENDER-EQUITY REPORT (2012), 9-10 [hereinafter GENDER-EQUITY REPORT], *available at* http://www.nwcaonline.com/nwcawebsite/docs/downloads/ncaagenderequityreport2010.pdf?sfvrsn=0.

director in 2010, the program was honored for "Overall Excellence in Diversity" and also received an award in the "Diversity Strategy" category from the Texas A&M University Laboratory for Diversity in Sport. Upon receiving this recognition, Lund stated that diversity plays a large role in the philosophy of the athletics department, especially in the hiring of coaches. He cited the necessity of advertising and networking in all avenues to source potential hires, and the necessity to follow up by convincing sought-after diversity-enhancing candidates that Carleton is the right place to be.[61] In 2010, former Associate Athletic Director Gerald Young, a black administrator with significant experience in diversity training, replaced Lund as athletic director.[62]

6. Student Health and Safety

The athletic director is responsible for the health and safety of every student-athlete, coach, staff member, and fan involved with the athletic program, as all of those may bring lawsuits if they are injured or otherwise harmed in connection with the athletic department.[63] On average, athletic directors at schools without football programs must manage the safety of approximately 280 athletes, while at schools with football programs this number jumps to roughly 530, due to increased counts of football players and female student-athletes.[64] In addition to varsity-level student-athletes on campus, athletic directors may be

61. *Diversity In D-III*, ATHLETIC MGMT. MAG. (Feb.–Mar. 2010), http://www.athleticmanagement.com/2010/02/20/diversity_in_d-iii/index.php.

62. *Gerald Young, Athletic Director*, CARLETON COLL., http://apps.carleton.edu/athletics/about/directory/Gerald_Young (last visited Feb. 13, 2015).

63. *See* WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW 2013-2014 SUPPLEMENT 76, 92 (2d ed. 2013).

64. *Division III Facts and Figures*, *supra* note 28.

responsible for the health and safety of students participating in junior varsity, intramural,[65] and fitness activities.[66] Through managerial and hiring practices, the athletic director puts staff members in a position to provide a high level of care and treatment to those with physical or mental needs. Actions in this capacity can be preventative or reactive, as constant updates must be made to prevent future health concerns while maintaining the ability to provide any treatment that may be needed by a student-athlete.[67] Specifically, athletic directors may develop strategies to organize health and safety policies and clarify liability issues related to travel to and from athletic events. As athletic programs continue to take athletics-related trips during school breaks, both domestically and internationally, athletic directors must be proactive in maintaining safety-oriented policies and accountability. These policies must apply to not only more significant travel instances but also day-to-day travel, such as students leaving games with parents, student-athletes driving vans filled with teammates, and student-athletes spending varying amounts of time in hotels in unfamiliar cities. The athletic director must have a working understanding of the ever-changing NCAA bylaws related to student health as presented in NCAA documentation such as the "NCAA Sports Medicine Handbook." However, the school's athletic training staff performs the majority of the physical treatment of student athletes. The athletic director hires and supervises the director of athletic training, who manages a relatively small staff of roughly five to 10 assistant athletic trainers, each generally holding a master's degree in athletic training and various certifications (NATABOC, CSCS, etc.). Amherst

65. *See, e.g.*, CHAMPION, JR., *supra* note 63, at 92 (lawsuits have been brought in all those circumstances).

66. *Emerson College Executive Search Profile*, *supra* note 44.

67. WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW 2013-2014 SUPPLEMENT 250 (2d ed. 2013).

College[68] and Bowdoin College[69] each employ five athletic trainers including a director of athletic training, while Wheaton College (Illinois) staffs nine trainers, although only two are employed by the athletic department.[70] To draw a comparison to a high-profile Division I athletic training staff, the Louisiana State University (LSU) training staff carries 10 full-time athletic trainers employed directly by the university, as well as 12 graduate assistant athletic trainers, 43 student athletic trainers (undergraduates assisting the graduate assistants and senior trainers), and 22 additional healthcare staff (mostly contracted through other private practices) with titles including team physician, dentist, radiologist, orthopedic surgeon, team psychologist, and team neurologist.[71]

7. Student Health and Safety Issues and Litigation

Student-athletes assume a level of risk when playing their respective sports;[72] if health issues are not mitigated or handled properly by the athletic department, the athletic director and respective staff members may be held responsible for any downstream litigation.[73] A lawsuit filed

68. *Staff Directory*, AMHERST COLL., https://www.amherst.edu/athletics/department/directory (last visited Feb. 13, 2015).

69. *Staff Directory*, BOWDOIN COLL. DEP'T OF ATHLETICS, http://athletics.bowdoin.edu/information/directory/index (last visited Feb. 13, 2015).

70. *Wheaton College Sports Medicine*, THE OFFICIAL SITE OF WHEATON ATHLETICS, http://athletics.wheaton.edu/sports/2008/2/12/sports_medicine.aspx?tab=sportsmedicine (last visited Feb. 13, 2015).

71. *LSU Athletics Staff Directory*, LSUSPORTS.NET, http://www.lsusports.net/ViewArticle.dbml?DB_OEM_ID=5200&ATCLID=177229 (last visited Feb. 13, 2015).

72. CHAMPION, JR., *supra* note 63, at 106.

73. *See generally id.*

against Division III member Frostburg State University for wrongful death of a student-athlete on the football team serves as a tragic example of the result of alleged negligence with respect to player safety.[74] According to lawsuit documentation, Derek Sheely, senior fullback and captain of the Frostburg State football team, collapsed following a preseason drill at the Division III school in western Maryland and died six days later on August 28, 2011.[75] Case documentation also states that in practices leading up to Sheely's collapse, Frostburg coaches used derogatory and demeaning language to push Sheely and other players through high-contact drills.[76] Sheely's family filed a lawsuit against the NCAA, the Frostburg head football coach, a Frostburg assistant football coach, a Frostburg assistant athletic trainer, and Kranos Corporation, the holding corporation of Schutt Sports and producer of injury-preventing football helmets.[77] The wide range of defendants in this case, and more specifically the department-level staff of the implicated athletic department, demonstrates the need for athletic directors to effectively monitor and implement NCAA health and safety policies to avoid litigation and, more important, profound and fatal injuries.[78] It is important to mention that numerous health and safety cases exist across all NCAA Divisions and no specific health issue is

74. Nathan Fenno, *Death of Frostburg State Player Derek Sheely Due to 'Egregious Misconduct,' Lawsuit Says*, WASHINGTON TIMES (Aug. 22, 2013), http://www.washingtontimes.com/news/2013/aug/22/death-frostburg-state-player-derek-sheely-due-egre/?page=all; Juan Carlos Rodriguez, *Lawsuit Targets NCAA, Helmet Maker Over Death of Player*, LAW360 (Aug. 23, 2013, 3:55 PM), http://www.law360.com/articles/467330/lawsuit-targets-ncaa-helmet-maker-over-death-of-player.

75. Fenno, *supra* note 74.

76. Second Amended Complaint, Sheely v. Nat'l Collegiate Athletic Ass'n, (Md. Cir. Ct. Aug. 22, 2013) (No. 380569V), 7.

77. *Id.*

78. *Id.*

necessarily a symptom of Division III athletics — many cases result in injury and not litigation.

In response to growing concerns over student-athlete health and safety related to the brain and psychological issues, the NCAA instituted the Mental Health Task Force to ensure that member-institution athletic trainers, physicians, athletic directors, and coaches address mental health issues with student-athletes.[79] By studying and increasing the awareness of mental health issues that many student-athletes face on a day-to-day basis, the Task Force plans to create and disseminate educational materials to be digested by athletic directors, coaches, and athletes.[80] It is imperative that Division III athletic directors adopt the policies set forth by the Task Force — not only to abide by NCAA bylaws, but also to put student-athletes in the best position possible to overcome mental health issues.

8. Hazing

Also at the heart of student-athlete safety is the issue of hazing. Hazing is generally described as a situation in which members of a team are intentionally embarrassed or harassed, regardless of the individuals' consent.[81] Athletic directors' primary responsibilities with respect to hazing are to determine the athletic department's hazing policies, communicate policies to coaches and other responsible parties, follow up and ensure adherence to policies, and make swift and effective decisions (firings, suspensions,

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79. Brian Burnsed, *NCAA Mental Health Task Force Holds First Meeting*, NCAA (Nov. 26, 2013, 12:00 AM), http://www.ncaa.org/about/resources/media-center/news/ncaa-mental-health-task-force-holds-first-meeting.

80. *Id.*

81. *Facts: What Hazing Looks Like*, HAZINGPREVENTION.ORG, http://hazingprevention.org/home/hazing/facts-what-hazing-looks-like/ (last visited Feb. 3, 2015).

etc.) in the event of hazing. Athletic directors place a strong emphasis on the prevention of hazing across athletic teams, because recent high-profile incidents have compromised the reputations of many athletics programs.[82]

Hazing is equally relevant at all levels of NCAA competition, and Division III programs face the same challenges as their Division I and II counterparts. Although athletic directors usually do not spend time working directly with student-athletes, it is imperative that athletic directors effectively communicate the gravity of hazing violations to student-athletes through department staff and coaches. From the athletic director's perspective, hazing policy creation and supervision are regular responsibilities, while implementation and reporting fall solely on coaches and, ideally, self-policing student-athletes. It is common for an athletic department to develop a hazing policy to be included in the student-athlete handbook or in a standalone form, for student-athletes to ingrain the policies and provide their signatures to demonstrate their willingness to cooperate with the code. Washington and Lee University includes its Hazing and Retaliation Policy in the student-athlete handbook and, within the document, includes the definition of hazing, policies on reporting violations, procedures for determining judgment and punishment, and a disclaimer that allows the school to interpret hazing beyond the specific examples laid out in the handbook.[83]

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82. Theodore V. Wells, Jr., Brad S. Karp, Bruce Birenboim, & David W. Brown, *Report To The National Football League Concerning Issues of Workplace Conduct at the Miami Dolphins* (Feb. 14, 2014), http://63bba9dfdf9675bf3f10-68be460ce43dd2a60dd64ca5eca4ae1d.r37.cf1.rackcdn.com/PaulWeissReport.pdf.

83. *Washington and Lee Student Athlete Handbook*, OFFICIAL SITE OF WASHINGTON & LEE ATHLETICS, http://www.generalssports.com/information/Inside_Athletics/sahandbook/index (last visited Feb. 13, 2015).

Many institutions choose to handle hazing cases internally, enabling the athletic director to take a role in the process, as seen at York College in 2013.[84] In this case, the entire 42-man wrestling team was investigated in late 2013 after an anonymous tip to school officials reported that some members of the team were hazing other teammates. The judicial board, comprised of faculty and school administrators, investigated 30 students who were handed sanctions ranging from warning to expulsion. Other members of the team were found not responsible and records of their charges were expunged. Following school sanctions, the York College athletic director and head wrestling coach were granted the right to impose further sanctions against those involved. Since the case was handled entirely by the school, and no local law enforcement officials were involved, there is no record as to how many students received sanctions. Though all appeals were denied, there is no record as to further sanctions handed down by the coach or athletic director. As demonstrated in this case, athletic directors must maintain awareness of each team's behavior and take proactive measures upon discovery of any infractions.[85]

84. *See York College Investigation Confirms Hazing; Sanctions Range from Warnings to Expulsions*, YORK DAILY RECORD (Nov. 9, 2013, 11:49 AM), http://www.ydr.com/sports/ci_24480109/york-college-students-sanctioned-after-hazing-investigation-suspension.

85. *See* Zach Berman, *Lacrosse Program Shaken by Hazing Inquiry*, N.Y. TIMES, Jul. 7, 2012, at D1.

B. Strategic Planning

Athletic directors can be likened to CEOs, in that they help develop, oversee, delegate, and execute the high-level strategy of both the institution's individual athletic programs and the program as a whole. The athletic director manages the athletic department and works with the institution at large in a manner consistent with the strategic plan. These goals vary by institution and by athletic program within the department. For certain institutions or specific sports within an institution, competing at the national level is expected and setting goals of winning national championships is reasonable. For others, simply competing within the conference is a realistic goal. Athletic directors must recognize the strengths and weaknesses across their program's distinct teams and shape goal-setting on individual bases around these realities.

1. Student-Athlete Recruiting and Retention

A major component of an athletic department's strategic plan is student-athlete recruiting. Athletic directors play a key role in this process at an operational and interpersonal level by maintaining adherence to NCAA bylaws,[86] controlling the department's recruiting budgets for each sport, and managing coaches' progress throughout the recruiting cycle. At some institutions, athletic directors are seen as drivers of overall enrollment, and teams (such as football) are formed to boost enrollment at the school during economic down times. Financial resources present a critical challenge in this process, as individual sport budgets for recruiting are, on average, just more than $2,000 per year.[87]

86. NCAA DIVISION III MANUAL, *supra* note 16, at § 13.01

87. *The Equity in Athletics Data Analysis Cutting Tool*, OFFICE OF POSTSECONDARY EDUC., http://ope.ed.gov/athletics/index.aspx (last

In many cases, a limited recruiting budget constrains recruiting to local geographic areas. However, many coaches and athletic departments are also able to find creative ways to recruit players at the national and international levels. Amateur Athletic Union (AAU) tournaments, showcase events, and various selective high school sport tournaments provide athletic departments a one-time cost for coaches to identify many prospective recruits over the course of a weekend, for instance. In contrast to the somewhat limited model of collegiate coaches visiting one specific high school game at a time to evaluate one or two players, the recruiting model has become more cost-efficient with the growing popularity of selective tournaments, especially with specific participation criteria such as "academic tournaments" allowing for higher efficiency recruiting for coaches at selective colleges.[88]

After successful recruitment, retaining student-athletes is a concern for many athletic directors. Though fewer risks are observed at more selective Division III institutions, athletic directors may be required to manage cases involving risks of individual student-athletes' athletic ineligibility as enforced at the conference or NCAA level. At the Division III level, student-athlete eligibility is determined by the individual's good academic standing at his or her particular school. Student-athletes do not have specified student services programs, but, rather, academic services are provided to the entire student body. As athletic directors operate without the aid of unique student-athlete or academic service departments, they must utilize head and assistant coaches to monitor student-athlete academic,

visited Feb. 13, 2015) (average found by selecting sorting options to reach data).

88. *General Camp Information*, HEADFIRST HONOR ROLL CAMPS, http://www.headfirsthonorroll.com/general-baseball-prospect-camp-info.asp (last visited Feb. 18, 2015).

personal, and professional progress.[89] With this delegation of responsibility, coaches take on an involved role and form well-rounded relationships with student-athletes. Coaches not only watch over their roster's academics, but also monitor their personal skill development in extracurricular areas such as leadership. Athletic directors will also concern themselves with keeping student-athletes engaged in their respective sports and retaining their participation and engagement as athletes.

For athletic directors, successful student-athlete retention begins with strategic decisions in hiring head coaches. In many ways, the head coach embodies and creates the substance of a student-athlete's athletic experience, and athletic directors must seek the proper "fit" with consideration paid to the culture of the institutional student-body as well as each sport. Athletic directors will also take on the role of marketers, to develop school spirit and attendance at athletic events. Attracting local community members, alumni, and students to athletic events creates a buzz and in turn generates a greater sense of purpose and community connection for student-athletes. Developing and maintaining sponsorship opportunities with local and regional businesses also provides additional revenue to support the athletic department.[90]

2. Admissions

In the recruiting process, athletic directors must not only have a strong understanding of the recruiting system and chronology but also possess significant knowledge of the inner workings and department leaders at their particular

89. *About SAAS*, UNIV. OF S. CAL. STUDENT-ATHLETE ACAD. SERVICES, http://saas.usc.edu/about (last visited Feb. 13, 2015).

90. *University of Wisconsin-Whitewater Executive Search Profile*, ALDEN & ASSOC'S, http://www.aldenandassoc.com/executive-search/past-searches.html (last visited Feb. 18, 2015).

institutions. Athletic directors must make difficult decisions when communicating across departments. For example, they face challenges when choosing "which battles to fight" with the Office of Admissions. Not every student will be admitted to the school, so athletic directors must be prudent when determining which students to support. Coaches of individual sports are generally expected to do the in-person legwork required to attract student athletes to campus, while athletic directors function as liaisons between the athletic department coaches and admissions at critical points in the recruiting process. Once a student-athlete has expressed interest in the school in the form of applying for admission, athletic directors will meet with coaches and admissions staff members to sort out any issues related to the admissions process.

Athletic directors must have a clear understanding of the admissions process, as it involves key subordinates of the athletic director as well as key superiors in the admissions staff, most often the Dean of Admissions. In the common admissions cycle, the athletic department will provide admissions with "rating sheets" for each prospective student-athlete, assessing the candidate's ability and the team's need for the athlete. This information may be useful in making an admissions decision, and the process is very important in maintaining head coach recruiting motivation and time commitment. Athletic directors pay special consideration to getting "early reads" to gauge the potential admissibility of prospective student-athletes, allowing head coaches to have insight into which student-athletes to focus on and to reduce wasted efforts for inadmissible candidates. However, academic strengths of applicants are evaluated in the same manner as non-athletes. When academic rating falls below a specific level of criteria, athletics' need of the

athlete and any minority or special status are factored and considered as criteria for that student's admissibility.[91]

The athletic director will oftentimes step in during difficult admissions decisions to "go to bat" for specific student-athletes on behalf of the head coach. In conflicts between coaches and the admissions staff, athletic directors must choose in which cases they will support their coaches' wishes for the admittance of a student and in which cases they will explain alternative paths to respective coaches. Generally, athletic directors will provide alternative solutions for both parties to get a more well-rounded view of a prospective student-athlete; these approaches include inviting the student-athlete to campus for a formal interview with admissions staff members and communicating to the student-athlete specific actions he or she can take to improve probability of admittance (usually through augmenting the high school course load with advanced-level courses or retaking a standardized test such as the SAT or ACT).

Colleges with needs and desires for improvement in specific sports or areas of athletic participation may form ad hoc committees or special task forces to achieve results. A strong example of this admissions-athletics tandem approach occurred in 2011 at Kenyon College, an athletic program that at the time had won 54 NCAA Championships in Men's and Women's Swimming and Diving but had not achieved a winning record in football since 2005. Jennifer Delahunty, dean of admissions and financial aid at Kenyon, led an ad hoc committee established in the summer of 2011 to develop a strategic plan to improve the football program's performance and recruiting capabilities, as she claimed the school was losing talented prospective athletes to Ivy

91. WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES, 62-63 (James L. Schulman et al. eds., 2005).

League, NESCAC, and Patriot League schools. The committee recommended and implemented significant changes to admissions operations in relation to the football team, including policies that allowed "admissions staffers to provide an early read on a recruit's chances for admissions and . . . provide an early notification to the student-athlete."[92]

3. Consideration for Actions of Student-Athletes, Parents, and Alumni

At the Division III level, athletic directors are more accessible to student-athletes and parents than at larger Division I universities, and they will often need to directly handle issues faced or caused by student-athletes. Generally, the student-athlete's head coach will handle commonplace issues, but in more extreme circumstances involving severe poor academic performance or social behavior, the athletic director may be asked to step in and manage the situation. In other cases, athletic directors may face pressure from parents, alumni, or fans to influence internal athletic department decision-making regarding student-athlete playing time, budget allocation, athletic department building projects, coaching assignments, and other athletics-specific issues. Despite these challenges, successful athletic directors will acknowledge external opinions with respect and internally decipher which opinions to consider. Additionally, they will conduct such decision-making with professionalism and give full consideration of all relevant input from the interested parties.

In reference to student-athlete discipline, particular cases may prove more complex and become much larger issues than the athletic department initially intended. In a

92. Dennis Read, *All in the Plan*, ATHLETIC MGMT. MAG., (Jun.–Jul. 2012), http://www.athleticmanagement.com/2012/05/28/all_in_the_plan/index.php.

2012 case[93] filed by former Middlebury College hockey player Jack Knelman against the college and his hockey coach Bill Beaney, the plaintiff sought tuition reimbursement and economic loss from a professional hockey career after being unexpectedly released from the team by Beaney during the 2010-2011 season. [94] The plaintiff also cited that Middlebury and Beaney had breached their contract with Knelman by, among other things, "failing to adhere to the NCAA Division III's requirement that Middlebury assure the actions of its coaches and administrators exhibit fairness and honesty in their relationships with student-athletes." [95] Erin Quinn, athletic director at Middlebury, is not explicitly stated to be an involved party in this case, however the claims made by Knelman allege administrative discordance with NCAA bylaws, which the athletic director holds ultimate responsibility for upholding across the athletic department.

C. Compliance

Far from the limelight of the media and marketing attention, some of the athletic directors' most important tasks include working in congruence with NCAA and conference regulations. At the Division I level, it is not uncommon for an athletic department to have the largest proportion of their employees working in the compliance department under an Associate Athletic Director for Compliance. [96] At this high level of competition and profitability, compliance employees are a form of security or insurance for the athletic department, because infractions

93. CHAMPION, JR., *supra* note 63, at 211.

94. *See* Knelman v. Middlebury Coll., 898 F. Supp. 2d 697 (D. Vt. 2012) aff M, 570 F. App70 66 (2d Cir. 2014).

95. *Id.*

96. *Department of Athletics Organizational Chart*, OHIO STATE, http://grfx.cstv.com/schools/osu/graphics/pdf/genrel/org-chart-athletics.pdf (last visited Feb. 13, 2015).

can be extremely costly if sanctions such as postseason bans or recruiting restrictions are imposed. While compliance with NCAA bylaws is a key function of the athletic director at the Division III level, the potential losses resulting from infractions are not as significant as those in Division I programs. Therefore, athletic directors in Division III are expected to head all compliance efforts, though there is the possibility of help from an assistant or associate athletic director who handles the finer details of compliance, operations, and facilities.

Particular issues, such as amateurism, are more prevalent at the Division I level and are not as common in Division III athletics. Despite the differences, compliance with NCAA regulations still requires significant attention by Division III athletic directors.[97] NCAA compliance regulations extend over the entire experience a student-athlete has with a particular institution, from recruiting to graduation. Although, compared to their Division I counterparts,[98] Division III athletic directors do not face the same level of pressure from off-campus parties, such as alumni or boosters, yet innate pressures to promote success on the field and in the classroom may lead to compliance issues. In Division III, department-level infractions may take the form of unauthorized compensation to students for athletic achievements or overlooking poor academic performance in order to maintain a student's athletic eligibility. In addition, specific issues such as impermissible

97. *University of Wisconsin-Whitewater Executive Search Profile*, *supra* note 90.

98. Pat Forde, *Source: Mack Brown Forced Out as Texas Coach after President Withdrew Support*, YAHOO! SPORTS (Dec. 23, 2013, 7:57 PM), http://sports.yahoo.com/news/source--mack-brown-forced-out-as-texas-coach-after-president-withdrew-support-005700558.html; *Mack Brown*, SPORTS REFERENCE: COLLEGE FOOTBALL, http://www.sports-reference.com/cfb/coaches/mack-brown-1.html (last visited Feb. 18, 2015).

benefits in the form of financial aid infractions, Title IX noncompliance, and academic dishonesty are key areas of NCAA regulation in which athletic directors focus their attention.

1. General Compliance Issues

Athletic directors are responsible for maintaining a culture of compliance for their own actions as well as those of coaches and staff. Institutions that have had an individual non-compliant team have been served punishments that affect more than just the infracting team. In 2012, the NCAA Division III Committee on Infractions cited the football coaching staff at Division III Illinois College for unethical conduct with respect to compliance issues and put the athletic department as a whole on three years of probation in the form of recruiting restrictions.[99] Athletic directors not only must maintain compliance with federal government, NCAA, and conference and school bylaws, but they are also responsible for the completion and submission of each organization's reporting requirements.

2. Financial Aid Infractions

Financial aid infractions are prevalent at the Division III level, as athletic department representatives may offer impermissible benefits to student-athletes in order to competitively recruit and retain them. NCAA regulations bar member institutions from awarding financial aid to any student on the basis of athletics leadership, ability, participation, or performance.[100] Despite pressures to offer

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99. The Associated Press, *Illinois College Put on Three Years Probation for Unethical Conduct*, NCAA, http://www.ncaa.com/news/football/article/2012-08-24/illinois-college-put-three-years-probation-unethical-conduct (last updated Aug. 24, 2012, 9:36 PM).

100. *See* NCAA DIII MANUAL, *supra* note 16, at § Figure 14-1.

impermissible benefits to student-athletes, athletic directors must be fully aware of financial aid regulations and ensure proper accordance with the bylaws.

In recent years, financial aid infractions at Division III institutions have occurred at many schools, including Kean University,[101] University of Wisconsin-La Crosse,[102] Maine Maritime Academy, [103] and Baldwin Wallace University. [104] In each of these cases, either the NCAA Committee on Infractions or the institution itself levied penalties, such as probation of particular sports, postseason bans, show-cause orders for coaches, vacating prior championships or tournament participation, public reprimand and censure, full disclosure of infractions to prospective student-athletes and in all athletics media outlets, and full compliance with recommendations made by the NCAA Committee on Financial Aid Committee following full review of the institution's financial aid practices.

Pederson et al. v. NCAA et al. is a 2014 case filed by one current and two former Kean University female student-athletes in response to their scholarships being removed (along with those of eight additional athletes) by the

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101. *NCAA Places Kean on Probation,* NCAA (Apr. 19, 2012, 3:34 PM), http://www.ncaa.com/news/ncaa/article/2012-04-19/ncaa-places-kean-probation.

102. *UW-La Crosse Punished by NCAA*, NCAA (Apr. 11, 2012, 4:01 PM), http://www.ncaa.com/news/ncaa/article/2012-04-11/uw-la-crosse-punished-ncaa.

103. *Maine Maritime Placed on Two Years Probation for Violating NCAA Rules*, Oct. 18, 2013, http://www.ncaa.com/news/article/2013-10-18/maine-maritime-placed-two-years-probation-violating-ncaa-rules.

104. *Baldwin Wallace Will Skip Postseason Play in All Sports this Season*, NCAA (Oct. 31, 2012, 9:58 AM), http://www.ncaa.com/news/ncaa/article/2012-10-31/baldwin-wallace-will-skip-postseason-play-all-sports-season.

university following warnings issued by the NCAA for improper financial aid offers to student-athletes.[105] According to case documentation, plaintiffs alleged that Kean unilaterally decided to prevent student-athletes from sport participation due to their entitlement to a "Dorsey Scholarship," because the school's NCAA distribution limit of this particular scholarship had been exceeded.[106] Furthermore, the plaintiffs were forced to make a decision between keeping their "Dorsey scholarships," which provided roughly $12,000 per semester, or continuing to play their sport, without the opportunity for a court hearing and prior to a complete NCAA investigation.[107] With women representing 73 percent of the student-athletes impacted by Kean's decision, and the NCAA's policies and procedures in violation of the New Jersey Law Against Discrimination, the plaintiffs were ruled to be members of a protected class that have allegedly been disproportionately impacted in this case.[108] "A New Jersey federal judge has denied the consolidation of a putative class action, siding with the NCAA, which argued procedural rules barred the combination of federal and state actions claiming female athletes had their scholarships rescinded due to NCAA rules that disproportionately affect women."[109]

3. NCAA, Conference, and Institutional Eligibility

105. Class Action Complaint, Pedersen v. Nat'l Collegiate Athletics Ass'n (D.N.J. Apr. 21, 2014) (No. 14-cv-02544).

106. *Id.* at 8-9.

107. *Id.*

108. *Id.* at 12.

109. Joshua Alston, *NCAA Sex Bias Suits Can't Be Consolidated, NJ Judge Says*, LAW360 (Jan. 12, 2015, 8:18 PM), http://www.law360.com/articles/610391/ncaa-sex-bias-suits-can-t-be-consolidated-nj-judge-says.

The NCAA requires students to maintain a particular level of academic performance in order to compete at the intercollegiate level. More specifically, a student-athlete must be enrolled as a full-time student, be in good academic standing, and make consistent, satisfactory progress toward a degree.[110] While Division I athletic departments generally have administrators who are responsible for documenting student-athlete academic performance, Division III athletic directors or other administrators must directly monitor and manage this issue through reports made by coaches and athletic administrators.[111] At many Division III institutions, student-athletes must meet eligibility standards set not only by the NCAA but also by the respective conference and the institution.[112] Under these rules, Division III institutions cannot utilize common Division I eligibility waivers such as "redshirting."[113] In many cases, institutions will maintain the ability to determine eligibility decisions on a case-by-case basis, determined by officials of the institution. Amherst College's Student Handbook communicates this ad hoc approach in the Athletic and Physical Education section:

> All full-time students at Amherst College are considered eligible to participate in the extracurricular activities of the college, unless barred from such participation by the dean of students for academic or disciplinary reasons.[114]

In addition to these eligibility policies, Amherst and all NESCAC schools provide Academic/Athletics Conflicts

110. NCAA DIII MANUAL, *supra* note 16, at § 14.01.1.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Athletics and Physical Education: Eligibility Rules*, AMHERST COLL. ATHLETICS & PHYSICAL EDUC., https://www.amherst.edu/campuslife/deanstudents/handbook/athletics#Eligibility (last visited Feb. 13, 2015).

policies to establish the priority of all academic responsibilities (i.e., "classes, meetings, or examinations") and scheduling above any athletic commitment (e.g., "scrimmages or practice").[115]

4. Title IX[116]

Gender equity, both in hiring and in terms of athletic opportunity, is a critical facet of the job for an athletic director.[117] Enacted in 1972, Title IX promotes equal educational opportunity for all individuals in federally supported academic institutions. Because the law recognizes athletic pursuits as educational opportunities, athletic administrators are constantly monitoring compliance with Title IX.

