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ESSAYS

A REJOINDER TO TIMOTHY DAVIS, INTERCOLLEGIATE ATHLETICS IN THE NEXT MILLENNIUM: A FRAMEWORK FOR EVALUATING PROPOSALS, 9 MARQ. SPORTS L.J. 253

ALLEN L. SACK & ELLEN J. STAUROWSKY*

When Ellen Staurowsky and I began research on our book, *College Athletes for Hire*, one of our major goals was to stimulate a national debate over the use and abuse of the term “amateur” as it applies to collegiate sport. We were especially interested in reactions from the legal community given the critical role that attorneys have often played in shaping NCAA policy. We were therefore happy to find that our book had been prominently featured in Timothy Davis’ recent symposium article on collegiate sport reform that appeared in the *Marquette Sports Law Journal*.¹ However, we are concerned that Davis’ rendering of some of our central arguments and proposals may divert attention away from important legal issues that attorneys are likely to encounter as the college sport industry enters the next millennium.

Underlying Davis’ entire framework for evaluating recent proposals for collegiate athletic reform is his assumption that scholarship athletes are amateurs pursuing sport during their free or discretionary time. Once this premise has been established a priori, any effort at reform that supports open professionalism (such as the proposal we make in the final chapter of our book) can be easily dismissed on the grounds that the primary mission of colleges and universities is education, not professional entertainment. Based on the historical record, however, one can just as easily argue that it was the NCAA that fashioned the first signifi-

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1. See Timothy Davis, *Intercollegiate Athletics in the Next Millenium: A Framework for Evaluating Proposals*, 9 MARQ. SPORTS L.J. 253 (1999).

cant professional model of college sport.² The illusion of amateurism was then maintained to avoid unrelated business income taxes, antitrust scrutiny, and demands by players for benefits such as workers compensation and a greater share of the revenue they help to generate

Most of the reasons Davis cites for opposing the intrusion of professionalism into intercollegiate sport are right on target. What he fails to acknowledge in his article, however, is the degree to which the NCAA itself has abandoned the amateur principles upon which it was founded. At its first annual convention in 1906, the NCAA included among violations of amateurism "the offering of inducements to players to enter colleges or universities because of their athletic abilities, or supporting or maintaining players while students on account of their athletic abilities, either by athletic organizations, individual alumni, or otherwise, directly or indirectly."³ The principle of amateurism, as originally conceived by the NCAA, clearly forbade scholarships or financial aid based on athletic rather than academic ability.

Early NCAA opposition to scholarships and other financial inducements to athletes was in part a reflection of elitist notions derived from the British aristocracy. However, there were also academic reasons for opposing professionalism in the form of athletic scholarships. Among these was the concern that subsidizing students for playing sports would divert their attention away from the essential educational mission of a university, and cut them off from the mainstream of academic life. Respected educators in the Ivy League and in the NCAA's Division III continue to this very day to insist that granting athletic scholarships creates a class of athletic specialists for whom sport is more of a profession than an avocation. Howard Savage in his famous Carnegie Report of 1929 cited athletic scholarships as one of four types of athletic subsidization that was undermining amateur college sport in America.⁴

As college sport evolved as a viable form of mass commercial entertainment in the early 20th century, payments to college athletes from sources both within and outside of universities became fairly commonplace. Nonetheless, it was not until 1956 that the NCAA, under pressure

2. A major source of confusion throughout the Davis article is his failure to distinguish between two concepts that are analytically distinct: commercialism and professionalism. Following a distinction made by Howard J. Savage in *American College Athletes* (1929), my co-author and I defined commercialism as staging athletic events to generate revenue, and professionalism as subsidizing athletes for their performance. It was the evolution of NCAA-sponsored professionalism that was the primary focus of our book, not commercialism.

3. NCAA PROCEEDINGS OF THE FIRST ANNUAL CONVENTION, Dec. 29, 1906, at 33.

4. SAVAGE, *supra* note 2, at 201.

from a significant portion of its membership, changed its constitution and bylaws to allow colleges to award scholarships based on athletic ability. In 1957, these grants were set at room, board, tuition, fees, and laundry money.⁵ Walter Byers, the executive director of the NCAA at the time scholarships were legalized, recently characterized this watershed decision as “a nationwide money laundering scheme” whereby money formerly given “under-the-table” to athletes and their families could now be funneled through university channels.⁶

From a legal perspective, an athletic scholarship awarded in 1956 was more like a gift to further an athlete’s education than an employment contract. During these early years, schools were allowed to pay the educational and living expenses of athletes for four years, but could not remove or reduce the award if they voluntarily withdrew from their sport, sustained an injury, or proved to be a recruiting mistake. At this point in the evolution of athletic subsidization, universities were still financially committed to athletes as students regardless of their performance in sports. This system came under attack, however, in the early 1960s when increasing numbers of athletic directors began complaining that athletes were accepting scholarships and then deciding for one reason or another not to play.⁷

In 1967, the NCAA passed legislation that gave athletic scholarships the force of a contractual quid-pro-quo. According to this new legislation, if a scholarship athlete made only token appearances at practice or did not show up at all, such action would be considered a fraudulent misrepresentation of information on the student’s admissions application, letter of intent, or tender, and would constitute grounds for the immediate termination of financial aid.⁸ The 1967 legislation also allowed the termination of aid to athletes who refused to follow the directions of athletic department staff members. This legislation gave coaches the kind of financial control over athletes that one usually associates with employment.

5. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1956-57 YEARBOOK, at 4.

6. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES (1995).

7. During this period, Arizona State’s athletic director complained to Walter Byers that “approximately 10 students who had accepted their scholarships to compete in our program . . . have decided not to participate. I think that this is wrong. Regardless of what anyone says this is a contract and it is a two-way street.” ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA’S AMATEUR MYTH 83 (1998).

