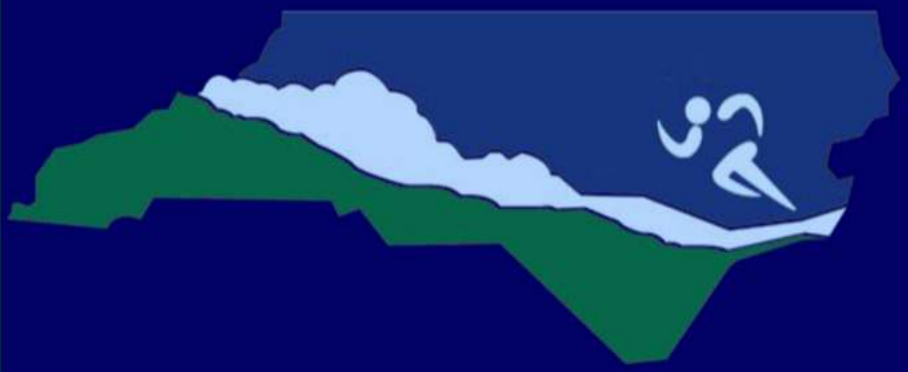
North Carolina Journal

NC SHAPE | Special Winter Issue



North Carolina Journal

Special Winter Issue (February, 2020)

Dr. John C. Acquaviva, Editor

About: The North Carolina Journal is published by the North Carolina Alliance for Athletics, Health, Physical Education, Recreation, Dance and Sport Management (also doing business as NC SHAPE). This is a professional peer-reviewed journal intended to meet the needs of AHPERD-SM educators and to serve as a forum for socioeconomic, educational, and ethical issues.

- Manuscripts submitted to the NCJ should not be submitted to other publications simultaneously.
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- Manuscript acceptance is based on originality of material, significance to the Athletics, Health, Physical Education, Adapted Physical Education, Dance, and Sport Management professions.

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Special Issue Overview

In this issue Dr. John Acquaviva kicks off the discussion identifying potential problems which may arise from payment for an athlete's NIL. Dr. Tom Appenzeller follows with his "The Sky is Falling" piece reflecting on the California Senate Bill No. 206 which will grant college athletes the right to receive money for the use of their name, image and likeness beginning in 2023. Dr. Tom Collins, a sport management professor, reflects on the subject from his perspective as a former collegiate athletic director at NCAA Division I Campbell University and Division II Brevard College. The National Wrestling Coaches Association (NWCA) executive director Mike Moyer examines the issue from a collegiate/Olympic sport perspective. Finally, Dr. Acquaviva and Dr. Johnson conclude the conversation with a summary of points as well as suggestions for NCAA consideration.

If you would like to make general comments on the contents/viewpoints of this special issue, please email the editor of the NCJ - John Acquaviva. All other authors welcome comments on their articles.

A special word of appreciation to Dr. Dennis Johnson who served as the co-editor for this issue. Dennis A. Johnson is the president of Hem-View Consultants: Specializing in Sport Leadership and is retired from Wingate University. He can be reached at drdennisajohnson@gmail.com

Please note that viewpoints expressed are those of the authors, not NCAAHPERD-SM (also doing business as NC SHAPE) as a whole.

Background

For decades, supporters of paying college-athletes – most often sports media figures and former athletes have been pushing for some type of compensation for those who play college football or basketball. Its supporters are now hopeful that student-athletes will be able to generate income through endorsements rather than relying on direct payments from the university. Following years of pressure on the NCAA to create a payment system, the state of California took action by passing a bill in the fall of 2019 to allow student-athletes to be paid. Florida, Colorado, Illinois and others have similar bills forthcoming. The NCAA, anticipating these bills being passed, formed a committee in May, 2019 to start addressing this issue, and eventually their Board of Governors voted in October, 2019 to unanimously allow student-athletes to be paid for the use of their name, image and likeness (NIL). The three NCAA divisions are now considering specifics on how to instill this policy. This debate, of course, is not new and a number of academics and professionals in the sport industry have produced thought pieces on this topic (Johnson & Acquaviva, 2012; Sanderson & Siegfried, 2015; Weston, 2014).

