

11-2010

Exploring the Commercialized Arms Race Metaphor

Alfred Mathewson

University of New Mexico - School of Law, mathewson@law.unm.edu

Follow this and additional works at: https://digitalrepository.unm.edu/law_facbookdisplay

 Part of the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Mathewson, Alfred. "Exploring the Commercialized Arms Race Metaphor." *Reversing Field: Examining Commercialization, Labor, Gender, and Race in 21st Century Sports Law* (2010): 536 pages. https://digitalrepository.unm.edu/law_facbookdisplay/38

This Book Chapter is brought to you for free and open access by the School of Law at UNM Digital Repository. It has been accepted for inclusion in Faculty Book Display Case by an authorized administrator of UNM Digital Repository. For more information, please contact amywinter@unm.edu.

REVERSING FIELD

mining
Commercialization, Labor,
Gender, and Race in
21st-Century
Sports
Law

Edited by **andré douglas pond cummings & Anne Marie Lofaso**

WEST VIRGINIA UNIVERSITY PRESS • MORGANTOWN 2010



WEST VIRGINIA UNIVERSITY PRESS, MORGANTOWN 26506

COPYRIGHT 2010 BY WEST VIRGINIA UNIVERSITY PRESS

ALL RIGHTS RESERVED.

FIRST EDITION PUBLISHED 2010 BY WEST VIRGINIA UNIVERSITY PRESS

18 17 16 15 14 13 12 11 10 1 2 3 4 5 6 7 8 9

ISBN-10: 1-933202-55-6

ISBN-13: 978-1-933202-55-6

(ALK. PAPER)

LIBRARY OF CONGRESS CATALOGUING-IN-PUBLICATION DATA

REVERSING FIELD : EXAMINING COMMERCIALIZATION, LABOR, GENDER, AND RACE IN 21ST-CENTURY SPORTS
LAW / EDITORS, ANDRÉ DOUGLAS POND CUMMINGS, ANNE MARIE LOFASO.

P. CM.

INCLUDES BIBLIOGRAPHICAL REFERENCES.

ISBN-13: 978-1-933202-54-9 (PBK. : ALK. PAPER)

ISBN-10: 1-933202-54-8 (PBK. : ALK. PAPER)

ISBN-13: 978-1-933202-55-6 (CLOTH : ALK. PAPER)

ISBN-10: 1-933202-55-6 (CLOTH : ALK. PAPER)

I. SPORTS—LAW AND LEGISLATION—UNITED STATES. I. CUMMINGS, ANDRÉ DOUGLAS POND. II. LOFASO,
ANNE MARIE.

KF3989.R48 2010

344.73'099—DC22

LIBRARY OF CONGRESS CONTROL NUMBER: 2009043724

COVER ILLUSTRATION BY RAYMOND VERDAGUER / WWW.RVERDAGUER.COM

COVER DESIGN BY THAN SAFFEL / WVU PRESS

*To Lavinia, my soulful muse,
and to Cole Kaianuanu and Malia Ao'ilagi, my first and first*

*To Jim, my ever was,
and to Giorgianna Rose, our ever shall be*

CONTENTS

Foreword.....	xiii
John Carlos	
Preface	xv
Acknowledgments	xviii
Introduction.....	
Stacey B. Evans	
The Interconnectivity of Sports to Commercialization, Labor, and Race	8
John W. Fisher II	
 PART I: COMMERCIALIZATION: THE RECRUITING AND SELLING OF THE MODERN ATHLETE	
Overview	13
andré douglas pond cummings	
More Lightning and Less Thunder: The Challenge for NCAA Athletics	16
Bernard Franklin	
The Value and Perils of Intercollegiate Athletics: A Presidential Perspective	28
David C. Hardesty, Jr.	
Exploring the Commercialized Arms Race Metaphor	34
Alfred Dennis Mathewson	

Describing Racism as Asymmetrical Market Imperfections, or How to Determine Whether the NBA Dress Code is Racist	46
Andre L. Smith	

Athletes as Television Celebrities: Why We Watch; How They Benefit; Must They Be Responsible?	66
Sherri Burr	

PART II: LABOR: HOW THE ATHLETE CHANGES THE ECONOMIC PLAYING FIELD

Overview	85
Anne Marie Lofaso	

A. BALLS OR STRIKES: ARE ECONOMIC WEAPONS FINDING THE ZONE?

Introduction	89
Jeffrey M. Hirsch	

The 1994-'95 Baseball Strike and National Labor Relations Board: To the Precipice and Back Again	92
William B. Gould IV	

1994 Baseball Players' Strike: A Case Study in Labor's Use of its Most Effective Economic Weapon	106
Dennis P. Walsh	

The State of Sports Law and Policy: Views from a Labor Law Professor	115
William B. Gould IV	

B. FALSE/POSITIVES: DEBATING THE MERITS OF DRUG TESTING

Introduction	128
Anne Marie Lofaso	

The Temptation of Performance-Enhancing Drugs	130
andré douglas pond cummings	
Performance-Enhancing Drugs and How They Affect Today's Athlete: Views from a Medical Doctor	136
Julian Bailes	
From Barry Bonds to USADA: Protecting the Interests of "Drug-Free" Athletes	147
Timothy Davis	
Challenging the Premise of Steroid Testing in Sports	158
Wm. David Cornwell, Sr.	

