

FROM INEQUITY TO OPPORTUNITY: KEEPING THE PROMISES MADE TO BIG- TIME INTERCOLLEGIATE STUDENT- ATHLETES

Rodney K. Smith *

Robert D. Walker **

I. INTRODUCTION

In 1994, the National Collegiate Athletic Association (hereinafter "NCAA") agreed to a lucrative television contract with CBS, valued at \$1,750,000,000 over an 8-year period.¹ This contract provided over \$200,000,000 per year in revenue to the NCAA, essentially for the right to televise the Division I-A men's basketball tournament.² This agreement demonstrated the entertainment value of men's intercollegiate basketball at its highest level. In 1999, the NCAA and CBS entered into a new contract. Under this contract, the NCAA will receive over \$6,000,000,000, \$500,000,000 per year for the right to televise the association's men's basketball championship tournament over the 11-year period from 2002-2013.³ Thus, within five years, the NCAA had entered into a contract that more than doubled the annual payment that it was to receive for the television rights to the tournament which will result in approximately \$250,000,000 in new income on an annual basis.

* Herff Chair of Excellence in Law, Cecil C. Humphreys School of Law, The University of Memphis. The author gratefully acknowledges the excellent research assistance provided By Brandon Larsen and Muriel Malone and the capable technical support of Karol Usmani.

** J.D. anticipated 2001 University of Arkansas – Little Rock, B.A. Brigham Young University, 1998.

¹ Welch Suggs, *CBS to Pay \$6-Billion for TV Rights to the NCAA Basketball Championships*, THE CHRONICLE OF HIGHER EDUCATION, December 3, 1999, at A54.

² Other NCAA events were included, but their inclusion did not add significantly, if at all, to the value of the contract. It was clear that CBS was primarily bargaining for the right to televise "March Madness," the Division I-A men's basketball tournament.

³ *Id.*

The economic value of big-time⁴ intercollegiate athletics is evidenced in other ways, as well. A recent report indicated that 74% of Division I-A men's basketball teams made an average of over \$2,000,000 in profits and 71% of Division I-A men's football teams showed average profits of over \$5,000,000 per year.⁵ It is clear that "big-time" intercollegiate athletics is often very profitable. Other men's and women's sports at all levels typically are not profitable.⁶ Indeed, it is clear that funds generated by profitable Division I-A men's basketball and football programs are being diverted to cover expenses generated by nonrevenue-producing programs.

Approximately forty-five percent (45%) of the student-athletes in men's football at the Division I-A level are African-American,⁷ and more than sixty percent (60%) of student-athletes in Division I-A men's basketball are African-American. The number of African-Americans and persons of color in other sports programs, on the other hand, is minimal.⁸ Thus, it is evident that profits generated in significant measure by African-American male athletes are being diverted to fund non-revenue producing sports played largely by white student-athletes. Arguably, this diversion of funds constitutes exploitation of male athletes of color in men's basketball and football.⁹

Given the profitability of men's basketball and football, at the Division I-A level, and the fact that this profit is generated in significant measure by the efforts on the court and field by athletes of color, a number of commentators have argued that athletes at this level should be paid for their efforts and entertainment value.¹⁰ These recommendations range from proposals calling for the professionalization of intercollegiate men's basketball and football at the Divi-

⁴ "Big-time" intercollegiate athletics, as used in this article, refers to the major revenue-producing sports of men's basketball and football, at the Division I level in men's basketball and the Division I-A level in men's football.

⁵ *Survey Shows Increase in Deficits*, THE NCAA NEWS (October 12, 1998)

<<http://www.ncaa.org/news/19981012/active/3534n01.html>> [hereinafter *Deficit Survey*].

⁶ For example, it has been noted that, "Twenty Division I respondents made money on their women's basketball program. Only two of those were in Division I-A, although the average figure was substantial (\$274,000)." *Id.* That same article, however, showed that "financial deficits for intercollegiate programs are growing at an increasing rate." *Id.* "The deficit [expenses over revenues] grew from \$237,000 in 1995, when the last study was made, to \$823,000 in 1997." *Id.* What this survey shows, but refrains from drawing attention to, is the fact that men's basketball and football, at the Division I-A level, are the only truly profitable sports. Thus, the profits from those sports are being used to fund other non-revenue producing sports as the overall cost of intercollegiate athletics increases.

⁷ Perry A. Zirkel, *Standards for African-American Athletes Will Perpetuate Academic Racism in Big-Time Sports*, KNIGHT-RIDDER NEWSPAPERS, March 13, 1998.

⁸ *Id.*

⁹ See, e.g., Rodney K. Smith, *When Ignorance is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329, 347-352 (1996).

¹⁰ See, e.g., Michael P. Acain, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307 (1998) [hereinafter "Acain"]; and Allen L. Sack & Ellen J. Staurowsky, *College Athletes for Hire: The Evolution and Legacy of the NCAA's Amateurism Myth* (Praeger 1998) [hereinafter "Sack & Staurowsky"].

sion I-A level, with direct and potentially lucrative payments to top athletes,¹¹ to less dramatic efforts to pay student-athletes at this level with more modest stipends, while retaining grants-in-aid.¹² Even NCAA officials have considered using a portion of the additional dollars generated by the new CBS contract to televise the men's basketball tournament for stipends to supplement the current grants received by student-athletes at this level.

The NCAA's primary argument, however, is that, by providing academic scholarships for student-athletes, they are providing them with a very valuable resource – educational opportunity. Serious questions have arisen, however, regarding whether the NCAA and its member institutions are keeping their part of the bargain with student-athletes in revenue-producing programs.¹³ Indeed, a recent commentator has argued that the agreement between the NCAA's member institutions and their "big-time" athletes may well be unconscionable.¹⁴ Graduation rates, a strong indicator of how much educational opportunity is actually being received by these student-athletes, are extremely disappointing and seem to add fodder to the argument that student-athletes in men's basketball and football at the Division I-A level are not receiving the benefit of their bargain, in terms of actual educational opportunity. Low graduation rates, based on the NCAA's own tracking of graduation by student-athletes, based on graduation rates within *six* years of initial enrollment by the student-athlete, even though athletes are typically given just four or five years of scholarship assistance, are disquieting. Overall graduation rates for the class of freshmen entering in 1992 indicate that only fifty-one percent (51%) of Division I-A football players graduated, with only forty-one percent (41%) of Division I basketball players graduating.¹⁵ These figures become even more disturbing when it is noted that only thirty-three percent (33%) of African-American male athletes playing Division I-A men's basketball and thirty-seven percent (37%) of Division I-A football players graduated, figures that have sadly been dropping.¹⁶ Whatever the cause, it is clear that the NCAA and its member institutions are not, in fact, providing the kind of educational opportunity that would clearly justify concluding that these athletes are being well compensated for their efforts.

This article will explore two questions: 1) Whether "big-time" intercollegiate student-athletes are being treated inequitably; and 2) If there has been in-

¹¹ *Id.*

¹² See, e.g., C. Peter Gopelrud III, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081 (1997) [hereinafter "Gopelrud"]. The NCAA refers to its financial aid or scholarships for student-athletes as grants-in-aid.

¹³ See, e.g., Timothy Davis, *College Athletics: Testing the Boundaries of Contract and Tort Law*, 29 U.C. DAVIS LAW REV. 971 (1996).

¹⁴ Timothy Davis, *An Unconscionability Analysis of the Student-Athlete/University Relationship* (paper presented August 15, 2000 at the Annual Meeting of the American Sociological Association) [hereinafter Davis, *Unconscionability*].

¹⁵ "1999 Graduation-Rates Summary," cited in www.ncaa.org.

¹⁶ *Id.*

equitable treatment of student-athletes in Division I revenue-producing programs, what should be done about it? As to the second question, this article will examine models that have been proffered for compensating intercollegiate athletes at this level, critique those models, and offer a new model that seeks to balance the educational objectives of the NCAA and its member institutions with the need to provide meaningful compensation to those student-athletes, including in particular African-American student-athletes, who generate the substantial profits in Division I-A men's basketball and football.

II. ECONOMIC AND EDUCATIONAL INEQUITY

Much has been written about economic and educational inequity in the treatment of male athletes, particularly athletes of color, in the revenue-producing sports of Division I men's basketball and Division I-A football.¹⁷ It is not necessary to rehash all that has been written on this topic. Indeed, it will suffice to demonstrate that a strong case has been made for economic and educational inequity in the treatment of these student-athletes.

A. Economic Inequity

The NCAA and its member institutions often complain that they are losing money in operating their intercollegiate athletics programs.¹⁸ Cedric W. Dempsey, the NCAA's President, has emphasized that "[t]he popular myth is that college athletic programs make profits. The fact is that only 78 out of 1,000 programs generate more revenues than they spend."¹⁹ While essentially accurate on its face, this statement tells only part of the story.

It is true that most athletic programs, particularly at the Division II and III levels, are not profitable.²⁰ At the Division III level, student-athletes are awarded grants on a need or academic basis and are not awarded athletic grants-in-aid.²¹ Division II schools, where athletic grants are awarded, run average deficits evidenced by 1997 figures of \$947,000 for programs with football and \$773,000 for programs without men's football.²² While students often attend Division II and III athletic events, those events are seldom televised and are of little commercial appeal. Programs at that level simply do not demonstrate the capacity or entertainment value necessary to generate profits.

The picture at the Division I level is more complicated. The NCAA notes

¹⁷ See, e.g., Sack & Staurowsky, *supra* note 10.

¹⁸ See, e.g., *Deficit Survey*, *supra* note 5, which is intended to demonstrate an increase in deficits for intercollegiate athletic program.

¹⁹ *Supra* note 1, at A54.

²⁰ *Deficit Survey*, *supra* note 5.

²¹ Allen L. Sack & Ellen J. Staurowsky, *A Rejoinder to Timothy Davis, Intercollegiate Athletics in the Next Millennium: A Framework for Evaluating Proposals*, 10 MARQ. SPORTS L. J. 117, 120 (1999) [hereinafter *Rejoinder*].

²² *Deficit Survey*, *supra* note 5.

that, "[t]he deficit for the average Division I-A program grew from \$237,000 in 1995 . . . to \$823,000 in 1997."²³ It also points out that deficits at the Division I-AA²⁴ level have risen from \$1,700,000 in 1995 to \$2,000,000 in 1997.²⁵ While these figures appear to substantiate Director Dempsey's assertion that profitability is a myth in intercollegiate athletics, one must look deeper to get a full picture.

The figures cited above include all sports. Division I institutions have multiple programs for men and women. Rarely are any of these programs, other than men's basketball and football, profitable. There are exceptions, such as an occasional women's basketball program,²⁶ but, as a general rule, the only programs that generate a profit are men's basketball and football.²⁷ Profits generated by men's basketball and football are diverted to cover the expenses of non-revenue programs. Even though profits from men's basketball and football may be substantial, they are often dissipated in helping to keep other programs operating. Those other programs offer athletic grants-in-aid, even though the athletes in those sports are not generating revenue. Salaries for coaches, travel, and operational and maintenance expenses in those programs cause overall expenses to mount. Thus, even though profits from men's basketball and football programs at the Division I level may be substantial, they are often consumed in helping to finance nonrevenue-producing sports.

This situation is somewhat analogous to a major corporation with two primary profit centers or subsidiaries. In that sense, the corporation might report a loss as a whole, but it would not lose sight of the profitability of its profit centers. Indeed, it would do what it could to ensure the profitability of those centers, while dealing with the problem of continuing losses in other areas. Pressure to maintain other nonrevenue men's programs, coupled with demands for equity in women's programs under Title IX, has made it very difficult for the NCAA and its member institutions to minimize losses in other areas. This places considerable pressure on the profit centers to maintain the profitability or at least minimize the losses of the entire athletics program at an institution. Additionally, funds generated by the profit centers also are used to maintain the NCAA itself.

This already complicated picture is rendered all the more difficult by problems related to determining the actual profitability to a Division I-A institution of its men's basketball and football programs. Certainly, one can examine general profits at the institutional level. The primary source of revenue for an institution, according to the NCAA, is in the form of ticket sales.²⁸ Those ticket sales purportedly account for twenty-eight percent (28%) of the revenue,

²³ *Id.*

²⁴ Division I-AA includes programs that have a Division I men's basketball program, but do not have men's football programs at that level. *Id.*

²⁵ *Deficit Survey*, *supra* note 5.

²⁶ *Id.* and accompanying text.

²⁷ *Id.*

²⁸ *Id.*

sales purportedly account for twenty-eight percent (28%) of the revenue, while at levels other than Division I, the primary source of revenues is student fees.²⁹ There are other significant areas of revenue production, however, that are not included in the NCAA's survey, from which it concludes that only a small percentage of programs are profitable.

Television and related contracts, including sales of materials with the institution's logo, are often not included in the institution's calculations of revenue. For example, President Dempsey of the NCAA reports that, in 1999 "[t]here will be \$151-million [of television and related revenue] distributed to Division I members to help support opportunities for student-athletes."³⁰ As much as \$100-million in additional funds may be generated by the tournament, under the existing television agreement,³¹ and other marketing income, for the conferences and institutions participating in the tournament and the NCAA. It is difficult to determine profits generated from this latter source since it is unclear under current accounting practices how to distinguish tournament revenue from market-related revenue. It is, however, conservative to assume that those revenues may run into the millions of dollars, given the advertising value of the tournament itself. Revenues from ticket sales and concessions are also substantial. These funds may not find their way into calculations of a program's profitability at an individual institution.

