Exploring Ethical Issues and Examples by Using Sport

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I. INTRODUCTION

The purpose of this paper is to inspire instructors to expand the possible topics used to teach ethics in undergraduate or graduate business law, legal environment or sport law courses. These topics might lead to further exploration and inquiry and can be developed into research projects and presentations. In this down economy which has revealed hoards of Ponzi schemes and introduced the world to a man named Madoff, the traditional approach to teaching ethical issues in the business law course is rife with a host of new opportunities for class discussion, supplanting the now almost old-school, yet worthy, Enron discussion and analysis. Thus, instructors can consider the following sport-related examples to supplement the current syllabus of material and to provide ethical and legal issues and scenarios for students to ponder.

The instructor should address these subjects after first establishing a general foundation and relationship between ethics, morals, law, the American legal system, and the role of lawyers, which best suits the needs in the course. It also might be helpful to explain the usefulness of the

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1 See Adam Epstein, Multi-level Marketing and its Brethren: The Legal and Regulatory Environment in the Down Economy, 12 ATLANTIC L.J. 91-124 (2010) (comparing the similarities and differences between multi-level marketing organizations (MLMs), Ponzi schemes, and pyramid schemes, and supporting consideration for legislation allowing those who elect to participate in an MLM to be given at least a three-day cooling off period to reconsider their association, similar to the FTC door-to-door sales rule).
2 Id.
3 See Milton C. Reagan, Jr., Ethics in Corporate Representation: Teaching Enron, 74 FORDHAM L. REV. 1139 (2005) (noting that the word “Enron” has become a shorthand reference for corporate wrongdoing in the first years of the twenty-first century, and that though analyzing the complex transactions by the lawyers involved with Enron’s downfall might actually raise more questions than provide answers, asking the right questions is an important aspect of effective teaching).
4 See, e.g., Rakesh K. Anand, Toward an Interpretive Theory of Legal Ethics, 58 RUTGERS L. REV. 653 (2006) (organizing article around one simple question: “Where’s the law in legal ethics?” and explaining that at least in
exercise to students given that someday they might serve as a juror, or as an advocate such as a manager, coach, parent, lawyer or athletic administrator. Effective instructors should present the ethical dilemmas and balance the discussion so that students are encouraged to decide for themselves their stance on an issue.

II. ETHIC THEORY

Before exploring these sport-related ethical issues and examples, it may be helpful to define term ethics. A simple definition is “The discipline dealing with what is good and bad with a moral duty and obligation.” A discourse on the phrase situational ethics might also be appropriate.

In the sport context, consideration of ethics might evoke the adage that “an ethic of service is at war with a craving for gain.” Put differently, while coaches, players and administrators claim they believe in adhering to principles of ethics and good sportsmanship, it is likely that they do so provided such principles do not interfere with or impede the likelihood of winning. Thus, the struggle between playing by the rules and competing at-all-costs is often the heart of the issue.

Exploration of ethical issues in sport also provides an opportunity to consider the various theories and framework of ethics commonly discussed in popular business law texts. The theories that are typically addressed include Ethical Fundamentalism, Kantian Theory, Social Justice Theory, and the Profit Maximization Theory. Providing examples as to how these theories apply to sport may be helpful to the student.

Profit Maximization Theory advocates that business should maximize profits for shareholders, and the discussion might center on business decisions that underlie both professional and intercollegiate sports. Ethical Fundamentalism can be applied to both professional amateur sports as it involves looking to an outside source such as a rule-book for ethical commands. The Kantian Theory, which calls for recognizing humanity in various situations, can be discussed in the context of intercollegiate sports where student-athletes are often characterized as commodities and free labor for multi-million dollar coaches and administrators. Kantian Theory promotes the principle of do unto others as you would have them do unto you. Given the ultra-competitive nature of coaching in professional and amateur

America, law is a symbolic form of political life and reminding the reader that political life and moral life are incommensurable spheres of human experience.

5 WEBSTER’S DICTIONARY OF LAW (1st ed. 1996).
6 HENRY CHEESEMAN, BUSINESS LAW ETHICS AND SOCIAL RESPONSIBILITY OF BUSINESS 665 (7th ed. 2009).
8 SUSAN B. SHURDEN, JUAN SANTANDREU & MICHAEL C. SHURDEN, HOW STUDENT PERCEPTIONS OF ETHICS CAN LEAD TO FUTURE BUSINESS BEHAVIOR, 12 J. LEGAL, ETHICAL & REG. 1 (2010).
9 See, e.g., Associated Press, Bruce Pearl Says He Mislead NCAA, ESPN (Sept. 10, 2010, 9:02 PM), http://sports.espn.go.com/ncb/news/story?id=5554682 (noting that after a 17 month investigation by the NCAA that the University of Tennessee athletics director, Mike Hamilton, as a pre-emptive punishment reduced head basketball coach Bruce Pearl’s pay by $1.5 million over five years and prohibiting him from participating in off-campus recruiting, and his three assistants also had their pay reduced and cannot participate in off-campus recruiting for various periods, all as a result of impermissible prospective student-athlete recruiting violations).
10 CHEESEMAN, supra note 6.
11 Id.
12 Id.
14 Id.
sport, there are numerous examples of the rationalization of this unsavory behavior because competitors already engage in similarly shady or deceptive practices; especially during the recruitment of high school athletes.\textsuperscript{15} Finally, the Social Justice Theory, which calls for the least advantaged in society to receive assistance to realize their potential and overcome past injustice, can be used to discuss the National Collegiate Athletic Association’s commitment to promoting gender and racial diversity.\textsuperscript{16}

