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New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue

PROFESSOR LEROY D. CLARK†

I. INTRODUCTION

In late 1940s America, anyone confidently suggesting that black Americans, with the help of a few activists and organizations of limited resources, would eradicate all forms of legalized racial segregation would have met enormous skepticism. Deep and lasting reform of the status quo is extremely difficult because many forces are often arrayed against societal change. Tradition, habit, and inertia of even those adversely affected by the prevailing mores can weigh heavily against the alteration of a social structure.

Changing the social structure of racial segregation, especially in the South, was also fraught with the potential for explosive violence and economic retaliation, because the subordination of blacks was a deeply held emotional tenet in the white community. Nevertheless, in retrospect, we know that the Civil Rights Movement was a sterling success in dismantling legal apartheid in America.

Given the accomplishments of this movement, one is prompted to ask the following questions: How was it done? How was this near miracle of social change effected? Are there ingredients from the past that we might build on and reconstruct to meet some of the remaining barriers to the protection and advancement of black Americans? Most importantly, are there resources that the black community now has or which can be developed to add impetus to the struggle for civil rights, but which were previously unavailable to earlier activists of the 1950s.

† Professor of Law, Catholic University Law School. Mr. Rico Sogocio, while a third year student, did excellent work as my research assistant in the development of this article. I also wish to thank Professor Michael Cozzillio of Widener University Law School and Napoleon Williams of the NAACP Legal Defense and Educational Fund, Inc. for their careful reading and helpful comments.
and 1960s?1

This article espouses an indirect argument against the Critical Legal Studies (CLS) theory that creating new or expanded rights is a futile response to the plight of the black community.2 The article also attempts to respond to the challenge which Professor Mari J. Matsuda made to the CLS community—to deal with the void in their literature of concrete programmatic approaches toward changing the status quo by listening to the voice of minority scholars.3 Instead of repeating the criticisms of CLS, which others have made quite adequately,4 I will set

1. This writer was propelled into studying these questions at a recent visit to Memphis, Tennessee, in the Fall of 1991, in which the opening of a National Civil Rights Museum was being celebrated. The event was a homecoming of sorts, a reunion, and an opportunity to reminisce about many of the veterans of the Movement, including Bob Moses, Julian Bond, Diane Nash, The Freedom Singers, John Lewis, and H. Rap Brown among others too numerous to name. I listened to many of them recount their experiences in the Movement, the descriptions of successful and failed strategies, and their tentative prescriptions for the future. I then decided to try to distill some essence from it all, and reflected upon my own experiences in the Movement, to make some projections of the key elements for a revived future for the Civil Rights Movement.

2. See, e.g., Peter Gabel & Paul Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 369-70 (1982) ("We reject ... the liberal-legalist view that powerless groups in society can gradually improve their position by getting more rights."). I disagree with these kind of negative sweeping conclusions, which are generally not supported by any empirical data. I think there is still much to be gained by careful and precise thinking in the civil rights arena, and so I continue to try. See Leroy D. Clark, The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization, 38 CATH. U. L. REV. 795 (1989); see also Andrew W. Haines, The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Skepticism and Solipsism?, 13 WM. MITCHELL L. REV. 685 (1987) (criticizing some CLS analyses and their failure to understand the incremental and gradual quality of black struggle); Minority Critiques of the Critical Legal Studies Movement, 22 HARV. C.R.-C.L. L. REV. 297-447 (1987) (in particular those articles by Richard Delgado, Mari J. Matsuda, Patricia Williams, and Harlon Dalton).

3. Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323, 330 (1987) ("The standard critique of Critical Legal Scholarship paints the movement as non-programmatic."). Professor Matsuda also references the work of Professor Louis B. Schwartz. See, Louis B. Schwartz, With Gun and Camera Through Darkest CLS-Land, 36 STAN. L. REV. 413, 455 (1984) (commenting bitingly that "CLS is not offering concrete revolutionary proposals, it is simply offering surrealistic pictures for our minds.") Professor Matsuda takes account, however, of the fact that there may be no unitary school of CLS theory, and notes Professor Tushnet's discussion of the programmatic elements in CLS literature. See Mark U. Tushnet, Critical Legal Studies: An Introduction to its Origins and Underpinnings, 36 J. LEGAL EDUC. 505, 511 (1986); see also Gabel and Harris, supra note 2, at 369 (suggesting innovative ways in which CLS theory can be translated into a reformation of traditional practitioner approaches to political and non-political cases).

4. See Ed Sparer, Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement, 36 STAN. L. REV. 509, 552-74 (1984) (criticizing those in CLS who limit themselves to negative critiques of traditional doctrine). Professor Matsuda says in partial explanation of the value of CLS that "some commentators, however, argue that the development of theory is a necessary first stage of struggle." Matsuda, supra note 3, at n.39. One may agree with the foregoing comment by Kelman that
forth a problem-solving approach which I believe will add to the literature in the field. I will explore a particular subject matter, namely black youth in college athletics, and suggest a new direction that civil rights organizations could pursue with promising results, if supplemented by appropriate support.

First, the article will examine the success of the Civil Rights Movement. Next, the article will outline the exploitation of (mostly black) college athletes. Finally, the article will encourage civil rights organizations to fight this exploitation. This article examines the legitimacy of the monopolized "marriage" between pre-professional sports training and academic institutions and makes suggestions for radical reform or restructuring along with a strategy for achieving the same.

II. SUCCESS OF THE CIVIL RIGHTS MOVEMENT AND THE CHANGED CHARACTER OF RACIAL SUBORDINATION

The Civil Rights Movement is often considered to have prematurely lost its momentum or, worse yet, to have died altogether, when it may simply have lost organizational support primarily because the major goals of the Movement have been realized with respect to litigation and legislation.

5. See John O. Calmore, Exploring the Significance of Race and Class in Representing the Black Poor, 61 OR. L. REV. 201, 215-17 (1982) (discussing the "premature death" of the Civil Rights Movement); see also Derrick A. Bell, A Hurdle Too High: Class-Based Roadblocks to Racial Remediation, 33 BUFF. L. REV. 1 (1984) (concluding that it is "a movement now brought to a virtual halt").

6. Those who express despair about the alleged failures of the Civil Rights Movement seem not to ask one important question: how fast can one expect racial discrimination to disappear from a society in which the victims were slaves for a longer period than they were free? No comparisons of black progress with that of other victimized groups are ever made (e.g., Native Americans or "the Untouchables" of India). Thus, we are left only with subjective perspectives uninformed by a baseline for judgment.

The second error of the critics is to characterize the movement as a failure because a significant and disproportionate segment of the black community suffers the ravages of existing below the poverty line. See, e.g., Frances L. Ansley, Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship, 74 CORNELL L. REV. 993 (1989). Professor Ansley admits that "dramatic gains were made in dismantling Jim Crow law and practices," but then suggests current failure because of unacceptable levels of "unemployment and poverty" and poor health among blacks. Id. at 1000.

The Civil Rights Movement was primarily a movement to end legal apartheid, and it gave wider access to those blacks who were credentialed, trained or skilled, or who could become so quickly. The black community has $9 billion more per year in real income (adjusted for infla-
Once this success was achieved, civil rights organizations necessarily assumed a leadership role in advocating the most favorable interpretations of existing law, and in monitoring federal and state agencies that administer anti-discrimination laws. This has been admirably accomplished by a number of civil rights organizations equipped with the tools for legal intervention—the NAACP Legal Defense Fund Inc., the Mexican and Puerto Rican Legal Defense Funds, and the Lawyers' Committee for Civil Rights Under Law.

There is always a need for new legislation to repair inadequate judicial interpretations of the law. This necessity became apparent during the Reagan and Bush administrations, the first post-1960s administrations to take an anti-civil rights stance. Legislation can be enacted since another by-product of the Civil Rights Movement was added protection for racial minorities in the exercise of the right to vote. Minority voting placed a sufficient number of black and liberal politicians in federal, state, and municipal legislative bodies such that

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7. See Norman C. Amaker, Civil Rights and the Reagan Administration (1988) (an accounting of failures to adequately enforce civil rights laws during the Reagan administration). Indeed, Reagan and Bush are also the only two elected Presidents who would have opposed passage of the 1964 Civil Rights Act on the ground that it would be unconstitutional. See Doug Freeland, The Senate-Bush: The Polls Give Him "Excellent Chance," HOUS. POST, Oct. 11, 1964, at § 12; see also David S. Broder, Reagan Attacks the Great Society, N.Y. TIMES, June 17, 1966, at 41.