One should also note that of the \$151,000,000 President Dempsey claims will be distributed to benefit student-athletes, a substantial portion of those dollars are diverted to fund the conferences to which institutions belong. Additionally, a substantial portion of the operational costs of the NCAA itself are generated by the tournament, but never find their way into a calculation of income at the institutional level. Certainly, NCAA and conference expenses can be said to "help support opportunities for student-athletes," but those figures may not find their way into calculations of actual profits generated by the tournament. The same can be said about television and related revenues generated from football bowl games. Some of it finds its way into income calculations at the institutional level, but a portion of it goes to the conference and for other purposes. Thus, accounting for the true income generated by Division I men's basketball and football requires a determination of actual revenues generated from all sources. It is important, as well, to examine the source of all expenses generated by entities other than the institution.

To complicate matters further, institutions do not account for the less tangible value generated by the commercially and publicly appealing Division I men's basketball and football programs. It has been observed that institutions with successful men's basketball and football programs experience an increase

²⁹ *Id.*

³⁰ *Supra* note 1.

³¹ Television revenues, under the current contract with CBS, exceed \$215 million. Debra E. Blum, *Athletic Notes*, THE CHRONICLE OF HIGHER EDUCATION, May 19, 1995, at A41.

in applications to the institution.³² This increase in applications and media attention for the institution is a clear benefit, economically and otherwise, but it never finds its way into determinations of the income generated by the men's basketball and football programs.

It is clear, therefore, that income figures are deflated in significant ways. Nevertheless, they are substantial. As previously noted,³³ even with figures that do not reflect the full profitability of men's basketball and football programs, seventy-four percent (74%) of Division I-A men's basketball programs made an average of \$2,200,000 of revenues over expenses in 1997, with seventy-one percent (71%) of Division I-A men's football programs making an average of approximately \$5,000,000 in 1997. Many Division I-A football and basketball programs make a substantial profit, despite the fact that figures reported do not include all sources of income.

Institutions have essentially acknowledged the potential profitability of Division I-A men's basketball and football. Salaries for coaches are the largest single expense at the Division I-A level, whereas grants-in-aid (scholarships for student-athletes) are the major expense at all other levels.³⁴ Head coaches in Division I-A men's basketball and football are often paid more than \$1,000,000 per year in personal income from all sources.³⁵ Assistant coaches at the Division I-A also receive substantial salaries, often exceeding salaries paid to head coaches in Divisions II and III. Institutions also generally pay substantially higher salaries for coaches and athletics administrators associated with Division I-A men's basketball and football programs, in further recognition of the profitability or potential profitability of those programs. In short, they do what any corporation would do. They pay their executives according to profitability or potential profitability of a given enterprise.

Courts have upheld this differential in pay for men's coaches against Title IX claims of gender discrimination on the part of coaches of women's programs at the same level, essentially on the ground that there is a different market for revenue-producing programs.³⁶ Institutions and courts alike, therefore, have recognized the special market and profit potential of Division I-A men's basketball and football. Unfortunately, this recognition of the special market niche of men's basketball and football at the "big-time" level has not resulted in greater benefits for the student-athletes who play a major role in generating

³² Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 296 (1994) (citing Mark R. Whitmore, *Denying Scholarship Athletes Worker's Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763, 782 (1991)).

³³ *Deficit Survey*, *supra* note 5.

³⁴ *Id.*

³⁵ Rob Remis, *Analysis of Civil and Criminal Penalties in Athletic Agent Statutes and Support for the Imposition of Civil and Criminal Liability Upon Athletes*, 8 SETON HALL J. SPORT LAW 1, 55-56 (1998).

³⁶ See discussion of *Stanley* case and related matters, *infra* at note 212, and accompanying text.

these revenues.

Given that student-athletes at this level do not share in the revenues generated by "big-time" men's basketball and football in the same unique manner as the NCAA, conferences, institutions, coaches and administrators, it is not surprising that claims of exploitation and inequitable treatment have arisen. Student-athletes at this level, who are primarily athletes of color, have a strong argument that they are not receiving an equitable share of the wealth they contribute to generating. They have no union or other means of arguing their case or bargaining to ensure fair compensation and are left to rely on the good will of others who are more powerful.

B. Academic Inequity

The major inducement for a prospective athlete in Division I-A men's basketball and football, other than being given the opportunity to showcase his talents, is educational in nature. In exchange for coming to an institution and participating in its men's basketball or football program, the athlete receives a grant-in-aid to attend the institution. This grant-in-aid typically includes tuition and fees, room, board and books. This grant, which represents an opportunity to obtain an education, is a major inducement to the athlete to attend the institution and participate in intercollegiate athletics.

Graduation rates for student-athletes at this level indicate that, for many athletes, particularly athletes of color, this inducement is more imagined than real. For example, in men's basketball at the Division I level, only forty-one percent (41%) of the male athletes graduated within six years, while the overall graduation rate for male students at those same institutions for the same time period was fifty-four percent (54%).³⁷ In Division I-A football, fifty-one percent (51%) of the athletes graduated, as compared to fifty-eight percent (58%) of males in the general student body at the same institutions.³⁸ The figures are even more glaring for African-American athletes. In men's Division I basketball only thirty-three percent (33%) graduated, as compared to fifty-four percent (54%) of the male students at the same institutions.³⁹ In Division I-A football, 42 percent (42%) of the black student-athletes graduated, as compared to fifty-eight percent (58%) of male students at those institutions.⁴⁰ These graduation rates have remained fairly constant over the past decade.⁴¹ Student-athletes in "big-time" men's football and basketball are not graduating at the same rate as their male counterparts in the student body, lending some credence

³⁷ *Deficit Survey, supra* note 5.

³⁸ *Id.*

³⁹ *Id.* It is worth noting, however, that the 33% graduation rate among black athletes compares more favorably to the 31% graduation rates for black males in the same institutions over the same six year time period.

⁴⁰ *Id.*

⁴¹ *Id.*

to the argument that they are not receiving a genuine educational opportunity in exchange for their participation in intercollegiate athletics.

It might be argued that this is understandable, given that these athletes may not be interested in converting their educational opportunity into a degree. Simply, they may be more interested in pursuing their athletic career than in furthering their education. This speculation, which may itself carry with it a hint of racism, is undercut in two ways. First, a more plausible explanation may be that the coaches in men's basketball and football at this level demand more of them, in terms of time and energy, than athletes in other programs. While this assertion is speculative because there is little empirical data available in this important area, it makes sense that coaches at this level, who are better paid and are under extreme pressure to win because profits are tied to winning programs, demand more of their players, in order to retain their position, salary and benefits. Student-athletes in major programs spend long hours studying playbooks, practicing, and training. They have to do so to be competitive since competitiveness translates into dollars for institutions, conferences, and the NCAA.

Second, a recent study by the National Center for Public Policy and Higher Education undercuts the sometimes implied notion that athletes of color,⁴² who predominate in these revenue-producing programs, care less about education than their counterparts in the general student-body. That study found that most Americans believe that a college degree is necessary for success, but African-American and Hispanic parents place an even higher value on the degree than do white parents.⁴³ Of course, the attitude of athletes of color in big-time sports may not be easily translatable to this study of parental attitudes, but the study nevertheless seems to undercut the assertion of lack of interest in a degree on the part of these student-athletes.

Given the lack of data and empirical study that has been done on these issues, and because the NCAA, conferences and institutions have far more resources to determine the causes of the failure of student-athletes to graduate at a higher rate, the burden should be on them, and not the athletes, to demonstrate that the athletes simply do not want to take advantage of the educational opportunity they are purportedly being given. Even if there were such a study supporting the thesis that student-athletes at this level do not desire a degree, the educationally-related institutions that reap substantial benefit from the athletes should be expected to break down such cultural barriers.

While it is more difficult to demonstrate that the institutions, through demands of their coaches, and otherwise, are engaging in some form of educa-

⁴² For obvious reasons, related to thinly veiled racism, this argument is seldom written, but the authors have heard it with enough regularity to have to reluctantly note it.

⁴³ John Immerwahr and Tony Folerio, *How the Public and Parents - White, African American and Hispanic - View Higher Education*, National Center for Public Policy and Higher Education, National Center for Postsecondary Improvement (May 2000) <<http://www.highereducation.org/reports/expectations.shtml>>.

tional fraud or exploitation, a sufficient case can be made for the proposition that the burden has clearly shifted to the institutions to prove that they have done all within their power to ensure that educational benefits are in fact received by these student-athletes and claims of inequity are unfounded. In not doing so, they are essentially recognizing that Division I-A men's basketball and football may have little educational purpose, at least insofar as actual compensation of the athletes is concerned. If this is true, then arguments for compensating student-athletes as professionals of a sort would seem to have more merit. Therefore, we will examine the various models of compensation that have been proffered.

III. MODELS OF COMPENSATION

There have been a number of models that have been suggested as means of compensating student-athletes in Division I-A men's football and basketball, in response to concerns regarding inequitable treatment of student-athletes at that level. These various models are largely of four types: (1) revenue-sharing; (2) instituting a professional division within the intercollegiate system; (3) a scholarship plus stipend approach; and (4) the reform approach taken by the NCAA.

A. Revenue-Sharing

The concept of revenue-sharing was substantially developed by Michael P. Acain.⁴⁴ Revenue-sharing centers on the idea that universities receive enormous financial benefits from their student-athletes and ought to share that revenue with those who produce it.⁴⁵ However, because NCAA rules prohibit student-athletes from receiving compensation for their athletic performance,⁴⁶ other than in the form of grants-in-aid or scholarships, these student-athletes do not receive a fair proportion of the profits they are critically involved in producing for their schools.⁴⁷

Acain asserts that the NCAA's grant-in-aid and allowance of student-athletes to hold part-time jobs is only an "illusion of compensation," and that in reality, the compensation that is given is insufficient.⁴⁸ Acain emphasizes that permitting an athlete to hold part-time employment will cover the costs of attending a university, but it does not take into consideration the personal and travel costs sustained by the athlete.⁴⁹ Acain believes that, while universities have reaped significant revenue from the labors of their athletes at this level, the athletes have been treated unfairly.⁵⁰ Through implementation of a "reve-

⁴⁴ Acain, *supra* note 10.

⁴⁵ *Id.*

⁴⁶ *Infra* note 53, and accompanying text.

⁴⁷ Acain, *supra* note 10.

⁴⁸ *Id.* at 335-36.

⁴⁹ *Id.* at 316.

⁵⁰ *Id.* at 336.

nue-sharing plan between student-athletes and the colleges . . . those athlete [will receive] the compensation they deserve.”⁵¹

In order for a revenue-sharing plan to be implemented, allowing student athletes to receive a portion of the revenues generated from their athletic participation, Acain stresses that the NCAA would need to amend NCAA Constitution § 12.02.2.⁵² Additionally, NCAA Rule 15.2 would need alteration for the revenue sharing plan to work, and Rule 12.1.1 would have to be changed in order to implement the various forms of compensation to the student-athletes recommended by the Acain Plan (“the Plan”).⁵³ The Plan also considers the costs of each sport, and concentrates on sharing the net profits.⁵⁴ If, for example, a team did not net any profit in any particular year, the student athlete would be forced to “rely on their scholarship as their sole means of compensation.”⁵⁵ The Plan would also implement a “seniority-based system,” which provides student-athletes with compensation for longevity, loyalty, and continued contribution to their respective programs.⁵⁶

The revenue plan would permit student athletes to receive a percentage of the school’s revenue earned by the athlete’s particular team.⁵⁷ The revenues would be divided so fourth-year athletes would receive 1% of all revenues generated by their sport that year; third-year athletes would receive .75 % of the net revenues earned by their sport in the particular year; second year athletes would receive .50% of the net revenues, and first year athletes would receive .25% of the net revenues.⁵⁸ The remaining earnings received by the sport could then be distributed for various expenses at the discretion of the athletic department.⁵⁹ Additional revenue could be distributed to the athletes for the awards or payments that are given to teams for their participation in post-season competition.⁶⁰ Generally speaking, the payments are given to the conferences and then divided up among the members of the conference.⁶¹ The individual amounts that each of the schools still receive is a substantial sum.⁶² Acain suggests that a 65% distribution to the school and 35 % distribution to the athletes of the post-season net revenues would be sufficient compensation and reward for their post-season play.⁶³ Acain further suggests that, while revenues during the season are distributed based on a seniority type of system, the revenues re-

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 336-37.

⁵⁴ *Id.* at 337.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 338

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 338-39.

ceived from post-season play in tournaments should be distributed based on the individual performance of the particular athlete during the post-season play.⁶⁴ Acain believes that because not every team can make it to a playoff, the revenue sharing system during the post-season should be based on those that contribute to the team's success, regardless of how many years they have been at the university.⁶⁵ For the profits earned by a team for their post-season performance, Acain suggests that 50% of the revenues should go to the starting players, 35% should go to the key reserves that come off of the bench, and 15% should go to the remaining members of the team.⁶⁶

Student-athletes could also be compensated by increasing the amount of money that accompanies academic and athletic All-American awards.⁶⁷ At the present time, the NCAA has limited the amounts of these awards to \$300.⁶⁸ Under the proposed revenue-sharing theory, athletes would receive compensation in excess of the current \$300 limit for their academic and athletic excellence.⁶⁹ For example, Acain asserts that the NCAA could start its own annual athletic All-American team funded by newspaper and magazine sponsors.⁷⁰

Acain also considers the academic All-American teams.⁷¹ Every year, GTE honors approximately 700 student-athletes for their performance in the classroom as well as their athletic performance.⁷² Acain suggests that under the revenue-sharing plan, money for these awards could be generated by a \$1,500 donation by each school that is a member of the NCAA.⁷³ Thus, with the more than 1,000 member institutions, \$1.5 million of the requisite \$1.75 million (this comes to \$2,500 per athlete) for these awards could be produced by the schools, with the remaining \$250,000 donated by some other source.⁷⁴ Those athletes that qualify for both the athletic All-American and academic All-American teams should be compensated double the amount for their excellent achievements.⁷⁵ The revenue-sharing plan would provide the money for these bonus earnings either through the individual schools, the NCAA, or through private forms of donation.⁷⁶ Due to the ever-increasing popularity of college

⁶⁴ *Id.* at 339.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* (citing the NCAA DIVISION I MANUAL, Art. 16.1.4.2.1.)

