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## **The Shame of College Sports Atlantic**

By TAYLOR BRANCH

The list of scandals goes on. With each revelation, there is much wringing of hands. Critics scold schools for breaking faith with their educational mission, and for failing to enforce the sanctity of "amateurism." Sportswriters denounce the NCAA for both tyranny and impotence in its quest to "clean up" college sports. Observers on all sides express jumbled emotions about youth and innocence, venting against professional mores or greedy amateurs.

For all the outrage, the real scandal is not that students are getting illegally paid or recruited, it's that two of the noble principles on which the NCAA justifies its existence—"amateurism" and the "student-athlete"—are cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes. The tragedy at the heart of college sports is not that some college athletes are getting paid, but that more of them are not.

Don Curtis, a UNC trustee, told me that impoverished football players cannot afford movie tickets or bus fare home. Curtis is a rarity among those in higher education today, in that he dares to violate the signal taboo: "I think we should pay these guys something."

Fans and educators alike recoil from this proposal as though from original sin. Amateurism is the whole point, they say. Paid athletes would destroy the integrity and appeal of college sports. Many former college athletes object that money would have spoiled the sanctity of the bond they enjoyed with their teammates. I, too, once shuddered instinctively at the notion of paid college athletes.

But after an inquiry that took me into locker rooms and ivory towers across the country, I have come to believe that sentiment blinds us to what's before our eyes. Big-time college sports are fully commercialized. Billions of dollars flow through them each year. The NCAA makes money, and enables universities and corporations to make money, from the unpaid labor of young athletes.

Slavery analogies should be used carefully. College athletes are not slaves. Yet to survey the scene—corporations and universities enriching themselves on the backs of uncompensated young men, whose status as "student-athletes" deprives them of the right to due process guaranteed by the Constitution—is to catch an unmistakable whiff of the plantation. Perhaps a more apt metaphor is colonialism: college sports, as overseen by the NCAA,

is a system imposed by well-meaning paternalists and rationalized with hoary sentiments about caring for the well-being of the colonized. But it is, nonetheless, unjust. The NCAA, in its zealous defense of bogus principles, sometimes destroys the dreams of innocent young athletes.

The NCAA today is in many ways a classic cartel. Efforts to reform it—most notably by the three Knight Commissions over the course of 20 years—have, while making changes around the edges, been largely fruitless. The time has come for a major overhaul. And whether the powers that be like it or not, big changes are coming. Threats loom on multiple fronts: in Congress, the courts, breakaway athletic conferences, student rebellion, and public disgust. Swaddled in gauzy clichés, the NCAA presides over a vast, teetering glory.

### Founding Myths

From the start, amateurism in college sports has been honored more often in principle than in fact; the NCAA was built of a mixture of noble and venal impulses. In the late 19th century, intellectuals believed that the sporting arena simulated an impending age of Darwinian struggle. Because the United States did not hold a global empire like England's, leaders warned of national softness once railroads conquered the last continental frontier. As though heeding this warning, ingenious students turned variations on rugby into a toughening agent. Today a plaque in New Brunswick, New Jersey, commemorates the first college game, on November 6, 1869, when Rutgers beat Princeton 6–4.

Walter Camp graduated from Yale in 1880 so intoxicated by the sport that he devoted his life to it without pay, becoming "the father of American football." He persuaded other schools to reduce the chaos on the field by trimming each side from 15 players to 11, and it was his idea to paint measuring lines on the field. He conceived functional designations for players, coining terms such as quarterback. His game remained violent by design. Crawlers could push the ball forward beneath piles of flying elbows without pause until they cried "Down!" in submission.

In an 1892 game against its archrival, Yale, the Harvard football team was the first to deploy a "flying wedge," based on Napoleon's surprise concentrations of military force. In an editorial calling for the abolition of the play, The New York Times described it as "half a ton of bone and muscle coming into collision with a man weighing 160 or 170 pounds," noting that surgeons often had to be called onto the field. Three years later, the continuing mayhem prompted the Harvard faculty to take the first of two votes to abolish football. Charles Eliot, the university's president, brought up other concerns. "Deaths and injuries are not the strongest argument against football," declared Eliot. "That cheating and brutality are profitable is the main evil." Still, Harvard football persisted. In 1903, fervent alumni built Harvard Stadium with zero college funds. The team's first paid head coach, Bill Reid, started in 1905 at nearly twice the average salary for a full professor.

A newspaper story from that year, illustrated with the Grim Reaper laughing on a goalpost, counted 25 college players killed during football season. A fairy-tale version of the founding of the NCAA holds that President Theodore Roosevelt, upset by a photograph of a bloodied Swarthmore College player, vowed to civilize or destroy football. The real story is that Roosevelt maneuvered shrewdly to preserve the sport—and give a boost to his beloved Harvard. After McClure's magazine published a story on corrupt teams with phantom students, a muckraker exposed Walter Camp's \$100,000 slush fund at Yale. In response to mounting outrage, Roosevelt summoned leaders from Harvard, Princeton, and Yale to the White House, where Camp parried mounting criticism and conceded nothing irresponsible in the college football rules he'd established. At Roosevelt's behest, the three schools issued a public statement that college sports must reform to survive, and representatives from 68 colleges founded a new organization that would soon be called the National Collegiate Athletic Association. A Haverford College official was confirmed as secretary but then promptly resigned in favor of Bill Reid, the new Harvard coach, who instituted new rules that benefited Harvard's playing style at the expense of Yale's. At a stroke, Roosevelt saved football and dethroned Yale.

For nearly 50 years, the NCAA, with no real authority and no staff to speak of, enshrined amateur ideals that it was helpless to enforce. (Not until 1939 did it gain the power even to mandate helmets.) In 1929, the Carnegie Foundation made headlines with a report, "American College Athletics," which concluded that the scramble for players had "reached the proportions of nationwide commerce." Of the 112 schools surveyed, 81 flouted NCAA recommendations with inducements to students ranging from open payrolls and disguised booster funds to no-show jobs at movie studios. Fans ignored the uproar, and two-thirds of the colleges mentioned told The New York Times that they planned no changes. In 1939, freshman players at the University of Pittsburgh went on strike because they were getting paid less than their upperclassman teammates.

Embarrassed, the NCAA in 1948 enacted a "Sanity Code," which was supposed to prohibit all concealed and indirect benefits for college athletes; any money for athletes was to be limited to transparent scholarships awarded solely on financial need. Schools that violated this code would be expelled from NCAA membership and thus exiled from competitive sports.

