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**FROM BROKE TO BESPOKE: PROVIDING FINANCIAL  
SECURITY TO STUDENT-ATHLETES WITHIN THE  
CONFINES OF AMATEURISM**

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**I. INTRODUCTION**

In the 2013 documentary, “Schooled: The Price of College Sports,” star running back Arian Foster admitted to accepting money while attending college as a student-athlete. While such an act may seem innocuous in the abstract, Foster admitted to violating one of the oldest and most controversial values of the National Collegiate Athletic Association (“NCAA”): the preservation of “amateurism.” Yet as Foster says, he had no other option: “I really didn’t have any money. I had to either pay the rent or buy some food. I remember the feeling of like, ‘man, be careful.’ But there’s nothing wrong with it. And you’re not going to convince me that there is something wrong with it.”<sup>1</sup>

When describing his financial situation while living on campus, Foster said, “I think my check was like \$87 a month in dorm rooms . . . [a]t the end of the month you don’t have any money, your family can’t send you any money, a lot of those guys—80 percent of the team is made up of kids from the inner city.”<sup>2</sup>

Yet while student-athletes suffer financially in the name of “amateurism,” the NCAA and its member universities profit

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<sup>1</sup> Bobby Valentine, *Schooled: The Price of College Sports*, SPORTS ILLUSTRATED (Sept. 20, 2013), <https://www.si.com/football/2013/09/20/arian-foster-documentary-comments-about-being-paid-tennessee>; see also Tania Ganguli, *Arian Foster Says He Took Benefits* (Sept. 20, 2013), [http://www.espn.com/college-football/story/\\_/id/9698504/arian-foster-says-took-benefits-playing-tennessee-volunteers](http://www.espn.com/college-football/story/_/id/9698504/arian-foster-says-took-benefits-playing-tennessee-volunteers).

<sup>2</sup> Valentine, *supra* note 1.

handsomely, making hundreds of millions of dollars by utilizing the name, image, and likeness (“NIL”) of their athletes through broadcasts, ticket sales, and other revenue streams.<sup>3</sup> Some may view this disparity as inequitable or wince at the concept of a university exploiting its students for millions of dollars. However, judging from the actions of the NCAA and its member colleges, the tremendous revenue generated from perpetuating this disparity has created an overwhelming temptation. In a meeting with famous marketing executive Sonny Vaccaro, a few college deans balked at the prospect of their schools becoming an advertising medium for the sports industry. When questioned on the topic, Vaccaro replied:

You sold your souls, and you’re going to continue selling them. You can be very moral and righteous in asking me that question, sir, but there’s not one of you in this room that’s going to turn down any of our money. You’re going to take it. I can only offer it.<sup>4</sup>

Vaccaro’s response may have been brazen, but he was not wrong. He boasts of “writing checks for millions to everybody in higher education.”<sup>5</sup>

Vaccaro is not the only one writing these checks. The NCAA fosters a multi-billion-dollar ecosystem. The NCAA and its five richest conferences—the Atlantic Coast, Big 12, Big Ten, Pac-12 and Southeastern (“SEC”)—are guaranteed more than \$31 billion in current broadcast contracts.<sup>6</sup> Furthermore, the NCAA earned \$879 million in 2019 just for broadcast rights to the March

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<sup>3</sup> Other revenue streams include alumni contributions, guarantees, and NCAA distributions. *See Revenue*, NCAA, <https://web.archive.org/web/20160328083243/http://www.ncaa.org/abo/ut/resources/finances/revenue> [<https://perma.cc/3M79-RM79>].

<sup>4</sup> Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

<sup>5</sup> *Id.*

<sup>6</sup> Pamela MacLean & Eben Novy-Williams, *U.S. Athletes Get School Costs Paid but No Cash*, BLOOMBERG (Sept. 30, 2015), <https://www.bloomberg.com/news/articles/2015-09-30/ncaa-fails-to-set-aside-ruling-that-no-pay-cheats-athletes>.

Madness tournament,<sup>7</sup> and for the past fourteen years, ESPN has aired a 24-hour network solely devoted to college sports.<sup>8</sup> Finally, according to an audit conducted in 2012, college athletic programs generate roughly \$6.1 billion annually, largely from ticket sales, radio and television receipts, and royalties.<sup>9</sup> Revenues of this magnitude would be impossible without exceptional student-athletes.

Many schools have doubled down on their “investment” by spending hundreds of millions of dollars on expensive stadium renovations. For example, Texas A&M spent \$483 million<sup>10</sup> and Notre Dame spent an estimated \$400 million<sup>11</sup> on their respective

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<sup>7</sup> National Collegiate Athletic Association and Subsidiaries, *Consolidated Financial Statements as of and for the Years Ended August 31, 2017 and 2016, Supplementary Information for the Year Ended August 31, 2017, and Independent Auditors’ Report*, NCAA, [http://web.archive.org/web/20180618053204/http://www.ncaa.org/sites/default/files/2016-17NCAAFin\\_FinancialStatement\\_20180129.pdf](http://web.archive.org/web/20180618053204/http://www.ncaa.org/sites/default/files/2016-17NCAAFin_FinancialStatement_20180129.pdf) [<https://perma.cc/XNH2-FXRA>].

<sup>8</sup> *ESPN Fact Sheet*, ESPN MEDIA ZONE, <http://espnmediazone.com/us/espn-inc-fact-sheet/> (last visited Mar. 14, 2019).

<sup>9</sup> Among other revenue streams, including alumni contributions, guarantees, and NCAA distributions, another \$5.3 billion is generated from student fees allocated to athletics, direct and indirect institutional support, and direct government support. *See Revenue*, *supra* note 3.

<sup>10</sup> Kyle Field’s renovation was initially projected to cost \$485 million, but the massive redevelopment was completed under budget with final project costs coming to \$483,888,885. *See* Caitlin Clark, *Kyle Field Renovations Completed on Time And \$1.3M Below Estimated Cost*, THE EAGLE (Jan. 14, 2016), [https://www.theeagle.com/news/local/kyle-field-renovations-completed-on-time-and-m-below-estimated/article\\_073f11ae-0fed-514d-9e31-8938ae0e8002.html](https://www.theeagle.com/news/local/kyle-field-renovations-completed-on-time-and-m-below-estimated/article_073f11ae-0fed-514d-9e31-8938ae0e8002.html). *See also* Tim Newcomb, *Texas A&M’s Redone Kyle Field Is Now Largest in SEC, Full of New Amenities*, SPORTS ILLUSTRATED (Aug. 27, 2015), <https://www.si.com/college-football/2015/08/27/redone-kyle-field-now-largest-sec-full-fresh-amenities>.

