

Shifting the Goal Post: Antiracism and the Business of College Sports in a Post-COVID-19 World

JORDAN R. RHODES*

*After the killing of Breonna Taylor, Ahmaud Arbery, and
George Floyd, we witnessed global protests and calls for*

* J.D. Candidate 2021, University of Miami School of Law; B.A. 2013, University of Florida. During the 2020–21 academic school year, I was elected to serve as the Student Bar Association President at the University of Miami School of Law. With this position came a platform during an unprecedented and especially challenging time. Still, through my role, I was driven to create spaces for conversation around race and antiracism. It is my hope that this Essay will continue to foster other similar and important conversations, and I would like to thank the *University of Miami Law Review* and the Black Law Students Association for creating this special issue of the *University of Miami Law Review Caveat*.

As a graduate of a South Eastern Conference university located in the South, I am all too familiar with the many uncomfortable attributes of college sports. In college, I cheered on my university's predominantly Black basketball team in a stadium building named after a man who—when serving on the Florida State Supreme Court—voted against integrating that same university's law school. Similarly, I cheered on my university's predominately Black football team in a stadium where crowds repeatedly chanted “fight songs” with racist undertones. Although many people view sports as removed from “political” issues, my research has revealed to me the many flaws and explicit dangers in such a logic.

With regard to my work, I would like to thank Dean Osamudia James for her guidance in this Essay and for her support throughout my law school career. I would also like to thank the many wonderful Black faculty and staff at Miami Law, as well as the countless allies across the campus. Further, I am grateful to my friends and family. I am especially grateful to my mother, La Verne Rhodes; my father, Ronald Rhodes; and my brother, Tyler Rhodes for unconditionally motivating me through every obstacle and hardship. I am also grateful to Touré Strong for supporting me without reservation while always intellectually challenging me. Lastly, I am grateful to the many Black leaders, intellectuals, and activists throughout history, both on and off the field. If not for their sacrifices and accomplishments, the opportunities I have received would not be possible.

national racial justice reform. In the aftermath of this response, dozens of companies and institutions published their promises to combat racial inequity and advocate for racial justice reform, including the NCAA and several of its member universities. However, standing to lose millions from cancelling men's football and basketball, the NCAA decided to move forward with a 2020–21 athletics season. In reaching this decision, the NCAA ultimately relied on predominantly Black sports teams to provide revenue during a global health pandemic that has disproportionately impacted Black Americans. When placed in context with the NCAA's historic exploitation of college athletes, the financial motivation for this decision underscores the many flaws with the NCAA's "student-athlete" classification of college athletes. This Essay argues that the COVID-19 pandemic has illuminated the ways in which certain college athletes function more like "essential workers" than they do students. In doing so, this Essay seeks to demonstrate that a true commitment to racial progress on behalf of the NCAA and its member universities requires a reconfiguring of the power structure that currently governs the college athletics business. In other words, a true commitment to racial progress requires a shifting of the goal post.

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INTRODUCTION

When the coronavirus infection rates peaked throughout the nation¹ and many jobs and schools moved to online platforms, these individuals were asked to suit up and put their health at risk.² They exposed themselves to a deadly virus and many became infected.³ This description may initially bring to mind images of health care or grocery store workers, and although this description certainly applies to them as well, it also applies to college athletes. This Essay explores the actions taken by the National Collegiate Athletic Association (the “NCAA”) and its member universities in response to the COVID-19 pandemic and places these actions in the context of the structural racism that continues to plague college sports.

¹ Talal Ansari & Sarah Krouse, *New Virus Cases Are Below Summer Peaks as Concerns Rise About Testing Decline*, WALL ST. J. (Sept. 2, 2020, 4:47 PM), <https://www.wsj.com/articles/coronavirus-latest-news-09-02-2020-11599034888>.

² Alan Blinder et al., *College Sports Has Reported at Least 6,629 Virus Cases. There Are Many More.*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/sports/coronavirus-college-sports-football.html>.

³ *Id.* (discussing that incomplete data reveals that at least 6,629 college athletes, coaches, and staff members have tested positive for COVID-19 although number would likely be higher if more schools published this data).

Part I of this Essay employs Ibram X. Kendi's understanding of antiracism and antiracist policy to explain how the structure of the NCAA both produces and sustains racial inequity.⁴ This Part then discusses how the COVID-19 pandemic has illuminated (and perhaps exacerbated) some of these inequities. Part II discusses the NCAA's creation of the "student-athlete." Specifically, Part II explores how the NCAA and its member universities have used this classification to avoid compensating college athletes and providing them with the protections generally reserved for employees. This Part exposes how college athletes have functioned as "essential workers" for their universities throughout the pandemic, further exposing the myth of the "student-athlete." Part III begins with a brief discussion on how workers' rights advocates have utilized the pandemic to bring forth progressive labor reform and how similar reform efforts may spill over into the NCAA. Part III also suggests actions the NCAA and its member universities can take to fulfill the promises they made to combat racial inequity after the police killing of George Floyd.⁵ This Essay concludes by briefly foreshadowing the future of the NCAA and the lasting impact the COVID-19 pandemic will have on college sports.

I. THE STRUCTURE AND THE STORM

A. *The Structural Racism Plaguing College Sports*

On May 25, 2020, George Floyd—an unarmed Black man—was arrested and killed while in the custody of four Minneapolis police

⁴ See generally IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* (2019).

⁵ See *NCAA President Mark Emmert's Message to Membership on Inequality and Justice*, NAT'L COLLEGIATE ATHLETIC ASS'N (May 31, 2020, 6:36 PM) [hereinafter *NCAA Message on Inequality and Justice*], <https://www.ncaa.org/about/resources/media-center/news/ncaa-president-mark-emmer-ts-message-membership-inequality-and-injustice> ("Sport historically has been a catalyst for social change and through our leadership and the way we treat one another, each of us can continue to make a difference. We must, therefore, commit ourselves individually and collectively to examining what we can do to make our society more just and equal.").

officers.⁶ An eight minute and forty-six second video of the events of that day quickly spread across the Internet, and within two weeks, Black Lives Matter and anti-police brutality protests took place in all fifty U.S. states.⁷ In the national discussion that followed, there seemed to be a broadened understanding of the many ways in which racism functions within our society.⁸ For example, instead of understanding “racism” *solely* as isolated incidents motivated by malicious intent, there was a distinct focus on *structural racism*, or the idea that systems and structures often utilize procedures or processes that disadvantage particular races.⁹ Ibram X. Kendi—a leading antiracism scholar—however, uses the term “racist policy” as a clearer descriptor for what others often simply refer to as “structural racism.” Kendi and other scholars focus on the idea of *antiracist* policy (e.g., measures that produce or sustain racial *equity* between racial groups) as the answer for combatting centuries worth of *racist* policy (e.g., measures that produce or sustain racial *inequity* between racial groups).¹⁰ Nevertheless, the broadened understanding of

⁶ Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

⁷ Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (March 9, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

⁸ Ron Elving, *Will This Be the Moment of Reckoning on Race that Lasts?*, NPR (June 13, 2020, 7:00 AM), <https://www.npr.org/2020/06/13/876442698/will-this-be-the-moment-of-reckoning-on-race-that-lasts>.