\textbf{III. Starter Topics}

Whether teaching through theories or case studies, these starter topics might serve as a fundamental starting point to explore moral and ethical concerns in the context of sport. By using current sport-related examples, more students might be willing to participate because they can relate to the context. Most of today’s students are members of the Google Generation and using sport-related examples in class can be a fun and engaging way to connect with them as their guide or guru as the material is merely a touch away from their fingertips.\textsuperscript{17}

\textit{A. Fraud}

Addressing any of the ethic theories in great detail in the context of sport might be challenging, but a good starting point might be to explore fraud in sports. Instructors should invite students to think of ways in which participants knowingly or intentionally break the rules in order to achieve a win. A discussion of fraud in sports could include academic fraud,\textsuperscript{18} résumé fraud,\textsuperscript{19} or even recruiting fraud.\textsuperscript{20} Participation fraud can include the alleged cheating at the Boston Marathon involving Rosie Ruiz who apparently used a subway train to enhance her performance to win the race in 1980.\textsuperscript{21} A more recent example of participation fraud includes the case of West Texas high school student Jerry Joseph who in addition to using a fraudulent


\textsuperscript{16} CHEESEMAN, \textit{supra} note 6.

\textsuperscript{17} \textit{See} Joan Catherine Bohl, \textit{Generations X and Y in Law School: Practical Strategies for Teaching the “MTV/Google” Generation}, 54 LOY. L. REV. 775, 791 (2008) (“As law teachers, we must change. Law professors teaching past generations were purveyors of information, revered for the information they could impart…Gen X Y students are expert gatherers of information, or so they perceive themselves to be. The successful law teacher must transcend the old role of providing information and become a guru.”).

\textsuperscript{18} \textit{See} Glenn Wong, Kyle Skillman & Chris Deubert, \textit{The NCAA’s Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of a New Chapter}, 9 VA. SPORTS & ENT. L.J. 47 (2009) (providing an overview and analysis of NCAA Appeals Committee standards of review and recent changes to those standards, the bases for appeal, and a statistical assessment of “success” on each of those bases).

\textsuperscript{19} \textit{See} Brent C. Moberg, \textit{Navigating the Public Relations Minefield: Mutual Protection Through Mandatory Arbitration Clauses in College Coaching Contracts}, 16 J. LEGAL ASPECTS OF SPORT 85 (2006) (referencing inaccuracies on Coach George O’Leary’s resume resulting in only a five-day tenure as the head football coach).

\textsuperscript{20} \textit{See} Gene Wojciechowski, \textit{College “Recruit’s” Lie a Tale Gone Horribly Wrong}, ESPN (Feb. 8, 2008, 6:11 PM), http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&id=3236039 (discussing Kevin Hart and his fraudulent scheme to convince others that he was actually being recruited for football in 2007).

name, misrepresented his age (he was really 22, not 16) and that he had already graduated from a high school in Florida in 2007. Joseph led his team to the state Texas playoffs in 2010 before his real status was discovered.22

B. Performance Enhancing Drugs

The use of performance enhancing drugs (PEDs) is certainly a hot topic. The proliferation of ingestible supplement powder and pills has caused considerable concern over how to regulate, through drug testing, the presence of PEDs. In an effort to gain a competitive edge the regulation of PEDs has become the ultimate game of cat-and-mouse between the users and the testers, with both sides pushing the boundaries of ethical or moral conduct.23

Though PEDs have existed for decades, a concerted effort to test for drugs through the use of a urine sample did not begin at the international level until the 1980’s. Sadly, a plethora of doping abuses were discovered at the 2000 Sydney Olympics and in 2004 in Athens, Greece. However, the number of positive tests fell in 2008 in Beijing even as the number of tests given increased by over 1,000.24

Those who admit to knowingly use a supplement or drug considered a banned substance is a relatively clear example of unethical behavior in sport. Less clear, however, is how to deal with an athlete who claims to have unknowingly received a PED. For example, consider American elite swimmer Jessica Hardy who tested positive in 2008 for the drug clenbuterol, a prescription drug for asthma and breathing disorders and how she accepted a two year ban from the sport on the heels of the Beijing Olympics.25 Hardy attributed the positive test to a contaminated nutritional supplement, a claim she successful proved in a lawsuit against the manufacturer.26 Although she cleared her name from intentional wrong-doing, the damage had already been done to her reputation in the swimming community.27

While Hardy’s case is only one of countless others, a more curious question for class discussion might be whether or not it is legal to use a drug or supplement that has yet to be tested for or that its very existence has not yet been discovered. Is that cheating if there is no known existence of the drug? If it is not yet banned by a league or governing body, is it unethical to use the drug or is that just smart training? This was at the heart of the BALCO (Bay Area Laboratory Cooperative) scandal involving owner Victor Conte and his co-conspirator Patrick Arnold, a chemist, who developed the designer steroid THG (tetrahydrogestrinone).28 THG, also known as The Clear has been linked with use by Marion Jones and others after Coach Trevor

26 Id.
27 Id.
Graham first alerted United States Anti-Doping Agency (USADA) officials with evidence of a used syringe.  

C. Performance Enhancing Technology

The use of the high-tech, full body swimsuits in the competitions leading up to and during the 2008 Beijing Olympics garnered considerable attention but that attention paled in comparison to the actual results posted by the athletes. The suits aimed to improve performance by reducing the amount of drag in the water by using a water repellant fabric and creating a bubble effect between the suit and the swimmer. This allowed swimmers to maneuver on top of rather than through the water thus getting more speed out of their effort.

