

THEY'RE WATCHING YOU: HOW THE NCAA INFRINGES ON THE FREEDOM OF FAMILIES

GOLDBURN P. MAYNARD JR. *

Introduction	1
I. The NCAA and Sumptuary Laws	4
II. Family Surveillance	6
Conclusion: Looking the Other Way	11

[M]any of these laws served to inscribe and police social boundaries. Consumption was monitored, but so was assumption. It was not only that those of a lower status should not adorn themselves with the clothes or accoutrements of their betters; it was also that, by so clothing themselves, those of the lower classes would not assume the status of their betters.

—Bennet I. Capers ¹

INTRODUCTION

Not to pile on, but for a high visibility organization, the National Collegiate Athletic Association (NCAA) is truly unique in what it continues to get away with. The Association is so bold that it has normalized behavior that was deemed anachronistic centuries ago.² As March Madness fades from memory and the NFL draft looms on the horizon, it seems as good a time as any to remind ourselves of the many ways in which the NCAA is based on deeply troubling foundations. Sometimes by focusing on the low hanging fruit we miss some of the more bothersome and egregious injustices of the college system that disproportionately disfavors those who are most talented, poor, and of color.

This Essay argues that the NCAA's surveillance of the family and enforcement of its rules amount to a sumptuary restraint on the families of

* I would like to thank my former Dean, Susan Duncan, and my current Dean, Colin Crawford, for supporting this research. James Russell provided invaluable research assistance. I also owe enormous gratitude to Bridget Crawford and Adrienne Davis for their careful readings and insightful comments.

1. Bennet I. Capers, *Cross Dressing and the Criminal*, 20 YALE L.J. 1, 7 (2008).

2. It is not lost on me that I'm a professor at a school currently suffering sanctions. Fortunately, the NCAA has made itself so unpopular that no one should suspect that there is a causal connection between the two.

talented NCAA athletes. In order to keep its cartel in place, the NCAA must bar not only the athlete but everyone in his family from extracting any value from his talent. Luxury purchases are in effect barred for poor families. This is where the NCAA's enforcement and investigative arms step in. Disproportionately, the families of black athletes are put on notice that any signs of extravagant consumption (that is, beyond the level they should be able to afford) will lead to investigations and potential suspensions. At the moment when these families should be happiest, they have to worry lest they give off any appearance of living beyond their means. I argue that the NCAA's rules disproportionately disadvantage poor individuals of color. This underscores the inherently unjust nature of the college sports system and the complicity required to keep it in place.

This is by no means the first time that the NCAA has been taken to task or its operations analyzed in the legal literature. Scholars have evaluated its potential antitrust violations,³ the lack of due process in its enforcement program,⁴ and the racial bias in its academic standards.⁵ There is no surprise when someone critiques the NCAA, and in recent years it has appeared that the tide has been turning against it. Yet, no commentator has zeroed in on the ways that the NCAA works to keep the families of its athletes poor. From the entrance of athletes to college until the end of their tenure, poorer athletes and their families are monitored and kept poor by the NCAA.⁶

One way that the NCAA enforces its code of amateurism is ensuring that athletes are not paid. As a nation, we have long recognized that individuals should be able to extract value from their labor and trade commodities in the vast majority of cases.⁷ Denial of these rights requires work by a regulator or enforcer. Such an effort requires outsized enforcement of harsh rules.⁸ Because human beings are smart, it is difficult

3. Richard J. Hunter, Jr. & Ann M. Mayo, *Issues in Antitrust, the NCAA, and Sports Management*, 10 MARQ. SPORTS L.J. 69 (1999).

4. Sherry Young, *The NCAA Enforcement Program and Due Process: The Case for Internal Reform*, 43 SYRACUSE L. REV. 747, 747–48 (1992).

5. Michael Thompson, *Educational Necessity or Simple Discrimination: The NCAA's Initial Eligibility Standards and Prop. 16*, 9 SETON HALL J. SPORTS L. 521, 522 (1999).

6. This mirrors the treatment of low income women of color who receive or are perceived to receive public assistance. *See, e.g.*, KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* (2011).

7. *See generally* The Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1980) (used to oppose anticompetitive entities like monopolies and cartels); James Grey Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474 (2010).