This bold effort flopped. Colleges balked at imposing such a drastic penalty on each other, and the Sanity Code was repealed within a few years. The University of Virginia went so far as to call a press conference to say that if its athletes were ever accused of being paid, they should be forgiven, because their studies at Thomas Jefferson's university were so rigorous.

The Big Bluff

In 1951, the NCAA seized upon a serendipitous set of events to gain control of intercollegiate sports. First, the organization hired a young college dropout named Walter Byers as executive director. A journalist who was not yet 30 years old, he was an appropriately inauspicious choice for the vaguely defined new post. He wore cowboy boots and a toupee. He shunned personal contact, obsessed over details, and proved himself a bureaucratic master of pervasive, anonymous intimidation. Although discharged from the Army during World War II for defective vision, Byers was able to see an opportunity in two contemporaneous scandals. In one, the tiny College of William and Mary, aspiring to challenge football powers Oklahoma and Ohio State, was found to be counterfeiting grades to keep conspicuously pampered players eligible. In the other, a basketball point-shaving conspiracy (in which gamblers paid players to perform poorly) had spread from five New York colleges to the University of Kentucky, the reigning national champion, generating tabloid “perp” photos of gangsters and handcuffed basketball players. The scandals posed a crisis of credibility for collegiate athletics, and nothing in the NCAA’s feeble record would have led anyone to expect real reform.

But Byers managed to impanel a small infractions board to set penalties without waiting for a full convention of NCAA schools, which would have been inclined toward forgiveness. Then he lobbied a University of Kentucky dean—A. D. Kirwan, a former football coach and future university president—not to contest the NCAA’s dubious legal position (the association had no actual authority to penalize the university), pleading that college sports must do something to restore public support. His gambit succeeded when Kirwan reluctantly accepted a landmark precedent: the Kentucky basketball team would be suspended for the entire 1952–53 season. Its legendary coach, Adolph Rupp, fumed for a year in limbo.

The Kentucky case created an aura of centralized command for an NCAA office that barely existed. At the same time, a colossal misperception gave Byers leverage to mine gold. Amazingly in retrospect, most colleges and marketing experts considered the advent of television a dire threat to sports. Studies found that broadcasts reduced live attendance, and therefore gate receipts, because some customers preferred to watch at home for free. Nobody could yet imagine the revenue bonanza that television represented. With clunky new TV sets proliferating, the 1951 NCAA convention voted 161–7 to outlaw televised games except for a specific few licensed by the NCAA staff.

All but two schools quickly complied. The University of Pennsylvania and Notre Dame protested the order to break contracts for home-game television broadcasts, claiming the right to make their own decisions. Byers objected that such exceptions would invite disaster. The conflict escalated. Byers brandished penalties for games televised without approval. Penn contemplated seeking antitrust protection through the courts. Byers issued a contamination notice, informing any opponent scheduled to play Penn that it

would be punished for showing up to compete. In effect, Byers mobilized the college world to isolate the two holdouts in what one sportswriter later called “the Big Bluff.”

Byers won. Penn folded in part because its president, the perennial White House contender Harold Stassen, wanted to mend relations with fellow schools in the emerging Ivy League, which would be formalized in 1954. When Notre Dame also surrendered, Byers conducted exclusive negotiations with the new television networks on behalf of every college team. Joe Rauh Jr., a prominent civil-rights attorney, helped him devise a rationing system to permit only 11 broadcasts a year—the fabled Game of the Week. Byers and Rauh selected a few teams for television exposure, excluding the rest. On June 6, 1952, NBC signed a one-year deal to pay the NCAA \$1.14 million for a carefully restricted football package. Byers routed all contractual proceeds through his office. He floated the idea that, to fund an NCAA infrastructure, his organization should take a 60 percent cut; he accepted 12 percent that season. (For later contracts, as the size of television revenues grew exponentially, he backed down to 5 percent.) Proceeds from the first NBC contract were enough to rent an NCAA headquarters, in Kansas City.

Only one year into his job, Byers had secured enough power and money to regulate all of college sports. Over the next decade, the NCAA’s power grew along with television revenues. Through the efforts of Byers’s deputy and chief lobbyist, Chuck Neinas, the NCAA won an important concession in the Sports Broadcasting Act of 1961, in which Congress made its granting of a precious antitrust exemption to the National Football League contingent upon the blackout of professional football on Saturdays. Deftly, without even mentioning the NCAA, a rider on the bill carved each weekend into protected broadcast markets: Saturday for college, Sunday for the NFL. The NFL got its antitrust exemption. Byers, having negotiated the NCAA’s television package up to \$3.1 million per football season—which was higher than the NFL’s figure in those early years—had made the NCAA into a spectacularly profitable cartel.

#### “We Eat What We Kill”

The NCAA’s control of college sports still rested on a fragile base, however: the consent of the colleges and universities it governed. For a time, the vast sums of television money delivered to these institutions through Byers’s deals made them willing to submit. But the big football powers grumbled about the portion of the television revenue diverted to nearly a thousand NCAA member schools that lacked major athletic programs. They chafed against cost-cutting measures—such as restrictions on team size—designed to help smaller schools. “I don’t want Hofstra telling Texas how to play football,” Darrell Royal, the Longhorns coach, griped. By the 1970s and ’80s, as college football games delivered bonanza ratings—and advertising revenue—to the networks, some of the big football schools began to wonder: Why do we need to have our television coverage brokered through the

NCAA? Couldn't we get a bigger cut of that TV money by dealing directly with the networks?

Byers faced a rude internal revolt. The NCAA's strongest legions, its big football schools, defected en masse. Calling the NCAA a price-fixing cartel that siphoned every television dollar through its coffers, in 1981 a rogue consortium of 61 major football schools threatened to sign an independent contract with NBC for \$180 million over four years.

