

5.3 The evolution of professional college sport in the United States

Allen Sack¹

The United States is the only country in the world in which colleges and universities stage mass athletic spectacles for commercial gain. In 2013 athletic programmes in higher education accounted for an estimated US\$6.1 billion in revenue from activities such as ticket sales, television and radio receipts, alumni contributions, guarantees, royalties and association distributions.² Given that the athletes in this industry receive only room, board, tuition and fees as compensation, it is not surprising that the issue of providing college athletes with a greater share of the revenues has generated heated debate. This article examines the evolution of professional college sport in the United States, and makes recommendations for how to defend academic integrity in higher education from the corrosive aspects of the college sport industry.

Historical context

At its first business meeting, in 1906, the National Collegiate Athletic Association (NCAA) took a position on amateurism that was unequivocal and perfectly consistent with the model inherited from elite British universities and public schools.³ According to article VI of the by-laws, each institution was required to enforce amateur principles. The 'offering of inducements to players to enter colleges or universities because of their athletic abilities, or maintaining players while students on account of their athletic abilities', were treated as blatant violations of amateurism. Need-based aid not related to sports did not violate amateurism. Athletic scholarships did.⁴

As the twentieth century progressed, rampant commercialism in college sports and the NCAA's lack of enforcement power made violations of amateur rules a national scandal.⁵ As the financial stakes increased, so too did the pressure to recruit and subsidise the best players. In an effort to regulate behaviour it could not totally prevent, the NCAA compromised its amateur code in 1956 by allowing subsidies in the form of athletic scholarships. An official interpretation in the 1957 NCAA constitution limited these subsidies to room, board, tuition, fees, books and US\$15 a month for laundry.⁶

According to Walter Byers, the NCAA executive director during this period, the new scholarships, which were awarded for up to four years, could not be withdrawn if the recipient chose not to play. He did not want players to be mistaken for employees. When a college player was killed in an aeroplane crash while on an American football trip in the early 1960s, however, his family was awarded workers' compensation benefits, on the grounds that the payments he received each school quarter and his rent money during the playing season were conditioned on his playing football. This ruling was taken very seriously by the NCAA.⁷

Byers was concerned that some colleges were offering one-year grants that could be cancelled if athletes voluntarily withdrew from sports, arguing that these grants 'came perilously close to employment contracts'.⁸ Everett Barnes, the NCAA secretary/treasurer, contacted Warren Ashmead, an attorney, to get his opinion, which he shared with Byers. Ashmead's opinion was that, 'if scholarships are not contingent on athletic activity, the athlete would not come under workman's compensation as there would be no penalty to students when and if they cease athletic endeavors'.⁹

The issue seemed settled, until coaches, athletic directors and others began to complain in the late 1960s that athletes were accepting scholarships but deciding not to play. In other words, by granting

'no cut' four-year scholarships, the NCAA was protecting itself from workers' compensation lawsuits, but leaving the membership vulnerable to athletes who correctly concluded that they were not employees under contract and could therefore walk away from sporting activities if they so desired. To address this problem, the NCAA passed rules in 1967 to allow the immediate cancellation of the scholarship of an athlete who voluntarily withdrew from sport or who violated team rules.¹⁰

The 1967 decision allowed universities to cancel the scholarship of players who decided to quit or who violated team rules, but it did not allow coaches to get rid of 'dead wood' whose lack of skills put their teams at a competitive disadvantage. The NCAA dealt with this problem in 1973 by introducing one-year-renewable scholarships – a strategy that Byers had rejected earlier. This rule, which went unchanged until 2012, allowed the cancellation of an athlete's scholarship at the end of one year for virtually any reason, including injury, contribution to team success, the need to make room for a more talented recruit or failure to fit into a coach's style of play. The contractual nature of this relationship is unmistakable.¹¹ Athletic performance in one year now became a condition for retaining the grant in a subsequent year.