Athletic directors must be keenly aware of Title IX issues, because the Office for Civil Rights within the Department of Education, rather than the NCAA, enforces Title IX.[118] This level jurisdiction assumes the possibility of federal litigation regarding infractions by collegiate athletic departments. Federal law requires schools meet the three sections of Title IX: (1) accommodate the interests and abilities of the underrepresented sex, (2) maintain strictly

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115. *Athletics and Physical Education: Academic/Athletic Conflicts Policy*, AMHERST COLL. ATHLETICS & PHYSICAL EDUC., https://www.amherst.edu/campuslife/deanstudents/handbook/athletics#Conflict (last visited Feb. 13, 2015).

116. U.S. DEP'T OF EDUC., TITLE IX ENFORCEMENT HIGHLIGHTS (2012), *available at* https://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf.

117. JANET JUDGE & TIMOTHY O\H DERS NAT'L COLLEGIATE ATHLETIC ASS'N, GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS: A PRACTICAL GUIDE FOR COLLEGES AND UNIVERSITIES 99 (Karen Morrison ed., 2010) [hereinafter NCAA Gender Equity Guide] *available at* http://www.ncaapublications.com/DownloadPublication.aspx?download=GEOM11.pdf.

118. U.S. DEP'T OF EDUC., *supra* note 116, at 2.

proportional levels of financial assistance to male and female student-athletes, or (3) maintain equivalence in treatment, benefits, and other opportunities for male and female student-athletes.[119] The first and third areas of the compliance test are most relevant to Division III athletic directors, because the second requirement does not apply, as the NCAA does not allow athletics-based financial assistance for Division III student-athletes.[120] For Division III athletic directors, gender equity issues arise on the basis of several different factors, including effective accommodation, program elimination, roster management, history and continuing practice of program expansion, treatment issues, financial aid, separate programs, retaliation, employment, sexual harassment, and adequate notice.[121]

The law of Title IX is intended to promote gender-equity across educational opportunities in the United States, yet it does not solely aim to protect the interest of students and student-athletes. In the 2008 case *Kiser v. Clark College*, the head women's basketball coach, who was under yearly renewable contracts and had a reputation at the school for complaining about the disparities of the men's and women's basketball programs, was terminated. The coach claimed his communication of gender-related disparities in basketball was the reason behind his termination and prevailed under an implied cause of action under Title IX for retaliatory employment action based on an employee's complaints of sex discrimination.[122]

D. Financial Management

119. NCAA Gender Equity Guide, *supra* note 117, at 19.
120. *Division III Philosophy Statement*, *supra* note 18
121. NCAA Gender Equity Guide, *supra* note 117, at 19.
122. CHAMPION, JR., *supra* note 63, at 376.

At every level of athletic administration, management of finances is a critical aspect of running a collegiate athletic department. Athletic directors are expected to have a high degree of skill in both the budgeting of the school's athletic budget and fundraising. The costs of running a Division III athletic department are continually increasing, with median total expenses for all Division III departments with football programs growing more than 30 percent between 2008 and 2012, from $2.3 million to $3.0 million.[123] To highlight the disparity across Division III athletics spending and resources, the largest athletic department expenditures in 2012 were $13.5 million, while the lowest were $780,000.[124] However, even the largest reported Division III program expense pales in comparison to the median Division I FBS[125] program expense of $56.3 million in 2012.[126] The largest reported expenditure level of a Division III school with football is more comparable to Division I FCS[127] schools and Division I schools without football, whose median total expenditures were $13.8 million and $12.8 million in 2012, respectively.[128]

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123. NATT 2.F _REF288512600 \H ASST , 2004-2013 NCAA DIVISION III REVENUES AND EXPENSES REPORT §•CAA Divis (2013) [hereinafter NCAA DIII REVENUES AND EXPENSES REPORT] *available at* http://www.ncaapublications.com/DownloadPublication.aspx?download=D32013RevExp.pdf.

124. *Id.* at §C2.4.

125. Brandon Lilly, *College Football Explained*, THE GUARDIAN (Oct. 10, 2012, 9:00 AM), http://www.theguardian.com/sport/blog/2012/oct/10/college-football-explained-ncaa.

126. NCAA DI REVENUES AND EXPENSES REPORT, *supra* note 20, at Table 2.1.

127. Lilly, *supra* note 125.

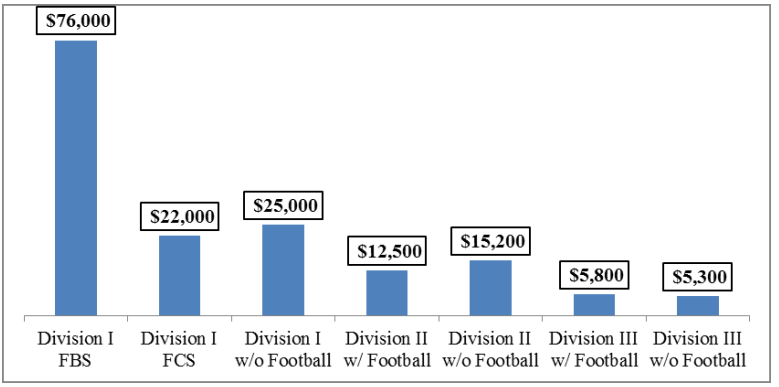
128. NCAA DIII REVENUES AND EXPENSES REPORT, *supra* note 123, at Table 2.4.

The athletic director must effectively manage the department's expenses and allocate funds for items such as salaries and benefits to coaches and staff, team travel, recruiting, equipment and uniforms, game expenses, medical expenses, membership dues, and facilities maintenance. Despite a wide array of expenses to consider, expenses per student-athlete at the Division III level are less than half of those at Division II schools, and roughly 13 times less than Division I FBS programs.[129] To provide insight into the proportional weight of these costs that the athletic director must balance, the mean salary and benefits expenses at Division III schools with a football program accounted for 45 percent of total expenses, with team travel and equipment as the second largest expense categories, representing 12 percent and 6 percent of total expenses, respectively.[130]

129. NCAA DI REVENUES AND EXPENSES REPORT, *supra* note 20, at Table 2.2; *see also* 2004-2013 NCAA DIVISION II REVENUES AND EXPENSES REPORT Table 2.1 (2013), *available at* http://www.ncaa.org/sites/default/files/D2_2013_RevExp.pdf; *see also* NCAA DIII REVENUES AND EXPENSES REPORT, *supra* note 123, at Table 2.1. Please see chart below for further details.

130. NCAA DIII REVENUES AND EXPENSES REPORT, *supra* note 123, at Table 3.10, Table 2.1

2012 Median Expense per Student-Athlete by Division and Subdivision[131]



1. Budgeting

In 2012, median athletics expenses represented an average of 5.0 percent of annual institutional spending at Division III institutions with football and 3.0 percent at schools without football.[132] Division I athletics budget percentages that year were comparable to those of Division III, with FBS Division I median athletics expenses representing 5.5 percent of institutional spending at institutions with football programs and 5.9 percent at those without football.[133] The vast majority of Division III athletic departments report no earned income, with total revenues primarily represented by college subventions and small NCAA distributions.[134]

131. *Id.* at Table 3.2; NCAA DII REVENUES AND EXPENSES REPORT, *supra* note 129, at Table 2.1; NCAA DIII REVENUES AND EXPENSES REPORT, *supra* note 123, at Table 2.2.

132. NCAA DIII REVENUES AND EXPENSES REPORT, *supra* note 123, at Table 2.5.

133. *Id.* at Table 2.7.

134. SHULMAN & BOWEN, *supra* note 13, at 245.

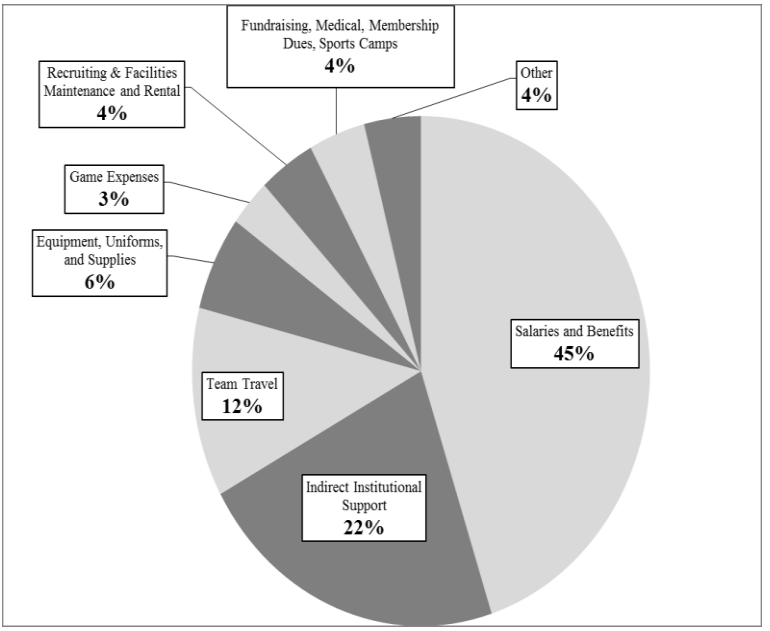
Due to the relatively small operating budget provided to athletic directors, the challenge is to provide the greatest student-athlete experience possible given the limited and fixed monetary resources. In 2012, at Division III schools with football programs, athletic departments incurred average expenses of roughly $1.9 million, or just more than $100,000 per program.[135] Included in these costs are salaries for head and assistant coaches, travel, lodging, food, equipment, uniforms, and game and event costs. Although the line items for particular athletic departments are similar, resources and budgets are not always proportional. In Division III conferences such as the NESCAC and the UAA, 2012 operating expenses reached roughly $5 million and $4.6 million per school, respectively, while SCIAC and MASCAC schools reported $2.7 million and $1.6 million, respectively.[136]

Athletic directors face the challenge of attracting the best coaches they can with an understanding of the limitations placed on their ability to pay a particular coach above budget. Finding this hiring "sweet spot" is a skill that athletic directors develop in time, along with an ability to convey incremental benefits beyond salary provided by employment within the athletic department, such as academic ranking, ease or relative ease of recruiting, number of assistant coaches, work-life balance, and reputation.

135. *The Equity in Athletics Data Analysis Cutting Tool*, *supra* note 87 (average found by selecting sorting options to reach data).

136. *Id.*

2012 Average Division III Athletic Department Operating Expense Distribution[137]



2. Revenues and Fundraising

At the Division III level, athletic directors can expect the majority of their resources to come from three distinct sources: (1) institutional support, (2) NCAA distributions, and (3) fundraising. Overall, Division III competition does not produce revenues to support continuing operations of the athletic department; the nonprofit status of the school allows the athletic program to operate on a non-taxed, donation and distribution basis. In 2012, athletic departments of Division III schools with football programs received 5 percent of

137. *Id.*

overall institution expenditures, while those without football programs received 3 percent.[138]

Augmenting institutional subventions are NCAA distributions, with overall distributions to Division III programs during the 2012-2013 school year at 3.18 percent of total NCAA operating expenses ($25.3 million of $618 million).[139] Division III distributions made by the NCAA are primarily used for NCAA championship expenses, at 77 percent of the distributions ($20.9 million during the 2012-2013 school year), while conference grants and programs received $4 million (15 percent), student-athlete services took $1.8 million (7 percent), and membership support services received $400,000 (1 percent).[140] Ultimately, NCAA distributions do not reach the operating budget of many Division III athletic departments, and therefore fundraising efforts are required to bridge the gap between institutional distributions and total operating costs. To cite a specific Division III athletic department, Denison University shows no earned income from athletics, with approximately $4,105,854 in revenues and expenses,[141] and almost all revenues reflecting university subventions.[142] In other

138. NCAA DIII REVENUES AND EXPENSES REPORT, *supra* note 123, at Table 2.5.

139. KATHLEEN T. MCNEELY, REVENUE – NACUBO, 5, (May 20, 2013), *available at* http://www.nacubo.org/Documents/EventsandPrograms/2013HEAF/NCAA_Update.pdf.

140. *Id.* at 14.

141. *The Equity in Athletics Data Analysis Cutting Tool*, U.S. DEP'T OF EDUC., http://ope.ed.gov/athletics/GetOneInstitutionData.aspx (under Name of Institution enter "Denison University"; follow "Denison University" hyperlink; then follow "Revenues and Expenses" hyperlink) (last visited Feb. 18, 2015).

142. SHULMAN & BOWEN, *supra* note 13, at 245.

Division III athletic departments, student fees,[143] fees from equipment rentals,[144] and fees for facility use[145] are utilized to generate additional revenue for the athletic department.

2013-2014 NCAA Distributions by Division[146]

	Division I	Division II	Division III
Dollars ($MM)	$484	$35	$26
Percentage of Total NCAA Budget (%)	61%	4%	3%

3. Facilities and Equipment Management

In yet another CEO-type function, athletic directors at all levels of NCAA competition must have the ability to foresee potential opportunity and need for facility improvements in their long-term growth strategy: "[G]eneral infrastructure costs at the Division III level [averaging] . . . 29 [percent] of total expenditures."[147] The development of new, state-of-the-art, top-recruiting facilities at Division III institutions does not occur in the same scope or at the same scale as in Division I. Yet, Division III athletic departments face similar pressures in

143. *Western Washington University Athletic Director Position Announcement*, ALDEN & ASSOC'S http://www.aldenandassoc.com/images/pdf/western_washington_university_director_of_athletics_position_announcement.pdf (last visited Feb. 18, 2015).

144. *Recreational Equipment*, CASE WESTERN RESERVE UNIV., http://athletics.case.edu/facilities/equipment (last visited Feb. 18, 2015).

145. *See Fitness and Wellness*, BRIDGEWATER STATE UNIV., http://bsubears.com/Campus_Recreation/Fitness/ThornburgFitCtr/Memberships (last visited Feb. 13, 2015).

146. McNeely, *supra* note 139, at 5.

147. SHULMAN & BOWEN, *supra* note 13, at 239.

their own respect. For example, "If Wesleyan (University) gets a new pool, Trinity (College) needs a new pool."[148]

For Division III athletic directors, facility improvements and respective long-term plans may be required to simply update and renovate older facilities in efforts either to modernize the appearance and functionality or to minimize hazards. However, it is becoming more common for Division III institutions to make decisions similar to their Division I counterparts by approving facility improvements intended to attract top-level student-athlete talent. Successful completion of such projects requires full commitment by the upper-level administration and significant efforts by the athletic director in the form of planning and fundraising. Athletic directors must develop the vision and rationale for new construction projects, advocate them to college management, and develop a strategic partnership with the college and project donors. These huge undertakings are representative of the college's commitment to athletics and, in large part, to specific athletic programs and initiatives at the college. For sport-specific facility construction, private donors often provide the majority of the financial support for the project. One example of this is seen in Amherst College's Pratt Field renovation, completed in fall 2013, where significant improvements were made for football, track and field, and many fall and spring sports.[149] Similarly, in 2009, improvements for the football and track and field programs

148. *Id.* at 227.

149. *Amherst College Annual Report*, 10-11, AMHERST COLL. (Jun. 30, 2012), *available at* https://www.amherst.edu/media/view/449283/original/2012AmherstAnnualReport.pdf; *see also* Peter Rooney, *A Makeover for Pratt Field*, AMHERST MAG. (Spring 2012), https://www.amherst.edu/aboutamherst/magazine/issues/2012spring/collegerow/pratt.

were made at the University of Wisconsin-LaCrosse's Roger Harring Stadium.[150] Institutional support levels may be enhanced when athletic directors present new facility planning focused on benefiting both student-athletes and the general student-body population (e.g., recreational and intramural athletics opportunities).[151]

Concurrent facility developments at Bowdoin College represent institutional distinctions between athletics-focused facilities and general student-body oriented facilities, as well as the prevalence of sustainability considerations. Bowdoin's Peter Buck Center for Health and Fitness, opened in 2009, was built with the intention to provide a fitness facility to serve the college's student body and student-athletes, as well as various campus community members, such as faculty and staff. Beyond the two-floor fitness center, the facility also houses the school's athletic department offices and campus health center. Bowdoin's Sidney J. Watson Arena, opened in the same year as the Peter Buck Center, was built with a focus on the school's men's and women's ice hockey programs.[152] At the time of completion, the facility "[boasted] the most energy-efficient refrigeration and dehumidification systems, seating design and home team accommodations of any Division III collegiate arena," and it was the first ever newly constructed

150. *Veterans Memorial Field Sports Complex*, OFFICIAL WEBSITE OF WISCONSIN-LA CROSSE INTERCOLLEGIATE ATHLETICS, http://www.uwlathletics.com/sports/2013/3/11/GEN_0311135615.aspx?id=149 (last visited Feb. 13, 2015).

151. *The John F. Jaeger Center for Athletics, Recreation, and Fitness*, GETTYSBURG COLL. ATHLETICS, http://www.gettysburgsports.com/sports/2009/10/15/GEN_1015092906.aspx (last visited Feb. 13, 2015).

152. *Sidney J. Watson Arena*, BOWDOIN POLAR BEARS, http://athletics.bowdoin.edu/information/facilities/files/watson/watson (last visited Feb. 13, 2015).

ice arena to earn the distinguished sustainability recognition of LEED Certification.[153]

Contemporary facility improvements, such as those at Bowdoin, will acknowledge sustainability concerns, and many projects will aim to attain LEED Certification for the overall sustainability considerations of any new facility.[154] One of the first LEED Certified Gold athletic facilities in the country was opened by Haverford College with the construction of the Douglas B. Gardner '83 Integrated Athletic Center, a new athletic facility in 2005 named after a dedicated alumnus who died in the September 11 attacks. The facility includes a fitness center, athlete service centers, a basketball arena, and the college's Athletics Hall of Achievement.[155]

As the scope and scale of on-campus athletic facilities continue to grow across Division III campuses, athletic directors face the challenge of overseeing and delegating event scheduling across those facilities. Varsity, junior varsity, intramural, co-ed, and student-organized groups at the institution will seek varying facility time needs, and the athletic director will often delegate the necessary scheduling responsibility to a qualified athletic department employee with experience in facilities or event management.

In addition to facilities-related responsibilities, athletic directors oversee continuous improvement and updating of uniforms and equipment across all sports. The athletic director will maintain a uniform update schedule for uniform and equipment renewal for heavy-use sports like

153. *Id.*

154. *About LEED: Overview*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/about/leed (last visited Feb. 18, 2015).

155. *Facilities*, HAVERFORD ATHLETICS, http://www.haverfordathletics.com/information/facilites/giac (last visited Feb. 13, 2015).

hockey and lacrosse.[156] Athletic directors must also stay up-to-date with improvements in equipment and uniform technology, particularly with respect to safety and performance.

4. Business-Related Legal Issues

Although business aspects such as marketing and sponsorships are not as significant issues at the Division III level in comparison to Division I, athletic directors place an emphasis on building the brand and goodwill of the athletic department and institution. To build the brand, the athletic director works to maintain or improve the perception of quality student-athlete experiences, draw more students and alumni to athletic contests, and facilitate fundraising and department initiatives. With generations of athletic directors working to maintain the athletic brand of the institution, leaders of athletic departments must be aware of and responsive to any potential infringement, defamation, or misuse of their brand. In a case heard on April 9, 2014, Muhlenberg College sued Sportswear, Inc., a Seattle-based online retailer of athletic apparel, for infringing upon the athletic department's trademarks, including the Muhlenberg name and mascot. The suit alleged that Sportswear, Inc.'s website was trading on the enormous goodwill of the college.[157] In cases like this, the athletic director must have controls in place to intercept potential infringements or any potential threats that may damage the athletic department brand.

New York University experienced the opposite situation from Muhlenberg College in 2010. In *Fleurimond*

156. *Springfield College Executive Search Profile: Director of Athletics*, *supra* note 41.

157. Complaint for Damages and Injunctive Relief, Muhlenberg College v. Sportswear, Inc., (Pa. Dist. Ct. filed Dec. 10, 2013) (No. 5013).

v. New York University, the plaintiff claimed ownership of the university's "Orion" mascot. The plaintiff alleged infringement by using and selling various items bearing the Orion design without her consent. The university moved to dismiss the complaint, contending that the plaintiff did not actually own the Orion copyright. Ultimately, New York University won the case because "the District Court . . . held that whether the university was plaintiff's employer entailed factual issue inappropriate for [a] motion to dismiss. [Ultimately,] the [c]ourt found the . . . drawing was a 'work made for hire.'"[158]

E. Off-Campus Responsibilities — NCAA, Conference, Committees, Professional Organizations

Division III athletic directors are responsible for bolstering their personal and departmental presence in communities surrounding the campus. On an individual level, athletic directors may have many off-campus responsibilities with respect to their particular conference, the NCAA, or any specific initiatives within athletics that they support. These responsibilities will come in the form of speaking engagements, panel discussions, committee meetings, conferences, or any events that require the athletic director's physical presence. In addition to their personal appearances, athletic directors will often seek off-campus opportunities for their student-athletes to become involved with in order to gain a broader overall experience (trips to New Orleans [post-Katrina], inner city volunteering, etc.).[159]

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158. CHAMPION, JR., *supra* note 63, at 447.

159. Gary Brown, *Lynchburg Coach Extends His Reach*, NCAA CHAMPIONS MAG. (Aug. 30, 2011), http://www.ncaachampionmagazine.org/extras/OlsenSide.pdf (Lynchburg (Va.) College's AD and head women's soccer coach have instituted a humanitarian program that allows Lynchburg student-

1. Conference Responsibilities

In many ways, conferences rely on the experience and decision-making ability of athletic directors who represent member institutions. With the combined perspectives of all athletic directors within the conference, the group can share best-practices and determine mutually beneficial arrangements that support the overall mission of the conference. By maintaining mandatory meetings, the conference allows itself to stay current and acknowledge the viewpoints of the various administrators and student-athletes the conference supports. Whether or not the conference places initiatives in gender equity, academics, religion, or any other focus, athletic directors are responsible for representing their institutions to the best of their abilities and ensuring that agreements made at the conference level support not only the student-athletes at their respective institutions, but also the student-athletes of competing institutions.[160] In each conference-sponsored sport, athletic directors spend significant time planning for conference-level postseason tournaments and championships. At these points in the academic year, athletic directors manage general scheduling requirements such as championship locations, timing, selections, pairings for competition, and staffing.

The NESCAC is an excellent example of a conference with significant policies in place that support the academic focus of member institutions and the conference as a whole. Specific regulations include measures to

athletes to visit and work on projects to support communities in the Gulu District of northern Uganda).

160. *University Athletic Association: Governing Documents — Constitution Bylaws Administrative Procedures, 2006-2007*, UNIV. ATHLETIC ASS'N (2006), *available at* http://www.uaa.rochester.edu/Administrative/Governing_Documents/UAA_Const_Bylaws_Admin.pdf.

minimize regular season and postseason interference with class schedules and examinations, limitations on number of contests and starting and terminal dates for competition, and out-of-season activities limited to conditioning exercises without the involvement of coaching staff.[161] Each of these policies is meant to encourage an athlete to achieve a balanced perspective on the role of athletics and academics, while creating the opportunity to play multiple sports or become involved with the campus community in non-athletic ventures. Having played a role in forming conference regulations, athletic directors in the NESCAC and similar Division III conferences must be willing to adhere to such policies and also share their perspective on the system in order to build on existing conference-wide best practices.

2. NCAA Responsibilities

The NCAA relies directly on Division III athletic directors to provide key insights into this level of student-athlete competition because, unlike heavily-staffed Division I institutions, Division III athletic departments do not have an extensive staff to address NCAA matters. With institutional representation required to place one vote per distinct issue, college presidents will generally prefer athletic department representation at the NCAA Convention, often with the athletic director taking this responsibility.[162] By attending the annual NCAA Convention, athletic directors have the opportunity to gather with peers and attend presentations on current topics in Division III athletics, in addition to convening to discuss and vote on prospective NCAA regulations proposed on the legislative

161. *About the NESCAC*, NESCAC, http://www.nescac.com/about/mission_statement (last visited Feb. 18, 2015).

162. NCAA DIII MANUAL, *supra* note 16, 0§ 3.02.3.1, 3.2.4.15.

agenda.[163] During the 2013 Division III Management Council meeting, for example, the council reviewed and approved four unique legislative issues pertaining to Division III athletics.[164]

A more specific NCAA responsibility held by athletic directors and other athletic department representatives is serving on the Division III Championships Committee.[165] The group is responsible for budgetary recommendations, supervising championship qualification and selection procedures, event management, and appointment of Division III sports committees.[166] Additionally, this committee holds the final authority regarding appeals related to all championship matters except selection or assignment across all Division III sports.[167] This group has three in-person, four-day meetings per year: one in January, one in June, and one in September, as well as monthly, one-hour conference calls throughout the year.[168]

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163. *Division III Management Council: Agenda*, NCAA DIVISION III (Oct. 21-22, 2013), http://www.ncaa.org/sites/default/files/Oct13_DII_MC_Agenda.pdf; *NCAA Convention: San Diego 2014 Registration*, PLANNINGPOINT.NET (Jan. 12, 2014), https://www.planningpoint.net/V2/Admin/Reporting/Reports/Customized/2014NCAAConvention/soe/index.cfm?Division=3.

164. *Division III Management Council: Agenda*, *supra* note 163.

165. *Division III Championships Committee*, NCAA, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=3CHAMPS (last visited Feb. 18, 2015).

166. *Division III Championships Committee Duties*, NCAA, http://www.ncaa.org/governance/committees/division-iii-championships-committee-duties (last visited Feb. 18, 2015)

167. *Id.*

168. *Id.*

1. Committees and Special Interest Groups

Athletic directors with particular skill sets or interests may pursue off-campus responsibilities that extend beyond the conference and NCAA into various committees, associations, and organizations related to college athletics. In contrast to conference and NCAA responsibilities, these professional organizations and independent committees are not mandatory. However, participation in such groups often broadens an athletic director's depth of knowledge in the field and increases networking opportunities.

The National Association of Collegiate Athletic Directors (NACDA) is a professional association in which athletic administrators from any level of competition can become members for opportunities to network, exchange information, and advocate on behalf of the profession within the field of collegiate athletics administration.[169] The association provides mediums such as a national convention for current athletic administrators to disseminate empirical information developed from a career in athletics administration studies, as well as platforms for research related to supporting the conditions, salaries, and future of the profession.[170] The National Association of Collegiate Women Athletic Administrators (NACWAA) is also a prominent professional association in the field of college athletics. The NACWAA serves a similar purpose as NACDA, yet the association features programs "dedicated to empowering, developing and advancing the success of

169. *Mission Statement*, NACDA, http://www.nacda.com/nacda/nacda-missionstatement.html (last visited Feb. 18, 2015).

170. *Id.*

women in the profession."[171] As an extension of the day-to-day operations of managing an athletic department, NACWAA membership gives female athletic administrators the opportunity to make a positive impact on the athletic administrative opportunities for current and future female athletic administrators.[172]

Though their job function is broad in scope within their day-to-day responsibilities, it is not uncommon for athletic directors to develop specialties within their field, given their own interests or immersion in a particular subject in the field of intercollegiate athletics. Specific topics of specialty include sports rules, championships, health and safety,[173] women in athletics,[174] and athletic opportunities for minorities.[175] Some, although not most, athletic directors — particularly those with significant experience in a field — serve as consultants or speakers on the previous topics in various capacities outside of their institutions.

171. *Learn About NACWAA*, NAT'L ASS'N OF COLLEGIATE WOMEN ATHLETICS ADM'RS, http://www.nacwaa.org/about-nacwaa (last visited Feb. 13, 2015).

172. *Id.*

173. *See, e.g.*, *About USBIA*, U.S. BRAIN INJURY ALLIANCE, http://usbia.org/about-usbia/mission/ (last visited Feb. 13, 2015) (USBIA is a special interest group that aims to educate communities about harmful long- and short-term effects of brain injuries and advocate for safe practices to avoid brain injuries such as concussions).

174. *Say It Sister!: Title IX*, https://www.now.org/nnt/08-95/titleix.html (last visited Feb. 19, 2015) (a special interest group that Athletic Directors may join voluntarily).

175. *NCAA Association Wide Committees*, NCAA, http://www.ncaa.org/governance/committees (last visited Feb. 18, 2015).

IV. The Qualifications, Demographics and Career Paths of Division III Athletic Directors

In a 1996 study, it was found that 23.9 percent (84 out of 351) of Division III athletic directors were women, while this figure was 5.6 percent (17 out of 305) at Division I institutions. As of 2009, female athletic directors' presence has increased, as 27.5 percent (124 out of 451) of Division III athletic departments were headed by women, while at the Division I level women accounted for 9.4 percent (32 out of 341) of all athletic directors.[176] In addition to the relatively low percentages of female athletic directors, a 2009 NCAA study reported that 4 percent of all collegiate athletic directors are black.[177] Utilizing a manually collected database of information regarding the backgrounds of Division III athletic directors, we have analyzed and updated the aforementioned characteristics and developed additional statistics, as well.

For this study to arrive at the following profile metrics, background information for 451 Division III athletic directors as of the 2013-2014 academic year was compiled into a single database. Our database was assembled using manual data collection from athletic department websites, LinkedIn.com profiles, and various online news sources. This process allowed for vast coverage of the Division III athletic director landscape; however, the data is limited to information reported through online sources. Statistics may be understated due to the informational limitations for many athletic directors. For example, in our data gathering, many athletic director profiles indicated a head coaching background but did not mention experiences as a student-athlete. Intuitively, we believe many of these athletic

176. *Principles and Practice of Sport Management*, *supra* note 10, at 178-179.

177. *Id.*

directors most likely played a sport in college. However, we did not infer any information in our research and for this reason all statistics reported in subsequent sections should be considered with the preface, "Online resources suggest that . . ." rather than as fully descriptive of the population. Major areas of information gathered in the database include demographic areas — such as age, gender, race, educational background, collegiate coaching and playing experience, and past athletic director and business experience. The following sections detail specific findings in each of these areas.

