NO SALARY, NO UNION, NO COLLECTIVE BARGAINING: SCHOLARSHIP ATHLETES ARE AN EMPLOYER'S DREAM COME TRUE

*Stephen L. Ukeiley**

---

* J.D. Candidate, 1996, Hofstra University School of Law; B.A., 1993, Rutgers University.

The author is the Editor-in-Chief of the Hofstra Labor Law Journal, and a recipient of the Jonathan Falk Memorial Scholarship for labor law students. Mr. Ukeiley wishes to thank Dorothy, Richard, Scott, and Sara Trueblood Ukeiley for their love and unyielding support which is cherished and always a great source of inspiration. Special thanks must go to Rutgers University Professor Robert Kubey, Ph.D., who has provided invaluable instruction and guidance on conducting research. Thanks are also due to Myc Rosenthal for his friendship and commentary regarding earlier drafts.

I. OVERVIEW

On April 3, 1994, *60 Minutes*[1] televised Leslie Stahl's interview with Sonny Vaccaro, a recruiter for Adidas, on the exploitation of college basketball players.[2] The focus of their discussion, which aired one day before the University of Arkansas captured the 1994 National Collegiate Athletic Association ("NCAA")[3] Men's Basketball Championship,[4] was to

1. *60 Minutes* is a weekly investigative program televised Sunday evenings on the Columbia Broadcasting System [hereinafter CBS] and its local affiliates.

2. *60 Minutes: The Final Four* (CBS television broadcast, Apr. 3, 1994) (transcript p. 4).

3. The NCAA is a private, nonprofit organization that administers, regulates, and enforces the rules regarding student-athletes' involvement in intercollegiate athletics. *See* Lee Goldman, *Sports and Antitrust: Should College Students Be Paid To Play?*, 65 NOTRE DAME L. REV. 206, 209 (1990) (citing *NCAA News*, Aug. 30, 1989, at A1).

4. Douglas Jehl, *Clinton's Doubleheader: Two Cities, Two Sports*, N.Y. TIMES, Apr. 5, 1994, at A14. Arkansas defeated Duke in the 1994 Championship Game by the score of 76-72. *Id.*

Unlike college football, the NCAA annually conducts a three-week 64-team basketball tournament to determine its season's champion. The selected teams, after being seeded and bracketed by the Division I Men's Basketball Committee, compete in the single elimination round-robin that culminates with the Final Four. In 1994, Charlotte, North Carolina, hosted the three-day Final Four. Arizona and Florida were the other semi-finalists. *See* Toni Ginnetti, *Clinton's Title-Game Prediction Comes True*, CHI. SUN TIMES, Apr. 5, 1994, at 89. For a discussion on the amount of money CBS has paid for the right to televise the NCAA Basketball Tournament, see *infra* note 22 and accompanying text.

criticize the lack of compensation and benefits awarded to college athletes.[5] The following is an excerpt from that pre-recorded interview:

> *Mr. Vaccaro*: For every coach in attendance — that's 3,000 or 4,000 coaches — we'll have a gift for everybody Everybody does. That's a perk. That's part of being in the business, and it's expected of you.
> *Ms. Stahl*: And the kids who play the game can't take a thing?[6]
> *Mr Vaccaro*: No. No.
> *Ms. Stahl*: Zero?
> *Mr. Vaccaro*: Zilch.[7]

This interview exemplifies the need for analyzing "to what extent" scholarship athletes are exploited by the NCAA and its member schools.[8]

Although the NCAA annually publishes a 400 page manual that contains the intricate rules and regulations which govern intercollegiate athletics, scholarship athletes have very little say in the formulation and enforcement of these provisions.[9] By contrast, the institutions for which they play are granted a

---

5. *See 60 Minutes: The Final Four*, *supra* note 2, at 4-5.

6. The NCAA Manual prohibits student-athletes from receiving equipment or apparel. The relevant provision, entitled *Other Prohibited Benefits-Athletics Equipment*, states,

> A student-athlete may not accept athletic equipment, supplies, or clothing (e.g., tennis rackets, golf clubs, hockey sticks, balls, shirts) from a manufacturer or commercial enterprise. Such items may be provided to the student-athlete's institution, to be utilized by the institution's team in accordance with accepted practices for issuance and retrieval of athletics equipment.

MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION § 16.12.2.6 (1994) [hereinafter NCAA MANUAL].

7. *60 Minutes: The Final Four*, *supra* note 2, at 4.

8. *See* NCAA MANUAL, *supra* note 6, §§ 3.01.1, 3.1.1, 3.2.3.3 (1994). The NCAA offers five types of memberships: active, conference, affiliated, corresponding, and provisional. NCAA MANUAL, *supra* note 6, § 3.01.1. Accredited colleges, universities, athletics conferences, and associations located within the United States and its territories are eligible for membership. NCAA MANUAL, *supra* note 6, § 3.1.1.

9. NCAA MANUAL, *supra* note 6, § 3.02.31. This section provides active four-year colleges or universities and accredited two-year upper-level collegiate institutions "the right to compete in NCAA championships, *to vote on legislation and other issues before the Association*, and to enjoy other privileges of membership designated in the constitution and bylaws of the Association." NCAA MANUAL, *supra* note 6, § 3.02.31. (emphasis added). *See also* NCAA MANUAL, *supra* note 6, § 21.3.28 (permitting the creation of a 31-member "Student-Athlete Advisory Committee" of which only 12 positions are allocated to Division I student-athletes); *but see* Debra E. Blum, *Showdown on Standards: Fight Over Academic Rules for Athletes Will Dominate NCAA Annual Convention*, CHRON. OF HIGHER EDUC., Dec. 7, 1994, at A37, A40 (estimating that 20 of the 40 proposals to be discussed at the 1995 NCAA Convention addressed the athletes' "welfare"). If passed, one proposal would require member institutions to create advisory boards comprised of

dominant, albeit often unrepresentative, voice. Consequently, scholarship athletes have little recourse against the "arbitrary and capricious decision[s]" of the NCAA and its universities.[10]

In an attempt to equalize this seeming inequity, some authors suggest paying student-athletes their "fair-market value."[11] For revenue producing sports such as football and basketball, this method is warranted because the players' market value clearly exceeds the economic value of the athlete's scholarship, which includes room, board, tuition, books, meal allowances, and other related expenses.[12] Others argue that an athletic scholarship is a binding contract that requires a university to provide a meaningful education in exchange for the student-athlete's commitment to enroll at that institution.[13] However, except for their acknowledgement that collective bargaining may operate as a resourceful negotiation tactic, these commentators have not analyzed the feasibility of granting scholarship athletes the right to select and join a College Players' Union.[14] This article attempts to fill that void by discussing the feasibility and legal ramifications of affording athletes this right.

Payment and perks alone will not eliminate the exploita-

---

student-athletes, while another would allow for consultations between student-athletes and the existing NCAA committee members. *Id.*

10. Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1371 (1989) (comparing the rights of professional athletes to student-athletes); *see* James H. Frey, *College Athletics: Problems of Institutional Control*, SPORT AND HIGHER EDUC., 179, 185-86 (Donald Chu et al. eds., 1985). Frey argues that athletic departments have achieved a greater independence than other university departments because of successful marketing strategies, "operational isolation," and networking. *Id.*

11. *See, e.g.*, Goldman, *supra* note 3, at 208. Professor Goldman specifies that only revenue-generating athletes are entitled compensation under his fair-market value approach. Goldman, *supra* note 3, at 208 n.22.

12. *See* NCAA MANUAL, *supra* note 6, §§ 15.2-15.2.7.5. This section, entitled *Elements of Financial Aid*, lists the components of a student-athlete's athletic scholarship. The elements include tuition and fees, room and board, employment, and other "outside sources." NCAA MANUAL, *supra* note 6, §§ 15.2-15.2.7.5.

13. Timothy Davis, *An Absence of Good Faith: Defining A University's Educational Obligation To Student-Athletes*, 28 HOUS. L. REV. 743 (1991) (suggesting that the enforcement of academic responsibilities will reinstate educational integrity) [hereinafter *An Absence of Good Faith*]; Robert N. Davis, *The Courts and Athletic Scholarships*, 67 N.D. L. REV. 163 (1991) (stating that a scholarship is an employment contract) [hereinafter *Athletic Scholarships*]; Cozzillio, *supra* note 10, at 1306-07 (arguing that the scholarship is an offer and the National Letter of Intent is the athlete's acceptance).

14. *See* discussion *infra* parts IV, V

tion of student-athletes.[15] For instance, Duke University men's basketball coach Mike Krzyzewski reportedly received a $1 million signing bonus, a $375,000 salary, and company stock options in exchange for having his players wear Nike shoes.[16] While Nike and Coach Krzyzewski benefitted financially from this endorsement, Duke's players received nothing, except the shoes, in return for their participation as "walking advertisements."[17] Dick Devenzio, a former Duke player, commented on the foolishness of the economic restraints that the NCAA clamps on student-athletes, "'You're [college basketball players] about to participate in a $100 million tournament, . . . and you're all willing to do it for nothing.' That wouldn't make much sense to most American capitalists."[18]

Recognizing scholarship athletes as "employees" will have a modest effect on the NCAA and its member institutions' ability to exploit student-athletes.[19] However, providing a salary[20]

---

15. *See* Roger G. Noll, *The Economics of Intercollegiate Sports*, RETHINKING COLLEGE ATHLETICS, 197, 197-98 (Judith Andre & David N. James eds., 1991) (characterizing the NCAA as a "cartel" whose members overlook moral integrity); *see also* Goldman, *supra* note 3, at 208 (arguing that the "NCAA operates as a classic cartel and its amateurism rules constitute antitrust violations.").

16. *60 Minutes: The Final Four*, *supra* note 2, at 3-4. Dean Smith, the head coach at the University of North Carolina, has a "less profitable" agreement with Nike than his Duke counterpart. After agreeing to a four-year $1.2 million deal, the North Carolina coach received a $500,000 signing bonus. *60 Minutes: The Final Four*, *supra* note 2, at 6. However, Coach Smith donates the majority of the salary provided by Nike to his assistant coaches. *60 Minutes: The Final Four*, *supra* note 2, at 6. *See* MURRAY SPERBER, COLLEGE SPORTS INC.. THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY 184 (1990). In the past six years, the value of "shoe deals" have more than doubled. For example, in 1989, Nike signed John Thompson of Georgetown for $200,000, University of Kentucky's Eddie Sutton for $160,000, and Syracuse's Jim Boeheim for $120,000. *Id.*

17. *See 60 Minutes: The Final Four*, *supra* note 2, at 4; *see also* SPERBER, *supra* note 16, at 185 (criticizing coaches who force their players to wear a specific company's equipment or apparel because the NCAA prevents student-athletes from receiving a share of endorsement profits). *See also Sidelines*, CHRON. OF HIGHER EDUC., May 4, 1994, at A42. The "shoe deals" are no longer restricted to coaches. Nike recently reached an agreement with two associate professors at the University of St. Thomas (Minn.) to determine the influence of academicians on students' "buying habits." *Id.*

18. *60 Minutes: The Final Four*, *supra* note 2, at 5. For years, Dick Devenzio has been outspoken about protecting the rights of college athletes. Hoping to convince the NCAA to pay student-athletes, Devenzio has unsuccessfully attempted to unionize college players, has provided "green cards" redeemable for $100 upon graduation, and has sought to organize a boycott of the Rose Bowl. Debra E. Blum, *The Undaunted 'Kook': An Agitator for Athletes' Rights Finds His Ideas May Be Gaining Experience*, CHRON. OF HIGHER EDUC., Apr. 13, 1994, at A33.

19. *See* John J. MacAloon, *Memory, Attention, and the Communities of Sport*, *in* RETHINKING COLLEGE ATHLETICS, 223, 235-36 (Judith Andre & David N. James eds., 1991)

and a few protected rights[21] will not adequately recompense scholarship athletes for their inability to voice an opinion within a billion dollar industry that has profited from their services.[22] Accordingly, it is imperative to level the playing field by recognizing Division I-A scholarship athletes as employees under the National Labor Relations Act ("NLRA" or "Act").[23] Once recognized, scholarship athletes who compete in "revenue generating" sports[24] will have the option of selecting

---

(suggesting that the lack of job security motivates college coaches to exploit their athletes).

20. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1988 & Supp. V 1994). Section 206(a)(1) raised the minimum wage for employees engaged in commerce, homeworkers in Puerto Rico and the Virgin Islands, employees in American Samoa, seamen on American vessels, and agricultural employees to $4.25 an hour. *Id.* § 206(a)(1).

21. Section 207(a)(1) of the Fair Labor Standards Act provides, in pertinent part:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate . .

Id. § 207(a)(1).

22. *See* Steve Zipay, *CBS Pays $1.725B for NCAA Tourney*, NEWSDAY, Dec. 7, 1994, at 72. CBS recently paid $1.75 billion for the exclusive rights to televise the NCAA's annual 64-team college basketball tournament through the year 2002. *Id.* The previous deal negotiated between the parties was for $1 billion over six years. *Id.*

23. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)). The NLRA defines "employee" as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any person who is not an employer as herein defined.

Id. § 152(3).

24. This article specifically addresses the concerns and rights of scholarship athletes participating in the "revenue generating" or "big money" Division I-A college sports, i.e., football and men's basketball. Restricting its scope in this manner does not suggest or imply that the players of other intercollegiate sports, such as soccer, lacrosse, tennis, and ice hockey, etc., are treated any differently than their "big money" counterparts. However, an accurate description of the distinguishing characteristics that exist between the various intercollegiate sports, specifically the examination of the lack of revenue generated by some sports in comparison to others and its impact on the employment status of scholarship athletes with respect to Title IX is deserving of an article unto itself.

an exclusive collective bargaining representative, if they so choose,[25] that will negotiate the terms and working conditions of their participation.[26]

II. INTRODUCTION

Providing scholarship athletes an opportunity to collectively bargain with the NCAA and its member institutions poses immediate concerns. After all, aren't scholarship athletes "primarily students" who have been given the opportunity to obtain a free education in exchange for playing intercollegiate athletics?[27] Although the experience and excitement of travelling nationwide to compete before sold-out stadiums and arenas is unparalleled, student-athletes are required to relinquish many of the freedoms and privileges enjoyed by their classmates.[28] For example, scholarship athletes may not seek employment during the academic semester because the income acquired from an outside position is deducted from the student's financial aid, which is limited to the combined costs of tuition and fees, room and board, and course-related books.[29]

Unfortunately, the NCAA and its member schools are in complete control of the "business" ironically named intercollegiate athletics, and as a result, the athletes' interests are secondary to the schools' all-out pursuit for revenue and

---

25. National Labor Relations Act, 29 U.S.C. § 157 (1988). The 1947 Taft-Hartley amendments provide employees defined within the Act the option of refraining from implementing their § 7 employee rights. *See id.*

26. Section 159(a) of the NLRA requires the employees' representatives to collectively bargain over wages, hours, and other working conditions for all of the employees within the unit. The section provides in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

Id. § 159(a).

27. *But see* Derek Q. Johnson, Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 105 (1985) (suggesting that many athletes are in college because of their athletic abilities).

28. *See* NCAA MANUAL, *supra* note 6, §§ 15.02.5.1, 15.1.1(a).

29. NCAA MANUAL, *supra* note 6, § 15.1.1(a). Similar restrictions prohibiting students from obtaining employment are not imposed upon the general student body. *See* Dan Dieffenbach, *THE GRADUATE*, SPORT, Mar. 1995, at 89 (questioning whether the "minimal spending money on the road," the inability to work during the academic year, and the demanding time commitments justify paying student-athletes).

championships.[30] Numerous incidents throughout the early 1990's illustrate the NCAA's disregard for the rights of scholarship athletes. For example, Bryan Fortay, a former student-athlete at the University of Miami, sued the Florida school after losing the starting quarterback job allegedly promised to him by then head coach Dennis Erickson.[31] The lawsuit received a significant amount of media coverage;[32] however, a Pell Grant Scandal that implicated ninety-one Miami athletes, including Fortay, remained relatively unreported.[33] Fortay, who was questioned by the Federal Bureau of Investigation without legal counsel, avoided prosecution by returning the illegally obtained funds and agreeing to enter a diversion program.[34]

Describing the absurdity of the situation, the district court wrote, "The fact that Fortay's story has transmogrified into a

---

30. *See* Harvey Araton, *Seton Hall: Blame and Shame*, N.Y. TIMES, Jan. 25, 1995, at B9. P.J. Carlesimo, former head basketball coach at Seton Hall University, defended his successor's decision to recruit and offer an athletic scholarship to a high school player facing sexual abuse charges, "'The only reason these kids are in the school is to play basketball.' Well, yeah, that's what we do. The only reason we recruit every kid is because they play basketball." *Id.* However, ten days after the player pleaded guilty, Seton Hall's Chancellor announced that the private university would not admit the player. *See* discussion *infra* notes 84-85 and accompanying text.

31. Fortay v. University of Miami, 1994 WL 62319, at *2, *4 (D. N.J. Feb. 17, 1994) (transferring the case to the Southern District of Florida). Fortay claims that he agreed to attend the University of Miami in 1988 because members of then head coach Jimmy Johnson's staff promised that he would be the team's quarterback. *Id.* at *4. According to Fortay, after Johnson left to take a similar position with the Dallas Cowboys, Dennis Erickson, Johnson's replacement, convinced the New Jersey native to remain matriculated at the Florida school because Fortay was going to be the Hurricanes starting quarterback "for at least two years." *Id.* However, in 1991, Erickson named Gino Torretta the Hurricane's starting quarterback, and he subsequently led the team to the national championship. *Id.* at *5; *see* Rick Reilly, *See You in Court*, SPORTS ILLUSTRATED, Aug. 30, 1993, at 112.