⁹ See Justin Worland, *America’s Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/> (discussing growing debate around systemic racism after “disturbing video of the murder of George Floyd”).

¹⁰ See KENDI, *supra* note 4, at 18–19 (“A racist policy is any measure that produces or sustains racial inequity between racial groups. An antiracist policy is any measure that produces or sustains racial equity between racial groups. By policy, I mean written and unwritten laws, rules, procedures, processes, regulations, and guidelines that govern people. There is no such thing as a nonracist or race-neutral policy. Every policy in every institution in every community in every nation is producing or sustaining either racial inequity or equity between racial groups. Racist policies have been described by other terms: ‘institutional racism,’ ‘structural racism,’ and ‘systemic racism,’ for instance. But those are vaguer terms than ‘racist policy.’ When I use them I find myself having to immediately explain what they mean. ‘Racist policy’ is more tangible and exacting, and more likely to

racism in the aftermath of the killing of George Floyd caused many to challenge the structures that have existed within our society for years, including the business of college sports.¹¹

Racism was embedded in our nation's fabric long before the U.S.'s very first intercollegiate sports competition, a crew match between Harvard and Yale in 1852.¹² Likewise, racist policies were utilized to various degrees throughout the history of college sports.¹³ During the 1800s and 1900s, legal segregation and social customs limited Black participation in college sports to historically Black colleges and certain predominantly white colleges in the North.¹⁴ Even in instances where Black athletes were permitted to participate with white athletes, their participation was restricted to track and field and other comparable sports that did not require "intimate physical contact" with white athletes.¹⁵ It was not until the 1970s, more than sixty years after the creation of the NCAA, that colleges across the country began to integrate their sports teams.¹⁶ However,

be immediately understood by people, including its victims, who may not have the benefit of extensive fluency in racial terms. 'Racist policy' says exactly what the problem is and where the problem is. 'Institutional racism' and 'structural racism' and 'systemic racism' are redundant. Racism itself is institutional, structural, and systemic.").

¹¹ Alan Blinder & Billy Witz, *College Athletes, Phones in Hand, Force Shift in Protest Movement*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/sports/ncaaf/football/george-floyd-protests-college-sports.html>.

¹² Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 623 (1995).

¹³ *Id.* at 623–36.

¹⁴ *Id.* at 624.

¹⁵ *Id.* at 631–32 (noting that sports such as track and field "were viewed as not involving the type of intimate physical contact required by basketball and swimming.").

¹⁶ *Id.* at 634; see also Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000); see also Richard Lapchick, *Breaking the college color barrier: Studies in courage*, ESPN (Feb. 20, 2008), https://www.espn.com/espn/blackhistory2008/columns/story?columnist=lapchick_richard&id=3254974 (noting that every SEC school had at least one Black college athlete by 1971–72); LANE DEMAS, *INTEGRATING THE GRIDIRON 3* (2010) ("As late as 1966, no African American student participated on any sport team in the Southeastern Conference (SEC), which includes Auburn University, the

as with the rest of the nation, integration did not mark the end of racial inequities and racist policies within college athletics.¹⁷ Although many Americans often prefer to view sports as removed from these difficult topics, structural racism is very much intertwined within the current system of college athletics.¹⁸

As it currently exists, the NCAA is a multi-billion-dollar business¹⁹ that relies on the unpaid labor, commodification, and disposability of young athletes.²⁰ The majority of the NCAA's revenue comes from the men's basketball championship tournament while Division I college football generates billions of dollars annually.²¹

University of Alabama, the University of Florida, the University of Georgia, Louisiana State University, Mississippi State University, the University of Mississippi, the University of Kentucky, the University of Tennessee, and Vanderbilt University.”).

¹⁷ See Dave Zirin, *A New Study Exposes Just How Racist College Sports Have Become*, NATION (Sept. 8, 2020), <https://www.thenation.com/article/society/ncaa-revenue-racism/>.

¹⁸ See Emily Sullivan, *Laura Ingraham Told LeBron James to Shut up and Dribble; He Went to the Hoop*, NPR (Feb. 19, 2018, 5:04 PM), <https://www.npr.org/sections/thetwo-way/2018/02/19/587097707/laura-ingraham-told-lebron-james-to-shutup-and-dribble-he-went-to-the-hoop> (discussing FOX talk show host Laura Ingraham and her comments toward LeBron James to “shut up and dribble” after his discussion of race and politics in an interview); Libby Emmons, *Dear Athletes: Keep Your Politics Out of Sports*, FEDERALIST (July 31, 2020), <https://thefederalist.com/2020/07/31/dear-athletes-keep-your-politics-out-of-sports/> (claiming, in a public letter to athletes, that “[f]ans watch sports to enjoy the competitive spirit, to root en masse for their teams, and to be entertained, transported for release. Athletes advertising their political messaging on the field is as disconcerting and jarring for fans as it would be for Natalie Portman to demand that she be allowed to wear her political statement cape while playing Queen Amidala. It’s just not what viewers are tuning in for, and they shouldn’t be forced to consume players’ political statements.”).

¹⁹ *Finances of Intercollegiate Athletics*, NAT’L COLLEGIATE ATHLETIC ASS’N [hereinafter *NCAA Finances*], <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (last visited May 7, 2021) (“The total athletics revenue reported among all NCAA athletics departments in 2019 was \$18.9 billion.”).

²⁰ Zirin, *supra* note 17.

²¹ *Where Does the Money Go?*, NAT’L COLLEGIATE ATHLETIC ASS’N, https://www.ncaa.org/about/resources/finances_ (last visited May 7, 2021); Chris Smith, *College Football’s Most Profitable Teams: Texas A&M Jumps to No. 1*, FORBES (Sept. 11, 2018, 9:52 AM), <https://www.forbes.com/sites/chris-smith/2018/09/11/college-footballs-most-valuable-teams/?sh=22a8a96d6>

Both of these sports are played predominantly by Black men in their late teens and early twenties.²² While these athletes receive scholarships in exchange for their labor, these scholarships do not often equate to the athletes' financial value—which can range in the hundreds of thousands or even millions of dollars.²³ Despite this explicit reliance on unpaid Black labor, the NCAA has historically failed to adequately care for or directly compensate the students they rely on so heavily.²⁴ A 2011 study revealed that roughly 85% of “full scholarship” Division I football players lived below the federal poverty line.²⁵ While these predominantly Black students have historically endured questionable living conditions, their output on the field of play has subsidized the sports programs played predominantly by white athletes.²⁶ This is a business model that “effectively transfers

c64 (discussing how college football's twenty-five most valuable teams generate a combined \$2.5 billion per year in revenue).

²² SHAUN HARPER, USC RACE EQUITY CTR., *BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS 3* (2018), <https://abfe.issuelab.org/resources/29858/29858.pdf> (“Black men were 2.4% of undergraduate students enrolled at the 65 universities but comprised 55% of football teams and 56% of men's basketball teams on those campuses.”).