<sup>11</sup> *See About the Project, Campus Crossroads*, UNIV. OF NOTRE DAME, <https://crossroads.nd.edu/about-the-project/faqs/#faq-enhancements> (last visited Mar. 14, 2019).

stadiums, with many other schools making similar expenditures.<sup>12</sup> Additionally, many universities have paid coaches millions to mentor “amateurs.” There are currently twenty-four college football coaches slated to make at least \$4 million this year alone, with the highest among them earning \$8.3 million.<sup>13</sup> Yet while these colleges have spent hundreds of millions on their athletic programs, some have asserted that the student-athletes (on which such programs rely) do not deserve *any* compensation, since “[s]cholarship athletes are already paid in the most meaningful way possible: with a free education.”<sup>14</sup>

Yet without financial stability, athletes like Arian Foster often go hungry and are incentivized to forego their education and begin their professional careers earlier. After all, a jump to the professional level brings the promise of not just food, but a hefty paycheck. If the NCAA refers to these players as “*student-athletes*” and preaches that academics come first, one would reasonably expect that the NCAA would encourage them to *continue* their education, rather than effectively chasing them away.

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<sup>12</sup> In addition, David Booth Kansas Memorial Stadium underwent \$350 million in renovations, Tennessee’s Neyland Stadium underwent \$340 million in renovations, Berkeley’s Memorial Stadium underwent \$321 million in renovations, and Colorado State Stadium underwent \$238 million in renovations. *See* KU Places Directory, *David Booth Kansas Memorial Stadium*, UNIV. OF KANSAS, <http://places.ku.edu/buildings/memorialstadium> (last visited Mar. 14, 2019); Rachel Ohm, *Neyland Stadium Set for \$340M in Renovations Starting in Summer 2018*, KNOX NEWS (Nov. 2, 2017), <https://www.knoxnews.com/story/sports/college/university-of-tennessee/2017/11/02/neyland-stadium-set-340-m-renovations-starting-summer-2018/820890001>; Nanette Asimov, *Cal Scrambling to Cover Stadium Bill*, SFGATE (June 16, 2013), <http://www.sfgate.com/collegesports/article/Cal-scrambling-to-cover-stadium-bill-4604221.php>; Chad Deutschman, *On-Campus Stadium Approaches Completion*, COLLEGIAN (Mar. 22, 2017), <https://collegian.com/2017/03/on-campus-stadium-approaches-completion/>.

<sup>13</sup> *See* Steve Berkowitz, *NCAA Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/> (last visited Mar. 14, 2019).

<sup>14</sup> *See* Gregory Huckabee & Aaron Fox, *Is it Ethical to Sell a Lower Tier College Sports Team Another Team of Far Greater Competitive Skill?*, 16 U. DENV. SPORTS & ENT. L.J. 89, 125 (2014) (quoting the Knight Commission).

This article accomplishes four objectives. First, it conveys the origins of the NCAA's leverage, which has enabled it to prevent student-athletes from receiving any income from their NIL. Second, it analyzes how a Ninth Circuit decision produced a change in the status quo, and its potential fallout. Third, it explores the current impediments to compensating student-athletes. Finally, it proposes a detailed solution to complete the spirit of the Ninth Circuit's decision, while preserving "amateurism," as defined by the NCAA's published standards.

## II. THE NCAA'S RISE TO POWER, AND THE LEVERAGE OF "AMATEURISM"

The NCAA, originally known as the Intercollegiate Athletic Association, was formed in 1906, and renamed the NCAA in 1910.<sup>15</sup> Its formation was a response to a number of factors, including: (1) the epidemic of universities paying their players (some of whom did not even attend the school), (2) the commercial growth of sports, and (3) the need for safety regulations after several on-field deaths.<sup>16</sup> One of the NCAA's first goals was to reinstate a requirement of complete amateurism, which most schools largely ignored. According to *American College Athletics*, a report published by the Carnegie Foundation in 1929, 81 of the 112 schools surveyed provided monetary inducements to student-athletes.<sup>17</sup>

The NCAA responded by adopting what has become known as the "Sanity Code" in 1948.<sup>18</sup> The Sanity Code capped the amount of financial aid a student-athlete could receive at the cost of tuition and fees, and prohibited schools from awarding such aid (or offering such aid to potential student-athletes) based

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<sup>15</sup> Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

<sup>16</sup> The issues faced at the time were "the extreme pressure to win, which is compounded by the commercialization of sport, and the need for regulations and a regulatory body to ensure fairness and safety." *Id.*

<sup>17</sup> Branch, *supra* note 4.

<sup>18</sup> See Dillon Besser, *The Forgotten Party in O'Bannon v. National Collegiate Athletic Association: How Non-Revenue Sports Operate in a Changing Intercollegiate Marketplace*, 101 IOWA L. REV. 2105, 2112 (2016).

on athletic ability.<sup>19</sup> Yet, the Sanity Code was all bark but no bite. Since the punishment for violating the code was termination of NCAA membership and a complete ban on participation in NCAA sports, colleges refrained from imposing such a severe penalty on each other.<sup>20</sup> Its ineffectiveness caused the NCAA to repeal the Sanity Code three years later.<sup>21</sup>

In 1956, the NCAA pursued a less restrictive approach to financial aid. This approach permitted NCAA members to give student-athletes scholarships based on athletic ability. Still, the NCAA limited the amount schools could award to “grant in aid,” which equaled the total cost of “tuition and fees, room and board, and required course-related books.”<sup>22</sup> Student-athletes could seek additional financial aid *unrelated* to their athletic skills, but if they chose to do so, the total amount of athletic and nonathletic financial aid they received could not exceed the “cost of attendance” at their particular school.<sup>23</sup>

In August 2014, the NCAA allowed their member schools to increase their financial aid to the full cost of attendance and in 2015, the colleges in the five wealthiest conferences voted 79-1 to adopt that approach.<sup>24</sup> However, the NCAA has steadfastly refused to lift the complete prohibition on student-athletes receiving compensation based on their athletic ability, regardless of the source. Boosters, would-be licensors, and companies hoping to utilize the student-athletes’ NIL or pay for an endorsement are still unable to do so.<sup>25</sup>

Furthermore, when it comes to enforcing these prohibitions, no infraction is too small. For example, the NCAA suspended A.J. Green for four games at the start of the 2010 season for selling his game-worn jersey to raise money for a

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<sup>19</sup> See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 333 (2007).

<sup>20</sup> *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1054 (9th Cir. 2015). See also Branch, *supra* note 4.

<sup>21</sup> See Smith, *supra* note 15, at 15.

<sup>22</sup> *O’Bannon*, 802 F.3d at 1054.

<sup>23</sup> *Id.*

<sup>24</sup> See Marc Tracy, *Top Conferences to Allow Aid for Athletes’ Full Bills*, N.Y. Times (Jan. 17, 2015), <https://www.nytimes.com/2015/01/18/sports/ncaas-top-conferences-to-allow-aid-for-athletes-full-bills.html>.