32. *See e.g.*, William F. Reed, *Plaintive Plaintiff*, SPORTS ILLUSTRATED, Nov. 22, 1993, at 74 (describing Fortay as the "Non-Player of the Week"); Rick Reilly, *supra* note 31, at 112 (suggesting that Fortay's actions will result in future lawsuits by "scrubs everywhere"); Tim Layden, *Fortay May be Wave of Future*, NEWSDAY, Aug. 30, 1993, at 91 (criticizing Fortay's decision to sue the University of Miami).

33. *Fortay*, 1994 WL 62319, at *3, *5. Tony Russell, then Assistant Director of Athletics at the University of Miami, was investigated for "illegally obtaining the [players'] financial aid." In 1994, he was sentenced to three years in jail after the U.S. Attorney's Office found that he illegally ascertained $220,000. *See Athletics Notes*, CHRON. OF HIGHER EDUC., Apr. 6, 1994, at A54.

34. *Fortay*, 1994 WL 62319 at *3, *5. In the spring of 1990, Fortay transferred to Rutgers University where according to NCAA rules, he was required to sit out the year in addition to losing an additional year of athletic eligibility. *See* NCAA MANUAL, *supra* note 6, § 14.5.1.

twenty-five count civil action . . . reflects the antagonistic elements of modern college sports; . . . student athletes lured to perform in a circus of big money gate receipts, television, and endorsements. . . ."[35]

In a less publicized incident, the NCAA prohibited a Denver delicatessen from selling "Rashaan salami" sandwiches, named after the 1994 Heisman Trophy winner Rashaan Salaam.[36] The NCAA precluded the sale of the item because of its rule that "a student-athlete's name may not be used for commercial gain."[37] This "right" is apparently reserved for the universities who are responsible for scheduling and approving their student-athletes' public appearances.[38]

Finally, Garrick Thomas, a member of the University of Pittsburgh basketball team, was surprisingly suspended for one game[39] after attending a Pittsburgh Pirates' baseball game with a twelve year-old girl.[40] The NCAA upheld Thomas' suspension despite the fact that the girl's father was reimbursed for the tickets he had provided.[41]

Examples such as these illustrate the need for allowing scholarship athletes to designate a collective bargaining representative.[42] However, before this determination can be made, two requirements must first be substantiated. First, it must be shown that the athletic scholarship creates an employment relationship between the University and its student-athletes.[43]

---

35. *Fortay*, 1994 WL 62319, at *1.

36. Ivan Maisel, *Runaway Buffalo: Colorado's Salaam is Setting a Heisman Pace*, NEWSDAY, Oct. 29, 1994, at A40. The Heisman Trophy is awarded to the best collegiate football player. Salaam, a running back from the University of Colorado, was the 1994 recipient of the prestigious award. *See* Ivan Maisel, *The Heisman Trophy 2,000 Yards Ahead; Colorado's Salaam Captures Heisman in a Runaway*, NEWSDAY, Dec. 11, 1994, at 7.

37. *See* Maisel, *Runaway Buffalo: Colorado's Salaam is Setting a Heisman Pace*, *supra* note 36, at A40.

38. *See* NCAA MANUAL, *supra* note 6, § 12.5.1.1(a). The provision requires student-athletes to obtain their athletic director's written approval prior to participating in a "member conference or a noninstitutional charitable, educational or nonprofit agency" event. NCAA MANUAL, *supra* note 6, § 12.5.1.1(a).

39. Neil Best, *In Big East, No Time to Laugh*, NEWSDAY, Dec. 6, 1994, at A56. Thomas missed the Panthers' 1994-95 season opener against the University of Buffalo. *Id.*

40. *Id.*

41. *Id.*

42. National Labor Relations Act, 29 U.S.C. § 159(a) (1988).

43. 29 U.S.C. § 152(2) provides:

The term "employer" includes any person acting as an agent of an employer,

Accordingly, Part III of this article focuses on the scholarship itself and explains why the student's acceptance of an athletic scholarship constitutes an employment relationship. However, recognizing college athletes as employees and requiring the universities to compensate players in exchange for their participation is only the first obstacle to overcome, as not all employees are entitled to collectively bargain over wages, hours and working conditions.[44]

The second determination to be made before scholarship athletes can select a collective bargaining representative is to ensure that their employment relationship comports with the statutory guidelines for union representation as provided in the NLRA and mandated by the federal courts and the National Labor Relations Board ("NLRB" or "Board"). In the private sector, the right to select an exclusive collective bargaining representative is reserved for workers included within the meaning of "employee," as defined by § 2(3) of the NLRA.[45] However, due to the vagueness of the provision which begins, "the term 'employee' shall include any employee, unless the Act states otherwise,"[46] Part IV is devoted to identifying the various kinds of student employment and examining each group's employment status.[47] This section further details why scholarship athletes, unlike their fellow student workers, are employees and deserving of union representation.

Although the NLRA's jurisdiction is restricted to "private" employers and employees,[48] this article does not differentiate between scholarship athletes who are attending private insti-

---

directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Id. § 152(2).

44. *See id.* §§ 152(3), 158(7)(d). In addition to excluding agricultural, confidential, and managerial employees from the definition of employees, the Act and the Board have also precluded independent contractors, agricultural laborers, and supervisors. *Id.* § 152(3).

45. *Id.* § 152(3). For the precise definition of "employee" as specified within the NLRA, *see supra* note 23.

46. 29 U.S.C. § 152(3) (1988).

47. The types of student employment commonly considered are medical interns, Ph.D. candidates, and student cafeteria workers. *See infra* part IV

48. 29 U.S.C. § 152(2)-(3) (1988).

tutions and those enrolled at public universities.[49] Since this distinction involves the determination of an appropriate bargaining unit, a decision that does not have to be made until after the athletes are recognized as employees, the matter is left for future analysis.[50] Lastly, Part V offers viable solutions to many of the collective bargaining issues and concerns that will arise after the NLRB and the federal courts recognize Division I-A scholarship athletes as employees.[51]

III. WHAT CONSTITUTES EMPLOYMENT?

Although a college scholarship is generally regarded as a contractual relationship between an athlete and a school,[52] the

---

49. Since the Act is only applicable to "private employees," student-athletes attending public institutions will remain bound by state employment laws. However, this presents additional concerns because the state legislatures will be influencing the competitive balance of intercollegiate athletics. For example, legislatures that refuse to recognize the state universities' scholarship athletes as public employees will be hindering their schools' recruiting efforts because private institutions, which will be offering its athletes financial compensation, will become more attractive and the economically sound choice for the top recruits.

However, it is worth noting that there have been instances where students attending state universities were found to be "employees" and were entitled to union representation under those states' employment laws. *See, e.g.*, Regents of Univ. of Mich. v. Michigan Employment Relations Comm'n, 204 N.W.2d 218 (Mich. 1973), *rev'g* 195 N.W.2d 875 (1972); *see also* House Officers Ass'n v. University of Nebraska Medical Ctr., 255 N.W.2d 258 (Neb. 1977).

50. *See* LABOR LAW CASES AND MATERIALS 297 (Archibald Cox et al. eds., 1991) [hereinafter LABOR CASES]. There are two basic types of bargaining units: single plant and multiemployer units. A multiemployer bargaining unit arises where employers within an industry "band together to bargain as a group with a single union which represents employees at all of the companies." *Id.* Examples of these units typically include professional sports leagues. However, since a "single plant unit" is presumed, the Board does not have the authority to require a multiemployer bargaining unit where such a unit has not been previously established. *Id.* (citing Metropolitan Life Ins. Co., 156 N.L.R.B. 1408 (1966)); Wyandotte Savings Bank, 245 N.L.R.B. 943 (1979). In other words, the parties must consensually agree to establish a multiemployer unit. LABOR CASES, *supra* note, at 297. As a result, the owners, or the universities, have the option of either "banding together" with the other NCAA institutions or negotiating collective bargaining agreements with the Union on an individual basis. LABOR CASES, *supra* note, at 297.

51. The Taft-Hartley amendments of 1947 significantly altered the appearance of the National Labor Relations Board. Instead of consisting of just three members, the Board was allotted five members in addition to the creation of a general counsel's position. The general counsel's duties include investigating alleged unfair labor practices, issuing complaints, and representing the Board when its decisions are challenged in court. 29 U.S.C § 153(a), (d) (1988).

52. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992), *aff'g in part and rev'g in part*, 740 F. Supp. 1319 (N.D.Ill. 1990); Barile v. University of Va., 441 N.E.2d 608 (Ohio 1981); Gulf S. Conf. v. Boyd, 369 So. 2d 553 (Ala. 1979); Taylor v. Wake Forest

primary reason why scholarship athletes are not considered "employees" of the schools they attend is the Indiana Supreme Court's ruling in *Rensing v. Indiana State University*.[53] In 1976, Fred Rensing, a former collegiate football player, sustained a career-ending injury during a scheduled spring practice that rendered him a quadriplegic.[54] Indiana's highest court concluded that Rensing's athletic scholarship did not create an employment relationship because "there was no intent to enter into an employee-employer relationship at the time the parties entered into the agreement."[55] Although the court acknowledged that there are no fixed guidelines for determining the existence of an employment relationship, it essentially based its decision on the following four factors: (1) intercollegiate athletics is an educational experience;[56] (2) neither Rensing nor Indiana State viewed the scholarship as a substitute for a salary; (3) the athletic scholarship was not taxed; and (4) the University was unable to terminate the relationship.[57] However, recent changes in policy, perception, and the law rebut the court's explanations and question the modern applicability of its decision.[58]

Univ., 191 S.E.2d 379 (N.C. 1972); *see also* Conard v. University of Wash., 834 P.2d 17 (Wash. 1992), *aff'g in part and rev'g in part*, 814 P.2d 1242 (Wash. 1991).

53. 444 N.E.2d 1170 (Ind. 1983); *but see* University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953) (holding that a football player on scholarship who received $50 a month to perform maintenance work on the university's grounds was an employee and entitled to workers' compensation after suffering a disabling injury during football practice). The Colorado Supreme Court reasoned that the student-athlete's job depended upon his playing football, and thus, his football-related injuries were an incident of his employment. *University of Denver*, 257 P.2d at 428.

54. *Rensing*, 444 N.E.2d at 1170. Spring practice consists of 15 practice sessions over a 29-day period. Of the 15 allotted practices, only 10 may include "contact" drills. *See* NCAA MANUAL, *supra* note 6, § 17.7.6(a).

55. *Rensing*, 444 N.E.2d at 1173. This conclusion thus precluded Rensing from receiving workers' compensation. *Id.* at 1172-74.

56. *Id.* at 1174. The court qualified the "educational" exclusion by commenting that if scholarship athletes were employed in a capacity "not integrally connected with the institution's educational program," then they would be considered employees. *Id.* However, the court misapplied this interpretation because football, unlike Physical Education, is not a recognized major, and an athlete's grade-point average is not determined by his or her performance on the playing field. *Id.*

57. *Id.* at 1173-74.

58. *See infra* parts III. A-D.

A. *Intent: Scholarship Athletes Are Not "First and Foremost" Students*

Rensing held that intercollegiate athletics are inherent within a student-athlete's educational experience, and as such, the athletic scholarship does not establish an employment relationship.[59] In support of this statement, NCAA bylaws stipulate that "[m]ember institutions' athletics programs are designed to be an integral part of the educational program and the student-athlete is considered an integral part of the student body . . . ."[60]

However, the results of an anonymous Division I-A College Football Coaches' Poll[61] suggests that the contrary may be true.[62] Although none of the thirteen coaches polled[63] consid-

---

59. *Rensing*, 444 N.E.2d at 1173.

60. NCAA MANUAL, *supra* note 6, § 12.01.2. *But see* discussion *infra* notes 186-89 and accompanying text.

61. The poll, which I conducted this past year, consisted of the following three (3) multiple choice questions:

1. According to "your" views regarding the definition of an employee, would you consider your scholarship players to be both students and employees of the university?
   A. Yes
   B. No
   C. No Opinion
2. In today's era, do you consider the "educational experience" of playing college football the primary purpose and goal of Division I-A football programs?
   A. Yes
   B. No other:
3. Approximately what percentage of your players go on to play some form of professional football after leaving your program?
   A. Under 2%
   B. Under 5%
   C. Under 10%
   D. Other please specify

62. Each of the following institution's coaches received the three question poll and a self-addressed stamped envelope. During the week of October 9, 1994, the following schools (head coach) were listed in the AP Top 25 as selected by the sports writers (*in order*):

1. *University of Florida* (Steve Spurrier), 2. *University of Nebraska* (Tom Osborne), 3. *Pennsylvania State University* (Joe Paterno), 4. *University of Colorado* (Bill McCartney), 5. *University of Michigan* (Gary Moeller), 6. *Auburn University* (Terry Bowden), 7. *Texas A&M University* (R.C. Slocum), 8. *University of Miami, Fl.* (Dennis Erickson), 9. *University of Washington* (Jim Lambright), 10. *University of Alabama* (Gene Stallings), 11. *Florida State University* (Bobby Bowden), 12. *University of Texas* (John MacKovic), 13. *Colorado State University* (Sonny Lubick), 14. *University of Arizona* (Dick Tomey), 15. *University of North Carolina at Chapel Hill* (Mack Brown), 16. *Kansas State University* (Bill Snyder), 17. *University of Notre Dame* (Lou Holtz), 18. *Syracuse University*

ered scholarship athletes to be both students and employees of their respective universities, four coaches (30%) indicated that providing an "educational experience" *was not* the primary purpose of their football programs.[64]

Critics similarly argue that many college athletes are in school for the sole purpose of playing sports and generating revenues.[65] The tremendous payoffs that college programs currently receive for maintaining high standards on the field corroborate this assertion. For example, both Virginia Tech and the University of Texas earned $8.3 million after the schools clashed in the 1996 Sugar Bowl.[66] Similarly, the University of Nebraska and the University of Florida each earned $8.8 million for playing in the Fiesta Bowl.[67] Although the figures are

---

(Paul Pasqualoni), 19. *Virginia Polytechnic Institute & State University* (Frank Beamer), 20. *Washington State University* (Mike Price), 21. *University of Utah* (Ron McBride), 22. *University of Oklahoma* (Gary Gibbs), 23. *University of Wisconsin* (Barry Alvarez), 24. *Boston College* (Dan Henning), and 25. *Duke University* (Fred Goldsmith).

63. Thirteen of the 25 coaches voluntarily responded. The poll was unsolicited and as such, no additional attempts were made to garner responses from the 12 coaches who chose not to participate.

64. The four coaches declined to specifically describe the "primary purposes" of their football programs. Presumably, generating revenue was a main concern. *See* Goldman, supra *note* 3, at 206 (comparing amateur athletics to "commercial products").

65. *Athletic Scholarships*, *supra* note 13, at 164. Following the 1991 NCAA Convention, Davis predicted that the NCAA and its member institutions would restore credibility to the process of higher education. *Athletic Scholarships*, *supra* note 13, at 164.

66. Ivan Maisel, *You Want Normal? Not This Season*, NEWSDAY, Dec. 3, 1995, at 19 [hereinafter *Not This Season*]. The figures nearly doubled last year's $4.2 million Sugar Bowl payoff received by both Florida State and the University of Florida. Ivan Maisel, *Fla. - FSU Rematch Possible in Sugar*, NEWSDAY, Nov. 28, 1994, at A35.

67. *Not This Season*, *supra* note 66, at 19. The estimated payment per team in the remaining 18 bowl games varied from $8.5 million to $100,000. *See Not This Season*, *supra* note 66, at 19. A breakdown of the anticipated revenue generated by each school per bowl demonstrates that being invited to the "more prestigious bowls" is a profitable experience: Rose Bowl ($8.5 million), Orange Bowl ($8.3 million), Sugar Bowl ($8.3 million), Gator Bowl ($3.1 million), Citrus Bowl ($3 million), Cotton Bowl ($2 million), Outback Bowl ($1.5 million), Holiday Bowl ($1.35 million), Peach Bowl ($1 million), Alamo Bowl ($1 million), Sun Bowl ($900,000), Aloha Bowl ($800,000), Carquest Bowl ($750,000), Liberty Bowl ($750,000), Independence Bowl ($750,000), Copper Bowl ($750,000), Las Vegas Bowl ($200,000) and Heritage Bowl ($100,000). *See Not This Season*, *supra* note 66, at 19. It is noted that a conference's bylaws may require a university to share the earnings it receives from a bowl appearance with the other members of its league.

When compared to last year's significantly lower figures, it is apparent that the cost for competing and attracting the best teams in the nation continues to rise. *See Bowl Games: N.C.A.A. Division I-A Football*, CHRON. OF HIGHER EDUC., Dec. 14, 1994, at A38. The financial compensation received by universities for competing in the 1994-95 college bowl games was as follows: Rose Bowl ($6.5 million); Orange Bowl ($4.3 million),

outlandish, they are not surprising considering the increased involvement of corporate sponsors[68] and television[69] within intercollegiate athletics.