8. This is the case even when the rules are for more noble purposes. For example, the IRS has fought a century long battle against taxpayers who seek to shift their income among their families. While there has been some limited success, a large part of the story has been to sanction income shifting through the joint tax return and to only tax very large intergenerational transfers, partly because of administrability concerns. *See, e.g.*,

to shut down any market completely. Human beings in such situations use ingenuity in finding endless ways to avoid the rules. As such, the NCAA cannot only enforce its rules in direct ways. Smart individuals will not write the athlete a check. Instead these individuals may find ways to funnel benefits to the athlete's coach, agent, school, etc. In all of this rule avoidance an entire industry is built around black college athletes with everyone profiting except the athletes and their families, who are the most deserving parties.

The current state of the world would make some sense if no one was profiting from college sports, but the evidence is abundant to the contrary.⁹ It is not that there's been a failure to ring the alarm, but major changes have not been forthcoming. Economists have long argued that the NCAA is a cartel, in that it limits both player compensation and output.¹⁰ Legal scholars have argued that its regulatory structure has disturbing racial elements, while other researchers have compared collegiate sports to slavery.¹¹ More recently, journalists have argued convincingly that players have similar and sometimes worse rights than indentured servants.¹² That such a cartel-like structure thrives in 2018 is stunning enough, but the restraints on those who surround an athlete have never been analyzed in the literature. So anachronistic are these restraints on consumption that most have never heard how they are described: sumptuary laws.

Because sumptuary laws have been long forgotten, I first briefly discuss their character and development over the centuries. The Essay then proceeds by discussing the families of Reggie Bush and Ryan Boatright, who were involved in NCAA investigations. Using these stories as a springboard, I argue that the NCAA's consumption restraints are worse than traditional sumptuary laws because those went largely unenforced. I conclude by discussing the miraculous staying power of the NCAA, which depends on a large number of individuals, from courts, to legislators, to fans, looking the other way.

Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993).

9. See, e.g., Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/?noredirect=on&utm_term=.3c2be74b968d [<https://perma.cc/Z7CG-67VM>].

10. See, e.g., Gary S. Becker, *The NCAA: A Cartel in Sheepskin Clothing*, BUS. WEEK at 24 (Sep. 14, 1987).

11. See, e.g., BILLY HAWKINS, *THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS* (2010); Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L. J. 199 (1996).

12. JOE NOCERA & BEN STRAUSS, *INDENTURED: THE INSIDE STORY OF THE REBELLION AGAINST THE NCAA* (2016).

I. THE NCAA AND SUMPTUARY LAWS

One feature that stood out from the mass of scattered accounts of sumptuary law I gathered together was that, with only a few exceptions, their authors treated the existence of sumptuary law with unrestrained condescension as if the very idea of regulating dress was absurd and doomed any law which so attempted to an early demise or subversion.

—Alan Hunt¹³

Simply put, sumptuary laws restrict luxury spending. The root of the word sumptuary is related to the word consumption, which is what these laws are meant to restrain.¹⁴ Historically, these laws were intended to regulate and reinforce social hierarchies and morals. These usually depend upon individuals' social rank, which determined their permitted clothing, food, and luxury expenditures. The earliest known example of a sumptuary law was from Ancient Greece.¹⁵ These laws were generally concerned with keeping certain groups (mostly women) in their place during funerals. Some included restrictions on (1) conspicuous consumption at funerals, (2) funeral procession size, and (3) the value of the food served.¹⁶

Examples of sumptuary laws can be found in Asia as well.¹⁷ In China, laws concerned the size and decoration of graves and mausoleums.¹⁸ In Japan, people of every class were subject to strict sumptuary laws that included regulation of the types of clothing that could be worn.¹⁹ As sumptuary laws developed over the centuries, two forms of dress regulation emerged: (1) expenditure limits, which could be placed on entire outfits or per item, and (2) reserving certain types of cloth, for example ermine to designated classes or categories.²⁰ The laws frequently prevented commoners from imitating the appearance of aristocrats and were also used to stigmatize disfavored groups.

Another purpose for sumptuary laws was to limit competition by a rising group. In the Late Middle Ages, sumptuary laws in medieval cities were instituted as a way for the nobility to cap or limit competition from the up and coming bourgeoisie.²¹ The nobility figured that if bourgeois

13. ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW x 1996.

14. *See Sumptuary law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

15. *See* HUNT, *supra* note 13, at 18.

16. *Id.* at 18–19.