A. Collegiate Playing Experience

Collegiate playing experience is a significant and prevalent trait of Division III athletic directors, with online resources suggesting that 58 percent (257 individuals) of the population participated in at least one intercollegiate sport in their undergraduate experience.

Characteristic	Individuals	% of AD Population
College Athletes	257	58%

Of those who played a sport in college, 28 percent (73 individuals) played more than one sport.

Characteristic	Individuals	% of College Athlete Population
Multisport Athletes	73	28%

In regards to specific sport participation, basketball (men's or women's) was the most prevalent college sport played by Division III athletic directors, with 27 percent (93 individuals) participating in basketball. Football and baseball also showed double-digit participation rates, at 16 percent (55 individuals) and 13 percent (45 individuals), respectively. The following table details the participation

count and rates for all sports that showed greater than 0-percent participation.

Sport	Participant Count	% of Participants
Basketball	93	27.1%
Football	55	16.0%
Baseball	45	13.1%
Soccer	30	8.7%
Softball	20	5.8%
Volleyball	17	5.0%
Lacrosse	14	4.1%
Wrestling	12	3.5%
Ice Hockey	10	2.9%
Tennis	9	2.6%
Track and Field	9	2.6%
Field Hockey	8	2.3%
Swimming and Diving	8	2.3%
Cross Country	5	1.5%
Golf	3	0.9%
Rugby	2	0.6%
Boxing	1	0.3%
Skiing	1	0.3%
Water Polo	1	0.3%

B. Collegiate Coaching Experience

Division III athletic directors have a high prevalence of head coaching backgrounds, with online resources suggesting that 67 percent (295 individuals) served as head coach in at least one collegiate sport over the course of their careers. In addition to the high rate of this characteristic, Division III athletic directors also demonstrate extensive tenure as head coaches, with the average athletic director serving in this role for 15 years. Average coaching tenure for Division III athletic directors with coaching backgrounds is skewed by those with extensive coaching backgrounds, such as Bob Corradi, the athletic director at Massachusetts Maritime Academy, who has served as the school's head

baseball coach for the past 42 years, the longest coaching tenure of any Division III athletic director serving in the 2013-2014 academic year.[178]

Similar to collegiate playing experience, basketball stands alone as the most prevalent sport coached by Division III athletic directors, with roughly 30 percent of athletic directors with head coaching experience serving as head basketball coaches (men's and women's). Basketball coaching sits roughly 20 percentage points above soccer, the next most prevalent sport coached, which comes in at 10 percent. The following table details the participation count and rates for all sports that showed greater than 0-percent participation.

Characteristic	Individuals	% of AD Population	Average Years Experience
Head Coach	295	67%	15.0

178. *Athletics Profile for Bob Corradi*, MASS. MAR. ATHLETICS, http://www.mmabucs.com/insideAthletics/directory/staff/Bob_Corradi (last visited Feb. 13, 2015).

Sport	Participant Count	% of Participants
Basketball	121	29.7%
Soccer	41	10.1%
Softball	37	9.1%
Baseball	32	7.9%
Football	32	7.9%
Volleyball	25	6.1%
Tennis	21	5.2%
Golf	19	4.7%
Lacrosse	14	3.4%
Ice Hockey	11	2.7%
Track and Field	11	2.7%
Wrestling	11	2.7%
Swimming and Diving	10	2.5%
Field Hockey	9	2.2%
Cross Country	7	1.7%
Skiing	2	0.5%
Boxing	1	0.2%
Cheerleading	1	0.2%
Squash	1	0.2%
Water Polo	1	0.2%

C. Previous and Current Athletic Director Experience

Though many Division III athletic directors have extensive professional backgrounds in varying fields, roughly 21 percent (91 individuals) served in the role of athletic director in at least one institution prior to their current roles. Of athletic directors who have served in this role at other institutions, the average previous tenure was roughly 6.4 years.

Characteristic	Individuals	% of AD Population	Average Years Experience
Athletic Director Experience	91	21%	6.4

Considering the population's overall experience at the top position in collegiate athletic departments, online resources suggest Division III athletic directors have an average of 10.2 years of total experience as athletic directors, with an average of 8.9 years coming from their 2013-2014 position. Put another way, roughly 87 percent of 2013-2014 Division III athletic directors began their careers and have remained in their existing roles. This information suggests that Division III athletic directors have a tendency to get hired as athletic directors without previous experience in the role, and once hired, they remain in their positions for extended periods of time.

Characteristic	Avg. Years in 2013-2014 Position	Avg. Years Total Experience
Current Position	8.9	10.2

D. Business Experience

Despite the increasing "business" functions performed by Division III athletic directors, only 10 percent (44 individuals) of the population has had some form of business experience outside of intercollegiate athletics.

E. Education

Characteristic	Individuals	% of AD Population
Business Experience	44	10%

Division III athletic directors generally have extensive educational backgrounds, with 96 percent (423 individuals) having earned bachelor's degrees or above, 79 percent (348 individuals) having earned master's degrees or above, and 6 percent (25 individuals) having earned doctorates.

Characteristic	Individuals	% of AD Population
Bachelor's Degree	422	96%
Master's Degree	348	79%
Doctorate Degree	25	6%

The data also suggests that a significant portion of 2013-2014 Division III athletic directors are serving at their undergraduate alma mater, with 20 percent of the population (89 individuals) fulfilling this characteristic.

Characteristic	Individuals	% of AD Population
Undergraduate Alumnus	89	20%

Division III athletic directors share common master's degree concentrations, especially in the fields of education, management or administration, and the sports field. The percentages for these categories are: 30 percent (133 individuals), 26 percent (116 individuals), and 20 percent (89 individuals) of the population, respectively.

Master's Degree Concentration	Individuals	% of AD Population
Education field	133	30%
Management or Administration	116	26%
Sports field	89	20%
Physical Education or Kinesiology	51	12%
Master's of Business Administration (M.B.A.)	32	7%
Juris Doctorate (J.D.)	6	1%

A significant portion of the Division III athletic director population holds master's degrees in physical education or kinesiology (12 percent), yet this group is the least likely to have held a head coaching position (55 percent), compared to noted fields of concentration. Though the population size is relatively small, with six individuals, 100 percent of Division III athletic directors with juris doctorates, or law degrees, have served as head coaches.

Master's Degree Concentration	Head Coach Experience	% of Master's Concentration
Education field	97	73%
Management or Administration	82	71%
Sports field	63	71%
Physical Education or Kinesiology	28	55%
Master's of Business Administration (M.B.A.)	18	56%
Juris Doctorate (J.D.)	6	100%

F. Age

Using college graduation year as a proxy for the point in time when individuals in the population were 22 years of age, the average age of Division III athletic directors is 51, with 1985 representing the average undergraduate graduation year. Another way to consider this information is that in 2013-2014, the average athletic director was only one year away from their 30th college reunion.

G. Gender and Race

Characteristic	Average Age*	Avg. College Graduation Year
Age	51	1985

**Assumes individuals are 22 years of age at their college graduation*

The gender proportion among Division III athletic directors is 71 percent males (316 individuals) and 29 percent females (126 individuals), a 2.5:1.0 male to female ratio.

Characteristic	Individuals	% of AD Population
Female	126	29%
Male	316	71%

From the perspective of race, Caucasian individuals hold the vast majority of Division III athletic director positions, at 93 percent (411 individuals). Races that round out the population are black, Hispanic, and Asian individuals, representing 5 percent (23 individuals), 1 percent (5 individuals), and 0.2 percent (1 individual) of the population, respectively.

Characteristic	Individuals	% of AD Population
Caucasian	411	93%
Black	23	5%
Hispanic	5	1%
Asian	1	0.2%

There does not seem to be a significant difference in how race effects gender, as the two racial groups with relatively large populations, Caucasian and black, share roughly the same gender proportionality as the population on the whole.

Characteristic	# Female	# Male	% Female	% Male
Caucasian	117	293	28%	71%
Black	7	16	30%	70%
Hispanic	0	5	0%	100%
Asian	1	0	100%	0%

By shifting the group of focus in the previous analysis from race to gender, the data reveals that racial proportions are relatively consistent across genders.

Characteristic	Caucasian	Black	Hispanic	Asian
Female	94%	6%	0%	1%
Male	93%	5%	2%	0%

Finally, after combining characteristics of race and gender, Caucasian males represent the majority of the population (66 percent), while Caucasian females represent less than half of this group, at 26 percent of the population.

Characteristic	# Female	# Male	Female % of AD Pop.	Male % of AD Pop.
Caucasian	117	293	26%	66%
Black	7	16	2%	4%
Hispanic	0	5	0%	1%
Asian	1	0	0%	0%

V. CONCLUSION

Division III athletic directors carry a wide range of job responsibilities and continue to face new challenges as litigation alters the landscape of college sports and the expectations of industry leaders. Though multiple legal cases regarding Division III athletic departments have been cited in this article, the Division III level of college athletics does not face the same level of legal and compliance issues as Division I, and the roles of athletic directors at these two levels of collegiate athletics differ accordingly. Given the nature, mission, and structure of Division III athletics, member institutions are unlikely to be impacted by much of the ongoing litigation regarding amateurism against the NCAA, while injury-related cases will likely factor into Division III athletics management.[179] However, legal knowledge and awareness, as well as the ability to actively reduce and manage risk, will always be positive attributes for a Division III athletic director.

In the future, our team plans to iterate on this study to track changes in job responsibilities and the profile of Division III athletic directors. Additionally, with increased access to information of historic profiles of Division III athletic directors, we also plan to provide a longitudinal study by including athletic director profile data from 10 to 20 years in the past.

179. Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014), http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model.

NCAA DRUG TESTING: IT'S TIME TO CHANGE

Jason Lewis*

I. PROPOSAL

Under the current NCAA drug-testing program, member institutions are largely responsible for drug testing their student athletes, while the NCAA conducts its own drug tests in championship competition and under some other circumstances. Additionally, member institutions are not required to develop drug-testing programs. Where a member decides to implement its own program, the NCAA merely offers guidance and does not mandate protocol that must be followed.

In the NCAA, member institutions are by their nature self-interested actors. Even without any evidence of malfeasance, the current NCAA system creates at least the possibility of impropriety. Allowing member institutions to implement substandard drug-testing programs presents a danger not only to current student-athletes but to the member institutions themselves. While it may seem as if the NCAA and its member institutions have adequately addressed doping in collegiate competition, there is no way of knowing whether their policies are actually effective.[1] Because of the

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1. *See* Mary Pilon, *Drug-Testing Company Tied to N.C.A.A. Stirs Criticism,* THE N.Y. TIMES (Jan. 5, 2013), http://www.nytimes.com/2013/01/06/sports/drug-testing-company-tied-to-ncaa-draws-criticism.html?pagewanted=all&_r=0 11/11/2014 (During the NCAA's year-round testing program for the 2010-11 year, only 63 positive tests were found in 10,735 samples, or 0.6 percent); *see also 2013 Anti-Doping Testing Figures Sport Report*, WORLD ANTI-DOPING AGENCY, 1, 4, *available at* https://wada-main-prod.s3.amazonaws.com/resources/files/WADA-2013-Anti-Doping-Testing-Figures-SPORT-REPORT.pdf (last visited Feb. 18, 2015) (As point of comparison, in 2013, WADA reported that out of 176,502 Olympic sport samples there were 1,712 adverse findings, or 0.97 percent. This may be an unfair comparison, since the NCAA figures

NCAA's bifurcated approach to drug testing, NCAA and member institution anti-doping programs have been viewed as fractured and ineffective.[2] The NCAA anti-doping program, administered by the independent company Drug Free Sport, has drawn criticism for lax notification policies and limited substance tests.[3]

The NCAA should no longer allow its members to control their own drug-testing programs. Instead, the NCAA and its member institutions should either petition the World Anti-Doping Agency to become signatories to the World Anti-Doping Code ("Code") or amend its drug-testing program to conform to the Code. Once member institutions become signatories to the Code, they should seek to have their drug-testing procedures solely administered either by the United States Anti-Doping Agency or by some other reputable third party.

II. HISTORICAL PRECEDENT

The NCAA began conducting drug testing on student-athletes at championship events in 1986 and four years later started its year-round program.[4] Part of the impetus for this change was a pending congressional probe

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only represent the NCAA year-round testing program and not all tests conducted by the NCAA and member institutions).

2. *See* Eddie Pells, *NCAA College Drug-Testing All Over the Map*, HUFFINGTON POST (Mar. 30, 2011) http://www.huffingtonpost.com/2011/03/30/ncaa-college-drugtesting-_n_842524.html.

3. Pilon, *supra* note 1 (Drug Free Sport does not administer unannounced tests, and college athletes can sometimes receive up to a day's notice of an impending test. Drug Free Sport advertises that all tests will be analyzed in a WADA certified laboratory but does check samples against the WADA banned substance list).

4. *See Understanding the NCAA's Drug Testing Policies*, NCAA, http://www.ncaa.org/health-and-safety/policy/drug-testing, (last visited Feb. 6, 2015).

and the threat of legislative oversight.[5] That move was 16 years in the making and required numerous surveys, committee investigations, and conference directives to member institutions.[6]

On July 17, 2000, Dr. Wade Exum, the former director of drug control administration for the United States Olympic Committee (USOC), filed a 42 U.S.C. § 1981 employment discrimination claim against the USOC.[7] In his complaint, Dr. Exum alleged the USOC was hostile towards his efforts to implement an effective doping control system and actively impeded those efforts.[8] Exum's complaint alleged she had personal knowledge of several high-level athletes failing drug tests at the Olympic Trials prior to the 2000 Olympic Games in Sydney Australia, but these athletes were not prevented from participating in the Games.[9] During litigation in the District Court of Colorado, the USOC motioned the Court to issue a protective order restricting disclosure of any document relating to individual athlete drug testing.[10] Exum's complaint came at a time when his position was being phased out of the USOC, and, since he tried negotiating a settlement with the USOC in lieu of

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5. *NCAA to Implement Drug Testing*, L.A. TIMES (Sept. 24, 1986), http://articles.latimes.com/1986-09-24/sports/sp-8886_1_drugs-testing-ncaa, 11/12/2014.

6. *See Key Dates in NCAA Drug-Testing History*, NCAA (Nov. 21, 2006), http://fs.ncaa.org/Docs/NCAANewsArchive/2006/Association-wide/key+dates+in+ncaa+drug-testing+history+-+11-20-06+ncaa+news.html.

7. Exum v. U.S. Olympic Comm., (D. Colo. 2003) (No. 1:00CV01421).

8. Steve Gutterman, *U.S. Olympic Leaders Accused of Doping*, ABC NEWS, http://abcnews.go.com/Sports/story?id=100883&page=1&singlePage=true (last visited Feb. 6, 2015).

9. *Id.*

10. Exum v. U.S. Olympic Comm., 209 F.R.D. 201, 204 (D. Colo. 2002).

litigation, his motivations have been called into question.[11] Regardless of Exum's motivation, his suit provides interesting context to the USOC's move to create an independent drug-testing authority.

On March 20, 2000, several months before Exum's resignation and lawsuit, the USOC created the United States Anti-Doping Agency (USADA).[12] The USOC formed the USADA in response to international criticisms its current doping control system lacked credibility.[13] The USADA took over doping control from the USOC on October 1, 2000, after the Sydney Olympic Games concluded.[14] Previously, the USOC provided specimen collection services for the various national governing bodies (NGBs) it regulated, but any sanctions related to a positive test for banned substances were left to the discretion of the individual NGB.[15]

In 2005, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the International Convention against Doping in Sport.[16] Countries that are party to the treaty must restrict the availability of prohibited substances to athletes, facilitate

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11. Alan Abrahamson, *USOC Official Made Big Demand*, L.A. TIMES (Sept. 30, 2000), http://articles.latimes.com/2000/sep/30/news/ss-29372, 11/12/2014.

12. Appellate Brief, Exum v. U.S. Olympic Comm., (Nos. 03-1256, 03-1280), 2003 WL 24033593, at *9.

13. *Independence & History*, USADA, http://www.usada.org/about/independence-history/ (last visited Feb. 18, 2015).

14. *Id.*

15. Appellate Brief, *supra* note 12, at *4.

16. *International Convention Against Doping in Sport 2005*, UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG. (Oct. 19, 2005), http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html.

doping controls, support national drug-testing programs, and withhold financial support from athletes who have committed doping infractions. Additionally, the countries must withhold financial support from sports organizations that do not comply with the World Anti-Doping Code, encourage transparency in labeling in the sports supplement industry, and support anti-doping education.[17] On August 4, 2008, after getting Senate approval, President Bush ratified the convention.[18]

American professional sports have come under scrutiny for what has been perceived as lax drug testing policies and procedures. The Clean Sports Act was drafted to mandate the American Professional Sports leagues address positive doping tests with punishments at least as strong as those of the World Anti-Doping Agency (WADA).[19] While the Clean Sports Act was not enacted, it started a national discourse concerning the problem of doping in professional sports. The Clean Sports Act may have partially come about in response to international pressure implying the United States was not committed to effective doping control. In 2003, Dick Pound, then president of WADA, proposed the international sports community ostracize the United States because of inadequate doping penalties in its professional sports

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17. *International Convention Against Doping in Sport 2005*, UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG. , http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/ (last visited Feb. 19, 2015).

18. *United States Ratifies International Convention Against Doping in Sport*, UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG. , (Aug. 6, 2008), http://portal.unesco.org/en/ev.php-URL_ID=43227&URL_DO=DO_TOPIC&URL_SECTION=201.html.

19. Paul H. Haagen, *The Players Have Lost That Argument: Doping, Drug Testing, and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 831 (2006).

leagues and because the United States had recently refused to meet a funding obligation to WADA.[20]

Since league rules in American professional sports are agreed upon through a collective bargaining process, organizations were, at first, recalcitrant in adopting drug-testing programs.[21] However, doping scandals and increased fan pressure have led American professional sports leagues to adopt at least some sort of protocol. Major League Baseball, for instance, adopted the revised Joint Drug Prevention and Treatment Program in 2013.[22] WADA Director General David Howman applauded MLB's efforts to enhance the effectiveness of its drug-testing protocol by adding human growth hormone testing seasonally along with longitudinal profiling for testosterone, and he commented that MLB has set the standard for professional leagues to follow.[23]

III. NCAA DRUG-TESTING PROGRAM

The NCAA's constitution[24] mandates member institutions be responsible for student-athlete welfare and wellbeing. Article 2.2 of the NCAA Division I bylaws states, "Intercollegiate athletics shall be conducted in a manner designed to protect and enhance the physical and educational

20. *IOC Urged to Make U.S. a Sports Outcast*, REDIFF INDIA ABROAD (Nov. 21, 2003), http://www.rediff.com/sports/2003/nov/21wada.htm.

21. Haagen, *supra* note 19, at 840.

22. Paul Hagen, *WADA Lauds MLB's Expanded Anti-Doping Testing*, MLB.COM (Jan. 31, 2013), http://m.mlb.com/news/article/41311348/wada-lauds-mlbs-expanded-anti-doping-testing.

23. *Id.*

24. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2014-15 NCAA DIVISION I MANUAL, art 2.2 (Aug. 1, 2014) [hereinafter NCAA DI MANUAL], *available at* http://www.ncaapublications.com/productdownloads/D115.pdf.

well-being of student-athletes."[25] Article 2.2.3 holds, "It is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes." [26] Operating under these simple policy statements, the NCAA sends the message its doping protocol has been created more to keep student-athletes safe than to try to identify and punish student-athletes for their conduct.

The NCAA's constitution continues to focus on how outside actors can influence student-athletes to students' detriment. Under Article 10.1(f), it is unethical for a prospective student-athlete, enrolled student-athlete, or any staff member to have a "[k]nowing involvement in providing a banned substance or impermissible supplement to student-athletes."[27] Of course, student-athletes are still ultimately responsible for the substances found in their bodies during drug tests, since student-athletes will be subject to penalties if they provide samples containing prohibited substances.[28] The NCAA bylaws list the classes of banned drugs and state that the Committee on Competitive Safeguards and Medical Aspects of Sports has the authority to identify specific drugs within those classes, even if those drugs are not explicitly listed as banned.[29] The NCAA bylaws further state that a student-athlete currently serving a doping suspension enacted by a national or international governing body acting under the WADA code shall be ineligible for collegiate competition.[30]

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25. *Id.*

26. *Id.* at art. 2.2.3.

27. *Id.* at art. 10.1(f).

28. *See NCAA Drug-Testing Program 2014-15*, NCAA, ch. 4, § 3.2, http://www.ncaa.org/sites/default/files/DT%20Book%202014-15.pdf (last visited Feb. 6, 2015).

29. *See* NCAA DI MANUAL, *supra* note 24, at art. 31.2.3.1.

30. *See id.* at art. 31.2.3.1.2.

While drug-testing procedures administered by the NCAA are in many ways similar to the most stringent international standards, Chapter V of the 2014-2015 NCAA Drug-Testing Program presents a weakness. This chapter details institutional drug testing not conducted by the NCAA.[31] Chapter V does not mandate or even suggest member institutions drug test student-athletes outside of any NCAA drug testing. Where a member institution wishes to create and implement a drug-testing program, Chapter V makes several recommendations but includes no requirements for member institutions to follow. Chapter V does not mandate the member institutions use the same banned substance list in their drug-testing program that the NCAA uses. Chapter V does not require the member institutions impose a specific penalty for positive drug tests. In fact, Chapter V does not command the member institutions to impose any penalty at all.

Obviously, member institutions prefer wide latitude in how they operate their athletic departments.[32] By giving member institutions this type of autonomy, the NCAA allows schools across the country with varying budgets and demographics to find systems best suited to their individual circumstances. This model might be appropriate for finding the best way to run an athletic department, but the resulting lack of consistency between schools and conferences is not

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31. *See NCAA Drug-Testing Program 2014-15*, *supra* note 28, ch. V at 12 (current NCAA drug-testing program gives NCAA authority to test at all championship events and to select individual student-athletes or entire athletic programs for year-round testing under certain circumstances).

32. *See* Michelle Brutlag Hosick, *Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014), http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure (describing recent change to Division I structure allowing Atlantic Coast, Big 12, Big Ten, Pac-12, and Southeastern conferences to change rules for themselves).

appropriate for an adequate drug-testing program. Where member institutions are not required to adopt a uniform drug-testing protocol, student-athletes at all member institutions suffer. If School A has stricter institutional standards for drug testing than School B, then the student-athletes at School A suffer, because they are subject to more onerous standards, and student-athletes at School B suffer, because it may be easier for them to get away with taking harmful substances. School B might have a less strict policy for budgetary reasons, but saving a small amount of money on the frontend might create a huge liability on the backend if a student-athlete provides a positive sample or is harmed as the result of taking a banned substance.

The only restriction that the NCAA Drug-Testing Program places on member institutions is found in Article 10.2, which says, "athletics department staff members . . . who have knowledge of a student-athlete's use at any time of a substance on the list of banned drugs . . . shall follow institutional procedures dealing with drug abuse or shall be subject to disciplinary or corrective action."[33] Essentially, Article 10.2 says member institutions must follow their own rules, but where a member institution has no rules, no action would need to be taken as the result of a positive drug test.[34]

IV. WORLD ANTI-DOPING CODE

The World Anti-Doping Code was developed and adopted in 2003, took effect in 2004, and was subsequently amended in 2009.[35] The World Anti-Doping Code has two

33. *NCAA Drug-Testing Program 2014-15*, *supra* note 28, at art. 10.2.

34. It is unlikely that any member institution has no institutional procedure for drug testing, but the absurdity of Article 10.2 is highlighted in this scenario.

35. *World Anti-Doping Code 2015*, WORLD ANTI-DOPING AGENCY, 4 https://wada-main-

basic purposes. The first purpose is "[t]o protect the *Athletes'* fundamental right to participate in doping-free sport and thus promote health, fairness and equality for *Athletes* worldwide."[36] The second purpose of the World Anti-Doping code is "[t]o ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping."[37] The Code strives for uniformity in implementation by focusing on core anti-doping principles, leaving some flexibility in individual implementation so that differently situated organizations may design anti-doping programs that will best fit their circumstances.[38] In order to achieve the second goal, uniformity in implementation, the Code provides International Standards and Models of Best Practice and Guidelines. International standards are mandatory technical and operational rules that signatories to the Code must follow, whereas the Models of Best Practices and Guidelines are recommendations signatories to the Code may choose to adopt.[39]

Under Article 23.1.2 of the World Anti-Doping Code, sports organizations other than those organizations required to accept the Code may become signatories to the Code upon invitation by WADA.[40] Signatories to the Code are required to accept certain articles of the Code. Those articles cover the Code's definition of doping and other

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prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf (last visited Feb. 19, 2015).

36. *Id,* at 11.

37. *Id.*

38. *Id.*

39. *Id.* at 12-13.

40. *Id.* at 120. (Article 23.1.1 lists the organizations that must be signatories to the Code. A comment to Article 23.1.2 indicates professional leagues not currently under the jurisdiction of a government of International Federation will be encouraged to accept the Code).

terms, anti-doping rule violations, proof of doping, specified substances, prohibited substance list, retirement procedures, automatic disqualification of individual results, individual sanctions, consequences to teams, appeals process, recognition of decisions, statute of limitations, and interpretation of the Code.[41]

V. NCAA APPEALS PROCESS

Once a banned substance is found in a student-athlete's urine sample, a series of coordinated events occur.[42] Section 8.2.2 of the NCAA Drug-Testing Program provides, "For student-athletes who have a positive finding of sample A, Drug Free Sport will call the director of athletics or his or her designee."[43] At this point, it is the member institution's responsibility to inform the student-athlete that the urine sample contains a banned substance.[44] Drug Free Sport will inform the director of athletics that both the institution and the student-athlete have the right to be represented at the laboratory when the second part of the initial urine sample is opened for testing.[45] This opportunity for representation during the second sample testing appears to have been implemented in order to create a transparent process that forecloses arguments of sample tampering.[46]

Once a banned substance is found in the student-athlete's sample B, Drug Free sport will notify the director

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41. *Id.* at 121.

42. It is important to note that at this stage in the process, the student-athlete's urine sample has been divided into two specimens, sample A and sample B.

43. *NCAA Drug-Testing Program 2014-15*, *supra* note 28, at § 8.2.2.

44. *See id.*

45. *Id.* at § 8.2.2.1.

46. While this process may appear to minimize the risk of tampering, it does not appear to afford student-athletes the right to seek and obtain independent testing of their samples.

of athletics and the institution will be required to declare the student-athlete ineligible.[47] Positive findings may be appealed to the NCAA competitive safeguards committee, but institutions are only required to file an appeal when the student-athlete requests an appeal.[48] The NCAA competitive safeguards committee is comprised of 20 members, with five positions for men, five positions for women, and 10 positions for either gender.[49] The committee must have two athletics directors or senior woman athletic administrators, one active coach, one member active in exercise physiology research, three members from the field of medicine (including one primary care team physician and one certified orthopedic specialist), one member responsible for an institutional athletic training program, one member representing the legal field, one member of the NCAA football rules committee, one member representing secondary school interest, one member active in sports medicine research, one member with expertise in drug testing, one student-athlete from each division sharing a combined vote, and two at large members.[50] The committee conducts the conference by telephone with the student-athlete and an athletics administrator is required to participate; student-athletes may designate a representative.[51] At least three committee members must

47. *See NCAA Drug-Testing Program 2014-15*, *supra* note 28, at § 8.2.3.2.

48. *See id.* at § 8.2.4.1.

49. *See Committee on Competitive Safeguards and Medical Aspects of Sports,* NCAA, http://www.ncaa.org/governance/committees/committee-competitive-safeguards-and-medical-aspects-sports (last visited Feb. 6, 2015)..

50. *See id.* There is only one circumstance under which a committee member may not participate based on a conflict of interest: when a committee member is employed by the member institution that is the subject of the appeal. *See id.*

51. *See NCAA Drug-Testing Program 2014-15*, *supra* note 28, at § 8.2.4.4.1.

hear the appeal, though it is possible for the entire committee to participate.[52]

The appeals process aspires to be anonymous, though anonymity is not a strict requirement.[53] Positive drug tests may be challenged for a procedural deficiency or on the grounds the student-athlete did not knowingly take the banned substance. A procedural challenge relating to the collection and testing of urine samples requires a student-athlete or institution show some procedural deficiency that, more likely than not, materially affected the integrity of the student-athlete's sample.[54] The committee can find no violation occurred where an institution or student-athlete can show the student-athlete was given a banned substance without his or her knowledge, as long as the student-athlete could not have reasonably known or suspected he or she was given the banned substance.[55] The committee can also find that no violation has occurred where the institution or student-athlete can show the student-athlete asked an appropriate athletics administrator specific and reasonable questions pertaining to a substance, medication, or product and that administrator assured the student-athlete that the substance, medication, or product did not contain a banned substance.[56] In this situation, the institution or student-athlete must show the student-athlete had no actual knowledge and should not have reasonably known the administrator provided erroneous information regarding the substance, medication, or product.[57] Institutions and student-athletes may provide any written materials

52. *See Drug Testing Appeals Process*, NCAA, § 1, http://www.ncaa.org/health-and-safety/policy/drug-testing-appeals-process (last visited Feb. 6, 2015).

53. *See id.* at § 3.

54. *See id.* at § 5(a).

55. *See id.* at § 5(b)(i).

56. *See id.* at § 5(b)(i)(i).

57. *See id.*

considered vital to the appeal to Drug Free Sport to be distributed to the subcommittee hearing the appeal.[58] Institutions are also specifically required to send all information pertaining to the drug-education program to Drug Free Sport for the subcommittee to determine the viability of that program.[59]

During the appeal, institutions will typically make an introduction, then the student-athlete will make an oral statement, and finally all parties will have an opportunity to ask and answer questions.[60] Following this process, all parties except for the subcommittee will leave the proceeding so the subcommittee may deliberate and come to a decision.[61] It is not clear how the subcommittee reaches its decision on appeals, other than by participating in a vote of some kind.[62] This appeals process provides no mechanism to review appeals. If the committee finds the institution or student-athlete has not met their burden during the appeal, the student-athlete will be prohibited from participating in competition for one year after the collection of the student-athlete's sample.[63]

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58. *See id.* at § 6.