The civil rights community had to seek legislative redress from Congress to reverse a string of decisions by the United States Supreme Court which would have made pursuit of employment discrimination cases more difficult. See Civil Rights Act of 1991, Pub. L. No. 102-106, 105 Stat. 1071 (1991).

8. Smith v. Allwright, 321 U.S. 649 (1944) (NAACP victory ending the practice of excluding blacks from voting in Democratic primaries held in southern states). Black voter registration rose in southern states from 250,000 to 1,008,614 by 1952. David Levering Lewis, The Origins and Causes of the Civil Rights Movement, in The Civil Rights Movement in America 3-17 (Charles W. Eagle ed., 1986). During the years 1940-1960, over three million blacks moved from the South to the North where the vote was more accessible. Id. Lewis argues that these legal and demographic changes were translated into blacks wielding the balance of power, in selected situations, to elect Democrats over Republicans, since the latter party appeared to have abandoned the racial and economic interests of the black community. This "cumulative impact of balance of
new legislation could be passed. The 1991 Civil Rights Act provides one example. Generally, since the 1960s, civil rights legislation has been favorably received in Congress, primarily because the American public has largely accepted the clear articulation of just and fair goals of the Civil Rights Movement. This is a key ingredient which the Movement must reproduce today.

Opinion polls, since the passage of the 1964 Civil Rights legislation, show the American public moving closer to the view that arbitrary factors such as race and ethnicity should not be barriers to benefits and opportunities. The widespread acceptance of this principle has been aided, in part, by the acceptance of the principle of equality as a valued protection for groups other than the black community; discrimination on the grounds of sex, religion, age, and disability have also been legally condemned. Indeed, a United States president has vetoed proposed civil rights legislation in only two instances since 1964. In these two instances, some have charged that the undiluted advancement of the principle of equality was not at issue, but rather the issue was the freedom of private organizations from governmental interference (during the Reagan Administration) or freedom from quotas and reverse discrimination (during the Bush Administration).

The problems confronting the black community are gradually changing in character. Racism is decreasingly evidenced in an open form; thus, the more traditional law enforcement approaches which rely on formal proof should also become decreasingly efficacious as a means of eradicating racism. Consequently, in order to be effective, civil rights organizations should expend fewer resources on monitoring traditional law enforcement, and more resources on new and bold initiatives, especially creative litigation, to cope with the new "under-

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9. But see Randall Kennedy, Derrick Bell's Apologia for Minister Farrakhan: An Intellectual and Moral Disaster, 2 RECONSTRUCTION 92 (1992) ("[A]mong the several calamities that have befallen the movement for black advancement is its diminution in moral standing in the eyes of many Americans.").


11. Former President Reagan vetoed the Civil Rights Restoration Act in 1988; his veto was overridden by Congress. See AMAKER, supra note 7, at 73-74. President Bush vetoed the Civil Rights Act of 1990, but subsequently approved the bill passed by Congress in 1991. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 162 (1991).
ground” character of racism.\textsuperscript{12} Many whites, however, still harbor a fair amount of muted, disguised or ambivalent hostility towards blacks, but its expression is now greatly complicated by tensions between the lower and middle classes, and the mixture of race into debates about value directions for the future.\textsuperscript{13} Any renewed thrust of modern civil rights organizations must take these factors into account and shape an approach which skirts the obstacles created by the new form of ambivalence in the general American public as it pertains to civil rights.

The black community faces a host of problems which can be summarily characterized as a weak capacity for generating income (the poverty problem) and an increasing tendency for the public to associate blacks with what is perceived as a deterioration in American values—for example, drug use, high levels of crime and violence, disin-

\textsuperscript{12} Some commentators have proposed frontal measures to deal with covert racism. See David A. Strauss, \textit{The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards}, 79 Geo. L.J. 1619 (1991) (proposing legislation which explicitly imposes on employers a duty to reach quotas of minorities and women in their workforce or pay fines).

\textsuperscript{13} The Lawyers Committee for Civil Rights Under Law has undertaken a creative initiative. They established a Fair Employment Council which sends out pairs of black and white applicants with identical qualifications. They then chart whether the black (and first) applicant receives fewer job offers. Suits have been filed on behalf of rejected black applicants, thus raising the interesting question of whether job \textit{"testers"} have standing to sue under laws prohibiting discrimination in employment. The Fair Employment Council's job testing technique, if sustained by the courts, could present a very efficient response to covert racial discrimination. (This writer was, until recently, a member of the Board of Directors of the Fair Employment Council.)

\textsuperscript{13} See Malcolm Gladwell, \textit{The Subtle Shades of Racism}, WASH. POST, July 15, 1991, at A3. Gladwell cites studies by Professor Samuel Gaertner which demonstrate that whites act on the basis of stereotypes of blacks, even when they do not consciously perceive this as racist behavior. See also Charles R. Lawrence III, \textit{The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism}, 39 Stan. L. Rev. 317 (1987); Andrew Hacker, \textit{White Responses—Right, Left, Guilty and Sex, in Two Nations; Black and White, Separate, Hostile, Unequal} 50-64 (1992).

\textbf{Thomas B. Edsall & Mary D. Edsall, \textit{Chain Reaction—The Impact of Race, Rights, and Taxes on American Politics} 3-31 (1991).} The Edsalls argue that Americans are in a quandary as to what values should guide our future. Many voters have left the Democratic party because they believe that a liberal elite has claimed the party, that large-scale social and economic forces determine one's opportunities, that more government intervention is needed, that more taxes are required, and that the individual's right to his own lifestyle, no matter how unorthodox (e.g., gays, radical feminists) has jeopardized commitment to individual responsibility, the work ethic, and family stability. The Edsalls argue that the Republicans, with some complicity by silent Democrats, have repeatedly captured the White House and exploited these value tensions, which are often cast as pitting the middle class against the poor, by using racial code words to coalesce a conservative majority.

Reliance on the covert use of race may be smart short-term politics, but it may also erode the capacity of whites to identify with blacks.
tegration of the family, excessive reliance on public welfare programs, a lack of business acumen and initiative, and an exploitation of unfair advantages through affirmative action (the image problem).14

Dr. Martin Luther King, Jr. was probably prescient when, just before his assassination, he tried to turn the Movement into a crusade against poverty, because most of the more aggravated disabilities that attend a large portion of the black community flow from poverty. Unemployment drives crime and family instability; an absence of capital suppresses business initiatives; a lack of financial resources renders many homeless, or condemns them to poor housing in neighborhoods with inadequate public schools. A lack of education locks one out of jobs and into the welfare system. Unemployment and underemployment blocks receipt of health insurance and forces people to resort to overcrowded, strained public health facilities, resulting in more disabilities and illnesses and further constrictions on employability.15 This vicious cycle feeds on itself and resists rehabilitation through any single approach.

Despite the genius of Dr. King in anticipating the need for attention to poverty, the current state of American public opinion would make a frontal and global attack on poverty by civil rights organizations too difficult and too massive an undertaking, especially given the limited range of resources that those organizations could conceivably muster. The conservative wing of the country has effectively influenced public opinion, and Americans are now suspicious of the massive governmental intervention that civil rights organizations would probably require in order to adequately address the problem. Furthermore, the widely held image of blacks as being too dependent upon public assistance would seriously compromise the ability of civil rights organizations to be effective advocates of such an approach. Moreover, one of the tenets of this article is that civil rights organizations must have an easily articulable message with goals and methods capable of garnering public support to reproduce the success achieved

14. Popular journalism repeatedly reflects these attitudes by white Americans. See, e.g., Harrison Rainie, Black and White in America, U.S. News & World Rep., July 22, 1991, at 18 ("[white Americans] feel taxes from those who work have become transfer payments to those who don't . . . . Many whites, by contrast, have come to see affirmative action itself as an unfair form of racial preference . . . .").

15. See William J. Wilson, The Truly Disadvantaged—The Inner City, the Underclass, and Public Policy (1987).
through the passage of civil rights legislation. The question of how, or even whether, poverty can be eradicated is fraught with controversy and debate; and it is unlikely that civil rights organizations could create a consensus on any given approach.

The legal arm of the Civil Rights Movement might be enlisted to attack various and sundry conditions of poverty as violations of the federal constitution. This approach succeeded in the late 1960s and 1970s, and has the advantage of not requiring mass mobilization and public support. However, while respectable arguments can still be made that many conditions of poverty infringe constitutional rights, the current United States Supreme Court has rejected a number of such claims. Moreover, the two Presidents who have been most hostile to the previous "liberal" character of the Court have made five of the recent Supreme Court appointments which will make the Court a less hospitable forum for such claims in the future.

