

Marquette Sports Law Review

Volume 26

Issue 2 Symposium: *The Changing Landscape of
Collegiate Athletics*

Article 2

Foreword

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Repository Citation

Jill K. Ingels, *Foreword*, 26 Marq. Sports L. Rev. 281 (2016)

Available at: <http://scholarship.law.marquette.edu/sportslaw/vol26/iss2/2>

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SYMPOSIUM:
THE CHANGING LANDSCAPE OF COLLEGIATE
ATHLETICS
FOREWORD

JILL K. INGELS*

In the third edition of *Sports Law and Regulation: Cases, Materials, and Problems*, Professors Matthew J. Mitten, Timothy Davis, Rodney K. Smith, and N. Jeremi Duru foreshadow changes within collegiate athletics.¹ The authors noted that “in the face of a highly commercialized culture driven by an apparent ‘win at all costs’ mentality, the second decade of the twenty-first century may be a decade of significant change that advances the interests of student-athletes and academic values.”²

As predicted, over the last several years, collegiate athletics has faced several questions and challenges, all changing the landscape of the NCAA and the governance of student-athletes and college sports. Debates have arisen regarding whether student-athletes should be paid, whether student-athletes should or can unionize, how colleges and universities may monitor its student-athletes’ social media, whether eligibility requirements disadvantage a class of student-athletes, and more. Twenty-first century student-athletes and collegiate athletics are heading in a direction drastically different than any other time in history, all seemingly motivated by the revenue-generating possibility of student-athletes and the changing landscape of the business of college sports.

The articles and comment in this symposium explore the issues facing the college sports industry and explore the effects on student-athletes, colleges and universities, and the NCAA. This symposium begins with an article by Adam Epstein and Paul M. Anderson, who offer a historical and legal perspective explaining the relationship between a college or university and a

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1. See MATTHEW J. MITTEN, ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 104 (3d ed. 2013).

2. *Id.*

student-athlete.³ The foundation of this relationship, aside from contract law, is amateurism, which Brian L. Porto thoroughly explores.⁴ Porto discusses how the meaning of amateurism has evolved since the NCAA's founding in 1906 and offers several proposals for potential adoption to harmonize sport and higher education. Just as amateurism has changed over time, so too has the business of college football. Thomas A. Baker III and Natasha T. Brison analyze how *NCAA v. Board of Regents* and *O'Bannon v. NCAA* led to significant changes in the application of antitrust law on college football and student-athlete regulation, respectively.⁵ As the next article, written by Thomas J. Horton, Drew DeGroot & Tyler Custis, discusses, conflicting court decisions, including *O'Bannon*, involving antitrust and employment law contributed to a serious crisis facing collegiate athletics.⁶ The authors review these legal trends to advocate for legislative action to balance the social, moral, and economic values integral to collegiate athletics.⁷ Rounding out the antitrust discussion is Andy Schwarz and Richard J. Volante's article, describing how the majority opinion in *O'Bannon* was an economic fallacy since the NCAA's collective boycott stifles competition and narrows consumer choice instead of advancing any procompetitive effect.⁸

Another article looking to economic theory to explain the changing landscape of collegiate athletics is Jill S. Harris's article regarding the demand for student-athlete labor and the corresponding number of NCAA rules violations.⁹ Using a reciprocal demand model, Harris illustrates how NCAA member institutions are willing to incur rules violations if those violations mean the institution acquires high-quality student-athlete labor.¹⁰ Michael Kessler's article also discusses how member institutions are making sure their student-athletes are on the court or playing field by punishing student-athletes differently for similar conduct. Kessler calls for the NCAA's help in adopting

3. See generally Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287 (2016).

4. See generally Brian L. Porto, *Neither Employees Nor Indentured Servants: A New Amateurism for a New Millennium in College Sports*, 26 MARQ. SPORTS L. REV. 301 (2016).

5. Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O'Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331 (2016).

6. See generally Thomas J. Horton, Drew DeGroot & Tyler Custis, *Addressing the Current Crisis in NCAA Collegiate Athletics: Where is Congress?*, 26 MARQ. SPORTS L. REV. 363 (2016).

7. *Id.* at 364–65.

8. See generally Andy Schwarz & Richard J. Volante, *The Ninth Circuit Decision in O'Bannon and the Fallacy of Fragile Demand*, 26 MARQ. SPORTS L. REV. 391 (2016).

9. See generally Jill S. Harris, *The Demand for Student-Athlete Labor and the Supply of Violations in the NCAA*, 26 MARQ. SPORTS L. REV. 411 (2016).

10. *Id.* at 411.

a uniform disciplinary policy to prevent such behavior, to help promote accountability on the part of student-athletes, and to promote transparency on behalf of each member institution.¹¹

This symposium also addresses the issues surrounding student-athlete labor. Todd A. McFall's article advocates for the NCAA and student-athletes to compromise on a compensation structure to ensure a rival league does not threaten the NCAA's existing structure.¹² David J. Berri then analyzes why schools limit the pay of student-athletes, how doing so affects competitive balance in collegiate athletics, and, finally, how much member institutions would pay student-athletes if compensation was unlimited.¹³ Berri concludes that the NCAA's argument that competitive balance is promoted by restricting student-athlete compensation, however, is inconsistent with empirical evidence indicating that student-athletes are, in fact, exploited.¹⁴ Another potential way in which student-athletes are harmed by the current structure of collegiate athletics comes from Phillip J. Closius's conclusion that then Second Circuit Judge Sotomayor's opinion in *Clarett v. NFL*, which he also argues was wrongly decided, restrains college student-athletes by inhibiting their ability to enter the NBA or the NFL much sooner than currently allowable.¹⁵ But court opinions are not the only way that student-athletes may be restrained. Other authors within this symposium believe that the NCAA is also obstructing student-athletes' ability to participate in athletics. Akuoma C. Nwadike, Ashley R. Baker, Velina B. Brackebusch, and Billy J. Hawkins address the looming consequences of the "2.3 or Take a Knee" legislation, which will first affect the 2016 incoming class of student-athletes.¹⁶ These authors offer a historical survey of the NCAA's eligibility standards to call into question the NCAA's racial integrity, believing the eligibility standards are skewed as to alienate African-Americans from participating in collegiate athletics altogether.¹⁷