<sup>25</sup> *O’Bannon*, 802 F.3d at 1055.

spring-break vacation.<sup>26</sup> While he served the suspension, the Georgia Bulldogs team store continued selling replicas of Green's jersey for a hefty profit. More recently, in July 2017, the NCAA revoked the eligibility of University of Central Florida kicker Donald De La Haye after he refused to de-monetize YouTube videos that the NCAA deemed to be "based on his athletics, reputation, prestige or ability."<sup>27</sup> While the NCAA makes such determinations on a case-by-case basis, it is entirely unclear as to what constitutes "reputation" or "prestige."<sup>28</sup>

The NCAA is quick to point to such prohibitions as measures taken to maintain amateurism, but they are undeniably lucrative for the organization. For example, from 1997 to 2014, the NCAA provided EA Sports with a license to create the NCAA Football video game with the image and likeness of all their star players.<sup>29</sup> This license was longstanding mainly because it was so profitable; the video game was an unequivocal success, reportedly selling 2.5 million copies in 2008 alone.<sup>30</sup> Ironically, the NCAA's licensing with EA Sports laid the groundwork for arguably one of the most important lawsuits in the NCAA's history, and created a precedent for student-athlete "compensation" in the near future, much to the dismay of the NCAA.

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<sup>26</sup> Mark Schlabach, *NCAA Upholds A.J. Green's Suspension*, ESPN (Sept. 18, 2010), <http://www.espn.com/college-football/news/story?id=5585220>.

<sup>27</sup> Benjamin A. Tulis, *NCAA's Statement on Student-Athlete Side Hustle Raises Questions*, THE NAT'L L. REV. (Aug. 11, 2017) (italics omitted), <https://www.natlawreview.com/article/ncaa-s-statement-student-athlete-side-hustle-raises-questions>.

<sup>28</sup> *Id.*

<sup>29</sup> See *The History of NCAA Football*, EA Sports (Nov. 27, 2013), <https://www.ea.com/news/ncaa-football-history>. The NCAA refrained from renewing its license in 2014, making the NCAA Football 2014 video game the last in the franchise to date. See Press Release, NCAA, NCAA Will Not Renew EA Sports Contract (July 2013), <https://web.archive.org/web/20130922005447/http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/July/NCAA+will+not+renew+EA+Sports+contract> [<https://perma.cc/ZN45-Z53Q>].

<sup>30</sup> See Branch, *supra* note 4.

### III. NCAA TAKES A LOSS: THE *O'BANNON* DECISION

The now-infamous *O'Bannon* case has an interesting backstory. Ed O'Bannon, years after being named an All-American basketball player at UCLA, discovered that he was depicted in a video game produced by EA Sports.<sup>31</sup> The game featured a virtual player on the UCLA team that wore his old jersey number (31), had his same height and build, and even mimicked his left-handed shot.<sup>32</sup> O'Bannon never consented to the use of his likeness in the video game, nor has he ever been compensated for it.<sup>33</sup> Yet, according to the NCAA rules, this was the appropriate, and indeed intended, result.<sup>34</sup> In fact, O'Bannon was still not entitled to any of the profits EA Sports generated by commercially exploiting his NIL, even after he left UCLA.<sup>35</sup>

O'Bannon sued the NCAA in federal district court in 2009, and the Ninth Circuit issued an opinion on appeal six years later.<sup>36</sup> O'Bannon alleged that the NCAA's amateurism rules violated Section 1 of the Sherman Antitrust Act<sup>37</sup> by preventing student-athletes from receiving compensation in exchange for use of their NILs.<sup>38</sup> In order to determine whether the NCAA's amateurism rules violated the Sherman Act, the Ninth Circuit applied the Rule of Reason test, rather than hold the restrictions illegal *per se*.<sup>39</sup> The court explained that even though the NCAA's restrictions were a horizontal restraint on trade, college sports

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<sup>31</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1055 (9th Cir. 2015).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.* at 1079.

<sup>36</sup> *Id.* at 1055. As the district court's decision was largely affirmed by the Ninth Circuit, the following analysis will be from the Ninth Circuit's perspective but will reference the district court opinion where appropriate. Oscar Robertson, whose NIL the NCAA continues to utilize over 27 years after he left college, also decided to join the suit. Marlen Garcia, *Oscar Robertson Joins Lawsuit vs. NCAA Over Use of Image, Likeness*, USA TODAY (Jan. 27, 2011), [https://usatoday30.usatoday.com/sports/college/2011-01-26-oscar-robertson-ncaa-likeness-lawsuit\\_N.htm](https://usatoday30.usatoday.com/sports/college/2011-01-26-oscar-robertson-ncaa-likeness-lawsuit_N.htm).

<sup>37</sup> *O'Bannon*, 802 F.3d at 1055; *see also* 15 U.S.C. § 1 (2018).

<sup>38</sup> *O'Bannon*, 802 F.3d at 1055.

<sup>39</sup> *Id.* at 1069–70.



could not exist without certain horizontal agreements.<sup>40</sup> One such agreement is the members' decision to enforce amateurism restrictions.<sup>41</sup>

The Rule of Reason test requires a three-step analysis. First, the court must determine whether the NCAA's actions created significant anticompetitive effects within a relevant market. Next, if significant anticompetitive effects exist, the court must determine whether there was a procompetitive justification for the NCAA's anticompetitive measures. Finally, the court must determine whether such procompetitive effects can be achieved through substantially less restrictive alternatives.<sup>42</sup>

#### A. ANTICOMPETITIVE EFFECTS WITHIN A RELEVANT MARKET

To evaluate the anticompetitive effects of the NCAA's agreement, the Ninth Circuit first determined the relevant market. The Ninth Circuit generally agreed with the district court, and found a cognizable "college education market" wherein colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities.<sup>43</sup> The court then noted that if the NCAA's compensation rules did not exist, member schools would compete to offer recruits compensation for their NILs.<sup>44</sup> By preventing students from receiving compensation beyond "grant in aid", the NCAA fixes the "price"<sup>45</sup> that schools pay to secure the services of their recruits, and effectively values the NILs of its student-athletes at zero. As the NCAA effectively prevents what would amount to a free market system, the court found substantial support for the

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<sup>40</sup> *Id.* at 1063.

<sup>41</sup> *Id.* at 1069. ("[W]e are persuaded . . . that the appropriate rule is the Rule of Reason . . . . Because the 'integrity of the 'product' cannot be preserved except by mutual agreement' [and] 'restraints on competition are essential if the product is to be available at all.'" (quoting *Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-04 (1984))).

<sup>42</sup> *Tanaka v. Univ. S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001).

<sup>43</sup> *O'Bannon*, 802 F.3d at 1072.

<sup>44</sup> *Id.* at 1070-71.