17. *Id.* at 24.

18. *See* 2 J.M.M. DE GROOT, THE RELIGIOUS SYSTEM OF CHINA 451–54 (1894).

19. *See* HUNT, *supra* note 13, at 24.

20. *See id.* at 27.

21. *See id.* at 25.

subjects appeared to be as wealthy as themselves, it could undermine the nobility's presentation of themselves as powerful, legitimate rulers.²²

Sumptuary laws were also made to control markets. By restricting the purchase of certain imported goods, these could be kept more affordable for the higher classes.²³ In Ancient Rome, there were various sumptuary laws that prevented inordinate expense in banquets and dress, such as the use of purple clothing—the dye was notoriously expensive.²⁴ Another example of this can be seen in sixteenth century Spanish America, where free women of color could only gain a higher status by marrying a Spanish man:

No *negra* or *mulata* woman, free or slave, can wear gold, pearls, or silk. But, if the free *negra* or *mulata* were married to an *español* man, she may wear gold earrings with pearls, a choker, and velvet on the hem of the skirt. They cannot wear crepe mantles or mantles of any other fabric, except for capes that fall just below the waist. The penalty for violating this law will result in the removal and forfeiture of the gold jewelry, silk dresses, and mantel.²⁵

It was not until the seventeenth-century that sumptuary laws fell into disfavor.²⁶ In Virginia and South Carolina, sumptuary legislation helped distinguish clothing for whites and slaves well into the eighteenth-century.²⁷ The laws were seen as a failure for the most part, as they were incredibly difficult to enforce.

Sumptuary laws are rarely discussed today in popular cultural or the legal arena because they are deemed as primitive. Some refer to taxes on cigarette smoking, sugary drinks, and plastic bags as sumptuary laws. These are not sumptuary restrictions, but sin taxes. They seek to make consumers internalize the costs of their behavior—which are borne by the rest of society. Their desirability and wisdom can and should be debated, as they have unintended consequences, but they are not sumptuary laws in the same sense. There are concerns about their regressivity, but there are

22. *Id.*

23. Barton Bebee, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 834 (2010).

24. *See* HUNT, *supra* note 13, at 105.

25. RECOPIACIÓN DE LAS LEYES DE LOS REINOS DE LAS INDIAS 325 (5th ed. 1841); Danielle Terrazas Williams, *Capitalizing Subjects: Free African-Descended Women of Means in Xalapa, Veracruz During the Long Seventeenth Century* (2013) (unpublished Ph.D. dissertation, Duke University).

26. HUNT, *supra* note 13 at 29–33.

27. *See* Shane White & Graham White, *Slave Clothing and African-American Culture in the Eighteenth and Nineteenth Centuries*, 148 PAST & PRESENT 149, 155 (1995).

also corrective benefits that undermine the claim that they target consumption to favor a certain group.²⁸

Today we focus more on the sumptuary ethic. We are so far removed from sumptuary laws these days that all that is left is a remnant of the word, thrown out as pejorative against government efforts at regulations of luxury and health. The few commentators who have analyzed sumptuary laws largely utilize them as an analogy to the related animus behind modern rules on military dress²⁹ and rules that ban cross dressing.³⁰ This ethic is arguably still alive today in employer dress codes, which incorporate similar fears of social disorder and gender trouble as did Elizabethan sumptuary laws.

II. FAMILY SURVEILLANCE

A striking feature of the great bulk of sumptuary law was that it was directed at conceptions and images of the social order. It was concerned with attempts to protect hierarchical conceptions of social relations, to resist some of the most directly visible manifestations of rising social groups challenging or undermining the incumbents of advantaged social positions.

—Alan Hunt³¹

Today's NCAA exemplifies a modern, ongoing attempt to enforce sumptuary laws that disproportionately disadvantage the families of poor black athletes. From its inception, intercollegiate competition has been marked by troubling racial dynamics.³² The exclusion and segregation of the late the nineteenth and early twentieth centuries have given way to more covert forms of discrimination. The surveillance of the families of black athletes is one such example. Matters of race and class form a toxic mixture in this environment, undermining the economic freedom and privacy of these families.