Another important series of issues facing collegiate athletics, today, regards Title IX, which several authors within this symposium address, analyze, and explore. First, Anita M. Moorman and Barbara Osborne analyze Title IX's

11. See generally Michael Kessler, *Let's Give It Arrest: Why the NCAA Should Adopt a Uniform Disciplinary Policy*, 26 MARQ. SPORTS L. REV. 433 (2016).

12. See generally Todd A. McFall, *Hey, College Sports. Compromise on Compensation and You Can Have a Legal Monopoly*, 26 MARQ. SPORTS L. REV. 459 (2016).

13. See generally David J. Berri, *Paying NCAA Athletes*, 26 MARQ. SPORTS L. REV. 479 (2016).

14. *Id.* at 480–81.

15. See generally Phillip J. Closius, *The Jocks and the Justice: How Sotomayor Restrained College Athletes*, 26 MARQ. SPORTS L. REV. 493 (2016).

16. See generally Akuoma C. Nwadike, et al., *Institutional Racism in the NCAA and the Racial Implications of the "2.3 or Take a Knee" Legislation*, 26 MARQ. SPORTS L. REV. 523 (2016).

17. *Id.*

sexual violence protections to determine whether colleges and universities, in light of heightened awareness of possible violations of federal laws by institutions in handling sexual violence and harassment complaints, are protecting its students.¹⁸ The authors recommend that college administrators, athletics administrators, and coaches implement consistent best practices, within and outside of the athletics program, to prevent sexual violence on campus and ensure the institution's sexual misconduct policies accurately reflect the current state of the law.¹⁹ Another Title IX issue addressed within this symposium is James J. Hefferan, Jr.'s analysis of what activities are considered sports for purposes of Title IX under the three *Biediger v. Quinnipiac University* decisions.²⁰ Hefferan also explores the implications of these *Biediger* decisions on Title IX litigation in the future.²¹ Again, while Title IX makes no mention of athletics or sports, Pamela Bass notes how Title IX has had a great impact on collegiate athletics.²² Bass's article offers economic, social, and legal perspectives as to why fewer women are holding the role of head coach at member institutions while female participation in athletics is at its highest.²³

Just as Title IX issues in collegiate athletics are gaining national attention, so too are the issues surrounding the use of social media. One article within this symposium highlights the issues surrounding today's digital age in athletics and athletic departments. Stephen W. Dittmore reviews the potential legal issues, from First Amendment issues to copyright law, to explore whether athletic departments are, in fact, media organizations, and to what extent the digital age affects how an institution may protect its intellectual property.²⁴

Also featured within this symposium is a report by Martin J. Greenberg and Alexander W. Evrard regarding the integral role that athletic directors play within college and university athletic departments. The authors thoroughly illustrate how athletic directors, today, act like a company's chief executive officer and this article examines everything there is to know about athletic directors—from their employment contracts and responsibilities to changes the

18. See generally Anita M. Moorman & Barbara Osborne, *Are Institutions of Higher Education Failing to Protect Students?: An Analysis of Title IX's Sexual Violence Protections and College Athletics*, 26 MARQ. SPORTS L. REV. 545 (2016).

19. *Id.* at 578–80.

20. See generally James J. Hefferan, Jr., *A Sporting Chance: Biediger v. Quinnipiac University and What Constitutes a Sport for Purposes of Title IX*, 26 MARQ. SPORTS L. REV. 583 (2016).

21. *Id.*

22. See generally Pamela Bass, *Second Generation Gender Bias in College Coaching: Can the Law Reach That Far?*, 26 MARQ. SPORTS L. REV. 671 (2016).

23. *Id.*

24. See generally Stephen W. Dittmore, 26 MARQ. SPORTS L. REV. 713 (2016).

authors believe athletic directors will face in the future.²⁵

Darius Love's Comment rounds out this symposium, exploring the First Amendment issues associated with public universities regulating student-athlete social media use if such student-athletes were granted employee status.²⁶ The *Northwestern University* unionization case is analyzed to determine what needs to occur before student-athletes could be deemed employees at member institutions.²⁷

The extensive array of articles within this symposium issue demonstrate how the landscape within and future of collegiate athletics, and the NCAA, has changed and is continuing to change. From student-athlete compensation to First Amendment issues, the study of sports law at the collegiate level continues to grow and develop over time. Whether we will see the issues within this symposium be addressed by member institutions, the NCAA, and even Congress in the coming years is left to be seen. The *Marquette Sports Law Review* remains dedicated to continued scholarship in the area of sports law and looks forward to hopefully publishing articles in the future with the answers to some of the issues and questions presented within this symposium.

25. See generally Martin J. Greenberg & Alexander W. Evrard, *Athletic Directors*, 26 MARQ. SPORTS L. REV. 735 (2016).

26. See generally Darius Love, Comment, *Work, Play, Tweet: Public University Regulation of Employed Student-Athlete Social Media Use*, 26 MARQ. SPORTS L. REV. 825 (2016).

27. *Id.*