Still, there are a variety concerns regarding the NCAA and it's faux-professional model (specifically in big time football and basketball) masquerading as amateurism. Johnson and Acquaviva (2012) discussed the pay-to-play issue in a point-counterpoint research-based article and concluded as many others have, that paying athletes fails on a variety of levels. However, one of the suggestions from that discussion has since been implemented by the NCAA; college athletes may now receive full cost of attendance as part of their scholarship (ranging from $2000-$5000).

Brief History

Paying college athletes has repeatedly been struck down in the courts; however, *O'Bannon v. NCAA* opened the door to allow athletes to benefit financially from the use of their NIL (Weston, 2014). The NCAA faced one of the first challenges of the NIL issue with Jeremy Bloom in 2002-03. Bloom was the "All American" student athlete, a member of his state champion high school football team, a track star, a skiing star, and had hoped to compete with the University of Colorado football team after he finished the 2002 Olympics as a skier. He turned down a football scholarship and accepted endorsement money in order to train for the next Olympics in 2006 (Freedman, 2003). The National Collegiate Athletic Association (NCAA) determined that in order for Bloom to compete as a collegiate athlete, he must forfeit his modeling and entertainment opportunities from skiing, even though some college athletes can play another sport for money during the off season.

Bloom appealed to the NCAA and was forced to either give up his sponsorship money or become ineligible to play college football. Bloom's case presents one of the first examples of the conflict arising between the "NCAA's Amateurism Bylaws and their current application of the NCAA's stated purpose: betterment of its student-athletes" (Freedman, 2003).

The legal case *O'Bannon v. NCAA* was a win for the NCAA in terms of maintaining the tradition of amateurism and opposing pay for play in college. However, it also found that a previous ruling (i.e. *NCAA v. Oklahoma Board of Regents*) "gives the NCAA 'ample latitude to adopt rules preserving 'the revered tradition of amateurism in college sports'…it does not stand for the sweeping proposition that student-athletes must be barred, both during their college years and forever thereafter, from receiving any monetary compensation for the commercial use of their names, images and likenesses" (Way, 2019).

When the *Fair Pay to Play Act* was passed in California in September, 2019, it will enable college athletes to benefit from their NIL commencing in 2023 (Smith, 2019). And despite the vote to begin exploration into the NIL policy, the NCAA cautioned that any rule change must maintain a clear distinction between college and professional sports in order to preserve the higher education focus of the NCAA. All reports will be voted on no later than January 2021 (NCAA, 2020).

In the following pages, we hope to provide clarity, raise legitimate questions, and offer potential solutions regarding the NIL policy.

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Potential Problems with the Name, Image and Likeness Policy

John Acquaviva, Ph.D

The NIL policy is only in the discussion stages, and thus it is not known whether a practical solution to an extremely complex issue can found (NCAA, 2019). Therefore, here are some potential downfalls to the issue at hand.

Problem #1 with the NIL Policy. Let's expose this policy to what it is. It will likely masquerade as a "play for pay" situation. Any parameters that are officially put into place and follow whatever NCAA rules exist, would likely create a phony payment-for-likeness system. That is, if a university wants that 5-star recruit, they will get him/her even if they have a criminal record, are a below-average student, or have poor communication skills. A wealthy booster will simply funnel their own money to a local business who in turn will sign the athlete to an endorsement deal. Let the sham begin.

Problem #2. This policy may bring out some companies who offer an athlete a series of TV commercials from organizations or businesses that are in poor taste, considered immoral, or are in direct conflict with basic university values (e.g. porn sites, local strip clubs, and beer, liquor and tobacco companies). Even if the NCAA disallows such businesses to be included from being a part of this policy, the NCAA or the university may face lawsuits since the businesses and perhaps even the families of the athletes can claim some type of discrimination if all businesses aren't allowed to be a part of this.

Problem #3. It will likely create an uneven playing field between the states. Some states, at this writing, will tax the student-athletes' endorsement deal noticeably more than a neighboring state, enough to create a situation where athletes are flooding to schools in one state and sidestepping another to earn more money (Tax Foundation, 2018). This wouldn't just be a

small dilemma, this could create a dreadful and immensely complex situation for schools within a state with high tax rates.

Problem #4. Money directed toward one recruit or a set of on-roster athletes may harm college athletics overall. Funds from a booster, for instance in the past was usually directed toward the football team or the general athletics fund. But under the new policy, funds can be directed to one particular player. As alluded to earlier, that very booster may own "Bob's Auto Sales" and Bob will get that 5-star QB's attention when he offers him a TV commercial contract to sell cars in exchange for $100,000. This is a great solution for the football team in the short term and likely within the rules, but now the smaller men's and almost all women's sports (like wrestling, soccer, and track & field) will have taken a hit. Not a good thing in the long term for football, in this instance, or for that institution's sports program.