⁶⁹ *Id.*

⁷⁰ *Id.* at 340

⁷¹ *Id.*

⁷² *Id.* (citing to GTE Homepage, GTE Academic All-America Teams Program <<http://www.gte.com>>. "Students must be a sophomore, have at least a 3.20 GPA, and be a starter or key backup player on their team." *Id.*)

⁷³ *Id.* at 340-41.

⁷⁴ *Id.*

⁷⁵ *Id.* at 341.

⁷⁶ *Id.*

sports, merchandise and paraphernalia, profits are booming.⁷⁷ Student-athletes who are the primary contributors to the merchandise's popularity, however, do not share directly in any of the revenues that the schools receive.⁷⁸ Acain argues that student-athletes should receive a percentage of the merchandise and revenue endorsements they are responsible for generating.⁷⁹ The revenue sharing for endorsements might occur in any of three different ways: (1) the universities could decide, through some form of license agreement, to divide a portion of the revenues with the student athletes by, for example, giving 35% of the revenues generated to the athletic department which in turn would distribute the earnings among the student-athletes; (2) where name brands pay schools to put their logos on the uniforms, schools could share a percentage of those profits with the student athletes; and (3), the NCAA could allow student-athletes to participate in endorsement contracts, and keep 80% (Acain uses this percentage for simplicity) of the revenues they earn from endorsements.⁸⁰ Acain's Plan certainly endeavors to address issues of economic exploitation and inequity in the compensation of "big-time" student-athletes. While some attention is given to providing compensation to academic All-Americans, the Plan does not otherwise address issues of educational inequity. Acain is to be commended for his detailed effort to address the economic inequity issues so as to ensure that student-athletes are equitably compensated for their efforts.

However, there are problems with the Acain Plan. Professor Timothy Davis has developed a framework for evaluating reform proposals like the Acain Plan.⁸¹ Professor Davis evaluates such proposals on three bases: 1) their impact on the education value; 2) their social implications; and 3) practical problems associated with implementing the proposals.⁸² These three bases provide a helpful framework for evaluating the Acain Plan and similar reform proposals. Institutions of higher education were formed for the very purpose of furthering academic values. The NCAA ascribes to this value, as well, when it describes its basic purpose as follows:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the student-athlete as an integral part of the student body. By so doing, it provides a clear line of demarcation between intercollegiate athletics and professional sports.⁸³

⁷⁷ *Id.*

⁷⁸ *Id.* (citing Vladimir P. Belo, *The Shirts off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133 (1996)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 342

⁸¹ Timothy Davis, *Intercollegiate Athletics in the Next Millenium: A Framework for Evaluating Reform Proposals*, 9 MARQ. SPORTS L.J. 253 (1999) [hereinafter *Framework*].

⁸² *Id.* at 262-271.

⁸³ 1999-2000 NCAA DIVISION I MANUAL, Article 1.3.1.

The Acain Plan does not address academic values. Instead, the revenue-sharing it proposes directly conflicts with the purposes of the NCAA, as Acain appears to recognize.⁸⁴ On one level, therefore, it would seem to be inappropriate to evaluate Acain's Plan on that ground, because it merely addresses economic and not educational inequity. There are two ways, nevertheless, in which the failure to address the impact of his Plan on educational values constitute a legitimate, and telling, critique of the Acain Plan. First, Timothy Davis notes that "[u]nder a professional model, institutions will be more likely to abandon any sense of obligation to provide student-athletes with a meaningful educational opportunity."⁸⁵ Professor Davis adds that "[t]he racial composition of the revenue-producing sports, concomitant with the likelihood that only the revenue-producing sports would become professionalized, means that the impact of the professional model will be disproportionately felt by African-American student-athletes."⁸⁶

Davis then questions the extent to which "the underlying premises of the professional model rely on and feed into untrue stereotypes of African American student-athletes' intellectual acumen and desire to seek educational pursuits."⁸⁷ Therefore, at a minimum, Acain and other advocates of a revenue-sharing model must respond to claims that their potential diminution of the academic value is unwarranted and constitutes greater cost to the athlete than the benefits accrued by the athlete under their respective models. The proponents of a revenue-sharing model also fail to address serious questions of academic inequity of the type raised earlier in this article, which may constitute another form of taking advantage of these athletes.⁸⁸

There are also economic reasons for considering the academic value and these considerations provide a second basis for criticizing the Acain and related proposals, based on academic values. As demonstrated in this article,⁸⁹ the economic value of a college education, as evidenced by a degree, is well in excess of \$500,000, in current dollars, over the working lifetime of the student-athlete, who graduates with a degree, as compared to the athlete who does not receive such a degree.⁹⁰ It is highly unlikely that Acain's Plan would provide income at that level for each athlete. Thus, the economic value emphasized by Acain's Plan is less than the value of an education, even in a very tangible sense.

Professor Davis also states that proposals should be evaluated based on their social impact on the student-athletes. In this regard, Davis asserts that:

Athletes who participate in the professional division are more likely to feel isolated

⁸⁴ Acain, *supra* note 10, and accompanying text.

⁸⁵ Davis, *Framework*, *supra* note 81, at 267.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *supra* notes 37-43, and accompanying text.

⁸⁹ See *infra* note 181, and accompanying text.

⁹⁰ *Id.*

from an institution's academic and social mainstream. . . . Issues of stigma are likely to become more prevalent. Will athletes be individuals who feel that they occupy a legitimate place as students' on college campuses? In particular, will African-American student-athletes become even more isolated and stigmatized on college campuses and suffer the consequences that ensue therefrom?⁹¹

Athletes, under the Acaín Plan, are even more likely to suffer from the social stigma that already exists for many student-athletes, especially African-American athletes, on campus. The sense that they are not really students, even that they may be "dumb jocks"⁹² or "gladiators" paid merely to entertain the student body and others,⁹³ is likely to be increased under a model like Acaín's, that emphasizes revenue-sharing and not education.

Professor Davis also suggests that reform proposals be evaluated on practical grounds, emphasizing legal and structural issues.⁹⁴ As Davis notes, "courts have not been nearly as hesitant to become involved in issues involving the business function of universities."⁹⁵ Under a revenue-sharing plan, like Acaín's, which emphasizes the business aspects of "big-time" intercollegiate athletics, it is likely, as Davis notes, that legal issues will be raised in the following areas: "antitrust issues relating to the determination of salaries of student-athletes, athlete entitlement to worker's compensation given their employee status, labor issues such as the applicability of the National Labor Relations Act, gender equity issues, and taxation issues relating to the tax status of both the compensation paid to athletes and of the revenues generated by the professional team."⁹⁶ It is also doubtful that contributions by graduates and friends of the University to the athletic program envisioned by Acaín would be deductible for tax purposes. If issues arise in these and related legal areas, and it is likely that they will under a model like Acaín's, they will carry with them significant legal and transaction costs.⁹⁷ Time and energy of athletes and administrators will have to be directed to dealing with such issues, and diverted from educational purposes. Accounting costs will increased under Acaín's Plan, because it raises complex accounting issues. For example, determining net profit, which is to be shared, is no simple task, given that revenue generated comes in many forms, ranging from gate receipts to television revenues. Acaín seems to recognize this in the area of marketing revenues, for the use of univer-

⁹¹ Davis, *Framework*, *supra* note 81, at 268.

⁹² *See id.* at 265.

⁹³ Professor Harry Edwards has bemoaned the fact that the day may have arrived when "big-time" student-athletes have achieved the status of gladiators. *Id.* at 268.

⁹⁴ *Id.* at 269-71.

⁹⁵ *Id.* at 269.

⁹⁶ *Id.*

⁹⁷ In addition to economic costs that may be reflected in responding to a judgment, there are transaction costs, even in unsuccessful legal actions. Legal recourse invariably entails emotional and economic costs, for example in terms of lost hours of work expended in defending against the lawsuit. These and related costs are transaction costs – costs attributable to responding to a legal action.

sity logos, etc. It will be difficult to determine what is to be shared, and those difficulties will lead to accounting and ultimately legal disputes.

Davis also discusses the practical implications of structural issues that necessarily arise under models like Acain's.⁹⁸ Since a new status is being created, new rules will have to be promulgated to deal with institutions in that status, in order to maintain a level playing field.⁹⁹ All the professionalization models, including Acain's, are essentially calling for a change in the paradigm of governance for intercollegiate athletics. The structural difficulties in any such paradigmatic change cannot be discounted or dismissed.

Sharing revenues, as envisioned by Acain, runs a high risk of compromising academic values for institutions and student-athletes alike, increasing the economic costs to and social stigma suffered by athletes, and suggests a change in paradigm that could have serious hidden implications for all concerned. Given these problems, Acain's Plan may ultimately raise the question of a need to create a professional minor league, divorced from the educational enterprise, given the manner in which such a proposal compromises academic values, or a professional division in intercollegiate athletics that openly recognizes the special economic and non-academic nature of men's basketball and football at the most competitive levels.

B. Professional Division Within the Intercollegiate System

Allen L. Sack and Ellen J. Staurowsky propose a model whereby a professional division would be included within the intercollegiate system.¹⁰⁰ Sack and Staurowsky propose a two-tier system that they believe encourages and portrays true amateurism,¹⁰¹ while allowing for some of the major athletic powers to participate in a "professional" league. The programs would be self-sufficient and totally unrelated to basic university academic operations.¹⁰²

The two-tiered system includes an amateur tier, very similar to the approaches taken by Division III teams, or the Ivy League, where scholarships and financial aid are distributed based on need and academic merit.¹⁰³ This tier could, without compromise, adhere to academic values. Furthermore, as

⁹⁸ *Id.* at 269-71.

⁹⁹ Professor Davis lists six such issues. *Id.*

¹⁰⁰ *Rejoinder, supra* note 21, at 120. (For a complete discussion and analysis of Sack and Staurowsky's theory, see Allen L. Sack & Ellen J. Staurowsky, *College Athletes For Hire: The Evolution and Legacy of the NCAA's Amateur Myth* (1998)).

¹⁰¹ Sack and Staurowsky are strong proponents of an amateurism model, but they also acknowledge that it is unlikely that institutions with big-time programs will revert to an amateurism model. As such, they somewhat reluctantly offer their dual-tier model, which accepts and tries to address the need to compensate athletes at the "big-time" level. They correctly note, as well, that the NCAA itself is involved in compensating student-athletes and propose a system that they believe better accommodates academic values and economic equity. See Sack & Staurowsky, *supra* note 10.

¹⁰² *Id.*

¹⁰³ *Id.*

Sack and Staurowsky emphasize,¹⁰⁴ this tier would be truly amateur in nature and would enable institutions participating in that tier to claim "amateurism" as a value.

The second tier involves a professional model, or a league where major sport programs compete as entities separate from the university's academic mission and operations.¹⁰⁵ Under Sack and Staurowsky's professional model, the athletes receive room, board, and one year of college tuition paid for every year the athlete played in the professional college sports league.¹⁰⁶ Furthermore, under this proposed professional model, the athletes have up to ten years from their initial entrance into the professional college league to take advantage of the room, board, and tuition credits they earn while playing in the professional league.¹⁰⁷ The athletes must satisfy the admissions requirements imposed on any entering student.¹⁰⁸ While the athletes participate in the professional college league, they are not required to be simultaneously enrolled as students at the particular institution.¹⁰⁹ Sack and Staurowsky argue that under the current NCAA system, athletes, because of their scholarship contracts, are required to put their sport as a top priority.¹¹⁰ At the same time, however, in the name of amateurism, the NCAA also requires that these student-athletes carry a full-time student academic load.¹¹¹ Sack and Staurowsky believe that their professional model resolves problems found in the current system in that it would allow the athletes to obtain an education at a self-dictated pace. Their professional model is also designed to deal with the extreme emotional and physical demands of "big-time" intercollegiate athletics.¹¹² Sack and Staurowsky anticipate that this system would be particularly beneficial in providing an education to those with educationally inhibited backgrounds.¹¹³ Further, under their proposed professional college sports model, they state that athletes would be able to legally pursue many entrepreneurial avenues engaged in by their coaches, such as endorsements, television contracts, speaking engagements, and money from sports agents.¹¹⁴ Finally, Sack and Staurowsky believe that athletes should receive some type of annual payment that is aligned with the "financial realities of an open market."¹¹⁵

¹⁰⁴ *Id.* In fact, Sack and Staurowsky's major purpose in writing their book was to promote amateurism as a value in intercollegiate athletics and to stimulate a national dialogue regarding the importance of amateurism, as a matter of academic integrity. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 121.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 122.

¹¹⁵ *Id.*

Sack and Staurowsky's proposal is another effort to ensure that student-athletes are compensated equitably for their participation in revenue-producing athletic programs. They also endeavor to deal with issues related to educational values. Their model is designed to compensate athletes for their athletic performance, without compromising academic values at the institutional or individual level. The model is praiseworthy for its attempt to deal with both economic and academic inequities. As was the case with the Acaín Plan, however, there are problems when one examines the Sack and Staurowsky model in greater depth.

Unlike the Acaín Plan, the Sack and Staurowsky model is designed to preserve academic values. It does so by forming an amateur division, which is closely tied to the academic institution and its values. At the same time, rather than completely divorcing the professional division from academic institutions and values, which would give rise to criticisms of the sort raised relative to the Acaín Plan,¹¹⁶ Sack and Staurowsky provide student-athletes in the professional division with grants-in-aid that may be used after their athletic careers have ended. They argue that this will permit athletes to focus on their athletic job until they have exhausted their eligibility, at which time they will have amassed grant-in-aid credit that may be used to obtain an education, unencumbered by the demands of participating as an athlete in a "big-time" program.

