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## Let's Get Serious – The Clear Case for Compensating the Student Athlete – By the Numbers

Neal Newman  
*Texas A&M University - School of Law*

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# LET'S GET SERIOUS - THE CLEAR CASE FOR COMPENSATING THE STUDENT ATHLETE – BY THE NUMBERS

## A UNIVERSITY OF MICHIGAN ATHLETIC PROGRAM CASE STUDY

By: Professor Neal Newman

### ABSTRACT

*Should college athletes be compensated for their play and if so, how? The first question has been a debate for some time now. But the second question—the “how”—not so much. This writing addresses both questions in depth. With the Ed O'Bannon case that was decided back in August of 2014 and the palaver the Northwestern football team raised in their efforts to unionize, it is acknowledged that the discussions on this issue may have reached its crescendo years ago. That is until now. On September 27, 2019, Gavin Newsom, the Governor of California, signed into law Senate Bill 206. Senate Bill 206 is a law that will allow athletes who compete in collegiate sports for California colleges and universities to profit off of their name, image or likeness; a practice that is currently prohibited under NCAA rules. The law is scheduled to go into effect January 1, 2023.*

*California's passing of S.B. 206 has set off a chain reaction. As of May 25, 2020, over 34 states have drafted their own Pay for Play provisions. California's initiative with a large majority of states following suit has forced the NCAA to do something it has resisted doing for more than 60 years. On April 29, 2020 the NCAA's Board of Governors announced it is moving forward with a plan that would allow college athletes to earn money for endorsements and a host of other activities involving personal appearances and social media content. The NCAA's Pay for Play version is scheduled to go into effect in the fall of 2021. A quick review of some of the groundwork the NCAA is laying on this issue reveals that the NCAA will be attempting to reign in and place tighter restrictions on what the athletes can do by way of endorsement and promotions than the more general provisions found in the respective state Pay for Play provisions.*

*For example, the NCAA's Pay for Play provision will more than likely prohibit her athletes from using their respective universities' names and school logos in any of the athlete's endorsements or promotions thus severely limiting the athletes' ability to use their name, image, or likeness optimally. By contrast, S.B. 206 does not contain such restrictions. Thus, the stage has been set for some wrangling that will occur between the NCAA and the respective states. Dynamics that spark a host of interesting issues for analysis and exploration for another day.*

*But key for the task at hand is the fact that none of these Pay for Play provisions address the prohibition against the universities themselves compensating*

*the college athlete. Those prohibitions are still in place and the NCAA has given every indication that it intends to do everything it can to keep it that way.*

*Accordingly, this writing focuses on the step yet to be taken: The Universities themselves compensating the college athlete. That act would be far more significant as university compensation would reach a larger portion of Division I athletes and not just the highly marketable superstars that pepper the top echelon Division I programs. This writing makes the clear case for universities' compensating their athletes.*

*This writing stands alone in that it also shows the viability of compensating the college athlete by setting the analysis within the context of an NCAA Division I program; namely the University of Michigan. This article proposes with specificity how compensating the college athlete can be done without disrupting existing athletic programs. Popular refrains of athletic program poverty and having to shut down other sports programs are addressed and summarily debunked. The time has come to recognize that these athletes are university employees and are an integral part of the revenue generating component that earns millions for their respective universities. It's time that these athletes be compensated fairly and appropriately for their efforts. This piece makes the clear case for it and quantifies it by the numbers.*

## I. INTRODUCTION

*Amateurism: An athlete is not exploited when he is fairly compensated in a business transaction outside of the institution. To the contrary, one could more persuasively argue that an athlete is exploited when he is expressly disallowed from realizing his value while his reputation and skill are being used to realize a profit for others.<sup>1</sup>*

The question of compensating college athletes has been a topic of debate for some time now.<sup>2</sup> With the Ed O'Bannon case that was decided back in August of 2014 and the palaver being raised by the Northwestern football team in their efforts to unionize,<sup>3</sup> it is acknowledged that the discussions on this issue may have reached its crescendo years ago.

That is until now. On September 27, 2019, Gavin Newsom, the Governor of California, signed into law Senate Bill 206, the *Fair Pay for Play Act*, which will allow athletes who compete in collegiate sports for California colleges and

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1. RAMOGI HUMA & ELLEN J. STAUROWSKY, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 10 (2011), <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf> [https://perma.cc/G8ZF-RFBM] (quoting Jay Bilas, former Duke and pro basketball player, current ESPN and CBS sports analyst).

2. See 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/> [https://perma.cc/EWD6-NQRR].

3. Sheldon D. Pollack & Daniel V. Johns, *Northwestern Football Players Throw a "Hail Mary" but the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy*, 15 VA. SPORTS & ENT. L.J. 77 (2015).

universities to profit off of their name, image or likeness; a practice that is currently prohibited under NCAA rules. The law is scheduled to go into effect January 1, 2023.

California's passing of S.B. 206 has set off a chain reaction. As of May 25, 2020, some 34 states have drafted their own *Pay for Play* provisions.<sup>4</sup> California's initiative with a large majority of states following suit has forced the NCAA to do something it has resisted doing for more than 60 years.<sup>5</sup> On April 29, 2020 the NCAA's Board of Governors announced it is moving forward with a plan that would allow college athletes to earn money for endorsements and a host of other activities involving personal appearances and social media content.<sup>6</sup> The NCAA's *Pay for Play* version is scheduled to go into effect in the fall of 2021.<sup>7</sup> A quick review of some of the groundwork the NCAA is laying on this issue reveals that the NCAA will be attempting to reign in and place tighter restrictions on what the athletes can do by way of endorsements and promotions than the more general provisions found in the respective state *Pay for Play* provisions.<sup>8</sup>

For example, the NCAA's *Pay for Play* provision will more than likely prohibit her athletes from using their respective universities' names and school logos in any of the athlete's endorsements or promotions, thus severely limiting the athletes' ability to use their name, image, or likeness optimally.<sup>9</sup> By contrast, S.B. 206 does not contain such restrictions.<sup>10</sup> Thus, the stage has been set for some wrangling that will occur between the NCAA and the respective states. Dynamics that spark a host of interesting issues for analysis and exploration for another day.

The key for the task at hand is the fact that *none* of these *Pay for Play* provisions address the prohibition against *universities* compensating the college athlete. Those prohibitions are still in place and the NCAA has given every indication that it intends to do everything it can to keep it that way.

Accordingly, this writing focuses on the step yet to be taken: The Universities themselves compensating the college athlete. That act would be far more significant and further reaching as compensation from the universities themselves would reach a larger portion of the Division I athletes who play a significant role in revenue generation and not just the highly marketable superstars that pepper the rosters of the top echelon Division I programs.<sup>11</sup>

To the latter point relating to compensation at the university level. Back when the college athlete compensation debates first commenced, many conceded the

4. J. Brady McCollough, *Q&A: What the NCAA's Report on Name, Image and Likeness Means for College Athletes*, LA TIMES (Apr. 29, 2020, 5:11 PM), <https://www.latimes.com/sports/story/2020-04-29/q-a-what-ncaa-report-on-name-image-and-likeness-means> [https://perma.cc/8HFU-K94C].

5. Ralph D. Russo, *Skeptics Loom as NCAA Builds Guardrails Around Compensation*, NBC PHILA. (Apr. 29, 2020, 8:34 PM), <https://www.nbcphiladelphia.com/news/sports/ncaa-board-supports-name-image-and-likeness-compensation-for-student-athletes/2379395/> [https://perma.cc/R9PA-BKQH].

6. *Id.*

7. NCAA BD. OF GOVERNORS, FEDERAL AND STATE LEGISLATION WORKING GROUP FINAL REPORT AND RECOMMENDATIONS 31 (2020), [https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf) [https://perma.cc/T8V7-6XDT].

8. *See id.*

9. *Id.* at 22.

10. S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019).

11. Speculation on the author's part, but the inference is a reasonable one. Companies seeking athletes to endorse their products are more likely to seek out the high-profile athletes.

arguments being put forth by those who opposed the idea of compensating college athletes and accepted these arguments without question:

*“College athletes are already being paid with an athletic scholarship.”*<sup>12</sup>

*“Paying students to play would ruin college sports.”*<sup>13</sup>

*“[M]ost colleges would have to shut down their programs if they were forced to pay the athletes.”*<sup>14</sup>

*“[O]nly a few programs operate at a profit. They would be the only ones who could survive such a regime.”*<sup>15</sup>

The collective allowed themselves to be convinced that what was being said was accurate. The arguments seemed to make sense. They seemed to follow logically. But here in 2020, for various reasons, the mantel is being picked up and the issue is being revisited. Upon further investigations, it is evident that compensating student-athletes is not only viable, but is the right thing to do.

The issue of paying college athletes must be analyzed through an accounting lens in order to address statements such as: “only a few programs operate at a profit.”<sup>16</sup> The first question that must be asked is how do these programs spend their money? Spending can generally be broken down into two broad categories: “discretionary spending” and “non-discretionary spending.”<sup>17</sup> For example, equipment and uniforms for the players would fall into the “non-discretionary” category.<sup>18</sup> A new state-of-the-art Football Performance Center built next to the

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12. See Zach Dirlam, *There's No Crying in College: The Case Against Paying College Athletes*, BLEACHER REP. (Apr. 2, 2013), <https://www.bleacherreport.com/articles/1588301-theres-no-crying-in-college-the-case-against-paying-college-athletes> [<https://perma.cc/K2YY-H23U>] (making the case that athletes are paid in the form of “tuition” and other expenses).

13. Cody J. McDavis, Opinion, *Paying Students to Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/opinion/pay-college-athletes.html?module=inline> [<https://perma.cc/GP2W-77CW>].

14. See Philip D. Bartz & Nicholas S. Sloey, *The Joy of College Sports: Why the NCAA's Efforts to Preserve Amateurism are Both Lawful and in the Best Interest of College Athletics*, HACKNEY PUB. (Jan. 27 2012), <https://www.bclplaw.com/images/content/5/2/v2/52455/The-20Joy-20of-20College-20Sports-20-20Article-v2.pdf> [<https://perma.cc/78KC-TDZP>] (noting that the majority of college football programs operate at a loss, and could not afford to pay student-athlete salaries).

15. See *id.*

16. See *id.*

17. See, e.g., Daniel Liberto, *Discretionary Expense*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/discretionary-expense.asp> [<https://perma.cc/TC3L-PNVT>].

18. See Jingzhen Yang, *Use of Discretionary Protective Equipment and Rate of Lower Extremity Injury in High School Athletes*, 161 AM. J. EPIDEMIOLOGY 511, 511–12 (2004) (explaining that certain protective equipment and athletic uniforms are required by state and national sports associations).

older, but perfectly functional, fitness facility would fall into the “discretionary” spending category.<sup>19</sup>

Thus, it is with this new perspective that the topic of compensating college athletes was approached. The money is there. It’s simply a matter of sharing, prioritizing, and re-allocating; something athletic departments have been railing against since the conversation on compensating athletes started.

