

INTERCOLLEGIATE ATHLETICS: AN IMMENSE
SCANDAL WITH LEGAL IMPLICATIONS. A
REVIEW OF JAY M. SMITH AND MARY
WILLINGHAM'S *CHEATED: THE UNC
SCANDAL, THE EDUCATION OF ATHLETES, AND
THE FUTURE OF BIG-TIME COLLEGE SPORTS*.

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In June of last year, the Southern Association of Colleges and Schools (SACS) levied on the University of North Carolina at Chapel Hill the penalty of “probation” for two decades of academic fraud. Probation is the most severe penalty the Association can levy short of the revocation of accreditation. The Association cited seven standards which, it said, violated the standards of academic integrity and monitoring college sports. “It’s a big deal,” said Belle Whelan, SACS president, “This issue was bigger than anything with which we’ve ever dealt, and it went on for longer than anything else. This is the first one I can recall in the 10 years I’ve been here that we put an institution on probation for academic fraud or [for violations of] academic integrity.”¹ The University will remain on probation until such time that it demonstrates its compliance with the principles of the Association.²

This book, *Cheated: The UNC Scandal, the Education of Athletes, and the Future of Big-Time College Sports*,³ jointly written by two people—Smith, a professor of French history at UNC, and Willingham, a former employee of the University’s Center for Student Success and Academic Counseling—who indirectly played roles in the well-known and much-covered scandal at the University—only now and again touches on issues

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1. Arielle Clay, *Accrediting Organization: Problems at UNC-CH ‘a big deal’*, WRAL (June 11, 2015), <http://www.wral.com/accrediting-organization-puts-unc-ch-on-12-month-probation/14704731/#eGxzQRmMBTstDImv.99>.

2. *Id.*

3. JAY M. SMITH & MARY WILLINGHAM, *CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS* (2015).

that properly can be termed “legal.” That there were massive and repeated violations of academic integrity over a twenty-year period at Chapel Hill cannot now be in doubt. That hundreds, if not thousands, of students were enrolled in classes that either never met or that required little or no work, that many if not most of those students were basketball or football players, that passing grades were awarded to those students so they could retain their eligibility, as per the rules of the National Collegiate Athletic Association (NCAA), to remain on the teams, and that most of these courses were offered by the Department of African and Afro-American Studies, has been established and is not disputed by the University. One clear legal issue—the indictment for fraud of the chairman of that department Dr. Julius Nyang’oro⁴—has been resolved with the announcement by Orange County District Attorney Jim Woodall that the charge has been dropped.⁵

Indeed, that the University flagrantly and repeatedly violated not only its own educational principles but also the embedded principles of American higher education is a fact that has been substantiated by an external investigative body hired by the University. Kenneth Wainstein, a former federal prosecutor, and his colleagues, A. Joseph Jay III, and Colleen Depman Kukowski, issued a report, “Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill” on October 16, 2014.⁶ That 131-page report, fully delineating the extent of the scandal, was released to the public and has been accepted by the University.⁷ In the summer of this year, the University, in response to the Wainstein investigation, reported to the NCAA additional potential violations involving the women’s basketball and men’s soccer teams. In direct response to these admissions, the NCAA stated that the University “lacked institutional control” over athletics, a finding serious enough that it could lead to postseason bans, the vacating of wins, and scholarship penalties. Such a finding could also bring about the

4. A grand jury indicted Nyang’oro on a felony charge of obtaining property by false pretense. Investigators say he accepted \$12,000 for teaching a summer school course in 2011, but no lectures were ever held. Nyang’oro pleaded not guilty to the fraud charge in December and was released on a \$30,000 bond.

5. Julia Sims, *Fraud Charge Dropped Against UNC’s Nyang’oro*, WRAL (July 3, 2015), <http://www.wral.com/unc-prof-nyang-oro-sees-fraud-charge-dropped/13786227/#5rBmxVIEgU7OpzX3.99>.

6. The entire report is at: Kenneth L. Wainstein, A. Joseph Jay III, & Colleen Depman Kukowski, *Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill* (Oct. 16, 2014), available at <http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/UNC-FINAL-REPORT.pdf> (last visited Nov. 1, 2015).