What is being counseled here, however, is not despair, but merely a recognition of the terms of success, given the current climate in America. Two things are probably true: 1) civil rights organizations will have to attack smaller and more discrete portions of the problems facing the black community (this article will illustrate one such manageable problem); and 2) civil rights organizations must develop a high quality research capacity to address all of the variables that attend a problem so that understandable methods of resolution, which are palatable to the public, can be developed.

16. See, e.g., Tate v. Short, 401 U.S. 395 (1971) (barring states, under Equal Protection Clause, from resorting to imprisonment when indigent is incapable of paying total fine where there is a less intrusive alternative, like payments in installments); see also Thorpe v. Hous. Auth., 386 U.S. 670 (1967) (referencing February 7, 1967, directive from Department of Housing and Urban Development, entitling tenant of federally assisted housing project to notice and opportunity to be heard prior to eviction).


18. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (denying that the Texas system where school districts servicing a poor population received less funding than school districts servicing middle- and upper-class persons was a violation of the Equal Protection Clause of the Fourteenth Amendment); see also Harris v. McRae, 448 U.S. 297, 310-11 (1980) (finding no violation of the Due Process or Equal Protection provisions of the Constitution in denying financial support for abortion for indigent females under the Medicaid Act).

Bernadette Chachere, Welfare and Poverty as Roadblocks to the Civil Rights Goals of the 1980's, 37 RUTGERS L. REV. 789, 789 (1985) ("I . . . question the potential of civil rights to significantly improve the economic condition of the poor . . . . I . . . broaden the issue and ask to what extent the United States Constitution and the legal process can be used as vehicles for economic change.").
Considering all of the foregoing, I will show how this new approach might be utilized in conjunction with the second strength which emerged during the Civil Rights Movement—a capacity to work toward resolution of a problem by educating the victims and motivating them towards resolution. Such methods were effectively employed during the 1960s and 1970s in order to achieve the desegregation of public schools, the desegregation of public accommodations, and the right to vote. Such a “bottoms-up” approach contrasts with the manner in which elites solve their problems by leveraging great financial resources, paying high salaries for talent to figure out how to neutralize the rules governing most of the public, and holding pivotal positions of power. As blacks integrate the power structure of the country, the elite style may occasionally be available; however, the style is not yet dominant in a community whose prime characteristics are a lack of resources and power. The obstacles to be overcome remain substantial.

III. College Athletics—A Form of Exploitation of Minority (and Other) Youth?

College athletics present civil rights organizations with a new frontier, and one in which healthy reform could be achieved, albeit against great odds. Because over fifty percent of the college football players and over seventy percent of the college basketball players are black, it is appropriate for a civil rights organization to seize the initiative in addressing the problems in college sports. For many years, college athletics has been replete with corruption if one uses only the standards of the Amateur Athletic Associations and has, arguably, promoted the disparagement and exploitation of minority youth.

A brief background on the structure and operation of collegiate sports is in order. The National Collegiate Athletic Association (NCAA) is a voluntary association that sets standards for and monitors the athletic programs of over 1,000 member colleges and universities. The NCAA has divided its member colleges into divisions for purposes of defining which schools will compete against one another. This article focuses primarily on Division I and Division IA (consisting of over ninety schools) that have made a major commit-

ment in terms of facilities, resources, and personnel to basketball and football. This focus is adopted for two reasons. First, in these two sports the NCAA has a virtual monopoly, working through the colleges and universities, over the pool from which the professional teams choose their new entrants. Second, the average young athlete probably needs further physical maturation and refining of his skills in a team setting in these two sports, before attempting to enter the professional ranks.20

The monopoly by the colleges of pre-professional sports talent is reinforced by the practices of the professional basketball and football leagues. The National Football League (NFL) and the National Basketball Association (NBA) bar the formal drafting of athletes, until they have exhausted their NCAA eligibility.21 The NCAA, in turn, ends a student’s eligibility to play for his college, if he accepts any compensation from a sports agent or enters into a contract for the prospective receipt of pay.22 While there are minor professional leagues in basketball (e.g., the Continental league) and in football, as well as some limited opportunity for professional work abroad, none of these options have maintained the fan interest which the colleges have garnered. The student-athlete with professional potential is well-advised to take advantage of the visibility that the NCAA multi-million dollar television and cable contracts provide, because the visibility increases his chances of acceptance by the professional leagues and influences the level of salary he can demand.

The NCAA has two functions which impinge directly on the student-athlete recruited to play football or basketball. The Association is supposed to insure the integration of the student-athlete into the

20. Very few athletes have gone directly from high school to a professional team; it is so rare as to be insignificant. See Nelson George, Elevating the Game—Black Men and Basketball 192 (1992) (citing Moses Malone and Darryl Dawkins as two players who entered professional basketball without attending college).

21. The professional leagues allow athletes to enter its ranks prior to the end of their college eligibility, if they assert “hardship.” See Gerald Eskenazi, Tagliabue Considering New Draft Rules, N.Y. TIMES, Jan. 16, 1990, at B7 (discussing the NFL’s relaxation of rules regarding undergraduate access to the draft). This exception has, in effect, allowed the “superstars” to shorten their unpaid college stints, and many have elected to do so. This was probably not an act of humanity on the part of the professional leagues, but rather a strategy to avoid a test of whether the refusal to allow early entry was a violation of the anti-trust laws. See Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1067 (C.D. Cal. 1971) (holding that NBA bylaws prohibiting a player from negotiating a contract with an NBA team until four years after his high school graduation was a violation of anti-trust laws).

colleges' academic program and to insure that the student remains an "amateur"; that is, that the student receives no real wages for his athletic labors.23 The major problem that the NCAA faces in achieving these goals is that when colleges run what is, in effect, a large-scale commercial enterprise with full-time "employees" (the football and basketball players), they often find it grossly incompatible with their primary mission of providing a bona fide high-quality education for those "employees" who are also required to be full-time students.

The problem is further complicated by the fact that successful football and basketball teams directly, or indirectly, generate significant financial rewards for the NCAA and for the Division I and I-A schools.24 Given the potential for substantial financial gain and the enthusiasm of alumni for successful teams, there is enormous pressure on the colleges and alumni to covertly pay the star high school athletes to secure their attendance at a given university. Colleges are also pressured to admit stellar athletes who do not meet the normal academic standards, and then to devise an undemanding curriculum or, worse yet, to doctor academic records in order to maintain the student's eligibility to play.

The articles, reports, and books documenting these scandals in academe are legion and have been published over many years.25 One

23. The NCAA Constitution explains:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association 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.


25. The first of several major reports on the corruption in college sports was completed in 1929, and others followed in 1937 and 1974. See Robert N. Davis, Academics and Athletics on a Collision Course, 66 N.D. L. REV. 239, 245-47, 258 n.132 (1990). The latest was the report of the Knight Foundation Commission on College Sports, issued to the 1991 NCAA convention delegates. Id.

For more recent and more critical accounts, see ALEXANDER WOLFF & ARMEN KETEYIAN, RAW RECRUITS—THE HIGH STAKES GAME COLLEGES PLAY TO GET THEIR BASKETBALL STARS—AND WHAT IT COSTS TO WIN (1990); RICK TELANDER, THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT (1989); Rodney K. Smith, An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics, 67 DENV. U.L. REV. 213, 213 (1990) (noting that "[b]etween 1952 and 1985, thirty out of thirty-three institutions whose teams won national championships in Division I basketball during that era, were placed on probation for violating rules of the NCAA").
would imagine that institutions normally committed to lofty ideals and to the nurturing and protection of our youth would be very sensitive to these repeated charges, and that such institutions would, therefore, support and institute radical reform. However, only minor changes have been adopted, and the NCAA, the institution devoted to policing college athletics, has been ineffective in eradicating the practices which violate amateur athletic standards.26

Naturally, one questions how repeatedly criticized college athletics programs can continue to function in the same mode without change? The answer is two-fold. First, the covert illegal arrangements with top athletes is a "crime,"27 and our experience in every area of human activity, where all the participants are willing cooperators, confirms that it is nearly impossible to suppress such voluntary behavior. Secondly, and more importantly, even if one of the ostensibly "willing" participants is ultimately being injured or exploited, when all of the other major participants are satisfied and making huge profits, the activity will continue because the only real victim is weak and unorganized.28

All of the youth, black or white, who participate in the major college athletics of football and basketball are the real victims. They are being exploited, or they are not receiving appropriate recompense for providing entertainment for the public. These young athletes have often spent endless hours honing their skills before coming to college. And while in college, they may spend the equivalent of a thirty hour

26. See, e.g., Allen L. Sack, Looking Behind the Proposition 48 Image, N.Y. TIMES, Nov. 9, 1986, at S12. Proposition 48, discussed infra note 45, has been handled by the media as an effort to clean up college sports by adopting tough academic standards, but Sack criticizes the proposition as a cosmetic public relations gimmick which effects no real reform.