For the Fiscal year ending June 30, 2018, the University of Michigan Wolverines Football program generated \$124,928,493 in revenue.<sup>20</sup> For fiscal year ending June 30, 2018, the University of Michigan Wolverines paid their head coach, Jim Harbaugh, \$7.5 million in salaries, benefits and bonuses.<sup>21</sup> Totaling the salaries of all the University of Michigan athletic coaches both male and female, the total compensation amount for these University of Michigan athletic department personnel totaled \$27,869,781.<sup>22</sup> By comparison, in the form of scholarships consisting of room, board, books, and tuition, the University of Michigan recorded \$ 7,586,460 in “Operating Expenses Per Participant” for the 135 athletes who comprised the University of Michigan Wolverine’s Football roster for the 2017–2018 academic year.<sup>23</sup> Included in this amount are one year scholarships; scholarships that are not guaranteed and are renewable at the University’s discretion.<sup>24</sup> The “Operating Expenses Per Participant” consists of 6% of the total revenue that these athletes generated from their efforts on the field.<sup>25</sup>

In the current literature, few of the commentators broached the topic from the standpoint of sharing and re-allocating.<sup>26</sup> Likewise, few contributions to the conversation endeavor to work through the painstaking steps of laying out the

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19. See, e.g., *Completed and Cancelled Projects*, U. MICH., <https://umacc.umich.edu/projects/completed-projects/glenn-e-schembechler-hall-football-performance-center/> [https://perma.cc/78ZA-ETNS]. The Performance Center was budgeted for \$14.8 million. *Id.* See also Stephen M. Ross Athletic Campus–South Complex, MGOBLUE.COM, <https://mgoBLUE.com/sports/2017/6/16/facilities-south-complex.aspx> [https://perma.cc/9GWK-J6YV].

20. EADA, *University of Michigan Revenues and Expenses*, U.S. DEP’T EDUC., <https://ope.ed.gov/athletics/#/customdata/search> [https://perma.cc/3ZKE-PV4R] (follow hyperlink; then search name field for “University of Michigan-Ann Arbor” and click continue; then select the University of Michigan-Ann Arbor; then select 2018, Revenues and Expenses; scroll down and click Download to retrieve data).

21. Sarah McCarriston, *Top 25 College Football Coaching Salaries for 2018: Alabama’s Nick Saban Still on Top*, SPORTING NEWS, <https://www.sportingnews.com/us/naaa-football/news/college-football-head-coach-salaries-2018-season-nick-saban-urban-meyer-jim-harbaugh-jimbo-fisher/1aj12i59a90101pg4omwulw3ar> [https://perma.cc/8Y7X-XZ2G].

22. EADA *supra* note 20 (follow hyperlink; then search name field for “University of Michigan-Ann Arbor” and click continue; then select the University of Michigan-Ann Arbor; then select: 2018; Select All Head Coaching Staff; and Select All Assistant Coaching Staff; scroll down and click Download to retrieve data).

23. *Id.*

24. *Id.*

25. This number was derived by dividing the operating expense per student by total football revenue: (\$7,586,460/\$124,928,493). See *id.*

26. See e.g., George Dohrmann, *Pay for Play*, VAULT (Nov. 7, 2011), <https://vault.si.com/vault/2011/11/07/pay-for-play> [https://perma.cc/KU83-Q66C] (explaining that by cutting the “fat” in athletic programs, the more deserving athletes can be compensated).

financial viability along with the specifics on how compensating the athletes would work within the confines of current athletic revenue and expense numbers.<sup>27</sup>

This article, among other things, demonstrates the viability of paying the college athlete. Using the University of Michigan's athletic program as the case study, this article makes the case for which athletes should be paid, how much they should be paid, from where the money would come, and what effect, if any, would such a change have on that respective university's athletic department as a whole.

To be clear, it is anticipated that most athletic directors and coaches will not be receptive to the Model proposed in these pages. This is so because the proposed Model calls for athletic departments sharing the spoils of their financial success with the athletes that have been integral to that success. The discussion will be laid out as follows:

Part II makes the case for which athletes should be paid; generally speaking, compensation should be limited to only those programs that are generating a net-profit based on their current revenue and expense models. In most athletic programs those revenue generating sports are men's football and men's basketball exclusively.<sup>28</sup> Such is the case for the University of Michigan's Athletic Program.

Part III lays out the case for how the compensation Model will work. Here is where the "by the numbers" analysis figures most prominently. Using the University of Michigan's Athletic Program revenue and expense numbers, Part III lays out how paying those income generating athletes can be accomplished without the athletic department affecting its existing menu of non-income generating sports. Part III proposes a Model that most athletic departments are likely to blanch against. But this article's goal is to make clear the viability of such. The athletic department's decisions whether to follow suit will be a matter of choice—but not one borne by economic necessity which has been their claim for years.

Part IV addresses the more common and prevailing arguments that have persisted against compensating the college athlete and explains why many if not all of those arguments ring hollow in the economic and other realities in college sports as they exist today.

Part V discusses the potential impact of the Equal Pay Act and Title IX's "proportionality" requirement between men and women's sports and the athlete as an employee issue.<sup>29</sup> Part V shows how the Title IX lens through which this issue is viewed is in need of recalibration. For example, athletic departments pay women's team coaches a fraction of what men's team coaches are paid even though the two are coaching the same sport;<sup>30</sup> the difference in gender being the only delineating

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27. *But see id.*

28. *See* EADA, *supra* note 20, (Revenues and Expenses).

29. Title IX requires that female and male student-athletes receive athletics scholarship dollars proportionally to their participation. *See Title IX Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> [<https://perma.cc/BC2F-YDJX>].

30. *See* EADA, *supra* note 20, at Revenues and Expenses. *See also* James K. Gentry & Raquel M. Alexander, *Pay for Women's Basketball Coaches Lags Far Behind That of Men's Coaches*, N.Y. TIMES (Apr. 2, 2012), <https://www.nytimes.com/2012/04/03/sports/ncaabasketball/pay-for-womens-basketball-coaches-lags-far-behind-mens-coaches.html> [<https://perma.cc/79JF-EGGL>]. *See also* Tom Hopkins, *Unequal Pay Between Basketball Coaches Highlights Gender Income Inequality*, RECORDER (Apr. 3,

factor.<sup>31</sup> But the Courts have justified these pay disparities for two main reasons. One, as opposed to the current designation for student-athletes, these coaches are university employees—not students;<sup>32</sup> and two, the Courts have found that paying the men's team coaches more is justified due to the added responsibilities commensurate with coaching a sport like men's basketball—a major revenue generator for its respective university—versus women's basketball which by and large is not a major revenue generator for most schools.<sup>33</sup> Part V argues for this legal framework's justified extension to the student-athlete whose involvement in revenue generating activities *in substance* is akin to an employer-employee relationship and therefore should be treated as such.

Part VI, as alluded to earlier, discusses the most recent developments in the college compensation debate; namely California's passing of its *Pay for Play* law, which triggered some thirty-four other states following suit. Now the NCAA, in full reactionary mode, is in the process of crafting its own *Pay for Play* provision. Notable in the NCAA's effort is that the NCAA is looking to pass a Federal *Pay for Play* version that would pre-empt all the state *Pay for Play* provisions and would also contain a number of “guardrails” as the NCAA looks to maintain control over this significant shift in the economics of college sports.<sup>34</sup> Part VI will also discuss the implications that these competing *Pay for Play* provisions might have on the broader concept of college athlete compensation.

Part VII concludes.

## II. WHICH ATHLETES SHOULD GET PAID?

Collegiate athlete compensation should be limited to those sports that generate a net profit. Any other approach would not be viable, practical, or sustainable. It is acknowledged that creating a tiered system among college athletes, where a subset of those athletes are compensated beyond their scholarship to the exclusion of others, might be a dynamic that fosters controversy and conflict. Notions of fairness and collegiality come to the fore; the possible implications of paying the athletes of one sport but not another are acknowledged and appreciated. Those in protest would question how college sports could survive such atrocities.<sup>35</sup>

Once again, those arguments now ring hollow. Collegiate athletics would and will be just fine. The real atrocity stems from the financial weight of college athletics being carried by the few with the beneficiaries of those efforts not willing to share. For example, consider just the Power 5 conferences alone. In 2018, the

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2019), <https://centralrecorder.org/64139/news/unequal-pay-between-basketball-coaches-highlights-gender-income-inequality/> [<https://perma.cc/W7FT-7E7F>].

31. See, e.g., EADA, *supra* note 20, at Coaching Staff and Salaries. See also Gentry & Alexander, *supra* note 30.

32. See, e.g., Stanley v. Univ. of S. Cal., 13 F.3d 1313 (9th Cir. 1994).

33. See, e.g., *id.*

34. S.B. 206, 2019–20 Leg., Reg. Sess. (Cal. 2019).

35. McDavis, *supra* note 13.



teams comprising the Power 5 conferences generated approximately \$2.75 billion in revenue.<sup>36</sup>

Not sharing this pool of money with those who helped generate it should be what is controversial. To keep the discussion and the arguments simple, compensation should be limited to those sports that are generating a net profit. “Profit” is a function of revenue minus expenses.<sup>37</sup> As explained earlier, there are some expenses that an entity or organization must incur to operate. And then there are discretionary expenses. The discretionary items on which athletic departments spend their money is where attention must be focused.

To be fair, the expenses deemed discretionary and non-discretionary may be debatable as an athletic director may argue that a multi-million-dollar training facility is crucial and therefore non-discretionary for a high-profile program like the University of Michigan to perform and achieve at expected levels. The idea being that a “state-of-the-art” training facility is a draw for top level recruits. The assumption being—those facilities will be part of the attraction for a sought-after athlete in choosing the University of Michigan over some other program.

Now, to challenge this thinking and to view it from another perspective, what do you think the draw would be if instead, the expenditures for these multi-million-dollar state of the art facilities went directly toward compensating the athletes? The overall point here being—let’s be careful regarding the argument of an athletic program’s “profitability.” If you scan any particular athletic program’s expenditures it is more than likely that there are expenses in there that are discretionary, are not vital, and could be re-allocated in ways that could make the program even more successful.

Considering these paradigms and looking at them through the lens of the University of Michigan Athletic program, for the 2016–2017 fiscal year, the University of Michigan Men’s Football team generated a profit of \$81,475,112.<sup>38</sup> The Michigan men’s basketball team program generated a profit of \$10,044,627.<sup>39</sup> These were the only two teams that operated at a net profit in the University of Michigan’s Athletic Program. Accordingly, in keeping with the formula of compensating profitable athletic programs, these two programs would be eligible for their athletes being compensated. Before digging deeper into how the compensation

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36. Zach Barnett, *The Power 5 Schools Made How Much in 2018?*, FOOTBALL SCOOP (May 24, 2019), <https://footballscoop.com/news/the-power-5-schools-made-how-much-in-2018-conference-distributions-acc-big-ten-sec-big-12-pac-12-b1g/> [https://perma.cc/8GQY-4XLZ].

37. Profit is a synonym for net income. Net income is calculated as revenues minus expenses. Expenses include the explicit costs of doing business. See FRED PHILLIPS, ROBERT LIBBY & PATRICIA A. LIBBY, *FUNDAMENTALS OF FINANCIAL ACCOUNTING* 9–11 (6th ed. 2019). See also *id.* at 18 (explaining Generally Accepted Accounting Principles).