Swimmers wearing the suit proved it worked by breaking 62 world records between its debut in February 2008 and the close of the 2008 Olympic Summer Games. The avalanche of world records by those that wore the suit caused many former Olympians to refer to the use of the suits as technical doping and likened to the use of corked bat in baseball.  

In addition to the outlandish swimming performances at the Beijing Games and due to their extreme cost ranging from $200 to $700, many scholastic and local club swim leagues decided to ban the suits. Fears of permanently changing the dynamic of competitive swimming led to a complete ban of the suit in January 2010. Ultimately, an ethical issue to be explored is whether the suit defeated the spirit of the sport, though legal at the time, and whether exploiting rule loopholes is unethical or merely taking advantage of an unregulated opportunity.

D. Repeal of an Award Ex Post Facto

The importance of sports in American culture has created many professional sport athletes and coaches to be heralded as role models. What happens when such an athlete or coach runs afoul of the rules can lead to a number of ethical issues. For example, should committing a crime unrelated to their sport prevent an athlete from being inducted into a sport hall of fame or otherwise recognized for their past athletic achievement? Should a criminal charge, whether felony or misdemeanor, result in such an honor being rescinded?

Though he was never convicted for the murder of his ex-wife Nicole Brown Simpson and companion Ron Goldman, many felt that O.J. Simpson’s name should be removed from the

31 Id.
Buffalo Bills Wall of Fame at Ralph Wilson Stadium. Such discussions resurfaced in 2009 when he was convicted for armed robbery and sentenced to prison.\textsuperscript{37} More recently, national attention was given to Heisman Trophy winner Reggie Bush who was subsequently found to have violated NCAA amateurism rules. Bush was retroactively declared ineligible by the NCAA five years \textit{ex post facto}.\textsuperscript{38} He ultimately forfeited his Heisman Trophy and the New York Athletic Club declared no winner for the 2005 year. Given that his rule violations were unrelated to his performance, should Bush have relinquished the award. If so, should it be given to second place finisher Vince Young?

IV. YOUTH AND INTERSCHOLASTIC SPORTS

A. Sportsmanship and Excessive Parental Involvement

Unfortunately, there are numerous examples of inappropriate behavior by overly aggressive parents, spectators and coaches in youth sports. According to research presented in 2006 by the American College of Sports Medicine, too many youth sports coaches overemphasize winning and engage in abusive discipline.\textsuperscript{39} Although many youth sport leagues now require parents to sign a code of conduct, the consistently prevalent misbehavior by parents of young athletes can spark a discussion on whether enough is being done to curb poor sportsmanship at the early levels and beyond.\textsuperscript{40}

An example of an out-of-control parent involves the case of Thomas Junta who was convicted by a Massachusetts jury of manslaughter rejecting claims the hockey dad acted in self-defense when he beat another father to death at a youth scrimmage in 2000.\textsuperscript{41} He was convicted of manslaughter and was sentenced six to 10 years in prison. He was released in the fall of 2010.\textsuperscript{42}


\textsuperscript{40} Dianna K. Fiore, \textit{Parental Rage and Violence in Youth Sports: How Can We Prevent “Soccer Moms” and “Hockey Dads” from Interfering in Youth Sports and Causing Games to End in Fistfights Rather than Handshakes}, 10 VILL. SPORTS & ENT. L.J. 103 (2003); \textit{See also Buffalo Bills, Elements Added to Fans Code of Conduct Policy} (Sept. 9, 2010), http://www.buffalobills.com/news/article-1/Elements-added-to-fans-code-of-conduct-policy/92d8d945-0465-4142-8cb9-98e7626ec99 (announcing it would close the stadium parking lots two hours after the game was over, that the use of electronic message boards would carry a variety of reminders for fans during the game, that law enforcement will strictly enforce the “No Standing/No Parking” on roadways near the stadium parking lot entrances as a matter of safety, in addition to the roving Security/Alcohol management teams in the stadium parking lots during pre-game, pat-downs at all entrance gates, and permanent Fan Code of Conduct contact information displayed on the towers inside the stadium).


In 2006, an East Texas jury found a man guilty of aggravated assault with a deadly weapon in the shooting of a high school football coach.\textsuperscript{43}

\textbf{B. Mercy Rules (Running Up the Score)}

Running up the score with huge margins of victory have presented challenges for state high school athletic associations. The football committee of the Connecticut Interscholastic Athletic Conference (CIAA), which governs high school sports, adopted a \textit{score management} policy that would suspend coaches whose teams win by more than 50 points.\textsuperscript{44} In NCAA college baseball, a game is to end if a team is ahead by at least 10 runs after seven innings in a nine-inning game.\textsuperscript{45} In NCAA softball, the rule is invoked if one team is ahead by at least eight runs after five innings.\textsuperscript{46}

Examples of running up the score abound. In 2009, Micah Grimes was terminated as the basketball coach at the Covenant School girls basketball team (Texas) after beating Dallas Academy 100-0.\textsuperscript{47} Coach Grimes insisted that he did not run up the score and that he had nothing for which to apologize.\textsuperscript{48} Lincoln University beat Ohio State Marion 201-78 in basketball in 2006.\textsuperscript{49} In 2008, the Slovakia women’s hockey team beat Bulgaria 82-0.\textsuperscript{50}

Not all players are willing participants in running-up the score or otherwise manipulating records. In 2003, high school football player Nate Haasis from Springfield, Illinois, set a state passing record as a result of an agreement (unbeknownst to him) between both teams’ coaches to let his high school team score a touchdown.\textsuperscript{51} Three days later, Haasis asked that the pass be removed from the record books and his request was granted.\textsuperscript{52} Had Haasis not made the request on his own, should the record stand?