<sup>45</sup> *Id.* at 1058.

district court's finding that these rules have an anticompetitive effect on the college education market.

## B. PROCOMPETITIVE JUSTIFICATION

The Ninth Circuit then analyzed whether the NCAA's argument that amateurism, a core principal of the NCAA, provided sufficient procompetitive justification for these anticompetitive effects.<sup>46</sup> The court accepted the NCAA's argument that there is a "concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers."<sup>47</sup> The court found that preserving amateurism "makes [collegiate sports] more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball."<sup>48</sup> Nevertheless, the court noted that "not every rule adopted by the NCAA that restricts the market is necessary to preserving the 'character' of college sports."<sup>49</sup> Therefore, the court turned to the final factor.

## C. AVAILABILITY OF SUBSTANTIALLY LESS RESTRICTIVE ALTERNATIVES

The Ninth Circuit ultimately disagreed with the district court's analysis of the third factor, but still handed a victory to student-athletes. For a substantially less restrictive measure to be considered a viable alternative, that measure must be "virtually as effective in serving the procompetitive purposes of the NCAA's current rules, . . . without significantly increased cost."<sup>50</sup> The court noted that this is a significantly high burden, as the Supreme Court has instructed courts to generally afford the NCAA "ample latitude" to superintend college athletics.<sup>51</sup> The court then analyzed the two possible alternatives approved by the district court. These included (1) allowing NCAA member schools to award stipends to student-athletes up to the full cost of attendance;

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1073.

<sup>48</sup> *Id.* at 1074 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984)).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (quoting *City of Tuolumne v. Sonora Cty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).

<sup>51</sup> *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 120.

and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs.<sup>52</sup>

As for allowing NCAA schools to provide student-athletes with the full cost of attendance, the Ninth Circuit affirmed the district court's decision and held that raising the grant-in-aid cap to the cost of attendance "would have virtually no impact on amateurism . . . [since] all the money given to students would be going to cover their 'legitimate costs' to attend school."<sup>53</sup> The court also noted that there is no reason to assume college sports fans would be less interested in those sports if athletes' scholarships covered their full cost of attendance.<sup>54</sup> In fact, by the NCAA's own standards, student-athletes remain amateurs so long as any money paid to them is used for legitimate educational expenses.<sup>55</sup> Therefore, the Ninth Circuit found that providing student-athletes the full cost of attendance was a viable and substantially less restrictive alternative to the NCAA's amateurism rules.<sup>56</sup>

However, the Ninth Circuit reversed the district court's finding that offering student-athletes small amounts of deferred cash compensation for use of their NILs was an equally viable alternative.<sup>57</sup> The court asserted that "in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*."<sup>58</sup> The court decided that being a "poorly-paid college athlete" is much closer to being a minor league baseball player than being an amateur, and would significantly dampen the appeal of NCAA sports.<sup>59</sup> As the court warned, this slippery slope is one the NCAA may not survive:

Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit

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<sup>52</sup> *O'Bannon*, 802 F.3d at 1061.

<sup>53</sup> *Id.* at 1075.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1075–76.

<sup>57</sup> *Id.* at 1076.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its ‘particular brand of football’ to minor league status.<sup>60</sup>

The Ninth Circuit accordingly vacated this part of the district court’s opinion. As a result, the NCAA was not required to allow its member schools to pay student-athletes up to \$5,000 per year in deferred compensation.

#### **IV. OVERTIME: THE PROBLEMS THAT LIE AHEAD, AND THE STEPS NEEDED TO COMPLETE THE SPIRIT OF THE O’BANNON DECISION**

The *O’Bannon* decision, allowing schools to award cost of attendance, has had less than ideal repercussions. Some have asserted that schools are now creating incentives for athletes to attend by artificially inflating their cost of attendance in order to provide a larger monetary “cost of attendance stipend.”<sup>61</sup> This is plausible in part because the U.S. Department of Education provides guidelines for the stipend,<sup>62</sup> but financial aid offices at each school have the power to decide the amounts of each type of cost.<sup>63</sup>

It appears that the schools’ newfound freedom is too tempting for some of them to ignore. For example, Mississippi State University, University of Tennessee, and Auburn University are all located in states where cost of living is relatively low. In an economic study analyzing the lowest-cost states, Mississippi came in first, Tennessee came in seventh, and Alabama came in

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<sup>60</sup> *Id.* at 1078–79.

<sup>61</sup> Jake New, *More Money... If You Can Play Ball* (Aug. 12, 2015), <https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes>.

<sup>62</sup> For example, money can be calculated for tuition and fees; room and board; books; supplies; transportation and miscellaneous personal expenses.

<sup>63</sup> Jon Solomon, *2015–16 CBS Sports FBS College Football Cost of Attendance Database*, CBS SPORTS (Aug. 20, 2015), <http://www.cbssports.com/college-football/news/2015-16-cbs-sports-fbs-college-football-cost-of-attendance-database/>.

twelfth.<sup>64</sup> Yet Mississippi State, Tennessee and Auburn reported the highest cost of attendance, providing their student-athletes with a stipend of more than five-thousand dollars per year in extra spending money.<sup>65</sup>

University of Alabama is a particularly interesting case. When asked about the effects of the *O'Bannon* decision, Alabama's head football coach Nick Saban opined, "You can't create a system that can really almost promote fraud."<sup>66</sup> Saban's statement was made at a time when Alabama's cost of attendance stipend was one of the lowest in its conference at \$3,463 per year.<sup>67</sup> Coincidentally, Alabama's cost of attendance stipend rose 39.2% to \$5,386 following the *O'Bannon* decision.<sup>68</sup> This cost now gives high-powered schools a perceived competitive advantage over schools like Boston College, which has a much

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<sup>64</sup> See Missouri Economic Research and Information Center, *Cost of Living Data Series Annual Average 2018*, MISSOURI DEPARTMENT OF ECONOMIC DEVELOPMENT, [https://www.missourieconomy.org/indicators/cost\\_of\\_living/](https://www.missourieconomy.org/indicators/cost_of_living/) [<https://perma.cc/X4YW-VYLS>] (displaying that, unsurprisingly, California, D.C., and Hawaii were rated the most expensive). This article utilizes the cost of living figures from 2016 for consistency, as the cost of attendance stipends for each school are not readily accessible past the 2015-2016 academic year.

<sup>65</sup> Tennessee (\$5,666), Auburn (\$5,586) and Mississippi (\$5,126). See Natalie Williams, *SEC Coaches React to Wide Cost-of-Attendance Disparity; New League Rules Require Transparency*, AL.COM (June 4, 2015), [http://www.al.com/sports/index.ssf/2015/06/sec\\_coaches\\_cost\\_of\\_attendance.html](http://www.al.com/sports/index.ssf/2015/06/sec_coaches_cost_of_attendance.html).