PART III: FINDING EQUAL FOOTING: GENDER ISSUES IN SPORTS

Overview: Progress Riddled with Disappointment	173
Anne Marie Lofaso	
The Invisible Pregnant Athlete and the Promise of Title IX	175
Deborah L. Brake	
Title IX Backlash and Intercollegiate Athletics	216
Barbara Osborne	
Reflections of a Former Athlete as a Young Woman: Growing Up Under Title IX	235
Anne Marie Lofaso	
Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?	251
Bethany Swaton	

PART IV: RACE ISSUES IN SPORTS

Overview: A Troubling History but a Bright Future	281
andré douglas pond cummings	

Race in Sports: The Continuing Dilemma	284
Leonard J. Elmore	

A. RACING FROM THE PAST: EXPOSING RACISM IN TODAY'S COLLEGIATE ATHLETICS

Introduction	299
andré douglas pond cummings	

The Legacy of <i>Brown</i> : Commodification of the African American Student-Athlete?	301
Dana D. Brooks and Ronald Althouse	

Using Social Psychology to Evaluate Race and Law in Sports	311
Michael A. McCann	

From the Inside Looking Out: Racism in Men's Collegiate Coaching	322
Marlon LeBlanc	

Progress Realized? The Continuing American Indian Mascot Quandary	326
andré douglas pond cummings	

B. PROFESSIONAL EQUALITY: THE ROONEY RULE

Introduction	350
Todd J. Clark	

Minorities Are Separate and Unequal: A Look at the Minority Hiring Practices in Collegiate and Professional Athletics	353
Floyd Keith	

The Changing Landscape of African Americans in Sports	359
Kenneth L. Shropshire	
The Critical Role of the Fritz Pollard Alliance	363
Cyrus Mehri	
The Fritz Pollard Alliance, the Rooney Rule, and the Quest to “Level the Playing Field” in the National Football League	369
N. Jeremi Duru	
Pushing Weight	386
andré douglas pond cummings	

Exploring the Commercialized Arms Race Metaphor

Alfred Dennis Mathewson*

The metaphor of a commercial “arms race” in intercollegiate athletics appears frequently in recent sports law literature and discourse. I am intrigued by the metaphor and wish to briefly examine it and its implications. I conclude that the metaphor does fit, albeit uncomfortably. I also wish to present a couple of metaphors of my own.

I. Commercial Arms Race in Intercollegiate Athletics

My intrigue began with a study to examine the financial effects of intercollegiate athletics commissioned by the NCAA in 2003 that was updated in 2005.¹ The researchers tried to see if the data proved or refuted certain myths or common perceptions of intercollegiate athletics. Among other things, they specifically investigated the existence of an arms race in men’s football and basketball. The reports issued by the researchers, collectively referred to herein as the Orszag Report, indicated that there was some support for intra-conference arms races but not a national intercollegiate one and that there was stronger support for the existence of an arms race in capital expenditures for the construction of new facilities or the renovation of old ones, but that there were insufficient data to reach that conclusion with confidence.² The researchers ultimately concluded that the existence of an arms race was or had not been proved.³ The issuance of the ultimate conclusion bore an eerie resemblance to the pronouncements by the spokesperson for the American Tobacco Institute in bygone days, who at every opportunity to say so publicly, emphatically stated that no study had proved that cigarette smoking causes cancer.

The uncanny resemblance made me examine the metaphor. Let me begin with the definition of the arms race used by the researchers. The Orszag Report acknowledged that the term “arms race” may be used to describe disparate phenomena,⁴ but they were using a specific definition. The researchers were not seeking proof of the metaphor as a whole, but looked for only one of the

ingredients: financing. It was not just financing; it was particular money flows that they were looking for. An arms race existed only if they found a specific relationship between money flows by rivals. The researchers looked to see if an increase in spending by one institution was matched by an increase in spending by other institutions.⁵ They looked for the financial footprints of the arms race in data that are not visible to the public and then drew a conclusion about the existence of the entire metaphor. I do not criticize the methodology used for the Orszag Report; in fact, I assume that the methodology employed was sound.

The approach of the Orszag researchers was consistent with the frequent invocations of the metaphor in the public and scholarly discourse about the ills of intercollegiate athletics. The crescendo began with the validation of the metaphor in the 2001 Knight Commission Report with its clarion call for collective action to overcome an “athletics arms race.”⁶ The Knight Commission did not define the term, but its proposed measures to address an arms race were instructive. The measures included a reduction of expenditures in men’s basketball and football and the regulation of compensation for coaches in those sports. At least twenty law review articles published since 2003 have invoked or analyzed the metaphor.⁷ The references in the sports law literature tend to revolve around the escalation of revenues and costs in intercollegiate athletic programs rather than the acquisition of weapons. The facilities arms race is the primary version of the metaphor that actually contemplates the acquisition or development of weapons.