The attractiveness of media attention and financial support by corporate institutions has often compromised the educational level of student-athletes.[70] The tragic story of Dexter Manley, a former professional football player with the Washington Redskins and the Phoenix Cardinals, supports this view.[71] In 1986, Manley shocked the sports and academic communities by announcing that he had graduated from Oklahoma State University in spite of being illiterate.[72] Man-

---

Fiesta Bowl ($3 million), Cotton Bowl ($3 million), Citrus Bowl ($2.5 million), Holiday Bowl ($1.7 million), Gator Bowl ($1.5 million), Peach Bowl ($1.13 million), Sun Bowl ($1.1 million), Hall of Fame Bowl ($1 million), Carquest Bowl ($1 million), Aloha Bowl ($750,000.), Alamo Bowl ($750,000), Copper Bowl ($750,000), Freedom Bowl ($750,000), Independence Bowl ($750,000), Liberty Bowl ($750,000), and Las Vegas Bowl ($231,000). *Id.*

68. Nike recently agreed to a seven year contract with the University of Michigan, where the company will provide the University with approximately $1 million a year in shoes, uniforms, and scholarship money in exchange for using the school's logo within its commercials. *Sidelines*, CHRON. OF HIGHER EDUC., Nov. 30, 1994, at A41. Corporate sponsors are also active in the games themselves. For example, each college football Bowl Game is named after the game's primary sponsor. Two such bowls include the USF & G Sugar Bowl and the Mobil Cotton Bowl. Corporations are also building, purchasing, and renaming stadiums and arenas nationwide. For example, the recent additions include: America West Arena (Phoenix), Arco Arena (Sacramento), Delta Center (Salt Lake City), RCA Dome (Indianapolis), and USAir Arena (Landover, Maryland). *See* 16 INT'L SPORT SUMMIT, SPORTBILL, 92, 92-101 (1995).

69. *See* Rudy Martzke, *Around the Dial*, USA TODAY, Oct. 11, 1994, at 3C. The Entertainment & Sport Programming Network [hereinafter ESPN] announced that it anticipated televising 314 college basketball games during the 1994-1995 season. The cable station scheduled 219 games on ESPN and 95 additional contests on ESPN2. *Id.*

70. *See, e.g., Budweiser Sports Report: NFL Spotlight* (BET television broadcast, Oct. 24, 1992) [hereinafter *Budweiser Sports Report*]. Dexter Manley, a former professional football player reflecting on his college days at Oklahoma State University, stated, "I just felt it was a system where football came first . . . Academics was basically on the back burner " *Id. See generally An Absence of Good Faith*, *supra* note 13, at 753 (arguing that both commercialization and an intense pressure to win has resulted in lower academic standards); *see also* Goldman, *supra* note 3, at 210-12 (suggesting that in spite of stringent NCAA rules, Division I-A programs are motivated to "cheat").

71. *See* Dorothy Gilliam, *Dexter Manley Really Needs Us Now*, WASH. POST, Nov. 23, 1989, at C3; *Senate Panel Hears Manley Tell of Learning Disability*, N.Y. TIMES, May 19, 1989, at B17.

72. *Senate Panel Hears Manley Tell of Learning Disability*, *supra* note 71, at B17. In 1986, Manley enrolled at the Washington Lab School, where it was determined that his second-grade reading level was due to an auditory channel problem. Thereafter, the former defensive lineman was banned from the National Football League [hereinafter NFL] for violating the league's substance abuse policy. Gilliam, *supra* note 71, at C3. After being reinstated in 1990, Manley signed a contract with the Phoenix Cardinals. Michael

ley stated during a subsequent television interview, "I think OSU knew all along . . . . They set up your schedule for you, everyone is collaborating together — coaches and faculty . . . I'm sure it's happening today."[73] This raises serious questions and concerns as to how many other athletes have been unjustifiably admitted into college solely on the basis of their athletic talents.[74]

A recent NCAA study revealed that 479 (or four percent) of the first-year athletes who entered college during the fall of 1993 were unable to compete athletically because they were "academically underprepared."[75] According to the NCAA bylaws, these student-athletes, who are referred to as partial qualifiers, either achieved a grade-point average below 2.0 in their eleven high school core classes or obtained a score below 700 on the Scholastic Aptitude Test (or a seventeen on the American College Test), or both.[76] The four percent figure was up one-half percent from the previous year, and there is evidence that the recruitment of "academically underprepared" student-athletes has become the norm.[77]

Wilbon, *Manley Faces Up To New Direction*, WASH. POST, Nov. 24, 1990, at F1. In 1995, Manley's rehabilitation regressed after he was arrested three times within a four-month span for drug-related offenses. *SportsPeople*, N.Y. TIMES, Feb. 21, 1995, at B9. Manley subsequently pleaded guilty to two counts of cocaine possession and received a four year prison sentence. *See Manley Gets 4-Year Jail Sentence*, N.Y. POST, Aug. 5, 1995, at 33.

73. *Budweiser Sports Report*, *supra* note 70.

74. *See, e.g.*, *Ross*, 957 F.2d at 411 (holding that the plaintiff athlete may have stated a valid breach of contract claim against Creighton University). *See also* Allen Guttmann, *The Anomaly of Intercollegiate Athletics*, *in* Rethinking College Athletics, 17, 26 (Judith Andre & David N. James eds., 1991). University of Georgia President Fred Davidson acknowledged that prospective college football and basketball players who answered every question incorrectly on the Scholastic Aptitude Tests [hereinafter SATs] were eligible for athletic scholarships. *Id.* Responding to a question regarding the school's admission policies, Mr. Davidson replied "[w]e have to compete on a level playing field." *Id.* However, University of Georgia athletes for sports other than football and basketball were required to score a combined 650 on the standardized exam. *Id. But see* NCAA MANUAL, *supra* note 6, § 14.01.1. The section entitled *Academic Status* prohibits a student-athlete from participating in intercollegiate athletics unless the athlete is enrolled in a full-time program, is in "good academic standing," and maintains "satisfactory progress" towards a degree. NCAA MANUAL, *supra* note 6, § 14.01.1.

75. Debra E. Blum, *NCAA Study Shows Slight Rise in Enrollment of Academically Underprepared Athletes*, CHRON. OF HIGHER EDUC., Apr. 27, 1994, at A34.

76. *Id.* Although they failed to meet the other academic requirements, partial qualifiers, by definition, must have an overall high school grade-point average of 2.5 or higher. *See* NCAA MANUAL, *supra* note 6, § 14.02.9.2.

77. Blum, *supra* note 75, at A34; *see* Allen Guttmann, *supra* note 74, at 23 (commenting that 150 colleges recruited Chris Washburn to play basketball even though he answered every question incorrectly on the verbal section of the SATs); *see also* NCAA

In 1978, Kevin Ross was offered a basketball scholarship to attend Creighton University in spite of scoring within the bottom fifth percentile nationally on the American College Test.[78] In exchange for his commitment to attend the Nebraska school, the University promised to provide tutoring so that Ross could obtain "a meaningful education."[79] However, four years later, Ross left the school approximately thirty-two credits short of graduating,[80] with a D average, and an overall seventh grade reading level.[81] In 1990, Ross filed an "educational malpractice" suit against the University, which was dismissed by the District Court for the Northern District of Illinois.[82] Although the Seventh Circuit affirmed the dismissal, it remanded the case to the district court to determine if the school breached its contractual duties by failing to provide "sufficient tutoring."[83]

However, not every institution tarnishes its image and reputation by drastically lowering its academic requirements to recruit top athletes. For example, Seton Hall University rejected the application of Richard Parker, a 6-foot 4 1/2-inch basketball recruit,[84] after the high school senior pleaded guilty to first-degree sexual abuse following a January 1994 incident

---

MANUAL, *supra* note 6, § 14.4.3.4.6(d) (providing that first-year athletes may take up to 12 credits of remedial, tutorial, or non-credit courses to comply with the minimum academic requirements).

78. *Ross*, 957 F.2d at 411. In 1978, the average score of incoming first-year Creighton students was within the top 27%. *Id.*

79. *Id.* at 412.

80. *Id.* Ross passed Marksmanship and Theory of Basketball; however, the credits from these courses were not included within his total towards graduation. *Id.* In addition to advising him to take these courses, Ross claims that Creighton athletic officials had a secretary read, prepare, and type his assignments. *Id.*

81. *Id.*

82. *Id.* at 414-15, 417 (primarily because courts do not want to "take on the job of supervising the relationship between colleges and student-athletes . . .").

83. *Id.* at 417. Ross alleged in his complaint that he was unable to benefit from his academic experience because Creighton University reneged on five promises. The five points at issue involved the failure of Creighton University to:

(1) provide adequate and competent tutoring services,
(2) require [Mr. Ross] to attend tutoring sessions,
(3) afford Mr. Ross a reasonable opportunity to take full advantage of tutoring services,
(4) allow Mr. Ross to red-shirt, and
(5) provide funds to allow Mr. Ross to complete his college education

Id. at 415-16.

A verdict was still pending at the time this article was written.

84. Jack Curry, *Athlete Guilty of Felony Rejected by Seton Hall*, N.Y. TIMES, Jan. 24,

at the Manhattan Center.[85] Regardless, it remains a misnomer to describe Division I-A football and basketball programs as part of the educational system because providing an education is secondary on the universities agendas.[86] Paul "Bear" Bryant, the former legendary head football coach at the University of Alabama, once described the priorities of universities and scholarship athletes as follows:

> I used to go along with the idea that football players on scholarship were "student-athletes," which is what the NCAA calls them. Meaning a student first, an athlete second. We were kidding ourselves, trying to make it more palatable to the academicians. We don't have to say that and we shouldn't. At the level we play, the boy is really an athlete first and a student second.[87]

B. Compensation: A Salary or Hourly Wage Is Not Required

The Indiana Supreme Court in *Rensing* also discussed whether an athletic scholarship provided sufficient compensation to constitute employment or if a stated wage was required.[88] Relying upon a circular argument, the Indiana court held that the scholarship was not equivalent to a salary be-

---

1995, at B11. Richard Parker averaged twenty-six points per game during his senior year and was considered to be amongst the nation's top fifty high school seniors. *Id.*

85. *Id.* After his application was rejected, Parker withdrew from his high school team "in the best interests of [his] school, classmates and the team." *Id.* Within two weeks of his announcement, the Board of Education found Parker guilty of "parallel school charges" and ordered him to attend another school. The Board apparently had no choice but to transfer Parker, as New York law requires its school systems to provide an education to all school-age students. *Player Banned From School*, N.Y. TIMES, Feb. 4, 1995, at 30.

In the fall of 1995, Parker enrolled at Mesa Community College in Arizona, with the understanding that he would be prohibited from playing basketball for at least one season. *See* Barry Baum, *Parker To Attend Mesa Despite Hoop Ban*, N.Y. POST, Sept. 1, 1995, at 100. However, Mesa Basketball Coach Rob Standifer shortly thereafter was forced to resign following three weeks of intense public criticism regarding the enrollment of Parker. *See* Barry Baum, *Coach Who Wooed Parker Forced Out at Mesa C.C.*, N.Y. POST, Sept. 20, 1995, at 59.

86. *See* Johnson, *supra* note 27, at 106 (commenting that gate receipts, television contracts and alumni contributions are more important to a university than is providing an education).

87. DONALD CHU, THE CHARACTER OF AMERICAN HIGHER EDUCATION AND INTERCOLLEGIATE SPORT 190 (1989).

88. *See Rensing*, 444 N.E.2d at 1173-74 (1983) (holding that scholarship athletes, similar to the recipients of academic scholarships, are compensated for previously demonstrated abilities in a specific area; therefore, the scholarship should not be considered pay or income).

cause NCAA rules, which prohibit student-athletes from receiving "pay," permit athletic scholarships.[89] Accordingly, the court reasoned that if a scholarship was equivalent to "taking pay," then the NCAA would have investigated and taken action against the University or Rensing.[90] Although the court was correct in its assertion that student-athletes are not allowed to accept salaries, it mistakenly used the NCAA's definition of "salary" as the standard for resolving the dispute.[91]

Two years after the decision, the United States Supreme Court effectively neutralized part of the holding in *Rensing* with its decision in *Alamo Foundation v. Secretary of Labor*.[92] In *Alamo Foundation*, the Court held that workers for a nonprofit religious organization who received "food, shelter, clothing, transportation and medical benefits," as opposed to a salary or a hourly wage, were employees under the Fair Labor Standards Act.[93] After applying the "economic reality test" to determine the existence of an employment relationship,[94] the Court reasoned that the workers were employees because the employer was expected to regularly provide these benefits.[95] The Court considered the benefits, although not distributed in the form of a paycheck, to be wages, and thus held that the associates were employees.[96]

---

89. *Id.* at 1173; *see* NCAA MANUAL, supra note 6, § 16.01.1.

90. *Rensing*, 444 N.E.2d at 1173. The court stated, "Rensing was given free tuition, room, board, laboratory fees and a book allowance. These benefits were not considered to be pay by the University or by the NCAA since they did not affect Rensing's or the University's eligibility status under NCAA rules." *Id. But see* Coleman v. Western Michigan Univ., 336 N.W.2d 224, 226 (Mich. 1983) (concluding that a scholarship was equivalent to wages).

91. *Rensing*, 444 N.E.2d at 1173.

92. 471 U.S. 290 (1985).

93. *Id.* at 293, 303-04, 306. *See* Fair Labor Standards Act, 29 U.S.C. § 203(m). Section 203(m) provides, "'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees . . . " *Id.*

94. *Alamo Found.*, 471 U.S. at 293-94 (citing Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961) *rev'g* Mitchell v. Whitaker House Coop., 364 U.S. 861 (1960)). In *Goldberg*, the Supreme Court applied the "economic reality" test to determine that homeworkers were employees. *Goldberg*, 366 U.S. at 33. The Court reasoned, "The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management, in other words, can hire or fire the homeworkers." *Id.* For the provisions of the economic reality test, see *infra* text accompanying note 98.

95. *Alamo Found.*, 471 U.S. at 293.

96. *Id.* (citation omitted).

In *Watson v. Graves*,[97] the Fifth Circuit expressly delineated the four prongs of the "economic reality" test utilized in *Alamo Foundation*: for an employment relationship to exist, the employer must possess the ability to (1) hire and fire employees; (2) plan work schedules; (3) determine employees' wages; and (4) maintain employment records.[98] After applying these four factors, the *Watson* court concluded that two inmates who had been working outside the prison grounds in conjunction with their work release programs were employees.[99] The facts revealed that the hiring contractor "not only determined which inmate would work for him, but also when, how frequently, how long, and on what projects . . . ."[100] Consequently, the court concluded that an employment relationship existed between the inmates and the contractor, and as a result, the inmates were employees under the Fair Labor Standards Act.[101]

Many of the same factors used to justify the existence of the employment relationships in *Alamo Foundation* and *Watson* are also present in the relationship between scholarship athletes and the NCAA institutions. For example, a university has the ability to select scholarship recipients, terminate the scholarships of those student-athletes who engage in "serious misconduct,"[102] determine the length of practices,[103] and design the team's game and travel plans. Moreover, the scholar-

---

97. 909 F.2d 1549 (5th Cir. 1990).

98. *Id.* at 1553-54.

99. *Id.* at 1551, 1554-55. The County Sheriff's daughter and son-in-law hired the two inmates and sometimes required them to work 13-hour days in exchange for the fixed rate of $20. *Id.* at 1551. The inmates brought suit, attempting to achieve employment status so that they would be entitled to receive minimum wage and overtime pay. *Id.* at 1551, 1557.

100. *Id.* at 1554-55. Although the Sheriff, as opposed to the employer, determined the inmate's pay rate of $20 per day, the court avoided this issue because the compensation was a "flat rate." Thus, the court reasoned that the rate was "left to the discretion" of the contractor because no negotiations had taken place. *Id.* at 1555 n.11. Additionally, although neither party documented the employment, the court ruled that the fourth-prong of the economic reality test, maintaining employment records, was not determinative. *Id.* at 1555.

101. *Id.* at 1556.

102. *See* NCAA MANUAL, *supra* note 6, § 15.3.4.1(c).

103. However, a college football team is permitted a maximum of 29 preseason practice opportunities. A "practice opportunity" is defined in the NCAA Manual as:

> [O]ne for each day beginning with the opening of classes, one for each day classes are not in session in the week of the first scheduled intercollegiate contest and two for each other day in the preseason practice period except . . . when

ship and the National Letter of Intent represent the necessary written documentation[104] as required by the fourth prong of the economic reality test.[105]

Similar to the employees in *Alamo Foundation*, scholarship athletes also expect to be compensated with items other than a salary or a stated wage. For example, in addition to providing room and board, tuition, and books, institutions offer their athletes extensive medical coverage.[106] Included within the twelve-item list of medical expenses that a school may provide are the following expenditures:

1) medical insurance;
2) drug-rehabilitation;
3) counseling for eating disorders;
4) contact lenses and other eyewear necessary to compete athletically;
5) medical examinations;
6) required surgical expenses after sustaining an injury while participating in "activities that will prepare the student-athlete for competition"; and
7) preseason dental examinations when "conducted in conjunction" with the preseason physical.[107]

---

all institution dormitories are closed and the institution's team must leave campus and practice is not conducted.

NCAA MANUAL, *supra* note 6, § 17.02.13.

104. NCAA MANUAL, *supra* note 6, § 13.02.7. The National Letter of Intent is "the official document administered by the Collegiate Commissioners Association and utilized by subscribing member institutions to establish the commitment of a prospect to attend a particular institution." NCAA MANUAL, *supra* note 6, § 13.02.7. In addition to the National Letter of Intent, student-athletes are required to submit an annual statement detailing their eligibility, recruitment, financial aid status, and gambling activities. NCAA MANUAL, *supra* note 6, § 14.1.3.1.