38. This number was derived by taking total football revenue of \$124,928,493 minus total team expenses of \$43,453,382. See EADA, *supra* note 20 (follow hyperlink; then search name field for “University of Michigan” and click continue; then select University of Michigan-Ann Arbor; then download the revenue and expense data for 2017; subtract football expenses from football revenue to get profit).

39. This number was derived by calculating total football revenue of \$124,928,493 minus total team expenses of \$43,453,382. See *id.* (follow hyperlink; then search name field for “University of Michigan” and click continue; then select University of Michigan; then download the revenue and expense data for 2017; subtract men’s basketball expenses from men’s basketball revenue to get profit).

Model would work, we want to reiterate and highlight the fact that the University of Michigan spent \$14.8 million on the *Glenn E. Schembechler Hall Football Performance Center*.<sup>40</sup> While the author is mindful of the fact that capital expenditures such as this Performance Center arguably enhances the experience for the student-athlete, it must be acknowledged, however that these expenditures are discretionary; spending that the Michigan athletic department could have allocated for other purposes.

### III. THE PROPOSAL

#### A. The Criteria

Careful thought must go into proposing a Model that alters a regime that has been in place and entrenched for decades. Many have lamented that it can't be done. But for a few exceptions, those that said it could be done didn't get into specifics. Within this context, for such a controversial proposal to work, the proposed Model must have certain characteristics.

First, the Model must be objective. If there is anything arbitrary about the Model then it is subject to being abused or misapplied.

Second, the Model must be scalable; both up and down. Not all athletic programs are created equal so a "one size fits all" Model would be vulnerable (and rightfully so) to attack, criticism, abuse, and misapplication. A scalable Model, however, is one that can adapt to any athletic department's economic realities.

Third, it should be noted that this Model's success hinges on athletic departments operating their programs with integrity. These athletic departments are expected to use the same cost metrics that it used prior to implementing the Model. It is anticipated that costs would stay essentially the same as they were prior to implementing the Model with the only difference being a portion of the expense pool being reallocated to those student-athletes whose sports are generating a net profit. Therefore, it is incumbent upon the athletic programs to operate with integrity and to continue being fiscal stewards over their athletic programs. Sudden or erratic changes in a program's profitability would call into question whether the program was operating in good faith.

Fourth, the key to a viable Model is one that leaves all of the university's current sports offerings intact and operating as they did prior to the Model's implementation. Leaving current programs fully intact is key as that negates one of the oft cited arguments against college athletes being compensated, which is that other programs would have to be shut down in order to extend compensation to those sports that are contributing to the bottom line versus taking away from it.<sup>41</sup>

Fifth, the compensation number should be tied to that particular team's financial performance. Tying the number to that team's financial performance underscores the notion of "merit pay."<sup>42</sup> When revenues increase for example, then

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40. The Performance Center was budgeted for \$14.8 million. See UNIVERSITY OF MICHIGAN, *supra* note 19.

41. Bartz & Sloey, *supra* note 14.

42. The Fair Labor Standards Act does not require or address the issue of merit pay. See Fair Labor Standards Act, 29 U.S.C. § 201-19. See also *Merit Pay*, U.S. DEPT. OF LABOR,

the corresponding compensation increases. Likewise, when revenue decreases, then the corresponding compensation would decrease. By compensating the athletes in this fashion, the amount going to the athletes will always be in line with that sport's fiscal reality.

Finally, the Model must be clear and transparent. The author recognizes potential arguments in opposition. Any lack of clarity or lack of transparency would foster an environment of potential abuse or improper application, which further illustrates why clarity and transparency are paramount. Objectivity; scalability; being in good faith; leaving all other programs intact; clarity; and transparency are the key characteristics for a workable college athlete compensation Model.

## B. The Model

Broadly speaking, this is how the proposed Model would work. The premise is simple. Athletes would be compensated by drawing upon that portion of an athletic program's expenses that is used for compensating athletic department personnel; making one additional slice of the pie with that newly sliced portion going towards compensating those college athletes that fall under the criteria of being part of a profitable program. Yes—that would mean that athletic directors, coaches, and other ancillary athletic department personnel would all end up potentially taking home a little bit less, so that the athletes can likewise reap the benefits of their revenue generating efforts.

When the Model is laid out by the numbers, it is evident that the Model is both fair and viable. In fact, it becomes evident that the unfairness stems from not sharing with the main component that makes these programs so viable. Again turning to the University of Michigan's athletic program, in 2017–2018, the University of Michigan's athletic program generated revenue of \$188.1 million.<sup>43</sup>

Regarding expenses, the University of Michigan recorded \$185 million in expenses for the fiscal year ending 2018,<sup>44</sup> recording a net profit of \$2.5 million.<sup>45</sup> However, the key expense number for this proposed Model is the one where all the athletic program salaries are totaled. That number would include the coach's salaries from all the athletic programs combined; both the income and the non-income generating sports. The money generated from the football and men's basketball programs are supporting and subsidizing all of these other programs. Thus, all of these salaries should be included in the pool of money from which a portion would be drawn to compensate the players.

The athletic director's salary should be included in the pool as well. The University of Michigan paid Warde Manuel \$842,550 as the University of

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<https://www.dol.gov/general/topic/wages/meritpay> [<https://perma.cc/BX2Q-SDCK>] (defining “merit pay” as “a raise in pay based on a set of criteria set by the employer . . . [that] usually involves the employer conducting a review meeting with the employee to discuss the employee's work performance during a certain time period”).

43. Zach Shaw, *Inside the Michigan Athletic Department's 2018 and 2019 Budgets*, MICH. INSIDER (June 23, 2018), <https://247sports.com/college/michigan/Article/Inside-the-revenues-expenses-and-changes-in-the-Michigan-athletic-departments-2018-and-2019-budgets-119307980/> [<https://perma.cc/2M28-DMXZ>].

44. *Id.*

45. *Id.*

Michigan's athletic director during the 2017–2018 fiscal year,<sup>46</sup> paying Jim Harbaugh \$7,504,000 during that same period.<sup>47</sup> During the 2017–2018 fiscal year, the combined salaries of all the athletic program coaches in the University of Michigan's Athletic program totaled \$28,869,781 making the total compensation amount in Michigan's athletic program equal to \$29,712,331.<sup>48</sup>

To be clear, paying the football, and men's basketball team players would be confined to the salary pool that makes up athletic department compensation. So the athletic department is not paying any additional money. The Model simply re-allocates the existing pie.

The question then becomes, what percentage of that number should be re-allocated to paying the players? That is a difficult question because no precedent has been set. But the number should not be random. There should be some methodology or thought process behind the number. The number should be consistent and fair. And the number should be steeped in some kind of economic reality or basis. The temptation would be to use the NFL's pay scale for possible benchmarks. But the revenue and cost structures are so different that attempting to reconcile the two may be an apples and oranges comparison.

### C. Applying the Model to the University of Michigan Athletic Program

Taking into account all of the above criteria and its corresponding rationale, 5% of the revenue the team generates should be set aside for player compensation. How was the 5% derived? Admittedly, this number is somewhat arbitrary. But starting with a conservative number that underscores the notion of fairness by all metrics pre-empts arguments that would cut against the Model. Additionally, after calculating athlete compensation based off of the 5% revenue figure, the resulting compensation numbers are conservatively below what some commentators have assessed as the fair market value for the athlete's participation in their respective sport.<sup>49</sup> Thus, the 5% of generated team revenue is the starting point.

The players would be paid by reallocating a portion of the salaries paid to ALL the coaches that comprise that university's athletic program. All of the salaries paid to these coaches comes from the revenue generated from the profitable athletic teams. The integral revenue generating component of these programs are the athletes on the field. It is acknowledged that this new Model is a considerable change from current practice. With the basic Model outlines set forth, let's again turn to the University of Michigan's Athletic Program.

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46. 2017–18 *University of Michigan Salaries*, UMSALARY.INFO, <https://www.umsalary.info/deptsearch.php?Dept=athletics&Year=2> [<https://perma.cc/58QQ-N4RQ>].

47. See EADA, *supra* note 20 (follow "Michigan" hyperlink under "School" column).

48. This amount was derived by adding the athletic director's salary to the total coaching salary: (\$28,869,781 + \$842,500). See EADA, *supra* note 20, at Revenues and Expenses; see also 2017–18 *University of Michigan Salaries*, *supra* note 46.

49. See STAUROWSKY & HUMA, *supra* note 1, at 4 ("If allowed access to the fair market like the pros, the average FBS football and basketball player would be worth approximately \$121,048, and \$265,027 respectively (not counting individual commercial endorsement deals).").

At the time of drafting, the most current financial information available on the University of Michigan's athletic program was the fiscal year ending June 30, 2018. Thus, fiscal year 2018 will be used for applying the Model.

For fiscal year 2018, the University of Michigan athletic program had the following teams showing a net profit:

Team	Participants	Revenue	Expenses	Net Profit	Gross Margin
Football	135	\$124,928,493	\$43,453,382	\$81,475,111	65%
Men's Basketball	16	\$20,027,574	\$9,982,947	\$10,044,627	50%

The total salary amount paid to all the University of Michigan athletic coaches for fiscal year 2018, was \$28,869,781.<sup>50</sup> To reiterate how this compensation Model is to work, player compensation is to come from the coaches' salary money pool.

#### 1. *The 5% Allocation Applied to the Wolverine Football Program*

Applying this matrix to the University of Michigan Wolverine Football Program, the allocation would work as follows. First off, 5% of the total revenue that the football team generated for fiscal year 2018 was \$6,246,425 (5% times \$124,928,493).<sup>51</sup> That would be the total amount allocated to the 135 players that comprises the University of Michigan's football roster.<sup>52</sup> The amount would be re-allocated from the \$29,712,311 currently paid to all University of Michigan athletic coaches—both men and women plus the athletic director.<sup>53</sup> As a result, the coaches salary pool would be reduced to \$23,465,906; a 21% re-allocation in all.<sup>54</sup> Granted, the amount seems substantial. But again—putting it in context—it is a re-allocation toward fairness, and a re-allocation that involves including a component that was integral to generating that revenue. It is a reallocation to what should have been done in the first place. And it is a reallocation toward the true economic realities of these sports endeavors. Granted, it can be hard to put the genie back into the bottle. But it should never have gone down this path in the first place.

Additionally, an athletic department would have discretion as to the pool from which the money would be drawn. One suggestion would be to take a disproportionate amount from the football coaches' salaries. The author is not blind,

50. See EADA, *supra* note 20, at Revenues and Expenses.

51. See *id.* (reporting that total football revenue was \$124,928,493).

52. See *id.* (reporting the operating expenses through a team-by-team breakdown as to the number of participants).

53. Amount was derived by adding the Athletic Director's salary to Total Coaching Salary: (\$28,869,781 + \$842,500). See *id.*; see also *2017–18 University of Michigan Salaries*, *supra* note 46.

54. Amount was derived from: (\$29,712,331 - \$6,246,425) = \$23,465,906.

however, to the realities of the marketplace. It is the head football coach who is primarily responsible for the revenue generating product as he is the orchestrator of the product put on the football field.<sup>55</sup> Any athletic department that begins cutting the head football coach's salary to reallocate that amount to players risks losing that coach to another program, or so the argument goes.