With a huge chunk of the NCAA's treasury walking out the door, Byers threatened sanctions, as he had against Penn and Notre Dame three decades earlier. But this time the universities of Georgia and Oklahoma responded with an antitrust suit. "It is virtually impossible to overstate the degree of our resentment ... of the NCAA," said William Banowsky, the president of the University of Oklahoma. In the landmark 1984 *NCAA v. Board of Regents of the University of Oklahoma* decision, the U.S. Supreme Court struck down the NCAA's latest football contracts with television—and any future ones—as an illegal restraint of trade that harmed colleges and viewers. Overnight, the NCAA's control of the television market for football vanished. Upholding Banowsky's challenge to the NCAA's authority, the Regents decision freed the football schools to sell any and all games the markets would bear. Coaches and administrators no longer had to share the revenue generated by their athletes with smaller schools outside the football consortium. "We eat what we kill," one official at the University of Texas bragged.

A few years earlier, this blow might have financially crippled the NCAA—but a rising tide of money from basketball concealed the structural damage of the Regents decision. During the 1980s, income from the March Madness college basketball tournament, paid directly by the television networks to the NCAA, grew tenfold. The windfall covered—and then far exceeded—what the organization had lost from football.

Still, Byers never forgave his former deputy Chuck Neinas for leading the rebel consortium. He knew that Neinas had seen from the inside how tenuous the NCAA's control really was, and how diligently Byers had worked to prop up its Oz-like façade. During Byers's tenure, the rule book for Division I athletes grew to 427 pages of scholastic detail. His NCAA personnel manual banned conversations around water coolers, and coffee cups on desks, while specifying exactly when drapes must be drawn at the NCAA's 27,000-square-foot headquarters near Kansas City (built in 1973 from the proceeds of a 1 percent surtax on football contracts). It was as though, having lost control where it mattered, Byers pedantically exerted more control where it didn't.

After retiring in 1987, Byers let slip his suppressed fury that the ingrate football conferences, having robbed the NCAA of television revenue, still expected it to enforce amateurism rules and police every leak of funds to college players. A lethal greed was "gnawing at the innards of college athletics," he wrote in his memoir. When Byers renounced the NCAA's

pretense of amateurism, his former colleagues would stare blankly, as though he had gone senile or, as he wrote, "desecrated my sacred vows." But Byers was better positioned than anyone else to argue that college football's claim to amateurism was unfounded. Years later, as we will see, lawyers would seize upon his words to do battle with the NCAA.

Meanwhile, reformers fretted that commercialism was hurting college sports, and that higher education's historical balance between academics and athletics had been distorted by all the money sloshing around. News stories revealed that schools went to extraordinary measures to keep academically incompetent athletes eligible for competition, and would vie for the most-sought-after high-school players by proffering under-the-table payments. In 1991, the first Knight Commission report, "Keeping Faith With the Student Athlete," was published; the commission's "bedrock conviction" was that university presidents must seize control of the NCAA from athletic directors in order to restore the preeminence of academic values over athletic or commercial ones. In response, college presidents did take over the NCAA's governance. But by 2001, when the second Knight Commission report ("A Call to Action: Reconnecting College Sports and Higher Education") was issued, a new generation of reformers was admitting that problems of corruption and commercialism had "grown rather than diminished" since the first report. Meanwhile the NCAA itself, revenues rising, had moved into a \$50 million, 116,000-square-foot headquarters in Indianapolis. By 2010, as the size of NCAA headquarters increased yet again with a 130,000-square-foot expansion, a third Knight Commission was groping blindly for a hold on independent college-athletic conferences that were behaving more like sovereign pro leagues than confederations of universities. And still more money continued to flow into NCAA coffers. With the basketball tournament's 2011 television deal, annual March Madness broadcast revenues had skyrocketed 50-fold in less than 30 years.

#### The Myth of the "Student-Athlete"

Today, much of the NCAA's moral authority—indeed much of the justification for its existence—is vested in its claim to protect what it calls the "student-athlete." The term is meant to conjure the nobility of amateurism, and the precedence of scholarship over athletic endeavor. But the origins of the "student-athlete" lie not in a disinterested ideal but in a sophistic formulation designed, as the sports economist Andrew Zimbalist has written, to help the NCAA in its "fight against workmen's compensation insurance claims for injured football players."

"We crafted the term student-athlete," Walter Byers himself wrote, "and soon it was embedded in all NCAA rules and interpretations." The term came into play in the 1950s, when the widow of Ray Dennison, who had died from a head injury received while playing football in Colorado for the Fort Lewis A&M Aggies, filed for workmen's-compensation death benefits. Did his football scholarship make the fatal collision a "work-related" accident? Was he a school employee, like his peers who worked part-time as teaching assistants

and bookstore cashiers? Or was he a fluke victim of extracurricular pursuits? Given the hundreds of incapacitating injuries to college athletes each year, the answers to these questions had enormous consequences. The Colorado Supreme Court ultimately agreed with the school's contention that he was not eligible for benefits, since the college was "not in the football business."

The term student-athlete was deliberately ambiguous. College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals). That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that they were students meant they did not have to be compensated, ever, for anything more than the cost of their studies. Student-athlete became the NCAA's signature term, repeated constantly in and out of courtrooms.

Using the "student-athlete" defense, colleges have compiled a string of victories in liability cases. On the afternoon of October 26, 1974, the Texas Christian University Horned Frogs were playing the Alabama Crimson Tide in Birmingham, Alabama. Kent Waldrep, a TCU running back, carried the ball on a "Red Right 28" sweep toward the Crimson Tide's sideline, where he was met by a swarm of tacklers. When Waldrep regained consciousness, Bear Bryant, the storied Crimson Tide coach, was standing over his hospital bed. "It was like talking to God, if you're a young football player," Waldrep recalled.

Waldrep was paralyzed: he had lost all movement and feeling below his neck. After nine months of paying his medical bills, Texas Christian refused to pay any more, so the Waldrep family coped for years on dwindling charity.

Through the 1990s, from his wheelchair, Waldrep pressed a lawsuit for workers' compensation. (He also, through heroic rehabilitation efforts, recovered feeling in his arms, and eventually learned to drive a specially rigged van. "I can brush my teeth," he told me last year, "but I still need help to bathe and dress.") His attorneys haggled with TCU and the state worker-compensation fund over what constituted employment. Clearly, TCU had provided football players with equipment for the job, as a typical employer would—but did the university pay wages, withhold income taxes on his financial aid, or control work conditions and performance? The appeals court finally rejected Waldrep's claim in June of 2000, ruling that he was not an employee because he had not paid taxes on financial aid that he could have kept even if he quit football. (Waldrep told me school officials "said they recruited me as a student, not an athlete," which he says was absurd.)