59. *See id.* at § 7.

60. *See id.* at § 8.

61. *See id.* at § 9.

62. This can be inferred from the fact that the three student-athlete representatives from the three NCAA divisions combine for one vote. *Committee on Competitive Safeguards and Medical Aspects of Sports*, *supra* note 49.

63. *Drug Testing Appeals Process*, NCAA, http://www.ncaa.org/health-and-safety/policy/drug-testing-appeals-process (last visited Feb. 6, 2015) (under NCAA Bylaws 18.4.1.5.1, student-athletes who test positive for "street drugs" shall be ineligible to compete for a period equal to one half of their competitive season); *see also NCAA Drug-Testing Program 2013-14*, 12, *available at* https://www.ncaa.org/sites/default/files/5.%20Drug%20Testing%20Program%20Book%202013-14.pdf (last visited Feb. 6, 2015) (under

Sometimes, a student-athlete's testing sample will be found to contain a substance the student-athlete is taking for medical treatment. The NCAA will allow an exception in some cases, but the process for obtaining an exception can be complicated. Chapter II of the NCAA Drug-Testing Program details the medical exception process.[64] The NCAA will consider granting a medical exception to a student-athlete for the following classes of substances: stimulants, anabolic agents, beta-blockers, diuretics, peptide hormones and analogues, anti-estrogens, and beta-2 agonists.[65] In order for the NCAA to grant an exception for anabolic agents and peptide hormones, the member institution must seek approval from the NCAA by submitting a medical exception pre-approval form before the student-athlete participates in collegiate competition.[66] For all other classes of banned substances, institutions are expected to keep comprehensive documentation of the student-athlete's medical records and submit documentation in a medical exception request after the student-athlete has tested positive for a banned substance.[67]

VI. WORLD ANTI-DOPING CODE APPEALS PROCESS

The World Anti-Doping Code contains a broad appeals process, allowing for appeals both to the individual governing body finding the violation and to the Court of

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Section 9.0 of the NCAA Drug-Testing Program, student-athletes' eligibility may not be reinstated until they test negative for banned substances in an "exit test" administered by the NCAA).

64. *See NCAA Drug-Testing Program 2014-15*, *supra* note 28, at 2.

65. *See id.*

66. *See id.*

67. *See id.* (NCAA will not grant a medical exception for what it refers to as "street drugs").

Arbitration of Sport ("CAS"). The right to an appeal under the Code is first outlined in Article 8, which states:

> For any *Person* who is asserted to have committed an anti-doping rule violation, each *Anti-Doping Organization* with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason[s] for any period of *Ineligibility* shall be *Publicly Disclosed* as provided in Article 14.3.[68]

Article 8.5 provides a mechanism for direct appeals to CAS stating,

> Anti-doping violations asserted against *International-Level Athletes* or *National-Level Athletes* may, with the consent of the Athlete, the *Anti-Doping* Organization with results management responsibility, WADA, and any other *Anti-Doping Organization* that would have had a right to appeal a first instance hearing decision to *CAS,* be heard directly at *CAS,* with no requirement for a prior hearing."[69]

Any decision made under the Code or made under a rule adopted pursuant to the Code is subject to an appeal.[70] The Code provides a large scope of review, allowing for the appellate panel to review all issues relevant to the alleged doping infraction and not limited to the scope established by

68. *World Anti-Doping Code 2015*, *supra* note 35, at 57.

69. *Id.* at 59 (interested parties include the athlete, the anti-doping organization with results management responsibility, WADA, and any other anti-doping organization with a right to appeal).

70. *Id.* at 80.

the sanctioning body.[71] This effectively means bodies have de novo review power when hearing an appeal to an alleged doping violation. Furthermore, the ultimate arbitral body, CAS, is not required to give any deference to the sanctioning organization.[72]

Where an athlete subject to the World Anti-Doping code believes he or she has a justified reason to use a banned substance for medical purposes, he or she may apply for a therapeutic use exemption (TUE). A body deciding whether to grant a TUE must do so in accordance with the International Standard for Therapeutic Use Exemptions.[73] The process for athletes to apply for TUEs depends on their status as either national-level athletes or international-level athletes. National-level athletes apply for TUEs to their national anti-doping organization, while international-level athletes apply for TU's to the international federation.[74] Under some circumstances, an athlete may apply for a retroactive TUE.[75] WADA retains broad rights to review any TUE, and it must review a TUE granted or denied by a national anti-doping body to an international federation.[76] When WADA does not review or not reverse an international federation decision regarding a TUE, all interested parties to the CAS may appeal the decision.[77]

VII. BENEFITS TO THE NCAA

71. *Id.*
72. *Id.* at 81.
73. *Id.* at 31.
74. *Id.* at 31-32 (athletes may also apply for a TUE to a major event organization, but any TUE granted by that organization is effective for that event only).
75. *Id.* at 35 (this applies to athletes who are neither national-level athletes nor international-level athletes).
76. *Id.*
77. *Id.*

The NCAA is currently under an immense amount of scrutiny concerning student-athlete welfare.[78] By adopting the World Anti-Doping protocol and putting its members under the purview of the USADA, the NCAA can seriously bolster its assertion that student-athlete welfare is one of its top concerns. The NCAA's most aggressive critics assert the NCAA is run in a manner that exploits student-athlete labor for its own pecuniary gain, with the student-athlete being either uncompensated or undercompensated.[79] While a change in NCAA doping policy would not directly address the student-athlete compensation problem, it would go a long way toward showing that the NCAA does in fact have the student-athlete's best interests in mind.

The current NCAA doping model leaves too much room for abuse, either by student-athletes motivated to succeed at any costs or by athletic departments willing to

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78. Concussions and Chronic Traumatic Encephalopathy ("CTE") have dominated the headlines, with the NCAA recently reaching a proposed settlement of $70 million in a class action lawsuit over the issue. *See NCAA Reaches Proposed Settlement in Concussion Lawsuit*, NCAA (July 30, 2014), http://www.ncaa.com/news/ncaa/article/2014-07-29/ncaa-reaches-proposed-settlement-concussion-lawsuit. Although $70 million may seem insignificant compared to the $765 million settlement reached in a similar class action lawsuit against the NFL, the NCAA settlement only covers diagnostic expense for student-athletes and not treatment expenses. *See* Jon Solomon, *NCAA Settlement: Football Players Carry Three Times Risk of CTE Symptoms*, CBSSPORTS.COM (July 30, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24643655/ncaa-settlement-football-players-3-times-more-likely-to-have-cte-symptoms. Nevertheless, student-athletes in the class are not foreclosed from bringing suit against individual member institutions. *See id.*

79. Armstrong Williams, *WILLIAMS: The Exploitation of College Athletes*, THE WASHINGTON TIMES (Apr. 6, 2014), http://www.washingtontimes.com/news/2014/apr/6/williams-the-exploitation-of-college-athletes/.

turn a blind eye. Furthermore, the current NCAA approach places the student-athlete at odds with the NCAA and member institutions. Where drug tests can be administered by a disinterested third-party under a uniform policy and positive tests can be appealed to professional arbitral bodies, the perception that the NCAA or a member institution has acted in a biased manner toward a particular student-athlete would be greatly diminished.

Member institutions are currently expected to formulate and implement their own drug-testing programs while adequately educating and advising student-athletes regarding doping. These institutions must decide what type of drug-testing program can be feasibly administered based on their budget, student-athlete population, and athletic-department structure. If member institutions, instead of implementing their own drug-testing programs, had a uniform protocol they could implement without having to invest their own resources, those resources could be reallocated more properly. Furthermore, the risk of member institution practices being called into question if a student-athlete has a positive test would be greatly minimized.

VIII. DRAWBACKS FOR THE NCAA

This proposal presents a drastic difference from the status quo in the NCAA drug program. By adopting the World Anti-Doping Code, the NCAA and member institutions would be held to a much higher standard, and with higher standards come higher costs. Member institutions often conduct screens for a limited number of substances, because the cost is thus substantially less.[80] Additionally, conducting appeals through a third-party arbitrator would cost a considerable amount more, since the current appeal system in the NCAA uses an NCAA

80. Pilon, *supra* note 1.

committee and does not appear to cost a member institution anything. In the Court of Arbitration for Sport, each party must pay a minimum of 1,000 Swiss francs and must pay 250-400 Swiss francs for an arbitrator's hourly fee.[81] However, the NCAA can still retain control over the first appeal in a doping violation, since Article 13 of the World-Anti Doping Code does not foreclose a signatory from performing its own post-decision review and, in fact, limits the appeals process based on whether an appellant has exhausted the post-decision review process.

By becoming a signatory to the World Anti-Doping Code, the NCAA and its member institutions would lose a significant amount of control over their own affairs, at least regarding drug testing. The NCAA has historically fought to maintain its autonomy, arguing its model, uniquely based on the concepts of amateurism in athletics, requires regulations that create the most level playing field for all member institutions.[82] However, the NCAA's efforts to self-regulate in the past have largely been based on attempting to ensure all member institutions have equal opportunities to generate revenue and therefore opportunities to be competitive. Adopting the World Anti-Doping Code would place all

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81. *Arbitration Costs*, COURT OF ARBITRATION FOR SPORT, http://www.tas-cas.org/en/arbitration/arbitration-costs.html (last visited Feb. 19, 2015). *See also American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes*, AM. ARBITRATION ASS'N 1, 4, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004136&RevisionSelectionMethod=LatestReleased (last visited Feb. 19, 2015) (American Arbitration Association is the designated arbitration organization for USADA and bases its fees on CAS fees).

82. *See generally* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 96 (1984) (NCAA argued restricting television broadcasts of college football preserved competitive balance among all member institutions).

member institutions on an even playing field, since all student-athletes would be subject to the same rules and testing procedures year-round. By giving up some power over their own affairs, member institutions would gain an outcome that addresses a core concept of the NCAA model, with member institutions and ultimately student-athletes having an equal opportunity to compete regardless of resources.

IX. BENEFITS TO STUDENT-ATHLETES

If the NCAA and its member institutions become signatories to the World Anti-Doping Code, student-athletes will be guaranteed their competitors will be subjected to the same rigorous drug-testing protocols they are. No longer would institutional policies dictate the methods of testing and the penalties imposed for testing positive, as they have in the past and do currently.[83] The fairness and transparency provided by the Code could also potentially keep student-athletes from making the decision to take a banned substance based on the belief their competitors may be taking it, as well. The NCAA has placed an emphasis on ensuring a fair playing field between member institutions, and a move toward a stricter and more uniform doping code would do the same thing for student-athletes.

A great majority of student-athletes are legally adults, and as adults they are expected to make mature decisions about their personal health and integrity. Student-athletes are held personally accountable for what they put into their bodies, but the current NCAA drug-testing program leaves the door open for abuse. The constant pressure for results on the field can lead student-athletes to

83. *See* Pells, *supra* note 2 (discussing institutional drug policies "as varied as the schools themselves").

make poor decisions.[84] The pressure to succeed is often coupled with the reality that a student-athlete's scholarship depends on how he or she performs, and the prospect of losing tens of thousands of dollars in scholarship money can lead some down the wrong path.[85] A fairly implemented, uniform drug-testing policy might take away some of the incentive for student-athlete drug use.[86] Where the testing is more comprehensive, regularly administered, and strictly enforced, the incentive to use banned substances diminishes. Any drug-testing program deals with the reality of actors trying to beat the system, but the stakes in the NCAA are too high not to have the most comprehensive system possible.

The following table represents reported ergogenic drug use by Division I men's sports. This data was taken from a 2013 survey given by the NCAA to 21,000 student-athletes. This data shows a significant number of student-athletes have taken substances included on the NCAA banned substance class list, especially amphetamines. This table does not show data on marijuana use, a substance banned both by the NCAA and WADA. Of student-athletes

84. *See generally* Andrea Petróczi & Eugene Aidman, *Psychological Drivers in Doping: The Life-Cycle Model of Performance Enhancement*, SUBSTANCE ABUSE TREATMENT, PREVENTION, POLICY 3, 7 (2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2315642/.

85. NCAA DI MANUAL, *supra* note 24, at art. 15.3.4.3 (an institution may not cancel a student-athlete's financial aid based on performance, but if the award agreement is only for one year, the institution may choose not to renew the student-athlete's financial aid).

86. In a 2013 survey completed by 21,000 student-athletes, 60 percent reported that they saw drug testing as a deterrent. *See NCAA Student-Athlete Substance Use Study: Executive Summary August 2014*, NCAA, http://www.ncaa.org/about/resources/research/ncaa-student-athlete-substance-use-study-executive-summary-august-2014 (last visited Feb. 6, 2015).

surveyed, 21 percent reported that they had used marijuana within the prior 12 months.[87]

87. *See NCAA National Study of Substance Use Habits of College Student-Athletes*, NCAA, 32, (July 2014), http://www.ncaa.org/sites/default/files/Substance%20Use%20Final%20Report_FINAL.pdf.

Overall Percentage of Use Within Last 12 Months[88]									
Year	Baseball	Basketball	Football	Track	Ice Hockey	Lacrosse	Soccer	Swimming	Wrestling
Amphetamines	8.8%	1.8%	3.9%	11.9%	6.8%	16.7%	3.4%	5.2%	11.9%
Anabolic Steroids	0.7%	0.4%	0.7%	0.6%	0.5%	1.7%	0.0%	0.0%	0.6%
Ephedrine	0.1%	0.7%	0.4%	0.5%	1.0%	2.5%	0.4%	0.4%	0.0%

The data from this survey suggests the current NCAA drug-testing program does not sufficiently deter the use of banned substances by student-athletes. No drug-testing program will ever be able to fully eliminate the use of banned substances, but the disparity between reported use and positive drug tests in collegiate athletics is too high, and ultimately it is the student-athletes who suffer from that disparity.

88. *See id.* at 63. Tennis and golf were left off this table for formatting reasons, but both sports had similar data to soccer. Female student-athletes' reported use of substances is substantially lower than that of male student-athletes. *See id.* at 64.

X. IMPLEMENTATION

In the past, WADA has urged professional sports leagues to adopt the World Anti-Doping Code.[89] In 2009, FIFA, the international governing body responsible for soccer adopted the World Anti-Doping Code.[90] FIFA has been viewed as a progressive partner in WADA's mission to eliminate sports doping and has been praised by the world organization for its efforts to implement wide-scale and effective doping controls in World Cup competition.[91] One of the main hurdles to professional sports leagues adopting the World Anti-Doping Code has been the collective bargaining agreements negotiated between players' associations and the leagues, with players' associations reluctant to place doping control under the authority of a third-party actor.[92] Since NCAA athletes are not generally considered employees, the NCAA does not have the duty to negotiate with a players' association to formulate and institute its rules.[93]

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89. Barry M. Bloom, *WADA Head Urges MLB to Adopt its Code*, MLB.COM (July 8, 2009), http://m.mlb.com/news/article/5767006/.

90. Graham Dunbar, *FIFA Backs WADA Code and Promised to Fight Doping with 'All Possible Means'*, USA TODAY (Dec. 19, 2014, 7:16 PM), http://webcache.googleusercontent.com/search?q=cache:RikmdUM79r4J:www.usatoday.com/sports/soccer/2008-02-29-2225821037_x.htm&client=safari&hl=en&gl=us&strip=1 (Google Cache) (last visited Feb. 6, 2015).

91. David Owen, *WADA Welcomes FIFA Anti-Doping Initiative*, INSIDETHEGAMES.BIZ, (June 18, 2014), http://www.insidethegames.biz/sports/summer/football/732-world-cup/1020800-wada-welcomes-fifa-anti-doping-initiative.

92. *See* George T. Stiefel III, *Comment, Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 BUFF. L. REV. 1225, 1279 (2008).

93. Courts have generally held student-athletes are not employees. *See* Waldrep v. Texas Employers Ins. Ass'n, 21 S.W.3d 692 (Tex. App. 2000) (holding a former NCAA football player was not an employee of

The NCAA could adopt the World Anti-Doping Code wholesale, in which case the association would most likely need to amend its constitution to reflect that adoption as a fundamental policy. If the NCAA amended its constitution in this manner, it could only do so at an annual or special convention and by a two-thirds majority vote of all delegates present and voting in joint session.[94] A vote under this scenario would apply to all divisions in the NCAA.[95] Alternatively, the NCAA could amend its current doping program to conform with the World Anti-Doping Code. Since this method would avoid amending the NCAA constitution, it could be adopted at a meeting by the board of directors or legislative council.[96] Member institutions may override legislation adopted by the board of directors or legislative council only by a five-eighths majority vote.[97] This approach would create a more realistic opportunity for the NCAA to adopt the World Anti-Doping Code than an

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the university for worker's compensation purposes); *but see* Northwestern Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359 (NLRB, Reg. 13, March 26, 2014), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4581667b6f (college football scholarship players at Northwestern University are employees under the NLRA and are entitled to vote on a collective bargaining representative).

94. *See* NCAA DI MANUAL, *supra* note 24, art. 5.3.7.2 at 35 (describing the procedure for an adoption of a "dominant provision"). "A dominant provision is any regulation that applies to all members of the association and is of sufficient importance to the entire membership." *See id.* at art 5.02.1.1. Further, 40 members from each division shall be present at the annual or special convention for voting purposes. *See id.* at art. 5.1.4.1.

95. Similarly, a two-thirds majority vote of present delegates is also required for amendments that affect only the membership of a specific division. *See id.* at art. 5.3.7.3.

96. *See id*. at art. 5.3.2.1. Legislation adopted by the legislative council is always subject to review by the board of directors. *See id.* at art. 5.3.2.2.4.1.

97. *See id*. at art. 5.3.2.3.6.

American professional league would have, since professional leagues can only negotiate collective bargaining agreements once a year, with some agreements remaining in force for several years.[98] This type of change is unlikely to happen overnight, and the NCAA would most likely need to vet the proposal through its committee process, but any work on the front end would be returned many times over if the NCAA could bring itself up to the world standard of doping control.

Perhaps the largest impediment to the NCAA's adoption of a broader anti-doping program is the cost associated with administration and execution. Across all divisions, approximately 460,000 student athletes compete in collegiate athletics.[99] Of those 460,000 student-athletes, nearly 50,000, or 10.87 percent, participate in championship competition.[100] Using the 10.87-percent participation rate, it is safe to assume that, of the 170,000 Division I student-athletes, approximately 18,500 participate in championship competition.[101] In 2010, the head of USADA, Travis Tygart, commented that the drug tests cost between $200 and $400, depending on whether the test is only looking for EPO or also screening for HGH.[102] Based on those figures, it would

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98. The current NFL collective bargaining agreement was adopted in 2011 and continues to remain in force. *NFL Collective Bargaining Agreement*, xiv, (Aug. 4, 2011), *available at* http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA.pdf.

99. *See Student-Athletes*, NCAA, http://www.ncaa.org/student-athletes (last visited Feb. 8, 2015).

100. *See Championships*, NCAA, http://www.ncaa.org/about/what-we-do/championships (last visited Feb. 8, 2015).

101. *See NCAA Division I*, NCAA, http://www.ncaa.org/about?division=d1 (last visited Feb. 8, 2015).

102. *Money Not a Factor in USADA's Drug Testing Program. Mayweather-Mosley Drug Tests Cost $6,400-$12,800*, EXAMINER.COM (June 14, 2010, 6:28 PM), http://www.examiner.com/article/money-

cost between $3.7 million and $7.4 million to drug test the 18,500 Division I championship-caliber student-athletes three times a year, which accounts for one test during championship competition and two random tests during the year.[103] Drug tests designed to screen a larger group of banned substances are inherently more expensive, and the appeals process outlined by the World Anti-Doping Code would cost much more than the current NCAA process.

However, the NCAA currently has a reserve of $530 million in unrestricted assets.[104] Part of those funds could potentially be used to help institute a broader anti-doping program and could even be replaced by increased revenue.[105] Additionally, member institutions could allocate funds they are currently using on their own drug-testing programs to the NCAA, with the NCAA surveying member institutions on how much they spend on drug-testing programs and institute a base contribution based on the average, with an additional contribution based on a program's size. It is also important to note the NCAA would not be required to drug test every single student-athlete. In its guidelines for signatories to the World Anti-Doping Code, WADA suggests a drug-testing program identify an

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not-a-factor-usada-s-drug-testing-program-mayweather-mosley-drug-tests-cost-6-400-12-800.

103. These figures should be considered high, since not every competitor at a championship is typically drug tested. It should be noted that these figures reflect only drug-testing costs and do not account for administrative costs.

104. *See The NCAA Budget: Where the Money Goes*, NCAA, http://www.ncaa.org/health-and-safety/ncaa-budget-where-money-goes (last visited Feb. 8, 2015).

105. It is possible that a move to increase doping control could be viewed as a proactive move by the NCAA to protect student-athlete welfare. This perception could contradict the increasing sentiment that the NCAA is profiting from the athletic abilities of student-athletes without giving them fair compensation.

athlete pool composed of athletes who regularly compete at the international level.[106] In the context of collegiate competition, this could mean the athlete pool may only consist of athletes who either have competed at the national level or can be reasonably expected to compete at the national level.

XI. CONCLUSION

While the financial implications of this proposal may seem high, the reality is the NCAA is a nonprofit organization operating based on certain core values. Those values include a dedication to the collegiate model and a dedication to sportsmanship and integrity, and they do not include a dedication to profit maximization.[107] Cost of implementation and administrative feasibility are poor arguments against taking action to ensure student-athlete wellbeing. The NCAA and many of its member-institutions already spend a considerable amount of money on drug testing and drug education. While this proposal might require funds beyond those already allocated to drug testing, it does not suggest funding for an entirely new program be diverted from existing programs. Instead, this proposal would have the NCAA and member institutions pool the funds they currently allocate to drug testing and education in order to administer a uniform program.

Student-athletes represent a unique segment of the sporting world. These young people have the incredible opportunity to compete for their schools while obtaining an education, but the current NCAA drug-testing program places this already vulnerable group in an even more precarious position. The autonomy given to member institutions under Chapter V of the NCAA Drug-Testing

106. *See World Anti-Doping Code 2015*, *supra* note 35, at 28.

107. *See NCAA Core Values*, NCAA, http://www.ncaa.org/about/ncaa-core-values (last visited Feb. 8, 2015).

Program is at odds with some of the basic, foundational premises of the NCAA Constitution. The hope is that student-athletes will always make the right decisions, but that should not be left to chance when the stakes are so high. Both student-athletes and athletic departments are under immense pressure to perform on the field, and the current NCAA drug-testing program leaves the unscrupulous too many opportunities to gain unfair advantages and places too many student-athletes at risk of undue harm. If the NCAA is serious about following its core values and placing student-athlete welfare above all other priorities, then it should take a real look at the way it addresses drug testing. Without making substantial changes to its drug-testing program and taking the doping issue head on, the NCAA is setting itself up for a major fall when the inevitable scandal occurs.

ENFORCING DRUG POLICIES IN COLLEGE SPORTS:
The Federal Government and NCAA

Tyler Brown*

In the article *NCAA Drug-Testing: It's Time to Change*, Jason Lewis draws the valid conclusion that the NCAA's approach to drug testing is fractured and ineffective. According to Lewis, criticism lies against the NCAA's drug-testing process because member institutions are primarily responsible for drug testing their own student-athletes, while the NCAA conducts its own drug testing of student-athletes primarily only in championship competitions. Lewis makes the point that member institutions are not required to develop drug-testing programs, and, moreover, where a member institution does decide to implement its own drug-testing program, the NCAA simply offers guidance and does not mandate instructional protocol.

According to Lewis, this lack of consistency created by the current drug-testing process creates room for abuse, by either student-athletes or member institutions. Lewis suggests a new structure that the NCAA and member institutions could adopt to create consistency among NCAA collegiate athletic institutions. Lewis proposes that the NCAA and its member institutions become signatories to the World Anti-Doping Agency (WADA)'s World Anti-Doping Code (WADC or the "Code") or, alternatively, amend their drug-testing programs to conform to the Code. Is this proposal the most feasible approach?

To be sure, Lewis's proposal is an ideal approach, but, as Lewis points out, by adopting the Code, the NCAA and member institutions would be held to a much higher standard. Accordingly, the NCAA and its member

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institutions would lose a significant amount of control over their own affairs. Indeed, as Lewis mentions, a more strict and consistent drug-testing program would saddle the NCAA and member institutions with increased financial burdens.

Although it may be true that the NCAA exists today "to govern competition in a fair, safe, equitable, and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount,"[1] it is also true that the NCAA is a private organization, made up of more than 1,000 active member institutions, colleges, and universities representing diverse student bodies, educational missions,[2] and various athletic budgets.[3] Over the past few decades, the NCAA has become increasingly powerful, due in large part to the growing popularity of college sports on television and through other media outlets.[4] Because member institutions and the NCAA prefer wide latitude in how they operate their athletic institutions, and because of the financial burdens of implementation and administration

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1. *Division II Strategic Positioning Platform*, NCAA, http://www.ncaa.org/governance/committees/division-ii-strategic-positioning-platform (last visited Apr. 16, 2015).

2. *See NCAA Membership*, NCAA, http://www.ncaa.org/about/who-we-are/membership (last visited Apr. 16, 2015).

3. *See* Christopher Schnaars et al., *Sports' College Athletics Finances*, USA TODAY (May 16, 2012, 8:14 AM), http://usatoday30.usatoday.com/sports/college/story/2012-05-14/ncaa-college-athletics-finances-database/54955804/1.

4. *See, e.g.*, Darren Rovell, *Once an Afterthought, the Dance Is Now Big Business*, ESPN (Oct. 11, 2005, 1:44 PM), http://proxy.espn.go.com/espn/print?id=2186638&type=story; *see also* David Davenport, *Legal Cases Are Blowing Up the NCAA Big Business Model – Why It Matters*, FORBES (Aug. 11, 2014, 5:17 PM), http://www.forbes.com/sites/daviddavenport/2014/08/11/legal-cases-are-blowing-up-the-ncaa-big-business-model-why-it-matters/.

of a strict and consistent drug-testing program, the likelihood of the NCAA and member institutions adopting the Code are probably very slim.

Accordingly, it may be safe to assume two conclusions. First, member institutions are probably not willing to change the NCAA's rules if those changes will decrease the autonomy of their athletic programs or if the amended rules might impose additional financial burdens. And second, the NCAA's amended drug-testing program will only ever be as strict or as well funded as the member institutions would require. Given these assumptions, the *federal government* may be the only entity capable of creating and enforcing drug-testing rules and regulations that govern intercollegiate athletics.

Perhaps the greatest obstacle to the federal government seizing control over the NCAA's regulatory function, however, is the Ted Stevens Amateur Sports Act, particularly the section on "restricted amateur athletic competition."[5] The act reads in relevant part:

> An amateur sports organization that conducts amateur athletic competition shall have exclusive jurisdiction over that competition if participation is restricted to a specific class of amateur athletes, such as high school students, college students, members of the Armed Forces, or similar groups or categories.[6]

Due to this federal legislation, the NCAA has exclusive regulatory jurisdiction over its own competitions. In order for the federal government to have regulatory power over the NCAA, this section of the United States Code would need to be removed or amended.

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5. *See* 36 U.S.C. § 220526(a) (West 2014).
6. *Id.*

If this code section were removed or amended, then under Congress's power to regulate interstate commerce,[7] Congress could potentially regulate college athletics through legislation or perhaps through the creation of a federal agency exclusively tasked with regulating college athletics.[8] Proponents of a federal regulatory plan believe a new federal agency could be placed under the Department of Education, could be charged with creating rules and regulations governing college athletic competitions, and could be empowered to enforce its rules.[9] The agency could be "funded through a tax on the revenue of college athletic departments, conferences . . . or even through the general revenue of the United States."[10]

The final step would be to mandate that universities comply with the rules of the federal agency. One method to force universities to comply would be to tie compliance to federal student aid.[11] Indeed, federal funding for education is already used to force member institutions to comply with Title IX.[12]

Under this federal agency approach, the federal government could assume the NCAA's regulatory functions,

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7. *See* United States v. Lopez, 514 U.S. 549, 559 (1995) (holding that Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce).

8. John Infante, *NCAA Miami Problems Show Need for Federal Takeover*, ATHLETICSCHOLARSHIPS.NET (Jan. 23, 2013), http://www.athleticscholarships.net/2013/01/23/ncaa-federal-takeover.htm.

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* 20 U.S.C. §§ 1681-1688 (codifying Title IX of the Education Amendments of 1972); *see also* 34 C.F.R. §§ 106.1-106.71 (identifying the purpose of 34 C.F.R. § 106 as to effectuate Title IX of the Education Amendments of 1972, as codified in 20 U.S.C. §§ 1681-1688).

and therefore it might be in the best position to force member institutions to comply with the Code. The federal agency could require that member institutions adopt the Code, and, moreover, the agency could then appoint the United States Anti-Doping Agency to administer the drug-testing procedures. The NCAA could then be "left to run championships and distribute revenue," which could be taxed to pay for the federal regulatory responsibilities.[13] Although this proposition may seem out of the ordinary, it presents an alternative solution to the NCAA drug-testing problem.

Granted, empowering the United States Congress with the ability to legislate drug-testing policies over college athletic institutions would not come without criticism. While Congress has not notably attempted to legislate drug-testing policies regarding college athletics in particular, Congress has on numerous occasions attempted to legislate drug-testing policies over professional athletics, albeit generally unsuccessfully.[14]

First and foremost, the critics of congressional legislation governing drug testing in the private sports industry are sure to cite constitutional concerns.[15]

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13. Infante, *supra* note 8.