²³ Craig Garthwaite & Matthew J. Notowidigdo, *The COVID-19 Pandemic is Revealing the Regressive Business Model of College Sports*, BROOKINGS (Oct. 16, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/10/16/the-covid-19-pandemic-is-revealing-the-regressive-business-model-of-college-sports/> (“If players in football and men's basketball received a similar share of revenue as NFL and NBA players—roughly 50% of sports-related revenue—then each scholarship football player would earn \$360,000 per year and each scholarship basketball player would earn \$500,000 per year. If wages by position reflected the relative earnings by position observed in professional sports, the starting quarterbacks would earn \$2.4 million per year on average. Even the lowest-paid football players would receive \$140,000 per year.”).

²⁴ RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT'L COLL. PLAYERS ASS'N, *THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 19* (2011), <https://www.ncpanow.org/research/body/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>.

²⁵ *Id.*

²⁶ Denise-Marie Ordway, *Power Five Colleges Spend Football, Basketball Revenue on Money-Losing Sports: Research*, JOURNALISTS RES. (Sept. 10, 2020), <https://journalistsresource.org/studies/society/education/college-sports-power-five-revenue/> (“In fact, Power Five institutions, home to the country's wealthiest athletic departments, use most of that revenue to fund less popular sports that tend to lose money and draw students from higher-income families, the analysis

resources away from students who are more likely to be [B]lack and more likely to come from poor neighborhoods towards students who are more likely to be white and come from higher-income neighborhoods.”²⁷

Further, studies in recent years have also exposed the NCAA’s use of racist policies in governing academic requirements (e.g., academic policies that produce racial inequities between Black and white athletes).²⁸ Other studies have exposed the racial disparities

shows.”); Garthwaite & Notowidigdo, *supra* note 23 (“The prevailing model rests on taking the money generated by athletes who are more likely to be Black and come from low-income neighborhoods and transferring it to sports played by athletes who are more likely to be white and from higher-income neighborhoods. The money is also transferred to coaches and used for the construction of lavish (and perhaps overly lavish) athletic facilities. With COVID-19 shutting off the money spigot, schools are being forced to publicly acknowledge that their athletic departments depend on regressively transferring money from athletes who grew up poor to those who grew up in richer households and to wealthy coaches This difference between revenues and expenditures demonstrates how the funds generated by football and men’s basketball players fund all of the remaining intercollegiate sports at each school. We estimate that the money generated by football and men’s basketball causes: increased spending on money-losing sports; higher salaries for coaches and administrators; and increased spending on athletic facilities. Today, the average school in a Power Five conference supports 20 sports, but only two sports consistently pay for themselves, and the revenue generated by these two sports supports the seemingly ever-increasing salaries for coaches and athletic department employees.”). Garthwaite additionally explained that distributing revenue from predominantly Black male sports to white, and often female, sports may keep universities in compliance with Title IX but “optimal policy must consider that equity is a multifaceted concern that involves not just gender, but also important issues such as race and income.” *Id.*

²⁷ Craig Garthwaite et. al., *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 36 (Nat’l Bureau Econ. Rsch., Working Paper No. 27734, 2020), https://www.nber.org/system/files/working_papers/w27734/w27734.pdf.

²⁸ Akuoma C. Nwadike et al., *Institutional Racism in the NCAA and the Racial Implications of the “2.3 or Take a Knee” Legislation*, 26 MARQ. SPORTS L. REV. 523, 539 (2016) (“Though the NCAA has claimed to work tirelessly over the years to undercut the racial undertones of its academic policies, what is likely to occur this fall is out of the NCAA’s hands. The new academic standard should statistically affect more incoming African-American males than any other population. By raising the minimum immediate-competition GPA to 2.3, almost half of African-American male student-athletes will struggle with eligibility.”).

that exist within the NCAA as well.²⁹ For example, in 2018, 55.2% of Black male college athletes in the Power Five conferences graduated within six years, compared to 69.3% of college athletes overall and 76.3% of undergraduate students overall.³⁰ In that same year, only 11.9% of the men's basketball and football head coaches in the Power Five conferences were Black, while only 15.2% of the athletic directors were Black.³¹ These disparities and policies reveal the impact of structural racism in college athletics, as they reflect an environment in which unpaid Black labor is significantly relied on, and yet Black people are underserved and underrepresented. Although the legal segregation of athletes no longer exists, and although no single NCAA rule or policy maker is *solely* responsible for these results, the accumulation of these policies and practices has produced racial inequities within college athletics.³²

B. *COVID-19 Illuminates an Uncomfortable Truth in College Sports*

Over the last several decades, college sports have become exponentially more paramount to higher education institutions in the U.S., both as drivers of revenue and as sources of advertising for recruiting students.³³ In the midst of the ticket sales and tailgates, many have turned a blind eye to the business's more questionable

²⁹ HARPER, *supra* note 22, at 3 (discussing racial disparities in graduation rates of college football and basketball players in Division schools and how only four schools—University of Miami, Georgia Tech, University of Arizona, and Vanderbilt University—graduated Black male student-athletes at rates higher than or equal to student athletes overall.).

³⁰ *Id.* at 2–3 (this study focuses on sixty-five universities that comprise Power Five conferences, which include Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac 12 Conference, and Southeastern Conference).

³¹ *Id.* at 8.

³² Sean Gregory, *The College Admissions Scandal Is Yet More Evidence of Collegiate Sports' Inequality Problem*, TIME (Mar. 14, 2019) <https://time.com/5550994/college-admissions-scandal-sports/>.

³³ Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), <https://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications>.

attributes.³⁴ However, in the last year, the COVID-19 pandemic has placed an uncomfortable spotlight on the intersection of college sports and race.³⁵ And this spotlight has illuminated many uncomfortable truths. Primarily, the NCAA has relied on a labor pool of predominantly Black athletes³⁶ during a global health pandemic in which Black Americans have been more likely to become infected,³⁷ hospitalized once infected,³⁸ and die from the virus in comparison to white Americans.³⁹ As stated in a recent New York Times article, “[s]ending young, unpaid Black athletes to provide football

³⁴ See generally HUMA & STAUROWSKY, *supra* note 24 (discussing how NCAA’s practices exploit college athletes for profit, while majority of NCAA athletes live below federal poverty line).

³⁵ Anya van Wagtenonk, *Covid-19 Is Exposing Inequalities in College Sports. Now Athletes Are Demanding Change*, VOX (Aug. 2, 2020 5:30 PM), <https://www.vox.com/2020/8/2/21351799/college-football-pac-12-coronavirus-demands>.

³⁶ *Id.*

³⁷ Stephanie Soucheray, *US Blacks 3 Times More Likely Than Whites to Get COVID-19*, CTR. INFECTIOUS DISEASE RSCH. POL’Y (Aug. 14, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/08/us-blacks-3-times-more-likely-whites-get-covid-19> (“Black Americans are infected with COVID-19 at nearly three times the rate of white Americans”); Richard Opiel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N. Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> (discussing how Black American residents of the U.S. have been three times as likely to become infected with COVID-19 in comparison to their white neighbors).