7. *Id.*

“death penalty,” which would shut down, for a certain period of time, specific athletic activities.⁸

What now remains to be said about this egregious (but not unique) instance of institutional malfeasance? More directly, what of legal interest is developed and exposed by Smith and Willingham’s study? The answer is not to be found in the bulk of the book. Most of its pages are given over to a detailed, if not tedious, and repetitive recitation of courses that never met but for which passing grades were awarded, instructors assigning no written work, faculty or staff “advisors” shunting athletes into “independent studies” courses for which there was no record of class meetings or formal assignments, and a general—if covert—understanding among certain coaches, members of the faculty, and members of the “Academic Support Program for Student Athletes” that special routes to passing grades had to be kept open to players of basketball and football (the two “profit sports” in American higher education). Those involved knew that such routes were closed to other students. The book is clear that University administrators, including the chancellor, Holden Thorp, did all they could, for as long as they could, to mask the existence of such a system and to ward off any close look at it. Even at the end-stage of the scandal, when the local newspaper, the *Raleigh News and Observer*, was uncovering fact after embarrassing fact, the authors say Thorp, “shared responsibility for the institutional strategy of protecting athletics from further harm, even if it meant that honesty and integrity had to go by the wayside.”⁹

Nor does this book shed very much new light on the Chapel Hill story. Despite the fact that Smith and Willingham were working on the campus and were thus afforded an exceptionally close look at the corruption of its academic life, their account does not significantly differ from that given by Paul Barrett writing in *Bloomberg Businessweek*.¹⁰ In fact, Barrett brings in more detailed information about, among other things, the exact numbers of athletes involved, the amount of money generated across the nation by the two “profit sports,” the number of grades that were changed at Chapel Hill (more than 500), and the number of Chapel Hill “at-risk” athletes from 2004 to 2012 who were reading at a third-grade level (some ten percent).¹¹

8. Andy Thomason, *Chapel Hill Lacked “Institutional Control” Over Athletics, NCAA Says*, CHRON. HIGHER EDUC. (June 4, 2015), <http://chronicle.com/blogs/ticker/chapel-hill-lacked-institutional-control-over-athletics-ncaa-says/100173>.

9. SMITH & WILLINGHAM, *supra* note 2, at 111.

10. Paul M. Barrett, *In Fake Classes Scandal, UNC Fails Its Athletes—and Whistle-Blower*, BLOOMBERGBUSINESSWEEK (Feb. 27, 2014), <http://www.bloomberg.com/bw/articles/2014-02-27/in-fake-classes-scandal-unc-fails-its-athletes-whistle-blower>.

11. *Id.*

As they bring their history of academic dishonesty at Chapel Hill to a close, Smith and Willingham broaden their findings to include similar, and similarly distressing, accounts at Auburn University, the University of Washington, the University of Michigan, and the University of Minnesota: fictitious courses, “ghost-written” essays composed by faculty members friendly to athletes, and equivalent scenarios of cover-up and stalling as whistle-blowers asked uncomfortable questions and local newspapers energetically moved in with investigations. The geography changes but the scandal remains the same.

“Honesty” and “integrity,” however, while profoundly important to institutions of higher education, are not terms that carry legal import. Only toward the end of the book do Smith and Willingham introduce certain issues that bring the scandal at Chapel Hill and other schools within the purview of legal interest.

Charging that the schools in question engage in “cartel-like practices,” the authors note that initiatives, such as the one sponsored by Congressman Charlie Dent of Pennsylvania and Tony Cardenas of California and the one drawn up by the Drake Group (an association of academic leaders founded in 1999 and devoted to “academic integrity in collegiate sport”), ask hard questions about the legal protections available to athletes, the degree to which their physical well-being was being protected, the terms by which their “grants-in-aid” (scholarships) are granted or removed, and the academic standards to which they should be held accountable. Asking these questions makes it easy to understand why, in 2014, the National Labor Relations Board in Chicago announced that football players at Northwestern University should enjoy the rights and protections afforded to Northwestern employees.¹² To think of those players not as “student-athletes,” but as employees, takes the discussion directly into a larger discussion about the athletes’ right to bargain and to earn money as a result of their grueling labors. In August of this year, however, the NLRB headquarters unanimously dismissed the petition of the Northwestern players to unionize, saying that “asserting jurisdiction in this case would not serve to promote stability in labor relations” and would, it implied, upset competitive balance in college sports.¹³ The NLRB did not, however, rule on a central question in the case — whether the players are university employees - leaving open the possibility that it could do so in the future.¹⁴

12. Northwestern University and C.A.P.A., 2014-15 N.L.R.B. Dec. P 15781 (Mar. 26, 2014).

13. Northwestern University and C.A.P.A., 362 N.L.R.B. No. 167 (2015).

14. Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players’ Union Bid*, N.Y. TIMES (Aug. 17, 2015), <http://www.nytimes.com/2015/08/18/sports/ncaafotball/nlrbsays-northwestern-football-players-cannot-unionize.html>.