27. The term "crime" is not used loosely. A number of state legislatures have reinforced the NCAA rules barring students from accepting compensation from a source outside the college, by making it a crime for an agent to sign a contract with a student-athlete while he continues to play for the college. See W. Jack Grosse & Eric Warren, The Regulation, Control, and Protection of Athlete Agents, 19 N. KY. L. REV. 49, 51 n.ll (1991).

28. The analogy here is to the consensual crimes of illicit drug sales and street prostitution. The drug addict and the prostitute are, in some sense, initiating or cooperating in the commission of the crime. These are illegal activities that we have not been able to suppress despite, in the case of drug transactions, accelerating imprisonments of drug traffickers and imposing harsher penalties.

However, the drug addict and the prostitute are, in an ultimate sense, victims, because they are involved in an activity which poses serious risks to their health and to their lives. They are persons who do not generally perceive themselves as having many options to change their lifestyles and, in that sense, they are vulnerable. Both groups, despite some fledgling efforts amongst prostitutes, are generally not organized for their own protection.
week in practice sessions, traveling, and playing games. In return, the average student-athlete receives only a scholarship and room and board.\textsuperscript{29} First, while many student-athletes serve the school for the full period of their athletic eligibility, the majority of student-athletes in the revenue-producing sports of football and basketball never graduate; thus, their graduation rates are significantly below that of non-athletes.\textsuperscript{30} Secondly, even those who manage to graduate may not have a marketable degree, if they had a pablum education.\textsuperscript{31}

The diminished returns which accrue to the student-athlete as contrasted with the profits of other actors in the system are discouraging. The athletic program may reap millions of dollars in prize money, if a basketball championship is won or if the football team secures an invitation to a major bowl.\textsuperscript{32} Television networks make millions of dollars from advertisers when they televise major college sports events.\textsuperscript{33} Consequently, the professional football and basketball leagues receive reams of publicity for the athletes they ultimately draft.

Head coaches at public universities sometimes have been known to receive a higher salary than the governor of the state, and these salaries are sometimes fattened by endorsement contracts with manu-

\textsuperscript{29} Pennsylvania State University's Joe Paterno noted the paradox that track and field athletes can have endorsement funds entered into a trust fund, whereas football and basketball athletes can receive no more than scholarships and incidental costs. See JOE PATERNO & BERNARD ASBELL, PATERNO BY THE BOOK 184 (1989).

\textsuperscript{30} One study showed that non-athletes graduated at a 41.5\% rate over a six-year period. Richard E. Lapchick, The Student-Athlete, in NEW PERSPECTIVES, U.S. COMMISSION OF CIVIL RIGHTS 36 (Winter 1988). Over a ten-year period, athletes in the revenue-producing sports of football and basketball graduated at rates of thirty-eight percent and twenty-seven percent, respectively. \textit{Id.}

\textsuperscript{31} A 1986 study of Division I basketball programs showed an indirect measure of "clustering" student-athletes into easy courses that would preserve their eligibility to play. \textit{Id.} at 37. When at least twenty-five percent of a team's players major in a subject whose majors account for less than five percent of the student body at large, "clustering" is taking place. Two-thirds of all basketball programs practiced this scheme, and it has been found more pronounced in ranked programs as opposed to unranked programs. \textit{Id.}

\textsuperscript{32} In fiscal year 1989, NCAA Division I-A Athletic programs produced an average of $9,685,000 in revenues per institution. MITCHELL H. RAI BORN, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETICS PROGRAMS 10 (1986). As one writer has noted, "schools participating in the Gator Bowl take home $1 million; those in the Cotton Bowl $2.5 million; those in the Sugar or Orange Bowl $2.75 million, and the Big Ten and Pac Ten representatives in the Rose Bowl get $6 million each." See TELANDER, supra note 25, at 44.

\textsuperscript{33} CBS charged advertisers $450,000 for every thirty seconds of television advertising time during the final championship game of NCAA basketball. Annetta Miller & Dody Tsiantar, The Real Super Bowl Battle, NEWSWEEK, Jan. 27, 1992, at 42. The event is now seen as competitive with the professional football's Super Bowl championship in terms of profitability to CBS. \textit{Id.}
facturers of athletic equipment. Everyone who works in conjunction with college athletics, including the NCAA officials, receives a full-time salary; that is, everyone except the student-athlete who actually provides the live performance that the spectator public is paying to view. Only the student-athlete is supposed to operate gratis—for school honor and glory.

The alumni and the fans of college teams provide an important element of the college athletic system. Alumni with extreme pride in their alma mater have often been the conduit for illegal support of the student-athlete. Alumni may also greatly increase their contributions to the college or university that has a winning sports team. Thus, the presidents of the colleges and universities might face withdrawal of alumni support if they were to institute policies which tended to hamper a sports team's success.

A college team may draw even more support than that provided by its alumni, because the populace of some towns or entire states may come to identify closely with the team. College sports may provide an important form of entertainment in an area. College officials may be well aware of the reliance of local residents on the team, and they know that they receive general public approval and support. This may be particularly important to the presidents of state universities that require political support.

The total effect is that practically everyone is reaping enormous financial benefits from college sports except the student-athlete who has no organizational backing devoted exclusively to confronting and reorganizing the system for his benefit. Elsewhere in this article, the exploited college athlete is compared to the vulnerable drug addict and the street prostitute. Note that blacks, in relation to their percentage of the population, occupy a disproportionate portion of all three groups. In my estimation, society becomes sluggish and inefficient in

34. The governors of Wyoming, Alabama, and California have salaries below those of the head football coaches at their respective state universities. See SPERBER, supra note 19, at 174-82 (discussing the coach as an entrepreneur).

35. Occasionally, the stench of exploitation can prompt a protest from the ranks of those who profit from the status quo. Witness the comment of the coach at Louisiana State University, who may hold the record ($300,000) for a lucrative contract with an athletic shoe company: "Look at the money we make off predominantly poor black kids. We're the whoremasters." WOLFF & KETEYIAN, supra note 25, at 294, 303.

36. The incidence of drug addiction has been hard to measure, and the estimates differ. One estimate is that blacks comprise fifteen percent of the nation's drug addicts, despite the fact that
problem-solving when, at some subliminal level, the white American
public perceives or defines a problem as primarily "black." If this
speculation has any merit, then some civil rights organization may
appropriately enter the fray and begin to struggle, on behalf of a group
of talented black youth, for a more equitable distribution of the finan-
cial gain that flows through amateur sports. Organizational backing is
necessary, for the vested interests in, and emotional commitment to,
the status quo of many individuals and institutions is strong and
must be challenged. Athletes should be organized to assert new and
radical, yet equitable, demands to protect their collective interests.

IV. LEGAL TACTICS FOR CONFRONTING THE EXPLOITATION
OF MINORITY YOUTH: THE NEED FOR A CIVIL RIGHTS
ORGANIZATION

What could civil rights organizations do on behalf of youth who
have the physical gifts to engage in college athletics? They could bring

they are only 11.9 percent of the population. John Powell & Eileen B. Hershenov, Hostage to the
Drug War: The National Purse, the Constitution and the Black Community, 24 U.C. DAVIS L.
REV. 557, 599-614 (1991). For minority females, the indirect measure of the involvement in
drugs and prostitution is the incidence of AIDS; though Black and Hispanic women are only
nineteen percent of the total female population, they represent seventy-two percent of the women
with AIDS. Id.

37. The way in which the media handles some reporting tasks may contribute to the pub-
lic's perception of a problem as a "black" problem. Blacks may be disproportionately involved
in drug use in relation to their proportion of the population, but seventy percent of drug-users
nationwide are white. According to a survey conducted by Black Entertainment News, however,
television news broadcasts associate drugs with "blacks fifty percent of the time, while only
thirty-two percent of the drug stories focus on whites." See Ishmael Reed, Tuning Out Network

Welfare may also be perceived by non-hispanic whites as basically a "Black" problem, de-
spite the fact that, in 1990, more than two-thirds of persons below the poverty line were white
(Blacks: 9,837,000 vs. Whites: 22,326,000). David H. Swinton, Economic Status of African
Americans: Limited Ownership and Persistent Inequality, in STATE OF BLACK AMERICA—1992
DEAD? 288, 296-301 (Eugene V. Rostow ed., 1971) (arguing that the United States, despite
greater financial resources, has a shrunken and ungenerous public welfare system in comparison
to other industrial democracies, because white Americans perceive welfare as a "black"
problem).