The author is not blind to the potential fallouts from this proposed compensation Model. However, an across-the-board requirement for all the Power 5 Conference teams would put everyone on equal footing and no one would have an advantage in that regard. Also, in looking at the Model with an open mind, one might appreciate and consider the potential positive effects such a Model could have on recruiting. A "*player centric*" Model may do wonders for recruiting that an inflated coach's salary could never do. Those universities that truly embrace this Model may attract recruits in a way that a Jim Harbaugh or a Nick Saban never could. And, if that turns out to be the case, the other programs would then be forced to follow suit or fall behind as the talent pool gravitates disproportionately toward those programs deciding to compensate their players fairly and appropriately.

In any event, as discussed earlier, any athletic department would have the discretion to draw that money from any current pool of expenses. The salary pool makes the most sense, but close scrutiny of any major athletic programs' budget can find a few million to re-allocate to accommodate this proposed Model. The millions of dollars spent on discretionary capital expenditures discussed earlier is just one example. The point is, the money is there. It's just a matter of institutional will in reallocating it.

## 2. *Allocating the Money Pool Within the Team*

The next challenge would be allocating that \$6,246,425 amongst the 135 players listed on the Wolverine's football roster. The obvious challenge here is the amount paid to each individual player. Should it be a simple equal allocation amongst the 135 players? Or should a team have a more bifurcated compensation structure? Some might take issue with paying the 3rd string kicker the same amount as the starting quarterback. One is integral to the program's success and the other may not ever set foot on the field.

Some type of salary scale would be in order—the NFL wage scale could be used as a basis for allocating pay amongst the players.<sup>56</sup> But, the NFL model is

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55. The author is not lost as to the impact that a head football coach can have on its program. The University of Michigan's recent history with its football program illustrates this very fact. In 2008 the University of Michigan Hired Rich Rodriguez as its head coach and after a failed three-year campaign hired Bready Hoke. During that seven-year period, the Wolverines went 46 and 42. The program finally turned around when the University of Michigan hired Jim Harbaugh in 2015. Though many feel like Harbaugh has not performed up to his pedigree, it is a significant improvement from what was happening with the program under the two previous coaches. The overall point here being that the head football coach is a very important position in high level college sports programs. And for that reason, they are able to command and are compensated very well for what they do. See *Michigan Wolverines School History*, SPORTS REFERENCE., <https://www.sports-reference.com/cfb/schools/michigan/index.html> [https://perma.cc/7XNZ-Q85N].

56. The Agreement is 316 pages in total, with a good portion of those 316 pages dedicated to player compensation. A careful reading of those provisions related to compensation quickly reveals how complicated and protracted the NFL's compensation system is. See NAT'L FOOTBALL LEAGUE,

protracted and complicated.<sup>57</sup> In keeping with the theme of avoiding things that could quagmire the process, a simpler payment regime would be called for here at the college level.

A more straightforward process would be to allocate the \$6.2 million pool between the starters and back up players. A proposed allocation—the first- and second-string players would receive 50% of the \$6.2 million and the back-ups would receive the remaining 50%.

Applying this proposed allocation, the compensation would work as follows:

For purposes of this salary allocation, the 11 starters on offense and the 11 starters on defense would be considered your first-string players. The immediate backups to these players would be your second-string players. Depending on the coaching philosophy at any particular school, your special teams may be comprised of a combination of starters from your offense and defensive sets with some back up players mixed in.<sup>58</sup> Given the relatively shorter period of time that the special teams players spend on the field, paying them as starters would not be appropriate. As for your 22 first- and second-string players you could further delineate the allocation with two thirds going to your first-string players and the remaining third going to your second-string players.

Applying this regime to the University of Michigan's football team, the 44 players comprising the first and second string would then split an allocated pool of \$3,123,213.<sup>59</sup> With a two-thirds to one-third allocation between starters and backups, each of the 22 starters would then receive annual compensation of \$94,646.<sup>60</sup> The 22 back up players would each then receive \$47,323.<sup>61</sup> With the University of Michigan's 135 Man Roster, the remaining 91 third string, reserve, practice squad players, etc., would receive the remaining \$3,123,213. If divided equally, that would be an annual compensation of \$34,321 per player. An overall fair stratification of the \$6.2 million pool.

These numbers may seem high, but not when put into context. Those players that start for a Power 5 conference football team have a unique and coveted skill set. Only a small fraction of the population possesses this skill set.

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COLLECTIVE BARGAINING AGREEMENT (2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/W9C5-Y98W>].

57. *See id.*

58. *See* Richard Lezin Jones, *Patriots Reward Starters by Using Them on Special Teams*, N.Y. TIMES (Feb. 4, 2005), <https://www.nytimes.com/2005/02/04/sports/football/patriots-reward-starters-by-using-them-on-special-teams.html> [<https://perma.cc/YV8G-RS25>] (explaining that the New England Patriots tend to break traditional approaches and place a large number of their starters on special teams).

59. Amount was derived from:  $((\$6,246,425/2) = \$3,123,213)$ .

60. Amount was derived from:  $((\$3,123,213 \times 2/3)/22) = \$94,646$ .

61. Amount was derived from:  $((\$3,123,213 \times 1/3)/22) = \$47,323$ .

Currently, there are 347 Division I schools.<sup>62</sup> 254 of those schools have football programs.<sup>63</sup> But there are only 64 teams that comprise the Power 5 Conferences.<sup>64</sup> Estimating an average roster size of 85 members per team, we are looking at approximately 21,590 players. This does not even take into consideration the number of high school players who were siphoned off in the transition from high school to college. Out of these 21,590 players, 5,440 players per year have the talent and skill level to play for a Power 5 conference team.<sup>65</sup> Out of those 5,440 players, 1,408 comprise the starting offensive and defensive players on those respective teams.<sup>66</sup> Thus, your Power 5 starting 22 on each of the respective teams represents 6.5% of an already select group of athletes.<sup>67</sup> Thus, given the unique and highly coveted skill sets these athletes possess, and given the value these athletes generate for their respective universities, these numbers are more than fair and are more than appropriate.

### 3. *The Allocation for Basketball and any Other Income Generating Teams*

Performing the same analysis for the University of Michigan men's basketball team, the compensation pool to be allocated to the basketball players would be \$1,001,379.<sup>68</sup> Allocating that \$1,001,379 amongst the basketball team's

62. See *List of NCAA Division I Schools*, ATHLETICS SCHOLARSHIPS, <https://www.athleticscholarships.net/division-1-colleges-schools.htm> [https://perma.cc/UHP3-627W] (noting that those 347 DI schools are located "across 49 different states" and "range from smaller private schools to the largest universities in the US").

63. "There are 125 Division I FCS football teams and 129 FBS football teams. FCS, or the Football Championship Subdivision, comprises 14 conferences: the Big Sky, Big South, CAA, Independent, Ivy, MEAC, Missouri Valley, Northeast, Ohio Valley, Patriot, Pioneer, Southern, Southland and SWAC conferences. FCS football teams compete in a 24-team playoff for the NCAA Division I Football Championship . . . FBS, or the Football Bowl Subdivision, consists of 11 different conferences: the ACC, American, Big 12, Big Ten, C-USA, Independent, MAC, Mountain West, PAC-12, SEC and Sun Belt conferences. FBS football teams compete in a four-team tournament culminating in the National Championship Game to determine the national champion." NEXT COLL. STUDENT ATHLETE, *Full List of Division I Football Teams: Find the Right Team for Your Athletic and Academic Goals*, NCSA SPORTS, <https://www.ncsasports.org/football/division-1-colleges> [https://perma.cc/45MV-S8EJ].

64. *Power Five Conferences*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Power\\_Five\\_conferences](https://en.wikipedia.org/wiki/Power_Five_conferences) [https://perma.cc/UA86-BRWJ] (last updated Oct. 25, 2020). "In college football, the term Power Five Conferences refers to five athletic conferences whose members are part of the Football Bowl Subdivision (FBS) of NCAA Division I, the highest level of collegiate football in the United States. The conferences are the Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference (SEC). The term 'Power Five' is not defined by the National Collegiate Athletic Association (NCAA), and the origin of the term is unknown. It has been used in its current meaning since at least 2006." *Id.* The ACC has 14 teams, the Big Ten has 14 teams, the Big 12 has 10 teams, the Pac 12 has 12 teams, and the SEC has 14 teams. All tolled the Power 5 Conferences are comprised of 64 teams. *Id.*

65. The 5,440-player estimate is based on a conservative estimate of 85 players per team times the 64 teams that comprise the Power 5. The actual numbers are likely higher. These numbers are conservative estimates simply to illustrate the point.

66. Number derived by multiplying the 64 teams that comprise the Power 5 conferences by the 22 players per team that comprise the offense and defense: (64 x 22 = 1,408).

67. Number derived by: (1,408/21,590).

68. Being 5% of University of Michigan's \$20,027,574 basketball revenue.



16-man roster comes to a compensation allocation of \$63,955 annually per player. Completing the loop here, the \$1,001,379 paid to the players on the University of Michigan men's basketball team would be drawn from the same \$23 million coaches salary pool mentioned earlier. Reiterating—the amounts being proposed here are significant. But that is the whole point. The contribution that these players are making to these revenue generating efforts are significant and would not have happened without their participation. A similar analysis would be performed for any other sport regardless of gender as long as they were profitable. The only difference would be the dollar amounts—which, again, are based on the revenue generated by the sport in question.

#### IV. THE (INVALID) ARGUMENTS AGAINST THE COMPENSATION MODEL

Pundits, commentators, and scholars have argued against athlete compensation—the most often cited arguments are encapsulated here and are summarily shown to be invalid.

##### A. Not Financially Viable

For the longest time, the most often cited argument for not compensating the college athlete was the proposition that paying college athletes was not financially viable.<sup>69</sup> What you read in the literature was that only a fraction of Division I college programs were even profitable.<sup>70</sup> Overtures of having to shut down other sports programs if the compensation model changed to paying the athletes was a common refrain.<sup>71</sup> Athletic programs expressing that sentiment alone proved to be enough to quash the conversations.

Upon closer review however, those arguments ring hollow. As laid out in the pages prior, compensating the college athlete is financially viable. As outlined in Section II, the proposed Model is scalable and would therefore fit any program. Setting the compensation mark as a percentage of revenue adapts it to fit any athletic program.

Additionally, athletic program expenditures should be scrutinized carefully. As discussed earlier, there is discretionary spending and non-discretionary spending. The discretionary spending is where scrutiny reveals fallacies in the “*it's not financially viable*” argument. When you look at a number of these athletic programs carefully, we see that a great number of them are spending significant amounts on major capital expenditures such as buildings and facilities. As case in point, in 2013 the University of Michigan set out on a capital campaign to build new facilities for

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69. See generally Cody J. McDavis, *Paying Students to Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/opinion/pay-college-athletes.html?module=inline> [<https://perma.cc/UM6C-8CCG>].