At first blush, this approach appears to maintain academic values by balancing the demands of athletics with the opportunity to receive an education. There are practical problems, however, with this approach. By participating in a professional division, the universities are adding what is essentially an entertainment business to their academic portfolio. In doing so, they taint their academic mission to some extent, given that the teams will presumably carry the university's name, even though the team members are not students.

Under the Sack and Staurowsky model, the athlete must be admitted to the institution, but he does not have to be an enrolled student while participating in the professional league.¹¹⁷ Admission is a prerequisite for the athlete to be permitted to participate for the institution in the league.¹¹⁸ The athlete then has ten (10) years from the time he enrolls to take advantage of the tuition credits earned while participating in the professional division, and he earns one (1) year of tuition credit, together with other benefits received, for each year he participates in the professional league.¹¹⁹ Under the current system, major universities offer academic support (e.g., tutors and structured study time). Sack and Staurowsky do not offer any academic and emotional support like that received by student-athletes in many programs today. Furthermore, coaches and administrators will have little incentive to assist in graduating athletes-turned-students, because the athletes will have used up their eligibility and their

¹¹⁶ *Supra* notes 81-98, and accompanying text.

¹¹⁷ *Rejoinder, supra* note 21, at 120-121.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

failure to graduate will not reflect poorly on the coach's program. Without such academic support and encouragement from the coaches, it is possible that the athlete-turned-student under the Sack and Staurowsky model will not graduate at levels commensurate with those obtained under the current system.¹²⁰

Another academic matter that deserves more study is the Sack and Staurowsky conclusion that the athlete will benefit by not going to school while participating in intercollegiate athletics. There is some indication that student-athletes perform better in the classroom during the season than out-of-season. While this is somewhat counter-intuitive, given the time demands placed on an athlete during the season which clearly deprives the athlete of study time, it may be that the athlete is more disciplined during the season and receives more academic support. During the season, many student-athletes are required to attend study sessions and their attention to academic matters is closely monitored. Athletes could lose this academic benefit under the Sack and Staurowsky proposal.

A final academic matter not addressed by Sack and Staurowsky is the time required to graduate. Currently, many students take five or more years to graduate. As previously noted, even the NCAA accumulates its graduation rates on a six-year basis.¹²¹ Under the Sack and Staurowsky model, however, the athlete would only receive one year of scholarship or aid for each year played, which would presumably be four years. That four-year scholarship may well be insufficient for the athlete turned student to graduate. It is worth noting, as well, that if the athlete has to wait four years before entering school, he may have many personal reasons for declining to use the grant-in-aid. He will have become an older, nontraditional student and may have family or other responsibilities that make attendance as a full-time student prohibitive.

Sack and Staurowsky also seek, at least implicitly, to deal with the social implications for the athlete. During his playing career, the athlete would essentially be an entertainer and would not be treated as a student. Later, the athlete would become a student and presumably would be treated like all other students. At that juncture, at least, the athlete would not suffer any stigma or ambivalence of role. He would be a student, just like any other student, although he may be older and may still carry some of the fame or notoriety of being an athlete.

There are also practical problems of both a legal and structural nature with the Sack and Staurowsky model. As a legal matter, given that athletes are now paid employees and the athletic enterprise has clearly become a business, a myriad of legal issues will have to be addressed, with all the actual and transaction costs that such legalization of "big-time" intercollegiate athletics would

¹²⁰ Of course, Sack and Staurowsky can argue that permitting the athlete turned student to go full time will more than compensate for the loss of academic support and coaching encouragement under the current system.

¹²¹ *Supra* note 15, and accompanying text.

entail.¹²² As a structural matter, the Sack and Staurowsky model would involve a major change in the governance structure of intercollegiate athletics. It might even threaten governance in other areas, since the NCAA derives much of its funding for governance purposes from revenues generated by the very programs that would be contained in the professional category envisioned by Sack and Staurowsky. Once again, a new paradigm would bring with it numerous and perhaps even intractable structural problems. Sack and Staurowsky have not evidenced much forethought in this regard.

As was the case with the Acain Plan, the Sack and Staurowsky model appears to address problems associated with the current operation of "big-time" intercollegiate athletics. It does so in a manner that raises many questions and might ultimately do more harm than good. Given the difficulty of new paradigms, less ambitious proposals have been offered, such as the stipend approach suggested by Dean C. Peter Goplerud III.

C. *Scholarship Plus Stipend Approach*

Dean Goplerud is particularly concerned with the fact that not enough attention is paid to the welfare of college athletes.¹²³ Goplerud believes that the relaxation of the student-athlete work rules adopted by the NCAA was well intentioned, but he asserts that they add yet one more element into the already time-crunched schedule of the athlete.¹²⁴ Additionally, Goplerud raises the concern that athletes might receive pay for no work, which would create an NCAA enforcement "nightmare."¹²⁵ Based on these concerns and a recognition that "big-time" college athletes are being treated in an economically inequitable manner, Goplerud asserts that it is time to compensate these athletes because "[w]e are no longer in an age of innocence where there is no commercialism in college athletics. It is big business and those most responsible for the product put on the field, the players, should be compensated."¹²⁶

Goplerud proposes that the NCAA develop legislation permitting compensation, in the form of stipends, to student athletes participating in Division I major revenue producing sports.¹²⁷ These stipends would be available to men's football and basketball, and women's basketball, volleyball, and other sports necessary to satisfy gender equity requirements.¹²⁸ The amount of stipend distributed to each athlete would be determined at the individual institution's discretion, subject to an over-all NCAA "salary cap."¹²⁹ This salary cap would be

¹²² For an outline discussion of these issues see *infra* page 41.

¹²³ Goplerud, *supra* note 12, at 1105.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 1089.

¹²⁸ *Id.*

¹²⁹ *Id.*

set at \$300 a month per scholarship student-athlete.¹³⁰ Half of the stipend would be deposited in a trust fund, which would be distributed to student-athletes obtaining a degree "within five years of matriculation."¹³¹ The schools that support football programs would conduct an independent calculation for their football costs, which would vary depending upon whether the school is Division I-A or Division I-AA.¹³² As permitted under the recently enacted NCAA rule, student-athletes would be allowed to work, yet they would still receive a stipend, which would not be counted against the "cost of attendance" at the university.¹³³ As long as the school does not exceed the salary cap, they can choose the amounts of the dividends paid to the athletes, whether very little, or if the school thought it necessary, none at all.¹³⁴ Additionally, those grants-in-aid athletes participating in nonrevenue-producing sports could work during the school year, and would have no maximum earnings cap.¹³⁵ Furthermore, under the scholarship-stipend approach, jobs must be accessible to the general student body as well as student athletes.¹³⁶

The Goplerud proposal is designed to deal with the economic inequities suffered by "big-time" athletes by permitting them to receive a stipend for their services. For Title IX reasons, however, he offers the stipend to athletes, particularly women, in nonrevenue-producing sports. Thus, rather than dealing with the economic inequity that currently exists, he may merely be compounding it. Furthermore, Goplerud does not tie his stipend directly to revenue production and profitability. While the proposal is a thoughtful effort to blend economic and educational values in an equitable manner, it is flawed as an approach to economic inequity arguments, because Goplerud does not evaluate it in light of actual revenues generated.

However, Peter Goplerud's stipend proposal does address academic inequities currently suffered by student-athletes in the major revenue-producing athletic programs. He demonstrates concern for academic values, by maintaining much of the current program and adding some incentives, and by requiring that a substantial portion of the stipend be placed in a trust to be received by a student-athlete if he graduates within five years. Yet, Goplerud's proposal does not directly address social implications that arise in "big-time" athletic programs. Student-athletes may continue to feel stigmatized. Indeed, being paid stipends for their performance may add to their sense that they are athletes first and students second.

Moreover, Goplerud's proposal generates some practical problems. He endeavors to avoid the legal problems associated with Title IX and gender eq-

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

uity by making women's programs at the Division I level eligible for the stipend, even though those programs generally are not revenue-producing.¹³⁷ It is not clear, however, that he has avoided Title IX problems. He indicates that women athletes may receive the stipends, but he also permits institutions some flexibility in paying the stipends (i.e., they can pay less than the cap). It is unclear whether the Goplerud plan could pay some athletes more and others less, generally or at a particular institution, which might create potential Title IX problems if women are paid less in either event.¹³⁸ The Goplerud plan also fails to avoid some legal issues (e.g., tax and workers compensation issues) that will arise if the stipend is considered compensation, which it might be since it is tied to performance.

The cap is itself one of a number of practical wrinkles to the Goplerud proposal that deserves more attention. He does not require institutions to provide the compensation. This will no doubt raise contractual issues with student-athletes who believe they have been promised a certain salary or compensation in some form. It will also create an imbalance in the playing field between institutions that pay the stipend and those that do not, further exacerbating the growing rift between major programs with the dollars required to fund the stipend and those that do not have the necessary dollars.

Given its apparent simplicity, the stipend approach suggested by Goplerud would appear to avoid structural issues. However, this is not so clear on a closer examination. If, in fact, his proposal widens the rift between schools able to pay the stipend and those unable or unwilling to pay, it may give rise to structural and governance problems. Schools paying the stipend will have a competitive edge in recruiting, which should translate itself into success in terms of performance. Thus, the proposal might require creation of a new division, with separate rules or, at a minimum, new rules outlining how the stipend is to be calculated and dispersed.

Thus, while the Goplerud proposal does not rise to the level of a new paradigm, it endeavors in some measure to deal with economic and academic inequities while leaving many unanswered questions and may, in reality, do very little to address economic and academic inequities that currently are present in "big-time" intercollegiate athletics. It raises too many questions for the limited benefit likely to be recognized by student-athletes and may effectively do little more than is currently being done by the NCAA.

¹³⁷ Of course, this will increase the expense of the stipends at the institutional level. In this regard, Dean Goplerud fails to examine economic and related implications of his proposal. For example, he indicates that the institutions will pay these costs, but he does not state where they will obtain the necessary funding.

¹³⁸ See *infra* at notes 203-210, and accompanying text, for a discussion of possible Title IX problems and solutions regarding variable stipends for men and women student-athletes.

D. The NCAA Model

In 1906, at the first convention of the Intercollegiate Athletic Association, the predecessor to the NCAA, the idea of inducements for athletic ability was proposed.¹³⁹ The amateur model, then prevailing in intercollegiate athletics, did not support aid to students through grants or other forms of financial aid for athletic performance.¹⁴⁰ Naturally, there was much opposition to the idea of scholarships, when it was first proposed.¹⁴¹ Much of this historical opposition was based on elitist notions of athletic participation and the value of amateurism, often rooted in British aristocracy.¹⁴² Academic concerns were also raised and centered on the idea that if students were subsidized for their athletic participation, they would not focus on their educational goals.¹⁴³ Today, educators in the Ivy League and Division III continue to espouse these views, arguing that the grant of athletic scholarships creates a group of sports specialists that turns intercollegiate athletics into “more of a profession than an avocation.”¹⁴⁴

Given the strength of these concerns among educators, it was not until 1956 that the NCAA, under rising pressure from athletics personnel, changed their constitution to permit scholarships based on athletic ability.¹⁴⁵ In 1957, these grants-in-aid, based on athletic ability, provided for room, board, tuition, fees and laundry money.¹⁴⁶ Walter Byers, who was then serving as the Executive Director of the NCAA, thought that athletic-based scholarships were themselves little more than a “laundering scheme,” with athletes being permitted to receive money, once given “under the table,” directly from university sources.¹⁴⁷ While Byers was uneasy about the growing commercialization of intercollegiate athletics, he may have helped fuel this commercialization by overseeing entry into the first major agreements to televise intercollegiate athletics.¹⁴⁸

As originally instituted, the scholarships were designed as gifts (grants-in-aid), and the student-athlete was able to retain the four year grant even if he ceased to participate in athletics for personal reasons or simply because he failed to contribute to the team.¹⁴⁹ Not surprisingly, athletics and university

¹³⁹ *Rejoinder, supra* note 21, at 118.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 118-19.

¹⁴⁶ *Id.* at 119.

¹⁴⁷ *Id.* (citing Walter Byers, *Unsportsmanlike Conduct: Exploiting College Athletes* (1995)).

¹⁴⁸ See Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. J. 9 (2000) (based on a presentation given at the Annual Meeting of the Association of American Law Schools in January, 2000).

¹⁴⁹ *Rejoinder, supra* note 21, at 119.

personnel began to be oppose treating these grants as gifts, without requiring that the athletes remain on the team.¹⁵⁰ As a result, in 1967, the NCAA changed the athletic grants-in-aid from a “gift” to more of a “contractual quid pro quo.”¹⁵¹ This change in status gave coaches and athletics administrators greater control, financially and otherwise, over the athletes’ educational future, and institutions were effectively able to eliminate financial aid when student-athletes ceased to participate as an active member of the team. For example, in addition to terminating the grant-in-aid when the athlete quit the team, a student-athlete could lose his aid if he failed to follow the directions of his coaches and athletics personnel.¹⁵²

While the 1967 changes in the scholarship status of student-athletes eliminated those athletes who failed to play or take their commitment seriously, it did not eliminate those athletes who were forced to quit due to injuries or those athletes who were recruiting errors.¹⁵³ The NCAA dealt with these problems, to some extent, by turning the four-year grant-in-aid into a grant that had to be renewed on an annual basis.¹⁵⁴ While institutions, through their coaches and athletics personnel, may effectively remove “dead wood,” athletes who do not perform up to recruiting expectations or who are injured,¹⁵⁵ the student-athlete is not able to transfer or leave one school for another on an annual basis, without first receiving approval from the institution where he initially played and may even lose a year of eligibility because of a transfer.¹⁵⁶ It is clear that the scholarship agreement, based on the letter of intent signed by an athlete, favors the institution and may be unconscionable for this reason among others.¹⁵⁷

Nevertheless, scholarships and grants-in-aid remain an important source of compensation for student-athletes. The economic value of a grant-in-aid is substantial. For example, in the Big-10, the average value of a one-year grant-in-aid, based on 1999-2000 figures, was \$14,712.00 for a resident and \$22,584.00 for a non-resident, with a high of \$34,476.00 at Northwestern University and a low of \$11,450.00 for a resident at the University of Wisconsin.¹⁵⁸ Over a five-year period, covering four years of eligibility, these figures jump in value to an

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* Failure to attend practices and meet athletics department expectations was considered a misrepresentation of the athlete’s admission application and letter of intent, which served to further solidify the idea that the student-athlete and the institution were involved in a contractual relationship.