We often hear about Reggie Bush, the former college football star who was stripped of his Heisman Trophy, the sport's highest honor. Even if the public no longer remembers the specifics, it has a whiff of wrongdoing, and his record has been stained. What has faded from the

28. See, e.g., Jake Blumgart, *A Soda Tax Is Fundamentally Regressive. What if It's Philadelphia's Best Hope for Progressive Change?*, THE NATION (May 13, 2016), <https://www.thenation.com/article/a-soda-tax-is-fundamentally-regressive-what-if-its-philadelphias-best-hope-for-progressive-change/> [<https://perma.cc/KF25-SH8J>].

29. Ramya Kasturi, Note, *Stolen Valor: A Historical Perspective on the Regulation of Military Uniform and Decorations*, 29 YALE J. ON REG. 419 (2012).

30. Capers, *Cross Dressing and the Criminal*, *supra* note 1.

31. HUNT, *supra* note 13, at 143.

32. Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 653 (1995).

national memory is the central involvement of Bush's family. Bush's mother and stepfather had agreed to pay landlord Michael Michaels \$4,500 in monthly rent when they moved into the Spring Valley house Michaels bought for \$757,000 in March 2005. Bush's parents and younger brother lived there for about a year in 2005–2006 when Bush was playing at USC. Michaels expected to be paid back by later signing as Bush's agent.³³ Bush's parents were also fronted funds to travel and stay at their son's away games.³⁴

It is against NCAA rules for players or their families to accept benefits from prospective agents.³⁵ While there had been rumors surrounding Bush, the details of the arrangement became public when Bush signed with other agents instead and Michaels sued his parents.³⁶ Regardless of whether Bush knew about this agreement, his parents living rent free in a nice neighborhood was seen as him being paid for his services. There are no exceptions for parental travel to see their loved one play.

More recently and egregiously, there was the case of University of Connecticut basketball player, Ryan Boatright, who was forced to sit out several games during the 2011–2012 season because of alleged wrongdoing by his mother.³⁷ She was accused of receiving \$8,000 in cash and impermissible benefits, including airfare and hotel on a recruiting trip and *so she could watch her son*.³⁸ The NCAA's investigation team harassed Tanesha Boatright at work with endless calls about the matter and later interviewed her at a hotel from 5 p.m. until 1 a.m.³⁹ The lack of subpoena power was no deterrent since the NCAA had her son's eligibility in their hands. The long suspensions were potentially impacting his play and could ruin a potential NBA career.

We're so used to NCAA discipline, that we may not ask the obvious question: who cares if Reggie Bush's parents lived rent free or Tanesha Boatright got some cash? Their sons were on the television screens, making their universities and athletic programs millions. They were, by

33. Brent Schrotenboer, *What's the Final Score in Bush vs. NCAA?*, SAN DIEGO UNION-TRIBUNE (June 24, 2010), <http://www.sandiegouniontribune.com/sdut-whats-the-final-score-in-bush-vs-ncaa-2010jun24-htmlstory.html> [https://perma.cc/3D2U-4EHK].

34. Bernie Wilson, *Landlord: Bush's Parents Didn't Pay \$54,000 in Rent*, ASSOCIATED PRESS (Apr. 28, 2006), http://www.espn.com/espn/wire/_/section/nfc/id/2425015 [https://perma.cc/K8XA-JF87].

35. Schrotenboer, *supra* note 33.

36. *Id.*

37. Brian Buckley, *UConn Basketball: How the NCAA is Ruining Ryan Boatright*, BLEACHER REPORT (Jan. 25, 2012), <http://bleacherreport.com/articles/1039517-uconn-basketball-how-the-ncaa-is-ruining-ryan-boatright> [https://perma.cc/A6T8-Q2TV].

38. *Id.*; Kevin Duffy & Ben Doody, *Tanesha Boatright's Attorney Blasts NCAA*, SF GATE (Jan. 29, 2012), <https://www.sfgate.com/uconn/article/Tanesha-Boatright-s-attorney-blasts-NCAA-2810858.php> [https://perma.cc/2XBY-GUMA].

39. NOCERA & STRAUSS, *supra* note 12, at 5.

comparison, taking less than a penny on the dollar. But this is what sumptuary laws are all about. None of this behavior would have been suspicious if these parents were wealthier. Any additional luxuries of life acquired by such families are deemed to be the result of their hard work or entitlement.

