Amateur Slaves: An Ethical and Legal Analysis of the Treatment of College Athletes

Nathan Curtis

Follow this and additional works at: https://scholarsarchive.byu.edu/byuplr

BYU ScholarsArchive Citation
Curtis, Nathan (2007) "Amateur Slaves: An Ethical and Legal Analysis of the Treatment of College Athletes," Brigham Young University Prelaw Review: Vol. 21 , Article 7. Available at: https://scholarsarchive.byu.edu/byuplr/vol21/iss1/7

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.
Amateur Slaves

AMATEUR SLAVES: AN ETHICAL AND LEGAL ANALYSIS OF THE TREATMENT OF COLLEGE ATHLETES
BY NATHAN R. CURTIS

I. INTRODUCTION

In April 2006, Reggie Bush, arguably the most high-profile college athlete of the decade, faced allegations of accepting payments and improper benefits while still an “amateur” at the University of Southern California. These widely publicized allegations have brought the college sports world once again under heavy scrutiny.Athletes in the revenue-producing sports, specifically men's football and basketball, provide the National Collegiate Athletics Association (NCAA), universities, coaches, advertisers, television stations, and many more with hundreds of millions of dollars in profit; yet these same athletes are prohibited from so much as accepting a free ride home from practice. Although the NCAA and most major universities claim that college athletics have a principally educational purpose, a closer look at the system reveals just the opposite to be true—it is a multi-billion dollar industry dependent on the labor of ill-compensated slaves. It is time to rethink this system as it violates ethical and legal doctrines. In this paper I will debunk some of the prevalent myths concerning college athletics: the NCAA's claim of amateurism, the university as an educational institution, and the athlete primarily as a student; analyze two legal challenges facing the NCAA—labor and antitrust issues; and look at the distinct advantages of a pay-for-play system.

1 Nathan R. Curtis is a junior at Brigham Young University majoring in Physics with a double minor in Spanish and Mathematics. He plans to go to law school and concentrate on intellectual property law. Nathan is from Cedar Hills, Utah.

II. THE NCAA AND AMATEURISM

The NCAA purports as one of its major principles: “Student-athletes shall be amateurs...and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived...[S]tudent-athletes should be protected from exploitation by professional and commercial enterprises.”3 Ironically, it is precisely the professional and commercial exploitation of college athletes of which the NCAA is guilty. In the eyes of many the NCAA is the head of a well-disguised labor cartel that contains its costs by severely limiting payments to players while standing to make immense profits off their contributions.4 Athletes are limited to scholarships – including only tuition and room and board – worth no more than about $30,000 a year even at the most prestigious universities. Despite the NCAA being a non-profit organization, the executive director brings in over $600,000 a year and other high officials bring in similar amounts.5 The NCAA itself markets its product and logo,6 and the major conferences market their games, logos, and even permission to use the players’ likenesses and life stories to for-profit television stations for millions of dollars, thereby promoting the commercial exploitation of student-athletes.

In order to preserve its power the NCAA flaunts the amateurism façade – the idea that college athletics exist primarily for talented athletes to further their education and to receive physical and social benefits. The NCAA publishes a three-volume, 1,268 page manual full of restrictions for players and universities to help maintain amateur status.7 For example, athletes cannot sign with an agent if they want to maintain eligibility, they must sit out a year if they transfer from one college to another, and they cannot earn

4 Andrew Zimbalist, Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports 20 (1999). See also id. at 18.
5 Id. at 52.
6 See id. at 4.
7 Id. at 5.
Amateur Slaves

more than $2,000 from outside employment during the season. The most notable of all regulations is that all college athletes are expressly prohibited from any sort of pay-for-play, meaning universities cannot directly pay athletes and, at the same time, athletes cannot use their sports talent to earn any money above the university scholarship. Such rules produce some puzzling contradictions. Why can schools "pay" players through scholarships but not through other means? Does compensation through scholarship not technically negate one's amateur status? Furthermore, traditional college students are not forbidden from profiting off their talents. A music student can publish a song and an English student can profit from a book. Why are athletes treated differently? The logical response is greed – the NCAA desires to control its laborers. Former Executive Director of the NCAA Walter Byers put it best when he said, "Collegiate amateurism is not a moral issue. It is an economic camouflage for monopoly practice."

III. THE UNIVERSITY AS AN EDUCATIONAL INSTITUTION

Publicly, universities agree with the NCAA principle that college athletics is "motivated primarily by education," but does that explain the university's obsession with sports? Why do universities spend millions of dollars on recruiting, traveling, building bigger and better stadiums, etc.? What is the root of this obsession with sports? The answer is quite simple. College sports, namely men's football and basketball, are big business.