Not long after the 1973 decision a number of players claimed that they were employees at the time they sustained serious injuries while playing college football. In one case, an athlete relied on what is often called an economic realities test to support his claim to be an employee.¹² According to this test, as used in the state of Michigan, four factors must be present in a contract for hire: the proposed employer's right to control the activities of the proposed employee; the proposed employer's right to discipline or fire the proposed employee; the payment of wages or other benefits for daily living expenses; and whether the task performed was an integral part of the employer's business. The athlete lost his case in this instance, because the judge ruled that college football is not a university business.

Over the next four decades one-year-renewable scholarships provided the burgeoning multi-billion-dollar college sports business with a reliable and disciplined source of cheap labour. Athletes who have not met a coach's performance expectations can be encouraged to transfer, or simply stripped of financial aid. Although several workers' compensation cases have been taken to court over the past couple of decades, NCAA attorneys and NCAA member institutions have been able to persuade judges that college athletes are merely students engaged in an amateur extracurricular activity.¹³

The twenty-first century: the NCAA under attack

Although the NCAA's amateur rhetoric dominated legal thinking throughout the twentieth century, the unbridled commercialisation of big-time college sport in the United States during the opening years of the new century has left the NCAA more exposed to legal attacks than ever.¹⁴ Among the plaintiffs who have sued the NCAA during this period is Ed O'Bannon, a former NCAA basketball player, who challenged the NCAA rule that bars college athletes from receiving a share of the revenue the NCAA and its member institutions earn from the sale of licences to use players' names, images and likenesses. The players contend that these rules are an unreasonable restraint of trade and thus violate the Sherman Antitrust Act, which aims to prohibit anti-competitive practices.

In 2014 the federal judge in the O'Bannon case ruled that the NCAA's limits on what major college football and men's basketball players can receive for playing sports unreasonably restrain trade, in violation of the antitrust laws.¹⁵ The ruling enables football players in the top Division I Football Subdivision (FBS) and male basketball players in Division I to receive a stipend of US\$5,000 a year, taken from the revenue the NCAA generates from the licensing of players' names, images and likenesses. These stipends will remain in trust while athletes are at school. The players will also

receive the full cost of attendance, which generally exceeds the current scholarship of room, board, tuition and fees by several thousand dollars, depending on the location of the college or university attended.¹⁶

According to the judge in the O'Bannon case, the historical record reveals that the NCAA has revised its rules governing athlete compensation numerous times over the years: 'Rather than evincing the association's adherence to a set of core principles, this history documents how malleable the NCAA's definition of amateurism has been since its founding.'¹⁷ This characterisation of the current use and misuse of the term 'amateur' by the NCAA adds considerable support to the central thesis of this article, namely that the definition of amateurism used by the founding fathers of the NCAA has been transformed on a number of occasions to suit the NCAA's political agenda. A counterfeit version has replaced the real thing.

The NCAA appealed this case,¹⁸ and other antitrust cases against the NCAA are still in the pipeline. But the most significant challenge to the NCAA's argument that big-time college athletes are amateurs and not professional employees is currently taking place in the state of Illinois, where the National Labor Relations Board (NLRB) has recently ruled that the Northwestern University football team has the right to unionise.¹⁹ Under the common law definition of employment, an employee is a person who performs services for another under a contract for hire, subject to the other's control or right of control and in return for payment.²⁰ College athletes would appear to fit the common law definition, and the NLRB in Illinois recently used this common law definition to argue its case.

It is significant to note that the NCAA, under pressure from the US Department of Justice, has recently changed its rules to give colleges and universities the option to return to the multi-year scholarships that were in effect before 1973, and that Northwestern is one of the schools that has done so.²¹ The NLRB argues, however, that a football player's scholarship can be cancelled immediately if the athlete voluntarily withdraws from sport or abuses team rules. Training for football at Northwestern University continues on a year-round basis. According to the NLRB decision, Northwestern players must devote 40 to 50 hours per week during the football season to their football duties. Athletes have to schedule classes to meet the demands of sport, and sometimes switch to easier majors to have more time for football. Failure to follow these rules puts an athlete's scholarship at risk.²² Northwestern has appealed the NLRB decision to the full NLRB. Just as in the O'Bannon case, this is still a work in progress. Nonetheless, it is fair to say that the very thought that plaintiffs might ultimately win these cases has created the greatest crisis in the history of college sport in the United States.