³⁸ Nicole Chavez & Jacqueline Howard, *Covid-19 Is Sending Black, Latino and Native American People to the Hospital at About 4 Times the Rate of Others*, CNN (Nov. 16, 2020, 9:04 PM), <https://www.cnn.com/2020/11/16/health/cdc-black-hispanic-native-american-coronavirus-hospitalizations/index.html> (“Black, Hispanic and Native American people infected with Covid-19 are about four times more likely to be hospitalized than others”); *COVIDView Weekly Summary*, CTR. DISEASE CONTROL (Feb. 5, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (“When examining age-adjusted hospitalization rates by race and ethnicity, compared with non-Hispanic White persons, hospitalization rates were 3.2 times higher among Hispanic or Latino persons and Non-Hispanic American Indian or Alaska Native persons, and 2.9 times higher among non-Hispanic Black persons.”).

³⁹ Tiffany N. Ford et al., *Race Gaps in COVID-19 Deaths Are Even Bigger Than They Appear*, BROOKINGS (June 16, 2020), <https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/> (discussing how death rates among Black and Hispanic/Latino people are higher than for white people in all age categories).

entertainment for wealthy, predominantly white universities that are laden with the virus—and knowing many of the players will return to their vulnerable neighborhoods and possibly spread more infection—is a dubious proposition.”⁴⁰

Moreover, during the COVID-19 pandemic, the NCAA took steps toward solidifying its power over college athletes through its proposed draft of name, image, and likeness (“NIL”) legislation.⁴¹ Although the legislation would allow certain college athletes (in limited situations) to financially profit off of their NIL,⁴² it would

⁴⁰ Kurt Streeter, *A College Football Conference Can Choose Players Over Profits for a Change*, N.Y. TIMES (Sept. 17, 2020) <https://www.nytimes.com/2020/09/17/sports/ncaaf/football/covid-big-ten-football-pac-12.html?searchResultPosition=1>; see also Azmatullah Hussaini & Jules Lipoff, *Op-Ed: COVID-19 is Making the NCAA’s Exploitation of Student-Athletes Even More Obvious*, L.A. TIMES (June 23, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-06-23/ncaa-athletes-coronavirus-colleges-pay> (discussing how reliance on unpaid Black labor in high revenue generating college sports is a dynamic that “also evokes America’s horrific history of unpaid slave labor” and that it is “hard to ignore the racist undertones when the financial benefit to these institutions is based on the unpaid work of young Black men”).

⁴¹ Pat Forde & Ross Dellenger, *NCAA’s Name, Image, Likeness Legislation Proposal Revealed in Documents*, SPORTS ILLUSTRATED (Oct. 12, 2020), <https://www.si.com/college/2020/10/13/ncaa-proposal-athlete-compensation-name-image-likeness>.

⁴² Michelle Brutlag Hosick, *DI Council Introduces Name, Image and Likeness Concepts into Legislative Cycle*, NAT’L COLLEGIATE ATHLETIC ASS’N (Oct. 25, 2021), <https://www.ncaa.org/about/resources/media-center/news/di-council-introduces-name-image-and-likeness-concepts-legislative-cycle> (stating that, if adopted, NCAA legislation would: (1) “[a]llow student-athletes to use their name, image and likeness to promote camps and clinics, private lessons, their own products and services, and commercial products or services;” (2) “[a]llow student-athletes to be paid for their autographs and personal appearances;” (3) “[a]llow student-athletes to crowdfund for nonprofits or charitable organizations, catastrophic events and family hardships, as well as for educational expenses not covered by cost of attendance;” (4) “[a]llow student-athletes the opportunity to use professional advice and marketing assistance regarding name, image and likeness activities, as well as professional representation in contract negotiations related to name, image and likeness activities, with some restrictions;” (5) “[p]rohibit schools from being involved in the development, operation or promotion of a student-athlete’s business activity, unless the activity is developed as part of a student’s coursework or academic program;” and (6) “[p]rohibit schools from arranging or securing endorsement opportunities for student-athletes.”).

avoid legally reclassifying college athletes as employees.⁴³ Such a structure would likely continue to preclude college athletes from unionizing and, therefore, prevent them from collectively bargaining over their health, safety, and other inalienable rights.⁴⁴ More so, despite facing pressure to reform for years,⁴⁵ the NCAA's NIL proposal came after five other states passed their own NIL legislation, suggesting the effort was simply an NCAA attempt to reassert its traditionally unfettered regulatory power.⁴⁶ The NCAA's strategic course of action illustrates how structural racism functions within the college sports business. Structural racism often centers around power—more clearly, it centers around who has power at the expense of who does not have power.⁴⁷ By proposing this legislation, the NCAA is refusing to shift bargaining power to its athletes, power that would allow high revenue-generating, predominantly Black athletes to have influence over their working conditions and safety standards. The COVID-19 pandemic, and its disproportionate impact on the Black community,⁴⁸ only underscores the broader need for athletes to share in this bargaining power.

⁴³ Marc Edelman, *NCAA Bill Would Kill College Athletes' Rights and Their Trust in the U.S. Political Process*, FORBES (July 31, 2020, 9:55 PM), <https://www.forbes.com/sites/marcedelman/2020/07/31/if-ncaa-bill-is-passed-it-would-kill-college-athletes-rights-as-well-their-trust-in-the-us-political-process/> (“Section 4 of the NCAA's proposed bill seeks to legislate that ‘an amateur intercollegiate athlete shall not be considered an employee of a university or college based on participation in amateur intercollegiate athletic competition’”).

⁴⁴ *Id.* (noting that part of purpose of section 4 is “to prevent college athletes from unionizing, even in an era when college undergraduate research assistants and teaching assistants have recently become allowed to form unions.”).

⁴⁵ See Ivan Maisel, *The NCAA must again put athletes first, this time around the NIL debate*, ESPN (Apr. 23, 2020), https://www.espn.com/college-sports/story/_/id/29083196/the-ncaa-again-put-athletes-first-nil-debate.

⁴⁶ See Gregg E. Clifton & Iciss Rose Tillis, *NCAA Takes Additional Steps Toward Ratification of Name, Image, and Likeness Legislation*, NAT'L L. REV. (Oct. 14, 2020, 3:05 PM), <https://www.natlawreview.com/article/ncaa-takes-additional-steps-toward-ratification-name-image-and-likeness-legislation>.

⁴⁷ See KENDI, *supra* note 4, at 18 (“When someone discriminates against a person in a racial group, they are carrying out a policy or taking advantage of the lack of a protective policy. We all have the power to discriminate. Only an exclusive few have the power to make policy.”).

⁴⁸ Streeter, *supra* note 40.