\textbf{C. Prayer}

At the interscholastic (i.e., high school) level, there are two areas which dominate the discussion with regard to religion: prayers related to sports practice and competition, and the possibly religious exercises conducted at the high school graduation ceremony. Issues involve members of many faiths. In 2010, Fordson High School in Dearborn, Michigan, received national attention when it decided to hold pre-season football practices between 11 p.m. and 4

\textsuperscript{45} \textsc{National Collegiate Athletic Association, Baseball 2009-10 Rules}, §75, (2009).
\textsuperscript{46} \textsc{National Collegiate Athletic Association, Softball, 2009-10 Rules}, (2009).
\textsuperscript{48} Id.
\textsuperscript{52} Id.
a.m. in order to accommodate its predominately Muslim squad. Is such an extreme accommodation ethical given that it is a public school and the team did have some non-Muslim students on the roster?

The plight of New Jersey high school football coach Marcus Borden, a Catholic by faith and a tenured Spanish teacher at East Brunswick High School, provides an opportunity for an interesting discussion in the interscholastic context. Borden resigned and then was reinstated after school administrators told him that he could not lead the team in prayer prior to sports contests or team dinners. The Third Circuit held that a reasonable observer would perceive the display as a government endorsement of religion (a violation of the Establishment Clause of the Constitution) since everyone knew that the popular coach led the team in prayer for 23 seasons. In 2008, Borden was finally forced to discontinue even bowing his head and getting down on one knee during a student-led team prayer when the Supreme Court denied certiorari.

Other interscholastic examples could include Catoosa County, Georgia cheerleaders who created controversy in 2009 when they held religious banners for football players to run through before football games. The school decided to end the practice after complaints. Also in 2009, a Kentucky parent expressed outrage that her son was baptized on a trip led by the high school head football coach. In 2010, a federal district court in Missouri held that a local school district’s decision to stop distributing flyers to parents, including a flyer for a Victory Through Jesus soccer camp, among others, did not violate the Constitution. The principal issue of the concept of separation between church and state may be clear to some with less clear to others evoking discussion involving law and ethics.

V. INTERCOLLEGIATE SPORT

The primary governing body of collegiate athletics in the United States is the NCAA. It was formed in 1909 by a group of college presidents to ensure sportsmanship, protect amateurism and promote education. These principles have been the core of the NCAA’s existence. However, since its formation the NCAA has continually struggled to create an atmosphere that balances those three principles with an “arms race” focused on winning and fueled by billion-

54 Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153 (3d Cir. 2008), cert. denied 129 S. Ct. 1524 (2009) (coach had no free speech right to contravene the local school board’s policy prohibiting faculty participation in student-led prayer activity).
55 Id. at 159-60.
56 Id. But see Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995) (“while a coach’s practice of leading and participating in prayers with a basketball team before and after games is unconstitutional, a high school graduation as “a significant, once in-a-lifetime event” to be contrasted with athletic events in “a setting that is far less solemn and extraordinary.”).
59 Victory Through Jesus Sports Ministry Found. v. Lee’s Summit R-7 Sch. Dist., 2010 U.S. Dist. LEXIS 54388 (W.D. Mo. June 3, 2010) (holding that the plaintiff did not even have standing to seek injunctive relief).
dollar television contracts. As a result, the NCAA rules governing sportsmanship, amateurism and academics present numerous ethical questions for students.

As a private, voluntary, non-profit association of over 1,000 member institutions, the NCAA has drafted and adopted regulations called bylaws designed to regulate its own membership. Is the regulation of ethical and unethical conduct just an example of the NCAA appearing to create rules that appear to enforce some standard of ethical behavior, but never in fact enforcing those standards?

For example, NCAA Bylaw 10.01.1, Honesty and Sportsmanship has existed since the early 1950’s, though it is rarely cited by the NCAA enforcement staff when prosecuting major enforcement cases. Even egregious cases such as the University of Colorado recruiting scandal that involved strippers and rape allegations did not trigger a 10.01.1 citation. Indeed, of the over 6655 of secondary infractions cases that occurred between 2001 and 2006, only seven included a 10.01.1 violation. Only 58 of the 590 major infractions cases that occurred between 1953 and 2006 include a citation of 10.01.1.

The following sections focus on a few ethical considerations specifically related to the NCAA and its bylaws. This may serve as a useful segment in since students will likely know someone on campus who is influenced by the NCAA bylaws either directly or indirectly.

A. Amateurism

According to the NCAA Manual, Article 1.3.1, the NCAA’s primary mission is “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” Many claim that student-athletes are students first, but is that a true statement? Should student-athletes at many of the major colleges actually be paid for their work instead of just receiving a scholarship and, of course, the Pell grant which is available to all students who need federal financial assistance? The NCAA claims that education is one of its primary purposes and yet a few years ago the University of Oregon hired an athletic director who did not even have a college degree.