105. *Watson*, 909 F.2d at 1553.

106. NCAA MANUAL, *supra* note 6, § 16.4.1.

107. NCAA MANUAL, *supra* note 6, § 16.4.1. The remaining five permitted expenditures are as follows:

1) death and dismemberment insurance for travel;
2) individual expenses resulting from a permanent disability that precludes future athletic participation;
3) medical treatment expenses resulting from an athletic injury;
4) medication and physical therapy required to compete athletically regardless of the cause; and
5) medication and physical therapy required to compete for part-time students.

NCAA MANUAL, *supra* note 6, § 16.4.1.

The Manual expressly characterizes these services as benefits that may be financed by NCAA member institutions. NCAA MANUAL, *supra* note 6, § 16.4.1. It is interesting to note that while all of the above medical expenses are covered within the scholarship, the NCAA prohibits universities from paying medical expenses that result from injuries sustained *"going to or from class"* or *"participating in classroom require-*

In *Alamo Foundation*, the Supreme Court also articulated that the workers' self-perceived status as either "volunteers" or "employees" was not a critical factor in determining the existence of an employment relationship.[108] The Court recognized that the parties were not the only groups to be affected by its decision.[109] Thus, after considering the potential impact on an entire industry, the Court held that the opinion of an affected party, whether a member of management or of the assembly line, was not controlling.[110] As applied to the athletic industry, the coaches' subjective views pertaining to the employment status of their players similarly will be an undeterminative factor in a court's final analysis.[111]

C. *Income: Portions of the Athlete's Scholarship Are Taxed*

The *Rensing* court also concluded that Rensing's acceptance of the scholarship offer from Indiana State University did not create an employment relationship because neither party considered the scholarship to be pay or income.[112] The court reasoned, "Rensing did not consider the benefits [of the scholarship][113] as income as he did not report them for income tax purposes."[114] In other words, if the scholarship does not have to be reported to the Internal Revenue Service, the court does not consider it to be income.[115]

Recent changes in the tax laws have weakened the effectiveness of this argument. Presently, section 117 of the Internal Revenue Code requires athletes to report the room and board portions of their athletic scholarships as taxable in-

---

ments" unless these costs are normally covered by the institution's insurance. NCAA MANUAL, *supra* note 6, § 16.4.2(c) (emphasis added).

108. *See Alamo Found.*, 471 U.S. at 302.

109. *Id.* The Court also realized that if a party's self-perceived status was a critical factor, an employer could coerce employees to testify that they did not view themselves as employees. *Id.*

110. *Id.* at 302.

111. This conclusion is supported by the results of the author's Division I-A poll, which indicated that none of the responding college football coaches considered their scholarship athletes to be employees. *See supra* notes 61-64 and accompanying text.

112. *Rensing*, 444 N.E.2d at 1173.

113. *Id.* Rensing received free tuition, room, board, laboratory fees, and a book allowance as part of his scholarship. *Id.*

114. *Id.*

115. *See id.*

come.[116] Thus, Congress has distinguished room and board (income) from those items, such as tuition and books, which are provided within the athletic scholarship but remain untaxed.

The critical distinction to be made between tuition and housing is that tuition is required for earning a degree. On the other hand, on-campus housing is not an indispensable element of a student's college experience, as is evidenced by the abundance of commuter students who enroll and graduate from institutions of higher learning each year.[117] As a result, the revised tax laws have effectually mandated that dormitory life is no longer inherent within the educational experience because it is taxed and considered to be income.[118] In spite of claims to the contrary,[119] it is clear that Congress no longer considers room and board to be educational. This being so, what can be said about the educational value of participating in intercollegiate athletics? Considering that many athletic officials have already abandoned ranks by publicly stating that the primary goal of intercollegiate athletics is to generate revenue and not to provide an education,[120] consistency dictates that the courts recognize athletic scholarships, at least in part,

---

116. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (amending I.R.C. §117). The revised §117 states, in pertinent part:

> The House bill limits the §117 exclusion for scholarships or fellowship grants . . . (2) to the amount of the scholarship required to be used, and in fact is used, for tuition and course-required fees, books, supplies and equipment ("course-related expenses"). Any other amount of a scholarship or fellowship grant received by a degree candidate (for example, amounts for *room, board or incidental expenses*) is includable in gross income

Id. (emphasis added). *See* Michael B. Tannenbaum, *Taxation of Qualified Scholarships, With a Focus on Athletic Scholarships*, SPORTS LAWYER (Sports Laws. Ass'n), Nov./Dec. 1994, at 1.

117. *See, e.g.*, Stephanie Bushey, *The College Board Annual Survey of Colleges, 1995-96*, §§ 17, 93 (Hofstra University undergraduate survey). The survey indicates that in 1994, 60% of the over 7,500 students at Hofstra University were commuters. *Id.*

118. *See Rensing*, 444 N.E.2d at 1173 (reasoning that since the benefits of the athletic scholarship were not taxable, the scholarship was not income).

119. *See, e.g.*, HOFSTRA UNIV. RESIDENTIAL FACILITIES, HOFSTRA UNIV. RESIDENTIAL LIFE (1994). The pamphlet's opening paragraph states, "At Hofstra University, over 4,000 students have chosen to enrich their college experience by becoming members of our residential community. The Residence Halls provide a comfortable and supportive living environment that complements the challenges of academic life." *Id.*

120. *See, e.g.*, Debra E. Blum, *The Big Scramble*, CHRON. OF HIGHER EDUC., Mar. 16, 1994, at A37. Rex E. Lee, the President of Brigham Young University, describing the state of collegiate athletics, stated, "People would be lying if they told you it [intercollegiate athletics] wasn't about making money and getting on TV Athletics programs are

as income.[121]

D. Termination: A Scholarship May Be Terminated Prior to Graduation

An employer's ability to terminate his or her employees is another condition of a legitimate employment relationship.[122] Thus, NCAA rules imposing restrictions on the university's ability to terminate the scholarships[123] of student-athletes who quit their teams during the athletic season may suggest to some that the athletic scholarship *does not* satisfy the fourth and final factor of the economic reality test.[124]

In spite of this partial limitation, situations exist where the university is permitted to immediately terminate the athlete's scholarship even if the former student-athlete is in "good academic standing."[125] For example, in *Conard v. University of Washington*,[126] the Washington Supreme Court held that the University of Washington had no obligation to renew two former football players' athletic scholarships following their involvement in a series of detrimental incidents.[127] Although the University voluntarily honored both players' scholarships until

---

here to stay because they are good for universities, but . . . in order to stay in the game you have to be able to pay the price." *Id.*

121. *But cf.* NCAA MANUAL, *supra* note 6, § 1.2(a). The section states that one of the functions of the NCAA is, "To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership . . . ." NCAA MANUAL, *supra* note 6, § 1.2(a).

122. *Rensing*, 444 N.E.2d at 1174 (stating that "the ordinary employer's right to discharge on the basis of performance was also missing."); *see also* Fox v. Contract Beverage Packers, 398 N.E.2d 709, 711 (Ind. 1980) (holding that an employee will be found to have multiple employers where the employers establish sufficient control over the employee and the means, manner, and method of his performance).

123. NCAA MANUAL, *supra* note 6, § 15.3.3.1. Section 15.3.3.1 (*Period of Institutional Financial Aid Award — One-Year Limit*) states: "Where a student's athletic ability is taken into consideration in any degree awarding financial aid, such aid shall not be awarded in excess of one academic year." NCAA MANUAL, *supra* note 6, § 15.3.3.1.

124. NCAA MANUAL, *supra* note 6, § 15.3.4.1(d). The provision entitled, *Reduction and Cancellation During Period of Award* provides, "If the recipient withdraws subsequent to the institution's first competition in that sport, the reduction or cancellation [in the recipient's financial aid] shall not occur prior to conclusion of that semester or quarter." NCAA MANUAL, *supra* note 6, § 15.3.4.1(d). *See* Tannenbaum, *supra* note 116, at 3.

125. NCAA MANUAL, *supra* note 6, § 14.02.5. The NCAA permits each institution to define "good academic standing," although their definitions must also comply with applicable NCAA legislation. NCAA MANUAL, *supra* note 6, § 14.02.5.

126. 834 P.2d 17 (Wash. 1992).

127. *Id.* at 19-20, 26. In addition to missing team practices, both players resisted arrest following an altercation outside a California restaurant, attempted to blackmail a

the completion of the academic year,[128] the court based its decision on a specific phrase contained within the athlete's agreements. The agreements required the student-athletes to remain academically eligible in accordance with NCAA and University rules, be in "good standing" at the University, and progress towards graduation.[129] Since the scholarship did not specify that the athletes' scholarships must be renewed upon the fulfillment of these conditions, the University was within its right to reject the players' requests for renewal.[130] Considering that it generally takes four or five years for scholarship athletes to graduate, if they do so at all,[131] the University's ability to allow a scholarship to expire without explanation is equivalent to terminating the relationship. Although this clearly does not suggest an employment at will situation,[132] the

---

female student with compromising photographs, and threatened the physical well-being of a male student. *Id.*

128. *Id.* at 24-25. Presumably, the seriousness of the two players' actions entitled the University to cancel their scholarships immediately. *See* NCAA MANUAL, *supra* note 6, §§ 15.3.4.1(c), 15.3.4.1.2.

129. *Conard*, 834 P.2d at 18. The court held, "[t]his assistance will be *considered for renewal* . . as long as you are a student in good standing, maintain normal progress towards graduation, and are in compliance with all eligibility requirements . . " *Id.* (emphasis added).

130. *Id.* at 21, 26. Moreover, under similar circumstances, such as when an athlete quits the team after having his scholarship renewed but prior to the commencement of the season, the university may *immediately* terminate or reduce the student's scholarship. NCAA MANUAL, *supra* note 6, § 15.3.4.1(a)-(d). However, the student is entitled to a hearing, but the "decision . . . is left to the discretion of the institution . . ." NCAA MANUAL, *supra* note 6, § 15.3.5.1.1.

Section 15.3.4.1 of the NCAA Manual, which was most recently revised in January 1994, expressly provides the University with this authority. The Manual states:

> *Reduction and Cancellation Permitted.* Institutional financial aid based in any degree on athletics ability may be *reduced or canceled during the period of the award* if the recipient:
>
> (a) Renders himself or herself ineligible for intercollegiate competition; or
>
> (b) Fraudulently misrepresents any information on an application, letter of intent or financial aid agreement (see 15.3.4.1.1); or
>
> (c) Engages in serious misconduct warranting substantial disciplinary penalty; (see 15.3.4.1.2), or
>
> (d) Voluntarily withdraws from a sport for personal reasons. If the recipient withdraws from a sport for personal reasons *prior to the institution's first competition in that sport*, reduction or cancellation may occur immediately . . .

NCAA MANUAL, *supra* note 6, § 15.3.4.1(a)-(d) (emphasis added).

131. *See* discussion *infra* notes 188-90 and accompanying text.

132. *See* Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 851 n.4 (1994) (defining employment at will as an employment relationship where either party may terminate the rela-

university may discharge its players where it can demonstrate "just cause."[133] Summarizing the athlete's predicament, Daniel Posin concludes, "[I]n reality . . . to keep his scholarship going from year to year, the recipient must play sports."[134]

In sum, the university's ability to terminate a scholarship provides the remaining element necessary to establish an employment relationship. The student's ability to remain enrolled after the athletic scholarship is terminated further suggests that the scholarship is provided to compensate the athlete and not to facilitate the educational process.[135]

Comparing the similarities of Division I-A intercollegiate athletics and the requirements of an employment relationship in this manner is a positive step towards protecting the rights of scholarship athletes. However, the next hurdle is to convince the NLRB that student-athletes are also employees under § 2(3) of the Act.[136] After examining the employment status of scholarship athletes within the context of previous Board decisions, it is evident that student-athletes should be entitled to select an exclusive collective bargaining representative. They are "such a vital input to the product, the game, that the relationship between the student-athlete and the institution is as much a business relationship as if the student-athlete were [already] considered an employee . . . ."[137]

---

tionship, absent a statutory or contractual clause to the contrary, for cause or without cause); *see also* Lawrence E. Blades. *Employment at Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employment Power*, 67 COLUM. L. REV. 1404 (1967) (discussing the need for government intervention in the area of employment law to protect employees from the corporations absolute right to discharge).

133. WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE EMPLOYMENT RELATIONSHIPS AND THE LAW 63 (1993). *See* Spang, *supra* note 132, at 851 n.8 (commenting that most collective bargaining agreements prohibit the employer from discharging an employee without "just cause").

134. Tannenbaum, *supra* note 116, at 10 (quoting Daniel Q. Posin, FEDERAL INCOME TAXATION OF INDIVIDUALS §9 (2d ed. 1993)).

135. *See Conard*, 834 P.2d at 21 (where after the University decided not to renew his scholarship, Vincent Fudzie remained enrolled at the University of Washington and earned a Bachelor of Arts degree).

136. *See* 29 U.S.C. § 152(3) (1988). Section 2(3) of the Act does not expressly exclude "students" from the definition of employee. *Id.* For the precise wording of the term "employee" under the Act, see *supra* note 23.

137. Richard P. Woods & Michael R. Mills, *Tortious Interference with an Athletic Scholarship: A University's Remedy for the Unscrupulous Agent*, 40 ALA. L. REV. 141, 162 (1988) (describing the relationship between student-athletes and the university as a business relationship).

IV. Scholarship Athletes and The National Labor Relations Act

After being recognized as employees under the NLRA, student-athletes such as Bryan Fortay should no longer be interrogated by the F.B.I. without the benefit of legal counsel or a union representative.[138] Moreover, Garrick Thomas will enjoy baseball games without the fear of suspension, and "Rashaan salami" sandwiches may become the most popular item on the menu in Denver.[139] However, before detailing why scholarship athletes are legally entitled to collective bargaining rights and privileges, the benefits and roles of union representation should first be examined.[140] In addition to clarifying the rights of both employees and employers, this information embodies the general concepts and requirements for negotiating a collective bargaining agreement.

The first step in establishing a collective bargaining relationship is for the employer to recognize a union, or another selected representative, as the employees' exclusive collective bargaining representative.[141] Typically, this is accomplished in either one of two ways. First, the employer may "voluntarily" recognize the bargaining representative after the union demonstrates that a majority of the employees within the unit support it as their bargaining representative.[142] Majority status is achieved by obtaining signed authorization cards from the eligible employees within the unit.[143] However, it is unlikely that the NCAA member institutions will voluntarily recognize a players' union without requiring an election, regardless of the percentage of cards ascertained, because "governmental intervention is the rule of the day."[144] Accord-

---

138. *See supra* notes 31-35 and accompanying text.

139. *See supra* notes 36-41 and accompanying text.

140. *See generally* James P. Begin & Edwin F. Beal, The Practice of Collective Bargaining (7th ed. 1985) (detailing the collective bargaining process since its inception within the United States over two centuries ago).

141. *Id.* at 156.

142. *Id.* at 159-60.

143. *Id.* at 160.

144. *Id.* Another compelling reason not to voluntarily recognize a union is that regardless of the employer's intentions, it is a § 8(a)(2) unfair labor practice (unlawful interference) to recognize a union that is subsequently found not to have achieved majority status. *See* International Ladies' Garment Workers v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961). The Court ruled that the employer has the burden of taking reasonable precautions to verify the Union's majority status. *Id.* at 739. It reasoned,

ingly, the union may then opt for the second and more common of the recognition methods; by petitioning the NLRB for a certification election.[145] Upon certification, the union and the employer are obligated to negotiate a collective bargaining agreement in good-faith.[146]

A union attempts to accomplish three objectives during collective bargaining: (1) secure and improve the employees' standard of living; (2) guarantee individual security against fluctuating markets; and (3) ensure employee participation in work and union activities.[147] Although the union may not achieve all of these sometimes conflicting goals, its underlying purpose is to increase employee participation in the establishment of work-related conditions.[148]

It is important to keep in mind that the parties do not have to collectively bargain over every issue raised.[149] "The legal duty to bargain in good faith, both in initial contract negotiations and during the term of a contract, is limited to mandatory subjects under § 8(a)(5) of the NLRA."[150] These issues include but are not limited to the employees' wages, hours, and other terms relating to working conditions.[151]

"[E]ven if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith." *Id.*

145. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988). Section 159(c)(1)(A) provides:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board-
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative
>
> (B) If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1)(A).

146. BEGIN & BEAL, *supra* note 140, at 203.

147. BEGIN & BEAL, *supra* note 140, at 97. Additional union objectives include the facilitation of future collective bargaining and the promotion of legislation and public policy. BEGIN & BEAL, *supra* note 140, at 97.

148. BEGIN & BEAL, *supra* note 140, at 97.

149. BEGIN & BEAL, *supra* note 140, at 203.

150. BEGIN & BEAL, *supra* note 140, at 203. *See* 29 U.S.C. § 158(a)(5) (1988). The section states that it is an unfair labor practice for an employer to refuse to negotiate the mandatory terms of collective bargaining as specified in § 159(a). For the terms of § 159(a), *see supra* note 26.