38. Sharon E. Rush, Touchdowns, Toddlers, and Taboos: On Paying College Athletes and
Surrogate Contract Mothers, 31 ARIZ. L. REV. 549 (1989) (exploring parallels between strong
emotional demands in society on amateur athletes and on females in their maternal roles—to wit
that both are ostensibly "pure, self-less and devoted" and, of course, absolutely disinterested in
money for their services). Professor Rush concludes that: "Just as our expectations about wo-
men and motherhood generally promote stereotypical views of women, because most college
athletes are minorities, adherence to traditional views about college athletes also perpetuates
racism." Id. at 551.
some of the same strengths to this problem that were brought to bear in attacking and breaking down all forms of racial segregation and discrimination—namely, educating the public, organizing the athletes, gathering white allies, and litigating to expose the unjust arrangements. However, the process of educating the public should entail a close examination of the entire inter-collegiate sport system. Although the challenges of education may necessitate devising recommendations which collide with some of the more cherished myths about college athletics, civil rights organizations are uniquely positioned to argue to the public that the continuation of the status quo is an indirect form of racial discrimination and exploitation.

Civil rights organizations should confront those commentators who oppose the recent efforts of colleges and universities to assure that all entering students have the minimum preparation to adequately complete a normal course of study. These battles, which always receive intense media coverage, wound the images of young black males, that already suffer from public suspicion that they are violent, gang-prone, irresponsible baby-makers, whose prime activity is using or selling crack. These young men do not need the “dumb jock” appellation to intensify the already high public disdain and suspicion. The debate in recent years about “qualifications” and minorities may be the ploy of some with ulterior racist motivations, but it behooves the black community not to reject all standards which are reasonably related to sensible educational goals. Young athletes should not be admitted to a college where, even with remediation, they are likely to fail; it is a scandal and disgrace that illiterate athletes have been admitted to college.

39. See, e.g., Linda Greene, The New NCAA Rules of the Game: Academic Integrity or Racism?, 29 St. Louis U. L.J. 101 (1984) (suggesting possible litigation to attack the new NCAA academic standards as violations of the anti-trust laws and of the Equal Protection Clause). While I question this approach as politically incorrect, civil rights groups could use more of the kind of creative, programmatic analyses that Professor Greene employs in this piece.

40. The negative public image of young black males is so pervasive that one scholar has sought to counter it with some hard facts. See Jewelle Taylor Gibbs, 10 Myths About Young Black Males, Boston Sunday Globe, Nov. 17, 1991, at 77-78. Samples of the myths which Professor Gibbs canvasses include: “Myth I: Black males are dropping out of high school in droves,” “Myth IV: Young black males do not want to work,” “Myth VI: Young black males don’t care about their out-of-wedlock children and don’t offer them any support.” Id.

41. See Note, Educating Misguided Student Athletes: An Application of Contract Theory, 85 Colum. L. Rev. 96, 96 n.3 (1985) (quoting Professor Harry Edwards of the University of California at Berkeley, estimating that the illiteracy rate may have been as high as twenty percent among Black athletes).
Civil rights organizations should publicly demand a complete separation of sports teams and college attendance. Playing on a major college team is, in effect, a full-time semi-professional sports job. Players should be recruited and paid exclusively on the basis of their athletic ability and contribution to the team. One may quite possibly be a superb athlete, even though one lacks a formal education.\(^{42}\) The proposal would also end the charade and deception of feigning academic or attendance records at a college where there is no potential for earning a degree.

One must question whether this means that a number of black youth will opt for semi-professional status, never complete college, and never go on to become professional athletes. Only a very small fraction of the athletes leaving college will be absorbed into the ranks of the professionals.\(^{43}\) However, this proposal may allow some young athletes, who have the ability to enter professional sports, to do so without feeling the need to falsify attendance records. Additionally, these may likely be the young athletes who rely most heavily upon professional sports, because their other options are limited by poor academic capacity, poor preparation, or lack of interest.\(^{44}\) These are the young men who will likely be harmed by the current proposals to tighten academic requirements for collegiate athletes.\(^ {45}\)

Moreover, these “quasi-collegiate” sports could retain much of the current structure, such as the four-year limitation on eligibility as a semi-professional. A key element in the proposal is that the semi-professional athlete would be adequately paid, so that he would have

\(^{42}\) Dexter Manley was a key player for the NFL championship Washington Redskin football team, and he was chosen to play in all-star games a number of seasons. Manley completed college as an illiterate. See DEXTER MANLEY & TOM FRIEND, EDUCATING DEXTER (1992).

\(^{43}\) In 1988, there were 17,623 males in Division I college football and basketball; there were less than 3,500 professional athletes in those two sports. See Lapchick, supra note 30, at 36.

\(^{44}\) See SPERBER, supra note 19, at 7-8 (arguing that athletes who are not prepared for college are being given scholarship money that was originally intended for academically motivated minority students). Thus, everyone loses, except the college’s athletic program, because the unprepared athlete is unlikely to graduate, and the academically prepared minority youth is deprived of scholarship money.

\(^{45}\) The NCAA adopted what is popularly called “Proposition 48” beginning with the 1989-90 academic year. It excluded persons from receiving athletic scholarships who did not meet minimum high school grade point averages of 2.0 (based on a maximum of 4.0) and a minimum of 700 on the Scholastic Aptitude Test (SAT). According to NCAA reports, more than ninety percent of the 242 basketball and football players who lost their eligibility in the first year of the Proposition’s operation were black. See Deborah E. Klein & William B. Briggs, Proposition 48 and the Business of Intercollegiate Athletics: Potential Antitrust Ramifications Under the Sherman Act, 67 DENV. U. L. REV. 301, 306 n.29 (1990).
the funds saved to pay college expenses at the end of the four-year term. Naturally, the semi-professional athlete would be able to earn extra money through the endorsement of athletic equipment, and other products, a practice which is currently barred to student-athletes because they are forced into the "amateur mold." A semi-professional athlete who had completed his four years of eligibility would only be admitted to the college where he played if he met the same academic requirements of all other students who applied.  

The proposal could mean that an athlete might attend a college other than the one for which he played, a college prepared to provide the kind of remediation needed to assist him toward successful completion. In practice, a number of black athletes might attend historically black colleges at the end of their athletic careers, since those colleges have experience in coping with students from disadvantaged backgrounds as well as with top scholars. Thus, black colleges may have a stake in backing the civil rights organizations that carry out such reform because they may be losing black students to the wasteful student-athlete process which now exists at predominantly white institutions.

The present arrangement has been a disaster for the black youth who are admitted to college under athletic scholarships. The vast majority of these youth do not succeed in professional sports, and their graduation rates are even lower than those of white student-athletes. They have been forced or steered into majors that accommodate their rigorous sports activity, but in fields which show declining opportunities for blacks.  

The proposal set forth herein would enhance the opportunity for successful completion of college, since the athlete would be studying without the distraction of a full-time sports job and without having to follow a course of study that does not enhance his op-

46. A number of variations might be possible to assure that the athlete later attends college. If the athlete had the qualifications to be admitted to the college for which he was playing, an arrangement could be made to deduct one year's college expenses from his salary for each year he played. The money could be invested on his behalf, but released only for the payment of tuition and other costs upon his retirement from semi-professional or professional athletics. True hardship or parental consent could be required for any other use of the funds.

47. One study by the Educational Testing Service showed black athletes graduating at the rate of thirty-one percent over six years, while fifty-three percent of white athletes were graduating over the same period. The majority of black student-athletes who graduated received degrees in sports administration, physical education, and communications. A study over a seven-year period showed that black employment in those fields declined from 6.4 percent to 4.8 percent. See Lapchick, supra note 30, at 37.
portunities for gainful employment in the future. Moreover, more attention to attendance at college will be generated because the athlete will know, definitively, that he has no prospect of playing professional sports; and, thus, he has more incentive to study vigorously, since college will be his only means of preparation for a vocation or profession other than sports. The proposal simply recognizes what many law schools already practice when they try to discourage first-year law students from holding jobs or when they close their night classes: it is extremely difficult to adequately perform two full-time jobs simultaneously.

The proposal may seem radical, but it simply shifts the time frame of one's educational process. Other writers have made similar proposals; and it is, indeed, the way in which the white-dominated sport of tennis operates. Top-ranked teenagers who play professional tennis are not required to attach themselves to a college and to perform exclusively for the financial benefit of that institution for four years, while they are at the peak of their physical gifts. If tennis players desire a college education, they pursue it on their own time schedule, after they have earned enough money through professional tennis to pay for their own education. Tennis players begin their professional careers as early as age sixteen through age nineteen years old, a time when many black youths in basketball and football are performing, for little or no compensation, at colleges for crowds often larger than the crowds at professional tennis matches.