70. See generally *id.*

71. See generally *id.*

both its revenue generating and non-revenue generating sports programs.<sup>72</sup> This campaign had a projected cost of \$161 million.<sup>73</sup>

The argument for committing those dollars is the expressed necessity for having a competitive edge over other athletic programs to continue to attract the best and the most talented athletes. But as also mentioned earlier, what if that money were paid directly to the athletes? How attractive would that school become to a five-star recruit that could play at any school of his choosing? As Schwartz points out, a financial analysis would reveal that the athletic programs would likely come out ahead if the trade-off is between capital expenditures in the millions versus athletic compensation for a fraction of that.<sup>74</sup>

Additionally, feasibility studies on paying college athletes have revealed that a lot of athletic programs are run inefficiently with costs being incurred that could be avoided with some belt tightening.<sup>75</sup> Using the University of Michigan as an example: Is a 135-man roster for the football program really necessary? NFL teams, for example, have a mandated 53-man roster. It is easy to conclude that the 53-man roster limit is driven at least in part, if not primarily, by economics. The less players on your roster, the less players the owners have to pay. Likewise, the same efficiencies could be applied to the college ranks. If the NFL can get by with a 53-man roster to cover a 16-game regular season schedule, surely the college ranks could get by with, say, a roster capped at 90 for example.<sup>76</sup> This was the number cited in one feasibility study. A roster cut down to 90 players noted the following savings respectively:

University of Louisville:	\$3,015,263
University of Mississippi:	\$3,013,498
University of Oregon:	\$2,712,410
San Jose State:	\$874,169 <sup>77</sup>

It is therefore reasonable to conclude that the University of Michigan would enjoy similar savings were it to engage in similar roster cutting measures. The overall point here being—the money is there. It's a matter of re-prioritizing that spending. Spending discretionary money to exhaustion and then pleading poverty is no longer a valid argument.

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72. See U. MICH., 2018 ANNUAL REPORT 21 (2018), [https://2018.annualreport.umich.edu/wp-content/uploads/sites/56/2018/12/FY18-U-M-Annual-Report\\_Final.pdf](https://2018.annualreport.umich.edu/wp-content/uploads/sites/56/2018/12/FY18-U-M-Annual-Report_Final.pdf) [https://perma.cc/V52Q-AWYV].

73. See *id.* at 23.

74. See Andy Schwarz, Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes, Santa Clara University Sports Law Symposium (Sept. 8, 2011), <https://drive.google.com/file/d/0BxM4wdtZ5uI-OWFhNGE1ZTltZTlYs00YmVILTk0YmItYTM4ZDUyY2MwNTE2/view> [https://perma.cc/AY26-WSDG].

75. See George Dohrmann, *Pay for Play: The Mission of our Universities is to Education, but College Sports is Big Business, and No One Wants Young Athletes Exploited*, VAULT (Nov. 7, 2011), <https://www.si.com/vault/2011/11/07/106127622/pay-for-play> [https://perma.cc/KSL9-UFF2].

76. A ninety-man roster was the number suggested in one commentator's analysis. *Id.*

77. *Id.*

## B. Compensation Would Cause a Disproportionate Distribution of Talent

Another often cited criticism of compensating college athletes is the argument that paying college athletes would create a disproportionate distribution of talent and thus would throw the competitive balance of college sports out of whack. The fact of the matter is that a disproportionate distribution of talent *already* exists. Overwhelmingly, Division I talent coalesces around the Power 5 conferences which has been the case for years. Of the NFL rosters for the 2019–2020 season, players from the Power 5 conferences comprised 78% of those rosters.<sup>78</sup> The disproportionate talent distribution already exists. Compensating these athletes would do nothing to widen what is already a chasm.

In fact, some scholars have argued the contrary—noting that the prospect of compensation may, in fact, tip the competitive balance to teams outside the Power 5.<sup>79</sup> The argument there being—instead of enticing a 5 star recruit on top notch facilities, or playing for a high profile program, that smaller program may be able to reach high for a highly sought after recruit simply by outbidding the other schools for that one player.<sup>80</sup> The overall point here being that a competitive imbalance in college sports already exists and compensating college athletes would do nothing to exacerbate that.

## C. Not Fair if All of the Other Sports Are Not Getting Paid

Another false narrative is the one that argues that compensating only a subset of college athletes is not fair to the remaining pool of non-revenue generating sports. Using the University of Michigan as our continuing case study, we see that the University of Michigan has at least 23 non-revenue generating sports.<sup>81</sup> These sports are able to subsist from the revenue being generated from the Men's Football and Basketball programs. From the revenue generated from these teams, these non-income generating sports receive support which goes towards both athletic scholarships for the players and monetary support for the programs themselves. The more pointed question to ask is whether it's fair that sports like golf, lacrosse, women's field hockey, men's and women's swimming, men's and women's cross country, and men's and women's track and field are supported from revenue generated from other sports and not subsist on their own?

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78. According to the article, there were 1,453 players from all the schools, and 1,127 of those players were from the Power 5 Conferences. See Spencer Parlier, *Colleges Most Represented on 2019 NFL Rosters*, NCAA (Jan. 17, 2020), <https://www.ncaa.com/news/football/article/2019-09-03/colleges-most-represented-2019-nfl-rosters> [https://perma.cc/93KL-P94V].

79. "On the other hand, if George Mason wants to win a recruiting war with Duke, it's probably doomed under the current system. Letting Have-Nots use cash is actually the best way to overcome the current unequal playing field. If we allowed schools to choose how much to offer a player, a current 'Have Not' college could use money to steal a player or two from the 'Haves' and help begin the climb to the ranks of the elite." Schwarz, *supra* note 74, at 55.

80. *Id.* at 59.

81. According to the revenue and expense data, the only teams showing a profit are Men's Basketball and Men's Football. Conservatively, the author did not include Men's Ice Hockey or Men's Lacrosse. Not even considering those two teams, that leaves 21 non-revenue generating programs supported by only two teams. See EADA *supra* note 20 (follow hyperlink; then search name field for "University of Michigan" and click continue; then select University of Michigan.).

The point being, the Model here is a purely economic one. Paying athletes that participate in sports that aren't profit generating is simply not economically viable or sustainable. The NCAA cannot continue to have it both ways; running their operation as a business on the one hand with heavily negotiated contracts with their television networks and advertisers, but then failing to fairly compensate a key revenue generating component of that business model. That is the self-serving model for which time has tolled. There no longer is, nor has there ever been, justification for these practices.

#### **D. These Athletes are Already Paid in the Form of a "Free Education"**

Many opponents of compensating collegiate athletes have argued that the athlete is being compensated in the form of a "free education."<sup>82</sup> They opine that the value of an undergraduate education resulting in a degree is valuable beyond measure.<sup>83</sup> Commentators have gone so far as to suggest that the athlete should be grateful for the opportunity to play football or basketball at their respective institutions.<sup>84</sup> Again, upon closer review, these arguments ring hollow.

The "education" that the athlete receives is anything but free. The athlete pays dearly. The reality is, the culture of D1 college football and basketball is this: if the athlete wants to actually get a meaningful, substantive education, he must do so on his own time. Any decision favoring his education over his commitment to his sport, the athlete does at the risk of losing his standing in his respective sport.

National Labor Relations Board regional director Peter Sung Ohr noted that players spend in excess of 50 hours a week honing their craft on the football field in the pre-season and in excess of 40 hours per week once the season starts.<sup>85</sup> Attending school and tending time to one's respective sport as a student-athlete is the equivalent of working two full-time jobs with one so demanding that it often times must be performed to the sacrifice and detriment of the other. First round draft pick Josh Rosen who played quarterback for the University of California, Los Angeles Bruins made these comments in August of 2017 while participating in a question and answer session on a popular fan website, *Bleacher Report*<sup>86</sup>: "Look, football and school don't go together. They just don't. Trying to do both is like trying to do two full-time jobs."<sup>87</sup> The author penning the article further commented, "[b]ut if the 'education'

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82. McDavis, *supra* note 13.

83. *Id.*

84. *See id.* ("For those who think that a free education is insufficient as compensation for playing sports, there are other options: The National Basketball Association's developmental league, for instance, offers \$125,000 contracts to top high-school talent. Such athletes can also pursue a career playing for other domestic or overseas professional leagues.").

85. Jake Novak, *The Ugly Truth About Major College Football*, CNBC (Aug. 13, 2017), <https://www.cnbc.com/2017/08/11/ucla-star-josh-rosen-exposes-an-ugly-truth-about-ncaa-football.html> [<https://perma.cc/V8WR-6D2Q>].

86. The Arizona Cardinals selected Josh Rosen in the first round. *See NFL Draft & Combine Profile – Joshua Rosen*, NFL, <https://www.nfl.com/prospects/josh-rosen?id=3219524f-5335-7433-3207-a02a4e884405> [<https://perma.cc/45UW-9VC4>]. He was the tenth player selected. *Id.*

87. Novak, *supra* note 85.

part of the deal is a sham, or at least impossible to attain even if college football players make a decent effort to study and play, then that deal is a fraudulent one.”<sup>88</sup>

The fact of the matter is, the demands put on these “student-athletes” are so great, so time intensive, and so consuming, that they have little, if any, opportunity to major in meaningful, substantive, marketable educational opportunities while they are engaged in their respective sport.

Translating this narrative to the University of Michigan Football program, the results are mixed. Historically, the Graduation Success Rate for the program hovered between a low of 66% in 2006 and a high of 73% in 2000.<sup>89</sup> This is for the period spanning from 1998–2008.<sup>90</sup> Beginning in 2009, however, the football program’s Graduation Success Rate has been trending upward climbing from 79% in 2009 to 91% in 2012, which puts it among the top schools nationally.<sup>91</sup> Overall, the Graduation Success Rate for Division I football programs for the 2009–2012 cohort was 78%, which was the lowest of all the NCAA division one sports, with men’s wrestling at just slightly higher at 79% followed by Men’s Basketball at 83%.<sup>92</sup> To Michigan’s credit, their football program has been trending upward as of late.

However, anecdotal evidence from the athletes themselves paints a very different picture of the notion of a “free education.” According to the account shared by Albert Evans, his “education” was neither free nor was it an education. Albert Evans is a former safety who played for the Purdue Boilermakers from 2007–2011. In 2012 he signed as an undrafted free agent with the Miami Dolphins. In his own words, Mr. Evans gives a very different account than that of a “free education.”

While students who have struggled and planned their lives around having to pay for college may wish they had their college paid for by an athletic scholarship, a lot of the athletes on those scholarships wouldn’t consider or be considered by their college if it wasn’t for their sports. We may see these “opportunities” as good things, but it can be like giving a baby money. Do they really know what to do with it? We recruit the fastest runners and highest jumpers, go into urban cities and country sides, and play on the emotions of young men who want to go pro. Although that opportunity is provided (the NCAA being a breeding ground for pro sports, an argument for another day), we know the percentages of individuals making it pro is microscopic. So while those students who do graduate have that piece of paper, it’s oftentimes a piece of paper they don’t know how to use while

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88. *Id.*

89. *Graduation Success Rate*, NCAA, <https://web3.ncaa.org/aprsearch/gsrsearch> [<https://perma.cc/LVB6-J95M>] (choose “University of Michigan” from drop down; then choose “Football” from drop down; then hit “Search”). The Graduation Success Rate equals the percentage of students that have graduated six years after entering school. See *Graduation Rates*, NCAA, <http://www.ncaa.org/about/resources/research/graduation-rates> [<https://perma.cc/8QB4-9KXG>].