151. 29 U.S.C. § 159(a) (1988). Subjects other than those affecting wages, hours, and working conditions are considered to be permissive subjects of collective bargaining. De-

In spite of the recent decline in union membership[152] and the labor strifes of two professional sports leagues,[153] the potential drawbacks of collective bargaining do not offset the scholarship athletes' need for representation. The bottom line is that scholarship athletes are asked to generate revenue, yet they are prevented from negotiating the terms of their "employment."[154] The Alabama Supreme Court stated in 1979, "The individual athlete has no voice or participation in the formulation or interpretation of these rules and regulations governing his scholarship, even though these materially control his conduct on and off the field. Thus in some circumstances the college athlete may be placed in an unequal bargaining position."[155] In addition, the value of the athletic scholarship is financially insignificant to the millions of dollars generated by the athletes on behalf of their schools.[156] Accordingly, the ath-

---

termining the type of subject is crucial because an employer may not unilaterally implement a mandatory subject prior to reaching a lawful impasse. *See* Marion Crain, *Expanded Employee Drug-Detection Programs and the Public Good: Big Brother at the Bargaining Table*, 64 N.Y.U. L. REV. 1286, 1300 (1989).

An impasse is generally referred to as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement . . ." *See* Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967). Commentators have described the term as a collection of circumstances that the Board and the courts will consider in determining whether the parties have negotiated in good-faith and if "further discussions would be fruitless." ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 448 (1976).

152. CHARLES CRAYPO, THE ECONOMICS OF COLLECTIVE BARGAINING: CASE STUDIES IN THE PRIVATE SECTOR 5-6 (1986). Between 1980 and 1984, the percentage of union workers decreased from 23% in 1980 to 18.8% in 1984. *Id.*

153. Major League Baseball and the National Hockey League both had labor problems in 1994. Major League Baseball canceled the season weeks before the scheduled start of the playoffs. Marty Noble, *Going. Going.. GONE!*, NEWSDAY, Sept. 15, 1994, at A82 (revealing that all but two owners, Peter Angelos (Baltimore) and Marge Schott (Cincinnati) voted in favor of canceling the season). The National Hockey League delayed the commencement of its regular season following a 105-day lockout that forced the reduction of the regular season from 84 to 48 games. *See* Mark Everson, *And the Banner Lived Happily Ever After*, N.Y. POST, Jan. 20, 1995, at 100; Larry Brooks, *It's Devils' Turn To Drink From Cup*, N.Y. POST, Jan. 20, 1995, at 96-97.

154. The term "employment" is placed within the quotation marks to designate that the courts have not yet considered scholarship athletes to be employees.

155. Gulf S. Conf. v. Boyd, 369 So. 2d 553, 558 (Ala. 1979) (holding that participation in intercollegiate athletics is a property right).

156. *See* Jillian Kasky, *Duke Beats The Top 25 Football Schools, But Check Caltech*, MONEY, Jan. 1995, at 20. The average financial aid award, i.e., tuition, fees, room and board, and books, provided to the scholarship recipients of the Top 25 college football teams (as of November 6, 1994) was $11,953. *Id. Cf.* SPERBER, *supra* note 16, at 106 (commenting that in 1985, Division I college football programs spent $554,000, or 12% of their total expenditures, on traveling expenses alone). *See also* Dieffenbach, *supra* note

letes deserve to reap the rewards of their efforts by having greater input in the formulation of NCAA policies.

A. The NCAA and Interstate Commerce

In order to invoke the rules and provisions listed within the National Labor Relations Act, the employment in question must affect interstate commerce.[157] Courts have repeatedly held that the NCAA and intercollegiate athletics are "engaged in interstate commerce in numerous ways."[158] For example, the NCAA and its member institutions oversee and market intercollegiate athletics in virtually every state,[159] sell nationally syndicated and local television rights to NCAA sanctioned events,[160] and schedule tournaments and games that require players, personnel, equipment and fans to travel across state lines.[161] It is clear, therefore, that intercollegiate athletics satisfy the commerce requirements. For instance, the decision by CBS to nationally televise a January 29, 1995 college basketball game between Kentucky and Arkansas, in addition to many similar contests, best illustrates this point.[162]

29, at 89 (suggesting that a college education does not compare financially to the millions of dollars professional teams are spending on players).

157. 29 U.S.C. §§ 151-152(7) (1988). The Act expressly defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States " *Id.* § 152(6).

158. NCAA v. Miller, 10 F.3d 633, 638 (9th Cir. 1993) (holding that a Nevada statute requiring the NCAA to provide Nevada institutions, employees, students, and boosters accused of breaking NCAA rules additional due process rights violates the Commerce Clause); *see* NCAA v. University of Oklahoma, 468 U.S. 85 (1984) (declaring the NCAA's restrictive television plan an unreasonable restraint of free trade); *see also* Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (upholding an NCAA rule restricting the number of assistant coaches permitted per institution).

159. NCAA v. Miller, 10 F.3d at 638.

160. NCAA v. University of Okla., 468 U.S. at 99; *see In Brief: Athletics*, CHRON. OF HIGHER EDUC., Oct. 1, 1986, at 40. Purchasing the broadcasting rights to televise college football has always been an expensive venture. For example, in 1986, ESPN and ABC agreed to a four-year $71 million contract to nationally televise intercollegiate football games on Saturday afternoons. *Id.*

161. NCAA v. Miller, 10 F.3d at 638; *see, e.g.*, SPERBER, *supra* note 16, at 109-10. In 1983, the cost of transporting players, staff, and personnel from the West Point and Naval Academies for the annual Army-Navy game in California surpassed $100,000. SPERBER, *supra* note 16, at 109-10. Subsequently, the game has been played in either Philadelphia or East Rutherford, New Jersey, sites closer to both academies. SPERBER, *supra* note 16, at 109-10.

162. *See Today's Radio/TV*, N.Y. TIMES, Jan. 29, 1995, § 8 (Sports), at 14. It is estimated that over two million fans watched Division-I college basketball during the 1993-1994 season. *See* Dieffenbach, *supra* note 29, at 88.

B. *Scholarship Athletes Represent a Cross-Section of Students Employed by Universities*

The next hurdle in identifying athletes as employees is to examine the inherent differences between the university's employment relationship with scholarship athletes and other student employees who have generally been precluded from collective bargaining.[163] In *St. Clare's Hospital*,[164] the NLRB delineated two categories of student workers employed by, or on behalf of, educational institutions.[165] The first group is comprised of students employed in positions related to their institutional or educational goals, such as medical interns and residents.[166] Student cafeteria workers dominate the latter group, which consists primarily of students attempting to supplement their income.[167]

The difficulty in classifying scholarship athletes as members of either group[168] should result in the Board creating an additional classification of student employees; a category specifically designed to examine the employment status of scholar-

---

163. *See, e.g.*, Cedars-Sinai Medical Ctr., 223 N.L.R.B. 251 (1976) (holding that medical interns, residents and clinical fellows are not employees under § 2(3) of the National Labor Relations Act because they are "primarily students").

164. 229 N.L.R.B. 1000 (1977).

165. *Id.* at 1001-02. The Board actually established four categories of student employees. Two of the categories are designated for students employed by their university, while the remaining two categories are comprised of commercial employers. *Id.* One group per each category is delegated for students employed in fields related to their educational goals, and the other is reserved for students working in unrelated areas. *Id.* For the purpose of this analysis, the characteristics and policies concerning the two groups of student employees employed by their university are examined.

166. *Id.*

167. *Id.* at 1001.

168. *See* CHU, *supra* note 87, at 73 (citing Wayne F. Blann, *Intercollegiate Athletic Competition and Students' Educational and Career Plans*, J.C. STUDENT PERSONNEL, 115-18 (Mar. 1985)). Partially due to the uncertainty of reaching the NFL and NBA, it is difficult to estimate the percentage of scholarship athletes who intend to pursue careers not involving the playing of sports. *Id.* In 1985, it was estimated that approximately 28% of the college underclassmen who were athletes planned on pursuing a career in professional sports. CHU, *supra* note 87, at 73. *But see* Dieffenbach, *supra* note 29, at 87. Rick Majerus, University of Utah head basketball coach, stated, "I think every player coming into college has some sort of aspirations of pro ball." Dieffenbach, *supra* note 29, at 87. By comparison, however, it is relatively certain that a majority of medical interns plan to practice medicine after completing the required training. *Cedars-Sinai Medical Ctr.*, 223 N.L.R.B. at 253. It also believed that most student cafeteria workers obtain their positions to supplement their income. *See* Cornell Univ., 202 N.L.R.B. 290, 292 (1973). The varying percentages in career objectives demonstrate just one of the distinguishing features between scholarship athletes and other student employees.

ship athletes.[169] However, until this new criteria is implemented, an analysis of previous cases and Board decisions suggests that scholarship athletes, unlike their classmates, qualify as employees under the NLRA.[170]

1. Students Employed in Fields Related to Their Educational Goals

The leading case excluding medical interns,[171] residents,[172] and clinical fellows[173] from the protections afforded by the NLRA is *Cedars-Sinai Medical Center*.[174] In that case, thirty-four interns, eighty-six residents and twenty-four clinical fellows ("the housestaff") unsuccessfully sought recognition as an appropriate bargaining unit.[175] Although the housestaff at Cedars-Sinai received an annual stipend[176] and a variety of fringe benefits,[177] the NLRB reasoned that "[i]t is the educational relationship that exists between the housestaff and Cedars-Sinai

169. 29 U.S.C. § 156 (1988). Section 6 explicitly provides the Board with the authority to create rules that further the provisions and policies behind the National Labor Relations Act. The section states, "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules as may be necessary to carry out the provisions of this Act." *Id.*

170. *See Introduction* in RETHINKING COLLEGE ATHLETICS, 12-13 (Judith Andre & David N. James eds., 1991) (suggesting that being a student is not a legitimate rationale for denying student-athletes employment status even though college football and basketball would become the *minor leagues* of the NFL and the NBA); *but see* Dan Dieffenbach, *THE GRADUATE*, SPORT, Mar. 1995, at 88 (quoting Rick Majerus, head basketball coach at the University of Utah, who claims that college basketball is already the minor leagues for the NBA). Majerus stated, "All the NBA players come from the NCAA so we are their minor-league system." *Id.*

171. *Cedars-Sinai Medical Ctr.*, 223 N.L.R.B. at 252. The term medical intern refers to the first phase of post-medical school training. *Id.*

172. *Id.* at 253. A resident is a physician who successfully completes an internship and is in the process of receiving specialized training in a specific area of medicine. *Id.*

173. *Id.* A clinical fellow is a physician who has completed both an internship and a residency and is attempting to become certified within a chosen specialty. *Id.*

174. *Cedars-Sinai Medical Ctr.*, 223 N.L.R.B. at 255. Cedars-Sinai is a private, non-profit medical corporation affiliated with the University of California at Los Angeles Medical School. *Id.* at 251. In 1976, the corporation offered medical internships and residencies in medicine, pediatrics, surgery, obstetrics and gynecology, pathology, psychiatry, and radiology. *Id* at 252.

175. *Id.* Before enrolling in a medical intern, resident, or a clinical fellow program, the housestaff member must have previously obtained his or her medical degree. *Id.*

176. *Cedars-Sinai Medical Ctr.*, 223 N.L.R.B. at 252. The stipend was considered to be a "scholarship," and the amount was determined "on a graduated basis ranging from first-year intern to a fifth-year resident." *Id.* The type of service provided and the amount of time offered by the housestaff was not a factor in appropriating the stipend. *Id.*

177. *Id.* Included within the list of benefits provided to the housestaff were the following: medical and dental care, annual vacations, paid holidays, uniforms, meals while on

(a teaching hospital) which leads us to conclude that the housestaff are students rather than employees . . . ."[178] Consequently, the housestaff were denied the right to collectively bargain due to the Board's perception that they were "primarily students" motivated by educational goals.[179]

Similarly, in *Leland Stanford Junior University*,[180] the Board refused to recognize eighty-three research assistants in Stanford's Physics Department as employees because completing the graduate program was a prerequisite for obtaining a Ph.D. degree.[181] The Board concluded that the research assistants were "primarily students" whose educational objectives superseded their employment goals.[182] The decisions in *Cedars-Sinai Medical Center* and *Leland Stanford Junior University* delineate a three-pronged explanation for excluding students employed within fields related to their educational goals from collective bargaining units: (1) they are primarily students;[183] (2) obtaining a college degree takes precedent over employment; and (3) training or education is required to earn a degree or to practice professionally.[184]

---

duty, and malpractice insurance. However, members of the housestaff did not qualify for retirement benefits. *Id.*

178. *Id.* at 253.

179. *Cedar-Sinai Medical Ctr.*, 223 N.L.R.B. at 253; Kansas City Gen. Hosp. and Medical Ctr., 225 N.L.R.B. 108 (1976). In California, physicians are required to complete an internship from a certified program before practicing medicine within the State. *Cedars-Sinai Medical Ctr.*, 223 N.L.R.B. at 251.

180. 214 N.L.R.B. 621 (1974).

181. *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 621; *see* Adelphi Univ., 195 N.L.R.B. 639 (1972) (refusing to include graduate assistants within a bargaining unit that included faculty members because the assistants were "primarily students").

182. *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 622. The number of hours required to work per week was left to the discretion of the research assistants. *Id.* at n.6. This highlights a significant difference between research assistants and scholarship athletes. College athletes are required to endure practices, workouts and meetings whose lengths are determined by the NCAA and the University's coaching staff. *See* Cozzillio, *supra* note 10, at 1367.

183. *Cedars Sinai Medical Ctr.*, 223 N.L.R.B. at 251; *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 621. The Board asserts an argument similar to the one offered in *Rensing*, where the Indiana Supreme Court held that an employment relationship did not exist between a University and its scholarship athletes. *Rensing*, 444 N.E.2d at 1773. *See supra* part III.

184. *See Cedars-Sinai Medical Ctr.*, 223 N.L.R.B at 253-54; *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 622-23; *Kansas City Gen. Hosp. and Medical Ctr.*, 225 N.L.R.B. at 109; *Adelphi Univ.*, 195 N.L.R.B. at 640.

a. The Nature of the Relationship Prevents Scholarship Athletes from Being "Primarily Students"

Regardless of the student-athlete's individual career objectives, the amount of time required,[185] the tremendous efforts put forth, and the restrictions imposed by the NCAA and its member institutions make it extremely difficult to accept that scholarship athletes are primarily students.[186] According to a 1994 NCAA survey, the graduation rate for college football players at the Top 25 Division I-A football programs was fifty-seven percent, eight percentage points lower than the schools' general student bodies.[187] The largest discrepancy occurred at Ohio State University, where only *twenty-nine percent* of the football players earned degrees compared to fifty-nine percent of the overall student population.[188] The University of Florida fared a little better, as thirty-seven percent of Gator football players fulfilled their degree requirements compared to sixty-three percent of the school's remaining students.[189]

---

185. *See* Douglas Lederman, *Many College Athletes Favor Limits on the Time They Spend on Sports*, CHRON. OF HIGHER EDUC., Sept. 20, 1989, at A44. A 1988 NCAA study reported that Division I college football and basketball players spent approximately five more hours per week on athletics than they did studying. *Id.* The athletes revealed that on average, they devoted 30 hours a week to their teams compared to 25 hours a week for academics. One football player criticized the lack of time allocated for studying by commenting, "Football is made No. 1 priority by the coaches. It is my full-time job. I have no time to find myself academically." *Id.*

186. SPERBER, *supra* note 16, at 297 (citing a statistic that from 1973 to 1985, Memphis State University graduated only *four* basketball players) (emphasis added); *see* Guttmann, *supra* note 74, at 25. When asked to analyze a debate for Speech Communication 380, a University of Southern California athlete wrote, "I when went John because He had a point on girl that I couldn't not again, so that made me think girl don't have body for lady unless they wont that why I went with John." Guttmann, *supra* note 74, at 25.

187. Kasky, *supra* note 156, at 20. The college teams studied were selected from the USA/CNN Top 25 Poll as of November 26, 1994. The 1994 report tracked the graduation rates of college football players who had entered college in 1987. Kasky, *supra* note 156, at 20. In other words, the results depict the percentage of football players who graduated college in six years. *But see* Debra E. Blum, *Are Athletes Graduating?: NCAA Study Gives Credence to Both Sides in Academic-Standards Debate*, CHRON. OF HIGHER EDUC., July 6, 1994, at A38. When expanding the study to include all of the scholarship athletes participating in Division I athletics, the athletes' graduation rate remained at 57%. However, the graduation rates for the general student body during the same six-year time period decreased to 56%. *Id.*

188. Kasky, *supra* note 156, at 20 (emphasis added).

189. Kasky, *supra* note 156, at 20. However, some schools reported higher graduation rates for football players compared to their overall student bodies. Kasky, *supra* note 156, at 20. For example, the football players at Duke University graduated at a rate of

In spite of the athletes' low graduation rates and the perplexing comments of some university administrators, the NCAA Presidents Commission recently proposed reducing the minimum academic standards for obtaining first-year athletic eligibility.[190] The proposal, which was rejected by the NCAA's member institutions,[191] stipulated that high school students with an overall grade point average of 2.5 or higher in college preparatory courses would be eligible to receive a scholarship and participate in practice drills regardless of their results on the SATs or the American College Tests ("ACT").[192] If passed, this proposal would have modified the existing rule that prohibits partial qualifiers from competing in games, practicing with their teammates, and receiving athletic scholarships.[193]

The NCAA Presidents' suggestion to lower academic standards by disregarding student performance on standardized tests[194] and allowing otherwise ineligible students to compete

---

96% as opposed to 95% for the general student population. The other schools falling into this category of academic excellence were: Boston College, Penn State, the University of Oregon, Colorado State, Mississippi State, the University of Tennessee, Brigham Young and the University of Utah. Kasky, *supra* note 156, at 20.