II. Militaristic Metaphor

Metaphors are often seductive in that their imagery is often more powerful than their logic.⁸ I sought to flesh out the images of the “arms race” metaphor in its entirety to see if the components of intercollegiate athletics align neatly with those of the metaphor. The metaphor has militaristic connotations.⁹ An arms race concerns the development of new weapons systems to stay ahead of opposing nations. It invokes images of opposing nations, commanders-in-chief, generals, armies, brain trusts, weapons, a military industrial complex, money, and financiers. The metaphor also contemplates action. The opposing nations then must acquire or develop weapons to keep up with or surpass rivals. If the metaphor is accurate, if it is to hold up, several of these images should be present in the intercollegiate athletics picture. The Orszag Report concentrated on the concomitant increase in spending that may accompany such weapons programs.

An examination of the picture of intercollegiate athletics, including men’s basketball and football but not limited to them, reveals the presence of several of these factors. The stars of the metaphor do align with intercollegiate athletics, uncomfortably so.

Metaphor	Factor
Nations	Universities, Conferences
Commanders-in-chief	University Presidents
Military industrial complex	Basketball – AAU Football – YAFL, high schools, camps
Brain trusts	Athletic Directors
Generals	Athletic Directors, Coaches
Armies	Teams
Weapons	Players, Coaches, Facilities
Financiers	Boosters, Taxpayers, Other Students, Fans, Advertisers
Arms control	NCAA Knight Commission Presidential Task Force Congress

The discomfort has to do with the characterization of people and individuals in the metaphor in military terms. Labeling university presidents as commanders-in-chief, boosters as financiers, or coaches as generals may not be unfair, but characterizing eighteen- to twenty-four-year-old student-athletes as weapons is unseemly. Yet, NCAA regulations on recruiting have everything to do with the efforts of universities to upgrade the caliber of athletes they put on the field to compete. The Orszag Report avoids this unpleasantness by focusing on capital and operating expenditures. Although the money has to be spent on something, only the former literally invites the weapons analogy; the latter simply connotes the costs of operating the military day to day.

Although the “race” component of the metaphor suggests that universities are trying to surpass one another, it does not require a school to act in response to another school other than to compete, to try to get better. The arms race for better coaches is reflected in the annual headlines about million-dollar salaries as coaches change schools. The race for better athletes is reflected in the stories and cases about recruiting violations and academic scandals. Indeed the historic debate over Proposition 48 and uniform minimum academic standards suggests a pool of gifted athletes craved by university athletic programs.¹⁰ Thus, an arms race may exist where a university seeks upgrades in athletic talent not necessarily in response to others. While a university may increase its spending as a competitive response, a more efficient university may make improvements without an increase in

athletic talent not necessarily in response to others. While a university may increase its spending as a competitive response, a more efficient university may make improvements without an increase in spending. It may reallocate resources within its operating budget. Moreover, operating expenditures will not reflect “soft” spending, that is spending by boosters and others to support a program from funds that are not channeled through a university. The improvements may show even if they are not reflected in university expenditures. Where the Orszag Report focused on the correlations between spending increases, another study may examine program improvements in terms of better players and coaches. Such a study would be more subjective though.

ARMS CONTROL

What is an arms race without arms control? The NCAA’s abandonment of cost containment initiatives in the 1990s resembles SALT I.¹¹ The Knight Commission’s initial recommendations in 1991 essentially called for a United Nations in the guise of a Coalition of Presidents. The more recent Coalition on Intercollegiate Athletics and the Drake Group¹² are influential nongovernmental organizations. The Presidential Task Force presents another industry effort at détente, although it does not explicitly mention the arms race in its report, *The Secondary Century Imperatives – Presidential Leadership – Institutional Accountability*.¹³

One of the more discomfiting components of the metaphor is the military industrial complex that consists of the companies that manufacture weapons and that have a vested financial interest in the continuation of the arms race. To the extent that facilities constitute weapons, the intercollegiate athletics industrial complex consists of the architects, construction and engineering firms, and investment firms that benefit from new facilities. In the context of the athletes, amateur organizations now sponsor training programs for children at early ages. Tennis shoe manufacturers sponsor programs and events for elite athletes. Television broadcasters now televise high school events. Newspapers and scouting services rank high school teams and athletes. Wannabe agents and unscrupulous coaches recruit young athletes and shower them with illegal compensation.¹⁴ Steroid designers, producers, and marketers are also part of the complex.

The discomfort is compounded by other more negative implications of the metaphor that cause me to worry. The application of the metaphor raises the specter of Katrina-like effects.¹⁵ That is, the actual existence of an arms race in intercollegiate athletics may mean consequences that are unforeseen by intercollegiate athletics policy elites because of their inability to fully comprehend the behavior of athletes and their families who are caught up in the arms race. The militaristic arms race metaphor contemplates the deterrence of war, but intercollegiate athletics involves ongoing conflicts in the form of competition. The war continues, and universities continue to produce weapons to compete in the war, not to prevent its occurrence. This aspect of the metaphor is incongruent with the traditional arms race metaphor but raises the prospect of collateral damage.