In 2010, NCAA signed a 14-year, $10.8 billion contract with CBS and Turner Broadcasting through 2024. It includes TBS, TNT and TruTV, and will send approximately $740 million

\[\text{\textsuperscript{61}} \text{Id.}\]

\[\text{\textsuperscript{62}} \text{This article utilizes the Division 1 Manual. National Collegiate Athletic Association, 2010-2011 NCAA® Division I Manual (2010) (hereinafter “NCAA Manual”), http://www.ncaapublications.com/s-13-Manuals.aspx?pagenum=2&view=0 (last visited Sept. 11, 2010). NCAA Manual, Bylaw, art. 10.01.1 (“Individuals employed by (or associated with) a member institution to administer, conduct or coach intercollegiate athletics and all participating student-athletes shall act with honesty and sportsmanship at all times so that intercollegiate athletics as a whole, their institutions and they, as individuals, shall represent the honor and dignity of fair play and the generally recognized high standards associated with wholesome competitive sports.”}).\]

\[\text{\textsuperscript{63}} \text{NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Legislative Services Database – LSDBi, https://web1.ncaa.org/LSDBi/exec/homepage (last visited Sept. 19, 2010).}\]

\[\text{\textsuperscript{64}} \text{Id.}\]

\[\text{\textsuperscript{65}} \text{NCAA Manual, art. 1.3.1, at 1 (“Basic Purpose”).}\]

\[\text{\textsuperscript{66}} \text{Joel Odom, The Pat Kilkenny Era at Oregon: Big Bucks, Big Bills, OREGONIAN (May 12, 2009, 8:36 AM), http://blog.oregonlive.com/behindducksbeat/2009/05/the_pat_kilkenny_era_at_oregon.html.}\]
annually to the NCAA members. The new agreement includes internet, wireless, marketing rights and every game will be shown live on one of four national television networks. Whether knowingly or unknowingly, all NCAA Division I student-athletes forfeit any right to the proceeds from those sales when they complete the annual eligibility papers to compete in their sport. Should student-athletes be allowed to control the use of their images in commercial video games, receive percentage of the royalties earned from the sales of their jerseys, photos and video images? A recent lawsuit might resolve these issues.

NCAA bylaws state that student-athletes may not have an agent otherwise they are considered professional and not an “amateur.” Interestingly, the NCAA does allow for an agent in one sport (and therefore be a professional) but remain an amateur in another sport. However, the agency contract must be sport specific. Otherwise, the NCAA’s position is that the agency contract automatically applies to all sports.

B. Clustering and Academic Integrity

In an attempt to raise graduation rates and stem the rising tide of criticism as to whether student-athletes were actually athlete-students, the NCAA adopted stricter academic and eligibility rules. Although the rules have resulted in a greater number of NCAA student-athletes graduating within a desired five-year window, some critics argue that student-athletes are limited to pursuing a certain course of study under this system. Essentially, the NCAA allegedly created a certain set of academic degrees that student-athletes choose so to allow them an easier path to academic eligibility and graduation.

Clustering is a term used to describe tactics used in some college sport programs or athletic departments to guide student-athletes into certain less arduous majors or classes. The media claims that some student-athletes are placed into “easy” majors so to remain in compliance with the NCAA’s academic eligibility requirements to ultimately earn a college degree. Scholars on the topic take a less pessimistic viewpoint, but nonetheless contend that in strengthening their academic requirements, the NCAA have in fact prevented student-athletes from pursuing degrees in academic programs that are often viewed as overly rigorous. According to a USA Today study, 118 of the 142 NCAA schools surveyed reported that at least one team in which 25 percent or more of the upperclassman majored in the same course of study.

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[^69]: NCAA Manual, art. 12.3.1, at 73 (“Use of Agents, General Rule”) (“An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.”).
[^70]: Id.
[^71]: See e.g., Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992) (affirming in part, reversing in part, and remanding the claim by former student-athlete who sought review dismissal of his claims against university for negligence and breach of contract arising from alleged failure to educate him).
Instances of academic fraud and academic integrity issues involving college student-athlete have been well reported. Scandals involving academic tutors and advisors completing assignments or passing along test answers have occurred at such universities as Auburn, Florida State, Georgia and North Carolina. Other types of academic fraud, including unwarranted grade changes and accepting students without proper qualifications, has occurred at St. Bonaventure and Creighton universities. Additionally, recent changes to NCAA academic standards have resulted in a new set of ethical dilemmas in which some claim that student-athletes with poor academic performance often fraudulently seek disability status in order to obtain greater accommodation under NCAA bylaws.74

C. NCAA Transfer Rules

Although the NCAA does not prohibit a coach from leaving one institution for another, NCAA rules do prevent student-athletes from having the same freedom as a general rule. Indeed, the NCAA permits coaches to transfer immediately while student-athletes have to complete one full year at their transfer school before being eligible to compete on a varsity athletic team.75 Exceptions to the general rule exist for student-athletes in every sport but football, basketball and men’s ice hockey, but only if they can obtain permission from or her current institution to transfer and compete to a new school.76 If the school denies permission and the appeal process unsuccessful, then the student-athlete must miss a season of competition and correspondingly lose a year or eligibility.77

In 2006, upon pressure for college athletic reform groups and others concerned about student-athlete well-being, the NCAA broadened its initial transfer exception rules.78 One such expansion was to allow student-athletes in all sports (even the revenue sports of football, basketball and men’s ice hockey) to transfer to another institution without penalty provided the student had earned their undergraduate degree at the first institution. The NCAA later changed the rule after too many top notch football student-athletes used it to follow coaches to another institution. Under the current rule, football and other revenue sport student-athlete can only use the exception if the institution that granted the undergraduate degree does not offer the desired graduate degree.79

This is precisely what happened in the summer of 2010 with University of Mississippi quarterback Jeremiah Masoli. Masoli earned his bachelor’s degree from the University of Oregon but was kicked off the football team after run-ins with the law. He attempted to transfer to Ole Miss but was denied his eligibility by the NCAA, which claimed that his primary purpose
was for athletic-rather than educational-purposes. The NCAA, however, reversed itself after an appeal and decided that as the bylaw read, there was a loophole in the way the bylaw was written, and as for Masoli and he should not be denied his opportunity to compete.  