Discussion and recommendations for reform

Throughout the early twentieth century the NCAA was unwavering in its commitment to the core amateur principle that college athletes should receive no financial inducements for participating in collegiate sports. During this same period college sport in many colleges and universities became a very popular form of mass commercial entertainment. As the decades passed, and college sport became a multi-billion-dollar industry, it made no business sense to trust the industry's fortunes to amateur college athletes pursuing sports in their spare time. The NCAA solution was to create a scholarship system that had all the trappings of employment but capped compensation at room, board, tuition and fees.

It was only a matter of time before the fundamental contradiction in this model would lead players to challenge the NCAA in court. If coaches can make millions of dollars a year from these mass athletic spectacles, how is it legal or fair to exclude athletes from this market? Perhaps anticipating a loss in the O'Bannon case, the NCAA's five richest and most powerful conferences have already formed an autonomous unit within the NCAA that can share some of the US\$1.5 billion it generates every year with football and men's basketball players. The problem with this strategy is that schools that are already struggling to compete in football with the 'Big Five' conferences will find it impossible to do so without budget cuts that could lead to the elimination of non-revenue-producing sports on many campuses.²³

While the strategy of the 'Big Five' may lead to reforms that produce financial benefits for a limited number of big-time college athletes, it does nothing whatever to address the complex problems facing sport in higher education in the United States today. To quote Congressman Jim Moran, who recently sponsored a bill to establish a Presidential Commission on Intercollegiate Athletics Reform: 'We need to give our colleges and universities the tools they need to sustain healthy intercollegiate athletic programs that benefit the schools and protect our student-athletes.'²⁴ Moran was not referring only to the athletes in the sports that produce the most revenue, but to all NCAA athletes.

The near-total emphasis on college sport as commercial entertainment creates excessive institutional expenditures on certain sports and has resulted in burdensome mandatory student fees as a funding source for athletic programmes. Money that should support academic programmes and educational opportunities for students is often siphoned into palatial stadiums, training facilities and coaches' salaries.²⁵ Elite athletes are often relegated to the periphery of student life. Again to quote Congressman Moran, 'Recent scandals involving...a number of the nation's most prestigious

institutions reveal the absence of policy and practice that would ensure a level of academic integrity, athletic welfare and financial soundness appropriate for non-profit institutions of higher education.²⁶

What may be needed is for Congress to consider replacing the NCAA with a federally chartered corporation that would have a laser focus on education. Professionalism and commercialism cannot be eliminated, but athletes should not be university employees like players in the National Football League. This federally chartered organisation would funnel benefits back to the athletes, but they would be educational and healthcare benefits, not cash payments. This new organisation, which could be called the Collegiate Athletic Association of the United States (CAAUS), would promulgate and enforce rules and regulations in order to achieve reforms such as the following.

- Ownership of the national Bowl Championship Series (BCS) should be given to CAAUS, with the proceeds being used to subsidise member institution programmes that contribute directly to the health, educational success and welfare of college athletes.
- Ensure that athletes are treated as students rather than employees or just athletes by mandating scholarship awards that extend through graduation and prohibiting cancellation for reasons of athletic performance or injury. Cancellation should be permitted only for voluntary withdrawal or serious violations of team rules.
- Require that all full scholarships awarded to Division I athletes cover the full cost of attendance as defined by the federal government, not merely the cost of education – the present NCAA limit.
- A committee composed of members of each faculty senate should closely review the disciplinary rules and regulations created by coaches and athletic directors to ensure that they are consistent with academic best practices.