B. IMPACT ON AFRICAN AMERICAN COMMUNITIES

I worry specifically about the impact of the arms race on African American communities. If athletes are weapons and universities are continually engaged in obtaining upgrades, the practices surely must have an impact. I worry about the view of youth in the high schools, in the middle schools, and on the playgrounds. I worry about the visibility of the athletic scholarship in African American communities. They certainly are far more visible than academic scholarships. In my own community, I hear many more youths expressing an interest in earning an athletic scholarship than an academic scholarship. Such youthful expressions are fueled by a perception that athletic scholarships are more attainable for them. Far too many young African American males hold the perception that teachers will not prepare them for college unless they show college potential as an athlete. Of course, they also see the numbers. They may believe that if they go to college, it will be on an athletic scholarship. Gifted athletes have a high expectation of receiving an athletic scholarship. The not-so-gifted may know that their chances of receiving an athletic scholarship are smaller, but many also believe that the probability of obtaining one is greater than that of receiving an academic scholarship.¹⁶ The result is a substantial investment by young African American males in the development of athletic prowess, an investment encouraged by teachers, counselors, and the intercollegiate athletics development complex. Taking the Katrina effect one step further, it is conceivable that the exodus of African Americans from baseball in the United States is due in part to the visibility of football and basketball scholarships.¹⁷ Prior to the wholesale recruitment of African American athletes after the success of the Civil Rights Movement, professional baseball virtually had a monopoly on the demand for young male athletes in African American communities. The monopoly on that talent ended with the nationwide integration of colleges and universities in the 1970s, and colleges and universities were able to attract athletes with the promise of better career options for the masses of athletes who were not likely to have a prolonged career as a professional athlete.¹⁸

C. COLLATERAL DAMAGE

The misdirection of educational pursuits is not the only collateral damage. The incentives for using steroids and other performance-enhancing substances are growing among athletes at all levels of sports, including youth. We are inundated with scandals involving the use of anabolic steroids and human growth hormones. Lance Armstrong, Barry Bonds, Roger Clemens, Marion Jones, Floyd Landis, and Mark McGwire are household names now as much for the linkage of their names to steroids as for their athletic achievements. The Olympic Movement has spawned the World Anti-Doping Code and the World Anti-Doping Agency to police the use of performance-enhancing substances by Olympic athletes. Such scandals have continued to occur in spite of the Anabolic Steroids Control Act of 1990 that added anabolic steroids to the list of prohibited controlled substances in the United States and the Anabolic Steroids Control Act of 2004 that banned additional substances. Congress

continues to hold hearings and pressure Major League Baseball and other professional sports to more forcefully regulate the use of such substances. Despite these efforts, the incentives to resort to performance-enhancing substances arise long before athletes reach professional levels.¹⁹ If colleges seek to upgrade athletic talent and award scholarships to better athletes, young athletes have an incentive to resort to such substances. As a result, states are beginning to intervene at the high school level. New Jersey has become the first state to authorize school districts to conduct random testing of athletes for anabolic steroids.²⁰ It did so after the governor of New Jersey formed a task force to study steroid use by high school athletes, and the task force issued a report finding that steroid use by teenage athletes was a significant public health problem.²¹

D. UNIVERSITY FACULTY

I have omitted any discussion of the place or role of the university faculty so far. Where do we fit within the metaphor? As faculty members, we have had, it seems to me, priorities other than the governance of intercollegiate athletics. Many of us are in the stands or researching the existence of the arms race or criticizing it. If intercollegiate athletics has morphed into commerce, perhaps it has happened in part because we have abdicated our roles as educators. The Knight Commission recently held the Faculty Summit on Intercollegiate Athletics at which it discussed the results of a survey of more than 2,000 faculty members about their perceptions on the role of faculty engagement in intercollegiate athletics. The executive summary reported that faculty members expressed their dissatisfaction on a number of issues, including their role in the governance of intercollegiate athletics and the academic performance of football and basketball players who they believe incur greater out-of-class demands than other students or other student-athletes.²² The Coalition on Intercollegiate Athletics has called for a larger role for faculty since its inception.²³

III. An Educational Arms Race

We need to start by reclaiming our role over the educational program for student-athletes. As educators, the faculty have a claim to expertise in the designing of curriculums and developing educational programs for special groups of students. We have developed summer programs and enrichment programs for students of color and at-risk students outside of athletics. We do not set them up as “mission impossible” programs. We design such programs to enhance the probability of success for such students. If faculty members are dissatisfied with the academic performance of athletes in revenue-producing sports, perhaps that academic performance results in part from our refusal to consider designing educational programs that make sense for those students.²⁴

What would happen differently if the faculty led an educational arms race in intercollegiate athletics? If intercollegiate athletics emphasized education, its educational character would be derived from the academic program it fostered rather than merely by the participation of those engaged in

some educational pursuit. The faculty should be an integral part of the transformation of the metaphor into an educational arms race. The starting point for emphasizing the educational program would be the design of an athletics program that provided opportunities for many more students. This is not a new idea. In an old case, *Naval Academy Athletic Association v. Comptroller of the Treasury*, the court determined that the intercollegiate athletic program at the Naval Academy was an educational program in part because it involved more than 50 percent of the student body.²⁵ I might add that the application of Title IX to intercollegiate athletics may become far less controversial if universities expanded participation to that magnitude.