90. *Graduation Success Rate*, *supra* note 89.

91. *Id.*

92. See *Graduation Rates*, NCAA, [https://web3.ncaa.org/aprsearch/public\\_reports/gsrAggr2019/1\\_0.pdf](https://web3.ncaa.org/aprsearch/public_reports/gsrAggr2019/1_0.pdf) [<https://perma.cc/84CD-WVXB>].

surrounded by family and social structures that don't know what to do with them either.

When I was 10 years old, I wrote an article for the local newspaper that asked me what school I wanted to go to and what I wanted to study. I said Purdue University in their school of Engineering. I didn't know that one day I would actually be able to attend Purdue on an athletic scholarship. But I wouldn't be able to go for Engineering. Neither would I be able to go for Athletic Training, my second choice, which I wanted to use to create a path into Physical Therapy School. I was told that the Engineering caseload and class schedule would not work, especially if I had dreams of playing. I was told I would not be able to receive my hours for Athletic Training because they were mostly during football season and spring practice. At that point, I was on my third choice which wasn't even a choice.

I was literally just there to play football. Having two choices of my own was more than a lot of my teammates and friends at other schools could say as they were left undecided and thrown into General Studies, Communications or Organizational Leadership and Supervision. So while those on the outside are complaining of paying for school because that's something they value, imagine getting something for free that you aren't just not interested in, but also something you don't really know what to do with it.

Collegiate sports looks glamorous from your couch. You play on national television. Your friends and family cheer for you. The fans cheer for you. You travel. You get free food. There's a lot of perks.

But you don't get to see what goes on inside those walls. They tell a different story for an 18-22-year-old boy. I didn't really believe that they did with you what they wanted until I arrived on campus. I was recruited as a running back, moved to safety, redshirted, had it pulled, played a few snaps at linebacker, all as a freshman. Then they moved me back to safety as a sophomore. Talk about a whirlwind. What I wanted didn't come into consideration, just what they needed from me.

Players literally feared the film room after a loss or a play they didn't do so well on. I've seen players transfer and careers go to hell because they couldn't take the scolding that would follow. Is that what it means to be an "amateur"?

The pressure of knowing coaches' jobs were based on your performance was a heavier burden than I wished to carry. At one point, I was brought into a coach's office and pleaded with to turn the season around because they feared losing their job. By pleading, I mean crying and family pictures being brought out and asking me to do it for their families. I left that office with a burden I have never forgotten. The kicker is, we got to a bowl game and

won and some of those coaches still moved on to their next position.<sup>93</sup>

Mr. Evan's story is just one of thousands played out over and over, year after year with slightly different thematic variations but with common endings. The story behind the curtain is barely visible to the public. This is intentionally so. No one really wants to see how the sausage is made and the price these athletes pay. They just want the end result. The amazing athletes putting their bodies at risk to entertain on Saturday afternoon and evening. And a failure to compensate these athletes under the guise of "amateurism" and the false concept of the "student-athlete."

The whole notion of a "free" education for these student-athletes is not what the general public assumes it to be. Upon close examinations, the realities are far different. Based on NCAA statistics that compiled data for 2018, 73,557 young men were playing Division I college football; 16,346 of these players were eligible for the 2018 NFL Draft.<sup>94</sup> Just 1.5% or 255 of those players were drafted that year.<sup>95</sup> Honing those odds somewhat, roughly 73% of the players drafted in that 2018 draft came from the Power 5 Conferences.<sup>96</sup> During that year, the Power 5 Conferences had 1,739 draft eligible players with 185 of those players being drafted (i.e. 11%).<sup>97</sup> So, there is already a delineating process that takes place at the college level. Even when narrowing the pool down to just the Power 5 conferences, the statistical probability of being drafted is still remote.

In spite of these statistics, most of these athletes go "all-in" on a proposition that will have a pay-out for only a select few. The coaches for these athletic programs know this very well. But the players have the blinders of youth, which only allows them to see themselves as the exception. That is until the realities hit 3-4 years later where the chips from their all-in bet have been cashed and they have little to show for their efforts. Either a degree of minimal or no use, or no degree at all, and no prospects of playing at the next level. These phenomena are a travesty.

The coaches and athletic departments know the realities here and the minimal prospects of going pro for most players; even the ones in the Power 5 conferences. But the lure of playing at the next level is strong. The coaches are aware of this and they use that as the carrot to get everything they can out of the player. It's clearly in the coach's best interest to get that player totally committed. His job as a coach literally depends on how the players perform. What happens after the player's

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93. Travis Miller, *Here's What a Former Purdue Football Player Wants You to Know About Being a Student Athlete*, HAMMER AND RAILS (Mar. 13, 2018, 12:07 PM), <https://www.hammerandrails.com/2018/3/13/17110940/ncaa-athlete-behind-the-scenes> [<https://perma.cc/D8BY-WL5T>].

94. See *Estimated Probability of Competing in Professional Athletics*, NCAA (Apr. 8, 2020), <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> [<https://perma.cc/SL8N-GTK9>].

95. *Id.*

96. See *id.* (noting that "[t]he five football conferences with autonomous governance accounted for 197 of the 254 [(i.e. 77%)] NCAA draft picks (SEC=64, Big Ten=40, ACC=34 [includes Notre Dame], Pac-12=33, Big 12=26)").

97. See *id.* ("Narrowing further to the five Division I conferences with autonomous governance (ACC, Big Ten, Big 12, Pac-12 and SEC), we estimate that 11% were drafted (197 / 1,769)").

eligibility is used up is not the coach's concern. Nothing about the coach's job hinges on the coach's interactions with the players after they leave the program. So let's dispel with this notion of a "free education." The price is high and the bargained for exchange couldn't be more disproportionate.

#### E. Too Much Money to be Paying 18-21 Year Olds

In reading some of the criticisms from those who opposed the idea of paying college athletes for their time and labor, some have expressed concerns about what these young men, most of whom being between the ages of 18–21, would do if they were to have access to the kind of money being proposed in this Model. Ridiculous and extreme concerns about spending all of their money on weed and alcohol for instance.<sup>98</sup>

Let us make sure we are cautious that any decision on whether or not to compensate a deserving labor pool is not contingent upon where and how that pool will decide to spend *their own money*. If societally, we go down that road, I do not know where we end up. But the point is understood. After all, we are talking about young adults, and the undergraduate years are supposed to be a learning experience. And not just in sociology, psychology, and marketing, but ideally in life lessons as well.

In that regard, the solution is a simple one. The institution can make receiving the money contingent upon the athlete completing a financial literacy course. The course content can touch on things such as money management, investing and saving, budgeting, information on retirement and insurance plans, etc. The dynamic can be set up such that completing the course is part of the earning process; a pre-requisite for receiving the money.

A second protective measure that may allay some of these concerns is having the institution withhold a portion of the student-athlete's compensation until four years after that student enrolled into the university as a freshman. Withholding a *portion* of the money in this fashion serves a two-fold purpose: (1) It takes away any incentive for the student-athlete to leave the institution early for purposes of receiving their compensation now instead of later; and (2) the delay encourages the athlete to stay at the University all four years to complete their education and get their degree. The amount that they actually receive can be tied to some type of living wage index for the area. This is so that the student-athlete can live comfortably, pay their bills, and perhaps support others who may be dependent on them even though they are college students.<sup>99</sup> Such are the realities of life for many of these students.

So, the more the institution is aware of and sensitive to their athlete's particular situations that will likewise result in "win-win" situations for both the athletes and the university.

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98. Mike Chiari, *Colin Cowherd Says College Athletes Would Buy "Weed and Kicks" With Salary*, BLEACHER REP. (Apr. 25, 2014), <https://bleacherreport.com/articles/2041740-colin-cowherd-says-college-athletes-would-buy-weed-and-kicks-with-salary> [https://perma.cc/65R4-RW3Q].

99. See Kevin McNamara, *With Little Money, Many Scholarship Athletes Struggle to Get By*, PROVIDENCE J. (Jan. 24, 2015), <https://www.providencejournal.com/article/20150124/SPORTS/301249983> [https://perma.cc/WE3S-TS8U].



For example, the amount the athlete receives could be tied to a living wage amount for a family of four. The student-athlete receives that amount while enrolled at school. He receives the balance on the graduation date four years after his enrollment. The remaining amount can be held in an interest-bearing trust account until that time. In sum, anyone scrutinizing college athletes compensation is encouraged to be discerning. Upon analysis, the arguments against compensating college athlete rings hollow.

## V. TITLE IX CONSIDERATIONS – PROPERLY RECALIBRATING TITLE IX

Title IX's "equal treatment" mandates have been cited as one of the biggest financial obstacles for paying college athletes.<sup>100</sup> Title IX in relevant part states that "*no person in the United States shall, on the bases of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.*"<sup>101</sup>

This language has been interpreted to mean that whatever you do for men's sports, you must proportionally do for women's sports.<sup>102</sup> Accordingly, those that oppose paying college athletes—namely the NCAA, the coaches, the athletic departments, and other stakeholders—will argue that the Title IX mandates requiring equal or proportional monetary support for both men and women makes the notion of paying *any* athletes above their scholarship a cost prohibitive endeavor.<sup>103</sup>

This "equal treatment" mandate is convenient for the NCAA and the other stakeholders who would stand to take home less financially if required to share their compensation with the athletes who are integral in generating these revenue dollars in the first place. The discussions and analysis on this issue have failed to probe deeply and have failed to give the athletes' relationship with their respective universities the deference it deserves. Pundits and scholars for the most part have accepted Title IX's mandate as a non-movable, non-negotiable, non-challengeable facet of Title IX. If you are going to pay the men, then you must pay the women. Or so the argument goes.

But the argument is a frustrating one and one that has been relied on to exploit because it places idealistic principles of equity and fairness into the context of big business, capitalism, and the economic principles of supply and demand. And these variables simply don't reconcile; not if you are trying to be fair, which Title IX purportedly seeks to do.

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100. See Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon*, 41 J. COLL. & UNIV. L. 297, 298 (2015) ("In response to the argument that withholding compensation from athletes whose labor generates millions of dollars of revenue is tantamount to exploitation, the NCAA argues that paying athletes in revenue sports, coupled with the commensurate obligation under Title IX to pay female athletes, would be prohibitively expensive for college athletics as we know it. Ergo, no pay for play.").

101. See *Gender Equity and Title IX*, NCAA, <https://www.ncaa.org/about/resources/inclusion/gender-equity-and-title-ix> [https://perma.cc/V5LY-76Q7].

102. See *Gender Equity*, NCAA, at *How is Title IX Applied to Athletics?*, <http://www.ncaa.org/sites/default/files/S-A%2BPamphlet.pdf> [https://perma.cc/U4Z8-ZWEQ].