14. *See, e.g.*, Clean Sports Act of 2005, S. 1114, 109th Cong. (2005); Office of National Drug Control Reauthorization Act, H.R. 2564, 109th Cong. (2005); Drug Free Sports Act, H.R. 1862, 109th Cong. (2005); Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong. (2005).

15. *See, e.g.*, *Drugs in Sports: Compromising the Health of Athletes and Undermining the Integrity of Competition: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce and H.R.*, 100th Cong. (2008) (statement of Donald Fehr, Executive Director, Major League Baseball Players Association), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg49522/html/CHRG-110hhrg49522.htm.

Constitutional critics might point out that "suspicionless drug testing,"[16] mandated by the federal government, can run afoul of the general Fourth Amendment requirement that searches must be based on individualized suspicion of wrongdoing.

In addition to the constitutional critics, other critics suggest that the involvement of an entity like the WADA will simply not improve the current system in any respect.[17] These critics believe that athletic programs are "already managed by independent entities and individuals with substantial expertise and integrity."[18]

Finally, perhaps the most significant critic of increased legislation surrounding drug testing in the sports industry is President Barack Obama. Indeed, President Obama admitted that "congressional hearings around steroid use is [sic] not probably the best use of congressional time."[19] President Obama believes that the drug-testing issue is primarily a problem that those in the sports industry need to solve for themselves.[20]

On the other hand, Senator John McCain is sure to point out that there are many issues that Congress would much rather address, and, but for the nonfeasance of athletic institutions, Congress would not be attempting to take

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16. *Id.*

17. *See id.* (statement of David Stern, Commissioner, National Basketball Association).

18. *Id.*

19. Ben Pershing, *Obama Differs with McCain on Steroids*, THE WASHINGTON POST (Oct. 2, 2008, 11:57 AM), http://voices.washingtonpost.com/44/2008/10/obama-takes-swipe-at-mccains-s.html (statement of President Barack Obama).

20. *See* Walter T. Champion & Danyahel Norris, *Obama vs. Bush on Steroids: Two Different Approaches to a Pseudo-Controversy — Or Is It Really Worthy of Note in a State of the Union Address?*, 36 T. MARSHALL L. REV. 193, 199-204 (2011).

action.[21] Other proponents of federal legislation point out that perhaps the critics have simply the "wrongheaded idea that the unique nature of sports makes impossible a positive federal role in fixing this problem."[22] These proponents point out that sports leagues in other nations are overwhelmingly "subject to independent drug testing and enforcement agencies that are, one way or another, governmental or quasi-governmental bodies."[23] For example, Australia operates the Australian Sports Drug Agency.[24] But ultimately, proponents of federal legislation governing drug-testing point out that perhaps the critics are most concerned about the bottom line: money. According to Major League Baseball player Jose Canseco, if Congress does not take action, sports institutions "will not regulate themselves" and drug-testing issues "will go on forever."[25] And in the end, it may all boil down to "making money."[26] Indeed, any legislation that potentially affects the budgets of sports institutions will likely be adamantly opposed.

The NCAA's approach to drug testing is fractured and ineffective. Lewis offers the proposition that the NCAA and its member institutions should either become signatories

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21. *John McCain Wants USADA to Oversee Pro Sports' Testing*, CBS SPORTS (May 24, 2005, 6:43 PM), http://www.cbc.ca/sports/john-mccain-wants-usada-to-oversee-pro-sports-testing-1.565189.

22. Robert Housman, *Steroids and the Feds*, THE WASHINGTON TIMES (April 5, 2005), http://www.washingtontimes.com/news/2005/apr/5/20050405-095934-9345r/?page=all.

23. *Id.*

24. *Id.*

25. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the Comm. on Gov't. Reform H.R.*, 109th Cong. (2005) (statement of Jose Canseco, former Oakland Athletic and Texas Ranger), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg20323/html/CHRG-109hhrg20323.htm.

26. *Id.*

to the Code or amend their drug-testing programs to conform to the Code. While this proposition is valid, another solution may be found through the involvement of the federal government. The federal government would need to repeal or amend existing legislation that is currently preventing it from regulating intercollegiate sports and then subsequently assume the NCAA's regulatory functions. While this plan could face strong opposition, as indicated by recent legislation attempting to govern professional athletic programs, it is another viable solution in the attempt to force the NCAA and its member institutions to comply with the World Anti-Doping Code.

THE END GAME:
How the NCAA Has Failed to Prepare Student-Athletes for Careers After Sports

Maggie Wood*

I. INTRODUCTION

Unfortunately, society has gotten into "'the habit of having athletes spend the first quarter or third of their lives making stories and the rest of their lives telling those stories.'"[1] Two years ago, my brother, Sean, graduated from college with a bachelor's degree in Business Management. He attended a small, private liberal arts college that was a member of Division I of the National Collegiate Athletic Association (NCAA). Sean and I were both fortunate to receive scholarships to play golf for this institution.

I always knew I was not going to play golf after graduation. Golf had always been a means to an end, a way to receive a quality education. This worked out well for me because, at our school, student-athletes were, first and foremost, students. Sean's ambitions differed from my own; he was an exceptional player with aspirations of playing golf professionally. When he graduated in 2012, he started playing professional golf mini-tours. Although he was playing well and racking up multiple top-10 finishes, his medical condition made it impossible for him to practice. Medical specialists informed Sean that he had fractured a vertebrate and would have to cease practicing and playing golf immediately or risk becoming paralyzed. His condition

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1. Sam Riches, *How We Set Up Our Professional Athletes to Fail*, PAC. STANDARD, (Feb. 18, 2014), http://www.psmag.com/navigation/business-economics/professional-athletes-set-fail-74247 (quoting Andy Billings, professor at the University of Alabama Sport's Communication Program).

took more than a year and a half to heal. During that time, Sean was unable to practice.

Sean panicked, because his back took longer than expected to heal. It was the first time he was faced with the possibility that he would not play professional sports, and he did not have a backup plan. Sean had obtained a college degree, but his only non-academic experience was playing golf.

Sean's story does not suggest that all student-athletes are unprepared for non-sport-related careers after they graduate from college. On the contrary, many student-athletes are either in careers they prefer or are on their way to obtaining post-graduate degrees.[2] However, Sean's experience is not unique. More than 15 percent of student-athletes graduate without having thought of a career outside of sports.[3] The NCAA has even acknowledged that only 55 percent of student-athletes start planning for careers during college.[4]

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2. These professions include engineering, marketing, teaching, and physical therapy.

3. *See* Brandy Sue Leffler, PERCEPTIONS OF SPORT RETIREMENT BY CURRENT STUDENT-ATHLETES 109 (2012), *available at* http://scholar.utc.edu/cgi/viewcontent.cgi?article=1044&context=theses&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Fsearch%3Fclient%3Dsafari%26rls%3Den%26q%3D15%2525%2Bof%2Bstudent%2Bathletes%2Bno%2Bcareer%26ie%3DUTF-8%26oe%3DUTF-8#search=%2215%25%20student%20athletes%20no%20career%22.

4. News Release, *College Athletes Optimistic About Financial Future, But Survey Shows Unrealistic Expectations*, NCAA (Oct. 24, 2005), http://fs.ncaa.org/Docs/PressArchive/2005/Corporate%2BNews/College%2BAthletes%2BOptimistic%2BAbout%2BFinancial%2BFuture%2BBut%2BSurvey%2BShows%2BUnrealistic%2BExpectations.html.

Less than two percent of student-athletes will play professional sports after graduating from college;[5] despite this low number, many collegiate student-athletes believe they will play professional sports.[6] Even those who do play professionally have very limited career spans. For instance, baseball is the sport with the highest percentage of student-athletes playing professionally, but the average length of a professional baseball player's career is only five and a half years.[7] Even grimmer, the average length of a professional football career is only three and a half years.[8] With so few student-athletes having a lasting professional career in sports, it is imperative they receive career guidance while in college.

The NCAA commits itself to ensuring the welfare of its student-athletes and states that "it is the responsibility of each member institution to establish and maintain an environment in which a student-athlete's activities are conducted as an integral part of the student-athlete's

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5. *See Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, NCAA RESEARCH (Sept. 24, 2013), https://www.ncaa.org/sites/default/files/Probability-of-going-pro-methodology_Update2013.pdf (baseball is an exception, as 9.4 percent of NCAA student-athletes playing baseball turn professional).

6. Scott D. Sandstedt et al., *Development of the Student-Athlete Career Situation Inventory (CACSI)*, 31 J. CAREER DEV. 79, 80 (2004); Shaun C. Tyrance et al., *Predicting Positive Career Planning Attitudes Among NCAA Division I College Student-Athletes*, 7 J. CLINICAL SPORT PSYCHOL. 22, 32 (2013).

7. *See* Richard T. Karcher, *Rethinking Damages to Lost Earning Capacity in a Professional Sports Career: How to Translate Today's Athletic Potential into Tomorrow's Dollars*, 14 CHAP. L. REV. 75, 128 (2010) (citing Sam Roberts, *Just How Long Does the Average Baseball Career Last?*, N.Y. TIMES (July 15, 2007), http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html).

8. Nick Schwartz, *The Average Career Earnings of Athletes Across America's Major Sports Will Shock You*, USA TODAY (Oct. 24, 2013), http://ftw.usatoday.com/2013/10/average-career-earnings-nfl-nba-mlb-nhl-mls.

educational experience." [9] However, student-athletes' athletic activities can more often than not overshadow the career preparation part of their educational experience. [10] Although most schools have career development programs for the general student body, it is not sufficient to merely make them available for student-athletes. Career development is "the creation of realistic and mature career plans based on one's interests, goals, aptitude, and awareness of vocational options and requirements."[11] This article suggests that student-athletes encounter structural and institutional challenges unlike the challenges typical of the general student population. [12] These additional challenges make it less likely that student-athletes will independently seek out career services and participate in adequate career development.[13] Therefore, the NCAA must require its member institutions to provide career services and must also hold the institutions accountable for preparing their student-athletes for careers outside of sports.

II. BACKGROUND

This section will explore the multiple factors that are a part of a student-athlete's academic and career success. First, it will discuss how the NCAA is currently structured to ensure that student-athletes achieve academic success. Second, it will examine graduation rates as an indicator of

9. NAT'L COLLEGIATE ATHLETIC ASS'N, 2014-15 NCAA DIVISION I MANUAL §§ 2.1, 2.2.1 (Aug. 1, 2014) [hereinafter NCAA DI MANUAL], *available at* http://www.ncaapublications.com/productdownloads/D115.pdf..

10. *See* Tyrance, *supra* note 6, at 23.

11. *Id.*

12. W. Matthew Shurts & Marie F. Shoffner, *Providing Career Counseling for Collegiate Student-Athletes: A Learning Theory Approach*, 31 J. CAREER DEV. 95, 95 (2004).

13. Sandstedt, *supra* note 6, at 80.

the NCAA's impact on student-athletes' academic performance.

This section will also discuss the NCAA's attempt to provide career assistance and the various institutional level efforts to provide career development assistance to student-athletes. This section will then explore post-college experiences of student-athletes in the workplace. Finally, it will survey the various ways that the NCAA and its institutions fund athletic departments.

A. The History of the NCAA

The NCAA was founded in 1906 as a nonprofit, voluntary organization.[14] It is made up of member institutions, which include four-year post-high school colleges or universities and "two year upper level collegiate institutions."[15] Currently, more than 1,200 schools are members of the NCAA.[16] The member institutions are vested with the organization's decision-making power.[17] Member institutions are grouped and compete in three different divisions: Division I, Division II, and Division

14. Diane Heckman, *Tracking Challenges to NCAA's Academic Eligibility Requirements Based on Race and Disability*, 222 WEST'S EDUC. L. REP. 1, 3 (2007).

15. *NCAA Membership*, NCAA, http://www.ncaa.org/governance/membership (last visited April 12, 2014).

16. *NCAA Membership*, NCAA, http://www.ncaa.org/about/who-we-are/membership (last visited Mar. 10, 2015).

17. *See* Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement and Infractions Processes: The Laws that Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 259 (2010).

III.[18] Division I is further subdivided for schools having football programs into two groups, namely Football Bowl Subdivision (FBS) and Football Championship Subdivision (FCS).[19] Institutions competing in bowl games are part of the FBS, and schools participating in championships run by the NCAA are part of the latter.[20] Because the majority of studies have examined the relationship between career development and student-athletes at the Division I level, exclusive of the other divisions, this article will focus mainly on Division I requirements.[21]

B. NCAA Structure for Ensuring Academic Success

The NCAA's basic purpose is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."[22] More than 460,000 student-athletes participate in the NCAA.[23] To guarantee institutions provide their student-

18. *See id.* at 260; *see also Divisional Differences and the History of Multidivisional Classification*, NCAA, http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification (last visited Mar. 5, 2015).

19. *See Divisional Differences and the History of Multidivisional Classification*, *supra* note 18.

20. *NCAA Division I*, NCAA, http://www.ncaa.org/about?division=d1 (last visited Mar. 10, 2015).

21. That is not to say that student-athletes at Division II and III schools do not face some of the same challenges. Indeed, many of the same career development suggestions could be extrapolated to those institutions, as well.

22. NCAA DI MANUAL, *supra* note 9, at § 1.3.1.

23. *See Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, *supra* note 5.

athletes with quality educations, the NCAA sets eligibility standards for both the students and the teams.

To help student-athletes meet the eligibility requirements, NCAA Bylaw 16.3.1.1 mandates institutions provide student-athletes with academic counseling or tutoring.[24] Institutions have the option of providing the required academic counseling or tutoring through their athletic departments or through counseling available to their general student population.[25] The following sections detail the structure and effectiveness of the academic eligibility requirements.

1. Eligibility Standards

The NCAA's eligibility requirements are "designed to assure proper emphasis on educational objectives, to promote competitive equity among institutions and to prevent exploitation of student-athletes."[26] Initial eligibility and continuing eligibility provide the two sets of academic standards student-athletes must meet in order to compete.

a. Initial Eligibility

Before a student-athlete can participate in Division I athletics at an NCAA member institution, the student must satisfy the initial eligibility standards.[27] Currently, the initial eligibility standards require a student-athlete at the high school level to have completed 16 core course requirements while earning a minimum grade point average in those courses.[28] The student must have also earned a minimum

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24. NCAA DI MANUAL, *supra* note 9, at § 16.3.1.1.

25. *Id.*

26. *Id.* at § 2.12.

27. *Division I Initial Eligibility Toolkit*, NCAA, http://www.ncaa.org/division-i-initial-eligibility-toolkit (last visited Mar. 10, 2015).

28. NCAA DI MANUAL, *supra* note 9, at § 14.3.1.1.

SAT or ACT score, based on a sliding scale of grade point averages and standardized test scores.[29] Beginning with student-athletes enrolling in college in 2016, the students must meet a heightened grade point average, 2.3 instead of 2.0, and heightened standardized test scores to satisfy the initial eligibility standards.[30]

A recent survey of NCAA-mandated Faculty Athletic Representatives (FARs) found 38 percent of Division I schools surveyed admitted student-athletes who did not meet their schools' admission standards.[31] Even more alarming, schools with high-revenue sports have admitted student-athletes who are only at a fourth-grade reading level.[32] Some institutions defend the practice of admitting student-athletes who would not have otherwise been qualified to attend their university by arguing they devote more academic services to student-athletes who are less prepared, to help them succeed and graduate.[33] However, other college administrators have criticized this practice and claim that looking at graduation rates is not the best indicator of what student-athletes have learned while in college.[34] In fact, student-athletes who have entered college academically behind their peers and then left school without

29. NCAA DI MANUAL, *supra* note 9, at § 14.3.1.1.2.

30. NCAA DI MANUAL, *supra* note 9, at § 14.3.1.2.1.

31. *See* Gary Brown, *NCAA Survey Shows Healthy Faculty Influence on Student-Athlete Academic Success*, NCAA (Mar. 4, 2013), http://fs.ncaa.org/Docs/NCAANewsArchive/2013/march/ncaa%2Bsurvey%2Bshows%2Bhealthy%2Bfaculty%2Binfluence%2Bon%2Bstudent-athlete%2Bacademic%2Bsuccessdf30.html.

32. Sarah Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th Graders*, CNN (Jan. 8, 2014, 1:05 PM), http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/.

33. *Id.*

34. *Id.*

adequate education have been unsuccessful in their attempts to hold the schools accountable.[35]

Student-athlete challenges to the initial eligibility standards generally fail.[36] Courts have given deference to the NCAA's eligibility standards, and, as one court stated when defending the standards, "'[I]f the concept of a 'student athlete' is not to be an oxymoron, the NCAA's initial eligibility requirements must be more than an afterthought or an administrative inconvenience of students, teachers, coaches, and counselors."[37] The most common consequences of admitting student-athletes who do not meet the academic enrollment standards of their schools are allegations of academic fraud and dishonesty when athletic departments try to help those student-athletes meet the continuing eligibility standards.[38] The University of North Carolina has been embroiled in controversy recently for what has been called an "unprecedented academic fraud case."[39] For more than 18 years, the university provided sham classes to more than 1,500 student-athletes to help them maintain eligibility.[40] The university is now at the will

35. Ross v. Creighton Univ., 957 F.2d 410, 417 (7th Cir. 1992); Heckman, *supra* note 14, at 4.

36. Heckman, *supra* note 14, at 10.

37. *Id.* (citing Hall v. Nat'l Collegiate Athletics Ass'n, 985 F. Supp. 782, 802 (N.D. Ill. 1997)).

38. *See* M. Tae Phillips, *Un-Equal Protection, Preferential Admissions Treatment for Student-Athletes*, 60 ALA. L. REV. 751, 756 (2009), *available at* http://www.law.ua.edu/pubs/lrarticles/Volume%2060/Issue%203/phillips.pdf.

39. Jon Solomon, *UNC's Unprecedented Academic Fraud Case Will Test NCAA*, CBS SPORTS (Oct. 24, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24765822/uncs-unprecedented-academic-fraud-case-will-test-ncaa.

40. *Id.*

of the NCAA, and it could face punishments ranging from postseason bans to vacating wins.[41]

b. Continuing Eligibility Standards

To help student-athletes achieve ongoing academic success while in college, the NCAA has established continuing eligibility standards that students must meet.[42] The NCAA has also given member institutions the responsibility of monitoring eligibility to ensure that member institutions do not permit ineligible student-athletes to participate in competition.[43]

Student-athletes enrolled in Division I institutions must "complete 40 percent of the coursework required for a degree by the end of their second year . . . 60 percent by the end of their third year, and 80 percent by the end of their fourth year."[44] The NCAA set these percentages based on statistics showing student-athletes who achieve the above benchmarks by the specified year are more likely to graduate.[45] A student-athlete must also be enrolled in at least six credit hours and meet a minimum grade point average each term to be eligible to play the next term.[46]

Continuing eligibility requirements are more demanding than the progress toward degree standards for

41. *Id.*
42. *See Remaining Eligible: Academics*, NCAA, http://www.ncaa.org/remaining-eligible-academics (last visited Mar. 5, 2015).
43. *Id.*
44. *Id.*
45. *See id.*
46. *See id.*

non-athletes.[47] Despite these higher standards, student-athletes tend to finish in the bottom of their classes, with only nine percent finishing in the top third.[48] As expressed above, the stringent continuing eligibility requirements could also cause student-athletes and their athletic departments to cheat, thereby ensuring that underperforming student-athletes remain eligible.[49]

2. Academic Progress Rate

Another program the NCAA uses in its effort to ensure institutions are providing for the academic success of their student-athletes is the Academic Progress Rate (APR).[50] The NCAA initiated the APR in 2003 as part of a larger academic reform program.[51] The purpose of the reforms was "to ensure that the Division I membership was dedicated to providing student-athletes with exemplary education and intercollegiate-athletics experiences in an environment that recognizes . . . the primacy of the academic mission . . . while enhancing the ability of . . . student-athletes to earn a four[-]year degree."[52] The APR was a reaction to scholarship student-athletes in certain sports either not graduating or graduating without any measurable academic success.[53]

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47. Josephine Potuto, William H. Lyons, & Kevin N. Rask, *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student Athletes*, 92 OR. L. REV. 879, 892 n.46 (2014).

48. Phillips, *supra* note 38, at 765.

49. *See id.* at 756.

50. *See Academic Progress Rate (APR)*, NCAA, http://www.ncaa.org/about/resources/research/academic-progress-rate-apr (last visited Mar. 6, 2015).

51. *See Academic Progress Rate Q&A*, NCAA (Mar. 14, 2014, 12:25 PM), http://www.ncaa.org/about/resources/media-center/news/academic-progress-rate-qa.

52. NCAA DI MANUAL, *supra* note 9, at § 14.01.4.

53. *See Academic Progress Rate Q&A*, *supra* note 51.

a. Reporting and Calculating the APR

Member institutions are responsible for annually reporting to the NCAA the data necessary for calculating the APR; if the institutions fail to report, its teams may be ineligible for regular competitions or championships.[54] APR is calculated annually by giving each student-athlete one point per semester for retention if the student-athlete stays in school and one point for eligibility if he or she remains academically eligible.[55] Each team's point total is a combination of the points earned by its athletes divided by all points possible and multiplied by 1,000.[56] An APR of 1,000 is a perfect score and means every student-athlete on that team was eligible and remained at that school.[57] Starting in 2015, to remain eligible, a team must earn a minimum APR of 930 for four years.[58]

b. Penalties for Failure to Meet the Minimum APR

If a team does not achieve the minimum APR, the NCAA will penalize the team.[59] The team will first have to submit a plan to the NCAA, in which the team details how

54. NCAA DI MANUAL, *supra* note 9, at §§ 3.2.4.4, 14.01.6.1, 18.4.2.2.2.

55. *See, e.g.*, *Frequently Asked Questions About Academic Progress Rate (APR)*, NCAA, http://www.ncaa.org/about/resources/research/frequently-asked-questions-about-academic-progress-rate-apr (last visited Mar. 28, 2015); NCAA DI MANUAL, *supra* note 9, at § 14.02.1; Phillip C. Blackman, *The NCAA's Academic Performance Program: Academic Reform or Academic Racism*, 15 UCLA ENT. L. REV. 225, 238 (2008).

56. Blackman, *supra* note 55.

57. *See Academic Progress Rate Q&A*, *supra* note 51.

58. *See id.*; *see also Academic Progress Rate (APR)*, *supra* note 50.

59. *Frequently Asked Questions: About Academic Progress Rate (APR)*, *supra* note 55.

it will improve its APR.[60] In 2011, the NCAA overhauled the penalty structure for failure to reach the minimum APR.[61] The APR now has three levels of penalties.[62]

The first penalty level limits a team's possible practice time to five days and 16 hours a week.[63] The second level builds on the first level and reduces the number of competitions a team can participate in during the regular or postseason.[64] If a team reaches the third level, it could face "coaching suspensions, financial aid reductions and restricted NCAA membership."[65] The NCAA's Committee on Academic Performance oversees the program and has the discretion to impose penalties if a team fails to meet the minimum APR for three consecutive years.[66]

The NCAA provides carrots as well as sticks for meeting the minimum APR. For example, football teams can qualify for extra benefits if they meet the minimum APR.[67] Until 2016, if there are an insufficient number of teams in the FBS eligible for postseason bowl games, a team having one of the top five APRs in the FBS will be eligible to play in the postseason.[68]

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60. *See APR: Division I Academic Progress Rate*, NCAA (2014), http://www.ncaa.org/sites/default/files/91852%20BTBD%20Academic%20Progress%20Rate%20WEB_0.pdf.

61. *Frequently Asked Questions: About Academic Progress Rate (APR)*, *supra* note 55.

62. *See APR: Division I Academic Progress Rate*, *supra* note 60.

63. *See id.* This is a four-hour and one-day reduction in practice time.

64. *See id.*

65. *Frequently Asked Questions: About Academic Progress Rate (APR)*, supra note 55.

66. *Id.*

67. NCAA DI MANUAL, *supra* note 9, at § 18.7.2.1.4(e).

68. *Id.*

The NCAA also imposes penalties on individual student-athletes for failing to earn their APR points. For instance, a student-athlete who plays on a football team competing in the FBS or FCS and fails to earn his APR point during the fall term receives a four-game suspension at the beginning of the next season.[69]

Starting in 2009, the NCAA imposed postseason bans on teams for failing to meet the minimum APR, The NCAA first imposed such penalties on the University of Tennessee–Chattanooga and Jacksonville State University football teams.[70] In 2012, the NCAA penalized the University of Connecticut (UConn) men's basketball team for its low APR just two years after it won the National Championship.[71] The UConn penalty was one of the most publicized penalties for a team failing to meet the minimum APR.[72] UConn ultimately raised its APR high enough to be eligible to compete the season after the penalty was imposed.[73]

After the 2012-2013 season, the NCAA imposed postseason bans on 18 Division I teams whose APRs did not

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69. *Id.* at § 14.4.3.1.6.

70. *See* Matthew J. Mitten et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 840 n.322 (2010).

71. *See* Timothy Davis & Christopher T. Harrison, *NCAA Deregulation and Reform: A Radical Shift of Governance Philosophy?*, 92 OR. L. REV. 77, 120-21 (2013); Adam Himmelsbach, *UConn is Among Those Barred from Postseason Basketball*, N.Y. TIMES (June 20, 2012), http://www.nytimes.com/2012/06/21/sports/ncaabasketball/uconn-basketball-is-among-those-to-receive-postseason-ban.html.

72. Davis & Harrison, *supra* note 71.

73. *N.C.A.A. Hands Out Postseason Bans for Academics, but UConn Is Back*, N.Y. TIMES (June 11, 2013), http://www.nytimes.com/2013/06/12/sports/ncaabasketball/ncaa-hands-out-postseason-bans-for-academics-but-uconn-is-back.html.

meet the minimum required standard.[74] The majority of the teams penalized were from limited resource institutions, and 11 were from historically black colleges and universities.[75] Limited resource institutions are defined as schools participating in Division I that are in the bottom 15 percent in funding.[76] For the 2014-2015 season, the NCAA imposed postseason bans on 36 teams; although this ban more than doubled the number of teams banned in the postseason the year before, the NCAA said the increase was expected, because it had raised the minimum required APR from 900 to 930.[77] Although the increase may suggest teams are unresponsive to the APR system, UConn's team serves as an example of how the system can change the behavior of teams to ensure an increase in academic attainment of student-athletes.[78] The threat of an APR penalty can also make national headlines and possibly change institutional behavior due to an institution's fear of bad press.[79]

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74. *Id.*

75. *Id.*

76. *See* NCAA RESEARCH, NATIONAL AND SPORT GROUP APR AVERAGES AND TRENDS 30 (2014), *available at* http://www.ncaa.org/sites/default/files/CAP_may2014_public-release_FINAL.pdf.

77. Michelle Brutlag Hosick, *Student-Athletes Continue to Achieve Academically*, NCAA (May 14, 2014, 8:36 AM), http://www.ncaa.org/about/resources/media-center/news/student-athletes-continue-achieve-academically.

78. *See N.C.A.A. Hands Out Postseason Bans for Academics, but UConn Is Back*, N.Y. TIMES (June 11, 2013), http://www.nytimes.com/2013/06/12/sports/ncaabasketball/ncaa-hands-out-postseason-bans-for-academics-but-uconn-is-back.html.

79. *See* Jake Trotter, *Cowboys Given Full Weekly Practices*, ESPN (July 29, 2014), http://espn.go.com/college-football/story/_/id/11280865/ncaa-lifts-oklahoma-state-cowboys-apr-penalty.

c. Effects of the APR

Generally, FARs have reported that the academic reforms of 2003 have significantly affected the academic success of student-athletes.[80] Since initiation of the APR in 2003, baseball, men's basketball, football, and women's basketball have all seen increases in APR, eligibility, and retention.[81] The average four-year APR for all Division I sports from 2009 to 2013 was 976.[82] In revenue-earning sports, which include football and men's basketball, the average four-year APRs for that same time were 951 and 957, respectively.[83] However, FCS football teams had the lowest average APR at 947.[84]

The NCAA commissioned a study of the APR trend at limited resource schools.[85] The study found that the average APR had increased over three years, from 947 to 962.[86] However, by the 2012-2013 season, significantly more teams at limited resource institutions than at other schools were still not achieving 930 APRs.[87]

Therefore, a discussion of the average APR of all Division I sports may not show the entire picture. Despite the APR system, certain categories of student-athletes continue to face challenges in the classroom.[88] This is

80. Brown, *supra* note 31.
81. Hosick, *supra* note 77.
82. *See APR: Division I Academic Progress Rate*, *supra* note 60; *see also* NCAA RESEARCH, *supra* note 76.
83. *See APR: Division I Academic Progress Rate*, *supra* note 60.
84. *See* NCAA RESEARCH, *supra* note 76.
85. Hosick, *supra* note 77.
86. *Id.*
87. *Id.*
88. *Id.*

particularly true at schools competing in the Big-5 conferences and at limited resource institutions.[89]

C. Student-Athlete Graduation Rates

The benefits of having a college degree are undeniable.[90] People who have college degrees make 98 percent more an hour than people without college degrees.[91] Starting with the 1995 entering class, the NCAA has tracked the graduation success rate (GSR) of student-athletes to monitor the academic success of its student-athletes.[92] The graduation success rate builds on the federal graduation rate (FGR).[93] The FGR "assesses only first-time full-time freshmen in a given cohort and only counts them as academic successes if they graduate from their institution of initial enrollment within a six-year period."[94] GSR adds transfer students, mid-year enrollees, and non-scholarship students to the equation, and it subtracts the students who left the institution while in good academic standing.[95] The NCAA believes GSR is a more accurate measure of student-

89. *See* Paul Steinbach, *Record NCAA Graduation Rates Don't Tell the Whole Story*, ATHLETIC BUS. (Dec. 2011), http://www.athleticbusiness.com/Governing-Bodies/record-ncaa-graduation-rates-don-t-tell-the-whole-story.html.