I have argued elsewhere that the NCAA is an athletics governance organization rather than an educational institution.²⁶ In my view, even those policies of the NCAA that promote academic objectives are constrained by its athletics governance mission. Take the case of the caps on athletic scholarships, one of the bulwark policies of the NCAA. The NCAA has imposed limits on the number of scholarships a university may award for years.²⁷ Penalizing schools with the loss of scholarships is a standard sanction for infractions.²⁸ Such rules are *per se* anti-educational. I cannot think of any policy that is more anti-academic than the limits on scholarships solely to preserve competitive balance in the athletic arena because such policies explicitly limit the number of educational opportunities available. Rather than limit scholarships, why not require more? The pro-educational value of athletic scholarships is reflected in the Faculty Summit findings, which show that faculty members continue to favor the awarding of athletic scholarships.²⁹ The very nature of scholarships provides students with an opportunity to receive a college education. Why not broaden the distribution of athletically related scholarships? Why not require universities to give out one academic scholarship to a student who has grades and scores above NCAA minimums from the same high school as one receiving an athletic scholarship? Instead of helping universities to save money by penalizing them with the loss of scholarships, why not require them to award additional scholarships to non-athletes?

A student contacted me after I spoke at the “Reversing Field” symposium³⁰ with the observation that an educational arms race is taking place. He observed the building construction of classrooms and other educational buildings around campus. The student suggested that West Virginia University was engaged in a facilities arms race to attract better students. Perhaps an educational arms race is also an appropriate metaphor. Law schools, for example, have responded to the US NEWS & WORLD REPORTS rankings in ways that are often less than admirable.³¹ The rankings have affected the redirection of resources to match or surpass other law schools to move up in the rankings. Universities are paying attention to the rankings in programs other than law schools. I concede the educational arms race in academic programs. However, I have something else in mind. I am talking about an arms race focused on the academic side of intercollegiate athletics. The educational component should be more than the graduation rates of student-athletes. At the Faculty Summit, there was some discussion, not by faculty but by former athletes, of the development of majors in sports just like drama and theater. I have argued before that programs must be designed to give athletes an incentive in

their academic development.³² As it is now, we ask them to pursue their studies with incentives that are similar to those that we ask them to have for their participation in intercollegiate athletics. We insist that they play for the love of the game.³³ Our Pollyanna view similarly asks them to pursue their degrees solely for the love of learning.

IV. Conclusion

The educational arms race—I continue to use the term advisedly—of which I am speaking is the development of the academic side of athletics. The Internal Revenue Service (IRS) takes the position that intercollegiate athletics as presently constituted is educational for the student-athletes involved, for the student body who supports them, and for the fans who watch them.³⁴ Why not make that a reality rather than a myth that is accepted by long standing policy, by *stare decisis*? Let's not merely graduate student-athletes; let's educate them. Let universities compete for them with the quality of education that universities specifically design to educate athletes in intercollegiate athletics. Let's develop academic weapons and try to outdo each other with the academic programs built for intercollegiate athletics.

Let's compete with the NBA for Greg Oden, for Kevin Durant. Let's compete with the NFL for the Maurice Clarets. Let's commit to educate them. Let's recruit with the slogan, "We want to educate you." Let's say to Greg Oden, "We want you in our classrooms. We would like to have you for four years." Yes, I know, financially, it's asking a lot. But why not let it be a choice? Why not let Greg sign with an NBA team and get paid while in college? He will be in the classroom because he wants to be. Personally, I would like to have Greg in my classroom. I would welcome the opportunity to teach him.