The long saga vindicated the power of the NCAA's "student-athlete" formulation as a shield, and the organization continues to invoke it as both a legalistic defense and a noble ideal. Indeed, such is the term's rhetorical power that it is increasingly used as a sort of reflexive mantra against charges of rabid hypocrisy.

Last Thanksgiving weekend, with both the FBI and the NCAA investigating whether Cam Newton had been lured onto his team with illegal payments, Newton's Auburn Tigers and the Alabama Crimson Tide came together for their annual game, known as the Iron Bowl, before 101,821 fans at Bryant-Denny Stadium. This game is always a highlight of the football season because of the historic rivalry between the two schools, and the 2010 edition had enormous significance, pitting the defending national champion Crimson Tide against the undefeated Tigers, who were aiming for their first championship since 1957. I expected excited fans; what I encountered was the throbbing heart of college sports. As I drove before daybreak toward the stadium, a sleepless caller babbled over WJOX, the local fan radio station, that he "couldn't stop thinking about the coin toss." In the parking lot, ticketless fans were puzzled that anyone need ask why they had tailgated for days just to watch their satellite-fed flat screens within earshot of the roar. All that morning, pilgrims packed the Bear Bryant museum, where displays elaborated the misery of Alabama's 4-24 run before the glorious Bryant era dawned in 1958.

Finally, as Auburn took the field for warm-ups, one of Alabama's public-address-system operators played "Take the Money and Run" (an act for which he would be fired). A sea of signs reading \$CAM taunted Newton. The game, perhaps the most exciting of the season, was unbearably tense, with Auburn coming from way behind to win 28-27, all but assuring that it would go on to play for the national championship. Days later, Auburn suspended Newton after the NCAA found that a rules violation had occurred: his father was alleged to have marketed his son in a pay-for-play scheme; a day after that, the NCAA reinstated Newton's eligibility because investigators had not found evidence that Newton or Auburn officials had known of his father's actions. This left Newton conveniently eligible for the Southeastern Conference championship game and for the postseason BCS championship bowl. For the NCAA, prudence meant honoring public demand.

"Our championships," NCAA President Mark Emmert has declared, "are one of the primary tools we have to enhance the student-athlete experience."

#### "Whoremasters"

NCAA v. Regents left the NCAA devoid of television football revenue and almost wholly dependent on March Madness basketball. It is rich but insecure. Last year, CBS Sports and Turner Broadcasting paid \$771 million to the NCAA for television rights to the 2011 men's basketball tournament alone. That's three-quarters of a billion dollars built on the backs of amateurs—on unpaid labor. The whole edifice depends on the players' willingness to perform what is effectively volunteer work. The athletes, and the league officials, are acutely aware of this extraordinary arrangement. William Friday, the former North Carolina president, recalls being yanked from one Knight Commission meeting and sworn to secrecy about what might happen if a certain team made the NCAA championship basketball

game. "They were going to dress and go out on the floor," Friday told me, "but refuse to play," in a wildcat student strike. Skeptics doubted such a diabolical plot. These were college kids—unlikely to second-guess their coaches, let alone forfeit the dream of a championship. Still, it was unnerving to contemplate what hung on the consent of a few young volunteers: several hundred million dollars in television revenue, countless livelihoods, the NCAA budget, and subsidies for sports at more than 1,000 schools. Friday's informants exhaled when the suspect team lost before the finals.

Cognizant of its precarious financial base, the NCAA has in recent years begun to pursue new sources of revenue. Taking its cue from member schools such as Ohio State (which in 2009 bundled all its promotional rights—souvenirs, stadium ads, shoe deals—and outsourced them to the international sports marketer IMG College for a guaranteed \$11 million a year), the NCAA began to exploit its vault of college sports on film. For \$29.99 apiece, NCAA On Demand offers DVDs of more than 200 memorable contests in men's ice hockey alone. Video-game technology also allows nostalgic fans to relive and even participate in classic moments of NCAA Basketball. NCAA Football, licensed by the NCAA through IMG College to Electronic Arts, one of the world's largest video-game manufacturers, reportedly sold 2.5 million copies in 2008. Brit Kirwan, the chancellor of the Maryland university system and a former president at Ohio State, says there were "terrible fights" between the third Knight Commission and the NCAA over the ethics of generating this revenue.

All of this money ultimately derives from the college athletes whose likenesses are shown in the films or video games. But none of the profits go to them. Last year, Electronic Arts paid more than \$35 million in royalties to the NFL players union for the underlying value of names and images in its pro football series—but neither the NCAA nor its affiliated companies paid former college players a nickel. Naturally, as they have become more of a profit center for the NCAA, some of the vaunted "student-athletes" have begun to clamor that they deserve a share of those profits. You "see everybody getting richer and richer," Desmond Howard, who won the 1991 Heisman Trophy while playing for the Michigan Wolverines, told USA Today recently. "And you walk around and you can't put gas in your car? You can't even fly home to see your parents?"

Some athletes have gone beyond talk. A series of lawsuits quietly making their way through the courts cast a harsh light on the absurdity of the system—and threaten to dislodge the foundations on which the NCAA rests. On July 21, 2009, lawyers for Ed O'Bannon filed a class-action antitrust suit against the NCAA at the U.S. District Court in San Francisco. "Once you leave your university," says O'Bannon, who won the John Wooden Award for player of the year in 1995 on UCLA's national-championship basketball team, "one would think your likeness belongs to you." The NCAA and UCLA continue to collect money from the sales of videos of him playing. But by NCAA rules, O'Bannon, who today works at a Toyota dealership near Las Vegas, alleges

he is still not allowed to share the revenue the NCAA generates from his own image as a college athlete. His suit quickly gathered co-plaintiffs from basketball and football, ex-players featured in NCAA videos and other products. "The NCAA does not license student-athlete likenesses," NCAA spokesperson Erik Christianson told The New York Times in response to the suit, "or prevent former student-athletes from attempting to do so. Likewise, to claim the NCAA profits off student-athlete likenesses is also pure fiction."

The legal contention centers on Part IV of the NCAA's "Student-Athlete Statement" for Division I, which requires every athlete to authorize use of "your name or picture ... to promote NCAA championships or other NCAA events, activities or programs." Does this clause mean that athletes clearly renounce personal interest forever? If so, does it actually undermine the NCAA by implicitly recognizing that athletes have a property right in their own performance? Jon King, a lawyer for the plaintiffs, expects the NCAA's core mission of amateurism to be its "last defense standing."