103. See Buzuvis, *supra* note 100.

The problem with Title IX in this context is that it conveniently disregards economic substance and puts in its place an artificially created construct, which is the antiquated notion of the “student-athlete”—a term the NCAA coined years ago to justify its current and exploitive treatment of the college athlete.<sup>104</sup>

In its early iterations, the “student-athlete” concept was premised upon the idea of college students participating in sports as an enhancement, a furthering of and a complement to the student’s educational experience as a college student.<sup>105</sup> The intended connotation here was that participation in college sports was to be an extra-curricular “add-on,” if you will. Something akin to recreational activities to round out the college student experience. Something the student is doing voluntarily and is by all means secondary to the student’s primary goal, which is to procure his college degree in his chosen field of study with all else being secondary to that primary objective.

But nothing could be further from reality. At least not for the sports that are generating millions for their respective universities. These programs and the athletes that participate in them are responsible for the livelihoods of thousands that live off of the revenue that these programs generate. As documented earlier, these athletes spend anywhere from 35–50+ hours a week on their “recreational” activity. Every aspect of their participation is mandated and controlled. If job performance expectations are not met, then the athlete is subject to scholarship “non-renewal.”<sup>106</sup> What is the substance of the relationship here? Is it one of “student-athlete” or employer-employee? When and where challenged, courts have already made findings of an employer-employee relationship,<sup>107</sup> although courts have found ways to deftly side-step the issue and thus have punted on the question for now.<sup>108</sup>

To date, however, there have been modest challenges to Title IX’s application.<sup>109</sup> This is so because the whole notion of properly compensating college athletes has been stalled. But there should be an open challenge. Once you properly

104. See Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/8XRY-383Q>] (“For all the outrage, the real scandal is not that students are getting illegally paid or recruited, it’s that two of the noble principles on which the NCAA justifies its existence—‘amateurism’ and the ‘student-athlete’—are cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes.”).

105. See *id.*

106. See *Athletic Scholarships: Everything You Need to Know*, NEXT COLL. STUDENT ATHLETE, <https://www.ncsasports.org/recruiting/how-to-get-recruited/scholarship-facts> [<https://perma.cc/33RC-88Y6>] (noting that athletic scholarships may be subject to “non-renewal” for a variety of reasons, including poor performance).

107. See Post-Hearing Brief of Petitioner at 3, *Nw. Univ. v. Coll. Athletes Players Ass’n*, No. 13-RC-121359, 2014 WL 1922054 (N.L.R.B. Mar. 17, 2014).

108. See, e.g., Sheldon D. Pollack & Daniel V. Johns, *Northwestern Football Players Throw a “Hail Mary” but the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy*, 15 VA. SPORTS & ENT. L.J. 74, 77 (2015).

109. In the article, the author makes the argument that players should be paid differently based on skill, ability, demand, etc. Similar to the argument made for justifying coaches for men’s basketball versus women’s basketball. See Marc Edelman, *When It Comes to Paying College Athletes, Title IX is Just a Red Herring*, FORBES (Feb. 4, 2014), <https://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/#78851ac51bde> [<https://perma.cc/3Q27-MYH2>].

re-frame the lens as to what is occurring here, which is a labor pool being mischaracterized as “student-athletes,” then the issue can be properly and appropriately addressed.

Athletes that generate millions for their respective institutions—generally football and basketball players—are university employees. As such, they should be compensated appropriately for their labor—period. Extending the argument further, for any sports program that is generating a net profit through the engagement of that sport, the “college-athlete” should be compensated appropriately as employees for their time and labor. Just like any other student who takes a job working for that university. Failure to recognize the economic substance of these relationships for what they are—i.e., employer-employee relationships—results in exploiting a labor pool that is powerless yet is sacrificing their time, their bodies, and their labor to the benefit of other stakeholders. This could not be Title IX’s intended outcome.

In this regard it should be made clear and underscored that the athletes participating in *any* sport regardless of gender that is earning a net profit, should be compensated in accordance with the Model proposed in this writing. It is acknowledged however that very few, if any, women’s teams would qualify under this criteria. Contrary to what many might expect, even popular teams like the Lady Huskies of the University of Connecticut do not operate at a profit.<sup>110</sup> Indeed, *most* teams regardless of gender do not operate at a profit. Generally, it is the men’s basketball and footballs teams that keep their entire athletic programs afloat. And in those instances where none of the teams are operating at a profit, then school tuition and other fees are drawn upon to supplement those team budgets.<sup>111</sup> But again, none of these dynamics negates the propriety of compensating the team sports that generate millions for their respective universities. In fact, this information makes for an even stronger argument as these universities are able to offer the wide array of sports offerings that they do, due to the wide success and profitability of the men’s basketball and football teams.

#### **A. Case and Point—Paying the Men’s Basketball Coaches More Than the Women**

Generally speaking, among Division I college coaches, the coaches for the Division I women’s basketball teams are paid one half to a third of what the Division I men’s basketball team coaches are paid.<sup>112</sup> How is this reconciled under the “equality” mandates of Title IX? According to the case law, it is done quite easily.

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110. Data shows the UConn Lady Huskies breaking even at best. But in no event were they generating a profit. EADA *supra* at note 20 (search “University of Connecticut”; then choose “University of Connecticut”; then click on “Revenues and Expenses”).

111. See Alex Putterman, *UConn Athletic Department in 2018: Generated \$40 Million in Revenue, Incurred \$81 Million in Expenses*, HARTFORD COURANT (Jan. 17, 2019), <https://www.courant.com/sports/hc-sp-uconn-sports-athletic-department-finances-revenue-expenses-20190117-2wdp5gimnvhllywykl6npcmy7u-story.html> [<https://perma.cc/TU5W-TFHN>].

112. James K. Gentry & Raquel M. Alexander, *Pay for Women’s Basketball Coaches Lags Far Behind That of Men’s Coaches*, N.Y. TIMES (Apr. 2, 2012), <https://www.nytimes.com/2012/04/03/sports/ncaabasketball/pay-for-womens-basketball-coaches-lags-far-behind-mens-coaches.html> [<https://perma.cc/87QL-UTZN>].

In essence, these matters aren't treated as Title IX issues, but they are treated as employer employee issues and are therefore subject to the Equal Pay Act of 1963.<sup>113</sup>

The key case cited when addressing these issues is *Stanley v. University of Southern California*. In this case, former head coach of the University of Southern California women's basketball team, Marianne Stanley filed suit against the University of Southern California.<sup>114</sup> The complaint set forth various federal and state sex discrimination claims, including violations of the Equal Pay Act (EPA),<sup>115</sup> Title IX,<sup>116</sup> the California Fair Employment and Housing Act (FEHA),<sup>117</sup> and the California Constitution, Cal. Const. article 1, section 8.<sup>118</sup> As summarized by the Ninth Circuit:

The gravamen of Coach Stanley's multiple claims against USC is her contention that she is entitled to pay equal to that provided to Coach (George) Raveling for his services as head coach of the men's basketball team because the position of head coach of the women's team requires equal skill, effort, and responsibility, and [is performed] under similar working conditions.<sup>119</sup>

The case's procedural posture should be noted. In the case, Coach Stanley sought a preliminary injunction. She wanted her position as the USC women's head basketball coach to remain intact pending the outcome of her suit against the University.<sup>120</sup> Her injunction was denied and Coach Stanley appealed. On appeal, the Court explained the burden that the party seeking the injunction must meet.

The party seeking the injunction must (1) show that they will suffer irreparable injury if injunctive relief is not granted; and (2) the party seeking injunctive relief will probably prevail on the merits; and (3) in balancing the equities, the non-moving party will not be harmed more than the party seeking the injunction is helped by the injunction; and (4) granting the injunction is in the public interest.<sup>121</sup>

The Court's analysis with prong (2), the moving party's likelihood of prevailing on the merits is what is most relevant here. As explained in the case, "The thrust of Coach Stanley's argument in this appeal is that she is entitled, as a matter of law, to make the same salary as was paid to the Head Men's Basketball Coach at USC."<sup>122</sup> But the Court disagreed with Coach Stanley's assertion. According to the case, for a plaintiff to meet their burden, the "plaintiff must prove that an employee is paying different wages to employees of the opposite sex for equal work . . . the jobs need not be identical but they must be 'substantially equal.'"<sup>123</sup> Further, the Court explained, "the EPA prohibits discrimination in wages between employees on

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113. 29 U.S.C. § 206(d)(1) (1988).

114. *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1316 (9th Cir. 1994).

115. 29 U.S.C. § 206(d)(1).

116. 20 U.S.C. § 1681(a) (1986).

117. CAL. GOV'T CODE § 12921 (West 1992).

118. *Stanley*, 13 F.3d at 1318.

119. *Id.* at 1319.

120. *Id.* at 1318.

121. *Id.* at 1319.

122. *Id.* at 1321.

123. *Id.* at 1321.

the bases of sex . . . for equal work, on jobs the performance which requires equal skill, effort, and responsibility and which are performed under similar working conditions.<sup>124</sup> Each of these components must be substantially equal to state a claim.”<sup>125</sup>

The Court expressed its doubt that Coach Stanley would be able to meet her proof burden.<sup>126</sup> The sum of the Court’s analysis was that the men’s basketball head coaching job came with more responsibility and requirements than the women’s head coaching job.<sup>127</sup> The Court noted that “Coach Raveling’s responsibilities as head coach of the men’s basketball team require substantial public relations and promotional activities to generate revenue for USC.”<sup>128</sup>

The Court noted that these efforts generated revenue that was 90 times greater than the revenue generated by the women’s basketball team.<sup>129</sup> The Court explained that Coach Raveling was required to conduct twelve outside speaking engagements per year, to be accessible to the media for interviews, and to participate in certain activities designed to produce donations and endorsements for the USC Athletic Department in general.<sup>130</sup> In contrast, the Court noted that Coach Stanley’s position as head coach did not require her to engage in the same intense level of promotional and revenue-raising activities.<sup>131</sup>

Further, the Court noted that Coach Raveling, the men’s head coach, had more experience and more job-related skills which rightfully contributed to the higher pay.<sup>132</sup> The Court also noted that USC had employed Coach Raveling three years longer than Coach Stanley.<sup>133</sup> The Court also noted that Coach Raveling had been a college basketball coach for 31 years, while Coach Stanley has had 17 years’ experience as a basketball coach.<sup>134</sup>

Finally, and perhaps most important and relevant to the issue of “student-athletes” as employees and the commensurate compensation that should follow, the Court noted that an employer *may consider the marketplace value of the skills of a particular individual when determining his or her salary*.<sup>135</sup> Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA.<sup>136</sup>

Under this final factor, the Court noted that the USC men’s basketball team generated greater attendance, more media interest, larger donations, and produced substantially more revenue than the women’s basketball team.<sup>137</sup> The Court noted that USC placed greater pressure on Coach Raveling to promote his team and to

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124. *Id.*; 29 U.S.C. § 206(d)(1) (1989).

125. *Stanley*, 13 F.3d at 1321.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1322.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (citing *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980) (emphasis added)).