190. Jack McCallum & Alexander Wolff, *Scorecard*, SPORTS ILLUSTRATED, Oct. 10, 1994, at 15-16. The proposal was recommended at the 1995 NCAA Convention. *Id.*

191. *See* Ivan Maisel, *Wild About Husky Hoops*, NEWSDAY, Jan. 18, 1995, at A60.

192. McCallum & Wolff, *supra* note 190, at 15. However, a partial qualifier, a student who does not score high enough on the standardized test to qualify for first-year athletic eligibility but graduated from high school with a 2.500 or higher overall grade point average, would still be ineligible to compete in games throughout the first year of college. NCAA MANUAL, *supra* note 6, §§ 14.02.9.2., 14.3.1.1-14.3.1.1.1. The present system, which is scheduled to remain in effect until August 1, 1995, calculates first year athletic eligibility by performing a cross tabulation of the incoming athlete's G.P.A. in college preparatory courses, i.e., three years of English, two years of mathematics, two years of a natural or physical science, including one laboratory course if offered by the high school, two years of social science, two years of additional academic courses, and his or her results on the SAT or the ACT. NCAA MANUAL, *supra* note 6, §§ 14.3.1.1-14.3.1.1.1.

193. NCAA MANUAL, *supra* note 6, § 14.3.2.1. The Manual's section entitled *Eligibility for Financial Aid, Practice and Competition - Partial Qualifier and Nonqualifier* provides:

> *Division I.* An entering freshman with no previous college attendance who enrolls in a Division I institution and who is a partial qualifier . may receive financial aid . . . that is not from an athletic source and is based on financial need only, consistent with institutional and conference regulations, but may not practice or compete during the first academic year in residence.

NCAA MANUAL, *supra* note 6, § 14.3.2.1.

194. *See* McCallum & Wolff, *supra* note 190, at 15. The use of standardized tests continue to be a factor in the admissions process. *See, e.g.*, HOFSTRA LAW SCHOOL APPLICATION BROCHURE 58, (Robert L. Douglas ed. Oct. 1993). The brochure states, "[T]he Class of 1996, which entered the Law School in August 1993, had a Law School Admission Test median score of 156 and a cumulative undergraduate grade point average me-

in practice demonstrates that "educating" students is not the NCAA's primary concern.[195] Although there may be some merit to the argument that both the academically ineligible student and the university may benefit from the student's participation in practice, i.e., the athlete will become familiar with his teammates both on and off the court, practice prevents the player's skills from deteriorating, and there is heightened motivation to satisfy academic requirements,[196] the student's best interests are once again being overlooked.[197]

Moreover, the Presidents' proposal is a "win-win" situation for college coaches. In addition to instructing and developing a young player who may or may not contribute to the team the following year, the coaches can use these academically ineligible first-year students to motivate the team's regulars on a daily basis. However, there are no guarantees for the athlete.[198] For example, if the partial qualifier does not fulfill the coach's expectations during the "year-long tryout," or if he is seriously injured, the university is under no obligation to renew his scholarship.[199] Consequently, not only has the player taken time away from studying but also subjected himself to additional risks without having an opportunity to perform under game-conditions.

If the NCAA was truly looking after the students' best in-

---

dian of 3.25. It should be noted, however, that the LSAT and undergraduate record, although important, are not determinative." *Id.*

195. *See* Dieffenbach, *supra* note 29, at 88 (quoting Charles Grantham, former executive director of the National Basketball Players Association, who stated that education at some institutions "has taken a backseat"). *See also Athletics Notes*, CHRON. OF HIGHER EDUC., Apr. 6, 1994, at A54. Professors at the University of New Mexico passed an advisory resolution to cease all intercollegiate athletics at the Southwestern school. The measure, which does not have binding authority, was designed to facilitate discussion on the direction of college athletics after the school permitted a basketball player to "drop and add two courses" late in the semester to retain his athletic eligibility. *Id.*

196. *See* McCallum & Wolff, *supra* note 190, at 15-16.

197. *See* CHU, *supra* note 87, at 109. One method employed by coaches to preserve their students' athletic eligibility is to have them bypass upper-level courses by frequently changing their declared majors. CHU, *supra* note 87, at 109. Although not conducive for learning purposes, this gives the athletes a better chance to remain academically eligible for the balance of their college days. *See, e.g.* Steve Wulf, *Scorecard*, SPORTS ILLUSTRATED, Apr. 24, 1989, at 13 (commenting that during his three years of playing college football at the University of Iowa, Ronnie Harmon's class schedule included only one course within his major (computer science), while he took courses such as watercolor painting and billiards).

198. *See* McCallum & Wolff, *supra* note 190, at 15-16.

199. *See* NCAA MANUAL, *supra* note 6, § 15.3.5.1.

terests, the Presidents would have proposed that partial qualifiers are entitled to keep their scholarships, yet may not participate in practices or games until they have fulfilled all institutional and NCAA academic requirements.[200] This recommendation, in addition to offering "underprepared" student-athletes an opportunity to gradually acclimate themselves to college, reinforces a concept that has been mentioned yet has rarely been enforced — the students' education takes precedence over intercollegiate athletics.[201]

b. Further Evidence That the Educational Goals of Scholarship Athletes Do Not Always Supersede Their Athletic Objectives

Unlike the situations involving medical interns[202] and graduate research assistants,[203] the educational goals of scholarship athletes do not take precedent over their experiences on the playing field.[204] In a disturbing story regarding the University of Massachusetts Basketball program ("UMass"), the *Boston Globe*[205] reported that the Northeastern school, similar to most Division I institutions, relaxes its admission requirements for incoming basketball recruits.[206] According to the ar-

---

200. *Cf.* NCAA MANUAL, *supra* note 6, § 14.3.2.1.1 (partial qualifiers, whether they were recruited or walked-on, are ineligible to receive athletically-based financial assistance and may not participate in their team's practices or games). However, they are eligible for other forms of financial aid. NCAA MANUAL, *supra* note 6, § 14.3.2.1.1 (freshman partial qualifiers may receive "nonathletics institutional financial aid").

201. *See* Rensing v. Indiana State Univ., 444 N.E.2d 1170, 1173-74 (1983). According to former Notre Dame University basketball coach Digger Phelps, college players have been paid (illegally) since at least 1982, and the NCAA has not done enough to discourage this behavior. He commented,

> There is a going underground price for players. It is $10,000 a year and $40,000 for their varsity career. And if the NCAA continues to levy such weak punishments on colleges for violations, the going rate is sure to climb to $100,000 a career in a couple of years. It's worth it to these schools to take the risk.

Gordon S. White Jr., *Coach Says Colleges Pay Stars $10,000 a Year*, N.Y. TIMES, Mar. 26, 1982, at A22.

202. *Cedars-Sinai Medical Ctr.*, 223 N.L.R.B. at 251, 253.

203. *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 621-22.

204. *See infra* notes 205-17. The statement is not intended to suggest that all scholarship athletes are more concerned with their statistics than earning college degrees. Rather, it is used to demonstrate that in a billion-dollar business such as intercollegiate athletics, the students' academic responsibilities are often overlooked.

205. Daniel Golden, *High Rank, Low Grades*, BOSTON GLOBE, Oct. 19, 1994, at 1, 12. Unfortunately, the *Globe* demonstrated poor judgment by printing the names and grade point averages of six UMass basketball players without obtaining their consent. *Id.*

206. *Id. But see* NCAA MANUAL, *supra* note 6, § 14.1.5.1.1. The manual specifically

ticle's author Daniel Golden, UMass basketball players did not compare favorably to the rest of the student body on the college entrance exams. While the average SAT score of the university's first-year students was approximately 1000, the school's basketball players averaged a combined score of just 790.[207]

The importance of academics continued to be neglected after the UMass players were admitted. For example, one senior player who was suspended[208] by head coach John Calipari after missing classes during the 1994 spring semester stated, "I was so worried about basketball and getting to the Final Four[209] that I let classes slip my mind . . . ."[210] Moreover, four of the thirteen scholarship athletes on Coach Calipari's 1994 team were on academic probation because their overall grade-point averages fell below the mandatory 2.0, or C, average.[211]

The University of Massachusetts' student handbook states that students who maintain a grade-point average of 2.0 or below are not in "good standing."[212] Since only athletes in "good academic standing" are eligible to compete intercollegiately,[213] the four UMass basketball players should have been ineligible until they improved their standing. Why then, were the players not removed from the team?

In response to this question, Nancy Fitzpatrick, the university's registrar, noted that "the handbook is not the final

---

allows the university to implement separate entrance requirements regarding athletes if these alternative provisions are contained within an official university document. NCAA MANUAL, *supra* note 6, § 14.1.5.1.1.

207. Golden, *supra* note 205, at 12. The school's football players averaged a combined score of 844. Golden, *supra* note 205, at 12.

208. Golden, *supra* note 205, at 12. Although the player was suspended for three games during the 1994-1995 season, two of those games were exhibition contests that are not included within the team's overall record. However, the player did miss UMass' season opener against defending national champion Arkansas. Golden, *supra* note 205, at 12.

209. UMass was defeated by the University of Maryland in the second round of the 1994 NCAA College Basketball Tournament. *See* William C. Rhoden, *N.C.A.A. Tournament: Midwest; Unheralded Maryland Jolts UMass*, N.Y. TIMES, Mar. 20, 1994, § 8, at 1.

210. Golden, *supra* note 205, at 12. The player received a failing grade in "Psychology of Sport and Physical Activity" and D's in both "Sports Broadcasting" and "Sociology of Sport and Physical Activity." Golden, *supra* note 205, at 12.

211. Golden, *supra* note 205, at 1.

212. Golden, *supra* note 205, at 12.

213. NCAA MANUAL, *supra* note 6, § 14.01.1. Section 14.01.1, entitled *Academic Status*, provides that all student-athletes must be in "good academic standing" at their institution to be eligible to compete athletically.

word."[214] Due to an NCAA provision that allows each institution to define "good academic standing,"[215] the university may disregard its stated policies to protect its athletes' eligibility. Ms. Fitzpatrick added that the *real policy*, in spite of what is stated within the handbook, is that all students are in "good standing" and eligible to compete athletically unless they have been suspended or dismissed from the university.[216] This demonstration of neglect and disregard for the athletes' best interests by the NCAA, the universities, and the student-athletes themselves reinforces the notion that college athletics is not about educating students.[217]

c. *Playing Intercollegiate Sports Is Not a Prerequisite for Becoming a Professional Athlete*

In *Cedars-Sinai*, the NLRB emphasized that successfully completing a post-medical school internship was a prerequisite for practicing medicine within the state of California.[218] However, this policy runs contrary to the operating procedures of professional sports leagues that embrace student-athletes on the basis of their athletic talents and not their degree status.[219] In fact, sixty percent of the college football and basketball players drafted in 1989 had not obtained college diplomas.[220] Specifically, of the seven football players drafted

---

214. Golden, *supra* note 205, at 13.

215. NCAA MANUAL, *supra* note 6, § 14.01.1.1.

216. Golden, *supra* note 205, at 13. A student may be suspended from the University of Massachusetts if his overall grade-point average remains below 2.00 for two consecutive semesters. Golden, *supra* note 205, at 13.

217. Johnson, *supra* note 27, at 99-101; *see* Joanna Davenport, *From Crew to Commercialism - The Paradox of Sport in Higher Education*, *in* SPORT AND HIGHER EDUC., 5, 14 (Donald Chu et al. eds., 1985) (commenting that a Big Ten Conference member once altered its final examination schedule so that its students would be able to attend the football team's bowl game).

218. *Cedars-Sinai Medical Ctr.*, 223 N.L.R.B. at 253. *See* discussion *supra* notes 171-79 and accompanying text.

219. *See, e.g.*, David DuPree, *NBA Moms Nurtured Sons' Early Dreams of Glory*, USA TODAY, Apr. 27, 1989, at 10C. Isiah Thomas, formerly of the NBA's Detroit Pistons, left the University of Indiana prior to completing his degree requirements to begin his professional basketball career. Thomas did, however, subsequently return to Indiana to earn his degree. *Id.* In addition, former basketball legend Magic Johnson left Michigan State University during his sophomore year after being drafted by the Los Angeles Lakers. *Nuggets, Hornets Talk Trade Denver Would Get Top Draft Pick*, USA TODAY, June 6, 1991, at 3C.

220. Douglas Lederman, *Athletics Notes*, CHRON. OF HIGHER EDUC., Aug. 1, 1990, at A30. Of the 54 basketball players selected in the 1989 NBA Draft, only 26 (48%) had

from Florida State University and the eight football and basketball players taken from the University of Houston, not a single athlete had fulfilled all of his degree requirements.[221]

Student-athletes are also permitted to apply for the National Basketball Association and National Football League Drafts as underclassmen in exchange for forfeiting their remaining college athletic eligibility.[222] For example, between 1971 and 1994, 164 of the 259 underclassmen that have entered the NBA Draft have been selected by the various clubs.[223] In addition to being drafted prior to graduation, a few players have reached the NBA and the NFL without playing for Division I college programs, if they attended college at all.[224] For example, Kevin Garnett, a nineteen year old center, chose to follow this path, and he was rewarded when the Minnesota Timberwolves drafted him during the first round of the 1995 NBA Draft.[225]

---

graduated from their institutions. *Id.* By comparison, only 38% of the 331 college players taken during that year's NFL Draft had earned their degrees. *Id.*

221. *Id.*

222. *See Terps' Smith Leads Youth Parade*, TAMPA TRIB., June 29, 1995, at 1. The first five players drafted in the 1995 NBA Draft left school early to sign professional contracts. *Id.* Four of the players; Joe Smith, Antonio McDyess, Jerry Stackhouse, and Rasheed Wallace, were sophomores in college, and the fifth player, Kevin Garnett, had just graduated from high school. *Id.*; *see infra* notes 224-25 and accompanying text.

However, section 12.2.4.2.1 of the NCAA Manual, which was adopted in November 1994, enables college basketball players to enter the NBA Draft and still retain their athletic eligibility if they withdraw their names from consideration no later than 30 days following the draft. The provision states:

> *Exception-Professional Basketball Draft.* A student-athlete in the sport of basketball may enter a professional league's draft one time during his or her collegiate career without jeopardizing eligibility in that sport, provided that the student-athlete declares his or her intention to resume intercollegiate participation within 30 days after the draft.

See NCAA MANUAL, *supra* note 6, § 12.2.4.2. For an example of a student-athlete exercising this right, see *Lenard Returning to School*, NEWSDAY, July 13, 1994, at A59. Voshon Lenard decided to return to the University of Minnesota for his senior year after being drafted in the 2nd Round of the 1994 NBA Draft by the Milwaukee Bucks. *Id.* However, the Bucks retained Lenard's rights for the 1995 Draft. *Id.* Lenard currently plays for the Miami Heat.

223. Dieffenbach, *supra* note 29, at 89.

224. *See, e.g.*, Filip Bondy, *Thunder in the Heartland*, DAILY NEWS, Oct. 27, 1994, at 79 (outlining the professional basketball career of Darryl Dawkins, which began in 1975 when the high school graduate signed with the Philadelphia 76ers).

225. Paul Schwartz, *No Ordinary Joe*, N.Y. POST, June 29, 1995, at 80. Garnett became the first basketball player to enter the NBA without enrolling in college since 1975, when Darryl Dawkins joined the league. *Id.* Moses Malone was another basketball player who bypassed college to play professional basketball. Guttmann, *supra* note 74, at

In *Cedars-Sinai*, the Board identified another characteristic that distinguishes scholarship athletes from medical interns.[226] Commenting on the bright futures that await the medical interns, the Board stated, "Following [the] completion of their programs . . . the majority of the housestaff go into private practice and others go into group practices or accept positions with health organizations."[227] However, scholarship athletes are not as fortunate, as the vast majority of their careers terminate after college.[228] The Division I-A Football Poll highlighted the fierce competition for a limited number of available professional football positions.[229] When asked to estimate the percentage of their players who have played "some form of professional football"[230] after leaving school, eight coaches responded less than ten percent, three replied fewer than five percent, and the remaining three answered under two percent.[231] These results further support the conclusion that scholarship athletes should be excluded from the Board's student employment category that includes medical interns, Ph.D. candidates, and graduate research assistants.[232]

2. Students Employed in Positions Unrelated to Their Educational Goals

Scholarship athletes also lack a "sufficient community of interest"[233] with those students employed in fields unrelated to

---

89. As a high school graduate, Malone signed a $3 million contract with the Utah Stars of the now defunct American Basketball Association. Guttmann, *supra* note 74, at 89.

226. 223 N.L.R.B. 251 (1976).

227. *Id.* at 253.

228. *See* CHU, *supra* note 87, at 73 (commenting on the difficulties of becoming a professional athlete).

229. *See Division I-A College Football Coaches' Poll*, *supra* notes 61-62 and accompanying text.

230. "Forms" of professional football include the National Football League, the Canadian Football League, Arena Football and the World League.

231. *See supra* note 61 and accompanying text [results of the Coaches Poll are on file with the author]. The poll included the coaches from the best college football programs in the nation. It is anticipated that the percentages for players making the NFL are even more discouraging at the remaining Division I-A college football institutions.

232. *See St. Clare's Hosp.*, 229 N.L.R.B. at 1001-02.