II. HIDING BEHIND THE “STUDENT-ATHLETE”

A. *The Invention of the “Student-Athlete”*

How does the NCAA—an entity founded in the very early 1900s for the specific purpose of protecting college football players’ health and safety⁴⁹—justify its treatment of college athletes? To answer this question, many critics look back to 1955 when a Fort Lewis A&M football player and scholarship athlete named Ray Dennison suffered a fatal injury during a game.⁵⁰ When Dennison’s young widow filed for workers’ compensation benefits, arguing that his scholarship made the fatal collision a “work-related” accident, then NCAA executive director, Walter Byers, devised a legal strategy to avoid paying out the claim.⁵¹ Byers manufactured the “student-athlete” label to ensure that college athletes would not be legally categorized as employees, ultimately shielding the NCAA from liability and duties.⁵² Dennison’s widow lost her case,⁵³ and despite multiple lawsuits contesting this interpretation of “amateurism,” the NCAA has used the “student-athlete” classification to avoid affording

⁴⁹ See Christopher Klein, *How Teddy Roosevelt Saved Football*, HISTORY (July 21, 2019), <https://www.history.com/news/how-teddy-roosevelt-saved-football> (explaining President Theodore Roosevelt’s efforts to create greater regulation and oversight over college football after 19 deaths and 137 serious injuries in 1905 alone). It should be noted that the intercollegiate conference that implemented these reforms was the forerunner of the NCAA. *Id.*

⁵⁰ Ta-Nehisi Coates, *The Shame of the NCAA*, ATLANTIC (Oct. 17, 2011), <https://www.theatlantic.com/entertainment/archive/2011/10/the-shame-of-the-ncaa/246775/>.

⁵¹ *Id.*

⁵² *Id.*; see also Chuck Slothower, *Fort Lewis’ First ‘Student-Athlete,’* DURANGO HERALD (Sept. 25, 2014, 4:04 PM), <https://durangoherald.com/articles/79431>; Karen Given, *Walter Byers: The Man Who Built The NCAA, Then Tried to Tear It Down*, WBUR (Oct. 13, 2017), <https://www.wbur.org/on-lyagame/2017/10/13/walter-byers-ncaa> (“Feeling like the entire amateur system would crumble if schools were forced to pay workers’ comp claims for athletes, NCAA executive director Walter Byers met with his legal team and came up with a strategy to make sure no one would mistake a college athlete for an employee entitled to benefits. Schools were told to refer to players as ‘student-athletes.’ They were to speak of ‘college teams,’ not ‘clubs,’ which was a term used by the pros. They included an amateurism pledge with every scholarship offer. It worked. Dennison’s widow lost her suit, and the term stuck.”).

⁵³ Coates, *supra* note 50.

athletes rights and compensation ever since.⁵⁴ As college sports further developed into a business, however, even Bryers took issue with the system he helped create.⁵⁵ In 1984, he stated that campus athletic programs had adopted a “neoplatation mentality” where “the coach owns the athlete’s feet” and “the college owns the athlete’s body.”⁵⁶ This particular verbiage is especially poignant when considering the increased profitability of college sports since Bryers first coined the term “student-athlete,”⁵⁷ the NCAA’s continuing reliance on unpaid Black labor,⁵⁸ and the infamous history of slavery and Black physical commodification in the United States.⁵⁹

B. *How COVID-19 Exposed the Myth of the “Student-Athlete”*

“Social distancing,” “new normal,” and “super-spreader” are just a few of the terms introduced to us throughout the COVID-19 pandemic.⁶⁰ No phrase, however, is more relevant in the context of college athletics than “essential worker.”⁶¹ The proliferation of the term “essential worker” and our reliance on minimally paid grocery store and gig workers (e.g., delivery drivers and other independent

⁵⁴ Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187–88 (2020); see also *NCAA Sports Contracts and Amateurism*, US LEGAL, <https://sportslaw.uslegal.com/sports-agents-and-contracts/ncaa-sports-contracts-and-amateurism/> (last visited May 7, 2021).

⁵⁵ Given, *supra* note 52.

⁵⁶ *Id.*

⁵⁷ See *NCAA Finances*, *supra* note 19 (“The total athletics revenue reported among all NCAA athletics departments in 2019 was \$18.9 billion.”).

⁵⁸ Zirin, *supra* note 17.

⁵⁹ See generally Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html> (discussing roots of brutal and exploitative American capitalism as inextricably connected to history of a business practices rooted in slavery).

⁶⁰ See, e.g., *Coronavirus and the New Words We Added to the Dictionary in March 2020*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/new-dictionary-words-coronavirus-covid-19> (last visited May 7, 2021) (discussing new word Merriam-Webster added to their dictionary in response to the COVID-19 pandemic).

⁶¹ Jessie Mitchell, *Call Them What They Are: “Student-Athletes” Are Essential Workers*, MICH. DAILY (Oct. 29, 2020, 3:06 PM), <https://www.michigan-daily.com/section/columns/call-them-what-they-are-”student-athletes”-are-essential-workers>.

contractors) throughout the pandemic has sparked conversation around fair wages and working conditions.⁶² Unsurprisingly, these conversations have seeped into college athletics.⁶³ Regardless of whether college athletes are legally categorized as employees, NCAA and university action in response to the pandemic show that, when it comes down to it, “student-athletes” function more like “essential workers” than they do students who also happen to play sports.⁶⁴

The COVID-19 pandemic revealed that college men’s football and basketball athletes function as “essential workers” because they are financially indispensable to their institutions. During a time when universities across the nation were struggling financially⁶⁵ and the NCAA took out a line of credit after canceling March Madness in 2020,⁶⁶ the 2020–21 college football and basketball seasons

⁶² See Abigail Abrams, *The Challenges Posed By COVID-19 Pushed Many Workers to Strike. Will the Labor Movement See Sustained Interest?*, TIME (Jan. 25, 2021, 12:46 PM), <https://time.com/5928528/frontline-workers-strikes-labor/> (discussing rise in worker strikes and union activity since COVID-19 pandemic); Sharon Block & Benjamin Sachs, *Why the Pandemic Paves the Way for Labor Reform*, PUB. SEMINAR (May 21, 2020), <https://publicseminar.org/essays/why-the-pandemic-paves-the-way-for-labor-reform/> (discussing importance of empowering essential workers and providing better workplace conditions amid COVID-19 pandemic).

⁶³ Mitchell, *supra* note 61; see also Daron K. Roberts, *The Essential Workers of College Athletics Are Exerting Their Power*, UNIV. TEX. NEWS (June 18, 2020), <https://news.utexas.edu/2020/06/18/the-essential-workers-of-college-athletics-are-exerting-their-power/>; Streeter *supra* note 40.

⁶⁴ See Mitchell, *supra* note 61.

⁶⁵ Sam Briger, *As Campuses Become COVID-19 Hot Spots, Colleges Strain Under Financial Pressures*, NPR (Sept. 16, 2020 1:06 PM), <https://www.npr.org/2020/09/16/913500758/as-campuses-become-covid-hotspots-colleges-strain-under-financial-pressures> (discussing financial challenges COVID-19 pandemic exerted on universities across U.S.).