The only thing unique about this proposal is the suggestion that civil rights organizations seek the reform. Well-meaning individuals have been suggesting reforms of college athletics for many years, but

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48. See John C. Weistart, Serious Reform of College Sports Must Go Beyond Fine Tuning, CHRON. HIGHER EDUC., Jan. 10, 1990, at A52 (arguing that all proposals for reform should be measured by whether "they will help restore education as institutions' primary focus").

49. Senator Bill Bradley was able to complete, with honors, a rigorous academic program at Princeton University, while playing semi-professional basketball; but such capacity is probably extremely uncommon, and this level of performance should not be demanded, as it now is, of all athletes.

50. See Telander, supra note 25, at 214; John C. Weistart, Legal Accountability and the NCAA, 10 J.C. & U.L. 167 (1983) (suggesting judicial intervention in severance of amateur athletics from the education process); Robert N. Davis, The Courts and Athletic Scholarships, 67 N.D. L. REV. 163, 164 (1991) ("[t]he sooner we accept athletics as entertainment and treat athletes as employees, the sooner current problems in intercollegiate athletics will be remedied."); James A. Michener, Sports in America 196-204 (1976) (proposing semi-professional basketball and football leagues with the thirty-six schools with major commitments to these sports).
to no avail. Organizational muscle is needed to challenge the complex institutions and arrangements that sustain the current exploitative structure.\textsuperscript{51}

The ultimate goal of civil rights organizations would be to form a player's union to negotiate team contracts for all of the players at major colleges. For political, moral, and legal reasons, the organization would seek to represent all of the players, regardless of their race or ethnic background.\textsuperscript{52} Under current law, the National Labor Relations Board (NLRB) might refuse to recognize the student-athletes as "employees" within the meaning of the National Labor Relations Act (NLRA), but there would be ways to test that proposition.\textsuperscript{53} The NLRA was designed to allow union representation for persons who were paid for performing services; thus the act contemplates negotiations regarding "wages, hours, and working conditions." The NLRB might take the stance that the athletes are primarily students, and not employees, and that their participation in sports is a purely voluntary recreational activity, or merely training. However, much of the reality of college sports belies that interpretation, as it is very clear that the athletes are paid for their services, but the remuneration is limited and scantily disguised in the form of scholarships, room and board, and

\textsuperscript{51} Most of the official reports regarding corruption of college athletics have been done by persons with an interest in moderate reform, but not a radical alteration of the status quo to the benefit of the student-athlete. \textit{See} Davis, \textit{supra} note 50. To date, however, no report has proposed the payment of athletes and the separation of sports from education as is proposed in this article.

\textsuperscript{52} If the civil rights organization formed an entity which functioned like a labor organization under the National Labor Relations Act, it would be a violation of the law to exclude persons from the bargaining unit because of their race. \textit{See} Brotherhood of Ry. Trainmen v. Howard, 343 U.S. 768 (1952).

\textsuperscript{53} An organization could approach the student-athletes and ask for the right to represent them in negotiations with the college or university for better working conditions (e.g., fewer practice hours, better food, more respect from the coach, etc.). If the university refused to recognize the organization, the organization could file a petition for an election; and, if the election were validated, the organization could file an unfair labor practice suit alleging a refusal to bargain. Ultimately, a court could review the students' claims for recognition as employees in this manner. \textit{See} NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

At one time, the NLRB declined to assert jurisdiction over non-profit private universities. \textit{See} Trustees of Columbia Univ., 97 N.L.R.B. 424 (1951) (overruled by Cornell Univ., 183 N.L.R.B. 329 (1970)). The NLRB now asserts jurisdiction if the institution has available for its operation expenses a minimum of $1 million in gross annual revenues.

State and local governments are not governed by the National Labor Relations Act, 29 U.S.C. § 152 (1988), so one would necessarily look to the various state labor relations laws in order to determine the scope of organization permitted to public employees where the student-athlete was employed by a state university.
The athletic scholarship is not an absolute grant for four years of post-secondary education, nor does the scholarship always require the athlete to maintain a certain level of academic performance, as do academic scholarships. Indeed, at most colleges, if an athlete is injured and can no longer play on the team, he loses his scholarship the next year. Collective bargaining could provide additional protection to the athlete who becomes disabled in playing or practicing the sport.

Another legal challenge that civil rights organizations could mount against the current structure of college athletics would be to bring suits against colleges alleging that the student-athletes were "employees" within the meaning of the Fair Labor Standards Act (FLSA), and that the colleges have violated the minimum wage provisions of that statute. Athletes who dropped out of college, but who

54. In deciding whether students who worked part-time could constitute a bargaining unit under the NLRA, the NLRB has treated scholarship assistance as a form of compensation. San Francisco Art Instit., 226 N.L.R.B. 1251 (1976). The Board (with two members dissenting) denied representation to the students employed on a part-time basis, solely on the ground that their employment was temporary and that there might be a complete staff turnover in the unit before an election could be held. Id. Naturally, those conditions do not describe student-athletes who may play for the university over a two- to four-year period.

The Board has also found that interns and residents in a medical training facility were not employees within the meaning of the NLRA. Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251 (1976). The Board found that the interns and residents, while incidentally rendering services to patients, were primarily involved in training and fulfilling the prerequisites for entry into the medical profession. They characterized their income as a form of "scholarship." Id. The academic study of student-athletes is clearly separable from the rendering of services for the university in their game performances. Most college athletes have mastered the basic skills required for their sport before entering college, and their practice sessions and guidance by a coach would not transform them into student "interns" anymore than it would transform professional athletes who have the same regime, but who also have certified union representation. See Lee Goldman, *Sports and Anti-Trust: Should College Students Be Paid to Play?,* 65 Notre Dame L. Rev. 206, 251-52 (1990) (analyzing applicability of NLRA to student-athletes).

55. This is another example of how the interests of young athletes are ignored because they have no collective representation. Until 1973, athletic scholarships were awarded for four years and could not be revoked. The coaches, however, pushed the NCAA into giving athletic departments discretion to cancel scholarships annually. See Sperber, supra note 19, at 7. This enhanced the power of the coaches to drop athletes who performed poorly and underscored the university's prime, or sole, interest in the athlete's entertainment value.

See Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract By Any Other Name,* 35 Wayne L. Rev. 1275, 1371-72 (1989). Professor Cozzillio has done a thorough job in arguing that the "letter of intent" document which a high school athlete signs, thereby committing himself to attend a particular institution and to engage in athletics in return for financial aid, should be treated as a formal contract enforceable by the athlete for the year. In canvassing the options the young athlete has, in the event that the athletic department (arbitrarily) revokes the scholarship, Cozzillio takes note of the disparity in bargaining positions between the student-athlete and the professional athlete who has a collective bargaining agent.
had been on the team recently enough to be within the statute of limitations under the FLSA, would likely have standing to bring such suits. The civil rights organizations should not rely on those athletes who are still in school to be plaintiffs and witnesses, because they might be subjected to retaliation.

The civil rights organization would also want to select athletes who had an arranged course of easy study so that it could be asserted that there was no serious intention to provide an education and that tuition remission could not, therefore, be figured as part of the athlete’s compensation while he was on the team.56

Akin to litigation around the minimum wage strategy, a civil rights organization could begin to test, by litigating on a state-by-state basis, whether student-athletes are covered by workers’ compensation statutes when they are injured or killed while engaged in playing or practicing the sport for the college.57 The courts, to date, have split on the issue.58 However, under this article’s proposal of separate semi-professional teams, there would be no question that the athletes would be “employees” and, thus, protected under the state’s workers’ compensation laws.

Civil rights organizations could also file more “educational malpractice” suits against educational institutions for failing to perform the implied contract to provide an educational opportunity for the stu-

56. See Tony & Susan Alamo Found. v. Donovan, 471 U.S. 290 (1985) (holding that a non-profit, tax-exempt organization is not exempt from the Fair Labor Standards Act (FLSA) and that it does not matter that the persons who are deemed “employees” within the meaning of FLSA do not regard themselves as “employees” (like the student-athletes) if they receive room, board, and meals in compensation from the employer in return for services they render (again, like the student-athletes)).