136. *Id.*

137. *Id.*

win.<sup>138</sup> Evidence showing that a coach has the responsibility to produce a large amount of revenue indicates a substantial difference in responsibility.<sup>139</sup>

### B. As Equal Pay Applies to “Student-Athletes”

Other than the NCAA’s artificial mischaracterization of the “student-athlete,” there is no justification for students who work as football players on the field or basketball players on the court not being paid the fair market value for their services. In no other context does this occur other than in collegiate athletics—specifically in the sports of men’s football and men’s basketball. In substance, form, qualitatively, quantitatively, these athletes are university employees. The failure to recognize them as such is a failure to acknowledge the substance of the college athlete’s relationship to and services provided for that university.

As these matters relate to Title IX, just as the issue of equal pay among college coaches as university employees is taken out of the Title IX context and placed appropriately into the context of the Equal Pay Act, the payment of these “student-athletes” as University employees should be treated in the same fashion. The 35–50 hours a week these athletes spend on their respective sport, coupled with the level of control and emphasis the university exacts upon these athletes, coupled with the vital revenue generating aspect of their endeavors makes them every bit the employee as the coaches overseeing their play.

Once put in the proper context and therefore recalibrated to applying the appropriate and applicable law, i.e. the Equal Pay Act rather than Title IX, only then can an appropriate and just result be reached. Once the lens is properly refocused, we can now revisit the pay aspect for these athlete-employees as they will now be referred to going forward.

In that regard, in applying the EPA as it relates to compensation for the men’s football team, the skill, the talent, the ability, and most importantly, “*the marketplace value of the skills of a particular individual when determining his or her salary*”<sup>140</sup> are allowed if not required under the EPA. In that regard, the extreme popularity of men’s football would have to be considered. The millions of fans that view the sport on television and live at the stadiums on game day is to be considered. Likewise, the hundreds of millions of dollars that these athlete-employees generate would be relevant to the analysis as well. However that compensation number is derived (a version of which was done here in this paper’s Section II), any disparities between men and women on this basis would be justified under the EPA.

As far as the Title IX issues are concerned, just as no Title IX violations were deemed to have occurred with the disparate pay in men’s and women’s basketball coaching salaries, the same should apply here—perhaps even more so as there is no equivalent for women in terms of football. Further, if Title IX zealots are insistent, it should be pointed out that under this regime, scholarships for men’s and women’s sports would not be touched. Salary, or compensation for services produced would be considered a separate compensation narrowed to those considered athlete-employees versus just student-athletes with the amount above and

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138. *Id.*

139. *Id.* (citing *Jacobs v. College of William and Mary*, 517 F. Supp. 791 (E.D. Va. 1980)).

140. *Id.* (emphasis added).

beyond their current scholarship being considered taxable wages just like any other employee.

Accordingly, as long as the derived scholarship component remains equal or proportional between men and women, and as long as any pay to either women or men athlete-employees are derived based on the factors as set forth under the EPA, there should be no issues with compliance with either Title IX or the Equal Pay Act. All that is required here is a correct interpretation of the law as it applies to the college athlete-employee. Any deviation from this is a disingenuous legal interpretation and a self-serving effort by those currently benefiting from this misinterpretation.

And to be fair and to reiterate, the “student-athlete as employee” analysis would apply equally to both men’s and women’s sports. Where women’s teams are operating at a profit and generating revenue for their respective universities, they should and would likewise be compensated in accordance with the same 5% revenue formula. Again, it is acknowledged that this type of strict “by the numbers” analysis may cause some to conclude that pay based on profitability puts men and women’s sports at an inherent disadvantage as men’s sports have perennially been the revenue generating sports at most institutions. Such is an economic reality that cannot be ignored. It would be simplistic to say, “If you think women’s sports should be compensated comparably then go and support those women’s teams.” But that is in fact the answer. The proposed Compensation Model is not based off of gender equity or gender inequities for that matter. The Model is based off of pure economics and the blind financial realities of supply and demand.

## VI. RECENT LEGISLATION ON COLLEGE ATHLETE COMPENSATION

### A. California’s Pay for Play—and the Chain Reaction that Followed

*“For me, it’s a combination of first starting out as a civil rights issue and then, wait a minute: This is like flat-out exploitation of any student,” Skinner said. ‘I don’t know of any other industry that can rely on a large set of people’s talent for which they deny them any earnings and all compensation.’”<sup>141</sup>*

For more than 60 years, the NCAA was able to stave off, frustrate, and thwart all efforts that involved the college athletes under her purview from receiving any compensation beyond the cost of attendance.<sup>142</sup> That was until September of 2019 when California Governor Gavin Newsom signed into law Senate Bill 206 which, as it currently stands, will allow athletes who participate in college athletics in California to hire agents and make money off of their name, image or likeness. The Act is set to go into effect January 1, 2023.<sup>143</sup>

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141. Billy Witz, *California Law Makers Vote to Undo N.C.A.A. Amateurism*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/09/sports/college-athlete-pay-california.html> [https://perma.cc/VR3L-HRT9] (quoting Nancy Skinner, California Democrat in the Legislature and the lawmaker who sponsored S.B. 206).

142. Russo, *supra* note 7.

143. S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019).

The California *Pay for Play* Act was a game changer. The proposed Act reflects a shifting mind set—an acknowledgment that the NCAA's antiquated notion of the "student-athlete" was nothing but an artificially created construct that allowed the NCAA to reap billions off the backs of 18–21 year olds.<sup>144</sup> The Act was the toppling of the first brick of a wall that has been built over years and fortified through an NCAA propaganda machine that vilified student-athletes for engaging in such conduct as selling their jerseys for cash or signing autographs for pocket money to supplement a scholarship package that barely covered their cost of living.<sup>145</sup>

The California *Pay for Play* Act created an intriguing dynamic. The Act put the California legislature at odds with the NCAA. The showdown could best be described as a game of "chicken." But the game was short lived as it was readily apparent who had both the momentum and the stronger hand on the issue of college athlete compensation. Initially, NCAA President Mark Emmert tried to stare down the California legislature with his bluff of desperation stating that California schools may be ineligible to compete in NCAA championship competitions due to the unfair recruiting advantage that California schools would enjoy as a result of the California *Pay for Play* provision.<sup>146</sup>

But the California law makers were not concerned with Emmert's threats as they were well aware of the leverage California wields as the California market is integral to the NCAA's continued viability.

Shortly after California's passing of its *Pay for Play* provision, it became evident who had the high ground and the prevailing argument. As of May 25, 2020, some 34 other states have their own *Pay for Play* provisions in various stages of drafting and approval.<sup>147</sup> Now in complete reactionary mode, in October of 2019, the NCAA convened a committee referred to as the "Federal and State Legislation Working Group" (Working Group).<sup>148</sup> The NCAA's Board of Governors convened this Working Group to investigate possible responses to proposed state and federal legislation regarding the commercial use of student-athlete name, image or likeness ("NIL").<sup>149</sup> The Working Group drafted a report that it submitted to the NCAA's Board of Governors on April 17, 2020.<sup>150</sup> The Report, not surprisingly, recommended that the NCAA draft its own *Pay for Play* provision with the caveat that the provision is "*consistent with NCAA values and principles and with legal precedent.*"<sup>151</sup>

The Working Group's Report, in addition to exploring key provisions and language that it recommends be in the NCAA's final *Pay for Play* provision, also notes various legal challenges with which the NCAA is going to have to contend.

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144. See, e.g., Branch, *supra* note 2.

145. See, e.g., Travis Waldron, *University of Georgia Running Back Suspended for Profiting from His Own Signature*, THINKPROGRESS.ORG (Oct. 10, 2014), <https://thinkprogress.org/university-of-georgia-running-back-suspended-for-profiting-from-his-own-signature-b5ce24eb2a6c/> [<https://perma.cc/98VH-XF3H>].

146. Witz, *supra* note 141.

147. NCAA BD. OF GOVERNORS, *supra* note 9, at 27.

148. *Id.* at 1.

149. *Id.*

150. See generally *id.*

151. *Id.* at 1 (emphasis added).



Particularly noteworthy is the fact that the Working Group urged the NCAA's Board of Governors and the NCAA's President to "[e]nsure federal preemption over state name, image and likeness laws" and to "[s]afeguard the nonemployment status of student-athletes."<sup>152</sup>

The author found these two recommendations from the Working Group noteworthy due to the fact that for over 60 years, the NCAA consistently and unabashedly railed against *any* notion of her athletes being paid outside the scholarship and cost of attendance.<sup>153</sup> That, coupled with the fact that the NCAA only now—after the thirty plus odd states have forced the NCAA's hand is the NCAA—is in a reactive mode, putting forth its own version of a *Pay for Play* provision.<sup>154</sup> The NCAA, in doing so, is going to ask Congress to pass a federal *Pay for Play* version that, if enacted, would preempt each of the state versions, and would no doubt contain "guardrails" limiting the extent to which the athletes can use their name, image or likeness.<sup>155</sup> The NCAA's temerity in this regard is head shaking, but not surprising.

With California's initial *Pay for Play* provision, the NCAA's hand was forced. It had no choice at that point. Now the NCAA is in the mode of damage control and is doing what it can to limit its exposure while trying to capture as much control over the process as it can. It is evident that the NCAA is seeking to hold the college athlete compensation line at some limited version of the athlete using their name, image, and likeness while doing everything it can to make sure things don't go beyond that point. All of this while claiming to have the athlete's best interest at heart.

## B. What these Acts Do not Do

What California Senate Bill 206 did was call into question the long standing and antiquated notions of the "student-athlete" and "amateurism." The Act signified long overdue recognition that athletes, just like anybody else with a skill or talent, should be allowed to leverage that skill or talent for compensation. California's passing of its *Pay for Play* provision was the first brick to fall leaving the other states and the NCAA with little choice but to follow suit or be left behind.

What none of these Acts do, however, is provide for payment to all athletes who are participating in revenue generating sports; namely football and basketball at most universities.<sup>156</sup> Under these *Pay for Play* provisions, shoe companies, clothing manufacturers, athletic gear retailers, etc., will seek out those athletes that they deem most able to help market their product, good, or service. Whether this will involve a wide swath of college athletes or a select few is unclear. Speculation suggests that only a select view, more than likely those who have professional level ability anyway, will be the ones receiving these coveted endorsements, and the rest, without any additional intervention will still be in the same predicament of an exploited labor

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152. *Id.* at 27 (emphasis added).

153. Russo, *supra* note 5.

154. See NCAA BD. OF GOVERNORS, *supra* note 7, at 27.

155. See generally *id.* (highlighting the NCAA desire for federal preemption and opposition to individual state NIL legislation).

156. *Contra* S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019).

pool. Thus, these *Pay for Play* provisions are the necessary first step. But the push should continue to allow all athletes to receive fair compensation for the revenue they are generating.

## VII. CONCLUSION

The time has come; way past due actually. The injustice here is exploiting a labor pool that has been integral to the NCAA revenue generating machine for decades. Initially the arguments regarding preserving the integrity of “amateurism” and the notion of the “student-athlete” allowed the status quo to hold. If that ever were the case, it clearly is not today. In substance, shape, form, and essence, these college athletes sacrifice much where others benefit disproportionately. The universities’ arguments of not being financially viable and the dire predictions of having to scuttle athletic programs is alarmist talk designed to squash what should have been done years ago. The money is there. The reasons for doing so are there. It is time for the NCAA and the universities that comprise her to do the right thing. The case for compensating the college athlete is clear.