Eventually, the NCAA and the Boatrights reached a settlement, but even then, the organization was not gracious.⁴⁰

[B]oth UConn and Mr. Boatright should be commended for their cooperation throughout the process to gather information. The school and student-athlete's dedication to uncover the facts should be viewed as a positive example, not somehow construed negatively. Had Ms. Boatright cooperated fully from the beginning, this matter could have been settled months ago.⁴¹

Why should she have to “cooperate”? The assumption that black college athletes and their families should not benefit while white coaches, athletic directors, and NCAA executives handsomely profit is deeply entrenched.⁴² The intrusion into the Boatrights life seems beyond the pale, except in the world of: (1) the NCAA and schools more generally, (2) government benefits for the poor, or (3) prison.⁴³ All three of these spaces are burdened by legacies of class and race. America has a long history of treating poor as morally deficient individuals who need to be monitored.⁴⁴ There are long entrenched narratives about the welfare queens and substantial funds are spent every year to ensure that the poor are not committing “fraud” with their benefits.⁴⁵ This sound eerily similar to complaints about NCAA athletes wearing fancy sneakers or families enjoying lavish trips to watch college sporting events.

It is also impossible to escape the fact that both the Bush and Boatright families are black. The NCAA's rules affect all athletes, but they disproportionately disadvantage black ones. Once we limit the college athletic arena to the big sports (i.e., football and basketball) and the

40. Duffy & Doody, *supra* note 38.

41. *Id.*

42. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993) (“the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed sought to attain - by fraud if necessary”).

43. According to Michel Foucault, prison was but one part of a network of discipline that included schools, military institutions and hospitals. See DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977).

44. NANCY ISENBERG, *WHITE TRASH: THE 400-YEAR UNTOLD STORY OF CLASS IN AMERICA* xv (2016).

45. See, e.g., Kaary Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 646 (2009).

revenue generating schools, the statistics are stark.⁴⁶ A recent study by Shaun Harper found that black men made up only 2.5 percent of undergraduate students enrolled across all 65 such institutions, but they comprised 56 percent of basketball teams and 60 percent of football teams.⁴⁷ The study also showed that 16 percent of those coaches at these schools were black.⁴⁸ The average salary for the 65 athletics directors in the major conferences was \$698,755, but just 14.7 percent of them were black. And none of the commissioners of those conferences, who earned on average \$2.58 million annually, were black.⁴⁹

The overlapping racial and socioeconomic implications can also be seen when we compare the investigations of Boatright and Bush to that of Johnny Manziel, the white, former quarterback of Texas A&M. Manziel comes from a middle-class family and a more privileged background than either Bush or Boatright.⁵⁰ When he was accused of profiting from autograph sales, Manziel was represented by attorneys.⁵¹ Though he was questioned by investigators for six hours, he never admitted any wrongdoing.⁵² His family was much savvier about dealing with the NCAA. The result: the investigation was over in weeks and Manziel was suspended by Texas A&M for half a game.⁵³ This punishment was widely ridiculed in the press.⁵⁴ However, to this day he remains a Heisman winner, unlike Reggie Bush.⁵⁵

46. Shaun R. Harper, *Black Male Student-Athletes and Inequities in NCAA Division I Sports* (2016), https://equity.gse.upenn.edu/sites/default/files/publications/Harper_Sports_2016.pdf [<https://perma.cc/DHD3-AX7J>].

47. *Id.* at 2.

48. *Id.*

49. *Id.*

50. Wright Thompson, *The Trouble with Johnny*, ESPN (July 30, 2013), http://www.espn.com/espn/otl/story/_id/9521439/heisman-winner-johnny-manziel-celebrity-derail-texas-aggies-season-espn-magazine [<https://perma.cc/U9SJ-AHEY>].

51. Chris Fuhrmeister, *Johnny Manziel's Family Hires NCAA-Experienced Lawyer*, SBATION (Aug. 8, 2013), <https://www.sbnation.com/college-football/2013/8/8/4603472/johnny-manziel-attorney-ncaa> [<https://perma.cc/XAE3-TXWA>].

52. *Johnny Manziel Suspended for the First Half: NCAA Case Closed*, SPORTING NEWS (Aug. 28, 2013), <http://www.sportingnews.com/ncaa-football/news/johnny-manziel-suspended-first-half-ncaa-case-closed/a9a1nmero57a1ioqvpe89iblj> [<https://perma.cc/8TTD-9VVZ>].