Problem #5. This will cause locker room issues. One of the benefits of an amateur environment is that there's more of a team-mentality. In the professional ranks, "the team" still means something, but there is the elephant in the room: some players make more than others, and thus many athletes develop the approach of "everyone for himself". In the case of professionals, there are huge gaps in pay. But the difference between college and the pros is age, maturity, and well, professionalism. Now throw in the fact that the California bill will allow athletes to retain an agent, this will create a situation that is more delicate for the coach and the rest of the team. That is, college players will probably not handle these distractions well and will likely bring issues into the locker room not seen before the NIL policy. This could turn out to be a coach's worst nightmare.

Problem #6. This final point is still the strongest argument against any form of payment for college athletes: Now more than ever, we live in an era of entitlement. At one time our

country viewed the chance at higher education as a priceless commodity and playing sports was a bonus; even viewed as a privilege. However, it now seems that a college education is not held in the same esteem and worse yet, some see it as simply an opportunity to earn money and the education part as a nuisance. Although it is now evident that there has been a failure to convince much of the public of the true value of an education, keeping college athletes as pure amateurs remains the right thing to do since it will be the greater good among college sports programs (NCAA, 2020).

In conclusion, we all agree that cheating (e.g. funneling money to recruits and roster-players) to some degree has been occurring for decades. Simply put, it is impossible to envision a scenario where the NIL policy doesn't open the floodgates to universities and its fan base/boosters to find out every and anyway, within or out of the boundaries of this policy, to slide a stack of cash across the table to a student-athlete. If the NCAA thinks they have to police universities and their boosters now, the NIL policy will create situations that at this writing, have not even been an idea. That is, introduce a policy, and people will find loopholes.

The fear of the NCAA, as it should be, is that the mere notion of compensating student-athletes undermines and distracts from the university's primary purpose - education, something far more valuable than a modest paycheck demanded by many.

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The Sky is Falling: California Bill #206

Tom Appenzeller, Ed.D

Remember the story of Chicken Little who panicked when an acorn fell on her head and then she ran around town proclaiming the sky was falling? That fable leads us to California Senate Bill #206, probably one of the worst named pieces of state legislation in American history. Senate Bill #206 gives that student athlete the same rights as any other college student. The athlete now has the legal right to control his or her image or likeness and to get paid when a business wants to use that image.

Senate Bill #206 is like most laws passed in state or federal legislatures, talked about by many and actually read by very few. Even though Senate Bill #206 is just a little over one page long, I would still bet that many commentators have not read the actual law. The Fair Pay to Play Act has nothing to do with paying college athletes to play a sport. In fact, Bill #206 actually prohibits California post-secondary educational institutions, athletic associations, conferences or other groups or organizations with authority over intercollegiate athletics from providing compensation in relation to the athlete's name, image or likeness (Berg, 2019; Smith, 2019).

The California law does is allows student-athletes to be compensated for the use of the student's name, image or likeness. A music major on a full scholarship at a major university has always had the ability to profit from marketing their name, image, or likeness. So in one sense California is attempting to put the student back in student-athlete.

Senate Bill #206 requires that the student-athlete obtain professional representation from someone licensed by the state. The agent would have to comply with all federal laws in regards to their relationship with the student athlete. Talented high school baseball prospects drafted by Major League Baseball have always had the ability and the need to obtain representation.

Requiring a license from the state may eliminate some of the AAU and travel team coaches who act as pseudo agents today.

Four year private universities, the University of California and California State University would have to receive ten million dollars or more in annual revenue for media rights for intercollegiate athletics in order to be covered by Senate Bill #206. NCAA Division II, Division III and NAIA schools can probably relax because of the ten million dollar annual requirement. A student athlete would be prohibited from entering into a contract providing compensation if the athlete's contract is in conflict with his or her team contract.

According to the bill, the team contract could not prohibit the student athlete from marketing his or her name, image or likeness when not engaged in an official team activity. For example, the athlete would be allowed to sign photos in the off season or summer. Since Senate Bill #206 does not go into effect until January 1, 2023, California is giving the NCAA three years to resolve the issue and to give student athletes the same right to control their image as their fellow students.