90. David Leonhardt, *Is College Worth It? Clearly, New Data Say*, N.Y. TIMES (May 27, 2014), http://www.nytimes.com/2014/05/27/upshot/is-college-worth-it-clearly-new-data-say.html?_r=0&abt=0002&abg=1.

91. *Id.*

92. Michelle Brutlag Hosick, *Division I Student-Athletes Show Progress in Graduation Success Rate*, NCAA (Oct. 24, 2013, 6:46 PM), http://www.ncaa.com/news/ncaa/article/2013-10-24/division-i-student-athletes-show-progress-graduation-success-rate.

93. *Id.*

94. NCAA RESEARCH STAFF, TRENDS IN GRADUATION-SUCCESS RATES AND FEDERAL GRADUATION RATES AT NCAA DIVISION I INSTITUTIONS, 2 (2014), *available at* http://www.ncaa.org/sites/default/files/2014-d1-grad-rate-trends.pdf.

95. *Id.*

athlete graduation rates, because the academic experience of student-athletes is often less conventional than that of other students.[96]

Because the graduation rate of the general student body is measured by the FGR, the FGR must be used to compare the graduation rates of student-athletes and the general student population. For the 2007 entering class, the overall FGR of student-athletes was 66 percent, one percentage point higher than that of the general student population.[97] When comparing subgroups of the student population, student-athletes had higher FGRs every year where data was analyzed.[98] Female student-athletes had a higher FGR than women in the general student population.[99] African-American male student-athletes had an FGR that was 11 percent higher than African-American males in the general student body.[100] However, at the six major conferences, the graduation rate of African-American male student-athletes was more than five percent lower than that of the African-American male student body as a whole.[101]

Since 1995, the overall GSR for student-athletes has increased by 10 percent, which equates to 13,805 more

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96. *See* Hosick, *supra* note 92 (average number of years student-athletes are in school differs from that of other students).

97. Michelle Brutlag Hosick, *Student-Athletes Earn Diplomas at Record Rate*, NCAA (Oct. 28, 2014, 11:36 AM), http://www.ncaa.org/about/resources/media-center/news/student-athletes-earn-diplomas-record-rate. The entering class of 2007 is the most recent year available with complete data. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. SHAUN R. HARPER, ET AL., UNIV. PA., CENTER FOR THE STUDY OF RACE & EQUITY IN EDUC., BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS 7 (2013), *available at* http://www.gse.upenn.edu/equity/sites/gse.upenn.edu.equity/files/publications/Harper_Williams_and_Blackman_%282013%29.pdf.

students graduating.[102] The chair of the NCAA's Committee on Academic Performance, Walter Harrison, attributes the overall increases in the GSR to the academic reforms discussed above.[103]

Although the NCAA has made strides with the graduation rates of its student-athletes, some scholars are alarmed at the persistent gap between the GSR of Caucasian student-athletes and minority student-athletes.[104] In 2010, the GSR for African-American Division I football student-athletes was 60 percent.[105] That same year, the GSR for Caucasian football student athletes was 80 percent.[106] That put the gap in GSR between Caucasian and African-American football student-athletes at 20 percent.[107] Three years later, there was still a 19-percent disparity between GSRs of African-American football student-athletes and Caucasian football student-athletes.[108] The difference in the graduation rates between these two groups is even greater at

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102. Hosick, *supra* note 97.

103. *Id.*

104. *See, e.g.*, Richard Lapchick, *Keeping Score When it Counts: Assessing the 2010-11 Bowl-Bound College Football Teams - Academic Performance Improves but Race Still Matters*, THE INST. FOR DIVERSITY & ETHICS IN SPORTS, 1 (2010), *available at* http://www.tidesport.org/Grad%20Rates/2010-11_APR-GSR_BowlStudy.pdf; Davis & Harrison, *supra* note 71, at 114-15.

105. Lapchick, *supra* note 104, at 1.

106. *Id.*

107. *Id.*

108. *See* Steve Reed, *Report: Black Players Left Behind in Graduation Rates of Bowl-Bound Teams*, DIVERSE (Dec. 9, 2013), http://diverseeducation.com/article/58022/.

schools with highly competitive football and basketball programs.[109]

D. Student-Athletes Clustering in Majors

Selecting a major is one step toward developing an interest in a career outside of sports. Some student-athletes during and after graduation have voiced concern that athletics influenced the process of choosing a major.[110] The result of this influence is reflected in the clustering phenomenon.[111] Clustering occurs when a disproportionate number of student-athletes enroll in certain majors.[112]

There are several possible rationales for clustering: The curriculum is easier in those majors, those majors best fit into the inflexible athletic schedule of student-athletes, and athletes are more comfortable in classes with other athletes.[113] Some student-athletes have accused academic advisors of steering them away from majors because they would be too difficult for them to complete while athletes.[114]

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109. Krystal K. Beamon, *"Used Goods": Former African American College Student-Athletes' Perception of Exploitation by Division I Universities*, 77 J. NEGRO EDUC. 352, 354 (2008) (this difference results in African-American student-athletes being used by their universities exclusively for their athletic skills and, consequently, the athletes not reaping the full benefits of having a college education).

110. Jodi Upton & Kristen Novak, *College Athletes Cluster Majors at Most Schools*, USA TODAY (Nov. 19, 2008, 11:20 PM) http://usatoday30.usatoday.com/sports/college/2008-11-18-majors-graphic_N.htm.

111. Ray G. Schneider, Sally R. Ross, & Morgan Fisher, *Academic Clustering and Major Selection of Intercollegiate Student-Athletes*, 44 C. STUDENT J. 64, 64 (2010).

112. *Id.* at 64-65.

113. *Id.* at 68.

114. Stephanie Stark, *College Athletes Suffer the Greatest Injustice from NCAA*, USA TODAY (Aug. 28, 2011, 4:01 PM), http://college.usatoday.com/2011/08/28/college-athletes-suffer-the-greatest-injustice-from-ncaa/.

The theme underlying this issue is the academic costs of a desire, by the student athlete and the athletic department, for the student-athlete to remain eligible to participate in athletic competition.[115]

Although the NCAA collects information on student-athletes' majors, it has yet to study the information. When asked about clustering, Walter Harrison stated that clustering could reflect positive trends.[116] As an example, Harrison pointed to clustering of softball student-athletes at one school in a notoriously difficult biology program.[117] The suggestion that clustering is a negative occurrence presupposes the notion that institutions' vetted academic programs do not provide the general student population with an equal academic experience.[118] However, there is no doubt the academic value of some academic courses has been questioned.[119] Others caution that the comparison between the numbers of athletes with those of the general student population in a specific major could be problematic. This is because there are so many more students in the general population spreading out across different majors.[120]

A *USA Today* study found that, out of 142 NCAA member institutions polled, 83 percent had some amount of

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115. *See* Jeffrey J. Fountain & Peter S. Finley, *Academic Clustering: A Longitudinal Analysis of a Division I Football Program*, 4 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 24, 38 (2011), *available at* http://www.csri-jiia.org/documents/puclications/research_articles/2011/JIIA_2011_4_2_24_41_Academic_Clustering.pdf.

116. Upton & Novak, *supra* note 110.

117. *Id.*

118. Davis & Harrison, *supra* note 71, at 116.

119. *See* Amy Julia Harris & Ryan Mac, *Stanford Athletes Had Access to List of 'Easy' Classes*, CAL. WATCH (Mar. 9, 2011), http://californiawatch.org/dailyreport/stanford-athletes-had-access-list-easy-classes-9098.

120. *See* Upton & Novak, *supra* note 110.

clustering.[121] Football student-athletes in the Big 12 Conference cluster into majors not as popular with the general student population.[122] Schools with more successful football programs also have a higher percentage of football players clustering. This has led some to suggest that these teams are treated as merely a minor league for the NFL, where students are encouraged to take the easiest route to remain eligible for competition.[123] FARs have also reported that clustering occurs at most schools and even more often at FBS schools.[124]

Clustering is more prevalent among African-American student-athletes, male athletes, and athletes in high profile sports.[125] Superstar athletes, who are highly recruited out of high school and then drafted into the NFL, also exhibit a tendency to cluster.[126]

Clustering is a concern, because it causes student-athletes to enroll in certain majors for the sole purpose of maintaining eligibility to play sports.[127] Because a student's major prepares the student for a particular career, clustering could cause a student-athlete to prepare for a career he or she

121. *Id.*

122. Schneider, Ross, & Fisher, *supra* note 111, at 68.

123. *See, e.g.*, Fountain & Finley, *supra* note 115, at 38.

124. *See* Brown, *supra* note 31.

125. *See, e.g.*, JAMES L. SHULMAN & WILLIAM G. BOWEN, GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES, 79-80 (2011); James P. Sanders & Kasee Hildenbrand, *Major Concerns? A Longitudinal Analysis of Student-Athletes' Academic Majors in Comparative Perspective*, 3 J. INTERCOLLEGIATE SPORT 213, 229 (2010); Fountain & Finley, *supra* note 115.

126. *See* Fountain & Finley, *supra* note 115, at 35.

127. *Id.* at 28.

may have no interest in pursuing post-college.[128] Clustering can also affect student-athletes' incomes after graduation; because of clustering, student-athletes' projected incomes out of college are lower than non-student athletes' incomes.[129]

E. Salaries of Former Student-Athletes vs. Non Student-Athletes

There has historically been a dearth of research on salaries of former student-athletes compared to their non-athlete counterparts, and the limited research has produced varying results. A 2005 study found athletes receive a mixed and often modest return on their participation in athletics after college.[130] Fifty percent of former student-athletes receive the same average salary in their respective careers as non-athlete college graduates.[131]

Because of the competitive nature instilled in student-athletes at a young age, male student-athletes are more likely to seek out business degrees and higher earnings.[132] When former student-athletes enter into business careers, especially careers in financial services, their entry-level salaries are one-and-a-half- to nine-percent

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128. Kristina M. Navarro, *Toward an Understanding of Career Construction in the 21st Century: A Phenomenological Study of the Life Experiences of Graduating Student-Athletes at a Large Highly-Selective Midwestern University*, ISSUES IN INTERCOLLEGIATE ATHLETICS WORKING PAPER SERIES, 1, 9 (2013) *available at* http://sites.education.washington.edu/uwcla/sites/sites.education.washington.edu.uwcla/files/Navarro%202013_Full.pdf.

129. Sanders & Hildenbrand, *supra* note 125, at 230.

130. Daniel J. Henderson et al., Inst. for the Study of Labor, *Do Former College Athletes Earn More at Work? A Non-Parametric Assessment*, DISCUSSION PAPER SERIES 1, 14 (2005), *available at* http://ftp.iza.org/dp1882.pdf.

131. *Id.*

132. SHULMAN & BOWEN, *supra* note 125, at 263.

greater than non-athletes' salaries.[133] However, former student-athletes have a higher probability of becoming teachers, earning an average of eight-percent less than non-athletes in that career.[134]

That is not to say a student-athlete's experience as an athlete is not valuable.[135] In fact, top business schools in the country will consider a student's participation in college athletics when evaluating a student's application for a postgraduate program when that student-athlete's GPA and GMAT would not necessarily qualify them for admission.[136] Student-athletes may also earn more in the long term, because some employers are willing to pay a premium for the skills student-athletes develop while playing sports.[137]

College sports teams recognize a student-athlete's after-college experience is important to the athlete, especially to his or her career earnings.[138] Stanford's football program sent out letters to recruits containing the average salary of a Stanford graduate compared to graduates of other schools.[139] However, the letter did not specifically address earnings of student-athletes post graduation, which would have been a more honest reflection of the career experience of student-athletes.[140]

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133. *Id.* at 100; Henderson, *supra* note 130, at 14.

134. Henderson, *supra* note 130, at 14.

135. *See* SHULMAN & BOWEN, *supra* note 125, at 91.

136. *Id.* at 88-91.

137. *Id.* at 91.

138. *See, e.g.*, Troy Machir, *Stanford's Recruiting Pitch: It's All About the Money*, SPORTING NEWS (Oct. 16, 2014, 4:10 PM), http://www.sportingnews.com/ncaa-football/story/2014-10-16/stanford-recruiting-letter-money-annual-salary-advantage-college-football.

139. *Id.*

140. *Id.*

F. Student-Athletes' Dual Roles of Student and Athlete

Athletic identity is the identification of a student-athlete with his or her role as an athlete.[141] Student-athletes often identify more with their athletic role than with their student role.[142] This is true despite the NCAA limiting student-athletes in the amount of time they can participate in their sport per week and requiring student-athletes meet specific academic standards to remain eligible to participate in athletics.[143]

Certain subcategories of student-athletes are more susceptible to over-identifying with their athletic roles than other student-athletes. Female student-athletes have a higher athletic identity than male student-athletes.[144] Athletic identity serves as a barrier to integration within the entire university community for female student-athletes and hinders their development academically and socially.[145] However, studies have shown that a majority of women in C-suite positions are former college athletes.[146] Therefore, a pervasive athletic identity may not always have an adverse affect on a woman's experience in the workplace.

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141. *See* Tyrance, *supra* note 6, at 24.

142. Lacole McPherson, *Exploring the Relationship between Student-Athletes, Occupational Engagement, and Vocational Identity*, 1 GLOBAL SPORTS BUS. J. 38, 38-40 (2013).

143. *Id.* at 38.

144. Tyrance, *supra* note 6, at 33, 34.

145. *Id.*

146. *Female Executives Say Participation in Sport Helps Accelerate Leadership and Career Potential*, EY (Oct. 10, 2014), http://www.ey.com/GL/en/Newsroom/News-releases/news-female-executives-say-participation-in-sport-helps-accelerate--leadership-and-career-potential.

African-American student-athletes also tend to identify more with their athletic role.[147] Isiah Thomas, a former Indiana University basketball player, former college basketball coach, and NBA Hall of Famer, has dedicated his latest years to shedding light on this issue.[148] Thomas cites structural and institutional forces as the main reasons the graduation rates of African-American student-athletes continue to lag behind their Caucasian counterparts.[149] Whether it is because of academic stereotypes or financial pressures, African-American student-athletes overwhelmingly identify with their athletic identity.[150] Over-identification with their athletic role can cause student-athletes to leave college early without degrees to pursue professional sports.[151] Because professional sports careers are short-term, leaving school without a degree to pursue professional sports can leave a student-athlete without the tools necessary for finding adequate long-term employment.[152]

Over-identification with their athletic identity can directly affect student-athletes' career development. Student-athletes who identify more with their athletic identity than with their student identity tend to experience more anxiety associated with career development, and, as a result, the student-athletes are less likely to seek out career services.[153] They also have a more difficult time adjusting to

147. Isiah Thomas & Na'llah Suad Nasir, *Black Males, Athletes, and Academic Achievement,* HUFF. POST (July 7, 2013, 5:12 AM), http://www.huffingtonpost.com/isiah-thomas/black-males-athletes-and-_b_3232989.html.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Sandstedt, *supra* note 6, at 81.

changes in their career paths, which are inevitable because so few student-athletes will play professional sports.[154]

G. Funding for Institutionally Provided Services

Although many people think athletic departments make millions of dollars off of their athletics programs each year, only 23 of the 1,100 member institutions make more revenue from their athletics department than they spend.[155] This revenue comes from ticket sales, the NCAA, conferences, and state subsidies.

The NCAA earns nearly all of its revenue from "television and marketing rights fees," most of which come from the annual Division I men's basketball tournament.[156] The NCAA distributes about 60 percent of its revenue to Division I schools.[157] During the 2011-2012 season, this equated to about $503 million in distribution revenue.[158] The Academic Enhancement Fund (Fund) is an example of one program that the NCAA uses to distribute money to its member institutions.[159] The Fund is used to support student-athlete academic services, such as tutoring and salaries for

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154. Tyrance, *supra* note 6, at 30; Krystal Beamon, *"I'm a Baller": Athletic Identity Foreclosure Among African-American Former Student-Athletes*, 16 J. AFR. AM. STUD. 195, 195 (2012).

155. *Investing Where It Matters*, NCAA, http://www.ncaa.org/about/resources/media-center/investing-where-it-matters (last visited Mar. 10, 2015).

156. *The NCAA Budget: Where the Money Goes*, NCAA, http://www.ncaa.org/health-and-safety/ncaa-budget-where-money-goes (last visited Mar. 10, 2015).

157. *Distributions*, NCAA, http://www.ncaa.org/about/resources/finances/distributions (last visited Mar. 10, 2015).

158. *See id.*

159. *Id.*

academic staff at member institutions.[160] The Fund also allocates additional resources to limited resource institutions.[161] In 2010, the Fund distributed $66,000 to each Division I institution.[162]

Institutions can also apply for grants from the NCAA for up to $2,000 from the "Campus and Conference Services Grant Funding."[163] The schools can use the money to pay for speakers.[164] Some schools have requested grant funding for workshops that focus on career development.[165]

Universities can also receive money from their state governments, which the universities might then apply to their athletics program.[166] For example, Arizona State University's athletics department has received more than $80 million from the institution's budget since 2005.[167] In 2011, ASU's athletic subsidy comprised 19 percent of its

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160. *See* Mark Schlabach, *NCAA: Where Does the Money Go?*, ESPN (July 12, 2011), http://espn.go.com/college-sports/story/_/id/6756472/following-ncaa-money.

161. *Distribution of the Money*, NCAA CHAMPION MAGAZINE, Spring 2010, *available at* http://www.ncaachampionmagazine.org/Exclusives/WhereTheMoneyGoes.pdf.

162. *See* Schlabach*, supra* note 160.

163. *NCAA Campus and Conference Services*, NCAA, http://www.ncaa.org/about/resources/leadership-development-programs-and-resources/ncaa-campus-and-conference-services (last visited Mar. 10, 2015).

164. *Id.*

165. *Id.*

166. *See* Steve Bercowitz, Jodi Upton, & Erik Brady, *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY (July 1, 2013), http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/; *see also* Ronald J. Hansen & Anne Ryman, *College Sports Subsidies Remain Integral Part of Game*, ARIZ. CENT. (Aug. 18, 2012, 11:27 PM), http://www.azcentral.com/arizonarepublic/news/articles/2012/08/18/20120818college-sports-subsidies-integral.html.

167. *Id.*

athletic budget.[168] In that same year, all but seven schools from the Big-5 conferences had to subsidize their athletics departments.[169]

Despite its subsidy, ASU has found an alternative way to raise money for its athletics department.[170] During the 2014-2015 school year, ASU imposed a $150 athletics fee on every student enrolled in the university, creating an influx of $10 million in funds for the athletic department.[171] It is unclear whether the university will continue to receive the state subsidy in addition to the fee.[172] Student reactions to the athletics fee have been mixed; some students who do not attend games think it is unfair that the school requires them to pay the fee, while other students do not mind helping to fund the athletics program.[173] The ASU athletics department is planning to use the money from the fee for stadium, facility, and equipment improvements.[174]

Institutions also receive money from their conferences.[175] Schools can receive much more from their conferences than from the NCAA if they are members of the Bowl Championship Series, which includes the Big-5

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168. *Id.*

169. *Id.*

170. Scott Coleman, *Arizona State's New $150 Student Fee for Athletics: Will the Idea Spread to Tucson?*, ARIZ. SONORA NEWS SERV. (May 5, 2014), http://arizonasonoranewsservice.com/arizona-states-new-150-student-fee-athletics-will-idea-spread-tucson/.

171. *Id.*

172. *See* Anne Ryman, *Arizona Regents Approve Tuition, Fee Requests*, AZ CENTRAL (April 3, 2014, 8:56 PM), http://www.azcentral.com/story/news/arizona/2014/04/03/arizona-regents-tuition-fees-universities/7261413/.

173. *See id.*; *see also* Chris Cole, *ASU Student Leaders Propose Fee to Help Fund Athletic Programs*, CRONKITE NEWS (Oct. 10, 2013), http://cronkitenewsonline.com/2013/10/asu-student-leaders-propose-fee-to-help-fund-athletic-programs/.

174. Coleman, *supra* note 170

175. *Distribution of the Money*, *supra* note 161.

conferences: the SEC, ACC, Big 12, Pac 12, and Big Ten. [176] These conferences earn revenue from several sources, including television deals and bowl games.[177] The Big-5 conferences are made up of 65 member institutions; in 2013, these schools brought in more than 44 percent of all revenue earned in NCAA athletics.[178] In 2013, the SEC, Big 12, and Big Ten distributed more than $20 million to each of their member schools.[179]

H. Institutional Spending on Athletics

Many schools spend more money on support for their student-athletes than on support for their general student body.[180] This is especially true of schools participating in the larger conferences. [181] The highest disparity is in the Southeastern Conference, where spending per student-athlete is $163,931, compared to only $13,390 per non-athlete.[182]

Critics are most concerned about the disproportionate spending per student-athlete compared to

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176. *Id.*

177. Chris Smith, *How Massive Conference Payouts are Changing the Face of College Sports*, FORBES (Dec. 26, 2013), http://www.forbes.com/sites/chrissmith/2013/12/26/how-massive-conference-payouts-are-changing-the-face-of-college-sports/?&_suid=141437974442109264767486602068.

178. Paul M. Barrett, *The Insurgents Who Could Bring Down the NCAA*, BLOOMBERG (Aug. 21, 2014), http://www.businessweek.com/articles/2014-08-21/paying-ncaa-college-athletes-inside-the-legal-battle.

179. *See id.*

180. Barry Petchesky, *SEC Schools Spend $163,931 Per Athlete, and Other Ways the NCAA is a Bonfire for Your Money*, DEADSPIN (Jan. 16, 2013), http://deadspin.com/5976391/sec-schools-spend-163931-per-athlete-and-other-ways-the-ncaa-is-a-bonfire-for-your-money.

181. *Id.*

182. *Id.*

non-athletes because of how athletic departments are using their funds.[183] About one-third of the money spent on athletics goes toward paying the salaries of the athletics department staff; this includes academic support staff, but a majority of the funding is devoted to the coaching staff.[184] Recently, athletic departments have been criticized for spending money on unnecessary, lavish facilities for student athletes.[185] For example, at the University of Nebraska, each football player has an iPad in his locker.[186] In 2013, the University of Alabama finished $9 million improvements on its athletic facility, which now includes waterfalls, a theater equipped with video game systems, and stainless steel lockers.[187]

The University of Oregon has what is possibly the most extravagant athletics facility in the country. Phil Knight, founder of Nike, and his wife, were the sole funders of the $68 million facility.[188] The amenities include a 500-pound rug handmade in Nepal, foosball tables from

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183. Potuto, *supra* note 47, at 897-98.

184. Petchesky, *supra* note 180; Donna M. Desrochers, *Academic Spending Versus Athletic Spending: Who Wins?*, DELTA COST PROJECT, Jan. 2013, at 8, *available at* http://www.deltacostproject.org/sites/default/files/products/DeltaCostAIR_AthleticAcademic_Spending_IssueBrief.pdf (last visited Mar. 10, 2015).

185. Potuto, *supra* note 47, at 897-98.

186. Brent Yarina, *What's in Your Locker? At Nebraska, There's an iPad*, BIG TEN NETWORK, http://btn.com/2012/08/30/whats-in-your-locker-at-nebraska-theres-an-ipad/ (last visited Mar. 19, 2015).

187. Andrew Gribble, *More Than Just Eye Candy, Alabama's New Player Friendly Facility Thrives Off 'Functionality'*, AL.COM, http://www.al.com/alabamafootball/index.ssf/2013/08/alabama_players_facility.html (last updated Aug. 2, 2013, 6:52 AM).

188. Mason Walker, *A Look Inside the $68 Million Oregon Ducks Football Center*, PORTLAND BUS. J., http://www.bizjournals.com/portland/blog/real-estate-daily/2013/08/a-look-inside-the-68m-oregon-ducks.html (last updated Aug. 1, 2013, 3:14 PM).

Barcelona, a 40-yard electronic track, a coaches' locker room with a hydrotherapy pool and televisions embedded in the bathroom mirrors, chairs made out of Ferrari leather, and a ring room displaying past championship rings.[189]

People walking through the three buildings, which are all connected by skywalks, are continuously confronted with recruiting tactics. Outside the locker room, Oregon's mascot is displayed with a dollar sign on his top hat.[190] Finally, visiting recruits can wonder at an art installation of ceramic flying ducks representing the number of Oregon football players drafted by NFL teams.[191]

Schools on the cusp of being competitive in the major conferences have spent more on athletics in recent years than even the most competitive schools, in an effort to remain athletically relevant.[192] Schools justify spending on athletic departments by contending that the expenditures are used as a recruiting tool for both athletes and coaches, resulting in greater success on the field. Greater success leads to more benefits to the university, through greater donations, economic boosts in the community, and student interest.[193] However, winning athletics teams, not limited to those taking the pro-competitive route, generally only bring in modest, if any, returns from donors, student applications,

189. Greg Bishop, *Oregon Embraces "University of Nike" Image*, N.Y. TIMES (Aug. 2, 2013), http://www.nytimes.com/2013/08/03/sports/ncaafootball/oregon-football-complex-is-glittering-monument-to-ducks-ambitions.html?pagewanted=all&_r=0.

190. *Id.*

191. *Id.*

192. *See* Desrochers, *supra* note 184, at 4, 11.

193. *Id.* at 2.

and local revenue.[194] This minimal return has led to calls for schools to curb their spending on athletic programs.[195]

I. Current NCAA Framework for Student-Athlete Career Development: The CHAMPS-Life Skills Program

The NCAA allows institutions to provide career development services for student-athletes.[196] NCAA Bylaw 16.3.1.1 states that the NCAA, individual conferences, or the institutions may "finance other academic support, career counseling or personal development services that support the success of student-athletes."[197] However, the provision for career development is not mandatory.[198]

The NCAA also requires each institution to have a life skills program.[199] Since 1991, the NCAA has made efforts to ensure student-athletes are successful during and after college.[200] The NCAA Foundation and the Division 1A Directors' Association established the CHAMPS (Challenging Athletes' Minds for Personal Success)-Life Skills program (CHAMPS).[201] CHAMPS opened for enrollment to member institutions in 1994.[202] Member institutions and conferences are responsible for financially supporting the program.[203] However, the NCAA has awarded grants to its schools ranging from $500 to $2,000

194. *Id.*
195. *Id.* at 11.
196. NCAA DI MANUAL, *supra* note 9, at § 16.3.1.1.
197. *Id.*
198. *Id.*
199. NCAA DI MANUAL, *supra* note 9, at § 16.3.1.2.
200. NCAA, NCAA CHAMPS/LIFE SKILLS PROGRAM BROCHURE 2008-09, at 3 (2008).
201. *Id.*
202. *Id.*
203. *Id.* at 17.

to help the institutions develop their programs.[204] As of 2008, 330 Division I, 155 Division II, and 141 Division III institutions were participating in the program.[205]

The CHAMPS program requires participating institutions to provide career services; however, it does not specify any standards for the delivery of career services or penalties for failure to provide such services.[206] Each member institution is in charge of creating a CHAMPS program, taking into consideration the needs of the institution's student-athletes.[207] However, the institution must structure its program to meet five specific commitments, and each institution has the freedom to decide which commitments its program should most emphasize.[208] The five commitments include: academics, career development, athletics, personal development, and community service.[209] The NCAA allows institutions to meet these commitments by requiring student-athletes to attend workshops or participate in community service activities.[210]

Implementation of the CHAMPS program is not purposed primarily for career development; schools may

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204. *NCAA Awards 57 Inaugural Champs/Life Skills Grants*, NCAA (Sept. 21, 2009), http://fs.ncaa.org/Docs/PressArchive/2009/Announcements/20090921%2BChamps%2BLife%2BSkills%2BRls.html.

205. NCAA CHAMPS/LIFE SKILLS BROCHURE 2008-09, *supra* note 200, at 16.

206. Navarro, *supra* note 128, at 28-29.

207. NCAA CHAMPS/LIFE SKILLS BROCHURE 2008-09, *supra* note 200, at 5.

208. *Id.* at 6-7; *CHAMPS/Life Skills*, ALA. ATHLETICS, http://www.rolltide.com/ot/champs-life-skills.html (last visited Mar. 28, 2015).

209. NCAA CHAMPS/LIFE SKILLS BROCHURE 2008-09, *supra* note 200, at 6-7.

210. *Id.* at 6.

focus primarily on other prongs, such as community service. [211] Further, the programs are not tailored to any particular category of student-athletes, which can be problematic, because some student-athletes are at a higher risk of falling behind in career development.[212]

Wake Forest, a Division I institution, has a CHAMPS program.[213] Wake Forest recently published its *2013 CHAMPS Community Report*, highlighting the community service projects and hours its student-athletes had completed in the previous year. [214] The report also detailed the results of Wake Forest's CHAMPS Cup, a competition between the varsity teams at the school based on each team's completion of the CHAMPS commitments.[215]

Many schools have created a cup system.[216] In most cup systems, for teams to score points for career development, student-athletes have to show they attended

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211. *See CHAMPS*, WAKE FOREST STUDENT ATHLETE SERV., http://www.wakeforestsports.com/sass/sass-champs.html (last visited Mar. 27, 2015).

212. Tyrance, *supra* note 6, at 35.

213. *See CHAMPS*, *supra* note 211.

214. *See* WAKE FOREST, 2012-2013 WAKE FOREST ATHLETICS CHAMPS COMMUNITY REPORT (2013), *available at* http://issuu.com/ruskosce/docs/2013_champs_community_report_pdf_75de57f4fd4a8b.