In theory, the NCAA's passion to protect the noble amateurism of college athletes should prompt it to focus on head coaches in the high-revenue sports—basketball and football—since holding the top official accountable should most efficiently discourage corruption. The problem is that the coaches' growing power has rendered them, unlike their players, ever more immune to oversight. According to research by Charles Clotfelter, an economist at Duke, the average compensation for head football coaches at public universities, now more than \$2 million, has grown 750 percent (adjusted for inflation) since the Regents decision in 1984; that's more than 20 times the cumulative 32 percent raise for college professors. For top basketball coaches, annual contracts now exceed \$4 million, augmented by assorted bonuses, endorsements, country-club memberships, the occasional private plane, and in some cases a negotiated percentage of ticket receipts. (Oregon's ticket concessions netted former football coach Mike Bellotti an additional \$631,000 in 2005.)

The NCAA rarely tangles with such people, who are apt to fight back and win. When Rick Neuheisel, the head football coach of the Washington Huskies, was punished for petty gambling (in a March Madness pool, as it happened), he sued the NCAA and the university for wrongful termination, collected \$4.5 million, and later moved on to UCLA. When the NCAA tried to cap assistant coaches' entering salary at a mere \$16,000, nearly 2,000 of them brought an antitrust suit, *Law v. NCAA*, and in 1999 settled for \$54.5 million. Since then, salaries for assistant coaches have commonly exceeded \$200,000, with the top assistants in the SEC averaging \$700,000. In 2009, Monte Kiffin, then at the University of Tennessee, became the first assistant coach to reach \$1 million, plus benefits.

The late Myles Brand, who led the NCAA from 2003 to 2009, defended the economics of college sports by claiming that they were simply the result of a smoothly functioning free market. He and his colleagues deflected criticism

about the money saturating big-time college sports by focusing attention on scapegoats; in 2010, outrage targeted sports agents. Last year Sports Illustrated published "Confessions of an Agent," a firsthand account of dealing with high-strung future pros whom the agent and his peers courted with flattery, cash, and tawdry favors. Nick Saban, Alabama's head football coach, mobilized his peers to denounce agents as a public scourge. "I hate to say this," he said, "but how are they any better than a pimp? I have no respect for people who do that to young people. None."

Saban's raw condescension contrasts sharply with the lonely penitence from Dale Brown, the retired longtime basketball coach at LSU. "Look at the money we make off predominantly poor black kids," Brown once reflected. "We're the whoremasters."

#### "Picayune Rules"

NCAA officials have tried to assert their dominion—and distract attention from the larger issues—by chasing frantically after petty violations. Tom McMillen, a former member of the Knight Commission who was an All-American basketball player at the University of Maryland, likens these officials to traffic cops in a speed trap, who could flag down almost any passing motorist for prosecution in kangaroo court under a "maze of picayune rules." The publicized cases have become convoluted soap operas. At the start of the 2010 football season, A. J. Green, a wide receiver at Georgia, confessed that he'd sold his own jersey from the Independence Bowl the year before, to raise cash for a spring-break vacation. The NCAA sentenced Green to a four-game suspension for violating his amateur status with the illicit profit generated by selling the shirt off his own back. While he served the suspension, the Georgia Bulldogs store continued legally selling replicas of Green's No. 8 jersey for \$39.95 and up.

A few months later, the NCAA investigated rumors that Ohio State football players had benefited from "hook-ups on tats"—that is, that they'd gotten free or underpriced tattoos at an Ohio tattoo parlor in exchange for autographs and memorabilia—a violation of the NCAA's rule against discounts linked to athletic personae. The NCAA Committee on Infractions imposed five-game suspensions on Terrelle Pryor, Ohio State's tattooed quarterback, and four other players (some of whom had been found to have sold their Big Ten championship rings and other gear), but did permit them to finish the season and play in the Sugar Bowl. (This summer, in an attempt to satisfy NCAA investigators, Ohio State voluntarily vacated its football wins from last season, as well as its Sugar Bowl victory.) A different NCAA committee promulgated a rule banning symbols and messages in players' eyeblack—reportedly aimed at Pryor's controversial gesture of support for the pro quarterback Michael Vick, and at Bible verses inscribed in the eyeblack of the former Florida quarterback Tim Tebow.

The moral logic is hard to fathom: the NCAA bans personal messages on the bodies of the players, and penalizes players for trading their celebrity status

for discounted tattoos—but it codifies precisely how and where commercial insignia from multinational corporations can be displayed on college players, for the financial benefit of the colleges. Last season, while the NCAA investigated him and his father for the recruiting fees they'd allegedly sought, Cam Newton compliantly wore at least 15 corporate logos—one on his jersey, four on his helmet visor, one on each wristband, one on his pants, six on his shoes, and one on the headband he wears under his helmet—as part of Auburn's \$10.6 million deal with Under Armour.

### “Restitution”

Obscure NCAA rules have bedeviled Scott Boras, the preeminent sports agent for Major League Baseball stars, in cases that may ultimately prove more threatening to the NCAA than Ed O'Bannon's antitrust suit. In 2008, Andrew Oliver, a sophomore pitcher for the Oklahoma State Cowboys, had been listed as the 12th-best professional prospect among sophomore players nationally. He decided to dismiss the two attorneys who had represented him out of high school, Robert and Tim Baratta, and retain Boras instead. Infuriated, the Barattas sent a spiteful letter to the NCAA. Oliver didn't learn about this until the night before he was scheduled to pitch in the regional final for a place in the College World Series, when an NCAA investigator showed up to question him in the presence of lawyers for Oklahoma State. The investigator also questioned his father, Dave, a truck driver.

Had Tim Baratta been present in their home when the Minnesota Twins offered \$390,000 for Oliver to sign out of high school? A yes would mean trouble. While the NCAA did not forbid all professional advice—indeed, Baseball America used to publish the names of agents representing draft-likely underclassmen—NCAA Bylaw 12.3.2.1 prohibited actual negotiation with any professional team by an adviser, on pain of disqualification for the college athlete. The questioning lasted past midnight.