According to the *Raleigh News and Observer*, in April 1993, Duke Basketball Coach Mike Krzyzewski, signed a fifteen year Nike contract with a one million dollar signing bonus and annual salary of $375,000 plus stock options. *New York Times* (1993) reported that Coach K's salary at Duke went from 5.5 million in 2017 to $8,982,325 in 2018. Not every Division I coach is on a level with Coach Krzyzewski and not every student-athlete is going to be able to successfully market themselves. A Heisman Trophy candidate or star quarterback maybe, but a third string offensive tackle probably not. Back in the early 1970s, the NCAA and college football coaches claimed that Title IX would destroy sports on the campus. There would not be

enough money to go around. A few select athletes may make some extra money for an autograph, poster or jersey, but college sport will survive.

Chicken Little was wrong and the Fair Pay to Play Act will have a very limited impact on college sports. The real question should be how the NBA and NFL get the benefit of a free minor league system without any expenses. But that is a question for another day. Relax and thank California for standing up for the rights of college student-athletes.

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The Collegiate Model and The Compensation of Collegiate Athletes for Name, Image and Likeness (NIL)

Tom Collins, Ed.D

In October 2019, the NCAA Board of Governors voted, "to permit students participating in athletics the opportunity to use their name, image and likeness in the manner consistent with the collegiate model" (NCAA, 2019). The Board directed each of the association's three divisions to develop bylaws and policies that would assure student-athletes are treated similarly to non-athlete students. This action takes place within the context of on-going challenges to the NCAA's collegiate model that restricts compensation for student-athletes, including several state legislative proposals such as California's Fair Pay to Play Act. This California law, scheduled to go into effect in 2023, would allow student-athletes to hire agents, sign endorsement deals and receive compensation for use of their name, image and likeness. It would prevent the NCAA from imposing sanctions on students or institutions, even though these activities are currently prohibited by NCAA legislation (California Senate Bill SB 206, 2019).

From my perspective as a former Division I AD and now a sport management professor, the action by the NCAA Board represents a sincere effort to modernize its rules to reflect the current environment while maintaining a distinction between college and professional sports, preserving the collegiate model. This position is in sharp contrast to the cadre of critics and 'experts,' that promote treating student-athletes as employees and who reportedly view the NCAA's action as mere "smoke and mirrors" (Collins, 2019). I endorse an approach that is evolutionary rather than revolutionary, one where change comes from broad-based deliberation within the governance structure of intercollegiate athletics as opposed to politically charged state legislation or federal mandates.

College athletics today, Division I football and basketball in particular, is a multibillion-dollar enterprise. Conference payouts to those universities participating at the highest level can

exceed $26 million dollars annually and head coaches in those sports are typically the highest paid public officials in their state. The public perception that athletic departments are driven by revenues and profits, and everyone but the student-athletes are reaping the benefits (Potuto, Lyons, & Rask, 2014) is difficult to dispute. This wide-spread perspective fuels the pay-for-play argument to the point that at least a dozen states have some form of legislation pending that would challenge current rules limiting compensation for student-athletes.

To my mind, the pay-for-play argument and the passage of state legislation to regulate compensation of intercollegiate athletics is reactionary and myopic. Creating a patchwork of state laws governing compensation for student-athletes will bring chaos to college sports and fails to consider the role that the NCAA plays in providing balanced and fair opportunities to a broader range of student-athletes and institutions. Pay-for-play initiatives tend to focus on "big-time" sports and those high-profile athletes at the highest level of competition. They fail to fully consider implications that radical change will have on smaller institutions, non-revenue sports and gender equity. In addition, the constitutionality of such state legislation is suspect since it would interfere with interstate commerce, a regulatory power exclusively reserved for Congress. The California law would require the NCAA to either apply a separate set of rules for California schools or change NCAA rules to comply with California law. The situation would be further complicated should other states pass conflicting legislation.