- Require CAAUS and its members each to retain 5% of their gross annual media rights fees in an academic trust fund, to be utilised to disburse education grants to college athletes who have not completed their undergraduate degrees or wish to continue their education.
- Provide strong CAAUS due-process protection for college athletes, institutions and employees in danger of losing participation privileges or incurring financial penalties for alleged rule violations.
- Give CAAUS a limited antitrust exemption to control the cost of athletic programmes by capping sport programme operating expenditures and salary and wage budgets and preventing excessive expenditures.
- Allow freshman eligibility for only those athletes whose high school grade point average or standardised test scores are within one standard deviation of the mean academic profile of their entering class, thus giving ‘special admit’ students time to adjust to a more competitive academic environment than they may be used to.
- Provide extensive academic remediation for athletes who are ineligible to play as freshmen and limit their practice time to 10 hours a week. Remediation should begin in the summer, before these athletes enter college.
- Require that all academic and counselling support services for college athletes be under the direct supervision and budgetary control of the institution’s academic authority, administered externally to the athletic department, and be consistent with counselling and support services for all students.
- Require institutions to provide ‘whistleblower protections’ for those who disclose unethical conduct or institutional rules violations related to the conduct of athletics programmes.
- Limit athletic playing and practice seasons so as to minimise interference with athletes’ opportunities for acquiring a high-quality education in a manner consistent with that afforded to the general student body.

- Institutions should work with faculty senates to ensure that athletic contests are scheduled such that they minimise conflict with class attendance, and no athlete should be prohibited from taking a class that may occasionally conflict with a practice, or team, meeting.

These are just a few suggestions, to demonstrate the priorities of this new organisation. The CAAUS would allow universities to continue to provide a point of emotional attachment for fans, alumni and students. In fact, it could increase fan interest in athletic programmes that are not part of the major conferences. This model contains some of the best aspects of college sports in the United States, where competitive sport has always been a part of campus life.

Notes

¹ Allen Sack is Professor in the College of Business at the University of New Haven, Connecticut, and was a member of the University of Notre Dame's 1966 National Championship football team. He is immediate past president of the Drake Group, an organisation committed to defending academic integrity in college sports.

² See the National Collegiate Athletic Association's revenue page: www.ncaa.org/about/resources/finances/revenue.

³ Howard Savage, *Games and Sports in British Schools and Universities* (New York: Carnegie Foundation for the Advancement of Teaching, 1927), p. 78.

⁴ NCAA, formerly the Intercollegiate Athletic Association of the United States (IAAUS), *Proceedings of the First Annual Meeting* (New York: IAAUS, 1906), p. 33.

⁵ Jack Falla, *NCAA: The Voice of College Sports* (Mission, KS: NCAA, 1981), pp. 9–17.

⁶ 'Constitution of the National Collegiate Athletic Association, including Official Interpretations: Article III', in *NCAA 1956–57 Yearbook* (Kansas City, MO: NCAA, 1956), p. 4.

⁷ In a letter from Robert F. Ray, NCAA president, and Everett D. Barnes, secretary/treasurer, to faculty representative and athletic directors of member institutions, a request was made for institutions to protect themselves from further workmen's compensation claims by student athletes by changing the wording of grants-in-aids to ensure that there did not appear to be an employment relationship: see Unorganized Walter Byers Papers, Workman Compensation Folder, 21 December 1964, NCAA headquarters, Overland Park, Kansas. See also Allen Sack and Ellen Staurowsky, *College Athletes for Hire: The Evolution and Legacy of the NCAA's Amateur Myth* (Westport, CT: Praeger, 1999), pp. 81–82.

⁸ Walter Byers, *Unsportsmanlike Conduct: Exploiting College Athletes* (Ann Arbor: University of Michigan Press, 1995), p. 75.

⁹ Everett D. Barnes, letter to Walter Byers, 6 July 1964, Walter Byers Papers, Long Planning Folder, NCAA headquarters, Overland Park, Kansas.

¹⁰ M. R. Clausen, the person who proposed this amendment, argued that it would allow an athlete who had voluntarily left sport to be referred for disciplinary action, which could lead to the withdrawal of financial aid; see NCAA, *Proceedings of the 61st Annual Convention* (Kansas City, MO: NCAA, 1967), p. 122.