Just hours before the game was to start the next day, Oklahoma State officials summoned Oliver to tell him he would not be pitching. Only later did he learn that the university feared that by letting him play while the NCAA adjudicated his case, the university would open not only the baseball team but all other Oklahoma State teams to broad punishment under the NCAA's “restitution rule” (Bylaw 19.7), under which the NCAA threatens schools with sanctions if they obey any temporary court order benefiting a college athlete, should that order eventually be modified or removed. The baseball coach did not even let his ace tell his teammates the sad news in person. “He said, ‘It's probably not a good idea for you to be at the game,’” Oliver recalls.

The Olivers went home to Ohio to find a lawyer. Rick Johnson, a solo practitioner specializing in legal ethics, was aghast that the Baratta brothers had turned in their own client to the NCAA, divulging attorney-client details likely to invite wrath upon Oliver. But for the next 15 months, Johnson directed his litigation against the two NCAA bylaws at issue. Judge Tygh M. Tone, of Erie County, came to share his outrage. On February 12, 2009, Tone

struck down the ban on lawyers negotiating for student-athletes as a capricious, exploitative attempt by a private association to “dictate to an attorney where, what, how, or when he should represent his client,” violating accepted legal practice in every state. He also struck down the NCAA’s restitution rule as an intimidation that attempted to supersede the judicial system. Finally, Judge Tone ordered the NCAA to reinstate Oliver’s eligibility at Oklahoma State for his junior season, which started several days later.

The NCAA sought to disqualify Oliver again, with several appellate motions to stay “an unprecedented Order purporting to void a fundamental Bylaw.” Oliver did get to pitch that season, but he dropped into the second round of the June 2009 draft, signing for considerably less than if he’d been picked earlier. Now 23, Oliver says sadly that the whole experience “made me grow up a little quicker.” His lawyer claimed victory. “Andy Oliver is the first college athlete ever to win against the NCAA in court,” said Rick Johnson.

Yet the victory was only temporary. Wounded, the NCAA fought back with a vengeance. Its battery of lawyers prepared for a damages trial, ultimately overwhelming Oliver’s side eight months later with an offer to resolve the dispute for \$750,000. When Oliver and Johnson accepted, to extricate themselves ahead of burgeoning legal costs, Judge Tone was compelled to vacate his orders as part of the final settlement. This freed NCAA officials to reassert the two bylaws that Judge Tone had so forcefully overturned, and they moved swiftly to ramp up rather than curtail enforcement. First, the NCAA’s Eligibility Center devised a survey for every drafted undergraduate athlete who sought to stay in college another year. The survey asked whether an agent had conducted negotiations. It also requested a signed release waiving privacy rights and authorizing professional teams to disclose details of any interaction to the NCAA Eligibility Center. Second, NCAA enforcement officials went after another Scott Boras client.

The Toronto Blue Jays had made the left-handed pitcher James Paxton, of the University of Kentucky, the 37th pick in the 2009 draft. Paxton decided to reject a reported \$1 million offer and return to school for his senior year, pursuing a dream to pitch for his team in the College World Series. But then he ran into the new NCAA survey. Had Boras negotiated with the Blue Jays? Boras has denied that he did, but it would have made sense that he had—that was his job, to test the market for his client. But saying so would get Paxton banished under the same NCAA bylaw that had derailed Andrew Oliver’s career. Since Paxton was planning to go back to school and not accept their draft offer, the Blue Jays no longer had any incentive to protect him—indeed, they had every incentive to turn him in. The Blue Jays’ president, by telling reporters that Boras had negotiated on Paxton’s behalf, demonstrated to future recruits and other teams that they could use the NCAA’s rules to punish college players who wasted their draft picks by returning to college. The NCAA’s enforcement staff raised the pressure by requesting to interview Paxton.

Though Paxton had no legal obligation to talk to an investigator, NCAA Bylaw 10.1(j) specified that anything short of complete cooperation could be interpreted as unethical conduct, affecting his amateur status. Under its restitution rule, the NCAA had leverage to compel the University of Kentucky to ensure obedience.

As the 2010 season approached, Gary Henderson, the Kentucky coach, sorely wanted Paxton, one of Baseball America's top-ranked players, to return. Rick Johnson, Andrew Oliver's lawyer, filed for a declaratory judgment on Paxton's behalf, arguing that the state constitution—plus the university's code of student conduct—barred arbitrary discipline at the request of a third party. Kentucky courts deferred to the university, however, and Paxton was suspended from the team. "Due to the possibility of future penalties, including forfeiture of games," the university stated, it "could not put the other 32 players of the team and the entire UK 22-sport intercollegiate athletics department at risk by having James compete." The NCAA appraised the result with satisfaction. "When negotiations occur on behalf of student-athletes," Erik Christianson, the NCAA spokesperson, told *The New York Times* in reference to the Oliver case, "those negotiations indicate that the student-athlete intends to become a professional athlete and no longer remain an amateur."

Paxton was stranded. Not only could he not play for Kentucky, but his draft rights with the Blue Jays had lapsed for the year, meaning he could not play for any minor-league affiliate of Major League Baseball. Boras wrangled a holdover job for him in Texas with the independent Grand Prairie AirHogs, pitching against the Pensacola Pelicans and Wichita Wingnuts. Once projected to be a first-round draft pick, Paxton saw his stock plummet into the fourth round. He remained unsigned until late in spring training, when he signed with the Seattle Mariners and reported to their minor-league camp in Peoria, Arizona.

"You Might As Well Shoot Them in the Head"

"When you dream about playing in college," Joseph Agnew told me not long ago, "you don't ever think about being in a lawsuit." Agnew, a student at Rice University in Houston, had been cut from the football team and had his scholarship revoked by Rice before his senior year, meaning that he faced at least \$35,000 in tuition and other bills if he wanted to complete his degree in sociology. Bereft of his scholarship, he was flailing about for help when he discovered the National College Players Association, which claims 7,000 active members and seeks modest reforms such as safety guidelines and better death benefits for college athletes. Agnew was struck by the NCPA scholarship data on players from top Division I basketball teams, which showed that 22 percent were not renewed from 2008 to 2009—the same fate he had suffered.

In October 2010, Agnew filed a class-action antitrust suit over the cancellation of his scholarship and to remove the cap on the total number of scholarships that can be awarded by NCAA schools. In his suit, Agnew did not

claim the right to free tuition. He merely asked the federal court to strike down an NCAA rule, dating to 1973, that prohibited colleges and universities from offering any athletic scholarship longer than a one-year commitment, to be renewed or not, unilaterally, by the school—which in practice means that coaches get to decide each year whose scholarships to renew or cancel. (After the coach who had recruited Agnew had moved on to Tulsa, the new Rice coach switched Agnew's scholarship to a recruit of his own.) Agnew argued that without the one-year rule, he would have been free to bargain with all eight colleges that had recruited him, and each college could have decided how long to guarantee his scholarship.