Student-athletes must receive permission from their current coach or athletic director before speaking with another institution about transferring to that school. If this permission to speak is not granted the student-athlete can transfer but may not receive any athletic related aid during their first year of enrollment. To further complicate the transfer process for student-athletes, many Division I institutions only grant permissions to speak if the student-athlete first agrees to forfeit attendance at any school within its same conference. This deters student-athletes from transferring to another school. 

D. Recruitment of High School Athletes 

The area of college recruiting provides a host of ethical issues for students. Due to the high stakes of Division I athletics, college coaches often offer more than the available scholarships to prospective student-athletes. This practice is known as over-signing and entails having a list of first and second choice recruits. Some college coaches will sign the second choice student-athletes to scholarship agreements only to rescind those agreements if a first choice student-athlete becomes available. The timing in this scheme is crucial in that a college coach must be careful to get the second choice prospect to sign the agreement first. In some cases, colleges have rescinded their offers.

In addition to over signing student-athletes, college coaches in all of the NCAA divisions have been cited for making illusory promises regarding playing time and positions during the recruiting process that go unfulfilled once the student-athlete gets to the institution. One such case resulted in litigation. In 1996, Brian Fortay sued the University of Miami after its former coach Jimmy Johnson promised Fortay the starting quarterback provision if he signed with the school. One year into his career at Miami Johnson left for the NFL and Fortay did not fit into Johnson’s successor, Dennis Erikson vision for the Hurricanes offense. Fortay ultimately transferred to Rutgers, but his bitterness remained at being left with an empty promise.

When prospective student-athletes (i.e., “prospects”) take one of their five official campus visits, they are entitled to three square meals in addition to reasonable snacks such as pizza and hamburger. This of course begs the question of how pizza and hamburger can be classified.

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80 Brandt, supra, note 36.
81 See e.g., Joe Schad, Brown Wants to Transfer to K-State, ESPN (July 31, 2010, 3:45 AM), http://sports.espn.go.com/ncf/news/story?id=5424622 (noting that University of Tennessee head football coach Derek Dooley refused to outright release for football player from his athletic scholarship claiming he had an obligation to protect the program. The effect of the decision was that Brown could transfer, but he would have to pay his own way at Kansas State for at least one year).
84 Id.
85 Id.
86 NCAA Manual, art. 13.6.2.2, at 110 (“Number of Official Visits-Prospective Student-Athlete Limitations”).
87 Id. art. 13.6.7.7, at 115 (“Meals on Official Visit”).
as “snacks.” Additionally, prospects must only be provided normal lodging without “special accessories,” such as Jacuzzi’s, and transportation to the campus itself must utilize normal commercial transportation at coach-class airfare. Helicopter and limousine transportation for prospects are prohibited and recognition of these modes of transportation usually draws immense laughter and discussion from the students as to why such provisions had to be included and whether the use of horse-and-buggy rides (or any other form of transportation for that matter) would be a violation.

E. Graduation Rates and other Measurements of Academic Achievement

As part of its major academic reform legislation of 2002, the NCAA adopted a graduation success rate (GSR) that it claimed more accurately measured that rate at which Division I student-athletes graduate. Using that rate the NCAA claims that student-athletes at institutions with major sports programs graduate at or above the general student body. Critics claim that the GSR skews the data and does not properly measure the number of student-athletes that graduate, especially in the sport of football. This debate highlights a number of ethical issues from the accuracy of research performed with a specific goal in mind to why such an arguably skewed measuring is needed.

Related to the NCAA’s GSR is its effort to hold college coaches responsible for the academic performance. The NCAA compiles Academic Progress Rates (APRs) for individual teams for the past six years. The APR awards one point per semester for those student-athletes who remain in school or graduating and another for maintaining academic eligibility. Starting in August 2010, the NCAA affixed APR score to coaches shining a spotlight on them and the role they play in their athletes’ academic success, coaches have voiced reservations about the plan, arguing that they are being singled out when, in fact, faculty, tutors and others on campus also might be held accountable. What ethical implications arise from such measurements? Students could consider the environment in which would make such a measurement necessary?

F. Hostile or Abusive Imagery

The use of Native American imagery, in particular, has been at the forefront of discussion and debate particularly involving the NCAA. In 2002, NCAA forbade championship events from taking place in South Carolina or Mississippi because the states use the confederate flag in some way. Did the NCAA really have the authority to take such an action? Is this consistent with the mission of NCAA? The display of the Confederate Flag challenged the states of Georgia, Mississippi, and South Carolina. In 2005, the NCAA required 31 schools to explain the necessity of the use of American Indian tribes as mascots or nicknames. The NCAA desired to

88 Id. art. 13.6.6, at 113 (“Accommodations on Official Visit”).
89 Id. art. 13.5.2.3, at 109 (“Air Transportation”).
90 Id. art. 13.5.2.1, at 108 (“General Restrictions”).
eliminate those mascots or nicknames that were *hostile or abusive.* Stanford University and Dartmouth College (among many others including Marquette, St. Johns, and Miami (Ohio)) retired their “Indians” team nicknames but only after bitter fights with alumni.94 Some colleges have nicknames, but not mascots (such as the University of Michigan, Indiana University and Central Michigan University).