⁶⁶ *NCAA Financial FAQs*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/about/resources/finances/2020-ncaa-financial-faqs> (last visited May 7, 2021) (explaining that NCAA will rely on a line of credit to make up for lost revenue since COVID-19 pandemic); see also Pat Forde, *First Coronavirus Financial Ripple Effects Felt in NCAA with Revenue Distribution Slashing*, SPORTS ILLUSTRATED (Mar. 26, 2020), <https://www.si.com/college/2020/03/26/ncaa-revenue-losses-march-madness-schools>.

became their financial lifeline.⁶⁷ Canceling college football alone would have led to an estimated \$4 billion in lost revenue⁶⁸ and could have potentially devastated athletic programs across the country.⁶⁹ Further, in many instances, the financial stakes were *so* high that college athletes returned to campus when: (1) the general student population was prohibited from returning; (2) a majority or all of classes were held online; and (3) mandated stay-at-home orders or curfews were still in effect.⁷⁰ This decision to bring college athletes

⁶⁷ See Nancy Zimpher & Jonathan Mariner, *Opinion: As Big Ten and Pac-12 Cancel Their Football Seasons Because of COVID-19, College Sports Programs Are Facing a Financial Apocalypse*, MARKETWATCH (Aug. 11, 2020 10:08 AM), <https://www.marketwatch.com/story/big-college-sports-programs-face-a-financial-apocalypse-if-the-football-season-is-cancelled-its-time-for-new-priorities-focused-on-the-athletes-11597154899>.

⁶⁸ Roberts, *supra* note 63.

⁶⁹ Mark Schlabach & Paula Lavigne, *Financial Toll of Coronavirus Could Cost College Football at Least \$4 billion*, ESPN (May 21, 2020), https://www.espn.com/college-sports/story/_/id/29198526/college-football-return-key-athletic-departments-deal-financial-wreckage-due-coronavirus-pandemic (referencing statements made by Oregon State’s Athletic Director, in which he said, “[a]nywhere from 75 up to almost 85% of all revenues to our departments are derived directly or indirectly from football . . . [i]ndirectly, I mean sponsorship dollars, multimedia rights, and then you’ve got your gate, your donations and whatnot. The impact of not playing a season is devastating. It would rock the foundation of intercollegiate athletics the way we know it. Frankly, I’m not trying to solve for that because it would be such a devastating circumstance that we’d almost have to get a whiteboard out and start over.”).

⁷⁰ Michael Rosenberg, *It Took a Pandemic to See the Distorted State of College Sports*, SPORTS ILLUSTRATED (Dec. 29, 2020), <https://www.si.com/college/2020/12/29/global-pandemic-exposed-ncaa-inc> (“In August, three prominent schools in the University of North Carolina system—UNC, NC State and East Carolina—sent students home after one week on campus. All three schools continued to play sports. UCLA decided to conduct ‘about 8% of fall-term courses in person or using a hybrid, with the remaining vast majority delivered remotely.’ Sports continued there as well.”); see also N.Y. Times Editorial Board, *College Football Is Not Essential*, N.Y. TIMES (Aug. 29, 2020), <https://www.nytimes.com/2020/08/29/opinion/sunday/college-football-covid.html> (discussing inaccuracy of term “student-athlete” in context of COVID-19 pandemic, as the Big 12, ACC and SEC moved forward with a football season despite many campuses sending nonathlete students home for their safety); Mitchell *supra* note 61 (“If there was any doubt before the pandemic that the term ‘student-athlete’ was oxymoronic, there isn’t any longer. My inbox in the week leading up to the Michigan football game against Minnesota included both guidelines from the University of

back to campus for an athletic season predictably attributed to rampant infections among college teams: a risk universities did not ask their wider student bodies to take on.⁷¹ For example, at Clemson University, 37 of their 120 college football players were infected shortly upon their return to campus in June 2020,⁷² even though, at that time, the wider student body was still not allowed to return to its dormitories and could only take classes online.⁷³ Granted, the NCAA did eventually give college athletes the choice to opt out of the season⁷⁴ and many expressed a strong desire to play.⁷⁵ Their “choice,”⁷⁶ however, does not negate the fact that college athletes

Michigan about how to follow the Washtenaw County emergency order and emails from the Michigan Athletic Department reminding me about game day. The email on Oct. 20 from University President Mark Schlissel announcing the stay-in-place order didn’t mention the term ‘essential workers,’ but the exception for University’s athletes (nearly all of whom are undergraduates) made it clear that is what the University has deemed them.”).

⁷¹ Rosenberg, *supra* note 70.

⁷² Michael David Smith, *37 Clemson Football Players Have Tested Positive*, NBC SPORTS (June 26, 2020, 6:28 PM), <https://profootballtalk.nbcsports.com/2020/06/26/37-clemson-football-players-have-tested-positive/>.

⁷³ See Zoe Nicholson, *Clemson University Begins Reopening on Monday. Here’s What to Know*, GREENVILLE NEWS (May 28, 2020 5:53 AM), <https://www.greenvilleonline.com/story/news/2020/05/29/clemson-university-reopening-plan-look-like-june-1-phase-one/5273200002/> (discussing Clemson’s reopening plan as of May 2020, which did not consider bringing back students until late summer at earliest).

⁷⁴ Stacey Osburn, *Board Directs Each Division to Safeguard Student-Athlete Well-Being, Scholarships and Eligibility*, NAT’L COLLEGIATE ATHLETIC ASS’N (Aug. 5, 2020 11:44 AM), <https://www.ncaa.org/about/resources/media-center/news/board-directs-each-division-safeguard-student-athlete-well-being-scholarships-and-eligibility> (“All student-athletes must be allowed to opt out of participation due to concerns about contracting COVID-19. If a college athlete chooses to opt out, that individual’s athletics scholarship commitment must be honored by the college or university.”).

⁷⁵ Dennis Dodd, *Players Want College Football to Go on This Fall, but They Have to Consider All the Risks*, CBS SPORTS (Aug. 10, 2020, 11:09 AM), <https://www.cbssports.com/college-football/news/players-want-college-football-to-go-on-this-fall-but-they-have-to-consider-all-the-risks/>.

⁷⁶ Kurt Streeter, *Virus Cases in College Sports Prove Athletes Are Workers*, N.Y. TIMES (Dec. 12, 2020), <https://www.nytimes.com/2020/12/12/sports/ncaaf-football/coronavirus-college-sports-athlete-pay.html> (“What about the belief that we shouldn’t really care because the N.C.A.A. set up special pandemic rules allowing players to opt out and return next season without losing eligibility?”).

were asked to expose themselves for the financial profit of institutions in ways that general students were not. The decision ultimately led to thousands of infections of a virus with unknown long-term health effects.⁷⁷

Other university action distinguishing college athletes from the general student population further highlights how college athletes have functioned as “essential workers” for their universities. For example, in many cases, universities tested athletes more frequently and consistently than their non-athlete counterparts.⁷⁸ This testing distinction, by itself, is not necessarily an issue as those most exposed and most at-risk should take priority (although one could question the ethics of diverting tests from other high-risk communities to allow for a college sports season). But what will occur when universities begin distributing the vaccine? Will college athletes also take priority then? Or will they then be treated like their non-athlete counterparts? The NCAA’s prioritization of athletes as it relates to COVID-19 testing, while also insisting that these athletes are akin

Anyone who says that doesn’t understand the pressure athletes feel to keep going, no matter the cost, in college sports.”); *see also* Uma M. Jayakumar & Eddie Comeaux, *The Cultural Cover-Up of College Athletics: How Organizational Culture Perpetuates an Unrealistic and Idealized Balancing Act*, 87 J. OF HIGHER EDU. 489 (2016) (discussing a qualitative study of Division I college athletes that exposes the ways in which underlying messages and structures often pressure college athletes to prioritize athletics above other aspects of their lives, such as their academics).