233. *See* NLRB v. Purnell's Pride, Inc., 609 F.2d 1153, 1156 (5th Cir. 1980). In determining an appropriate bargaining unit, the Board relies upon a series of factors which are referred to as the groups' community of interests. These factors include: (1) similarity in earnings, training, working conditions, and the nature of the work; (2) frequency of employee contact and interchange; (3) geographical proximity; (4) common supervision;

their career and educational goals.[234] The Board's reasoning for excluding student cafeteria workers[235] from collective bargaining units is that their employment is "merely incidental" to their primary objective of acquiring an education, and, in most cases, is designed to supplement their financial resources.[236] Moreover, since the student's enrollment at the institution is generally required,[237] the Board has been influenced by the temporary, or transitory, nature of the student's employment.[238]

In *Saga Food Services*,[239] seventy-three part-time student cafeteria workers, employed by a food service company on behalf of the University of California at Davis, were excluded from a bargaining unit that included eleven full-time non-students.[240] Citing the brevity of the part-time student's employment,[241] the Board concluded, "[It] has excluded students from units of employees at campus-related facilities, whether operated by the universities involved or by contractors [on] behalf of the universities, on the basis of their separate interests and the fact that the students' employment was incidental to their academic objectives."[242]

The Board used a similar argument to exclude twelve part-time student janitors from a unit of full-time employees at the San Francisco Art Institute.[243] In that decision, however, the Board considered the possibility of recognizing a collective bar-

---

(5) prior history of bargaining; (6) the employees' opinions; and (7) union organization. *Id.* For a description of the two types of collective bargaining units, see *supra* note 50.

234. *St. Clare's Hosp.*, 229 N.L.R.B. at 1001.

235. Saga Food Serv., 212 N.L.R.B. 786 (1974); Cornell Univ., 202 N.L.R.B. 290 (1973).

236. *Saga Food Serv.*, 212 N.L.R.B. at 787.

237. *Compare* Barnard College, 204 N.L.R.B. 1134 (1973) (noting that the institution set aside 10 part-time student related positions for its students) *with* NCAA MANUAL, *supra* note 6, § 14.1.5.1 (to maintain their athletic eligibility, student-athletes must be enrolled at their institution).

238. *St. Clare's Hosp.*, 229 N.L.R.B. at 1001; San Francisco Art Inst., 226 N.L.R.B. 1251, 1252 (1976).

239. 212 N.L.R.B. at 786.

240. *Id.* at 786-87.

241. *Id.* The student employees scheduled hours only during the academic year. *Id.* at 786.

242. *Id.* at 787; *see* Duke Univ., 306 N.L.R.B. 555 (1992) (noting that both parties agreed to exclude part-time students from an appropriate bargaining unit); *San Francisco Art Inst.*, 226 N.L.R.B. at 1251; *Cornell Univ.*, 202 N.L.R.B. at 292; *Barnard College*, 204 N.L.R.B. at 1135.

243. 226 N.L.R.B. 1251, 1251-52 (1976).

gaining unit comprised entirely of part-time student janitors.[244] Nonetheless, the notion was summarily dismissed because of "the brief nature of the students' employment tenure, by the nature of compensation for some of the students,[245] and by the fact that students are concerned primarily with their studies . . . ."[246]

a. Intercollegiate Athletics Is Not "Merely Incidental" to Obtaining an Education

Although a majority of scholarship athletes' career objectives do not include playing professional sports,[247] the argument that playing Division I-A college athletics is "merely incidental" to the students' primary interest of acquiring an education is unsubstantiated.[248] Describing the insignificance of the student-athlete's college education, John Palmer, a biology professor at the University of Massachusetts, stated, "They're [the athletes] just brought in to play some game. They don't get a very good education, if they get one at all."[249]

With so much riding on each victory, it is only natural that performances on the field take precedence over the students' classroom achievements.[250] The author witnessed this firsthand while trying out as a college first-year placekicker.[251] During one of the team's spring practices, a high-spirited debate took place between an assistant coach and a player regarding the scheduling of classes. During their conversation, the coach reminded the player, who is currently playing in the

---

244. *Id.* at 1252. The Petitioners raised the issue in the alternative. The Board commented that this request was "rare," since the exclusion of part-time employees from a bargaining unit containing full-time employees generally precluded them from union representation entirely. *Id.*

245. *Id.* at 1251. Of the 12 part-time student janitors, four received scholarships, two were in work-study programs and the remaining six received an hourly wage or a salary. *Id.*

246. *Id.* at 1252.

247. *See* CHU, *supra* note 87, at 73.

248. *See Saga Food Serv.*, 212 N.L.R.B. at 787.

249. Golden, *supra* note 205, at 13. The graduation rates for college football players suggests that education is not a primary concern. *See supra* notes 186-89 and accompanying text.

250. *See* Goldman, *supra* note 3, at 206 (suggesting that the NCAA and its member institutions do not always offer the education that student-athletes are promised).

251. The author attended Northeast State University that fields both Division I-A college football and basketball teams. In 1990, he was dropped from the football team approximately two weeks before the annual intrasquad spring game.

National Football League, that he should avoid registering for late afternoon and early evening courses because they conflicted with practice and team meetings.[252] Although the coach's request may not appear overbearing, it is important to put in perspective that colleges do not offer degrees in football, and the student-athletes' academic responsibilities sometimes include attending required courses which may or may not interfere with their athletic schedules. Unfortunately, the coach's interference is consistent with the NCAA's self-proclaimed purpose of "maintain[ing] intercollegiate athletics as an *integral part* of the educational program . . . ."[253] What could be more *integral* than a coach recommending to a student-athlete, whose playing time is determined by the coaching staff, that he refrain from selecting classes that begin after 1:10 p.m.?[254]

Further evidence that collegiate athletics is not "merely incidental" to obtaining an education became evident in November 1994, when the NCAA released the results of an eighteen month investigation into alleged improprieties by the University of Houston's football staff.[255] The University was only given a slap on the wrist after the NCAA determined that members of its coaching staff "oversaw illegal football practices, made improper contact with recruits and *provided one player a scholarship when he did not meet minimum academic standards*."[256] The NCAA reasoned that imposing penalties or sanctions against the school was inappropriate since these were only minor infractions.[257]

Interestingly, the *NCAA Enforcement Summary*[258] indicates that the University of Houston football program has been publicly disciplined or reprimanded on four previous occasions

---

252. Practice immediately followed the daily positional meetings, which began at approximately 3:00 pm. Each player was required to be dressed and taped before entering his respective meeting.

253. *See* NCAA MANUAL, *supra* note 6, § 1.3.1 (emphasis added).

254. Classes that began at 1:10 p.m. concluded by 2:30 p.m. Although some exceptions were tolerated, players scheduling courses during this time period had approximately 30 minutes to travel to the team's training facility, get dressed, and taped.

255. *West Virginia Tops No. 22 Syracuse*, ASBURY PARK PRESS, Nov. 25, 1994, at D9.

256. *Id.* (emphasis added).

257. *Id.* If the NCAA had categorized the staff's misconduct as major violations, then the football program could have been placed on probation. *Id.*

258. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ENFORCEMENT SUMMARY (1991 & Supp. 1993) [hereinafter NCAA ENFORCEMENT SUMMARY].

for similar infractions dating back to 1964.[259] In 1988, the program was placed on probation for three years, prohibited from bowl appearances for two years and banned from television for one year after its coaches were found to have provided improper financial aid, lodging, transportation, benefits, and employment to players and recruits.[260] These instances were just a few of the 436 occasions that the NCAA took "public disciplinary action" against its member institutions for violating NCAA rules from 1952 to 1993.[261]

b. *Learning Does Not Preclude Employment*

According to the NLRB, the education offered by a university impedes students' attempts to achieve "employee" status under § 2(3) of the NLRA.[262] However, if learning on the job necessarily disqualified workers from employment status, then collective bargaining would become antiquated and obsolete.[263] For instance, the drug policy recently agreed to by the NFL players would require them to dismiss the National Football League Players Association ("NFLPA") as their exclusive bargaining representative. The policy, which expressly intertwines education and professional athletics, emphasizes the "*education*, evaluation and treatment" of players regarding alcohol and drug abuse.[264]

Moreover, in *Regents of the University of Michigan v. Michi-*

---

259. *Id.* at 6-7, 15, 31. In reverse chronological order, the NCAA imposed penalties or publicly reprimanded the University of Houston's football program in 1988, 1977, 1966, and 1964. *Id.*

260. *Id.* at 31.

261. *Id.* at 2.

262. *See, e.g., San Francisco Art Inst.*, 226 N.L.R.B. at 1251. Referring to cases where it found students to be employees under the NLRA, the Board noted, "In only one were students working for the educational institution they attended, and in that case the Board found that it would be inappropriate to direct an election in a separate student unit." *Id.* at 1252. *But see Cedars-Sinai Medical Ctr.*, 223 N.L.R.B. at 254 (Fanning, dissenting). Member Fanning argued, "Since the statutory exclusions [of the NLRA] do not mention and the policy underlying the nonstatutory exclusions does not reach 'students,' the relationship between 'student' and 'employee' cannot be said to be mutually exclusive." *Id.*

263. *See Regents of Univ. of Mich.*, 204 N.W.2d at 226 (suggesting that employees in all professions continue to learn); *see Cedars-Sinai Medical Ctr.*, 223 N.L.R.B. at 254, 257 (Fanning, dissenting) (arguing that learning is distinct from employment).

264. *NFL, Players' Association Agreed on Expanded Drug Abuse Policy*, NEWSDAY, Oct. 29, 1994, at A29 (emphasis added). The new agreement mandates that a player's drug and alcohol treatment is covered provided the player cooperates with his evaluation and treatment. *Id.*

gan Employment Relations Commission,[265] the Michigan Supreme Court concluded that the University's medical interns, residents, and post-doctoral fellows were employees under the state's Public Employees Relations Act.[266] Rejecting the argument that students and employees are mutually exclusive categories, the court reasoned, "acquiring new skills does not detract from the findings . . . that they may organize as employees . . . . Members of all professions continue their learning throughout their careers."[267]

c. *Intercollegiate Athletics Is a Full-Time Position*

In *San Francisco Art Institute* and *Saga Food Services* respectively, the Board excluded student janitors and food service employees from appropriate collective bargaining units because of the brief and inconsistent nature of their employment.[268] The Board's decision in *San Francisco Art Institute* was predicated on the belief that, "[s]tudent janitors work[ed] approximately [twenty] hours a week. Additionally, student janitors' work schedules [were] tailored to accommodate their commitments as students."[269] Furthermore, the students at the art institute were employed on a semester-by-semester basis as opposed to year-round.[270]

The conclusions in *San Francisco Art Institute* and *Saga Food Services* may have been appropriate based on the facts presented in those cases. However, college football and basketball are full-time, year-round endeavors that may last up to five or six years.[271] The college football year typically begins

---

265. 204 N.W.2d 218, 224, 226 (Mich. 1973).

266. *Id.* at 226.

267. *Id.* The Michigan Supreme Court posed a hypothetical situation involving "fledgling lawyers." *Id.* The court suggested that even though these attorneys must improve their lawyering skills, their status as employees remains the same. *Id.*

268. San Francisco Art Inst., 226 N.L.R.B. 1251, 1251-52 (1976) (excluding 12 student janitors because the employment was incidental to obtaining an education); *Saga Food Serv.*, 212 N.L.R.B. at 786 (holding that 73 part-time student employees did not possess the requisite sufficient community of interest to be included with a unit of full-time employees).

269. *San Francisco Art Inst.*, 226 N.L.R.B. at 1251. Apparently, some students worked more than 20 hours a week, however they were in the minority. *Id.* at n.2

270. *Id.* at 1251.

271. NCAA MANUAL, *supra* note 6, §§ 14.2, 14.2.1. Student-athletes are permitted five years to complete their four years of athletic eligibility. However a sixth year of eligibility may be granted under section 14.2.5 if the player demonstrates a medical hardship.

with a "voluntary"[272] winter conditioning program, followed by spring practice, summer camp, and finally the actual fall season.[273] Professor Harry Edwards, a sociologist at the University of California, Berkeley, estimates that during the season, Division I football players spend up to sixty hours a week on football related activities, while basketball players endure as much as fifty hours a week.[274] Bernie Kosar, a professional quarterback, commenting on the time restraints imposed by playing college football, "[i]t's like having two full-time jobs.... It can make for a fifteen- or sixteen-hour day."[275]

The Board's concern about the brevity[276] of the students' employment is insignificant, as seen by its decision in *Hearst*

The NCAA defines a hardship as "an incapacity resulting from an injury or illness" that occurs:

> (a) during one of the player's four permitted athletic seasons,
> (b) prior to the midway point of the season and results in the player's inability to return to competition for the remainder of that season, and
> (c) before the student-athlete participated in more than two events or 20% (whichever is greater) of his or her team's scheduled events excluding scrimmages and exhibitions.

NCAA MANUAL, *supra* note 6, § 14.2.5(a)-(c). *See e.g.*, Steve Wieberg, *Conley Nears End of Six-Year Career*, USA TODAY, Nov. 17, 1994, at 8C. In 1994, the NCAA granted Dan Conley, a former Syracuse University football player, a sixth year of athletic eligibility because the linebacker endured 10 operations throughout his football career. *Id.*

272. Section 17.02.14.1(c) of the NCAA Manual permits out-of-season conditioning programs where:

> Voluntary participation by student-athletes in weight-training or conditioning programs utilizing the institution's facilities . provided such activities are *supervised only by members of the institution's strength and conditioning staff or*, in the sport of Division I-A football, *athletics trainers*, who perform such duties on a department-wide basis, . . provided the supervision is available to students generally.

NCAA MANUAL, *supra* note 6, § 17.02.14.1(c) (emphasis added). Since the coaching staff conducts these voluntary sessions, which are to be used for conditioning purposes only, the athletes have no choice but to participate. This is just another example of the NCAA establishing rules that are easily circumvented so as to permit the exploitation of the athletes. NCAA MANUAL, *supra* note 6, § 17.02.14.1(c).

273. NCAA MANUAL, *supra* note 6, §§ 17.7.2.1, 17.7.5.1, 17.7.6(a); *see* Robert L. Simon, *Intercollegiate Athletics: Do They Belong on Campus?*, *in* RETHINKING COLLEGE ATHLETICS, 43, 54 (Judith Andre & David N. James eds., 1991) (suggesting that college football is a year-round sport); *see also* SPERBER, *supra* note 16, at 304 (arguing that both college football and basketball seasons are too demanding on the athletes).

274. SPERBER, *supra* note 16, at 302. Professor Edwards also noted that there are additional "unrecorded hours" during the day where the student-athlete's ability to concentrate and study is similarly affected. For instance, the professor considers the time required for the athlete's body to recover from the aches and pains sustained on a daily basis as a primary source of these "unrecorded hours." SPERBER, *supra* note 16, at 303.

275. SPERBER, *supra* note 16, at 304.

276. *San Francisco Art Inst.*, 226 N.L.R.B. at 1251. The Board commented,

Corp.[277] In *Hearst*, the Board included the newspaper publishing company's part-time student employees assigned to the night complaint desk within a bargaining unit of full- and part-time employees.[278] The Board noted that a majority of the students intended to work for the company until graduation.[279] *Hearst* demonstrates that students ascertaining transitory employment may qualify as employees under the NLRA; therefore, scholarship athletes should not be excluded because of their limited athletic eligibility.[280]

Since the employment relationship between a student-athlete and a university is unique, it is extremely difficult, if not impossible, to accurately categorize scholarship athletes within either of the two existing student employee subgroups.[281] Accordingly, the Board should reconsider its position and consider the advantages and disadvantages of recognizing scholarship athletes as employees under the Act.[282] Part V addresses some of the concerns and problems that the Board will encounter in making this determination. However, two things are certain. First, an additional student employment category is required to address the employment status of Division I-A scholarship athletes. Second, a binding decision regarding their ability to collectively bargain is necessary to end the repeated breach of student trust by the NCAA and its member institutions.[283] In the words of Harvey Araton,

> They'll [college coaches] drag their players all over North America for network cash guarantees, and - as Nebraska's Tom Osborne proved last week when he started a lineman on probation for sexual assault and a defensive back awaiting his day in

---

"[T]urnover by students is relatively high and no student janitor has ever stayed past graduation to assume a position as full-time janitor." *Id.*

277. 221 N.L.R.B. 324 (1975).

278. *Id.* at 325. The Board reasoned that student employees shared a sufficient community of interest with their co-workers that made the groups indistinguishable. *Id.*

279. *Id.* at 324. Although contradictory testimony regarding the length of the students' employment at the night desk was provided, the Board chose not to resolve the discrepancy. *Id.* at 324 n.1 The employer had argued that the students were at the night desk for less than nine months, whereas the Circulation Operations manager testified that students typically remained employed for three years. *Id.*

280. *Id.* Based upon the Board's determination that the length of employment is not a determinative factor, it is reasonable to conclude that the student-athletes' athletic limited eligibility will be examined in the same manner.

281. *See* discussion *supra* part IV.B.

282. 29 U.S.C. § 152(3) (1988).