<sup>66</sup> David Climer, *In the NCAA, There's No Such Thing as a Level Playing Field*, THE TENNESSEAN (June 4, 2015), <http://www.tennessean.com/story/sports/columnist/david-climer/2015/06/04/thing-level-playing-field/28503605/>.

<sup>67</sup> Jason Kendall, *What if Kansas Paid its Basketball Players? It Already Does, Sort Of*, KU SPORTS (July 24, 2016), <http://www2.kusports.com/news/2016/jul/24/what-if-kansas-paid-its-basketball-players-it-alre/>.

<sup>68</sup> Alabama's cost of attendance was \$5,386 for out-of-state players and \$4,172 for in-state players. See Michael Casagrande, *How Alabama's Cost-of-Attendance Scholarship Jumped 39 Percent*, AL.COM (July 28, 2015), [https://www.al.com/alabamafootball/2015/07/how\\_alabamas\\_cost-of-attendanc.html](https://www.al.com/alabamafootball/2015/07/how_alabamas_cost-of-attendanc.html).

lower cost of attendance stipend (\$1,400),<sup>69</sup> despite being located in the state with the fifth most expensive cost of living.<sup>70</sup>

This artificial inflation in a school's cost of attendance is precisely the domino effect the *O'Bannon* court was worried about, as it begins to resemble a bidding war to recruit top student-athletes. Consider a comparison between two schools in the SEC: the University of Tennessee and the University of Kentucky. Tennessee's football team has been a perennial powerhouse, with a winning percentage of 66% over 112 seasons.<sup>71</sup> Kentucky's football program, on the other hand, has been quite the opposite, with a winning percentage of just 45% over 101 seasons.<sup>72</sup> Since Tennessee and Kentucky are located in the seventh and tenth lowest cost of living states, respectively, one would expect that the cost of attendance stipends awarded to student-athletes would be comparable. Yet, Tennessee's stipend was more than *double* that of Kentucky's, with a difference of \$3,382.<sup>73</sup>

<sup>69</sup> James Crepea, *Why is Auburn's Cost of Attendance So Much Higher Than its Tuition, Room & Board?*, MONTGOMERY ADVERTISER (June 17, 2015), <http://www.montgomeryadvertiser.com/story/sports/college/auburn/2015/06/17/auburns-cost-attendance-much-higher-tuition-room-board/28899143/>.

<sup>70</sup> Missouri Economic Research and Information Center, *supra* note 64.

<sup>71</sup> *Tennessee Volunteers School History*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/schools/tennessee/index.html> (last visited Apr. 26, 2019) (winning percentage derived from school record through the 2016 season).

<sup>72</sup> *Kentucky Wildcats School History*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/schools/kentucky/index.html> (last visited Apr. 26, 2019) (winning percentage derived from school record through the 2016 season).

<sup>73</sup> Tennessee has a cost of attendance stipend of \$5,666 while Kentucky has a cost of attendance stipend of \$2,284. See Brad Wolverton & Sandhya Kambhampati, *At Least 15 Athletics Programs to Offer More Than \$4,000 in Extra Aid to Athletes*, THE CHRONICLE OF HIGHER EDUCATION (Apr. 9, 2015), <http://www.chronicle.com/article/At-Least-15-Athletics-Programs/229229/>. See also Tim Sullivan, *Lexington's Low Prices Could Hurt UK Athletics*, Courier Journal (Apr. 13, 2015), <https://www.courier-journal.com/story/sports/tim-sullivan/2015/04/13/cost-attendance-prove-costly-uk/25748011/>; Williams, *supra* note 65.

What stops these costs from continually escalating, and what differentiates these stipends from a bonus or a paycheck? By artificially inflating their cost of attendance in order to enable them to award higher stipends, these schools are presupposing a distinction that may not exist. The Ninth Circuit vacated the district court's award of \$5,000 per year in deferred compensation because "paying students for their NIL rights will vitiate their amateur status as collegiate athletes."<sup>74</sup> Does labelling the ever-increasing sum a "cost of attendance stipend" and awarding it to students immediately change that logic?

Furthermore, a school's inflation of its cost of attendance also adversely affects students who are not athletes. Since many students who are not on scholarship must take out loans to cover their tuition and living expenses, inflating the cost of attendance would cause them to request more money (and acquire more debt) than necessary. While a few students may immediately re-deposit the excess funds at the end of the semester, far more students may view the excess funds as a result of their frugal spending during the academic period and reward themselves by spending the remainder of the sum on personal activities. While this response is completely understandable, these students may end up paying thousands more in interest (as well as origination fees) for the additional loaned amount. This could have all been avoided had the schools not artificially inflated their cost of attendance.

Nevertheless, while the current cost of attendance stipend is far from perfect, it still has laudable intentions. For one, it provides a way to help struggling student-athletes cover their expenses. Ideally, the stipend should be directed to help students address expenses originating from food and groceries, school supplies, and transportation. Some schools achieve that aim.<sup>75</sup> Yet, many others fail to counsel their student-athletes on how the money should be spent and give them a large stipend with few constraints. For example, Auburn has a cost of attendance stipend of \$5,586, but that stipend is only divided into two categories:

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<sup>74</sup> O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1078 (9th Cir. 2015).

<sup>75</sup> Blair Kerkhoff & Tod Palmer, *They're Not Paychecks, But Major College Athletes Got Extra Scholarship Stipends for First Time this School Year*, KANSAS CITY STAR (June 26, 2016), <http://www.kansascity.com/sports/college/article86062792.html#storylink=cpy>.

\$2,728 for personal expenses and \$2,858 for transportation.<sup>76</sup> This presents two problems. First, a student-athlete may very well spend his or her stipend irresponsibly and have no money remaining to cover more vital expenses. Second, a stipend without specific spending constraints is disturbingly similar to offering a “cash sum[] untethered to educational expenses,”<sup>77</sup> which the Ninth Circuit explicitly rejected, stating that “once that line is crossed, we see no basis for returning to a rule of amateurism.”<sup>78</sup>

While the spirit of the *O’Bannon* decision is certainly well-intentioned, its restriction is: (1) under-inclusive as it does nothing to prevent schools from artificially inflating their cost of attendance and providing students with large stipends to use however they wish, similar to a paycheck, and (2) overbroad as it requires a relatively uniform stipend for all student-athletes at each particular school,<sup>79</sup> and may not provide adequate compensation for the amount of revenue generated by the student-athletes. A more structured and transparent system could resolve many of the current legal and logistical problems indirectly caused by the *O’Bannon* decision.

## V. PROPOSED SOLUTION

To curb the universities’ descent into a stipend ‘bidding war’ for top recruits, student-athletes should be “compensated” for their NILs while remaining amateurs under the NCAA’s current definition. A free market solution would benefit soon-to-be-highly-paid professionals, but largely ignore smaller market recruits, or players who outperform schools’ initial performance expectations. This article’s solution would benefit even this second group of overlooked players, while still preserving the values of amateurism championed by the NCAA.