¹⁵³ *Id.* at 120.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See 1999-2000 NCAA DIVISION I MANUAL, Article 14.5.1, which sets forth the general rule regarding transferring from one institution to another: “A student who transfers (see 14.5.2) to a member institution from any collegiate institution is required to complete one full academic year of residence at the certifying institution before being eligible to compete for or to receive travel expenses from the member institution”

¹⁵⁷ See, Davis, *Unconscionability*, *supra* note 14.

¹⁵⁸ See, *infra*, Appendix, Table 1.

value to an average of \$81,295 for residents and \$124,932 for non-residents, with a high of \$172,380 at Northwestern.¹⁵⁹ It is evident, therefore, that a grant-in-aid is of substantial dollar value to a student-athlete. The value of the grant increases dramatically, in terms of income, over the lifetime of a student-athlete who graduates.¹⁶⁰ There is also some lifetime economic benefit to student-athletes who attend but do not graduate from a university, since employees with some higher education tend to generate a higher income over the course of their working lives than do employees with only a high school education. However, that economic benefit is much less than the benefit accruing to a graduate.¹⁶¹

The Division I Board of Directors recently approved a proposal that permits institutions to provide financial aid during the summer term for entering basketball student-athletes.¹⁶² This move was intended to aid the student-athlete in making the academic transition to higher education and enable him easily to receive the twelve hours necessary to be in good standing after his initial fall semester. The Board of Directors also revisited a proposal, that was previously defeated by the Council, which would have required male basketball student-athletes to successfully complete a minimum of 12 hours acceptable toward a degree by the end of the first full term (fall) of their freshman year.¹⁶³ In supporting this effort and related initiatives, including the creation of the Division I Basketball Issues Committee,¹⁶⁴ Graham B. Spanier, Chair of the Board of Directors of the NCAA and President of Pennsylvania State University, emphasized that, "[m]y presidential colleagues and I believe that the current graduation rates are unacceptable among college basketball players. The Board also has a strong commitment to strengthening academic standards as early in the student-athlete's college career as possible."¹⁶⁵ This effort to increase financial aid in the furtherance of the NCAA's goal of heightened academic performance on the part of student-athletes in Division I basketball illustrates the NCAA's willingness to entertain economic incentives to student-athletes designed to improve academic performance.

The NCAA also recently took a potentially significant structural step that may ultimately enable it to initiate an era of significant reform in Division I men's basketball, when the Board of Directors adopted Proposal 132-B, which established a new Division I Basketball Issues Committee.¹⁶⁶ In reporting the formation of this Committee, Graham Spanier, stated, "[t]his is one of the

¹⁵⁹ See, *infra*, Appendix, Table 3.

¹⁶⁰ *Supra* notes 89-90. See also discussion at *infra* note 181, and accompanying text.

¹⁶¹ *Id.*

¹⁶² *NCAA Division I Board of Directors Approves Basketball Package, Seeks Other Reforms*, NCAA NEWS RELEASE, (April 27, 2000) <<http://www.ncaa.org>>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *NCAA Division I Board of Directors Approves Basketball Issues Committee*, NCAA NEWS RELEASE, (August 10, 2000) <<http://www.ncaa.org>>.

NCAA's most important initiatives in recent years . . . An overriding concern for us was putting together a committee that fairly represented the basketball constituency of Division I."¹⁶⁷ He added that, "[i]t is important that all voices are heard."¹⁶⁸ This Committee will engage in evaluating research and making recommendations to the Board of Directors on a regular basis. As such, it could well become a major vehicle for reform in Division I men's basketball in the future.

In 1997, the NCAA voted to allow student-athletes at the Division I level the opportunity to hold a part-time job, while receiving scholarship support, as a means of providing the student-athlete with more spending money.¹⁶⁹ Proposition 62, which allows student-athletes to hold such part-time jobs, was adopted by a very narrow margin: 169 delegates for and 150 delegates opposed.¹⁷⁰ Opponents of Proposition 62 argued that it would create enforcement problems and permit institutions to try to compensate athletes by giving them "no show" or "pay-for-athletic participation" jobs.¹⁷¹ After passage, Sam Smith, chairperson of the NCAA President's Commission, acknowledged that there were many legitimate problems in application that must be faced under Proposition 62, but he believed that it was a step in the right direction.¹⁷² In April of 1998, the NCAA Division I Management Council approved Proposition 62, permitting student-athletes in Division I to hold part-time jobs and earn up to \$2000 during the academic year.¹⁷³

In addition to providing student-athletes with the opportunity to hold part-time jobs during the academic year,¹⁷⁴ Cedric Dempsey, executive director of the NCAA, has suggested that \$10,000,000 of the new television contract revenue be designated for clothing, emergency travel and other special needs of student-athletes.¹⁷⁵ He added that it is his intent to "propose that these funds be increased and made more flexible for assisting student-athletes."¹⁷⁶

Given the value of grants-in-aid and other support for student-athletes, such as tutoring and other forms of academic support, member institutions of the NCAA are already offering substantial compensation to student-athletes. Of course, with the exception of some tutoring or related academic benefits directed specifically to men's basketball and football players, student-athletes in nonrevenue-producing programs receive similar benefits, even though they do

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *The working athlete*, THE SEATTLE TIMES (Jan. 18, 1997)

<<http://www.seattletimes.com>>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *See supra* note 1.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

not generate the income required to cover the cost of such expenses related to providing those benefits.

The NCAA's compensation model has significant strengths. Obviously, it avoids the structural problems often incident in the other models or proposals, because it is already designed to fit easily into the regulations adopted by the NCAA for the governance of Division I athletics. Changes, such as the part-time income proposal (Proposition 62) and Director Dempsey's recommendation of additional benefits, will have to be incorporated in the rules. The NCAA's recommended changes, however, are less dramatic and require far less change in the regulations and governance structure than many other proposals for change.

Furthermore, the NCAA's compensation model focuses largely on educational benefits and, by doing so, it furthers academic values. As previously noted,¹⁷⁷ however, the poor graduation rates for men's basketball and football players at the Division I level raise questions regarding the extent to which such academic values are actually being furthered. These concerns are compounded by the economic necessity of producing revenues in men's football and basketball to support less profitable athletic programs at an institution. The need to produce revenue can put time and related demands on the student-athlete that do not necessarily exist in other programs. This emphasis on economic factors may also adversely impact the student-athlete's sense of his reason for being at the institution. The student-athlete may justifiably wonder whether his real reason for being at an institution, in the eyes of the institution, is primarily economic and not educational.

Concerns also arise relative to aspects of the inequitable nature of the NCAA's compensation model. The student-athletes producing most of the revenue, which fuel athletics operations at Division I institutions, are involved in men's basketball and football. Athletes of color predominate in those sports and they produce significant revenue, which is used to help fund nonrevenue-producing programs that are heavily populated by white students, many of whom are middle and upper-middle class.¹⁷⁸ It is this inequity that no doubt has spurred Director Dempsey and others to support some compensation for student-athletes in men's basketball.

However, in trying to address such inequities, the NCAA is up against two significant obstacles. One obstacle is simply that of intransigence. Because the men's basketball and football players lack bargaining power,¹⁷⁹ there is little pressure placed on administrators to respond to this inequity. Administrators are often crisis managers, and simply do not have the time, the inclination, nor the energy necessary to respond to problems of inequity unless they are raised by powerful constituencies at or external to the institution. Many of them may

¹⁷⁷ *Supra* notes 15-16, and accompanying text.

¹⁷⁸ *Supra* notes 7-9, and accompanying text.

¹⁷⁹ Davis, *Unconscionability*, *supra* note 14.

recognize that serious problems exist, but those problems are unlikely to get much attention until they become crises. The NCAA's recent effort to create a Division I Basketball Issues Committee to study and make recommendations regarding academic and economic issues that must be addressed, may be a means of moving such issues to the forefront and is evidence that the NCAA appears to recognize current difficulties that lead to intransigence, in terms of reform, at the institutional level.¹⁸⁰

The other problem that makes it difficult to address these economic inequities, despite claims of inequitable treatment, is largely legal in nature. Administrators are fearful of Title IX limitations of differing treatment of men and women in intercollegiate athletics. If they provide more funding to men's basketball and football, the revenue-producing sports, they justifiably fear that Title IX claims may be raised, resulting in transactional and economic costs to the institution, as the institution is challenged to provide similar aid to women's programs. These factors make it very difficult for the NCAA to address problems of inequity.

IV . OUR ECONOMIC AND ACADEMIC EQUITY MODEL

Each of the four models discussed have substantial virtues. The first three are significant efforts to deal with issues of economic inequity in "big-time" men's football and basketball. Each of these three models, however, also have deficiencies at a number of levels, ranging from structural problems in implementation to a lack of details in terms of the particulars of the recommendations. Even more significant, each of the first three proposals or models fails to address directly issues of academic inequity and integrity. The NCAA model, on the other hand, does a somewhat better job of dealing with academic and structural issues, even though serious questions can be raised in terms of academic equity and integrity issues that remain unresolved. The NCAA's model is weaker than the other models in many respects in terms of its treatment of issues of economic inequity.

In the following proposal or model, we endeavor to deal directly with issues of economic and academic integrity, drawing on the strengths and learning from the weaknesses of each of the models outlined in this article. At a minimum, we hope to stimulate further the dialogue that will ultimately give rise to reform in the future. In our more optimistic moments, we believe that the recommendations we suggest can provide the basis for meaningful change in "big-time" intercollegiate athletics - change that will help achieve economic equity without unduly compromising the rightful academic mission of institutions and student-athletes.

Poor graduation rates among student-athletes in men's football and basketball at the Division I level, particularly the lower rates among athletes-of-color, raise serious questions of academic and economic inequity. On the one

¹⁸⁰ See *supra* notes 162-164, and accompanying text.

hand, when institutions recruit a student-athlete to participate in "big-time" intercollegiate athletics, the major value that they offer the student-athlete is a grant-in-aid and the opportunity to receive an education. Low graduation rates raise legitimate questions regarding the commitment of institutions to provide a genuine educational opportunity to student-athletes. It is not surprising, therefore, that critics claim that student-athletes are being exploited in the sense that they are hired to help maintain the commercial viability of the institution's athletic program and are not receiving the educational quid pro quo offered by the institution as an inducement to bring their athletic skills to campus. Economically, these student-athletes are expected to produce revenues to fund their program and other nonrevenue-producing programs at the school, as well as providing significant funding for the Conferences and the NCAA, while failing to receive the educational benefits that would make their agreement with the institution equitable.

Recognizing these and related problems, the other models have suggested moving toward a purer professional model than now exists in "big-time" intercollegiate athletics. They suggest increased compensation for the athletes in some form. In doing so, they also note that the current system is hypocritical in the sense that it purports to be based on academic values but is really little more than a thinly veiled professional program. In contrast, while we recognize that the NCAA itself provides a limited professional or compensation model, we argue that the compensation and education issues can be reconciled in a manner that removes much of the inequity present in the current system.

We recommend major changes in the area of grants-in-aid that will increase graduation rates and, therefore, compensation for the student-athletes. We also discuss funding and implementation issues that have made reform difficult in the past.

A. Grants-in-Aid

The value of a degree is substantial. In current dollars, based on labor statistics, it is generally worth in excess of \$500,000, during the working life of an individual.¹⁸¹ Therefore, increasing graduation rates among student-athletes in the revenue-producing sports is a way of providing them with substantial compensation, in addition to the value of the grant-in-aid itself. Increasing graduation rates will also respond to concerns regarding educational equity, because success in this area is evidence that the institutions have fulfilled their part of

¹⁸¹The United States Census Bureau released figures in 1998 regarding the earnings gap between people with a high school education and those with bachelor's degrees. In those figures the Bureau stated that college graduates made an average of \$40,500 in the prior year, while the average high school graduate earned \$22,000. People with bachelor's degrees, therefore, earned an average of over 75% more per annum than high school graduates. At over \$18,000 per year in additional average income, and an expected working life of thirty years, the difference is \$540,000 in current dollars.

the bargain by providing their student-athletes with an actual education.¹⁸² Efforts to increase graduation rates among these student-athletes can simultaneously deal with issues of academic and educational inequity. Much of the focus of our proposals, therefore, is to provide for an increase in graduation rates among student-athletes in the revenue-producing sports. It must be conceded, however, that our proposals do not deal with the amateurism concerns raised by Sack and Staurowsky.¹⁸³ Indeed, as to revenue-producing athletic programs, we not only concede that they are “professional” but build on that premise, insuring that meaningful compensation is received by the student-athletes, who unlike their counterparts in other Divisions and nonrevenue-producing programs, are due additional compensation for the additional revenues they are significantly involved in producing.