Endnotes

Professor of Law, University of New Mexico School of Law

1. Robert E. Litan, Jonathan M. Orszag, Peter R. Orszag, *The Empirical Effects of Collegiate Athletics: An Interim Report* 6 (2003), available at http://naaa.org/wps/wcm/connect/151b42804e0dac199f62ff1ad6fc8b25/empirical_effects_of_collegiate_athletics_interim_report.pdf?MOD=AJPERES&CACHEID=151b42804e0dac199f62ff1ad6fc8b25; Jonathan M. Orszag, Peter R. Orszag, *The Empirical Effects of Collegiate Athletics: An Update* 8 (2005), available at http://naaa.org/wps/wcm/connect/97483e804e0dabfa9f32ff1ad6fc8b25/empirical_effects_of_collegiate_athletics_update.pdf?MOD=AJPERES&CACHEID=97483e804e0dabfa9f32ff1ad6fc8b25.
2. *Id.*
3. Dr. Myles Brand, President of the NCAA, has acknowledged the existence of an arms race in facilities. Rick Wright, *Mixing Athletics, Academics Important*, ALBUQUERQUE JOURNAL, Oct. 6, 2007, available at <http://www.abqjournal.com/sports/600395sports10-06-07.htm>. The Albuquerque Journal reported that:

During a question-and-answer session that followed his speech, Brand was asked if he thought escalating salaries for head coaches constituted a significant financial problem for intercollegiate athletics. The question was asked by Schmidly [President of the University of New Mexico] who last March presided over the hiring of Lobo men's

basketball coach Steve Alford for a total package of \$975,000. “No,” Brandsaid, adding, he was far more concerned about a sports-facilities “arms race” that, in part, has caused athletics budgets to increase at a rate three to four times that of total university budgets.

Id. The interview was conducted following a speech at the University of New Mexico. In the speech, Dr. Brand made no explicit reference to an “arms race” but did describe conditions that indicate an arms race:

The pursuit of “big time” status in sports can drive institutions to spend beyond their means, to isolate athletics from the realities that face the rest of the campus, and to endanger the financial security of an institution that takes on large debt for facility expansion. There are institutions in the NCAA personnel growth in the hopes of attaining national higher education standing through athletics achievement. It is a very risky proposition. The vast majority of Division I institutions—all but six—must subsidize athletics.

Dr. Myles Brand, President of the NCAA, Address at the University of New Mexico Inauguration Ceremony for President David Schmid (Oct. 5, 2007).

4. See *supra* note 1.
5. See *supra* note 1.
6. Knight Commission, *Report, A Call to Action: Reconnecting College Sports and Higher Education* (2001), available at http://www.knightfoundation.org/research_publications/detail.dot?id=178173.
7. There have been numerous articles published during the past several years about an arms race or races in intercollegiate athletics. Jude D. Schmit, *A Fresh Set Of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 *SPORTS LAW J.* 219 (2007) (addition of twelfth game in football as source of revenue to finance arms race of increased spending); Ronnie Wade Robertson, *Tilting At Windmills: The Relationship Between Men’s Non-Revenue Sports And Women’s Sports*, 76 *MISS. L.J.* 297 (2006) (proposing cap on spending in revenue sports to slow down arms race that endangers women’s and non-revenue sports); Erin E. Buzvis, *Survey Says . . . A Critical Analysis Of The New Title IX Policy And A Proposal For Reform*, 91 *IOWA L. REV.* 821 (2006) (football expenditures as an arms race); Kevin J. Rapp, *Forced To Punt: How the Bowl Championship Series and the Intercollegiate Arms Race Negatively Impact The Policy Objectives Of Title IX*, 80 *IND. L.J.* 1167 (2005) (arguing that the BCS is part of arms race); Maxwell J. Mehlman et al., *Doping In Sports and the use of State Power*, 50 *ST. LOUIS U. L.J.* 15 (2005) (doping arms race); Rich Haglund, *Staring Down the Elephant: College Football and Title IX Compliance*, 34 *J.L. & EDUC.* 439 (2005) (facilities arms race); *Are We Playing By The Rules? A Debate Over the Need For NCAA Regulation Reform*, 7 *VAND. J. ENT. L. & PRAC.* 439 (2005) (financial arms race); *Is The System Flawed? Legal Ramifications of the Bowl Championship Series and Conference Alignment*, 7 *VAND. J. ENT. L. & PRAC.* 461 (2005) (ongoing upward pressure on expenditures as arms race); Robert P. Baker, *It is Time to Revise the Miller-Ayala Act*, *LOS ANGELES LAWYER*, June 2005, at 52, available at <http://www.lacba.org/Files/LAL/Vol28No4/2160.pdf> (citing Knight Commission’s athletic arms race); Yuri Nicholas Walker, *Playing the Game of Academic Integrity vs. Athletic Success: The Americans with Disabilities Act (ADA) and Intercollegiate Student-Athletes with Learning Disabilities*, 15 *MARQ. SPORTS L. REV.* 601 (2005) (a building and spending arms race); Elisa Hatlevig, *Title IX Compliance: Looking Past the Proportionality Prong*, 12 *SPORTS LAW J.* 87 (2005) (elimination of non-revenue teams to fund arms race in men’s basketball and football); Robert P. Baker, *The Unintended Consequence of the Miller-Ayala Athlete Agents Act: Depriving Student Athletes of Effective Legal Representation*, 12 *UCLA ENT. L. REV.* 267 (2005) (refers to a financial and athletic arms race); Richard M. Southall, *Symposium: Legal Issues and Reform in Intercollegiate Athletics, Preface*, 15 *J. LEGAL ASPECTS SPORT* 1 (2005) (marketing techniques as source of revenue to fund arms race); Adam R. Schaefer, *Slam Dunk: The Case for an NCAA Antitrust Exemption*, 83 *N.C. L. REV.* 555 (2005) (citing Knight Commission arms race); Martin J. Greenberg, *Sports Facility Financing and Development Trends in the United States*, 15 *MARQ. SPORTS L. REV.* 93 (2004) (facilities arms race); Eric Bentley, *Title IX: The Technical Knockout for Men’s Non-Revenue Sports*, 33