⁷⁷ Blinder, *supra* note 2; *see also* Rosenberg, *supra* note 70. (“We will likely not know for many years how this virus affects people long-term. We do know, however, that there were outbreaks in college sports—Houston men’s basketball coach Kelvin Sampson, for one, said his entire team had COVID-19—and that, while some coaches and schools took protocols extremely seriously, others portrayed them as an annoyance.”); *Long Term Effects of COVID-19*, CTR. DISEASE CONTROL, <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html> (last visited May 7, 2021); Paula Lavigne & Mark Schlabach, *Heart Condition Linked with COVID-19 Fuels Power 5 Concern About Season’s Viability*, ESPN (Aug. 10, 2020), https://www.espn.com/college-football/story/_/id/29633697/heart-condition-linked-covid-19-fuels-power-5-concern-season-viability (discussing potential link between long term heart complications and COVID-19 infection among college athletes).

⁷⁸ Laine Higgins, *The Surest Way to Get a Coronavirus Test in College: Play Football*, WALL ST. J. (Sept. 10, 2020, 10:40 AM), <https://www.wsj.com/articles/the-surest-way-to-get-a-coronavirus-test-in-college-play-football-11599748810>.

to their non-athlete counterparts, highlights the NCAA's hypocritical classification of "student-athletes." If the NCAA can recognize situations where these athletes deserve to be prioritized, particularly when that prioritization allows the NCAA and its member universities to receive financial revenue, then the NCAA can also recognize that these athletes deserve other protections as well.

III. IF NOT "STUDENT-ATHLETES," THEN WHAT?

A. *Using Essential Workers for Progressive Labor Reform*

Advocates across the country have utilized the COVID-19 pandemic to bring forth progressive legislation focused on improving essential workers' working conditions.⁷⁹ For example, in May of 2020, the mayor of Philadelphia signed into effect the Essential Worker Bill of Rights, which protects workers who speak out against unsafe workplace conditions during the COVID-19 pandemic.⁸⁰ With the attention afforded to college sports conditions since the pandemic, it is unsurprising that similar efforts have been made to advocate for college athletes at the federal level as well.⁸¹ For example, in December, Senator Cory Booker proposed a bill entitled the College Athletes Bill of Rights.⁸² The bill includes sweeping reforms to the current NCAA structure.⁸³ Specifically, the bill would: (1) afford athletes in revenue-generating sports a share of profits, (2) provide lifetime scholarships, (3) ensure government oversight of health and safety standards, (4) require public reporting of booster donations, (5) allow for unrestricted transferability, and (6) create a commission with subpoena power to ensure

⁷⁹ See, e.g., Conor J. Hafertepe & David J. Woolf, *New Philadelphia Ordinance Protects Employees Who Blow the Whistle on Unsafe Workplaces During COVID-19*, NAT'L L. REV. (June 30, 2020), <https://www.natlawreview.com/article/new-philadelphia-ordinance-protects-employees-who-blow-whistle-unsafe-workplaces>.

⁸⁰ *Id.*; PHILADELPHIA, PENN., CODE § 9-5001-09.

⁸¹ Billy Witz, *Bill Offers New College Sports Model: Give Athletes a Cut of the Profits*, N.Y. TIMES (Dec. 19, 2020), <https://www.nytimes.com/2020/12/17/sports/ncaafootball/college-athlete-bill-of-rights.html>.

⁸² *Id.*

⁸³ *Id.*

compliance.⁸⁴ Although this effort would drastically change the business of college sports, its outcome remains uncertain. Both versions of these worker bill of rights illustrate how advocates in a range of areas have utilized the pandemic as a springboard for progressive labor reform; however, questions still remain with regard to the NCAA. Are those with power ready and willing to allow for actual reform? If reform does occur, what aspects of the current NCAA structure should change? What steps can be taken toward achieving antiracist policies and practices within college athletics?

B. *The COVID-19 Pandemic Reveals the Need for Independent Representation and a Power Shift in the NCAA*

As the pandemic continues, the many justifications for a legal reclassification of “student-athletes” and overall restructuring of college sports become more evident. However, it is worth noting that solely reclassifying “student-athletes” as employees or allowing them to receive financial compensation in limited ways, will not solve all of the issues in college athletics. Further, while allowing college athletes to financially benefit from their NIL in regulated instances may be a step in the right direction, such an adjustment will not necessarily benefit every player and it does not represent a structural change to an increasingly flawed system.⁸⁵ Decisions around reforming athlete classification and revenue sharing must be made through a power analysis lens. More specifically, for legislation to serve as antiracist reform to the college athletics business, universities and the NCAA must shift some of the power they exclusively hold to the college athletes. By allowing college athletes to collectively bargain over their health, safety, and other rights through the establishment of an independent representative body, the NCAA could shift some of its power to the athletes: ultimately

⁸⁴ *Id.*

⁸⁵ See Mark Emmert, *If College Athletes Could Profit off Their Marketability, How Much Would They Be Worth? In Some Cases, Millions*, USA TODAY (Oct. 10, 2019, 9:16 AM), <https://www.usatoday.com/story/sports/college/2019/10/09/college-athletes-with-name-image-likeness-control-could-make-millions/3909807002/> (discussing that ability of a player to profit from name, image, and likeness legislation depends on a number of factors such as marketability of player and location and market of university).

allowing college athletes to have an unprecedented level of influence over the management of the college sports business.⁸⁶

Focusing on the importance of collective bargaining is not to suggest that college athletes on high revenue generating teams should not also receive compensation. Financial power and the ability to build generational wealth, in any capacity, is also an important component of combatting racial inequities. However, *independent representative* power and the ability to *influence* NCAA policy and structure is often overlooked in conversations around NCAA reform. Further, this form of power is especially important when considering the NCAA's history of structural racism.⁸⁷ Those with authoritative power in the NCAA system (e.g., the NCAA decision-makers, university presidents, athletic directors, and coaches) are overwhelmingly white, while those that provide the labor—but do not share in that power—are disproportionately Black.⁸⁸ Collective bargaining would shift who maintains the authority and power within the business, a move that could reach beyond just college athletics.⁸⁹

⁸⁶ Rohan Nadkarni, *College Football Players Need a Union Now More Than Ever*, SPORTS ILLUSTRATED (July 2, 2020), <https://www.si.com/college/2020/07/02/college-football-needs-a-union-now-more-than-ever> (“To understand the importance of unions in the context of the COVID-19 pandemic, one simply has to look at the professional sports world. While the ethics of the NBA returning in late July are up for debate, that return comes only after robust discussions between the league and its players association, whose president, Chris Paul, dealt personally with commissioner Adam Silver. Inside that union there has been dissent about a comeback, and some concern that basketball might distract from the ongoing protests against police brutality—but those voices have been *heard* and, if players return, they will have made the NBA engage in discussions regarding social justice. In baseball, players used their bargaining power to prevent MLB owners from skirting an initial agreement to pay prorated salaries based on the number of games played. In the end, they could not be unilaterally forced to play under conditions they deemed unworthy of the risk. College football players do not have the same protections, yet they’re being called back to campus, and those who choose *not* to play do so without any NCAA plan to ensure their scholarships are preserved.”).