¹¹ Robert A. McCormick and Amy Christian McCormick, 'The Myth of the Student Athlete: The College Athlete as Employee', *Washington Law Review*, vol. 8 (2006).

¹² *Coleman v. Western Michigan University*, 336 N. W. 2d 224 (1983).

¹³ See *Rensing v. Indiana State University*, 444 N.E. 2d. 1173 (1983). Kent Waldrep was rendered a quadriplegic in a Southeast Conference football game in 1974. Waldrep lost his final appeal in his legal quest for workman's compensation benefits in 2000. It may be prophetic that the judges concluded their opinion by noting that 'college athletics has changed dramatically over the years', and they could not say what their ruling would be 'if an analogous case were to arise today'. See *Waldrep v. Texas Employers Insurance Association*, 21 S.W.3d 692 (Tex. App. 2000).

¹⁴ Mary Grace Miller, 'NCAA and the Student-Athlete: Reform is on the Horizon', *University of Richmond Law Review*, vol. 46 (2012).

¹⁵ *New York Times*, 'N.C.A.A. Must Allow Colleges to Pay Athletes, Judge Rules', 8 August 2014, <http://www.nytimes.com/2014/08/09/sports/federal-judge-rules-against-ncaa-in-obannon-case.html>

¹⁶ *New York Times*, 'What the O'Bannon Ruling Means for Colleges and Players', 8 August 2014, <http://www.nytimes.com/2014/08/09/sports/what-the-obannon-ruling-means-for-colleges-and-players.html>

¹⁷ Edward O'Bannon, et al., Plaintiffs, v. National Collegiate Athletic Association; Electronic Arts Inc.; and Collegiate Licensing Company, Defendants, no. C 09-3329 CW (N. D. Cal. 2014), www.nacua.org/documents/Wilken-NCAA-Order_8-11-14.pdf, p. 80.

¹⁸ *New York Times*. 'After Ruling in O'Bannon Case, Determining the Future of Amateur Athletics', 21 October 2014, <http://www.nytimes.com/2014/10/22/sports/after-obannon-ruling-figuring-out-whats-next.html>

¹⁹ ESPN (US), 'Northwestern players get union vote', 27 March 2014, http://espn.go.com/college-football/story/_id/10677763/northwestern-wildcats-football-players-win-bid-unionize.

²⁰ Charles Muhl, 'What Is an Employee? The Answer Depends on the Federal Law', *Monthly Labor Review* (January 2002), p. 3.

²¹ Thomas Bright, 'NCAA Institutes Multi-Year Scholarships', *DePaul Journal of Sports Law and Contemporary Problems*, vol. 8 (2011).

²² NLRB, Illinois, 'United States Government before the Labor Relations Board, Region 13', Northwestern, Employee, and College Athletes Players Association (CAPA), Petitioner, case 13-RC-121359, www.cnn.com/2014/images/03/26/Decision_and_Direction_of_Election.pdf.

²³ *Chronicle of Higher Education* (US), 'The "Big Five" power grab: the real threat to college sports', 19 June 2014, <http://chronicle.com/article/The-Big-Five-Power-Grab-/147265>.

²⁴ *Fairfax News* (US), 'Rep. Moran introduces bill to reform NCAA', 1 December 2014. For a discussion of the bill, see *The News & Observer* (US), 'US legislation would create presidential commission for college sports', 4 December 2014, www.newsobserver.com/2014/12/04/4376880_federal-legislation-would-create.html?rh=1.

²⁵ David Ridpath, Brian Porto, Gerald Gurney, Donna Lopiano, Allen Sack, Mary Willingham and Andrew Zimbalist, 'The Drake Group Position Statement: Student Fee Allocations to Fund Intercollegiate Athletics', 2 March 2015.

²⁶ See <http://www.arlnow.com/2014/12/02/moran-introduces-bill-to-reform-broken-college-sports-system/>