This solution entails “compensating” players for the great value they add to their respective universities (and the NCAA) in the form of a loss-of-value (“LOV”) insurance policy, with

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<sup>76</sup> *Why is Auburn’s Cost of Attendance So Much Higher Than Its Tuition, Room & Board?*, MONTGOMERY ADVERTISER (June 17, 2015), <http://www.montgomeryadvertiser.com/story/sports/college/auburn/2015/06/17/auburns-cost-attendance-much-higher-tuition-room-board/28899143/>.

<sup>77</sup> *O’Bannon*, 802 F.3d at 1078.

<sup>78</sup> *Id.*

<sup>79</sup> Some schools report a different cost of attendance for in-state and out-of-state students, but fail to provide any specific figures for cost of attendance beyond these two large groups.



premiums paid from a fund financed with a percentage of the revenue generated by the players' NIL. This would provide any qualifying player who suffers an injury that derails or significantly impedes his or her career with the ability to collect on a policy that could help either finance the athlete's rehabilitation or jumpstart a transition to a new profession. While student-athletes would never see a penny of this money in an ideal situation, they would have the comfort of knowing that should they ever need it, they could reap a share of the school's (or the NCAA's) profits that they helped generate. This solution also helps the "victims" who need it most. Few pity the NFL or NBA millionaires who lost a few extra dollars at the beginning of their careers. However, college stars who suffer career-altering injuries can take comfort in knowing that their injuries will not preclude their ability to profit from their amateur achievements.

#### A. LOSS-OF-VALUE INSURANCE EXPLAINED

A loss-of-value insurance policy protects a player's future contract value from decreasing below a pre-established threshold due to an injury or illness suffered during the coverage period.<sup>80</sup> Currently, the insurance industry mandates that LOV insurance be purchased in addition to permanent total disability insurance, which covers an athlete who suffers a career-ending injury.<sup>81</sup>

The process for purchasing LOV coverage is fairly straightforward. First, an insurance underwriter determines an athlete's projected draft position and, depending on the player's projected ranking, may offer a coverage limit.<sup>82</sup> Next, the underwriter sets a LOV threshold, which is typically fifty percent of the athlete's projected rookie contract.<sup>83</sup> If the player ultimately receives a contract offer that is lower than the threshold amount solely because of a significant injury or illness, the player may be able to collect up to the coverage limit.<sup>84</sup> However, standard coverage exclusions may prevent the athlete from collecting on the policy, even if the prior factors are met. These vary based on

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<sup>80</sup> *Loss-of-Value White Paper*, NCAA, <http://www.ncaa.org/about/resources/insurance/loss-value-white-paper> [<https://perma.cc/U39K-BV9N>].

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

provider and individual plans, but typically include pre-existing injuries or illnesses, osteoarthritis or a cumulative injury, a criminal act, intentional self-injury, or a mental disorder or disease.<sup>85</sup> Medical underwriting is usually required to disclose any such pre-existing injuries or illnesses, which are usually excluded from coverage.

## B. LOV INSURANCE PRESENTS A SIGNIFICANT FORM OF COMPENSATION TO STUDENT-ATHLETES

While players may purchase LOV policies directly through a provider, the NCAA does not provide LOV policies to student-athletes.<sup>86</sup> These policies can become quite expensive because insurers absorb the risk of compensating players for potentially millions in lost wages. As rookie contracts are generally based solely on draft position under the NFL Collective Bargaining Agreement,<sup>87</sup> a player who falls from his or her projected spot in the draft due to injury could end up losing millions of dollars.

Myles Jack is unfortunately an example of such a player. Jack, a linebacker out of UCLA who declared for the 2016 NFL Draft, was considered a consensus top-5 pick,<sup>88</sup> in line to sign a rookie contract worth millions of dollars. However, just seven months before the draft, Jack tore his anterior meniscus during a

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<sup>85</sup> *Id.*

<sup>86</sup> *Loss-of-Value White Paper: Executive Summary*, NCAA, <http://www.ncaa.org/about/resources/insurance/loss-value-white-paper-executive-summary> [<https://perma.cc/94GU-DYNJ>].

<sup>87</sup> Compensation for rookies pursuant to the Collective Bargaining Agreement is based on the league's salary cap and the rookie compensation pool, with the league-wide pool divided among the member clubs, with each club getting a share proportional to its total number, round and position of the club's draft picks (plus a max of \$75,000 for undrafted rookies). See NFL Players Association, *NFL Collective Bargaining Agreement 21–32* (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/X5UH-AG87>].

<sup>88</sup> Jack was the 3rd ranked player on NFL Network draft analyst Daniel Jeremiah's 2016 rankings, and Jack was projected to go 5th overall by renown draft analyst Todd McShay. See Daniel Jeremiah, *Daniel Jeremiah's Top 50 Prospects for 2016 NFL Draft*, NFL (Mar. 4, 2016), <http://www.nfl.com/news/story/0ap3000000637416/article/daniel-jeremiahs-top-50-prospects-for-2016-nfl-draft>.

routine football practice.<sup>89</sup> With a projected four to six-month recovery period, teams shied away from him on draft day, and Jack fell out of the first round completely.<sup>90</sup> Instead, with the fifth pick in the draft, the Jacksonville Jaguars selected cornerback Jalen Ramsey.<sup>91</sup> Ramsey signed a four-year rookie deal worth \$23.3 million with a \$15 million signing bonus.<sup>92</sup> Jack would not be selected until the 36th pick, also by the Jaguars, where he signed a four-year rookie deal worth only \$6.3 million, with a \$2.8 million signing bonus—a difference of over \$17 million, or almost 73%.<sup>93</sup>

Jack's story ultimately proved to be a happy one, as he has crafted a successful career in the NFL.<sup>94</sup> However, there are several athletes whose injuries prevented them from having a professional career at all. One such example is Stanley Doughty, a former defensive tackle for the University of South Carolina. Doughty was told by his team's training staff to play through a spinal injury that he suffered during a game.<sup>95</sup> As a result, Doughty went undrafted, and while he eventually signed a contract with the Kansas City Chiefs, he never received medical clearance to play in the NFL and was forced to retire early.<sup>96</sup>

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<sup>89</sup> Stefanie Loh, *Here's How Myles Jack, Former Bellevue and UCLA Star, Got Himself Ready for the NFL Draft*, SEATTLE TIMES (Feb. 19, 2016), <https://www.seattletimes.com/sports/seahawks/heres-how-myles-jack-former-bellevue-and-ucla-star-got-himself-ready-for-the-nfl-draft/>.