⁸⁷ See generally Nwadike, *supra* note 28.

⁸⁸ Harper, *supra* note 22 at 2–9; see also Jake New, *Report: Sports Leadership ‘Dominated’ by White Men*, INSIDE HIGHER ED (Nov. 22, 2016), <https://www.insidehighered.com/quicktakes/2016/11/22/report-sports-leadership-dominated-white-men>.

⁸⁹ Nadkarni, *supra* note 86.

For example, after the police killing of George Floyd, there was a resurgence in athlete activism at the collegiate and professional levels.⁹⁰ During the corresponding racial justice protests of the summer of 2020, several college athletes took to social media to express their desire for progress.⁹¹ Some challenged their states' governors⁹² and others their coaches and universities.⁹³ Should these athletes gain the ability to collectively bargain, not only could they—like their professional counterparts—advocate for better working conditions,⁹⁴ but they could also attempt to hold their universities accountable for the promises and commitments their universities made

⁹⁰ Jori Epstein et al., *Fear, Despair, Outrage, Hope: Athletes Open up on Why They Joined Protests*, USA TODAY (June 6, 2020, 9:56 AM), <https://www.usatoday.com/story/sports/nfl/2020/06/06/athletes-protests-george-floyd-death/3147154001/>.

⁹¹ Corbin McGuire, *College Athletes Using Platforms to Speak Out on Social Justice Issues*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 18, 2020, 11:00 AM), <https://www.ncaa.org/about/resources/media-center/feature/college-athletes-using-platforms-speak-out-social-justice-issues>.

⁹² Bomani Jones, *College Football Players Are Unpaid Stars on the Field—And Have No Power off It*, VANITY FAIR (Aug. 27, 2020), <https://www.vanityfair.com/culture/2020/08/college-football-unpaid-stars-with-no-power> (“On June 22, Mississippi State running back Kylin Hill retweeted the governor, Tate Reeves, who had stated that adopting a second state flag was not an option. Mississippi would have one flag, whatever that flag would be. With remarkable bravery, Hill said he would no longer represent his home state if the flag didn’t change. His tweet closed with ‘I’m tired,’ a telling statement from someone so young. Hill’s act of defiance amplified the discussion nationally. On June 28, both houses of the state legislature passed a bill to change the flag.”).

⁹³ Nadkarni *supra* note 86; Tommy Beer, *FSU Football Star Threatens Boycott, Claims Coach Lied About George Floyd Discussion*, FORBES (June 4, 2020, 2:35 PM), <https://www.forbes.com/sites/tommybeer/2020/06/04/fsu-football-star-threatens-boycott-claims-coach-lied-about-george-floyd-discussion/?sh=81ac11c35672> (discussing FSU football-led protest that took place after FSU players accused their coach of lying about personal conversations with players after killing of George Floyd).

⁹⁴ See Nick Shook, *NFL, NFLPA Reach Agreement on COVID-19 Adjustments to CBA*, AROUND NFL (July 24, 2020, 6:03 PM), <https://www.nfl.com/news/nfl-nflpa-reach-agreement-on-covid-19-adjustments-to-cba>; Tim Reynolds, *NBA and Players Union Stiffen Coronavirus Protocols*, CHI. SUN TIMES (Jan 12, 2021, 2:55 PM), <https://chicago.suntimes.com/2021/1/12/22227596/nba-players-union-stiffen-coronavirus-covid-19-protocols>.

in the wake of the George Floyd protests.⁹⁵ In all, independent representation through collective bargaining would afford athletes greater protections should they continue to speak out against their coaches or universities, while also providing a lasting seat at the table and an ability to ensure persistent reform.⁹⁶

CONCLUSION

As of January 27, 2021, the COVID-19 death toll in the U.S. was 423,519 and the number of total cases reached 25,301,166.⁹⁷ Meanwhile, issues with vaccine distribution and availability have propelled new doubts on the likelihood of a full “return to normal” in 2021.⁹⁸ However, on that same day in January, the SEC announced their 2021–22 football schedule, which included a return of nonconference games.⁹⁹ This schedule means that players will face even more teams than they did in the 2020–21 season and thus increase their potential exposure to the virus. Now, more than ever, some sort of change within college athletics must be implemented. If the NCAA and its member universities are truly committed to

⁹⁵ See, e.g., Marc J. Spears, ‘Black Lives Matter, People’: How the NBA’s Social Justice Efforts Dominated the Season, UNDEFEATED (Oct. 12, 2020), <https://theundefeated.com/features/how-the-nba-social-justice-efforts-dominated-the-season/> (discussing success NBA players and their union were able to achieve in pushing larger organization through player-led activism following George Floyd protests).

⁹⁶ See *supra* Nadkarni note 86.

⁹⁷ *Brief-U.S. CDC Reports Total Deaths of 423,519 Due to Coronavirus as of Yesterday*, REUTERS (Jan. 27, 2021 3:38 PM), <https://www.reuters.com/article/brief-us-cdc-reports-total-deaths-of-423/brief-u-s-cdc-reports-total-deaths-of-423519-due-to-coronavirus-as-of-yesterday-idUSL4N2K24BO>.

⁹⁸ See Matthew Conlen et al., *Why Vaccines Alone Will Not End the Pandemic*, N.Y. TIMES (Jan. 24, 2021), <https://www.nytimes.com/interactive/2021/01/24/us/covid-vaccine-rollout.html>.

⁹⁹ See Alex Scarborough, *SEC Football Schedule Release Features Return of Nonconference Games, Three Power 5 Matchups on Sept. 4*, ESPN (Jan. 27, 2021), https://www.espn.com/college-football/story/_/id/30789318/sec-football-schedule-release-features-return-nonconference-games-3-power-5-matchups-sept-4; see also Paul Myerberg, *Big Ten Football Reduces Season Schedule to Only Conference Games, Maybe Setting Stage for Others to Follow*, USA TODAY (July 9, 2020), <https://www.usatoday.com/story/sports/college/2020/07/09/big-ten-football-reduces-season-schedule-only-conference-games/5408329002/>.

combatting *structural* racism,¹⁰⁰ they should start by making *structural* changes to a system that has enabled the exploitation of Black athletes for decades.

¹⁰⁰ See *NCAA Message on Inequality and Justice*, *supra* note 5.