Agnew's suit rested on a claim of an NCAA antitrust violation combined with a laudable academic goal—making it possible for students to finish their educations. Around the same time, lawyers from President Obama's Justice Department initiated a series of meetings with NCAA officials and universities in which they asked what possible educational rationale there was for allowing the NCAA—an organization that did not itself pay for scholarships—to impose a blanket restriction on the length of scholarships offered by colleges. Tidbits leaked into the press. In response, the NCAA contended that an athletic scholarship was a "merit award" that should be reviewed annually, presumably because the degree of "merit" could change. Justice Department lawyers reportedly suggested that a free market in scholarships would expand learning opportunities in accord with the stated rationale for the NCAA's tax-exempt status—that it promotes education through athletics. The one-year rule effectively allows colleges to cut underperforming "student-athletes," just as pro sports teams cut their players. "Plenty of them don't stay in school," said one of Agnew's lawyers, Stuart Paynter. "They're just gone. You might as well shoot them in the head."

Agnew's lawsuit has made him a pariah to former friends in the athletic department at Rice, where everyone identified so thoroughly with the NCAA that they seemed to feel he was attacking them personally. But if the premise of Agnew's case is upheld by the courts, it will make a sham of the NCAA's claim that its highest priority is protecting education.

#### "They Want to Crush These Kids"

Academic performance has always been difficult for the NCAA to address. Any detailed regulation would intrude upon the free choice of widely varying schools, and any academic standard broad enough to fit both MIT and Ole Miss would have little force. From time to time, a scandal will expose extreme lapses. In 1989, Dexter Manley, by then the famous "Secretary of Defense" for the NFL's Washington Redskins, teared up before the U.S. Senate Subcommittee on Education, Arts, and Humanities, when admitting that he had been functionally illiterate in college.

Within big-time college athletic departments, the financial pressure to disregard obvious academic shortcomings and shortcuts is just too strong. In the 1980s, Jan Kemp, an English instructor at the University of Georgia,

publicly alleged that university officials had demoted and then fired her because she refused to inflate grades in her remedial English courses. Documents showed that administrators replaced the grades she'd given athletes with higher ones, providing fake passing grades on one notable occasion to nine Bulldog football players who otherwise would have been ineligible to compete in the 1982 Sugar Bowl. (Georgia lost anyway, 24–20, to a University of Pittsburgh team led by the future Hall of Fame quarterback Dan Marino.) When Kemp filed a lawsuit against the university, she was publicly vilified as a troublemaker, but she persisted bravely in her testimony. Once, Kemp said, a supervisor demanding that she fix a grade had bellowed, "Who do you think is more important to this university, you or Dominique Wilkins?" (Wilkins was a star on the basketball team.) Traumatized, Kemp twice attempted suicide.

In trying to defend themselves, Georgia officials portrayed Kemp as naive about sports. "We have to compete on a level playing field," said Fred Davison, the university president. During the Kemp civil trial, in 1986, Hale Almand, Georgia's defense lawyer, explained the university's patronizing aspirations for its typical less-than-scholarly athlete. "We may not make a university student out of him," Almand told the court, "but if we can teach him to read and write, maybe he can work at the post office rather than as a garbage man when he gets through with his athletic career." This argument backfired with the jurors: finding in favor of Kemp, they rejected her polite request for \$100,000, and awarded her \$2.6 million in damages instead. (This was later reduced to \$1.08 million.) Jan Kemp embodied what is ostensibly the NCAA's reason for being—to enforce standards fairly and put studies above sports—but no one from the organization ever spoke up on her behalf.

THE NCAA BODY charged with identifying violations of any of the Division I league rules, the Committee on Infractions, operates in the shadows. Josephine Potuto, a professor of law at the University of Nebraska and a longtime committee member who was then serving as its vice chair, told Congress in 2004 that one reason her group worked in secret was that it hoped to avoid a "media circus." The committee preferred to deliberate in private, she said, guiding member schools to punish themselves. "The enforcement process is cooperative, not adversarial," Potuto testified. The committee consisted of an elite coterie of judges, athletic directors, and authors of legal treatises. "The committee also is savvy about intercollegiate athletics," she added. "They cannot be conned."

In 2009, a series of unlikely circumstances peeled back the veil of secrecy to reveal NCAA procedures so contorted that even victims marveled at their comical wonder. The saga began in March of 2007, shortly after the Florida State Seminoles basketball team was knocked out of the NIT basketball tournament, which each spring invites the best teams not selected for the March Madness tournament. At an athletic-department study hall, Al Thornton, a star forward for the team, completed a sports-psychology quiz

but then abandoned it without posting his written answers electronically by computer. Brenda Monk, an academic tutor for the Seminoles, says she noticed the error and asked a teammate to finish entering Thornton's answers onscreen and hit "submit," as required for credit. The teammate complied, steaming silently, and then complained at the athletic office about getting stuck with clean-up chores for the superstar Thornton (who was soon to be selected by the Los Angeles Clippers in the first round of the NBA draft). Monk promptly resigned when questioned by FSU officials, saying her fatigue at the time could not excuse her asking the teammate to submit the answers to another student's completed test.

Monk's act of guileless responsibility set off a chain reaction. First, FSU had to give the NCAA preliminary notice of a confessed academic fraud. Second, because this would be its seventh major infraction case since 1968, FSU mounted a vigorous self-investigation to demonstrate compliance with NCAA academic rules. Third, interviews with 129 Seminoles athletes unleashed a nightmare of matter-of-fact replies about absentee professors who allowed group consultations and unlimited retakes of open-computer assignments and tests. Fourth, FSU suspended 61 of its athletes in 10 sports. Fifth, the infractions committee applied the byzantine NCAA bylaws to FSU's violations. Sixth, one of the penalties announced in March of 2009 caused a howl of protest across the sports universe.