283. *See* Simon, *supra* note 273, at 56 (suggesting that the pressure to win in intercollegiate athletics has resulted in the exploitation of student-athletes).

court on a gun rap - they'll sacrifice all standards of decency to become No. 1.[284]

V. Problems That May Arise After Scholarship Athletes Are Permitted to Join a Union

Recognizing student-athletes as employees under the NLRA will require a significant number of changes to the present NCAA system.[285] For instance, if the players choose to select an exclusive collective bargaining representative, the universities will have no choice but to negotiate in good-faith with the College Players' Association regarding the athletes' wages, hours, and working conditions.[286] However, the decision to unionize will not result "in an unlimited parade of horribles" for the universities or the NCAA[287] because a party's collective bargaining obligation is limited to "meet[ing] at reasonable times and confer[ring] in good faith with respect to wages, hours, and other terms and conditions of [the] employment."[288] In other words, while the parties are required to enter the negotiations with good-faith intentions, the Board does not have the authority to compel either party to accept an unfavorable agreement.[289]

This Article does not suggest that the inevitable labor disputes between the universities and student-athletes will easily be resolved. For instance, in April 1995, Major League Baseball players ended their eight month-long strike, which forced the premature cancellation of the 1994 season, after a New York Federal District Court issued an injunction restoring the terms of the expired collective bargaining agreement.[290] How-

---

284. Harvey Araton, *College 101: There's No Business Like the Pro Business*, N.Y. Times, Jan. 8, 1995, § 8, at 11. Tom Osborne is the University of Nebraska's Head Football Coach. On January 1, 1995, the Cornhuskers defeated the University of Miami (Florida) in the Orange Bowl to win the Division I-A NCAA Football Championship.

285. *See* Goldman, *supra* note 3, at 251-52 (suggesting that labor laws should be applied to student-athletes).

286. National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), 158(b)(3), 159(a) (1988).

287. *See Athletic Scholarships*, *supra* note 13, at 193 (suggesting that the recognition of scholarship athletes as employees will not financially overburden the universities).

288. 29 U.S.C § 159(a).

289. *See* Charles W. Nugent, Comment, *A Comparison of the Right to Organize and Bargain Collectively in the United States and Mexico: NAFTA's Side Accords and Prospects for Reform*, 7 Transnat'l Law, 197, 211 (1994) (stating that the NLRB cannot require a union or an employer to enter into a collective bargaining agreement).

290. *See* Murray Chass, *234 Days Later· The Players Are Asked to Report to Camps by End of Week*, N.Y. Times, Apr. 3, 1995, at A1, C3; *see also* Claire Smith, *Fans Should*

ever, many of the controversial issues that will be raised by the universities, or by the NCAA on their behalf, and the scholarship athletes' union are predictable. Discussing them here may serve to facilitate the collective bargaining process in the future.

First, the student-athletes may demand to include educational issues within their negotiated collective bargaining agreement.[291] In particular, they may seek to alter the minimum number of academic credits required to graduate or insist upon changes within the curriculum. Although the players, as employees, are legally entitled to exercise their § 7 employee rights regarding wages, hours, and working conditions,[292] the Board has the authority to exclude all educational issues from the genre of negotiable topics. For example, in *Regents of the University of Michigan*, the Michigan Supreme Court expressly prohibited the bargaining unit from negotiating topics within the "educational sphere."[293] The court hypothesized that while the student employees were entitled to collectively bargain over their salaries, they were not afforded the same opportunity regarding the selection of courses and assignments.[294]

The Board's implementation of a similar policy limiting the mandatory subjects of collective bargaining would be appropriate.[295] Since the athletic departments are considered to be "isolated" from the university's academic departments,[296] educational issues, which are unrelated to the athletes' wages, hours, and working conditions, are permissive subjects of collective bargaining.[297] Consequently, negotiations could be lim-

---

Turn Their Backs, Too, N.Y. TIMES, Feb. 10, 1995, at B12 (suggesting that baseball fans should find other interests because the owners and the players are destroying the game).

291. *See* Goldman, *supra* note 3, at 251-52 (commenting that the NLRB and state labor boards may exclude educational issues from the scope of bargaining topics between student-athletes and the NCAA).

292. 29 U.S.C. § 157 (1988).

293. Regents of the Univ. of Mich. v. Michigan Employment Relations Comm'n, 204 N.W.2d 218, 224 (Mich. 1973).

294. *Id.* The court added that future discrepancies regarding bargaining issues will be examined on a case by case basis. *Id.*

295. *Id.* at 324.

296. *See, e.g.*, Frey, *supra* note 10, at 185 (suggesting that athletic departments are operationally and programmatically isolated from the academic departments).

297. *See Goldman*, *supra* note 3, at 252 (suggesting that a clear distinction exists between the NCAA's amateur-status rules and its corresponding educational requirements).

ited to topics such as the players' salaries, length of practices, medical insurance, transferring, shared revenues, commercial endorsements and licensing agreements.[298]

A second area of concern centers on the negative impact that the scholarship athletes' employment status will have on their non-scholarship teammates and the institution's student body as a whole. First, the harmonious co-existence of union (scholarship recipients) and non-union members on the same team should not pose serious problems because the athletes presumably would comprise a single unit. Further, the overwhelming majority of student-athletes playing Division I-A college football and basketball are on scholarship, anyway. Under NCAA Rules, each Division I-A football program not on probation was permitted to offer eighty-five scholarships during the 1994-1995 academic year.[299] Similarly, basketball coaches were allotted thirteen athletic scholarships.[300] Based on numbers alone, discontent should be minimal. However, if animosity were to develop amongst the team's few non-scholarship athletes, it presumably would not reach a level that exceeds the present tension and jealousy that exists between a team's starters and reserves.

The more perplexing issue is the negative repercussions that paying scholarship athletes will have on the general student population's tuition and activity fees. A recent NCAA survey compiled during the late-1980's indicated that on average, student fees and assessments contributed $1.196 million to the Athletics Departments of Division I football schools.[301] Specifically, in 1987, each student enrolled at Virginia Tech was required to contribute $108 to the Athletic Department's budget.[302]

---

298. This list is not inclusive. However, confusion about the appropriateness of topics would be resolved on a case by case basis. *See Regents of the Univ. of Mich.*, 204 N.W.2d at 224.

299. NCAA MANUAL, *supra* note 6, § 15.5.5.1 (1994). Although the number of available scholarships has dropped from 92 in 1992, 85 athletic scholarships ensures that the vast majority of the squad will be scholarship recipients. *Id.*

300. NCAA MANUAL, *supra* note 6, § 15.5.4.1.

301. SPERBER, *supra* note 16, at 82 (suggesting that the practice of using students' activity fees to support the athletic department is consumer fraud). For example, during the 1986-87 academic year, $1.9 million of the Virginia Commonwealth University Athletics Department's $2.2 million budget was provided by the school's students. SPERBER, supra note 16, at 82-83.

302. SPERBER, supra note 16, at 84. The Virginia Polytechnic Institute was attempt-

Student fees will most likely continue to increase as the universities pass their newly acquired athletic expenses, at least in part, on to their tuition-paying students.[303] As one commentator suggests, "The bottom line on this revenue item is clear: whether an individual student likes college sport or not, plans on attending events or not, he or she must still pay these charges."[304] But this explanation does not address the question that the Board and the courts will have to consider in determining the employment status of scholarship athletes: Why should an in-state student resident bear the cost of her often out-of-state classmates' athletic talents?[305] The most logical response, as is the case when dealing with any business venture, is that when an owner spends more than anticipated, the extraneous costs are shared with the customers.[306] Consequently, in addition to increasing student activity fees, the universities may deem it necessary to raise ticket prices, implement tuition increases, seek additional government assistance,[307] and offer corporate sponsorships. Henry Dutton, commenting on the factors that influence a product's cost, states, "[t]he merchant usually charges as large a price for his goods [or services] as he can, consistently with ultimate profit, knowing that a part of the excess profits will certainly be ab-

---

ing to recover from its basketball and football teams both being placed on two years academic probation following a series of NCAA Rules violations. NCAA ENFORCEMENT SUMMARY, *supra* note 258, at 29. The extensive list of infractions included academic fraud, unethical conduct, and providing improper financial aid. NCAA ENFORCEMENT SUMMARY, *supra* note 258, at 29.

303. SPERBER, *supra* note 16, at 85-86. In 1982, when the University of Houston's Athletic Department was operating at a $3.4 million deficit, the school increased its student fees to balance the budget. As a result, the Department's share of student fees increased from $400,000 in 1985 to 1.72 million in 1987. SPERBER, *supra* note 16, at 85-86.

304. SPERBER, *supra* note 16, at 85-86.

305. *See High School Report*, N.Y. TIMES, Feb. 2, 1995, at B12. The following represents a small sample of the New Jersey high school football players who in 1995 signed National Letters-of-Intent to accept scholarship offers from out-of-state universities. Listed are the players' names and the college they plan on attending: Rashidi Brown (Clemson); Anthony DiCosmo (Boston College); Ryan Carfley (North Carolina); Wally Elegbe (Virginia); Andrew Elford (Ohio State); Fred Hammonds (Kansas); Bill O'Donnell (Syracuse); and John Wellington (Syracuse). *Id.*

306. *See* KEITH DAVIS, THE CHALLENGE OF BUSINESS 195 (1975) (suggesting that there are many factors to consider when determining the price of a product or service).

307. *See generally* SPERBER, *supra* note 16, at 87-90 (noting that state governments contribute significant sums of money to athletics departments). In 1988, Cal State at Fullerton received $2.5 million, Montana State was provided $1.34 million, and the University of Alaska at Anchorage received $1.2 million from their respective state assemblies. SPERBER, supra note 16, at 88.

sorbed by losses . . . ."[308]

Although the sharing of costs will remain a highly contested issue, students can take solace in the fact that the universities *should not* drastically raise their prices to offset their supplemental expenditures.[309] In addition to participating in callous spending, universities have already raised tuition and fees "close to their saturation point."[310] Moreover, if the trend of increasing prices to balance expenses proceeds at a disproportionate rate, some suggest that the universities will suffer even greater future losses.[311] These commentators predict that the additional costs will result in fewer students attending colleges with Division I athletics programs.[312] In other words, if universities raise their already high-priced fees too quickly, their customers, or students, will shop elsewhere.[313]

Lastly, a coach responding to the Division I-A College Football Coaches Poll[314] questioned if his players, as employees under the National Labor Relations Act, could strike every time practice was too demanding.[315] The simple response to the coach's inquiry is that his players are entitled to strike.[316] According to § 7 of the Act, employees may engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," which includes striking.[317]

---

308. *See* HENRY P. DUTTON, BUSINESS ORGANIZATION AND MANAGEMENT 175 (7th ed. 1933).

309. *Id.* (suggesting that determining an appropriate price involves many factors).

310. *See* SPERBER, *supra* note 16, at 86.

311. *See e.g.* SPERBER, *supra* note 16, at 86 (suggesting that continued increases in student expenses will make college unaffordable).

312. SPERBER, *supra* note 16, at 86.

313. *See* DAVIS, *supra* note 306, at 194-95 (arguing that consumers often equate a higher price with quality when looking at unfamiliar products). Presumably, prospective students generally make informed decisions as to the quality of education offered by a particular institution. Moreover, it is unreasonable to conclude that higher tuition and fee increases necessarily result in a better education. *See* Board of Educ. v. Nyquist, 439 N.E.2d 359, 363 n.3 (N.Y. 1982) (reasoning that the court could only *"assum[e]* that there is a significant correlation between amounts of money expended and the quality . . . of educational opportunity provided.") (emphasis added).

314. *See supra* note 61 and accompanying text.

315. Alexander Wolff, *The Great Bear Hunt*, SPORTS ILLUSTRATED, Aug. 30, 1993, at 94, 97. Presumably, the coach responding to my poll was referring to an incident that occurred at the University of Oklahoma, where the football players refused to practice until their coach satisfactorily explained why a certain quarterback was not playing. *Id.* Similarly, at Memphis State University, eighty-four members of the football team refused to practice after losing three straight games. *Id.*

316. 29 U.S.C. §§ 157, 163 (1988).

317. *Id.*

Moreover, the employees' ability to strike is crucial because a strike represents "the motive power that makes collective bargaining operate."[318] If the players were unable to strike, then the universities would have no realistic incentive to negotiate in good faith.[319]

However, before going on strike, employees should consider if their strike is lawful and if the potential benefits outweigh the risks. Determining the lawfulness of unfair labor practice and economic strikes,[320] which occurs after the decision to strike has been made, is the responsibility of the Board.[321] However, these questions cannot be resolved here since the Board's decisions are fact specific. On the other hand, analyzing the potential consequences that may result from the players decision to strike addresses the coach's immediate concern, i.e., what safeguards does the university and its coaching staff have against players taking advantage of their employment status?

A responsible union will not allow its members to go out on strike without sufficient cause since strikes are damaging and costly to both the employer and the employees.[322] Assuming in the coach's hypothetical situation that a collective bargaining agreement has been negotiated, issues affecting the players' working conditions, such as the frequency, duration, and in-

---

318. LABOR CASES, *supra* note 50, at 487 (discussing the influence that the employees' ability to strike has on the collective bargaining process).

319. *See* Jeffrey A. Spector, Comment, *Replacement and Reinstatement of Strikers in the United States, Great Britain, and Canada*, 13 COMP. LAB. L.J. 184 (noting that "economic weapons induce both parties to negotiate an agreement") (citing NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 489 (1960)).

320. 29 U.S.C. § 158(a) (1988). An unfair labor practice strike is a potential employee response to alleged 8(a) violations by the employer. *Id.*, *see* Nugent, *supra* note 289, at 208-09. Following a Board decision that the employer committed an unfair labor practice(s), the employer must "reinstate the striking employees to their former positions." LABOR CASES, *supra* note 50, at 595. However, if the employers engage in an economic strike, essentially every strike that is not in response to an alleged unfair labor practice, the employer is only obligated to place the returning workers on "preferential hiring lists." This means that as positions become available, the employer is obligated to rehire from these lists before seeking outside employees. Nugent, *supra* note 289, at 208-09.

321. Nugent, *supra* note 289, at 200-01.

322. 29 U.S.C. § 157 (1988). *See* BEGIN & BEAL, *supra* note 140, at 223 (stating that the union sustains economic losses and risks member dissatisfaction when the employees go out on strike). Moreover, a union represents all of the employees within the unit regardless of membership status. As a result, the union will not engage in a strike that is only supported by a small percentage of employees within the unit. BEGIN & BEAL, *supra* note 140, at 148.

tensity of practices, hopefully will have been included within that agreement.[323] In any event, the union has at its disposal the ability to file grievances with the NLRB, alleging the employer's actions are in violation of the agreement.[324] This is a viable alternative to striking because the NLRB has the authority to investigate complaints and provide for hearings.[325]

In addition, if the players decide to strike, the universities are permitted to replace them. Although the effectiveness of hiring replacement players remains uncertain,[326] the players must evaluate the costs and consequences of their actions. Most importantly, employees are not paid while exercising their right to strike.[327] The cessation of income and benefits, albeit temporary, should have a neutralizing effect on the players' willingness to irresponsibly create a work stoppage. Considering that college careers are generally limited to four years, and only a very few experience the high-paying salaries of the NFL and the NBA,[328] the players will not allow their limited careers to dissipate by striking over insignificant issues. Again, these items can be taken up with the Board through filing grievances. However, the mere presence of an economic weapon as powerful as the *ability to strike* will serve as the motive power that balances the playing field between scholarship athletes and the NCAA member institutions.[329]

---

323. 29 U.S.C. § 159(a) (1988).

324. *Id.* § 160(b).

325. *Id.*

326. In 1987, the National Football League employed replacement players after the regular players went on strike. Peter King, *The NFL Strike May Be Over, but Now It's Time for . . CHAOS*, NEWSDAY, Oct. 18, 1987, at 40. When the players returned from their 24-day strike, they were resentful of the owners' decision to continue playing with lesser personnel. *Id.* The resulting mistrust and anger between the two sides was summed up by former New York Giant Harry Carson, "The sport of football has been damaged . . . It won't be the way it was for a couple of years at least. There's an awful lot of bitterness in the game right now." *Id.*

327. *See* BEGIN & BEAL, *supra* note 140, at 223 (suggesting that the workers' decision to strike puts their "livelihood on the line"). *See, e.g.*, *Turner on Strike's High Cost*, N.Y. TIMES, Feb. 24, 1995, at B8 (Atlanta Braves' owner Ted Turner estimated that pitcher Greg Maddux lost $200,000 per outing missed due to the 1994 baseball strike).

328. *See*, Dieffenbach, *supra* note 29, at 89. Glenn Robinson, the first player selected in the 1994 NBA Draft, signed a 10-year deal with the Milwaukee Bucks for $68.15 million. Dieffenbach, *supra* note 29, at 89.

329. LABOR CASES, *supra* note 50, at 487; *see* Nugent, *supra* note 289, at 208.

VI. Conclusion

The arguments previously used to deny the employment status of Division I-A scholarship athletes are no longer applicable. Today's scholarship athletes are not primarily students, rather they are employees who receive compensation and pay taxes in exchange for their services within the billion dollar industry known as intercollegiate athletics.

At minimum, the National Labor Relations Board must create a new category of student-employees. Scholarship athletes, by the nature of their employment, are deserving of protection under the NLRA, as it is clear that the universities are not interested in their best interests. As Charles Craypo discussed, "Unions and collective bargaining are labor responses to the organization of production in a market economy."[330] Unfortunately, under the current system, it is the athletes who generate the revenues, yet they receive the least in return.

This Article does not resolve all of the problems that will be encountered in changing a system that has exploited student-athletes for years. Hopefully, it will serve to facilitate further discussion and action by present scholarship athletes seeking to protect the rights of their successors. The ball is in their court. However, until significant strides are made to counter the NCAA's "cartel-like" characteristics, scholarship athletes will remain *an employer's dream come true.*

330. Craypo, *supra* note 152, at 2.