Under our model, student-athletes participating in men’s football and basketball at the Division I level are permitted to receive up to six years of grants-in-aid. The NCAA’s graduation figures are themselves based on the number of student-athletes graduating within six years. Under the current system, these student-athletes can receive up to five years of assistance in the form of grants-in-aid; four years of grant for years the student-athlete participates in intercollegiate athletics and the possibility of a fifth year when the student receives aid but is red-shirted.¹⁸⁴ Some schools even provide an additional year of scholarship to student-athletes who use their four years of eligibility without being red-shirted for a year.¹⁸⁵ Thus, a number of student-athletes receive five years of grant support to use in obtaining their education and degree. It is clear, however, that graduation rates could be improved if institutions were required to provide a sixth year in grant assistance, which would comport with the six year figure used in compiling graduation rates by the NCAA. Given that there is evidence that student-athletes may perform better academically while playing, as opposed to when they are out of season,¹⁸⁶ it makes sense to permit the student-athlete to retain eligibility during that fifth and sixth year. This could result in higher graduation rates, as well. Our model does not necessarily antici-

¹⁸² We certainly recognize that a degree does not equal an education. By the same token, however, it is clear that a degree is evidence of an education. As such, it has value in the workplace, value that is generally translatable into higher economic compensation over the course of one’s lifetime.

¹⁸³ Sack & Staurowsky, *supra* note 10.

¹⁸⁴ An athlete who is red-shirted receives his grant-in-aid, practices with the team, but does not play in any games, thereby retaining four additional years of eligibility. In this regard, NCAA Bylaw 14.2.1 provides, in pertinent part, that: “A student-athlete shall complete his or her seasons of participation within five calendar years from the beginning of the semester or quarter in which the student-athlete first registered for a minimum full-time program of studies in a collegiate institution . . .” 1999-00 NCAA DIVISION I MANUAL, Article 14.2.1.

¹⁸⁵ The authors are personally aware of schools provide their student-athletes with continuing assistance after the athletes have completed their eligibility. This is an admirable practice, but it is variable.

¹⁸⁶ See, e.g., Timothy Davis, *An Absence of Good Faith: Defining a University’s Educational Obligation to Student Athletes*, 28 HOUS. L. REV. 743, 754-56 (1991).

pate an increase in the number of grants-in-aid to be offered. Rather, institutions would maintain the level of grants permitted but would parcel them out over the six years of eligibility. This may result in fewer grants being awarded to some entering freshmen thus leading to a consequent loss in opportunities for entering first-year students. However, the additional academic benefit for student-athletes who do matriculate should more than counter-balance this negative factor. This is an area which should be studied to ascertain the impact on potential and existing student-athletes and determine levels of academic performance during season. In this latter sense, it will be worthwhile to discover whether students do better in season than out-of-season. If a student performs better when playing, this increase in eligibility may have additional educational benefits. If he does not perform as well during season, this will present a new set of problems, which should be offset by the additional years of eligibility and financial aid anticipated in this proposal.

To ensure further that these additional grants actually translate into higher graduation rates, we also recommend some disincentives for institutions with programs that do not achieve graduation rates at an acceptable level and additional incentives for programs that exceed certain levels of performance in terms of graduation rates. As disincentives, we suggest that institutions that have graduation rates below certain levels be required to reduce the number of scholarships offered in the offending program. In this regard, we are building on a proposal already suggested by the Board of Directors of the NCAA which, if adopted, would provide for a reduction by one in grants-in-aids at Division I men's basketball programs where graduation rates drop below 50%.¹⁸⁷ We also recommend incentives, in the form of increased scholarships, for programs with higher graduation rates.

In men's football, for example, graduation rates are reported to average 51% generally.¹⁸⁸ Institutions with graduation rates that drop below that rate, in football, under our proposal, will lose grants-in-aid. Currently, each Division I-A institution with a football team is permitted to award a maximum of 85 grants-in-aid.¹⁸⁹ If an institution has a graduation rate of 46-50%, it will lose

¹⁸⁷ See discussion *supra* note 162. Our proposal, which provides for additional reductions, however, is likely to result in more dramatic action on the part of programs. Frankly, if only one scholarship is lost, the institution that graduates 20% of its players may simply write-off the lost grant-in-aid. They will not like having to lose it, but the difficulty of increasing graduation rates to the 50% level may be such that they simply are not willing to try. They may even perceive some slight advantage to being able to recruit players whom they believe are unlikely to graduate, but may be fine athletes, over institutions that are unwilling to recruit those athletes for fear of the effect it will have on their graduation rates. Under our proposal, however, such an institution would lose more than a single scholarship and would have significant reasons to increase graduation rates and academic progress.

¹⁸⁸ *Supra* note 15.

¹⁸⁹ The rule for Division I-A football provides that, "[t]here shall be an annual limit of 25 on the number of initial counters (per Article 15.02.3.1) and an annual limit of 85 on the total number of counters (including initial counters) in the sport of football at each Division I-A institution." 1999-2000 NCAA DIVISION I MANUAL, Article 15.5.5.1.

one grant-in-aid. A graduation rate of 41-45% will result in the loss of two grants; 36-40% results in the loss of three grants; 31-35% results in the loss of 4 grants; 26-29% results in the loss of 5 grants, and so forth. On the other hand, if a coach graduates 51-55% of his players, he will receive an increase of one grant over the current limit of 85; if 56-60% graduate, the program will be awarded 2 new grants; if 61-65% graduate, three new grants will be awarded; if 66-70% graduate, four new grants-in-aid may be awarded, etc. With a 100 percent graduation rate, institutions would be permitted to add a total of 9 grants in Division I-A men's football.

A similar system of incentives and disincentives are proposed in men's basketball at the Division I level. Currently, 41% of the athletes graduate in men's basketball at this level. In terms of disincentives, therefore, we suggest that if a program graduates only 30-40% of their players, they will lose a grant-in-aid; two grants will be lost in programs with graduation rates between 21-30%; three will be lost when the graduation rate falls to 11-20%; and, finally, four grants-in-aid, out of the thirteen currently allowed, will be lost in programs with graduation rates of 0-10%. Incentives will also be given: programs with graduation rates of 41-50% will receive an additional scholarship; programs graduating 51-60% of their players will receive two new scholarships; 61-70% graduation rates will result in a three grant increase; 71-80% will make four new grants available; 81-90% graduation rates will result in five new grants; and 91-100% graduation rates will provide the program with six new grants-in-aid, raising their scholarship limit from 13 to 19.

These incentives will induce coaches and administrators at institutions with lower graduation rates to find ways to improve their performance, knowing that the number of grants available will directly impact their capacity to recruit and develop a successful program. Today, coaches are occasionally given small contractual incentives for increased graduation rates, in terms of their overall income package. These incentives are such a minor part of the total value of an institution's agreement with the coach, that they really are of little impact in terms of inducing coaches to work hard to graduate their players. A coach knows that if he wins, and his team produces revenue, he will keep his job and receive significant increases in his income. If he graduates 100% of his student-athletes, but fails to win and produce revenue at an expected level, he will lose his job and income. Similarly, while administrators, including presidents, would like to see higher graduation rates for their student-athletes in revenue-producing sports, they are unlikely to do anything to increase graduation rates unilaterally at the institutional level if those efforts might result in less success in the program and a decline in coveted revenues. Even if administrators do not worry about the potential adverse competitive and economic impact of creating more stringent expectations for coaches in terms of graduation rates, at present they simply do not have much incentive to act – administrators do not perceive an institutional crisis, and leaders in higher education must, of necessity, be crisis managers. Without a perceived crisis, they will necessarily turn

their energy to areas that are more critical and demand their immediate attention. Coaches and athletics administrators, therefore, need stronger incentives to graduate students. Our proposal provides just such an impetus for greater action to ensure higher graduation rates.

We also recommend some economic incentives for the student-athlete to maintain the regular academic progress necessary to graduate within 6 years. We suggest that monetary stipends be paid to student-athletes in major revenue producing sports. For example, if a freshman has passed his required courses and evidenced academic progress in his first semester, he will receive a monthly stipend of \$50. If, at the end of the first year, he has made the requisite progress, based on a six-year graduation scale, he will receive \$100 per month during the following academic year as his stipend. After year two, if he has continued to make academic progress, he will receive a \$200 stipend; after year three of maintaining academic progress, he will receive \$300; four years will result in a monthly stipend of \$400; and after five years, in his sixth and final year of eligibility, the student-athlete's stipend will be \$500 per month. These stipends will recognize the student-athlete's academic efforts in a very direct manner. Incentives of this sort are far preferable to Proposition 62, which permits student-athletes to work to obtain additional income. Given the hours required of student-athletes, Proposition 62 may actually detract from academic performance, because student-athletes in revenue-producing sports will have to work at their sport *and* their part-time job, both of which take them out of the classroom.

Our recommendations were developed for the purpose of directly addressing current inequities in terms of educational values, evidenced by graduation rates and economic fairness, by increasing both short and long-term compensation to intercollegiate athletes. In this regard, our model also recognizes, as Sack and Staurowsky do, that the revenue-producing sports have essentially been professionalized. Thus, while we emphasize both economic equity and academic values, we do not accept that the achievement of educational values requires a purely amateur system. Rather, we realistically recognize that such a system of amateurism is not practical in "big-time" revenue-producing athletics, and actually lends itself to the economic inequities raised by so many commentators.¹⁹⁰

Our proposals might be subject to some criticism on the ground that they lack specificity and detail. Indeed, we concede that our recommendations, in terms of grants-in-aid incentives and disincentives, stipends, and increased eligibility, need to be studied in more detail. In that sense, we acknowledge that the numbers and dollars we suggest at each level are really only illustrative of a range of possibilities and are subject to revision in the interests of ultimate implementation.

We recognize two major problems, however, with our approach: 1) finding

¹⁹⁰ See discussion *supra* notes 28-36, and accompanying text.

adequate sources of funding for the substantial new expenses created by our recommendations; and 2) Title IX and gender equity implications, in terms of costs and legal obligations. Recognizing these major potential obstacles to implementation of our proposals, we have further suggestions regarding each of those areas.

Questions of funding necessarily arise, relative to our proposal, because it anticipates substantial increases in grants-in-aid, stipends for students, and increased eligibility. With growing concern over proliferating expenses in intercollegiate athletics,¹⁹¹ it is necessary, at least in a practical sense, to address economic issues. In terms of grants-in-aid, assuming that the average grant-in-aid is worth \$15,000 per year,¹⁹² if each Division I-A, I-AA and I-AAA institution added four grants-in-aid per year¹⁹³ in men's basketball, in the form of incentives for increased graduation rates, the cost would be almost \$20,000,000,¹⁹⁴ arguably a small price to pay for increased graduation rates. In turn, if stipends averaging \$300 per month were paid to all Division I-A, I-AA and I-AAA men's basketball players, the total cost would be less than \$20,000,000.¹⁹⁵ Even if the costs exceeded those figures, which are intended to

¹⁹¹ A recent article in the CHRONICLE OF HIGHER EDUCATION depicts this perceived problem regarding expenses:

[B]oth the revenue and expenses of athletics programs are increasing rapidly, said Mr. Isch, the NCAA's Vice President for Finance and Information Services. According to a report to be released this fall, athletics-related revenue has increased 60 percent since 1993, expenses are up 70 percent, salaries and benefits for administrators and coaches are up 47 percent, and capital costs have increased 260 percent, he noted.

Welch Suggs, *10 Years Later, Another Look at Big-Time College Sports*, THE CHRONICLE OF HIGHER EDUCATION, (September 8, 2000) at A69.

President Dempsey is also quoted as stating that institutions are in an "arms race" in terms of salaries, facilities, and other aspects of athletics departments. *Id.* Interestingly, in this article by Welch Suggs regarding the first meeting of the reconstituted Knight Foundation Commission on Intercollegiate Athletics, issues of racial inequity were also raised in terms of the membership of the Commission. Robert J. Minnix, President of the Black Coaches Association is reported as stating, "In order for Presidents and C.E.O.'s of our nation's colleges to make the issue [of racial equity] a top priority, it is necessary for the Knight Commission to lead by example in these efforts. . . If the Knight Commission continues to include only those of the majority culture, then the B.C.A. has no choice but to call their integrity and goodwill into question." *Id.* at A70. President LeRoy T. Walker, a Commission member and former president of North Carolina Central University, expressed the following concerns: "Sixty to 70 percent of the issues we're considering - grades, graduation rates, paying athletes - all center around two sports: football and basketball. . . . And the majority of players in those two sports are black." *Id.*

¹⁹² The average grant-in-aid in the Big-10 is \$14,712, and the average in the S.E.C. is \$12,576. See Appendix.

¹⁹³ This figure is intended to be on the high side. It would be wonderful to see graduation rates increased so that these grants-in-aid would have to be funded.

¹⁹⁴ This figure is based on the following equation: 318 (the number of Division I-A, I-AA and I-AAA institutions) times 4 (the number of grants added, which represents an average graduation rate of 60%, which is 20% higher than the current rate) times \$15,000 (the average cost of a grant-in-aid). The total is \$19,080,000.

¹⁹⁵ This figure was arrived at by multiplying the total number of Division I-A, I-AA, and I-

be on the high side and anticipate a dramatic increase in graduation rates and academic performance on the part of student-athletes in Division I-A, I-AA and I-AAA men's basketball, the NCAA is in a position to fund the cost of these incentives. Indeed, even if the total expense went as high as \$25,000,000, that expense would be a mere 5% of the total amount of revenue payable to the NCAA for its annual television contract with CBS, which is primarily being paid for the televising of "March Madness," the Division I national basketball tournament. In other words, even if the amount paid for such incentives grew dramatically, to \$25,000,000, the total expense anticipated would be only 10% of the \$250,000,000 increase in annual revenue generated by the new television contract soon to be effective. Clearly, this "compensation" for student-athletes, which is designed to result in the keeping of the educational covenant institutions have made with their athletes, is a pittance to pay to avoid the educational and economic inequity prevalent in the current compensation scheme. Indeed, the student-athletes may have a good argument for why they should be paid more than a mere 5% of the total revenues under the television contract (or merely 10% of the new revenues generated) which are attributable, in significant measure, to their athletic prowess.