53. *Id.*

54. See, e.g., Tracee Hamilton, *NCAA, Johnny Manziel and Signature Hypocrisy*, WASH. POST (Aug. 29, 2013), https://www.washingtonpost.com/sports/colleges/ncaa-johnny-manziel-and-signature-hypocrisy/2013/08/29/2367e7fa-10ac-11e3-8cdd-bdc09410972_story.html?utm_term=.e55b591e2746 [<https://perma.cc/P5H9-PNX9>].

55. Bill Pennington, *Reggie Bush, Ineligible for '05, Returns Heisman*, N.Y. TIMES (Sept. 14, 2010),

These restrictions are often deemed acceptable by the public because eventually athletes will get their payday. But many players are stuck in the middle. They are talented enough to be college stars but not talented enough to make it big in the pros. The dream of pro sports rarely comes true. Professional leagues recruit less than two percent of athletes, and black athletes continue to have lower graduation rates than their white, wealthier counterparts.⁵⁶ The NCAA is robbing them and their families of the most valuable period of their lives. Because of the NCAA's cartel, these athletes and their families only have memories of big games, and do not profit monetarily at all. They stay in their socio-economic station through monitoring and threats of lost eligibility.

Every other party in the college sports complex fares better than these socioeconomically disadvantaged athletes of color. Assistant coaches were, for a time, able to extract only limited value from their labor.⁵⁷ In 1992, the NCAA instituted a rule to restrict the salaries of certain assistant coaches to \$12,000.⁵⁸ A federal jury in Kansas found that the rule violated federal antitrust law by stifling competition and depriving the coaches of their fair market wages.⁵⁹ Substantial amounts of the money that players and their families never see ends up in the hands of head coaches and is used to build facilities.⁶⁰ The commercialization of college sports continues and the money the athletes generate does not disappear. It is only the players and their families who are not allowed to benefit.

The upshot is this: poor students of color and their families are transferring money to disproportionately wealthier white individuals.⁶¹ And this is how the NCAA's sumptuary rules are even worse than the historical ones: they restrict the making of money by those who are poor. The medieval bourgeoisie were not forbidden to earn money.⁶² They were just forbidden from taking on the trappings of a noble.⁶³ That is, they were not allowed to fool society into thinking they were nobles, but their wealth did not, in fact, change. Sumptuary laws were also not widely enforced and likely operated as more of a tax on luxury.⁶⁴ Members of society might

<https://www.nytimes.com/2010/09/15/sports/ncaafotball/15heisman.html>
[<https://perma.cc/8ERB-5CW5>].

56. Harper, *supra* note 46, at 16.

57. Kirk Johnson, *Assistant Coaches Win N.C.A.A. Suit: \$66 Million Award*, N.Y. TIMES (May 5, 1998), <https://www.nytimes.com/1998/05/05/sports/colleges-assistant-coaches-win-ncaa-suit-66-million-award.html> [<https://perma.cc/G6AW-E2UY>].

58. *Id.*

59. *Id.*

60. Lawrence M. Kahn, *Cartel Behavior and Amateurism in College Sports*, 21 J. ECON. PERSP. 209, 216 (2007).

61. *Id.* at 216–17.

62. See HUNT, *supra* note 13, at 25–26.

63. *Id.*

64. See *id.* at xiv, 25–26.

have to pay a fine to engage in certain types of consumption.⁶⁵ This was discriminatory but preferable to what the NCAA does. Here, a family is not able to pay a fine and continue to extract value. The consequences are draconian and can easily result in the suspension and loss of eligibility for the athlete.

Human beings so want to trade items that when you shut down markets underground economies and black markets tend to proliferate. This is not an abstract principle but a lesson that we've learned consistently over time. Note that the very enforcement of NCAA rules casts athletes in a negative light. It is as if they're doing something out of line or extraordinary. Actually, they're just doing what any normal human being would do. The athlete and the family are extracting value from their services, as every American has the right to do.

The result is not only outright bars on payment and silly rules but also draconian sumptuary restrictions on the families of athletes. This has the effect of pushing things further underground and further benefiting others. Individuals find other, less obvious but more inefficient ways of getting money to athletes. It also advantages those with more resources (since their expenditures do not arouse suspicion) or more sophisticated parties who can negotiate less risky agreements that are unlikely to be detected. The money and increased wealth that should benefit poor black families is instead captured by a large group of intermediaries and commercial interests.