<sup>90</sup> *See NFL Draft: Results, Analysis for All 253 Picks*, ESPN (May 3, 2016), [http://www.espn.com/nfl/draft2016/story/\\_/id/15440046/nfl-draft-2016-full-results-picks-analysis-order-round-1-7](http://www.espn.com/nfl/draft2016/story/_/id/15440046/nfl-draft-2016-full-results-picks-analysis-order-round-1-7).

<sup>91</sup> *Id.*

<sup>92</sup> *Jalen Ramsey*, SPOTRAC, <https://www.spotrac.com/nfl/jacksonville-jaguars/jalen-ramsey-18953/> (last visited Mar. 24, 2019).

<sup>93</sup> *Myles Jack*, SPOTRAC, <https://www.spotrac.com/nfl/jacksonville-jaguars/myles-jack-18984/> (last visited Mar. 24, 2019).

<sup>94</sup> *Id.*

<sup>95</sup> Meghan Walsh, *'I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes*, THE ATLANTIC (May 1, 2013), <https://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/>.

<sup>96</sup> *Id.*

Moreover, if players in Doughty's position return to school, they may end up losing their scholarship as well. NCAA rules do not prohibit a coach from revoking a player's scholarship the year after the athlete becomes injured.<sup>97</sup> As a result, athletes courted by numerous schools when they had the opportunity to display their athletic abilities are often left to fend for themselves. Without a scholarship, many athletes cannot afford their own health insurance and are wholly dependent on their school's healthcare system.<sup>98</sup> Even if these players are able to afford their own health insurance or are able to utilize their parents' coverage, athletes who lose their scholarship may drop out of college, unable (or unwilling) to pay for tuition.

LOV insurance can provide these tragic stories with a silver lining. For example, Ifo Ekpre-Olomu was initially projected by many as a first round pick,<sup>99</sup> but tore his ACL in the practice before the Rose Bowl.<sup>100</sup> If Ekpre-Olomu had been drafted at the end of the first round as predicted, he could have made \$6 million per year.<sup>101</sup> Yet teams feared how the injury would affect his career and resisted drafting him. As a result, Ekpre-Olomu dropped all the way to the seventh round and signed a four-year contract worth only about a third of his projected

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<sup>97</sup> Ben Strauss, *A Fight to Keep College Athletes From the Pain of Injury Costs*, N.Y. TIMES (Apr. 24, 2014), <https://www.nytimes.com/2014/04/25/sports/a-fight-to-keep-college-athletes-from-the-pain-of-injury-costs.html>.

<sup>98</sup> Walsh, *supra* note 95.

<sup>99</sup> For example, NFL draft expert Mel Kiper, Jr. of ESPN rated Ekpre-Olomu as the top senior cornerback available in the 2015 NFL Draft. Mel Kiper, Jr. *Top CB Prospects for 2015*, ESPN (June 12, 2014), [http://insider.espn.com/nfl/draft2015/insider/story/\\_/id/11065987/mel-kiper-early-ranking-top-cornerback-prospects-2015-nfl-draft](http://insider.espn.com/nfl/draft2015/insider/story/_/id/11065987/mel-kiper-early-ranking-top-cornerback-prospects-2015-nfl-draft).

<sup>100</sup> Andy Staples, *Man Coverage: How Loss-of-Value Policies Work and Why They're Becoming More Common; Punt, Pass & Pork*, SPORTS ILLUSTRATED (Jan. 18, 2016), <https://www.si.com/college-football/2016/01/18/why-loss-value-insurance-policies-becoming-more-common>.

<sup>101</sup> See *Malcom Brown*, SPOTRAC, <https://www.spotrac.com/nfl/draft/2015/round-1/> (last visited Mar. 14, 2019) (Malcom Brown was the last of the first-round picks for the 2015 draft and signed a \$7.6 million dollar contract, \$6 million of which was guaranteed, with the New England Patriots).

salary.<sup>102</sup> Fortunately, Ekpre-Olomu had the foresight to purchase LOV coverage. As a result of his fall in draft position, he received \$3 million from his policy and will collect another \$2 million if he never plays.<sup>103</sup> As of the date of this publication, Ekpre-Olomu remains unsigned.<sup>104</sup>

For all its benefits, an extensive LOV plan is not cheap, especially for a premium-caliber player. For example, the parents of Leonard Fournette, a former Louisiana State University tailback and current Jacksonville Jaguar, purchased two insurance policies, each worth \$10 million: one to cover total disability in the event of a career-ending injury and one to cover circumstances leading to a drop in his projected draft spot.<sup>105</sup> The premiums for these policies were approximately \$8,000 per \$1 million of coverage, which forced Fournette's parents to take out a loan.<sup>106</sup> While Fournette is fortunate his parents were in the position to bankroll such a prudent financial decision, players who come from less affluent families do not have that luxury.

### C. LOV INSURANCE FILLS A NEED UNADDRESSED BY CURRENT ALTERNATIVES

Admittedly, schools can already purchase LOV insurance for their athletes. Therefore, one could argue that if the proposed solution was an effective means to recruit athletes, schools would have already pursued this option. However, there are only a limited number of funds that schools can utilize to pay for these policies. One of the most common LOV payment system is the

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<sup>102</sup> *Ifo Ekpre-Olomu*, SPOTRAC, <https://www.spotrac.com/nfl/miami-dolphins/ifo-ekpre-olomu-16967/> (last visited Mar. 24, 2019).

<sup>103</sup> Darren Rovell, *Ifo Ekpre-Olomu Collects Record \$3M on Loss of Value Policy*, ESPN, (Oct. 19, 2015), [http://www.espn.com/nfl/story/\\_/id/13924955/ifo-ekpre-olomu-cleveland-browns-collects-3-million-draft-policy](http://www.espn.com/nfl/story/_/id/13924955/ifo-ekpre-olomu-cleveland-browns-collects-3-million-draft-policy).

<sup>104</sup> *Ifo Ekpre-Olomu*, *supra* note 102.

<sup>105</sup> See Dennis Dodd, *Leonard Fournette's \$10M Policies and the Unregulated World of Player Protection*, CBS SPORTS (May 12, 2016), <https://www.cbssports.com/college-football/news/leonard-fournettes-10m-policies-and-the-unregulated-world-of-player-protection/>.