- J.L. & EDUC. 139 (2004) (keeping up with the Joneses as arms race); Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should be Paid*, 3 VA. SPORTS & ENT. L.J. 226 (2004) (citing Knight Commission for a financial arms race); Suzanne Eckes, *Another Pin for Women: The National Wrestling Coaches Associations' Title IX Case is Dismissed*, 182 ED. LAW REP. 683 (2004) (escalating operational costs as an arms race); Kermit L. Hall, *Review of William G. Bowen & Sarah A. Levin's Reclaiming the Game: College Sports and Educational Values*, 30 J.C. & U.L. 711 (2004) (arms race for facilities and coaches); Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213 (2004) (immunity of Ivy league to arms race).
8. See Stephanie A. Gore, "A Rose by Any Other Name": *Judicial Use of Metaphors for New Technologies*, U. ILL. J.L. TECH. & POL'Y 403 (2003); Maureen Archer and Ronnie Cohen, *Sidelined on the (Judicial) Bench: Sports Metaphors in Judicial Opinions*, 35 AM. BUS. L.J. 225 (1998).
 9. The metaphor has been examined in other contexts in legal scholarship. The prevailing thought is that the militaristic connotations have been obscured. Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U. L. REV. 961 (1984). Thus, there are references to technological arms races in intellectual property law, Lee Kovarsky, *A Theory of the Arms Race*, 81 IND. L.J. 917 (2006), and positional arms races in law and economics, Michael Sabin, Note, *Antitrust and Positional Arms Races*, 30 HARV. J. L. & PUB. POL'Y 1023 (2007).
 10. Critics opposed Proposition 48 and its progeny because of disparate adverse racial effects. Proponents have maintained that academic integrity is at stake and that standards are necessary to assure that universities actually educate its athletes rather than exploit them for commercial purposes. See Linda S. Green, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS L. J. 101 (1984); see also Kevin M. McKenna, *A Proposition with a Powerful Punch: The Legality and Constitutionality of Proposition 48*, 26 DUQ. L. REV. 43 (1987); Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743 (1991); Alfred Dennis Mathewson, *Grooming Crossovers*, 4 J. GENDER RACE & JUSTICE, 225, 268 (2001) (discussing debate in African-American community over Proposition 48 between Arthur Ashe and Harry Edwards who supported it and John Thompson and John Chaney who opposed it).
 11. See Strategic Arms Limitations Talks, available at <http://www.state.gov/www/global/arms/treaties/salt1.html> (last visited July 7, 2009).
 12. The Coalition on Intercollegiate Athletics is a collaboration among the faculty senates of more than 56 universities whose primary goal is to reform intercollegiate athletics. See COIA, The Coalition on Intercollegiate Athletics, <http://www.neuro.uoregon.edu/~tublitz/COIA/index.html> (last visited July 6, 2009). The Drake Group is a network of faculty members whose motto is "Defending Academic Integrity in the Face of Commercialized Sport." See The Drake Group, <http://www.thedrakegroup.org/index.html> (last visited July 7, 2009); see also Ellen J. Staurowski and B. David Ridpath, *The Case for a Minimum 2.0 Standard for Division I Athletes*, J. LEGAL ASPECTS SPORT 113, 117-19 (2005) (comparison of the approaches of the Coalition on Intercollegiate Athletics and the Drake Group).
 13. NCAA Presidential Task Force on the Future of Division I Intercollegiate Athletics, *The Second Century Imperatives, Presidential Leadership—Institutional Accountability* (2006). available at <http://coia.comm.psu.edu/NCAA%20Presidential%20Task%20Force%20final%20report%20Oct%202006.pdf>.
 14. The NCAA is currently conducting an investigation of claims by a prospective agent that he permitted New Orleans Saints' running back Reggie Bush's family to live in a luxury home rent free while the star was enrolled at the University of Southern California. *Reggie Bush's NCAA case not going away*, USA TODAY, Oct. 10, 2007, available at http://www.usatoday.com/sports/football/nfl/saints/2007-10-09-bush-agent_N.htm; see also U.S. v. Piggie, 303 F.3d 923 (8th Cir. 2002) (involving conviction of organizer of secret scheme to pay high school age athletes to play on his AAU basketball team).