CONCLUSION: LOOKING THE OTHER WAY

Finally, the effects of the monopsony power over revenue-producing college athletes is not racially neutral. The participants in Division I men's basketball and football are disproportionately African-American.

—Lawrence M. Kahn⁶⁶

I enjoyed the 2018 tournament nearly as much as I had in previous years. The University of Virginia upset along with several bad picks killed my bracket by the end of the first weekend. I watched the Final Four and the Villanova coronation with my normal level of excitement. The perpetuation of the unjust college sports system depends on exactly this double consciousness. I know there is something morally bankrupt, legally questionable, and economically untenable about the NCAA and yet I continue to watch and contribute to their revenues.

65. *See id.*

66. Kahn, *supra* note 60, at 214–15.

Many have predicted the impending doom of the NCAA's system of amateurism.⁶⁷ All of the signs point in that direction: the market, the difficulties enforcing the system, the violations of antitrust laws, etc. And yet, the NCAA marches on. The organization has had a remarkable ability to play on the fear of the unknown. College athletes put on such an excellent show and college loyalties are so strong that the public worries about making drastic changes. Paying athletes is seen as one such change. It would be naïve to think that this fear does not play into the decisions of legislators or judges. On several occasions courts have criticized the NCAA system,⁶⁸ but no tribunal seems ready to be responsible for its much feared but unlikely demise.

Economists have shown time and again that the introduction of player compensation would not break the system.⁶⁹ It would actually redistribute some of the inflated, rent-dependent salaries of coaches and others.⁷⁰ And yet, as things change, athletes and their families continue to be short-changed. The NCAA has also been brilliant at changing slowly and giving away just enough but not more. When Shabazz Napier went on TV and complained about going hungry the NCAA took this black eye, changed the rule and people moved on.⁷¹ Athletes are still not paid, but colleges can at least pay them the entire cost of attendance now.⁷² None of these are revolutionary moves, but it removes some of the more egregious complaints.

Revenue-generating sports are still very much built on the back of black athletes. They disproportionately populate the ranks of top teams. These wealthy schools enroll tiny numbers of black students. This effect

67. Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/5MXR-KCWX>]; Scott Lemieux, *The NCAA's Business Model is About to Collapse – And that's a Good Thing*, GUARDIAN (Aug. 11, 2014), <https://www.theguardian.com/commentisfree/2014/aug/11/ncaa-business-model-court-ruling-obannon-case> [<https://perma.cc/AVU3-8BXQ>].

68. See, e.g., *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1052–53 (9th Cir. 2015).

69. Andy Schwarz, *Excuses Not Reasons: 13 Myths About (Not) Paying College Athletes*, SELECTED PROC. OF THE SANTA CLARA SPORTS L. SYMP. 46, 71 (2011), available at <http://sportsgeekonomics.tumblr.com/myths>.

70. *Id.*

71. Alicia Jessop, *The NCAA Approves Unlimited Meals for Division I Athletes After Shabazz Napier Complains of Going Hungry: The Lesson for Other College Athletes*, FORBES (Apr. 15, 2014), <https://www.forbes.com/sites/aliciajessop/2014/04/15/the-ncaa-approves-unlimited-meals-for-division-i-athletes-after-shabazz-napier-complains-of-going-hungry-the-lesson-for-other-college-athletes/#5ba7911115bd> [<https://perma.cc/P532-UP8B>].

72. Blair Kerkhoff & Tod Palmer, *They're Not Paychecks, but Major College Athletes Got Extra Scholarship Stipends for First Time this School Year*, KAN. CITY STAR (June 26, 2016), <http://www.kansascity.com/sports/college/article86062792.html> [<https://perma.cc/7SHJ-Z6HQ>].

is multiplied when class is added to the mix. If a family already has wealth, their expenditures are not suspicious so these rules disproportionately burden poorer families. Not only can they not extract any value from their loved ones, they have to watch a host of other parties do so. And they bear the risk of injury or of their loved one not being drafted by a professional team. This ultimately gets us back to the very real costs to society when we prevent individuals from benefitting from their work. Note that the value of the work does not disappear, it's just rerouted to others. All of this effort to benefit a cartel.

I can only hope that continued attention to these injustices will eventually result in some action. It is beyond time that athletes are paid and that families are prevented from seeing their loved ones compete in person.