Funding of the proposals in football is admittedly more problematic, primarily because there is no source of revenue comparable to the NCAA's new television contract with CBS and the expenses are high.¹⁹⁶ In terms of expense, funding the grants-in-aid portion of our proposal is costly. For example, if the 114 Division I-A institutions¹⁹⁷ increased overall graduation rates by 30%, they would be entitled to 6 additional grants-in-aid, each of which would be valued at an average of \$15,000. The total cost, under those very optimistic calculations would exceed \$10,000,000.¹⁹⁸ In turn, if stipends averaged \$300 per player and there were 91 players¹⁹⁹ per squad, the total cost of stipends for the

AAA institutions in the NCAA (318) times 15 players per institution (currently, the NCAA allows only 13 grants-in-aid per institution; we used the 15 figure in anticipation that institutions will increase their graduation rates and be entitled to more grants under my proposal) times \$300 in annual stipend per player (this figure represents an estimate of the average amount of stipend that will be paid monthly to players and reflects the \$300 that will be paid to fourth year players). The total cost for twelve monthly payments to each qualifying athlete would be \$17,172,000. A twelve-month payout is used, even though the academic year is only 9-10 months long.

¹⁹⁶ Today, the NCAA has little control over television revenues for football, either during the regular season or the bowl season. The revenues flow directed to conferences and institutions, and the NCAA has little control over these funds. There was a time when the NCAA exercised much more control over television revenues for football, but this came to an end when the United States Supreme Court decided the case of *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948 (1984), in which the Court held that the NCAA's control of television broadcasting in football violated antitrust law.

¹⁹⁷ We are only including Division I-A football, because Division I-AA has a separate championship, offers fewer scholarships, and does not generate the level of revenue produced by Division I-A institutions and conferences.

¹⁹⁸ Using the formula noted, the cost would be \$10,260,000.

¹⁹⁹ This figure is based on adding 6 grants-in-aid to the 85 grants currently allowable, for a

114 Division I-A institutions would be in excess of \$3,000,000.²⁰⁰ The aggregate cost of our compensation proposals could ultimately be as high as \$13,000,000 for Division I-A men's football. While this number is comparable to the cost of the proposals in Divisions I-A, I-AA and I-AAA men's basketball, there is currently no anticipated additional source from which those funds could be generated.

If, however, the NCAA were to initiate a national championship game, such a game could produce the revenues necessary to fund the proposal. The Rose Bowl payout to the Big Ten, for example, reportedly exceeded \$1,400,000 for each school, for a total in excess of \$15,000,000 to the Big Ten alone.²⁰¹ That payout is at a level which makes it practical to anticipate that the media would be willing to pay as much as \$30,000,000, for the right to televise a NCAA Division I-A sanctioned national championship on an annual basis. Yet, there may be some opposition to this move on the part of institutions and conferences that currently rely heavily on the funds currently generated from the various bowl games. However, our proposal would not necessarily diminish that source of revenue. If the national championship pitted the winners of two of the current major bowls against each other, that enthusiasm and concomitant revenue would be maintained for the major bowl games. Indeed, it is possible that enthusiasm might be heightened because four schools would be playing for the right to play for a legitimate national championship. Lesser bowls, in turn, would no doubt maintain the same attraction they have today. Thus, it is unlikely that institutions and conferences would lose revenues. Indeed, institutions that increased or maintained high graduation rates, throughout Division I-A, would receive additional dollars for grants-in-aid.

Major conferences and institutions might oppose this proposal for another reason. Currently, leading football conferences and institutions effectively control the televising of Division I-A football during the regular and bowl seasons. They may simply oppose any intrusion by the NCAA, as a whole, on their prerogative and power. We hope, however, that they will not permit petty turf differences to stand in the way of a source that could fund proposals dealing directly with economic and educational deficiencies in the current system.

The remaining concern we might anticipate, in response to our national championship recommendation, deals with objections to players participating in an additional game. Since the benefits of that additional game will flow directly to the players themselves, in the form of academic and economic benefits, those arguments would seem to be more than counter-balanced by the benefit to be received. This would be less true, of course, if the funds were simply funneled to the conferences and institutions and not the players, as is done under the current bowl system.

total of 91.

²⁰⁰ Using the formula, the cost would be \$3,112,200.

²⁰¹ Martha Brill, *No Matter What Size, Money Drives Bowls*, MICHIGAN DAILY <<http://www.espn.go.com/ncf.news/991203/00210397.html>>.

In addition to funding concerns, our proposals raise significant Title IX or gender equity concerns. If the additional dollars required to fund our grants-in-aid and stipend proposals for revenue-producing sports, largely Division I men's basketball and Division I-A men's football, must also be provided to other nonrevenue-producing men's and women's programs, it is unlikely that the funding necessary would be forthcoming. If women's programs do not receive similar funds, however, cries of gender inequity and violation of Title IX will surely be heard.

To date, most of the effort to achieve gender equity in intercollegiate athletics under Title IX has focused on participation issues -- insuring that women are able to participate in intercollegiate athletics in numbers proportional to men.²⁰² Professor B. Glenn George recently noted, however, that:

After more than twenty-five years of enforcement (or lack thereof), Title IX has finally evolved into a second phase of interpretation. Although Title IX has had a dramatic impact on the opportunities for women in intercollegiate athletics, particularly in the last decade, most of the attention until recently was focused on participation numbers. That battle has been largely won, at least in the courts, if not on the field. More recent attention has now turned to a new issue -- the equitable allocation of scholarship dollars. This second wave of Title IX enforcement is well on its way and has already altered the manner in which many institutions are counting and directing their scholarship budgets.²⁰³

Professor George points out that the shift from issues of participation to this second wave of Title IX enforcement, focusing the allocation of funds in the form of grants-in-aid, began in earnest in 1997, when the National Women's Law Center "filed a complaint with the OCR [Office of Civil Rights of the Justice Department, the governmental entity largely charged with enforcing Title IX in this context] against twenty-five institutions alleging Title IX violations based on a smaller proportion of financial aid going to women athletes."²⁰⁴ Professor George acknowledges that Division I programs with men's football teams present special problems because they are permitted to use 85 grants-in-aid for their football teams, a number that is exceedingly difficult to counter-balance, under current NCAA rules, with its limitations on grants-in-aid permitted to women's teams at the Division I level.²⁰⁵ Even though these efforts to achieve economic equity in terms of grants-in-aid dollars are of recent origin, institutions that are trying to achieve such equity are struggling to find the dollars necessary to fund the new grants and to provide enough women's sports to achieve this balance.²⁰⁶

Our proposal would potentially increase the number of grants in men's football and basketball, thereby exacerbating the existing imbalance in funding

²⁰² See, B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L.J. 273, 275-278.

²⁰³ *Id.* at 273.

²⁰⁴ *Id.* at 278.

²⁰⁵ *Id.* at 278-79.

²⁰⁶ *Id.*

between men's and women's grants-in-aid. Indeed, Professor George draws attention to a proposal that would "decrease the number of football scholarships (from eighty-five to seventy-five), while increasing the number of scholarships for some women's sports."²⁰⁷ This new wave of efforts to equalize grants-in-aid, therefore, would seem to be the death knell for our proposal.

However, this may not be the case. In *Smith v. National Collegiate Athletic Association*,²⁰⁸ the Supreme Court recently held that the NCAA is not subject to the requirements of Title IX on the ground that it receives dues from its members which receive federal financial assistance.²⁰⁹ This holding is less expansive than it would appear to be at first blush. Public, and perhaps even some private, institutions in the NCAA are subject to the strictures of Title IX, including any decisions that may be rendered in terms of equity in grants-in-aid dollars provided to men and women student-athletes. Thus, in effect, all the *Smith* decision does is insulate the NCAA by requiring that plaintiffs bring actions against individual institutions rather than seeking association-wide relief.

There is another legal defense that may be available to the NCAA. If it recognizes that it is compensating its athletes in revenue-producing sports at a different level than athletes in nonrevenue-producing sports, it could argue that Title IX does not apply. In this regard, there are two senses in which the economic equity requirements of Title IX might not apply to our proposals and revenue-producing sports generally: 1) Since the revenue-producing requirement is, on its face, gender neutral – women's sports that are revenue-producing could be included under our proposal at limited cost, if the critical criterion is revenue production and not gender (i.e., the regulation is gender-neutral and is not a pretext for disadvantaging women) -- Title IX would not apply;²¹⁰ and 2) Even if Title IX did apply generally, this is really an equal pay for equal work claim, like that of women coaches who have challenged the differential in compensation between themselves and coaches in men's sports.

If plaintiffs are unable to obtain relief under Title IX, they would be required to seek equity in grants-in-aid and related economic support under the Equal Pay Act of 1963.²¹¹ If they could establish unequal pay, they would not be left without any recourse. This would seem to be the more appropriate legal

²⁰⁷ *Id.* at 282.

²⁰⁸ 525 U.S. 459, 119 S. Ct. 924 (1999).

²⁰⁹ *Id.* at 462.

²¹⁰ A far more questionable yet somewhat related claim might be made. It could be contended that women are permitted to participate in big-time men's football and basketball, but simply have not yet demonstrated the talent necessary to play at the highly competitive level. They have rather created a separate athletic system, that is the sole enclave of women. Women are, nevertheless, permitted to play men's sports. This is not even a "separate but equal" system, since women may play on the men's team, but not vice versa. We do not support such a claim, because it has a potential, if accepted, to set back some of the momentous strides that have been made to increase athletic opportunities for women.

²¹¹ 29 U.S.C. § 206(d)(1) provides, in pertinent part, that a plaintiff must prove that an employer is paying different wages to employees of the opposite sex for equal work.

doctrine, because the issue is really one of equal pay for equal work. The Act would require that the plaintiff establish that she is receiving "different wages . . . for equal work." Women coaches have had difficulty establishing that they are engaged in "equal work," when compared to male coaches in revenue-producing sports. For example, in *Stanley v. University of Southern California*,²¹² the court held that Coach Stanley (the women's basketball coach) failed to offer proof that contradicted the evidence proffered by the University, which demonstrated that Coach Raveling (the men's basketball coach) had different responsibilities. The court elaborated on its holding:

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. These efforts resulted in revenue that is 90 times greater than the revenue generated by the women's basketball team. 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. Coach Stanley's position as head coach did not require her to engage in the same intense level of *promotional and revenue-raising activities*. This quantitative dissimilarity in responsibilities justifies a different level of pay for the head coach of the women's basketball team.²¹³

The distinctions between men and women coaches in Division I basketball, particularly in terms of revenue-production and media attention, would carry over to student-athletes in men's and women's basketball at that level as well. At the time when revenue production became similar, of course, equal pay would be due, but that is certainly not the case in the vast majority of men's and women's basketball programs at the Division I level. Men's and women's basketball at the Division I level generally occupy very different niches in the market, and those differences should be relevant in compensating student-athletes.

If these legal distinctions based on revenue production do not save our grants-in-aid and stipends proposals from gender equity objections, the NCAA could seek a limited or conditional legislative exemption from the strictures of Title IX. When Title IX was adopted, the NCAA and many of its member institutions endeavored to lobby Congress to obtain an exemption, particularly for men's football, from Title IX.²¹⁴ While this exemption effort has been unsuccessful in the past,²¹⁵ there are strong arguments in support of recognizing at least a conditional exemption.

To begin with, the situation is much different today, in terms of equity for women than it was at the time when such an exemption was originally sought.

²¹² 13 F.3d 1313 (9th Cir. 1994).

²¹³ *Id.* at 1321 (emphasis added).

²¹⁴ Deborah Brake and Elizabeth Catline, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE JOURNAL OF GENDER LAW & POLICY 51 (1996) (citing S. 1539, 93d Cong., 2d Sess. Section 536 (1974)).

²¹⁵ *Id.*

Much progress has been made in terms of gender equity in intercollegiate athletics and steps have been taken to solidify those gains. Indeed, those very strides have largely been funded at the Division I level by men's basketball and football, the revenue-producing sports. If the economic pressure from gender equity claims places undue economic demands on the current system, efforts to dismantle intercollegiate athletics may gain momentum, harming female as well as male athletes.

Racial equity claims also counter-balance gender equity claims in this area. This article has focused in some measure on economic and educational inequities suffered by student-athletes in Division I men's basketball and football.²¹⁶ The current system of gender equity itself raises some internal questions regarding racial equity for women athletes of color:

African-American women athletes, like their male counterparts, largely have not gained access to all intercollegiate women's sports and are concentrated in two sports: basketball and track. This possible lack of access to other sports (e.g., tennis, golf, swimming) on the part of male and female athletes of color is significant. Donna Lopiano notes that 81 percent of African-American women athletes at the intercollegiate level participate in track or basketball, and concludes that, "[t]he race question - How do you get minority athletes the opportunities to participate in all sports? - is just as important as the gender question." These disparities imply serious inequities.²¹⁷

Adding additional women's sports, in which women athletes of color have not historically participated perhaps for the simple reason that they may lack the resources to have participated in those sports when younger, only compounds problems of racial inequity. Sadly, those advocating the addition of women's sports do not deal directly with racial inequities, for male and female athletes of color, that should be addressed in determining whether to add additional sports and which sports should be added. When exemption arguments were made in the past, these concerns were not raised. Today, they undoubtedly would be, and their existence might temper some of the enthusiasm for gender equity in the form of providing funds for an equal number of grants and stipends for women athletes in nonrevenue-producing programs.