57. Under workers’ compensation statutes, the claimant must prove that he is an employee within the meaning of the statute, and that he suffered a personal injury by accident arising out of, and in the course of, employment. The employee forfeits the potential for a larger recovery under common law, but he is almost assured of some recovery because the employer, likewise, relinquishes the defenses he might have asserted at common law. See Mark A. Atkinson, Workers’ Compensation and College Athletics: Should Universities be Responsible for Athletes Who Incur Serious Injuries?, 10 J.C. & U.L. 197 (1983).

dent-athletes. Generally, these suits have been unsuccessful, because the courts have been reluctant to enter into a management role over the educational enterprise. Strong arguments exist, however, that those cases have not thoroughly analyzed the problem.59

A number of commentators have asserted that the refusal to pay student athletes, or limiting their pay to scholarships and minimal living expenses, may be a violation of the anti-trust laws.60 The NCAA is probably immune to attack based upon the constitutional Equal Protection and Due Process standards,61 but the organization has been held amenable to the antitrust laws in their dealings with member schools.62

Therefore, as noted above, there exists an abundance of litigation possibilities which the legal arm of civil rights organizations could undertake. The purpose of the suggested litigation would be two-fold: 1) to test the outer limits of current legislation as a means of addressing the problems; and 2) to educate the victims and the general public to the nature of the exploitation and unfairness of the status quo and seek the necessary legislative redress. Even if a university successfully defended a suit for educational malpractice, it would lose public esteem when the blatant exploitation of an athlete's ability is exposed.63

59. See Timothy Davis, An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes, 28 Hous. L. Rev. 743 (1991). Davis argues that if a duty to perform a contract in good faith were implied in the athlete-university arrangement, it would necessarily include a duty to provide educational opportunities. He further argues that courts have rejected educational malpractice suits by asserting that the duty to provide educational opportunity need not be a duty to assure specific educational outcomes since that will, to some extent, depend upon the energy and dedication of the student. He does believe that the university can be required to provide educational opportunity, via objective conditions like remediation, time for study, etc. This writer believes, however, that full-time involvement in a major sport would, for the average student, seriously undermine educational opportunities even if there were efforts to provide such opportunities.

60. See Goldman, supra note 54.

61. See NCAA v. Tarkanian, 488 U.S. 179 (1988) (holding in a closely divided 5-4 decision that the NCAA was not a "state actor" within the meaning of the Fourteenth Amendment to the Constitution, even though its rules are implemented through some members who are state universities); see also Stephen R. Van Camp, Note, NCAA v. Tarkanian: Viewing State Action Through the Analytical Looking Glass, 92 W. Va. L. Rev. 761 (1990).


63. See HERB APPENZELLER, SPORTS AND THE LAW—CONTEMPORARY ISSUES 118 (1985). Eight athletes brought suit against California State University for $14 million for failure to provide them with an education; the University settled with seven of the students and issued a public statement expressing its regret for what had happened. Id.

Civil rights organizations might believe, unlike this writer, that the current student-athlete system can be preserved through reformation. They might believe that efforts could be undertaken to lobby state legislatures to pass legislation that would provide a cause of action for educa-
the past, such litigation has been episodic, unfocused, and uncoordinated by civil rights organizations which could tie the publicity to a remedial proposal such as the one suggested in this article.

The approach outlined above should be conducted in conjunction with the Congressional Black Caucus because of the likelihood that federal legislation would be required in order to amend the NLRA and to free the colleges and universities from the current commitment to securing free labor from student-athletes. Civil rights organizations could solicit former athletes to testify about the many abuses in college sports over the years that they participated. Many black former athletes might be amenable to testifying about their receipt of under-the-table payments, if they are convinced that the reform would make the payments that they received legitimate and lawful for others.

The civil rights organizations that undertake this effort would have to reeducate the public away from the current view that there is something noble and romantic in young athletes working in sports for their colleges without pay. Although an occasional commentator will attack the legitimacy of the strict rules barring any compensation for athletes, much of the writing on this topic is replete with statements concerning the so-called "corruptive" influence in paying athletes for their talents and performances. It is often not made clear that it is not the payment which is corrupting, but the fact that it is done surreptitiously. This is especially true in the many cases where the student-athletes are from poor families in dire need of financial assistance. The problem should be attacked by civil rights organizations, because the current system involves black youths who, unlike some of their peers, have not opted for criminal activity out of despair and as a

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64. John Thompson, the coach of the basketball team at Georgetown University, is reported to have said: "Sometimes I wonder what dishonesty is. Is it dishonest for a kid to be paid ... or is it just against the rules?" WOLFF & KETEYIAN, supra note 25, at 296.


65. See, e.g., WOLFF & KETEYIAN, supra note 25, at 290 ("What does it mean that the NCAA publishes a thick code of rules but is unwilling to commit the resources to enforce them?").
means of survival. However, the college athletic environment forces these young athletes into the corrosive self-abuse of lying and functioning in a sleazy, underhanded manner. These young men are a product of an oppressive and a deprived environment, and they deserve to have their talents protected and rewarded. The answer, therefore, is to legitimize and to make adequate their payment, since they are the most important part of a multimillion dollar commercial enterprise.

V. ENLISTING ALLIES AND EXPERTISE

Civil rights organizations undertaking the proposal in this article would likely face charges that these demands are “radical” or “unrealistic.” These demands will be seen in those terms primarily by the many institutions who would be required to share power or resources with the student-athlete, such institutions will be discomfited by the pressure for change. The Civil Rights Movement of the 1950s and 1960s had to surmount exactly those kind of initial public attitudes. The Movement was successful, in part, because it attended to two variables: taking account of 1) who could be recruited to be an ally, because they agreed with the moral or strategic direction of the Movement and 2) who could be drafted to support the program in order to protect their own interests. The following analysis will dis-

66. Evidence already exists of an attitude of tolerating such corruption. See Goldman, supra note 54, at 208 (“A recent survey revealed that sixty percent of Division I basketball players had no moral problem with taking money under the table.”). This may simply be a common sense attitude, given the hypocritical situation into which such athletes are thrust; nevertheless, this attitude is still troubling.

67. See George, supra note 20, at 72. George asserts that blacks transformed and innovated the game of basketball in much the way that blacks essentially created jazz: The “new” game [of basketball played by Blacks] was about putting one’s personal stamp on any given contest, about using a team sport as a way to tell your story just as the beboppers did on bandstands nightly up North in every major citv. City ball was faster, louder, more stop-and-go, and like bebop, defiant of established standards of performance.

68. See Smith, supra note 26, at 213-14 n.7. Smith states:

[A]s will be discussed in this article, neither his (Rick Talendar’s) reform package which largely calls for the professionalization of big-time intercollegiate football, nor his contempt for the NCAA are justified. Indeed, while the NCAA “brass” is not without blemish, calls for reform by people like Richard Schultz, the Executive Director of the NCAA, are far more thoughtful and realistic than those proffered by Mr. Talendar.

69. Here, I take issue with the pessimistic analysis of Derrick Bell that the black agenda is always controlled and subordinated to the white agenda. Bell argues that “reform is seldom forthcoming until white policymakers perceive some self-interest-based benefit for themselves or,
tistinguish the "recruits" from the "draftees."

A number of major college sports programs are highly profitable, but the profits are usually reinvested for the support of other unprofitable athletic programs (e.g., track, soccer, swimming). The profits, however, do not usually go to support the college's main mission of providing academic offerings. Even some basketball and football programs drain the resources of some universities, because they do not generate sufficient revenue to offset expenses. Civil rights organizations should, therefore, attempt to recruit college presidents (who are sometimes paid less than the coach) as allies to a proposal for semi-professional teams that would generate revenue (as opposed to financial drain) and in which the increased revenue could be expended on academic as well as sports programs.

Indeed, college presidents, through the NCAA Presidents' Commission, have spearheaded recent efforts to reform college athletics. However, their efforts have usually focused only on the raising of the academic standards for students who are to receive athletic scholarships. Civil rights organizations could provide support to those college presidents backing so-called radical reform, which would likely be strenuously resisted by alumni and other supporters of the status quo.

70. Sperber, supra note 19, at 4.
71. Sperber even argues that universities do not derive much financial support for their academic programs from alumni who are boosters of the athletic program. Id. at 2. However, even programs that appear costly may possibly generate some income to the university. The visibility that the institution receives from the publicity surrounding a major and, especially, a successful sports program may increase applications for admission from non-athlete students and, thus, increase tuition revenue.
The presidents have a stake in the reorganization of college athletics, which would effectively end the current spectacle of corruption and diversion from the main mission of education. The minor reforms they have proposed, to date, through the Presidents' Commission are not likely to fully achieve those goals.\textsuperscript{72}

How could college sports programs be made more profitable and generate revenue for academic programs? The professional football and basketball leagues could be required to contribute financially to support what are, in effect, as one commentator put it, a "no-expense farm system."\textsuperscript{73} Student-athletes who want to enter professional baseball can join baseball's minor league, receive pay, and be groomed for the major leagues. Indeed, intercollegiate basketball and football associations have prohibited the development of professional minor leagues solely because of the historical anomaly that college teams existed well before the professional leagues in those sports were established.\textsuperscript{74} Therefore, a host of young athletes provide the supporting cast for the few stars who enter the professional leagues; yet they receive no income for that support.\textsuperscript{75}

The professional football and basketball leagues are extremely profitable \textit{de facto} monopolies, as evidenced by the astoundingly high salaries that they are able to pay the athletes. (One can also be assured that owners' profits are correspondingly astronomical, although the media rarely broaches the subject.) Civil rights organizations might also appeal to the leagues for financial support for a semi-professional structure of college sports; but, like most for-profit businesses, the owners are unlikely to respond to arguments based solely on claims of "fairness and equity." The leagues might, however, respond to a revival of the consumer boycott method aimed at convincing them to act


\textsuperscript{73} See Cozziillo, supra note 55, at 1281 n.15.