State legislative proposals and the potential for federal intervention pose an existential threat to the collegiate model, an NCAA construct that defines intercollegiate athletics participation as an avocation, one in which students balance their academic, social and athletics experiences. This collegiate model, and the related principles of amateurism and the clear line of demarcation between college and professional sports is what ties competitive sport to the

educational mission of colleges and universities. It is fundamental to intercollegiate athletics as it currently exists in the United States. Because of this, I support NCAA legislation that would allow students to use their name, image and likeness in the manner consistent with the collegiate model while opposing any play-for-pay plan that would provide compensation for athletic performance or participation. The impact of such a legislative change would be relatively small since the majority of 460,000 student-athletes participating in the NCAA, including those in football and basketball, do not have a market value that would exceed that provided through their current scholarship. Allowing outside compensation in a manner that would be available to non-athlete students would not necessarily impact competitive balance or gender equity concerns, provided there are no recruiting inducements involved and the agreements do not conflict with institutional sponsorship agreements.

The status quo is an untenable position for the NCAA. The association cannot continue to rest on an antiquated notion of amateurism that restricts compensation for student-athletes to the cost of attendance. There is a need to modernize NCAA rules relative to student-athlete compensation so that individuals have an opportunity to benefit from the use of their name, image and likeness and benefit for the media exposure and promotional value associated with big-time college sport.

I believe that the NCAA, through its federated governance structure, is in the best position to institute the necessary changes in a manner that provides opportunities for student-athletes, and yet maintains a commitment to its core principles. This is not a new predicament for the NCAA. I can recall serving on the NCAA Academic-Compliance-Eligibility cabinet in the late 1990s, when we were tackling the complexities of amateurism regulations. It was apparent that existing legislation based on the U.S. scholastic model of amateurism was

inadequate to address global complexities. The idea of expunging the word "amateurism" from the manual was tossed about. Fortunately, through the legislative process, we were able to develop policies enhancing participation opportunities for international students, while retaining a perfectly good word (and a core principle of the Association). The governance structure has effectively addressed similar issues in recent years, from allowing employment opportunities for student-athletes to increasing scholarships to cover cost of attendance. It appears that the directive issued by the NCAA Board of Governors is the appropriate response to this complex matter.

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Name, Image, and Likeness: Ramifications to College Wrestling

Mike Moyer

I have been asked to write this essay regarding the potential impact of the Name, Image, and Likeness (NIL) legislation being proposed in various states across the nation, and the new NCAA rules being drafted as I write. Due to the complexity of this issue and the need for much more clarification from legal experts on various aspects, I will refrain from taking a position for or against the concept. Disclaimer: *These are my personal feelings and are not representative of the National Wrestling Coaches Association (for which I currently serve as the executive director).*

That said, I had the good fortune of hearing a nationally renowned expert on this topic, Jill Bodensteiner (Athletic Director at St Joseph's University and attorney by trade) present to a group of different coach association representatives at the NCAA Convention in Anaheim California (2020). She did a fantastic job of framing the issue in a very succinct way.

Ms. Bodensteiner mentioned that the underlying concept of NIL is governed by state law. These state laws generally prohibit any third party from using the Name, Image, and Likeness (NIL) of an individual to make profit without that person's consent. Of course, media outlets are able to use the NIL of a person to report news. Currently, the NCAA rules do two things: 1) require a student-athlete to allow the NCAA to use their NIL and 2) prohibit a student-athlete from making money from their own NIL from the NCAA, a member institution, or any third party while they have NCAA eligibility and are competing. There are currently 34 states that have NIL laws and 8 of them – if passed – will allow student-athletes to be paid for their NIL beginning as early as July 2020.

As you can imagine, the current landscape as it relates to NIL is very problematic. For one, it would be challenging for all 50 states to have different rules regarding a student-athlete's ability to profit from their NIL. Secondly, the eight states that have pending laws allowing the student-athletes to profit from their NIL as of July 2020 would be violating the NCAA rules that prohibit it. Under the current NCAA NIL rules, these student-athletes would be ineligible for competition.

With all of this in mind, the NCAA will likely seek help from the federal government to sort all of this out. The Sherman Antitrust Act prohibits entities from colluding to fix prices, wages, or otherwise "capping" the open market. Federal intervention could help the NCAA and its member institutions govern the issue more universally.

At the NCAA level, both the NCAA and member institutions are passionate about avoiding "pay for play," or making student-athletes "employees" of member institutions. At the same time, the NCAA and its members are now open to the notion that student-athletes be allowed to profit from their NIL -- with some important limitations. Examples might include regulating boosters so that NIL does not become a recruiting factor, and prohibiting student-athletes from securing endorsement from competing sponsors of the athletic department (a limitation that is included in the California law), etc.