8. NCAA PROCEEDINGS OF THE 61ST ANNUAL CONVENTION, Jan. 9-11, 1967, at 122.

These new rules allowed the termination of scholarships for perceived insubordination or failure to take sports seriously. But schools with four-year scholarships still had no way to cancel the awards of players who had sustained injuries or who turned out to be recruiting mistakes. In 1973, the NCAA dealt with this problem by replacing four-year scholarships with grants that had to be renewed on a year-to-year basis.⁹ Universities could now eliminate "dead wood" by simply not renewing a scholarship. Although removal of financial aid from an injured athlete would be bad public relations, this could now be done without violating the NCAA's "amateur" code.

As this brief historical sketch indicates, the NCAA, between 1956 and 1973, crafted legislation that gave college sport all of the earmarks of employment.¹⁰ Not only were scholarship athletes now contractually obligated to play sports, but the significant role played by coaches in awarding and withdrawing financial aid gave them considerable control over athletes' lives. As the revenue derived directly and indirectly from commercial college sport has dramatically increased in recent years, sport has become an integral, albeit unrelated business of many universities. In light of these changes, it is difficult to accept Davis' portrayal of big-time college athletic programs as amateur activities that are substantially related to the academic mission of colleges and universities.

In the early drafts of our book, Ellen Staurowsky and I limited our proposals for athletic reform to those that could expand the realm of true amateurism in collegiate sport. The model we felt would work best was the one adopted by Division III schools and in the Ivy and Patriot Leagues where financial aid is based on need. However, we were ultimately convinced that it would be unrealistic to expect athletic powers such as Notre Dame and Michigan to abandon athletic scholarships. Therefore, we ended up proposing a two-tiered system that would expand the realm of true amateur sport, and at the same time leave room for a small number of sport super powers to operate their programs as totally self-supporting and unrelated university businesses.

It is our opinion, as former college athletes who are now college professors, that the professional model we proposed would offer athletes greater educational opportunities than the veiled professional model em-

9. BYERS, *supra* note 6, at 164.

10. For a legal definition of employment for workers compensation purposes see *Askew v. Macomber*, 398 Mich. 212, 247 N.W. 2d. at 226-226 (1983). When the four Askew factors are applied to modern scholarship athletes, it is difficult to see how the objective conditions of college sport differ from employment.

braced by Davis and the NCAA. In our model, the benefit package would include, among other things, room and board, plus one year of college tuition for each of the four-years of professional college sport completed. Athletes would have up to ten years from the time they enter the league to take advantage of the tuition credits they have earned. Admission standards and other requirements would be the same as for other students. In this collegiate professional division, college athletes would not have to be registered college students. However, we assume that most of them would at some point want to take advantage of this substantial educational benefit.

The educational advantages of this system over the professional model currently in place under NCAA rules seem obvious. Under the current system, scholarship athletes are contractually obligated to make sport their major priority. Yet, in order to maintain the amateur mythology that athletes are just regular students engaging in sport during their leisure time, the NCAA demands that they carry a full-time academic load of at least 12 credits a semester. Our model would allow athletes to pursue their education at their own pace and in a way that acknowledges the tremendous emotional and physical demands often associated with professional college sport. For athletes from educationally disadvantaged backgrounds our system would offer a genuine opportunity to get a meaningful education.

One of the concerns that Davis raises about an openly professional model is that it may reinforce the stereotype that athletes in revenue-producing sports (including substantial numbers of African Americans) have less of an interest in obtaining an education than other students. This is a legitimate concern. However, we are convinced that the current system is equally, if not more likely, to spawn such stereotypes. In our view, the vast majority of athletes do value education, but are caught up in a system that expects them to be both full-time students and professional entertainers. The myth of amateurism, by obscuring the tremendous demands often made on athletes as a condition for maintaining financial aid, leads many people to underestimate what athletes could accomplish if they were just regular students.

In an openly professional model such as the one we propose, athletes would have an opportunity to pursue a legitimate academic degree at times when the demands of sport are minimal or nonexistent. They would also be able to earn enough money from their athletic activities to ease the financial burden on their families. Not only would they be able to develop their academic and intellectual abilities to the fullest, but they would have the satisfaction of knowing that they had used their excep-

tional athletic abilities to pay for their college education. Those who stereotype scholarship athletes as a privileged elite gliding through college on a "free ride" could no longer diminish athletes' contributions and accomplishments.

A detailed treatment of every aspect of the compensation system we are proposing goes beyond the scope of this article and we admit that our proposal needs more attention to detail than we provided in our book. Suffice it to say, however, that in addition to the educational benefits already discussed, we believe professional college athletes, whether in our model or in the NCAA sponsored professional model, have a legal right to engage in the same kinds of entrepreneurial activities currently pursued by their coaches. These include product endorsements, speaking engagements, television appearances, and advances from sports agents. Compensation systems such as these are already being discussed by the NCAA as methods of preventing loss of talented players to other professional leagues. In addition, players should receive a yearly stipend commensurate with the financial realities of an open market.

College sport is currently undergoing a commercial revolution that pervades virtually every niche and cranny of university life. Given these dramatic changes, it is crucial that alternate models of reform be proposed and evaluated. It is unlikely, however, that reasoned and dispassionate discussion of alternate proposals is possible within the framework that ignores the possibility that many obstacles to maintaining academic integrity are related to professionalism embedded in the NCAA's own constitution and bylaws. What is needed is an open debate of the legal, social, and educational impact of the NCAA's use of the term amateurism, and its appropriateness in the next century. This debate should be informed by an honest look at collegiate sport history.