A collateral legal pursuit discussed by Willingham and Swift issues from a class-action lawsuit brought by two former athletes, Ed O'Bannon and Martin Jenkins, against the National Collegiate Athletic Association. The former players are challenging the organization's use of the images of its former athletes for commercial purposes. O'Bannon and Jenkins argue that a former student athlete should become entitled upon graduation to financial compensation for the commercial use to which his or her image is put. In response, the NCAA maintains that paying its athletes would be a violation of its concept of the "student athlete." In August of 2014, District Judge Claudia Wilken found for O'Bannon and held that the NCAA's rules and bylaws work in unreasonable restraint of trade, and thus in violation of antitrust law.¹⁵ One year later, an appellate court issued a stay to Judge Wilken's decision, thus granting at least a temporary reprieve for the NCAA.¹⁶

The ultimate solution to the dismaying crisis in intercollegiate sports could issue from ideas clearly legal in nature that have been proposed by, among others, labor attorney Jeffrey Kessler and *New York Times* columnist Joe Nocera. Kessler filed last year an antitrust suit in a New Jersey federal court on behalf of a group of college basketball and football players, arguing the association unlawfully limits player compensation to the value of an athletic scholarship. Kessler said, "in no other business—and college sports is big business—would it ever be suggested that the people who are providing the essential services work for free. Only in big-time college sports is that line drawn."¹⁷

For his part, Nocera, in column after column, has noted with anger that while the coaches at some schools make millions of dollars, those who play the "profit sports" make nothing. "The central conundrum is that universities are simply not built to run a multibillion-dollar entertainment industry. The only way they can do it is by looking the other way at certain practices, and making allowances for good athletes who don't care much about college itself. One of the reasons I advocate paying football and men's basketball players is that it would at least ensure that they got something for their efforts."¹⁸ Of course the schools will strongly resist this initiative and, in doing so, will rely on the notion of the "student-athlete," asserting that the education and the "grant-in-aid" provided to the

15. See *O'Bannon v. NCAA*, 7 F.Supp.3d 955, 1009 (N.D. Cal. 2014) ("[T]he Court finds that this restraint does violate antitrust law.").

16. See Marc Tracy and Ben Strauss, *Court Grants Stay in O'Bannon Case*, N.Y. TIMES (July 30, 2015), <http://www.nytimes.com/2015/08/01/sports/court-grants-stay-in-obannon-case.html>.

17. Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014), http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model.

18. Joe Nocera, *Playing College Moneyball*, N.Y. TIMES (Jan. 12, 2015), <http://www.nytimes.com/2015/01/13/opinion/joe-nocera-playing-college-moneyball.html>.

players is compensation enough. In all likelihood, both the initiative and the claim will find their way to the courtroom.

Another approach described by Willingham and Swift as they conclude is for the schools to establish rigorous programs for the remediation of students, including athletes, who are simply unprepared to perform at the collegiate level. This would mean, they write, “academics finally placed in a position of supremacy” on the campus, with practice time limited, with shorter seasons and less travel, and with more and better counseling. Again, as worthy or as practicable as these changes might be, they carry with them no legal implications. But what might well carry such implications would be a revision or the revocation of the Family Educational Rights and Privacy Act of 1974. Today, Willingham and Swift argue, the Act works to limit public knowledge of information about the educational records of all students including athletes and workers, in the Chapel Hill case, to shield those athletes from inquiry into their attendance in class, their selection of courses, and, among other things, their record of traffic violations on campus. This too would be opposed by many people, including both athletes and administrators, and would ultimately be destined for judicial treatment.

Other legal issues, not discussed by Willingham and Swift, await their possible day in court. Should content-free and work-free courses such as those liberally granted over the years at Chapel Hill entitle students who took advantage of those courses to a graduation degree? Or should those degrees be revoked? Should there be legal investigation of the possibility of the abuse of Federal monies—Pell grants, SEOG grants—that undergirded such courses?

In sum, this book is clear and detailed in its coverage of an immensely ugly and painful chapter in the history of the University of North Carolina at Chapel Hill. But only in its concluding pages does it direct attention to issues rising to formal legal pertinence.