In my opinion, the upside to allowing the student-athletes to profit from their NIL is that so many Olympic sport student-athletes such as wrestlers receive very little, if any, athletic scholarships. A fully funded NCAA Division I wrestling program only allows 9.9 athletic scholarships (which does not even cover all 10 weight classes). NCAA Division II allows a full complement of 9 scholarships in wrestling and NCAA Division III does not allow any athletic scholarships. The point being that not all wrestling teams are fully funded and those that are

most often allocate partial scholarships to insure a healthy distribution of wrestlers at each weight class. NCAA research indicates that across all three NCAA divisions, wrestling has the second largest percentage of first-generation college bound students of all sports. This means that many of our student-wrestlers come from families with very modest income levels so it is a struggle for them to pay for college expenses. If the wrestlers could profit from their NIL, they would at least be able to help cover the escalating cost of attendance at their respective colleges.

A potential downside of this approach is that colleges/universities could incur additional compliance staff (maybe 2-3 people) and other ongoing operating costs to administer the NIL program. In addition, it is possible that corporate sponsors could begin to "save" some advertising dollars for student-athletes, thereby paying less to member institutions. These funds from corporations often help support Olympic sports in an athletic department. In sum, the NIL changes could have a negative impact on funding for Olympic sports.

In addition to financial implications, there are dozens of nuances to be evaluated when implementing an NIL model. Topics include: who will educate the student-athletes regarding their NIL rights; how will student-athletes who have high NIL value manage academics, athletics and marketing opportunities; will student-athletes be allowed to have agents or other representation; how will NIL opportunities be monitored and enforced; what is the role of boosters; will the "conflicting sponsor" language included in the California law be included; how will NIL rights impact recruiting; and will there be concerns of gender equity and equity among sports.

In summary, the NIL is a very complex issue that is going to require extensive collaboration of all stakeholders. I hope that compromises can be reached so that the educational nature of the student-athlete experience is not jeopardized. I also hope that any NIL resolution

does not result in escalating costs for the athletic departments that ultimately come at the expense of broad-based Olympic sports programming.

Mike Moyer is the executive director of the National Wrestling Coaches Association. He can be reached at mmoyer@nwca.cc

Closing Remarks

As with the point-counterpoint article from 2012 (Johnson & Acquaviva, 2012), the editors have differing views regarding the NIL policy issue. Here's a summary from each perspective.

John Acquaviva, Ph.D: Two main issues will stand out if the NIL policy is adopted.

- There will be countless obstacles and problems if student-athletes are allowed to sign with an agent and parade around the country seeking endorsement deals. Even if agents were not part of this equation, student-athletes may spend an extraordinary amount of time securing endorsements, ultimately undermining the education piece and ironically, pushing aside preparation for Saturday's game. We all agree that education serves the greater good, so let's put that belief to practice.
- This policy will ask more questions than answer regarding what constitutes an endorsement deal and from whom they originate. To say this policy will "open a can of worms" is a vast understatement, and the NCAA is well aware of this, as probably are the growing number of supporters of some type of payment system. Thus, isn't it possible that despite the NCAA's flaws they have it correct in wanting student-athletes to remain pure amateurs?

Dennis Johnson, Ed.D: Developing NIL legislation is a positive step to keep "student" in the term student-athlete while maintaining the amateurism concept prevalent in the NCAA. To protect the concerns of the NCAA and others against this policy, note the following:

- The NIL policy is in no way a "pay for play" scenario for a student-athlete.

- If the music student, for example, is free to supplement their income by marketing their skills outside the institution, then why not the student-athlete?
- Student-athletes may or may not be required to be represented by an agent; but if so, hopefully the agent will act in the best interest of the student.
- Student-athletes should and will be taxed in the same manner as if they were working at a fast food restaurant by individual states and the federal government.
- The athletic scholarship of the student-athletes will be protected, regardless of outside funding according to the California proposal and hopefully under new NCAA legislation.
- The NIL policy will actually affect very few NCAA athletes as the majority have little to no market value.
- In sports such as wrestling where full scholarships are minimal and a large percentage of first generation athletes, the ability to market their skills is a positive to help pay for their education.

The NCAA is a broken system and in need of repair; hopefully, NIL policy legislation will bring about modernization and movement toward that repair. If not, then take the suggestion from 2012 and force schools in the power conferences to hire athletes to play football and basketball without being students but rather employees of the university (Johnson & Acquaviva, 2012).