<sup>106</sup> *Id.*

Student Assistance Fund (“Fund”).<sup>107</sup> Florida State University used this approach for Jameis Winston, Texas A&M used it for Cedric Ogbuehi, and the University of Oregon used it for Marcus Mariota.<sup>108</sup>

Unfortunately, the Fund has its limits, as it is not intended to be used as a recruiting tool. The NCAA website explains that “most of the money [in the Fund] is used for educational purposes, with some also going for needs such as clothing.”<sup>109</sup> Universities have described it as a fund “intended to assist in covering student-athletes’ non-athletics-related costs while attending an institution.”<sup>110</sup> Additionally, the capital included in the Fund is not exceptionally high. For example, the SEC has previously stated that its member schools have been allotted \$350,000 for the Fund.<sup>111</sup> Given the rising cost of LOV insurance premiums, this is simply not enough capital to adequately insure a number of different student-athletes. Moreover, most schools avoid using the Fund for this purpose due to political reasons, since the money is designated to cover unplanned expenses and would detract from

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<sup>107</sup> See Staples, *supra* note 100 (discussing the use of LOV insurance policies by student-athletes and how some schools dip into their NCAA-approved Student Assistance Funds to pay the premiums). This article does not claim to specify every alternative means through which a university can fund the payment of LOV insurance for student-athletes. *Id.*

<sup>108</sup> See Kristi Dosh, *Assistance Funds Pay Tab to Insure Stars*, SPORTS BUSINESS DAILY (Jan. 12, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/01/12/Colleges/Student-Assistance-Fund.aspx> (discussing how Florida State, Texas A&M, and University of Oregon all paid the premiums on the LOV policies for their star players).

<sup>109</sup> See NCAA, *Student-Athlete Benefits*, <http://www.ncaa.org/about/resources/finances/student-athlete-benefits> [<https://perma.cc/GBK4-C8UV>].

<sup>110</sup> See Sun Devil Compliance, *NCAA Student Assistance Fund*, ARIZONA STATE UNIVERSITY, <https://sundevilcompliance.asu.edu/enrolled-student-athletes/ncaa-student-assistance-fund> (last visited Mar. 24, 2019).

<sup>111</sup> See Bruce Feldman, *How Texas A&M Paid Over \$50,000 to Get Cedric Ogbuehi Back for 2014*, FOX SPORTS (July 16, 2014), <https://www.foxsports.com/college-football/story/texas-am-aggies-paid-nearly-60-grand-top-nfl-prospect-cedric-ogbuehi-071614> (stating that the SEC allotted each of its members \$350,000 for their Student Assistance Funds).

the funds available to other athletes.<sup>112</sup> As Bob Bowlsby, the Big 12 commissioner and chairman of the NCAA Football Oversight Committee, has stated, “I’m not comfortable having the Student Assistant Fund used for [insurance] . . . it’s a very large premium, typically, and it takes away from other kids.”<sup>113</sup>

#### D. LOV COVERAGE WOULD SATISFY THE REQUIREMENTS OF BOTH THE NCAA AND ITS PLAYERS

Every year, the NCAA releases its NCAA Division 1 Manual, which, among other topics, provides the rules and regulations governing amateurism and player eligibility. Currently, there is an explicit carve-out under Section 12.1.2.4.4, entitled “Exception for Insurance Against Disabling Injury or Illness, or Loss of Value.”<sup>114</sup> The provision provides that an individual may borrow against “his or her future earnings from an established, accredited commercial lending institution exclusively for the purpose of purchasing insurance . . . against a disabling injury or illness that would prevent the individual from pursuing a chosen career or for the purpose of purchasing loss-of-value insurance.”<sup>115</sup> The provision also explicitly contemplates a school’s role in purchasing LOV coverage, as the subsection further states, “an institution’s president or chancellor (or his or her designated representative from outside the department of athletics) may designate an institutional staff member (or staff members) (e.g., professional sports counseling panel) to assist a student-athlete with arrangements for securing the loan and insurance.”<sup>116</sup>

Given the language above, the NCAA would be hard-pressed to assert that allowing schools to purchase LOV insurance for qualifying players<sup>117</sup> would vitiate amateurism, as players are

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<sup>112</sup> See Staples, *supra* note 100.

<sup>113</sup> See Dodd, *supra* note 105.

<sup>114</sup> NCAA, DIVISION I MANUAL 69 (2018), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/U9WZ-XYAX>].

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> As LOV policies insure against the athlete’s fall in the draft, providers will typically only offer LOV insurance to players who are projected to be drafted (or drafted in a certain round or by a certain pick). See *Loss-of-Value White Paper*, *supra* note 80.

already permitted to do so themselves. Many of these policies, such as the coverage Leonard Fournette's parents purchased, are simply too cost-prohibitive to purchase with funds borrowed against future earnings. Additionally, there are only a select few players each year whose projected future earnings would be high enough to justify purchasing an expansive LOV policy. These financial implications simply have no impact on whether purchasing such policies would fall within the confines of the NCAA's rules.

While the costs for universities that purchase LOV coverage for their student-athletes would undoubtedly be significant, Section I demonstrates that these institutions are in prime position to bear the expense. Additionally, these expenses can be equitably drawn from a fund financed with revenue generated from commercially exploiting the players' NILs, finally "compensating" them for the immense value they bring to their schools. The revenue generated from monetizing players' NILs would enable universities to attract top talent based, in part, on the LOV coverage they would be willing to offer.

Schools could also include significant incentives within the structure of the LOV coverage to better serve their student-athletes. For example, the amount of LOV coverage purchased could be based on the projected performance of the player averaged over a minimum of two years, which would encourage student-athletes to remain in school to pursue an education. Players and NCAA critics alike have wanted a free-market system for years, this solution would provide one while preserving student-athletes' status as amateurs. It would allow the students to exist in an ideal intersection—between 'student' and 'athlete'.

## VI. CONCLUSION

It is time for a change. The NCAA and its member universities should no longer be allowed to improve their bottom-line to the detriment of their student-athletes. We must work to change the perception that a free education is sufficient compensation, especially when the NCAA allows coaches to revoke a player's athletic scholarship—this "free education"—if he or she gets injured.<sup>118</sup> The NCAA touts this arrangement as perpetuating amateurism, but such a "performance-based reward" is the epitome of compensation. When players can no longer compete, they are no longer permitted to utilize a university's resources free of charge. One would be hard-pressed to distinguish

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<sup>118</sup> See Strauss, *supra* note 9797.



this practice from an employee who gets laid off for not showing up to work.

Imagine if schools were required<sup>119</sup> to provide LOV insurance for their student-athletes. Picture the difference this would have made for Stanley Doughty, who was never able to live out his dream in the NFL. Leonard Fournette could have slept easy at night, without having to worry about how his parents will pay for his insurance premiums.

If everyone can agree to “play ball” and accept that student-athletes deserve some form of compensation for the risk they undertake and the value they provide for their universities, we may finally be able to change the inequitable status quo. True, some student-athletes may be disappointed that they will not get the high-cash salary available to professionals. However, LOV coverage will enable them to complete their education free of any financial distress, while not endangering their amateur status. The proposed solution is truly a “win” for everyone, no matter whose team they are on.

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<sup>119</sup> Such a requirement would be due to market forces, similar to the trend among certain schools of raising cost of attendance stipends to attract student-athletes, as previously critiqued in Section IV.