Twenty-seven news organizations filed a lawsuit in hopes of finding out how and why the NCAA proposed to invalidate 14 prior victories in FSU football. Such a penalty, if upheld, would doom coach Bobby Bowden's chance of overtaking Joe Paterno of Penn State for the most football wins in Division I history. This was sacrosanct territory. Sports reporters followed the litigation for six months, reporting that 25 of the 61 suspended FSU athletes were football players, some of whom were ruled ineligible retroactively from the time they had heard or yelled out answers to online test questions in, of all things, a music-appreciation course.

When reporters sought access to the transcript of the infractions committee's hearing in Indianapolis, NCAA lawyers said the 695-page document was private. (The NCAA claimed it was entitled to keep all such records secret because of a landmark Supreme Court ruling that it had won in 1988, in *NCAA v. Tarkanian*, which exempted the organization from any due-process obligations because it was not a government organization.) Media outlets pressed the judge to let Florida State share its own copy of the hearing transcript, whereupon NCAA lawyers objected that the school had never actually "possessed" the document; it had only seen the transcript via a defendant's guest access to the carefully restricted NCAA Web site. This claim, in turn, prompted intercession on the side of the media by Florida's attorney general, arguing that letting the NCAA use a technical loophole like this would undermine the state's sunshine law mandating open public records. After tumultuous appeals, the Florida courts agreed and ordered the NCAA transcript released in October of 2009.

News interest quickly evaporated when the sports media found nothing in the record about Coach Bowden or the canceled football victories. But the transcript revealed plenty about the NCAA. On page 37, T. K. Wetherell, the bewildered Florida State president, lamented that his university had hurt itself by cooperating with the investigation. "We self-reported this case," he said during the hearing, and he later complained that the most ingenuous athletes—those who asked "What's the big deal, this happens all the time?"—received the harshest suspensions, while those who clammed up on the advice of lawyers went free. The music-appreciation professor was apparently never questioned. Brenda Monk, the only instructor who consistently cooperated with the investigation, appeared voluntarily to explain her work with learning-disabled athletes, only to be grilled about her credentials by Potuto in a pettifogging inquisition of remarkable stamina.

In January of last year, the NCAA's Infractions Appeals Committee sustained all the sanctions imposed on FSU except the number of vacated football victories, which it dropped, *ex cathedra*, from 14 to 12. The final penalty locked Bobby Bowden's official win total on retirement at 377 instead of 389, behind Joe Paterno's 401 (and counting). This carried stinging symbolism for fans, without bringing down on the NCAA the harsh repercussions it would have risked if it had issued a television ban or substantial fine.

Cruelly, but typically, the NCAA concentrated public censure on powerless scapegoats. A dreaded "show cause" order rendered Brenda Monk, the tutor, effectively unhirable at any college in the United States. Cloaking an old-fashioned blackball in the stately language of law, the order gave notice that any school hiring Monk before a specified date in 2013 "shall, pursuant to the provisions of Bylaw 19.5.2.2(I), show cause why it should not be penalized if it does not restrict the former learning specialist [Monk] from having any contact with student-athletes." Today she works as an education supervisor at a prison in Florida.

THE FLORIDA STATE verdict hardly surprised Rick Johnson, the lawyer who had represented the college pitchers Andrew Oliver and James Paxton. "All the NCAA's enforcements are random and selective," he told me, calling the organization's appeals process a travesty. (Johnson says the NCAA has never admitted to having wrongly suspended an athlete.) Johnson's scalding experience prompted him to undertake a law-review article on the subject, which in turn sent him trawling through NCAA archives. From the summary tax forms required of nonprofits, he found out that the NCAA had spent nearly \$1 million chartering private jets in 2006. "What kind of nonprofit organization leases private jets?," Johnson asks. It's hard to determine from tax returns what money goes where, but it looks as if the NCAA spent less than 1 percent of its budget on enforcement that year. Even after its plump cut for its own overhead, the NCAA dispersed huge sums to its 1,200 member schools, in the manner of a professional sports league. These annual payments are universal—every college gets something—but widely uneven.

They keep the disparate shareholders (barely) united and speaking for all of college sports. The payments coerce unity within the structure of a private association that is unincorporated and unregulated, exercising amorphous powers not delegated by any government.

Searching through the archives, Johnson came across a 1973 memo from the NCAA general counsel recommending the adoption of a due-process procedure for athletes in disciplinary cases. Without it, warned the organization's lawyer, the association risked big liability claims for deprivation of rights. His proposal went nowhere. Instead, apparently to limit costs to the universities, Walter Byers had implemented the year-by-year scholarship rule that Joseph Agnew would challenge in court 37 years later. Moreover, the NCAA's 1975 convention adopted a second recommendation "to discourage legal actions against the NCAA," according to the minutes. The members voted to create Bylaw 19.7, Restitution, to intimidate college athletes in disputes with the NCAA. Johnson recognized this provision all too well, having won the temporary court judgment that the rule was illegal if not downright despotic. It made him nearly apoplectic to learn that the NCAA had deliberately drawn up the restitution rule as an obstacle to due process, contrary to the recommendation of its own lawyer. "They want to crush these kids," he says.

The NCAA, of course, has never expressed such a desire, and its public comments on due process tend to be anodyne. At a congressional hearing in 2004, the infractions-committee vice chair, Josephine Potuto, repeatedly argued that although the NCAA is "not bound by any judicial due process standards," its enforcement, infractions, and hearing procedures meet and "very likely exceed" those of other public institutions. Yet when pressed, Potuto declared that athletes would have no standing for due process even if the Supreme Court had not exempted the NCAA in the 1988 Tarkanian decision. "In order to reach due-process issues as a legal Constitutional principle, the individual challenging has to have a substantive property or liberty interest," she testified. "The opportunity to play intercollegiate athletics does not rise to that level."

To translate this from the legal jargon, Potuto used a circular argument to confine college athletes beneath any right to freedom or property in their own athletic effort. They have no stake to seek their rights, she claimed, because they have no rights at stake.

Potuto's assertion might be judged preposterous, an heir of the Dred Scott dictum that slaves possessed no rights a white person was bound to respect. But she was merely being honest, articulating assumptions almost everyone shares without question. Whether motivated by hostility for students (as critics like Johnson allege), or by noble and paternalistic tough love (as the NCAA professes), the denial of fundamental due process for college athletes has stood unchallenged in public discourse. Like other NCAA rules, it emanates naturally from the premise that college athletes own no interest in

sports beyond exercise, character-building, and good fun. Who represents these young men and women? No one asks.