In May, 2006, the NCAA issued a press release, stating, “The NCAA position on the use of Native American mascots, names and imagery has not changed, and the NCAA remains committed to ensuring an atmosphere of respect and sensitivity for all who participate in and attend our championships.”95 The University of Illinois at Urbana-Champaign gave up the use of *Chief Illiniwek* and the after the NCAA rejected its 2006 appeal that the mascot was not *hostile or abusive.*96 The Chief was retired in 2007, though *Fighting Illini* remains.97

For more than 25 years, Florida State University (FSU) students have portrayed Chief Osceola planting a flaming spear at midfield before every Seminoles home football game. In its report to the NCAA, FSU uses a common defense of such imagery, saying that it is respectful and a celebration of the culture. The NCAA allowed FSU to continue to use the Chief.98 In 2007, the University of North Dakota (UND) and the NCAA reached a settlement in which UND either got approval from the Spirit Lake Sioux and Standing Rock Sioux or would change their nickname. UND ultimately voted to drop the name and logo, though part of the reason was, apparently, so it could join the Summit League (Conference).99

The University of Mississippi (Ole Miss) sidelined its own *Colonel Reb* mascot in 2003.100 The southern gentleman’s term with the snow white goatee, cane and wide-brimmed hat reflecting separatist antebellum culture was retired, and many believed that it was a politically correct move for Ole Miss to distance itself from its Confederate past.101 Though Ole Miss has not yet adopted a mascot, the school has gained considerable attention with consideration of Star Wars’ character Admiral Ackbar.102 College of William and Mary’s *Tribe* was not okay as long as it had feathers, so it now uses the *Tribe* though their actual mascot is a griffin.103 What about Vikings, Mongols, Aztecs, Warriors, Fighting Irish, Trojans, Highlanders.

The NCAA is rife with examples that can be used for class discussion. Instructors can discuss with students the extent to which college mascots, images, and logos create or promote

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101 *Id.*


stereotypes, and whether the NCAA’s role is appropriate in this regard. Students can ponder if one of the roles of the organization is to police college and university nicknames and mascots? Is one of its roles to essentially coerce schools to change their mascots? Is this consistent with the tax-exempt purpose of education? Could all of this be a smokescreen to avoid dealing with other issues such as a multi-billion dollar tax-exempt television contract?

Still, the University of Toledo and Bowling Green University play for the “Peace Pipe” in football and no one seems to be bothered by that.\footnote{Graham Watson, Top 5 Non-BCS In-Conference Rivalries, ESPN (Aug. 22, n.d., 12:49 PM), http://espn.go.com/blog/ncfnation/post/_/id/223/top-5-non-ncf-in-conference-rivalries.} For example one could easily explore whether the use of the word Lady condescending to women just as in the Lady Vols?\footnote{As of the time of this writing, the University of Tennessee and the University of Texas also appear to be the last NCAA Division I schools to have separate men’s and women’s athletics directors.} Was political correctness the motivation behind changing the Orangemen is now the Orange at Syracuse University? The list goes on.

G. Religion

Similar to those at the high school level, dilemmas involving the use of or reference to religion during athletic events also exist at public colleges and universities. Consider a 2004 incident at the federally funded United States Air Force Academy which briefly had a banner hung in the locker room by head football coach Fisher DeBerry.\footnote{See Heather Cook, Service Before Self? Evangelicals Flying High at the U.S. Air Force Academy, 36 J.L. & EDUC. 1, 8 (2007) (noting that two weeks after the Academy initiated a program of religious tolerance, football coach Fisher DeBerry hung a banner in the football locker room declaring, “I am a Christian First and Last.” Despite an official reprimand from Academy officials, DeBerry allegedly continued to advise players to attend church the day after games and stating that “religion is what we’re all about at the Academy.”).} This banner was known as the “Competitors Creed,” a four-paragraph poem from the Fellowship of Christian Athletes (FCA) which begins, “I am a Christian First and Last.” The banner stayed up for one day before the coach was asked to remove it by Academy officials.\footnote{Michael Bradley, Separation of Church and Football, SPORTS ILLUSTRATED (May 26, 2005), http://sportsillustrated.cnn.com/vault/article/web/COM1045050/index.htm (noting that DeBerry’s actions were “dangerous” due to the tremendous influence he has over his impressionable student-athletes).} Students might be called upon to review the poem\footnote{Josh Wiley, Tim Tebow Bible Verses-Game by Game, ASSOCIATED CONTENT (Jan. 1, 2010), http://www.associatedcontent.com/article/2546065/tim_tebow_bible_verses_game_by_game.html.} and then tell explain whether they feel DeBerry may have crossed the line.