Finally, the same market arguments raised in an equal pay case could be reiterated before Congress by those seeking an exemption. They could seek an exemption for the limited purpose of insuring that dollars generated by revenue-producing sports receive some protection, particularly in light of the academic and economic needs of many of the male athletes potentially protected by the exemption. If the exemption were designed to offer a modicum of protection to student-athletes in the revenue-producing sports, the exemption would also protect women's sports that produce revenue, now or in the future. They would be treated equally. As such, it would, at least on its face, be gender-neutral.

²¹⁶ See discussion of this racial inequity *supra* notes 17-43. See also Smith, *supra* note 9.

²¹⁷ Smith, *supra* note 9, at 350.

If the NCAA were to seek such a limited exemption for revenue-producing sports, we also recommend that the exemption be conditioned on the individual members of the NCAA meeting their obligation to educate and, ultimately, graduate the student-athletes involved in generating those revenues. It could, for example, require institutions to graduate their student-athletes in the revenue-producing sports at a certain level (e.g., 50% in basketball or at a rate equal to the graduation rate of the general student body), in order to be able to assert the exemption from the strictures of Title IX. In other words, in order to assert an exemption in a review by the Office of Civil Rights, the institution would have to prove that it was graduating its student-athletes in revenue-producing sports at that given level. If they failed to meet the graduation requirement, they would be precluded from asserting the Title IX exemption. Such a conditional exemption, tied to graduation rates, has the added benefit of addressing both issues of academic and educational inequity that have been discussed throughout this article. Clearly, such a conditional limitation would put pressure on institutions (presidents, coaches and athletic administrators) that are not meeting their educational obligations to student-athletes in revenue-producing sports.

As was the case with Professor Gopelrud's stipend recommendation, our stipend will raise some legal issues. Stipends will be taxable as income to qualifying student-athletes, because that is what they are. Additionally, where compensation in the form of grants or stipends is received, such compensation may support arguments that these student-athletes are due worker's compensation. While it might be argued that the appropriate payment is a continuation of the scholarship, for such purposes, even if institutions are held responsible under workers compensation law, the cost will hardly be prohibitive, and they can be covered like other part-time employees at the institution. There may be other legal problems related to a formal recognition of compensation for student-athletes, but the institutions are already doing so much that it is undoubtedly just a matter of time until such legal requirements are enforced against them. Institutions, of course, may also seek exemptions from such laws.

In short, our proposals are viable. If the membership of Division I in the NCAA is serious about addressing academic values and economic inequities, we have provided them with the means of doing so, a means intended to build practically and reasonably upon existing economic, structural and educational issues of concern to the membership of the NCAA.

V. CONCLUSION

By focusing on balancing academic values and economic equity with a realistic recognition that "big-time" revenue-producing sports, particularly men's basketball and football, are here to stay, we have developed a model that could do much to deal with problems of economic inequity and the apparent slippage in educational values plaguing such athletics. While our proposals recognize

the reality of the commercialization of intercollegiate athletics,²¹⁸ at least insofar as revenue-producing sports are concerned, they are also designed to deal directly with claims of educational and economic inequity that have been raised by student-athletes and proponents of a professionalization of “big-time” intercollegiate athletics. We have also dealt with major problems - funding and Title IX - that might render our proposals impractical or unlawful. None of those problems, however, proved fatal. Thus, while we acknowledge that our proposals may need refinement, they do provide the basis of a game plan that could lead to success on the playing field and in the classroom. The only question remaining is whether the membership of the NCAA has the will to do what they already know to be right, to ensure that academic values and economic equity prevail in the operation of “big-time,” revenue-producing intercollegiate athletics.

²¹⁸ As noted on pages 30-33, recognizing this need for further compensation of student-athletes in revenue-producing sports may leave little vitality in the pure amateurism value at that level. Indeed, as Sack and Staurowsky so ably document, there is little left of the amateurism value at this level of competition anyway.

APPENDIX

Table 1. Total Cost of Attendance

<u>Big Ten</u>	<u>Tuition & Fees</u>	<u>Books & Supplies</u>	<u>Room & Board</u>	<u>Total</u>	<u>Personal Expenses</u>	<u>Total</u>
Illinois	\$5,020	\$740	\$5,844	\$11,604	\$2,060	\$13,664
non-resident	\$12,468	\$740	\$5,844	\$19,052	\$2,060	\$21,112
Indiana	\$4,652	\$692	\$5,492	\$10,836	\$2,240	\$13,076
non-resident	\$13,360	\$692	\$5,492	\$19,544	\$2,260	\$22,164
Iowa	\$3,204	\$840	\$4,594	\$8,638	\$3,120	\$11,758
non-resident	\$10,966	\$840	\$4,594	\$16,400	\$3,120	\$19,520
Michigan	\$6,526	\$700	\$5,810	\$13,036	\$1,944	\$14,980
non-resident	\$20,356	\$700	\$5,810	\$26,866	\$1,944	\$28,810
Michigan St.	\$5,043	\$716	\$4,298	\$10,057	\$1,437	\$11,494
non-resident	\$12,446	\$716	\$4,298	\$17,460	\$1,437	\$18,897
Minnesota	\$4,649	\$729	\$4,670	\$10,048	\$2,193	\$12,241
non-resident	\$12,790	\$729	\$4,670	\$18,189	\$2,193	\$20,382
Northwestern	\$24,648	\$1,128	\$7,320	\$33,096	\$1,380	\$34,476
non-resident	\$24,648	\$1,128	\$7,320	\$33,096	\$1,380	\$34,476
Ohio State	\$4,137	\$720	\$5,446	\$10,303	\$2,598	\$12,901
non-resident	\$12,087	\$720	\$5,446	\$18,253	\$2,598	\$20,851
Penn State	\$6,436	\$656	\$4,698	\$11,790	\$2,394	\$14,184
non-resident	\$13,542	\$656	\$4,698	\$18,896	\$2,394	\$21,290
Purdue	\$3,872	\$750	\$5,600	\$10,222	\$1,390	\$11,612
non-resident	\$12,904	\$750	\$5,600	\$19,254	\$1,470	\$20,724
Wisconsin	\$3,650	\$660	\$5,250	\$9,560	\$1,890	\$11,450
non-resident	\$12,400	\$660	\$5,250	\$18,310	\$1,890	\$20,200
Total	\$71,836	\$8,331	\$59,022	\$139,190	\$22,646	\$161,836
non-resident	\$157,967	\$8,331	\$59,022	\$225,320	\$23,106	\$248,426

SEC	<u>Tuition & Fees</u>	<u>Books & Supplies</u>	<u>Room & Board</u>	<u>Total</u>	<u>Personal Expenses</u>	<u>Total</u>
Alabama	\$2,872	\$700	\$4,324	\$7,896	\$3,254	\$11,150
non-resident	\$7,722	\$700	\$4,324	\$12,746	\$3,588	\$16,334
Arkansas	\$3,707	\$800	\$4,453	\$8,960	\$2,200	\$11,160
non-resident	\$8,691	\$800	\$4,453	\$13,944	\$2,200	\$16,144
Auburn	\$2,976	\$900	\$5,187	\$9,063	\$2,190	\$11,253
non-resident	\$8,766	\$900	\$5,187	\$14,853	\$2,302	\$17,155
Florida	\$3,230	\$700	\$5,040	\$8,970	\$1,590	\$10,560
non-resident	\$10,220	\$700	\$5,040	\$15,960	\$1,590	\$17,550
Georgia	\$3,276	\$610	\$5,770	\$9,656	\$1,824	\$11,480
non-resident	\$10,794	\$610	\$5,770	\$17,174	\$1,824	\$18,998
Kentucky	\$3,446	\$600	\$3,722	\$7,768	\$2,190	\$9,958
non-resident	\$9,666	\$600	\$3,722	\$13,988	\$2,302	\$16,290
LSU	\$2,711	\$668	\$3,772	\$7,151	\$1,778	\$8,929
non-resident	\$6,311	\$668	\$3,772	\$10,751	\$2,446	\$13,197
Mississippi	\$3,054	\$750	\$5,060	\$8,864	\$2,000	\$10,864
non-resident	\$7,006	\$750	\$5,060	\$12,816	\$2,000	\$14,816
Mississippi St.	\$3,017	\$600	\$5,135	\$8,752	\$1,799	\$10,551
non-resident	\$6,965	\$600	\$5,135	\$12,700	\$1,799	\$14,499
South Carolina	\$3,358	\$600	\$3,940	\$7,898	\$2,190	\$10,088
non-resident	\$7,884	\$600	\$3,940	\$12,424	\$2,302	\$14,726
Tennessee	\$3,234	\$1,028	\$4,214	\$8,476	\$4,152	\$12,628
non-resident	\$9,534	\$1,028	\$4,214	\$14,776	\$4,152	\$18,928
Vanderbilt	\$24,711	\$870	\$8,324	\$33,905	\$1,120	\$35,025
non-resident	\$24,711	\$870	\$8,324	\$33,905	\$1,120	\$35,025
Total	\$56,842	\$8,826	\$58,941	\$124,609	\$26,287	\$150,896
non-resident	\$118,270	\$8,826	\$58,941	\$186,037	\$27,625	\$213,662

Table 2. Average Cost of Attendance for One Year

<u>Big Ten</u>	<u>Tuition & Fees</u>	<u>Books & Supplies</u>	<u>Room & Board</u>	<u>Total</u>	<u>Personal Expenses</u>	<u>Total</u>
Average	\$6,530	\$757	\$5,365	\$12,653	\$2,058	\$14,712
non-resident	\$14,360	\$757	\$5,365	\$20,483	\$2,100	\$22,584

<u>SEC</u>	<u>Tuition & Fees</u>	<u>Books & Supplies</u>	<u>Room & Board</u>	<u>Total</u>	<u>Personal Expenses</u>	<u>Total</u>
Average	\$4,737	\$736	\$4,912	\$10,385	\$2,191	\$12,576
non-resident	\$9,856	\$736	\$4,912	\$15,504	\$2,302	\$17,806

Table 3. Total Cost of Attendance to Graduate – Includes an Estimated Annual Increase in Costs

<u>Big Ten</u>	<u>Graduate in 4 years</u>	<u>Graduate in 5 years</u>	<u>Graduate in 6 years</u>
Illinois	\$58,892	\$75,500	\$92,938
non-resident	\$91,996	\$118,183	\$145,679
Indiana	\$56,359	\$72,253	\$88,942
non-resident	\$95,530	\$122,471	\$150,759
Iowa	\$50,678	\$64,970	\$79,977
non-resident	\$84,134	\$107,861	\$132,774
Michigan	\$64,565	\$82,773	\$101,891
non-resident	\$124,177	\$159,197	\$195,968
Michigan St.	\$49,541	\$63,511	\$78,181
non-resident	\$81,449	\$104,419	\$128,537
Minnesota	\$52,761	\$67,641	\$83,265
non-resident	\$87,849	\$112,624	\$138,638
Northwestern	\$148,596	\$190,502	\$234,503
non-resident	\$148,596	\$190,502	\$234,503
Ohio State	\$55,604	\$71,285	\$87,750
non-resident	\$89,872	\$115,217	\$141,829
Penn State	\$61,135	\$78,376	\$96,479
non-resident	\$91,765	\$117,644	\$144,817
Purdue	\$50,051	\$64,166	\$78,987
non-resident	\$89,322	\$114,512	\$140,961
Wisconsin	\$49,352	\$63,270	\$77,884
non-resident	\$87,066	\$111,620	\$137,402

<u>SEC</u>	<u>Graduate in 4</u>	<u>Graduate in</u>	<u>Graduate in</u>
	<u>years</u>	<u>5 years</u>	<u>6 years</u>
Alabama	\$48,059	\$61,612	\$75,843
non-resident	\$70,403	\$90,257	\$111,104
Arkansas	\$48,101	\$61,666	\$75,909
non-resident	\$69,583	\$89,206	\$109,810
Auburn	\$48,503	\$62,181	\$76,543
non-resident	\$73,942	\$94,795	\$116,691
Florida	\$45,514	\$58,349	\$71,826
non-resident	\$75,643	\$96,975	\$119,374
Georgia	\$49,481	\$63,435	\$78,087
non-resident	\$81,883	\$104,975	\$129,222
Kentucky	\$42,921	\$55,025	\$67,734
non-resident	\$70,213	\$90,014	\$110,805
LSU	\$38,484	\$49,337	\$60,733
non-resident	\$56,881	\$72,922	\$89,765
Mississippi	\$46,824	\$60,029	\$73,894
non-resident	\$63,860	\$81,870	\$100,780
Mississippi St.	\$45,478	\$58,304	\$71,771
non-resident	\$62,492	\$80,115	\$98,619
South Carolina	\$43,480	\$55,742	\$68,617
non-resident	\$63,470	\$81,369	\$100,163
Tennessee	\$54,427	\$69,776	\$85,892
non-resident	\$81,581	\$104,588	\$128,745
Vanderbilt	\$150,962	\$193,535	\$238,237
non-resident	\$150,962	\$193,535	\$238,237

Table 4. Average Total Cost of Attendance to Graduate – Includes an Estimated 5% Annual Increase in Costs

	28% Graduate in 4 Years or Less	61% Graduate in 5 Years or Less	39% Graduate in 6 Years or More
Big Ten	Graduate in 4 years	Graduate in 5 years	Graduate in 6 years
Average	\$63,412	\$81,295	\$100,072
non-resident	\$97,432	\$124,932	\$153,806
<i>Average not including Northwestern</i>			
resident	\$54,894	\$70,374	\$86,629
non-resident	\$92,316	\$118,375	\$145,736
SEC	Graduate in 4 years	Graduate in 5 years	Graduate in 6 years
Average	\$55,186	\$70,749	\$87,091
non-resident	\$76,743	\$98,385	\$121,110
<i>Average not including Vanderbilt</i>			
resident	\$46,479	\$59,587	\$73,350
non-resident	\$69,996	\$89,735	\$110,462