\textsuperscript{74} John F. Rooney, Jr., \textit{The Origin and Growth of Intercollegiate Athletics, in The Recruiting Game—Toward a New System of Intercollegiate Sports} 12-23 (1987).

\textsuperscript{75} Sperber makes the argument, however, that while professional baseball and hockey have never entered into an agreement with the NCAA to leave student-athletes out of their drafts for four years, the universities are still supplying the equivalent of minor league training at no expense to those professional leagues as well. Since these sports are not profitable at the college level, the unpaid young football and basketball players are, \textit{de facto}, subsidizing professional baseball and hockey also. See Sperber, supra note 19, at 207-16.
in the interests of the thousands of minority youths who help line their pockets each year.

Civil rights organizations that undertake the reform of college athletics could also recruit support from blacks who have an interest in entering the college coaching profession, such as black high school coaches. Careful monitoring of the situation should produce some opportunities for litigation against universities for racial discrimination in the hiring of coaches. Only 4.2 percent of the head coaches at 278 Division I colleges in football, basketball, baseball, and track are black. \(^{76}\) Worse yet, only 3.1 percent of the assistant coaches, who are the most likely candidates for head coach positions, are black. Since many coaching positions are filled from the ranks of former college and professional athletes, blacks should logically represent more than such a small proportion of the coaching ranks. Were it not for covert racial discrimination and white male cronyism, more black head coaches would already be in place.

University faculties might also support reform, because they have been coerced or pressured into cooperating in schemes to maintain athletes' eligibility to play by doctoring their academic records or by allowing them to remain in good standing when, in actuality, they are not. Many faculty members must feel demoralized to be involved in this type of corruption (in addition to the insult of generally being paid less than the coaches at Division I schools). \(^{77}\) Civil rights organizations could urge them to become "whistle-blowers" and to offer legal assistance in the event that they are subjected to retaliation. \(^{78}\)

VI. ORGANIZING MINORITY YOUTH: ENTRE TO THE Ghetto

In order for civil rights organizations to begin to build the trust of those young athletes who could be recruited to participate in the reorganization of college athletics, activists need to become involved with

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76. Id. at 6.
77. "Almost all NCAA Division I football and men's basketball coaches have university salaries above those of the higher-paid full professors at their schools." SpéRBER, supra note 19, at 174.
78. Professor Jan Kemp was fired from her position as an assistant professor of English when she objected to athletes being allowed to remain at the university when other students with similar academic failings were being dismissed. She claimed that her First Amendment right of free speech was abridged, since she was penalized for voicing her objection, and she was awarded $400,000. Kemp v. Ervin, 651 F. Supp. 495 (N.D. Ga. 1986). See also Robert N. Davis, Academics and Athletics on a Collision Course, 66 N.D. L. Rev. 239, 249-51 (1990).
these young men during their junior high and high school years. The
task of organizing the victims must begin early. Charges have been
made that, at least in the sport of basketball, a number of persons of
questionable integrity have insinuated themselves into trust relation-
ships with talented minority youth through summer training camps
and tournament opportunities. There are muted charges that these
persons secure lucrative grants and financial support from athletic
shoe companies, while the young athletes merely receive "crumbs
from the table"—perhaps, free shoes.\textsuperscript{79} The civil rights organization
should actively enter the competition for these young athletes and
these training opportunities. They should compete with open books, a
reasonably salaried staff, and as much compensation to the youths as
possible. (Former athletes from the neighborhood would be optimal
staff members and persons who could build confidence in the effort.)\textsuperscript{80}
These summer training opportunities should be treated like summer
employment, and the youth should be paid. This method would be the
best means of creating in the youngsters' minds the legitimacy of their
earning money during their training period. While there has been a
history of exploiting and not compensating persons in training situ-
ations (it was once the norm for medical interns, and even the legal
profession had its period when law clerks were unpaid), those victims
of uncompensated labor managed to emerge from that kind of oppres-
sive relationship, and today they are paid. It is even more perverse to
foist this kind of unpaid apprenticeship on those from poor families,
who will be excluded from a number of opportunities because of the
lingering racial discrimination they will experience in the society at
large.

A number of High School All-Star extravaganzas are arranged
each year, sometimes with huge paying crowds in large arenas. While
it may be laudable that the corporate sponsors of these tournaments

\textsuperscript{79} WOLFF & KETEYIAN, supra note 25, at 27-66.

\textsuperscript{80} This phase of the proposal suggests that the civil rights organizations that undertake
these tasks would have to seek a grant or funding to augment their staff with persons who were
skilled enough to teach the sport to the young athletes involved. A pool of former athletes
(perhaps even some former professionals) would probably be very enthusiastic about joining such
an effort; and they could be very effective, especially if they had a local reputation for being a
superior athlete. What is envisioned here, however, is not simply the teaching of sports skills, but
the education of the youths to the system that they would be organized to confront. In this guise,
they would function in the manner that Cordell Reagon of the Civil Rights Movement "Freedom
Singers" said that they envisioned their role—not merely as performers, but as organizers.
designate the proceeds as "charitable," it is not clear why the charity should not begin at home—that is, with the players who are providing the entertainment. If the players want to contribute their income to charity, at least they, and not the corporate sponsor, should be able to claim the tax benefit. Compensation at the high school level would also require some lobbying to change laws which mandate an amateur status for young athletes who play for their high school during the regular season.

Involvement of civil rights organizations in the manner suggested would place them in a position that they have yet to attain: a strong entree into the Ghetto and interaction with an endangered species—the young black male. Other forms of intervention could result collaterally. Black parents could benefit from an organization exclusively committed to the best interests of their children.81

Unfortunately, a serious impediment which might frustrate this proposal is that, although civil rights organizations have staff persons who are well-versed in the traditional problems of racial discrimination, they may have no expertise in the field of professional and amateur sports. Organizations are not likely to pursue projects in which staff members lack sufficient expertise. The best way to remedy this problem would be for the head of the organization or organizations, to seek separate and adequate funding in order to recruit new staff possessing the requisite background and information, for the project.82 Attorneys with the appropriate combination of expertise in sports law and an interest in public service could join the staff. The regular staff could then be educated by the consultants; clinical education became a fixture in the law school world in much the same manner, by funding programs around, and in addition to, the regular faculty.

81. The recruitment of talented youth can be intense and bewildering for parents and young athletes who are besieged by scouts from many colleges; parents and athletes could use helpful advice. See Rooney, supra note 74.

82. Napoleon Williams, a staff attorney at the NAACP Legal Defense Fund, Inc. (LDF) argues that it is inappropriate to ask civil rights organizations to function beyond the arena of racial discrimination and become all-purpose problem-solvers for the black community. My view, counter to that argument, is that civil rights organizations will become obsolete unless they can shift emphasis and direction in accordance with changes in the nature of problems facing the black community. In the late 1960s, LDF did that, to some extent, when it began to explore litigation in the area of poverty law.
VII. CONCLUSION

The general public may be shocked by the notion of open negotiation and payment to young athletes in football and basketball, since they have become inured to an early twentieth century nostalgic notion of amateur athletics. In the past, colleges were largely populated by the youth of upper- and upper middle-class families, and college sports had a strictly recreational flavor that intramural sports may have on a campus today. That day has long since passed. Today, many youths from poor families, who have worked hard to develop their talents, are being treated like indentured servants; they receive the equivalent of room and board, while working on a full-time basis to the financial benefit of everyone else but themselves. Civil rights organizations, who should be responding to new forms of exploitation of blacks, particularly of black youth, have the experience and techniques for dramatizing and ending the exploitation. They need only draw on their own recent history—a clear and unmistakable message of injustice and a people-based movement to confront the inequities. Perhaps one day we will look back and see that they have performed another miracle against great odds.