VI. Professional Sport

A. Role of the Commissioner

\footnotetext[105]{As of the time of this writing, the University of Tennessee and the University of Texas also appear to be the last NCAA Division I schools to have separate men’s and women’s athletics directors.}
\footnotetext[106]{See Heather Cook, Service Before Self? Evangelicals Flying High at the U.S. Air Force Academy, 36 J.L. & EDUC. 1, 8 (2007) (noting that two weeks after the Academy initiated a program of religious tolerance, football coach Fisher DeBerry hung a banner in the football locker room declaring, “I am a Christian First and Last.” Despite an official reprimand from Academy officials, DeBerry allegedly continued to advise players to attend church the day after games and stating that “religion is what we’re all about at the Academy.”).}
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Exploring the role of the commissioner in the Big Four sports leagues, which has become much more proactive in handing down punishment for off-the-field incidents, might inspire students to consider the importance of a contract, codes of conduct, and consequences for actions. For example, current NFL commissioner Roger Goodell has not been bashful in exercising his right to issue penalties under the league’s conduct clause. In 2010, the NFL commissioner suspended Pittsburgh Steelers quarterback Ben Roethlisberger for six games for violating the NFL’s personal conduct policy. Goodell handed down the punishment one week after prosecutors decided not to charge Roethlisberger in a case involving a college student who accused him of sexually assaulting her in a Georgia nightclub in March, 2010. Roethlisberger became the first player suspended by Goodell under the personal conduct policy who had not been arrested or charged with a crime. A list of players suspended by Goodell since he became commissioner is listed in Appendix A.

A similar debate regarding the breadth of powers of the MLB commissioner occurred as far back as 1964 when Major League Baseball enhanced the commissioner’s powers. One specific power found in the MLB constitution is a clause called the “best interests of baseball” clause. Allen “Bud” Selig’s interpretation of “best interests” has largely expanded as of late. For example, in 2010, some suggested that Selig missed an opportunity to invoke the best interests of baseball clause to override the clearly erroneous call made by MLB first-base umpire Jim Joyce which forfeited the chance for Detroit Tigers pitcher Armando Galarraga to become only the 21st pitcher in MLB history to pitch a perfect game.

B. Retiring (Un-Retiring) From Competition

Brett Favre is just the most recent example of professional athletes in the spotlight who seem to be unable to walk away from their sport though he has taken the issue to a higher level. Favre’s consistent and annual display of uncertainty with regard to retirement has cause heated debate. Could fans sue for various contract law theories including intentional interference with contractual relations, breach of contract, promissory estoppel (i.e., detrimental reliance) if, for example, the fans relied on the decision by the athlete or coach, bought (or relinquished) their season tickets because a player then changed their mind? Other high-profile athletes such as Mario Lemieux, Dominik Hasek and even Michael Jordan retired from a sport, had a formal retirement ceremony, and then unretired thereafter. The same holds true for coaches such as Dick Vermeil. Could fans sue for the intentional (or negligent) infliction of emotional distress?

VII. Conclusion

The above issues form a solid basis from which the instructor can present to the class for animated discussion and debate. However, they are only the beginning of a discourse on ethics as the issues abound in sport. Many, if not all, of the ethical concerns or issues above involve legal issues as well. It is very important for the educator to remain as neutral as possible when presenting the material so as to appear as a mediator of sorts rather than promoting an agenda. Regardless of how neutral students appear to be, no doubt some of these issues will provoke even the most introverted students into the debate. In the end, it is likely that students and professors will continue to discuss the issues throughout their studies. Participation in such discussions, particularly by undergraduate students, enhances the active-learning environment and challenges the students and professors alike.
## Appendix A: NFL Personal Conduct Violation Suspensions Post-2006

<table>
<thead>
<tr>
<th>Player</th>
<th>Occurrence/Charge(s)</th>
<th>Suspension</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rocky Bernard</td>
<td>Assault</td>
<td>1 game</td>
</tr>
<tr>
<td>Michael Boley</td>
<td>Domestic Abuse</td>
<td>1 game</td>
</tr>
<tr>
<td>Fred Evans</td>
<td>Fighting with Police</td>
<td>2 games</td>
</tr>
<tr>
<td>Chris Henry</td>
<td>Varied Arrests</td>
<td>8 games</td>
</tr>
<tr>
<td>Larry Johnson</td>
<td>Simple Assault</td>
<td>1 game</td>
</tr>
<tr>
<td>Tank Johnson</td>
<td>Jail term</td>
<td>8 games</td>
</tr>
<tr>
<td>Adam “Pacman” Jones</td>
<td>Varied Arrests</td>
<td>16 games, 6 games</td>
</tr>
<tr>
<td>Marshawn Lynch</td>
<td>Weapons violation</td>
<td>3 games</td>
</tr>
<tr>
<td>Ricky Manning</td>
<td>Felony Assault</td>
<td>1 game</td>
</tr>
<tr>
<td>Brandon Marshall</td>
<td>Varied arrests</td>
<td>1 game</td>
</tr>
<tr>
<td>Bryant McKinnie</td>
<td>Street fighting</td>
<td>4 games</td>
</tr>
<tr>
<td>Rob Reynolds</td>
<td>Domestic disturbance</td>
<td>16 games</td>
</tr>
<tr>
<td>Ben Roethlisberger</td>
<td>Misconduct</td>
<td>6 games (reduced to 4)</td>
</tr>
<tr>
<td>Donte’ Stallworth</td>
<td>DUI-vehicular homicide</td>
<td>6 games</td>
</tr>
<tr>
<td>Fabian Washington</td>
<td>Domestic violence</td>
<td>1 game</td>
</tr>
<tr>
<td>Michael Vick</td>
<td>Dogfigthing</td>
<td>2 games</td>
</tr>
</tbody>
</table>