15. I am not merely referring to the law of unintended consequences, I am talking about consequences that were foreseeably unintended because of the cultural blinders of the elites, who make the policy decisions, precluded them from comprehending the causal links.
16. This reality is probably born out by comparative standardized test scores. Non-athletes who score similarly to athletes are not likely to receive an academic scholarship. Given that studies show that African Americans as a group tend to score significantly below other groups, it is a reasonable conclusion that African Americans are less likely to receive academic scholarships even if they score above NCAA minimums.
17. It has been frequently reported that studies show that a substantial number of youth pursue athletics because they are chasing the dream of playing professional sports. Notwithstanding the dream, there is also data that shows the benefits of a college degree. Many youth may tacitly desire the college education and the lure of it may explain why youth choose basketball and football over baseball, a sport that also offers lucrative financial payoffs for those fortunate to make it professionally. College baseball scholarships are neither as lucrative or as visible.
18. See generally Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 *FORDHAM URB. L.J.* 615 (1995) (author provides the history of the exclusion of black athletes from intercollegiate athletics in the Jim Crow Era and their integration during the Civil Rights Movement Era).
19. Jacqueline Stenson, *Kids on steroids willing to risk it all for success*, MSNBC.COM, March 3, 2008 (discussing survey of anabolic steroids by athletes in grades 8 through 12). See generally andré douglas pond cummings, *The Temptation of Performance Enhancing Drugs*, *infra* p. 130; Dr. Julian Bailes, *Performance-Enhancing Drugs and How They Affect Today's Athlete: Views From a Medical Doctor*, *infra* p. 136.
20. N.J. L.2005, c. 209, § 1, eff. Aug. 29, 2005, codified at NJSA §18A:40A-22 *et seq.* See also F.S.A. § 1006.20 (authorizing pilot program to conduct random testing of high school athletes for steroids and other substances); Va. Code Ann. § 22.1-279.6 (permitting but not requiring school districts to conduct drug testing).
21. Governor's Task Force on Steroid Use and Prevention, Final Report to Governor Richard J. Codey, (Dec. 2005), http://nj.gov/steroids/final_report/finalreport.pdf.
22. Knight Commission on Intercollegiate Athletics, Executive Summary, *Faculty Perceptions of Intercollegiate Athletics Survey* (Oct. 2007), http://www.knightcommission.org/images/pdfs/Knight_ExecSum_FINAL100907.pdf.
23. White Paper, Framing the Future: Reforming Intercollegiate Athletics, prepared for Coalition on Intercollegiate Athletics 3–6 (June 15, 2007), <http://www.neuro.uoregon.edu/~tublitz/COIA/FTF/FTFtext&appendix.htm>.
24. See Richard Salgado, *A Fiduciary Duty to Teach Those Who Don't Want to Learn: The Potentially Dangerous Oxymoron of "College Sports"* 17 *SETON HALL J. SPORTS & ENT. L.* 135 (2007) (arguing that universities may have a fiduciary duty to provide adequate educational assistance to student athletes). The Coalition of Intercollegiate Athletics opposes the design of academic programs for the purpose of insuring academic eligibility. White Paper, *supra* note 23, at 8 (Principle 1.2, The Primacy of Academics). That position is not inconsistent with but does not address the idea of designing programs to maximize the academic experience of student athletes. It does support the principle that the "core mission of athletic academic support programs should be to help athletes maximize their academic performance . . ." White Paper, *Academic Integrity in Intercollegiate Athletics: Principles, Rules, and Best Practices*, prepared for Coalition of Intercollegiate Athletics (April 1, 2005), available at <http://www.neuro.uoregon.edu/~tublitz/COIA/AID.html>. I am suggesting going beyond the academic support program.
25. 1977 WL 1568 (Md. Tax 1977).
26. Alfred Dennis Mathewson, *The Eligibility Paradox*, 7 *VILL. SPORTS & ENT. L.J.* 83, 87–97 (2000).
27. See NCAA Bylaw, art. 15.5.
28. See NCAA Bylaws, art. 19.5.1(e) (secondary violations); 19.5.2.1(e) (major violations); 19.5.2.2(c).

29. See *supra* note 22. The Coalition of Intercollegiate Athletics explicitly recognizes the award of scholarships as providing access to a college education. White Paper, Academic Integrity, *supra* note 20, at sec. 2. COIA further urges the presumption that one-year awards will be renewed for four years. *Id.*; White Paper, Framing the Future, *supra* note 23, at 9 (Principle 2.1).
30. “Reversing Field: Examining Commercialization, Labor & Race in 21st Century Sports Law,” West Virginia University College of Law, October 4–5, 2007, <http://www.law.wvu.edu/reversingfield>.
31. Jeffrey E. Stake, *The Interplay of Rankings Criteria and Effects: Toward Responsible Rankings*, 81 IND. L.J. 229 (2006).
32. See *supra* note 26, at 89.
33. NCAA Const., art. 2.9 (“Student athletes . . . should be motivated primarily by education and by the physical, mental and social benefits to be derived”).
34. See Tech. Adv. Mem. 78-51-002 (1978); 78-51-006 (1978). The IRS has presumed the educational nexus of intercollegiate athletics for many years. In fact, it has recognized educational benefits flowing to student athletes, the student body in general, fans and the public. *Id.*