215. *See id.*

216. TEX. A&M, TEXAS A&M UNIVERSITY ATHLETICS AND THE CHAMPS/LIFE SKILLS PROGRAM: IN PURSUIT OF THE AGGIE CUP . . ., *available at* http://grfx.cstv.com/photos/schools/tam/genrel/auto_pdf/aggie-cup-brochure.pdf; *Center for Student Success: CHAMPS Life Skills*, IND. STATE UNIV., http://www.indstate.edu/cfss/programs/athletes/champslifeskills.htm (last visited Mar. 27, 2015); *CHAMPS Cup and Team Awards,* UNIV. WASH. ATHLETICS, *available at* http://www.uwathletics.com/academic_services/champs_7609.pdf.

seminars or workshops on issues such as résumé writing, dressing for interviews, and using job search tools.[217] Wake Forest's report states that its Cup was created to incentivize its teams to complete more community services hours.[218] Although volunteering may provide student-athletes valuable skills to use once in their careers, it may not necessarily be the best way for student-athletes to explore career interests.[219] There exists a link for career development on the Wake Forest CHAMPS-Life Skills website.[220] The school "strongly encourages" student-athletes to visit career services during their time at school.[221] Career services specific to student-athletes are only available in the morning, once a week in the athletic department, and student-athletes may also visit the general career services whenever those times are available.[222]

The University of Alabama's athletics website has a page for its CHAMPS-Life Skills Program.[223] Under the heading of career development, the website provides student-athletes with the web address to the school's non-athletic career services department.[224] The University of Arizona (Arizona) has a more extensive career development

217. TEX. A&M, *supra* note 216.

218. *See* WAKE FOREST, *supra* note 214.

219. *Serving the Community Can Help People in School and in Their Careers*, STRAYER UNIV. (Feb. 10, 2014) http://www.strayer.edu/buzz/career-advancement/serving-the-community-can-help-people-in-school-and-in-their-careers/#sthash.ediFCHl6.dpbs.

220. *See CHAMPS*, *supra* note 211.

221. *See id.*

222. *See id.*

223. *See CHAMPS/Life Skills*, ALA. ATHLETICS, http://www.rolltide.com/ot/champs-life-skills.html (last visited Mar. 27, 2015).

224. *See id.*

website for its C.A.T.S. Life Skills program.[225] Arizona gives student-athletes guidance regarding where they can find help with picking majors, securing internships, and finding jobs.[226] However, linking to the non-athletic career services or other external career sites provide most of the information on the site.[227]

Despite CHAMPS being the only career development program the NCAA endorses, the NCAA has yet to test the effectiveness of CHAMPS for student-athlete career development.[228] CHAMPS is now under the umbrella of the NCAA's Student-Athlete Affairs.[229] It is unclear whether the NCAA monitors its member institutions' implementation of career development under the auspices of the life skills program.

225. *See C.A.T.S. Life Skills Program – Career Development*, UNIV. ARIZ. ATHLETICS, http://www.arizonawildcats.com/ViewArticle.dbml?&DB_OEM_ID=30700&ATCLID=208236237 (last visited Mar. 27, 2015).

226. *See id.*

227. *See id.*

228. Tyrance, *supra* note 6, at 36.

229. Navarro, *supra* note 128, at 10.

J. Model Institutional Student-Athlete Career Services

1. University of Michigan

The University of Michigan has a model student-athlete career development program, called M-PACT, designed to help student-athletes "discover, prepare for, and transition to their lives after graduation."[230] M-PACT has a career-shadowing program allowing student-athletes to gain experience in careers they are interested in by shadowing leaders in that career.[231] The program also offers career information sessions, where local employers speak to students about employment opportunities.[232] A unique facet of M-PACT is the 30 Minute Mentor Program, which allows a student-athlete to interact one-on-one with a mentor in the career of the athlete's choice.[233]

2. Arizona State University

Arizona State University has also established a career development program for its student-athletes. It offers career services tailored to each year a student-athlete attends the university and includes a one-credit course for junior and senior student-athletes to help them prepare for careers.[234] The course teaches networking, interviewing, and financial

230. *Michigan Professional and Career Transition (M-PACT) Program*, MGOBLUE.COM, http://www.mgoblue.com/asp/m-pact.html (last visited Mar. 27, 2015); *see also M-PACT Programs and Services*, MGOBLUE.COM, http://www.mgoblue.com/asp/m-pact-programs.html (last visited Mar. 27, 2015).

231. *See Michigan Professional and Career Transition (M-PACT) Program*, *supra* note 230.

232. *See id.*

233. *See id.*

234. Life Skills Programming: Outline of Offerings, Ariz. State Univ., 2012-2013 (on file with author).

planning; however, the course does not include an internship or externship component.[235]

Despite its good intentions, ASU's program does not appear to engage very many student-athletes.[236] Only 17 student-athletes participated in the career course during the 2012-2013 school year.[237] ASU also holds a career forum where student-athletes get the opportunity to meet one-on-one with employers; however, less than 30 percent of junior and senior student-athletes attended the event in 2013.[238] The most highly attended parts of the program are the Freshman Cohort events, which take place three times a year.[239] These events attempt to help student-athletes explore their identities and set goals.[240] Participation in career services declines significantly as student-athletes move up each year, notwithstanding the fact that the athletic department mandates junior and senior student-athletes attend career programming.[241] More than 50 percent of the entire student-body at ASU will participate in internships prior to graduation.[242] However, the school does not track student-athlete participation in internships.

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235. *Id.*

236. 2013-2014 OSAD Events Attendance Roster, Ariz. State Univ. (on file with author) [hereinafter OSAD Attendance].

237. Life Skills Programming: Outline of Offerings, *supra* note 234.

238. *See id.*; OSAD Attendance, *supra* note 236.

239. *Id.*

240. *Id.*

241. Email Correspondence between author and Natalie Thackrah, Assistant Dir. of the Office of Student-Athlete Development, Ariz. State Univ. (Nov. 3, 2014) (on file with author) (referencing OSAD Attendance, *supra* note 236).

242. *ASU Highlights*, ARIZ. STATE UNIV., https://eoss.asu.edu/cs/asuhighlights (last visited Mar. 28, 2015).

ASU's entire life skills program, including career development, costs less than $5,000 per year.[243] Most of that cost is for catering at the various events.[244] The university does not track the employment rates of its student-athletes post graduation.[245] Although ASU offers a range of career services to its student-athletes, it is difficult to gauge the effectiveness of the program with so few student-athletes participating and so little follow up after their graduations.

3. University of Memphis

In 2014, the NCAA issued a $10,000 NCAA Innovations in Research and Practice Grant to a group of researchers from the University of Memphis (Memphis) to find a "career readiness solution for student-athletes."[246] Out of 137 proposals, Memphis' proposal was one of six selected to receive the grant.[247] Memphis recognized that student-athletes face barriers to career development, including awareness, motivation, and time demands, putting them at a

243. Correspondence with Natalie Thackrah, *supra* note 241.

244. *Id.*

245. *Id.*

246. J.T. Mullen, *U of M Research Team Given NCAA Grant*, DAILY HELMSMAN (Apr. 22, 2014), http://www.dailyhelmsman.com/news/view.php/345589/U-of-M-research-team-given-NCAA-grant-. The grant program focuses on research and pilot programs that improve student-athlete wellbeing and mental health. *See* Michelle Brutlag Hosick, *NCAA Grants Will Fund Research That Benefits Student-Athletes*, NCAA (Apr. 10, 2014, 8:25 AM) http://www.ncaa.org/about/resources/media-center/news/ncaa-grants-will-fund-research-benefits-student-athletes.

247. *U of M Receives NCAA Grant to Help Prepare Student-Athletes for Careers*, UNIV. MEMPHIS (Apr. 18, 2014), http://www.memphis.edu/mediaroom/releases/apr14/ncaagrant.php.

disadvantage when they apply for jobs.[248] Memphis used the grant to develop a pilot program to test how student-athletes' participation in experiential learning enhances their career development.[249] Student-athletes participated in the pilot program in the summer of 2014. Memphis offered the class to junior and senior football and women's basketball student-athletes, because the researchers thought those groups were the least likely to participate in career development on their own.[250]

The program was part of the student-athletes' academic curriculum; the student-athletes who enrolled received seven credits for participating in group projects, presentations, and internships.[251] The first half of the class taught the students business concepts, while the second half focused on externships. [252]

The program placed almost all of the student-athletes with the same employer, Service-Master, for the externship portion; none of the externships were paid.[253] The instructor found that student-athletes who were less prepared academically did not finish the externship experience.[254] To measure the effectiveness of the program, the school tested the career development of student-athletes pre- and post-participation in the class;[255] however, the school does not

248. *See* Louis Goggans, *U of M Receives $10,000 NCAA Grant For Student-athlete Program*, MEMPHIS FLYER (Apr. 29, 2014, 1:31 PM), http://www.memphisflyer.com/NewsBlog/archives/2014/04/29/u-of-m-receives-10000-ncaa-grant-for-student-athlete-program; Telephone Interview with Dr. Tim Ryan, Associate Professor of Sport and Leisure Management, Univ. Memphis (Nov. 21, 2014).

249. *See* Mullen, *supra* note 246.

250. *See* Interview with Dr. Tim Ryan, *supra* note 248..

251. *See* Mullen, *supra* note 246.

252. *See* Interview with Dr. Tim Ryan, *supra* note 248.

253. *See id.*

254. *See id.*

255. *See* Goggans, *supra* note 248.

currently have plans to track the employment of the student-athletes after graduation.[256] Memphis also provides career development opportunities to its student-athletes through the CHAMPS program.[257]

K. Direct NCAA Career Assistance to Student-Athletes

The NCAA recognizes that student-athletes, regardless of their sport or their level of athletic skill, will likely need to find jobs outside of athletics after graduation, because most of them "will go pro in something other than sports."[258] Student-athletes can seek out various NCAA services for help in finding jobs or scholarships after graduation.[259] One such service is the Career in Sports Forum, where each year the NCAA selects 200 student-athletes to travel to Indianapolis to explore careers in sports.[260] The member institutions must first nominate these student-athletes; the NCAA urges schools to consider gender and racial diversity when choosing which student-athletes to nominate.[261]

The NCAA also provides student-athletes with multiple opportunities to pursue post-graduate

256. *See* Interview with Dr. Tim Ryan, *supra* note 248.

257. *Career Development*, UNIV. MEMPHIS, http://www.memphis.edu/lifeskills/career_development.php (last visited Mar. 28, 2015).

258. *Investing Where It Matters*, NCAA, http://www.ncaa.org/about/resources/media-center/investing-where-it-matters (last visited Mar. 28, 2015).

259. *Career in Sports Forum*, NCAA, http://www.ncaa.org/about/resources/leadership-development-programs-and-resources/career-sports-forum (last visited Mar. 28, 2015).

260. *Id.*

261. *Id*.

scholarships.[262] The Walter Byers Post-Graduate Scholarship awards $24,000 a year to one male and one female student for postgraduate schooling; the scholarship can be renewed upon evidence of the student's academic success at the post-graduate institution.[263]

However, the NCAA does not seem to prioritize preparing student-athletes for careers outside of sports. Preparation for life after sports is the only category on the NCAA's list of 10 values of playing college sports that mentions preparing students for careers outside of sports, and it is listed last.[264] Much of the list is dedicated to the idea that participating in college athletics will give student-athletes indirect career benefits like learning to work as a team and developing time management skills.[265]

L. Career Development of Student-Athletes

Reportedly, 15 percent of student-athletes have not planned for careers after college.[266] Even when student-athletes do start planning for non-sport careers during college, the planning usually does not occur until their college sports careers are over, often too late to pick the right majors and gain career experience.[267]

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262. *See, e.g.*, *NCAA Postgraduate Scholarship Program*, NCAA, http://www.ncaa.org/ncaa-postgraduate-scholarship-program (last visited Mar. 20, 2015); *Walter Byers Postgraduate Scholarship Program*, NCAA, http://www.ncaa.org/walter-byers-postgraduate-scholarship-program (last visited Mar. 20, 2015).

263. *Walter Byers Postgraduate Scholarship Program*, *supra* note 262.

264. *The Value of College Sports*, NCAA, http://www.ncaa.org/student-athletes/value-college-sports (last visited Mar. 20, 2015).

265. *Id.*

266. *See* LEFFLER, *supra* note 3, at 109.

267. McPherson, *supra* note 142, at 43-44.

The time deficit that student-athletes face can also cause them to choose careers not right for them.[268] Student-athletes often forego participating in internships or externships, which prevents them from gauging their career interests and building their résumés.[269] As a solution, some scholars have suggested athletic departments could offer internships to student-athletes within their athletic departments.[270] Internships in sports would help student-athletes realize they can pursue careers in sports that do not involve playing.[271] Despite the fact that most student-athletes do not get the opportunity to participate in externships, they cite practical experience, usually obtained outside of the classroom, as the most beneficial influence in career preparation.[272]

Full scholarship student-athletes sometimes face career misalignment, which occurs when athletes are in majors that will not qualify them for their career aspirations.[273] Football student-athletes that cluster in majors exhibit the most career misalignment.[274]

Student-athletes believe career transition assistance should not come solely from the general career services but should also come from the athletics department and coaches.[275] Because student-athletes interact the most with their coaches, the student-athletes likely trust that the coaches have the students' best interests in mind and would be the best people to advise them on important life decisions

268. Navarro, *supra* note 128, at 9.

269. *See* Stark, *supra* note 114; *see also* Rachell Buell, *How Jocks Rock the Job Hunt*, THE MUSE, https://www.themuse.com/advice/how-jocks-rock-the-job-hunt?es_p=123345 (last visited Mar. 24, 2015).

270. *See, e.g.*, Tyrance, *supra* note 6, at 35.

271. *Id.*

272. *Id.*

273. NAVARRO, *supra* note 128, at 17.

274. *See id.* at 18.

275. *See* LEFFLER, *supra* note 3, at 98, 100.

like career choice.[276] However, student-athletes have complained their overreliance on athletics has taken away from their career search and has left them feeling less prepared for life after athletics, because they were not forced to seek out career assistance.[277]

M. Gender and Career Development

Recent studies have shown female student-athletes are less knowledgeable about career planning than male student-athletes.[278] Women in the general student body also tend to perceive more issues with career development and academics than their male counterparts.[279] These findings contradict research from the early '90s suggesting that female student-athletes were better prepared for careers after sports.[280] Multiple factors could have affected this change.[281] One possible rationale for this variation is women's sports have changed in the past few decades, with more women participating in intercollegiate sports because of Title IX's equal funding mandate for male and female sports.[282] The level of competition within women's sports has also increased; women's teams are highly competitive, and they place a greater emphasis on winning than they did in the past.[283]

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276. *See id.*

277. NAVARRO, *supra* note 128, at 23.

278. Tyrance, *supra* note 6, at 30.

279. AMERICAN COLL. HEALTH ASS'N, AMERICAN COLLEGE HEALTH ASSOCIATION NATIONAL COLLEGE HEALTH ASSESSMENT, SPRING 2013 REFERENCE GROUP EXECUTIVE SUMMARY 15 (2013), *available at* http://www.acha-ncha.org/docs/ACHA-NCHA-II_ReferenceGroup_ExecutiveSummary_Spring2013.pdf.

280. Tyrance, supra note 6, at 31.

281. *Id.*

282. *Id.*

283. *Id.*

Female student-athletes are also less likely to feel confident in their career potential.[284] They often cite lack of involvement in campus life outside of their athletic activities as the reason they do not feel as prepared for careers.[285] Some have suggested that, because female student-athletes have been falling behind in career development, athletic departments should offer specialized career services to female student-athletes.[286] These programs should help female student-athletes integrate into the rest of the university so that they gain experience and develop interests outside of sports.[287]

N. Is There a Need for a Separate Model of Career Services for Student-Athletes?

Twenty-eight percent of the college student population as a whole visits career services at their school two to three times a semester.[288] Generally, student-athletes are slower than their non-athlete peers at developing career plans.[289] Some scholars have suggested that student-athletes who want to pursue career development may find that their athletic training and competition schedules make it very difficult to pursue the career services that are offered to the entire student body.[290]

During college, student-athletes face additional challenges to career choices unlike those of the general student population.[291] These challenges come from a

284. *Id.*
285. *Id.*
286. *Id.* at 34.
287. *Id.*
288. *Student Survey: Use of Career Services Rises for Class of 2013*, NACE (Oct. 16, 2013), http://www.naceweb.org/s10162013/use-of-career-services-student-survey-2013.aspx (based on 2013 statistics).
289. *See* Shurts & Shoffner, *supra* note 12, at 98.
290. *See* Sandstedt, *supra* note 6, at 81.
291. *See* LEFFLER, *supra* note 3, at 1-2, 4.

student-athlete's voluntary or involuntary disengagement from sports.[292] Many student-athletes structure their entire life around their athletic identity, which in most instances is abruptly stripped from them upon graduation.[293] Once student-athletes lose their athletic identity, they must begin developing new identities for themselves.[294] Therefore, some argue student-athletes require a career services program specifically tailored to their specific needs.[295] However, others have argued the career services offered to the general student population should suffice, as long as the career services' staff collaborates with the athletic department in motivating student-athletes to participate in career development.[296]

III. ANALYSIS

During college, student-athletes are pulled in many directions. They are responsible for performing well academically and athletically. For many student-athletes, the pressure to perform athletically takes over their entire college experience despite the fact that student-athletes usually do not participate in competitive athletics in the last three-fourths of their lives; there are approximately 460,000 student-athletes competing in the NCAA each year and only a small percentage of them will play professional athletics

292. *See id.*

293. *See id.* at 3.

294. *See id.* at 10.

295. *See, e.g.*, *id.* at 92; *see also* Interview with Dr. Tim Ryan, *supra* note 248; Matthew P. Martens & Felissa K. Lee, *Promoting Life-Career Development in the Student-Athlete: How Can Career Centers Help?*, 25 J. CAREER DEV. 123, 133 (1998).

296. *See* Martens, *supra* note 295.

after college.[297] Nevertheless, many student-athletes do not consider what career path they will take after sports end.[298]

Students who use career services are more likely to find jobs.[299] Student-athletes who begin planning for careers while they are in college will have easier transitions when their athletic career ends.[300] Therefore, career development should be mandatory for every student-athlete.

A. Inadequacy of Current Career Services for Student-Athletes

The NCAA has mandated for decades that student-athletes meet various academic standards to remain eligible to compete in athletics.[301] The NCAA has also conditioned its member institutions' eligibility to participate in competitions dependent on their students' academic eligibility and retention.[302] Despite all of these requirements, student-athletes continue to struggle with graduation rates and eligibility.[303]

Currently, the NCAA only suggests that schools offer career services to their student-athletes; the NCAA neither mandates the services nor sets any standards for the delivery of the services. This is true despite the fact that

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297. *Probability of Competing Beyond High School*, NCAA, http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school (last visited Mar. 20, 2015).

298. *See College Athletes Optimistic About Financial Future*, *supra* note 4.

299. Kerry Hannon, *Consider a School's Career Services Before Applying*, U.S. NEWS (Apr. 15, 2010, 12:00 AM), http://www.usnews.com/education/articles/2010/04/15/consider-a-schools-career-services-before-applying.

300. *See* LEFFLER, *supra* note 3, at 110.

301. NCAA DI MANUAL, *supra* note 9, at § 2.12.

302. Blackman, *supra* note 55.

303. Hosick, *supra* note 77.

student-athletes often lag behind their peers in career development. Unlike the NCAA's past response to low academic achievement and graduation rates, the NCAA has failed to adequately respond to student-athlete career development. This cannot continue; the NCAA must require that member institutions make career development an integral part of student-athletes' college experiences.

By not mandating participation in career services, the NCAA is assuming student-athletes will independently develop career plans like non-athletes, thus failing to recognize the connection between student-athletes' athletic experiences and academic and career development experiences. A student-athlete's athletic experience informs the rest of his or her life. Not only did CHAMPS not make career development a priority in the program, but it also did not provide any standards for the implementation of career development at member institutions, which could be the reason the NCAA has failed to measure its efficacy.

When left to their own devices, member institutions have not succeeded in motivating student-athletes to participate in career services.[304] This is not to say that schools do not provide any services; in fact, schools like the University of Michigan and ASU have implemented quite in-depth, innovative career services for their student-athletes. However, institutions currently have great discretion with career services, and there is no outside entity that holds them accountable for low student-athlete participation in career services.

Critics of this plan may argue that mandating that student-athletes participate in career services restricts the student-athletes' autonomy to make these life decisions on their own. However, that argument ignores the fact that the

304. Correspondence with Natalie Thackrah, *supra* note 241.

NCAA and its member institutions already mandate student-athletes participate in academic programs. This program is not taking career decisions away from student-athletes; instead, it is helping them to better make those decisions. Others may argue that student-athletes lack the time to participate in these programs and that member institutions lack the resources to provide more extensive career services. However, the following few sections will provide solutions for those concerns.

It seems like the NCAA recognizes the gravity of this problem, awarding one of only six research grants available in 2014 to the University of Memphis to study the effects of a proposed career development program on student-athletes.[305] However, this grant came at a time when the NCAA had warned that career counseling could be one of the student-athlete services cut if student-athletes are allowed to unionize.[306]

This article's proposed solution will highlight three key areas of amateur athletics affecting both the NCAA and its member institutions: regulation, revenue, and reputation. The NCAA must adopt a bylaw mandating institutions require student-athletes to participate in at least a minimum set of career services. It will also need to develop penalties for an institution's failure to ensure its student-athletes participate in career development programs at the institution.

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305. *See* Hosick, *supra* note 246.

306. *NCAA Urges Schools to Discuss Pitfalls of Unions*, AP NEWS (Apr. 12, 2014, 5:54 PM) http://bigstory.ap.org/article/ncaa-urges-schools-discuss-pitfalls-unions (it is not clear whether the NCAA is referring to funding for academic support that it gives to the schools or if it is suggesting that member institutions will cut their own funding for such programs in order to afford paying players or defending lawsuits).

B. Proposed Career Development Program

The NCAA must ensure student-athletes are active in their career development. This means it must go further than its CHAMPS program, which simply encouraged institutions to offer career services to student-athletes at the institutions' discretion. Therefore, the NCAA must mandate its member institutions require student-athletes to participate in career development. Implementing a career development program will not only ensure student-athletes prepare for their future careers, but it will also increase student-athlete success in the academic programs of the school.

The NCAA should require that all Division I schools meet the career development guidelines. The NCAA's recent grant of independence to the Big-5 conferences has caused many people to question how the NCAA can continue to provide a competitive balance when the Big-5 will have a greater ability to offer financial incentives to high school recruits to attend schools in those conferences.[307] This movement, however, could provide opportunities for student-athlete career development. For instance, the schools not able to provide the economic incentives that the Big-5 conference schools will offer to recruits can use the implementation of an effective career development program as a benefit. It would be a less expensive benefit for these schools to provide to student-athletes, compared to other recruiting ploys, such as upgraded athletics facilities. The University of Michigan has recognized that a well-developed career services department can be an effective recruiting tool, stating that its M-PACT program will

307. Patrick Rishe, *Will Big-5 Autonomy Create Greater Competitive Imbalance in College Sports,* FORBES (Aug. 7, 2014, 6:24 PM), http://www.forbes.com/sites/prishe/2014/08/07/will-big-5-autonomy-create-greater-competitive-imbalance-in-college-athletics/2/?&_suid=141582510581709413537704385817.

"greatly increase its attractiveness to the best and the brightest by servicing student-athletes' number one priority aside from academic and athletic support[:] pursuing a career path after graduation."[308]

The autonomy also allows the Big-5 conferences to set the amount of time student-athletes can devote to athletics each week.[309] Although some may argue competition will drive the conferences to increase allowable participation time, others predict the conferences will actually restrict participation time.[310] Restricting participation time in athletics could give student-athletes in the Big-5 conferences more time to devote to career development. Therefore, schools in large and small conferences could apply this program with different benefits to each.

1. Career Development Bylaw

The NCAA should adopt the following bylaw mandating student-athlete participation in career services:

> **16.3.1.3 Career Development**. Institutions shall make career development programs available to student-athletes. The institutions shall mandate that student-athletes participate in the career development programs, which at the least shall consist of mandatory participation in career counseling and internships.

308. *See Michigan Professional and Career Transition (M-PACT) Program*, *supra* note 230.

309. Mark Tracy, *Areas of Autonomy, What Do They Mean*, N.Y. TIMES (Aug. 6, 2014), http://www.nytimes.com/interactive/2014/08/06/sports/ncaa-autonomy-translation.html?_r=0.

310. *Id.*

The NCAA should set out best practices for its member institutions to use when creating career development programs. The following are various career development strategies, some based on systems already employed by member institutions, that the NCAA could allow its member institutions to implement in satisfaction of the career development mandate.

2. Career Counseling

Student-athletes face unique challenges that the rest of the student population does not face. By the time they graduate, student-athletes have spent around 18 years practicing and competing in their sports. The sport retirement process can be an emotional and difficult time for a student-athlete.[311] Sometimes the retirement process is a welcomed change, and other times it happens when an athlete least expects it to occur. To help student-athletes cope with the stress that comes with transitioning from competitive athletics to careers outside of sports, career counselors must know how to deal with these unique circumstances.

Many schools offer career counseling to their student-athletes, but they do not make it mandatory. At ASU, student-athletes are required to take an interest assessment after their first year of school,[312] but it is not clear to what extent, if any, the results are discussed with the student-athletes or if they are given help with tailoring their academic careers to their interests.[313]

Therefore, institutions should mandate that student-athletes meet with their career counselors each semester the

311. Beamon, *supra* note 154, at 355.

312. Life Skills Programming: Outline of Offerings, *supra* note 234.

313. *Id.*

student-athletes are in school, to ensure the student-athletes develop and know how to pursue their interests. Institutions should not wait until student-athletes are finished participating in college athletics to start counseling student-athletes for their future careers. Instead, it is important for student-athletes to receive career-planning help during each year of college, because their athletic careers could end at any time, due to injury or eligibility issues.

The counseling process must involve genuine major counseling that helps student-athletes get and stay on track to earn degrees in majors that correspond with their career goals. To reduce the negative effects of clustering and career misalignment, the counselors must refrain from pressuring student-athletes into choosing majors that are easier for student-athletes to maintain athletic eligibility. If counselors pressure student-athletes into choosing majors the athletes are not interested in, the athletes will graduate with degrees they cannot apply to their career goals. To ensure counselors are not swayed by athletic concerns, the student-athletes should visit career counselors available to the general student population. Utilizing existing career counselors will also allow schools to cut down on the cost of implementing the career development program, because the schools will not have to hire new career counselors.

The program should also be tailored toward the subcategories of student-athletes who have shown the least amount of career development in the past, specifically female, African-American, and high-revenue student-athletes. These are the three categories of student-athletes that identify the most with their athletic roles, exhibit academic clustering, and have less developed career

plans.[314] African-American student-athletes are also greatly behind in graduation rates.[315] Therefore, engaging with African-American student-athletes about the importance of earning a degree and planning for life after sports is very important and could be a key to them staying in college even after involuntary sport retirement, such as due to injuries that may occur during college.[316]

To help these categories of student-athletes explore their other roles and create interests outside of sports, counselors should encourage them to participate in activities on campus not involving athletics, such as clubs and other on-campus organizations. Although some may argue that student-athletes will not take time to explore their interests, requiring the student-athletes to meet regularly with their career counselors may make them feel like they are being held accountable. By failing to foster an environment where student-athletes participate in the school holistically, institutions have been unsuccessful in realizing the NCAA's purpose, because they have not maintained "the athlete as an integral part of the student body."[317]

The costs of providing adequate career counseling to student-athletes will include training existing career counselors in the exceptional college experiences of student-athletes. Currently, the NCAA encourages member institutions to send employees who work in the area of student-athlete development to the NCAA's Life Skills

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314. Sanders & Hildenbrand, *supra* note 125; Beamon, *supra* note 109, at 352; Thomas & Nasir, *supra* note 147.

315. Beamon, *supra* note 109, at 352..

316. HANOVER RESEARCH, BEST PRACTICES IN CAREER SERVICES FOR GRADUATING STUDENTS 5-6 (2012), *available at* http://www.hanoverresearch.com/wp-content/uploads/2012/04/Best-Practices-in-Career-Services-for-Graduating-Students-Membership.pdf.

317. NCAA DI MANUAL, *supra* note 9, at § 2.5.

Symposium.[318] This workshop would be the best forum for informing career counselors of the needs of student-athletes and for training the counselors in how to best help student-athletes with their career development. At the symposium, most of the discussion involves how to engage both the academic and athletic departments in student-athlete development.[319] This is especially important when trying to keep the major counseling and other services above reproach.

The NCAA pays for hotel and meal costs of those who attend, and therefore, the institutions' costs of training the counselors would be minimal, likely limited to flights and other ancillary expenses.[320] Instead of simply encouraging career counselors to attend the symposium, the NCAA should mandate attendance each year, so that the counselors receive ongoing training. The symposium would also be the best setting for the NCAA to monitor and receive reports on issues such as clustering and career development participation.

3. Mentor Program

Many schools offer career fairs for their student-athletes, but the University of Michigan's M-PACT program took networking further with its 30-minute mentor program. The program allows student-athletes to have 30-minute, one-on-one interactions with professionals working in

318. *Life Skills Symposium*, NCAA, http://www.ncaa.org/about/resources/leadership-development-programs-and-resources/life-skills-symposium (last visited Mar. 28, 2015).

319. NCAA, REPORT OF THE NCAA LIFE SKILLS SYMPOSIUM JUNE 19-21, 2013 MEETING 16 (2013), *available at* https://www.ncaa.org/sites/default/files/2013_LifeSkillsSymposium_Report.pdf.

320. *Life Skills Symposium, supra* note 318.

careers in which the students are interested,[321] thereby allowing student-athletes the opportunity to network with professionals the student-athletes may not have otherwise had the opportunity to meet. The NCAA should suggest that its institutions' career development programs include similar mentoring programs. It is especially important to tailor the mentoring program to female and high-revenue student-athletes, because they are the student-athletes most likely to fall behind in career development. Therefore, the school could host a career fair or mentor day focusing on women in the workforce. The school could also survey the interests of high-revenue student-athletes and invite mentors from fields that correspond with those interests.

To reduce the costs that a mentoring program may incur, the institutions could reach out to former student-athletes who are willing to volunteer their time. Using former student-athletes as career mentors also has the benefit of showing student-athletes that athletes can lead successful and fulfilling lives outside of sports.

Some may have concerns that the mentor program will create an extra benefit to the student-athlete, which is expressly prohibited by the NCAA except under limited circumstances.[322] However, it is unlikely that the NCAA would consider a mentor program or any other career services program an extra benefit, because the NCAA allows the institutions to provide their student-athletes with career counseling and life skills programs.[323]

321. *See M-PACT Programs and Services*, *supra* note 230.
322. NCAA DI MANUAL, *supra* note 9, at §§ 16.01.1, 16.02.3.
323. *Id.* at §§ 16.3.1.1, 16.3.1.2.

4. Internship Program

Time constraints are one of the major problems student-athletes face while in college.[324] When student-athletes have to balance sports with the rest of their lives, and sports usually win.[325] This means the already limited amount of time student-athletes have to devote to the rest of their lives must be divided among academics, social life, and future preparation. Unfortunately, student-athletes allocate much less time to preparing for their futures, especially their future careers.

Because of their busy athletic and academic schedules, student-athletes do not find the available time to participate in externships or internships. Therefore, the program should mandate student-athletes participate in internships. However, the school must ensure the internship program complies with the Fair Labor Standards Act (FLSA). Under FLSA, unless specific criteria are met, employers must pay their interns.[326]

Internships are very important to both the career selection process and the job hunt. Without any experience during college, student-athletes will have a difficult time choosing careers that best suit them. Student-athletes will also fall behind their peers if they do not have any career experience, because employers often require or prefer that prospective employees have some experience in the

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324. Sarah Scott, *UP Close: Students or Athletes?*, YALE DAILY NEWS (Sept. 23, 2011), http://yaledailynews.com/blog/2011/09/23/up-close-students-or-athletes/.

325. *Id.*

326. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

employers' fields.[327] Students who have internship experience also fare better in the marketplace; the difference in the median starting salary between students who have internship experience and those who do not is about $7,000.[328]

Some schools recognize the limited time that student-athletes have to devote to career preparation and have found ways to tailor internships to fit into the student-athletes' lives. For instance, Washington College offers its student-athletes career externship or shadowing experiences that only require the athletes take a day to complete.[329] However, shorter internships may not be that helpful to student-athletes. Granted, because student-athletes rarely engage in activities outside of athletics, a short program would be a good way to introduce them to outside experiences and help them test their interests. Shorter internships would also likely fall outside the qualifications of relevant labor law,[330] thus requiring no pay and making it

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327. *See* Christina Jedra, *Colleges Throwing Up Internship Roadblock*, USA TODAY (Sept. 9, 2013, 11:01 AM), http://www.usatoday.com/story/news/nation/2013/09/09/internship-limits-colleges/2775411/.

328. *See* HANOVER RESEARCH, *supra* note 316, at 7; *see also* NACE, THE COLLEGE CLASS OF 2014 6 (2014), *available at* http://www.naceweb.org/uploadedFiles/Content/static-assets/downloads/executive-summary/2014-student-survey-executive-summary.pdf (finding that students with paid internships commanded higher salaries than those with unpaid internships).

329. *See Scholar Athlete Career Development Program*, WASH. COLL., http://www.washcoll.edu/offices/career-development/Students/scholar-athlete.php (last visited Mar. 7, 2015).

330. Students participating in shorter internships would likely not be considered employees because 1) a student, not the employer, would be deriving the benefit of the internship, 2) the intern would probably not be used as a substitute for other employees but instead under the guidance of regular employees, and 3) the internship experience would be more like a classroom experience, to gain skills that could be used in many professions, than a focused training in the particular employment

easier for student-athletes to find internship opportunities. Therefore, the institutions should take into consideration the unique circumstances of their student-athletes when setting the length of their externship or internship requirements. The NCAA will consider an internship program designed exclusively for student-athletes a permissible benefit so long as student-athletes do not use their athletic abilities in their internships.[331]

5. Career Development Course

To satisfy the career development mandate, a university could also allow student-athletes to participate in a course similar to the course taught at the University of Memphis. As discussed previously, Memphis offers a seven-credit course on career development to student-athletes, which includes both an externship component and a classroom component.[332] Similar to the Memphis program, a career development program should include an externship component and regular classroom instruction.[333]

The in-class instruction should be similar to the class offered at ASU. It could include résumé building, interview tips, and general business skills that student-athletes may not receive in their other classes. Unlike ASU's course, which was offered for one credit and had very low participation, institutions should offer this course for enough credits that student-athletes would view it as worthwhile to participate. At Memphis, the first half of the term was spent in the

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at hand. U.S. DEP'T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

331. NCAA DI MANUAL, *supra* note 9, at § 16.11.1.10.

332. *See* Mullen, *supra* note 246.

333. In order for student-athletes to remain eligible to participate in athletics while completing internships for credit, the student-athletes must meet regularly with instructors. NCAA DI MANUAL, *supra* note 9, at § 14.2.2.6.

classroom, while the second half was spent at the externship.[334] However, some students did not finish the externship. Therefore, instead of having the classroom component distinct from the externship, the school should design the class to meet throughout the externship so that the instructor can oversee the student-athletes' progress. The Memphis externships were not paid; if an externship is included as part of a course given for credit, schools may be able to avoid having to find paid internships for their student-athletes, because the internships will fit into FLSA exceptions.

Some may argue that mandating career services is simply adding more to a student-athlete's already busy schedule. However, by making career development a required course, institutions could ensure student-athletes would be able to multi-task by completing academic courses and preparing for careers at the same time. Mandating student-athletes take the course would also ensure they spend at least the minimum amount of time necessary to think about their future career goals. The institutions could also track student-athlete participation in career development services by monitoring completion of the course, which would help to minimize the costs of commissioning outside surveys. Student-tuition fees should absorb the cost of providing a class and thus limit the need for outside funding for the course.

However, these courses could be highly scrutinized, due to the recent exposure of classes designed to pad student-athlete GPAs. For example, the University of North Carolina recently came under fire when the NCAA reopened an investigation into claims that student-athletes at the university had enrolled in sham classes designed by the university to help the athletes remain eligible for

334. *See* Interview with Dr. Tim Ryan, *supra* note 248.

competition while requiring no class work.[335] Also, after reports criticized Stanford's athletic department for directing student-athletes toward a list of "easy" courses, including Social Dances of North America and Beginning Improvising, the list was discontinued.[336] Therefore, to avoid scrutiny and prevent potential abuses of the class model, the school should have an internal mechanism to review the quality of education that students are getting from the class and should provide reports to the NCAA after each term on participation levels, grades, and a testimonial as to the authenticity of the program. Also, as suggested by Dr. Ryan at the University of Memphis, grouping student-athletes into externships at specific employers would allow greater oversight of the program. The schools could also offer the class as pass-fail instead of for grades, to prevent student-athletes from using the course to artificially pad their GPAs.[337]

For the class model and any separate externship program, the NCAA could partner nationally with businesses that are willing to provide externships to student-athletes. This would ensure student-athletes receive the same level of experience from their externships as student-athletes at different universities. A national partner would also relieve some of the burdens that a career development program will have on individual schools by not requiring the schools to find internships for student-athletes.

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335. *See* Sarah Lyall, *U.N.C. Investigation Reveals Athletes Took Fake Classes*, N.Y. TIMES (Oct. 22, 2014), http://www.nytimes.com/2014/10/23/sports/university-of-north-carolina-investigation-reveals-shadow-curriculum-to-help-athletes.html.

336. Harris & Mac, *supra* note 119.

337. *See* M. Tyler Brown, *College Athletics Internships: The Case for Academic Credit in College Athletics*, 63 AM. U. L. REV. 1855, 1896 (2014).

C. Enforcement of Proposed Plan

Although the NCAA currently allows institutions to provide career counseling services to student-athletes, and indeed many institutions do provide career counseling services, it is neither required nor are there any set standards detailing how institutions should deliver career services to their student-athletes. Without setting standards, the NCAA cannot hold the institutions accountable for their failure to provide adequate career development programs. When implementing a career development program, the NCAA should mirror its enforcement structure on the APR's enforcement and reporting structure.

First, to monitor the effectiveness of career development services at member institutions, the NCAA should require its institutions track their student-athletes' post-graduation experiences. The institutions should survey former student-athletes to find out how many are employed, how many are underemployed, and how many are pursuing further education. Underemployment may be one of the best indicators of a lack of student-athlete preparation for life after sport. Underemployed people may have jobs but may not be using their education or experience for those particular jobs.[338] Student-athlete underemployment could suggest athletes are not majoring in fields that interest them. It could also indicate that student-athletes are not receiving the requisite experience in their field during college. When paired with a degree, relevant experience would make student-athletes more desirable to employers.

The program should also require the institutions report employment statistics to the NCAA so that the NCAA can evaluate member institutions' student-athlete career services. The institutions should also share these reports

338. Gerald P. Glyde, *Underemployment: Definition and Causes*, 11 J. ECON. ISSUES 245, 246 (1977).

with recruits, so that student-athletes can make informed choices about their future that are influenced less by lavish amenities and more by future career success. Failure to report employment statistics should lead to ineligibility, as is the case when reporting a team's APR and a school's GSR. The NCAA should then develop a standard to measure the performance of the university with respect to the proposed program. For example, the NCAA could penalize institutions if the unemployment rate of an institution's former college athletes is higher than the national unemployment rate for people with college degrees.

The NCAA must design the penalty system to ensure that current and future student-athletes at violating institutions do not face the same employment-related problems as the former student-athletes. The NCAA should establish a two-tier penalty structure. The first-tier should penalize teams whose student-athletes fail to participate in the mandated career services. The penalty should include a limit on practice time, similar to the limits the NCAA imposes when teams fail to meet the minimum APR. A penalty on practice time will allow student-athletes more time to devote to personal career development.

The second-tier penalty should impose a fine regarding postseason revenue on teams whose athletes failed to complete the career services program and that have high unemployment or underemployment rates. Because student-athletes in high revenue sports are most likely to exhibit low career development, the fine will likely be levied against teams who are in the greatest need of adequate career development. The fine should then be allocated to help fund or expand career services at that university. Part of the monetary penalty should also be used to create programs for job placement of former student-athletes who are unemployed or underemployed. The money could also be used to create scholarship funds for student-athletes who left

school before graduating and who now want to get their degree. The second-tier penalty is necessary because, if schools had emphasized the value of obtaining a degree to the student-athlete's, then the student-athlete may not have left school.

As expressed by ASU's student-athlete career services coordinator, one of the greatest issues that institutions face when providing career services to student-athletes is getting student-athletes to participate in the programs. By threatening teams with fines for the failure of their student-athletes to participate in career services, the hope is that the teams will do more to motivate student-athletes to participate in career development. The penalty system should directly reflect the values of the career development program. By limiting practice time and allocating funds to career development programs, institutions would be incentivized to provide adequate career assistance to their student-athletes, and, if they failed, would be required to create adequate career service programs.

D. Funding the Proposed Career Development Plan

Although this program will require universities to expend greater funds on career development of student-athletes than the schools were previously spending, the hope is that universities and the NCAA will realize the utility of student-athlete career development and will allocate the necessary funds to the program. ASU's current life skills program, including career development, costs less than $5,000, and most of which is spent on food at the events.[339] Many schools already have career services for student athletes and career counselors. ASU's career services for the general student body had a $45,000 operational budget and

339. Correspondence with Natalie Thackrah, *supra* note 241.

a $1.5 million budget for employee salaries and benefits for 2014.[340] Student-athletes' tuition fees should pay for the career development course, as is the case for any other course. The costs of the program should be limited to: training existing career counselors, tracking employment of student-athletes after graduation, and establishing internal support and reporting mechanisms for career development.

One way to fund the program would be to re-evaluate how the NCAA distributes its funds. All Division I schools will continue to benefit from revenue sharing despite the fact that the Big-5 conferences have gained greater autonomy.[341] Although the NCAA distributes its revenue to member institutions for academic support through the Academic Enhancement Fund, the fund distributes only five percent of the NCAA's total revenue.[342] Most of the NCAA's revenue is distributed to select member institutions through the Basketball Fund, based on performance in the annual Division I basketball tournament.[343] However, many of the institutions that receive money from the Basketball Fund have the lowest APRs and GSRs.[344] Therefore, one possible

340. Telephone Interview with Elaine Stover, Dir. of Career Services, Ariz. State Univ. (Dec. 2, 2014).

341. Marc Tracy, *N.C.A.A. Votes to Give Richest Conferences More Autonomy*, N.Y. TIMES (Aug. 7, 2014), http://www.nytimes.com/2014/08/08/sports/ncaafootball/ncaa-votes-to-give-greater-autonomy-to-richest-conferences.html?_r=0.

342. NCAA, 2013-2014 DIVISION I REVENUE DISTRIBUTION PLAN 3 (2013), *available at* https://www.ncaa.org/sites/default/files/2013-14%20Revenue%20Distribution%20Plan.pdf.

343. *Id.*

344. *See* Alicia Jessop, *Making the Grade: NCAA Revenue Distribution and Academic Excellence*, RULING SPORTS (Aug. 11, 2011, 12:20 AM), http://rulingsports.com/2011/08/11/making-the-grade-ncaa-revenue-distribution-and-academic-excellence/. This is further exemplified by the earlier UConn example. UConn won the Division I tournament, entitling it to a larger distribution, but then failed to meet the minimum APR a year later. *See* Himmelsbach, *supra* note 71.

way to fund this program would be to restructure the revenue distributions from the NCAA.[345] By earmarking greater funds for academic support services, including the career development program through the Academic Enhancement Fund, schools would have more money to fund the career development program and schools struggling with their academic progress would have greater accountability in how they spend their money.

Because most of the NCAA's revenue comes from the Division I basketball tournament and the current Basketball Fund distributes money based on performance in the tournament, it is likely schools will argue that restructuring the fund would be equivalent to taking money away from the schools that may have earned the funds through their participation in the tournament. The NCAA could then argue that shifting only four percent from the Basketball Fund to the Academic Enhancement Fund would result in more than $50,000 more to each Division I school a year, which each team participating in the tournament would still be receiving. Therefore, it would only take a small restructuring of distribution to provide greater economic support for academic programs at all schools and to change the accountability of funds distributed to member schools.

The effects on recruiting at universities may also motivate universities to move funds to career development programs. For the last few decades, the NCAA's member institutions have been engaged in what has been called the athletics arms race, characterized by institutions escalating their spending on their athletic departments to remain athletically competitive with other schools.[346] It could be

345. *See id.*

346. Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F. 3d 328, 347 (7th Cir. 2012).

argued that this spending is not excessive or unnecessary, but instead it is made in lieu of direct payments to student-athletes.[347] However, this argument ignores the fact that student-athletes are only able to enjoy these expenditures temporarily, for up to four or five years at the most while attending a university. When student-athletes graduate or leave the university, they may only be left with the great memories of the time they spent in these facilities. Programs already cite recruitment as one of the main motivators to institutional spending on coaching staff and facilities, and students and their parents have increasingly factored in the benefits of career services offered by universities when choosing which university to attend.[348] As finding a job after college becomes more important to student-athletes, they will likely decide to attend schools that offer the best opportunity to secure jobs after graduation. Therefore, universities should adjust their spending patterns to devote more money to fund career development programs, to entice student-athletes to choose their schools.

The NCAA has spent millions of dollars in legal fees defending against pay-for-play cases brought by student-

347. *See* Brian Goff, *NCAA "Arms Race" Metaphor Gets the Economics Backwards*, FORBES (July 30, 2014, 10:40 AM), http://www.forbes.com/sites/briangoff/2014/07/30/ncaa-arms-race-metaphor-gets-the-economics-backwards/?&_suid=141438365463401884076199494302 3.

348. *See* Kim Clark, *How to Judge a College by its Career Services Office*, TIME (July 14, 2014), http://time.com/money/2982931/college-career-services-office-job-placement/.

athletes.[349] Student-athletes have long argued that they are not being fairly compensated for their athletic services to the universities. Institutions could argue that providing the career services specified in this article is adequate compensation for student-athletes' participation in college sports. Therefore, if student-athletes see satisfactory career services as a fair return on their athletic investment, they may not bring pay-for-play lawsuits and institutions and the NCAA will save money by not having to defend against these lawsuits. The NCAA could then divert the millions of dollars that it currently allocates to these lawsuits to student-athlete career development.

Although the proposed career development program may appear costly, many schools already have some form of career services, which means schools are already using resources for career development. Therefore, many programs will be able to use the resources that schools already provide for career services by simply adopting more efficient career development processes. Also, as student-athletes realize the importance of career development services to their future employment, universities and the NCAA will adjust their funding structures to ensure that student-athletes are receiving the full benefits of career services while in college.

E. Proposed Plan's Effect on Academic Reforms and Graduation Rates

349. *See* Barrett, *supra* note 178. The NCAA has asked the court in the *O'Bannon* antitrust case to reduce the amount of the plaintiffs' attorneys' fees and costs that the NCAA must pay from $50 million to approximately $10 million. *See* Steve Berkowitz, *NCAA Seeks Huge Reduction in O'Bannon Plaintiffs' Legal Fees*, USA TODAY (Feb. 6, 2015, 10:24 PM), http://www.usatoday.com/story/sports/college/2015/02/06/ncaa-seeks-drastic-reduction-o-bannon-plaintiffs-legal-fees/23015217/.

The career development program could also have indirect effects on the student-athletes' academic performance. It could improve student-athlete graduation rates, and it could help teams meet their minimum APR. The student-athletes tending to identify more with their athletic identities are the same student-athletes who tend to have lower graduation rates and exhibit clustering in majors.[350] These student-athletes tend to be high-revenue and African-American.[351] This plan will provide student-athletes with authentic guidance on how to choose a major, which will not simply involve choosing a major for the sole purpose of maintaining eligibility for competition. It will also ensure that student-athletes are given opportunities to explore their interests outside of sports.

By engaging student-athletes on this level, the hope is that student-athletes will realize the benefits of an education to future career goals. Therefore, the student-athletes will stay in school to earn degrees and take seriously their academic commitments, which will boost both the APRs of their teams and their schools' GSRs and, thus, improve the overall student-athlete well being. After implementation of this program, the NCAA should track the correlation between student-athlete participation in the program and student-athlete APR points and graduation rates. Improving graduation rates and APR is another incentive for institutions and the NCAA to devote funds to the career development program.

F. Proposed Plan's Effects on the Reputation of the NCAA and Member Institutions

The NCAA and its member institutions have been under attack over the past few years for the disproportionate

350. Sanders & Hildenbrand, *supra* note 125; Beamon, *supra* note 109, at 354; Thomas & Nasir, *supra* note 147.

351. *Id.*

benefits they receive from college athletics, compared to the benefits the student-athletes receive.[352] The proposed career services plan should positively affect the reputation of both the NCAA and its member institutions. About 460,000 student-athletes participate in athletics at NCAA member institutions.[353] Although only a small percentage of those student-athletes will play professional sports, the majority will have to find employment after graduation. Through reporting on the positive career development of student-athletes, the NCAA could use implementation of the proposed plan as an example of the benefits student-athletes receive from playing college sports, especially if career development and employment of student-athletes ever passes the levels of employment of non-student-athletes. When student-athletes realize there are many obstacles to direct payment from universities for their play,[354] student-athletes will likely consider career development as a better alternative to direct payment.

To boost awareness of its career development program, the NCAA should run a media campaign supporting the benefits of student-athlete career services. The positive effects that career development programs will have on student-athletes will likely entice former student-athletes who are now leaders in their careers to come forward as mentors or to offer externship opportunities to student-athletes.

The career development program has the potential for negative effects on the reputation of both the NCAA and its member institutions. Career development of student-athletes is not necessarily one of the problems of college

352. *Id.*

353. *Student-Athletes*, NCAA, http://www.ncaa.org/student-athletes, (last visited April 14, 2015).

354. *See* Mary Grace Miller, *The NCAA and the Student-Athlete: Reform is on the Horizon*, 46 U. RICH. L. REV. 1141, 1168-69 (2012).

athletics currently in the public eye. This program would change the current perspective. If results from the surveys of former student-athletes show athletes have a high unemployment or underemployment rate, member institutions will surely face some scrutiny over their career development services. Further, a negative response from the public could help propel schools to take accountability for student-athlete career development and better prepare their student-athletes for life after sport. The hundreds of thousands of student-athletes not playing professional sports will appreciate the NCAA and its member institutions looking out for their well being long after they graduate.

IV. CONCLUSION

The NCAA has demonstrated its commitment to assuring student-athletes achieve academic success at its member institutions. However, the NCAA has not shown the same commitment to student-athlete career development. Although only a small percentage of NCAA student-athletes will play professional athletics after college, many student-athletes believe they will play a professional sport. Even student-athletes who do not think they will play professionally face obstacles to career planning while in college. In the past, the NCAA has attempted to aid student-athletes in their career development by encouraging member institutions to offer career services through CHAMPS. However, the NCAA has stopped short of mandating student-athletes to participate in career services.

The NCAA's approach to career development has been ineffective at aiding student-athletes' career paths after sports. The NCAA has failed to recognize that student-athletes face challenges the general student population may not feel to the same degree, like time constraints and emotional attachment to various identities. Therefore, it is necessary that the NCAA mandate student-athlete

participation in career development.[355] To ensure institutions comply with the career development plan, the NCAA should set up a penalty system. Not only will a mandatory career development program directly affect student-athlete career preparation, but it will also have indirect effects on both graduation rates and the APR, by emphasizing the importance of graduating and genuine academic achievement to future career success. Although institutions will likely incur costs in administering this plan, if schools look at the costs as a further investment in the student-athletes' futures, versus the fleeting benefits the student-athletes receive from other athletic department expenditures, institutions should find room to fund at least the most basic services.

This plan also provides a great opportunity for the NCAA and its member institutions to demonstrate their interest in student-athlete success beyond the time that student-athletes are providing direct benefits to the school. Therefore, when weighing the costs and benefits of mandating student-athlete participation in career services, the NCAA and its member institutions would do well to realize that student-athletes are now, more than ever, looking to how their college experience can better prepare them for work after student athletics.

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355. Mandating career development for student-athletes is just one way that student-athletes can prepare for their futures. As Kristyne Schaaf-Olson points out in her note, following this article, student-athletes can also take advantage of their time as athletes by making connections with people working in sports. Hopefully, the proposed career development program outlined in this article will help student-athletes maximize their opportunities to network and intern in careers in sports while in college.

THE NECESSITY OF THE NETWORK:
Why a Successful Career Services Program for Athletes Must Be Tailored to the Unique Opportunities for Athletes

Kristyne Schaaf-Olson*

In the article *The End Game: How the NCAA Has Failed in Preparing Student-Athletes for Careers After Sports*, author Maggie Wood argues that college athletics and current career services do not do enough to prepare college athletes for careers after sports. The author suggests that this is a result of a lack of requirements and penalties requiring that student-athletes utilize career services. The author then proposes the NCAA pass a mandate that sets a minimum career services requirement and establishes a penalty system.

In this note, I suggest that athletics provide student-athletes with unique opportunities for career development after college. Additionally, because of the unique identity student-athletes hold, a mandate regarding conventional career services may still be inadequate. Therefore, a successful "career services" program for student-athletes should focus on the athlete's ability to understand his or her role is progressive, that being an athlete is being more than a player, and to see his or her athletic career as a process. In doing so, the focus should be on teaching student-athletes what unique knowledge, opportunities, and skills they have that can help them find fulfilling careers after sports. The focus should not solely be on access to conventional career services, but should also be on career services unique to the identity of student-athletes.

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I. ATHLETES' UNIQUE IDENTITIES PROVIDE UNIQUE OPPORTUNITIES

Although it may be true that a mandate should be in place to ensure student-athletes are participating in career services, the mandate suggested by the author would do little more than require attendance for career counseling and internships. Such a requirement still fails to consider the unique needs of student-athletes. In addition to the mandate, there should be a career services model that considers both the unique identity of student-athletes and the unique opportunities available to student-athletes.

A. Athletes' unique identities

As stated by a former athlete, "[o]ur careers as athletes may be sidelined to old trophies and medals; our titles may shrink to unofficial ones. It is crucial, though, that no matter what jobs we find or what shapes our new lifestyles take we never lose what we shared in those five hours on that typically-sunny California afternoon: We must never stop playing, and we must never stop wondering."[1] It is therefore important that career services opportunities take into consideration this unique perspective. Conventional careers may not meet the student-athletes' desire to never stop playing, and therefore career services must be creative in both giving students career services while at the same time maintaining the element of the game.

B. Issues with Identity after college

The issue with athletes after graduation is not necessarily a lack of direction in their degree or the fact that

1. Emily Layden, *As We Know It: Life After College Athletics*, HUFFPOST C., http://www.huffingtonpost.com/emily-layden/college-athletes-graduation-_b_1701138.html (last updated Sept. 25, 2012, 5:12 AM).

they did not attend meetings or seminars on how to find success; the issue is leaving the identity of athlete behind and forging on as someone new with all the ailments of time past. The issue is actually going from "athlete" to graduate and leaving years of competition and athletic identity behind.[2] Many athletes struggle with this identity shift after college, which may result in those athletes not being interested in conventional careers.[3] It is therefore important to focus on the students' unique identities and the opportunities presented to these students. It is equally important to provide career services targeted at opportunities unique to the athlete that make the transition easier.

C. Unique Opportunities for Athletes

The author states that, because many students do not go on to play professionally, and because many of those students who do play professionally have short careers, it is imperative that athletes receive career guidance while in college. However, providing general career guidance alone overlooks many unique opportunities presented to student-athletes as a result of the people they meet and the experience they gain on the field or the court. It is important that the skills and value of a college athletic career are highlighted in career services programs when preparing students for careers beyond sports and academia. While many student-athletes do not necessarily end up with minor or even major league careers, their status affords them unique opportunities of which they can take advantage.[4] Career services for athletes should help them.

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2. *Id.*

3. *Id.*

4. Russ Hafferkamp, *Unique Opportunities for Collegiate Athletes*, CAREERBALL (Feb. 7, 2012), http://careerball.net/college-and-elite-athletes/unique-opportunities-for-collegiate-athletes/.

Students should look at careers in sports that may allow them to alter their athlete identities rather than forgo them completely. For example, careers in sports include working with athletes, being a sports agent, working in college athletic departments, sports sales or marketing, health and fitness, coaching, and field maintenance.[5] Student-athletes have an advantage here, because they love sports.[6] They have been on the field, have earned the credibility, and have met many of the people that can lead to successful careers in sports. It is important that students start thinking of these careers earlier on, because networking is the key to a successful career.[7]

II. CASE STUDY – EXAMPLE

My husband played professional baseball in college and was drafted to the MLB before completing his college degree. After two "Tommy John" surgeries, and 10 years between the minor league and independent leagues, my husband decided it was time to retire the dream and start a career. Although this was not an easy decision, he began to see that other opportunities might be more stable. After he retired, he spent the academic year coaching a high school baseball team and his summers coaching a college summer league. He also contracted with an organization to coach at college baseball camps and got a job with a local MLB team as part of the grounds crew. At the same time, he finished his degree with the help of a scholarship through the Association of Professional Ball Players of America

5. *Sports Industry Jobs FAQ*, SPORTSCAREERFINDER, http://www.sportscareerfinder.com/sports_jobs_faq.php (last visited Apr. 11, 2015).

6. *Id.*

7. *Id.*

(APBPA).[8] Thereafter, he was able to get a job as a crew leader doing field maintenance. This job did not come as the result of any education he received; it came through a groundskeeper he had known while playing baseball. His bachelor's degree was just an achievement necessary to check a box prior to the interview. He has since built on this career and has been able to elevate his career position.

This is not to say that every athlete will have the same experience, and it may be difficult for many to decide what to do after college. However, what made the transition easier for my husband were the opportunities that he took advantage of while playing sports. Anytime the team was holding a coaching clinic for local youth or hosting an event to promote the team, he participated. He also never hesitated to lend a hand to the grounds crew after the game or when they were preparing for an event. He has since won field of the year on every field he has maintained.

The unknowns after college are a reality that all students must face, whether or not they are athletes; and no amount of academic rigor is going to prepare a student for a career after college. The key is taking advantage of opportunities and networking — that is how people get jobs — and playing college sports provides athletes with opportunities beyond the classroom. Additionally, when former athletes are struggling and unable to find jobs, they have large networks to tap into, acquired through sports.

III. CONCLUSION

8. *Roland Hemond and the Association of Ball Players of America (APBPA) Scholarship*, UNIV. PHOENIX, http://www.phoenix.edu/tuition_and_financial_options/scholarships/institutional-scholarships/prospective-students/apbpa-scholarship.html (last visited Apr. 9, 2015).

In conclusion, the author's proposed mandate and plan is a good suggestion toward reaching a uniform required system that prepares college athletes for careers. The current lack of policies and penalties requiring that student-athletes utilize career services allows the student-athlete career preparation inefficiencies to perpetuate.

However, a mandate may not be enough. It may be necessary, in addition to a uniform mandate, to provide student-athletes with unique opportunities for career development after college. Because of the unique student-athlete identity, a successful "career services" program for student-athletes should focus on the athletes' ability to understand their athletic experience as progressive. Such a program should assist the player in understanding that being an athlete is the beginning of a greater career. In doing so, the focus should be on teaching student-athletes what unique knowledge, opportunities, and skills they have that can help them find fulfilling careers after sports. The focus should not solely be on access to conventional career services, but should also be on career services unique to the identity of student-athletes and their networks.