The money generated by these two sports in the last twelve years has increased 300%, with universities as the primary benefactors. Universities are not the purely educational institutions they claim to be. At the expense of poorly compensated athletes, universities, the NCAA, major conferences, advertisers, coaches, and television stations

8 Zimbalist, supra note 4 at 18.
10 ZIMBALIST, supra note 4, at 19.
bring in over $4 billion in revenue each year. Universities, through participation in bowl games alone, can bring in almost $250 million every December and January. In 1999, CBS purchased the rights to broadcast March Madness, the men’s college basketball tournament, for more than $6.2 billion, which trickles down to the universities that participate. Interestingly, one court of law even noted more than fifty years ago that "higher education in this day is a business and a big one." Critics of college athletic programs point out that only about 40 Division I-A institutions operate in the black on a yearly basis. They believe that student-athletes are not exploited because colleges rarely make any profit off of their play. While it is true that many universities’ books show losses in the area of sports, this could not be any further from the truth. The first reason is that it is general practice that revenue from men’s football and basketball be used to subsidize other collegiate sports that do not bring in enough revenue. Based on data provided by the Office of Postsecondary Education, in 2005 Division I-A men’s football and basketball programs brought in total revenue of more than $2.1 billion, while expenses were only about $1.3 billion. On the other hand, the revenue gained by all other sports combined was a mere $294 million, about $577 million less than their

13 Thomas O’Toole, $17M BCS Payouts Sound Great, But..., USA TODAY, Dec. 6, 2006, at C1, available at http://www.usatoday.com/sports/college/football/2006-12-06-bowl-payouts_x.htm (calculated by summing the per team payouts in the Bowl Payout Breakdown chart included in the article).
14 Greenlee, supra note 9, at 1.
total expenses. 18 70% of football and basketball programs themselves bring in a profit of more than $1 million a year. In fact, during the University of Texas' national championship run from 2005-2006, the university reported over $42 million in profit off the football team alone. Other schools reported more than $30 million in profit the same year. 19

Secondly, university accounting is not an exact and complete science and is not equipped to account for all of the possible ways that universities profit off athletics. An economic study by Brian Goff, a Distinguished University Professor of Economics at Western Kentucky University, came to some interesting conclusions. Goff concluded empirically that any sort of achievement in athletics brings a significant increase (sometimes millions of dollars) in general university contributions, not just in athletics. He even found that a major achievement in athletics, such as a bowl game or an appearance in March Madness, sparks interest from prospective students, increasing a school's average SAT score. 20 After the "Cinderella" run by George Mason University to the Final Four, almost 400 more qualified freshmen enrolled at the university, forcing the university to house some in a hotel. 21 Simply put, athletic programs bring national exposure, and exposure brings more money and better students.

A similar study cut right to the heart of the exploitation issue. A pair of economists initiated an econometric study to determine exactly what a successful athlete provides his university—what is referred to as the marginal revenue product. By using regression techniques on extensive revenue data from almost all public and private universities, the 1995 study estimated that a successful football player (one who goes on to play in the NFL) brings in more than $500,000 per year in additional

20 Brian Goff, Effects of University Athletics on the University, in ECONOMICS OF COLLEGE SPORTS 65, 82 (John Fizel & Rodney Fort eds., 2004).
annual revenue for his university. A “premium” college basketball player generates more than $1,000,000.22 These figures show just what universities gain from the labor of uncompensated athletes—the study did not even look at the NCAA or any commercial enterprises and what they gain from the same labor. Such an unfair system has been described as having a “neoplantation mentality”23—it’s a modern form of slavery.24

IV. THE ATHLETE PRIMARILY AS A STUDENT

Opponents of a pay-for-play system recite two arguments supporting the status quo: first, student-athletes already receive enough “payment” for their participation in sports—a free education25—and second, student-athletes are recruited primarily to be students. A closer look reveals the truth to be that “student”-athletes are required to put their emphasis on the field, and not in the classroom. Although critics may have been correct when the NCAA was established 96 years ago, the arena of college sports has changed dramatically.

Though universities say that they give scholarships to athletes, it’s more correct that athletes earn scholarships from the university. Due to NCAA rule changes a little more than a decade ago, players can no longer receive a four-year scholarship. Universities are restricted to granting one-year scholarships which, to the detriment of the athlete as a student myth, are renewed by performance on the football field or basketball court, not by performance in the classroom.26 The NCAA does require that modest academic requirements be met by athletes, but universities have found inventive ways around them. Critics also do

23 Steve Wulf, Tote that Ball, Lift that Revenue, TIME MAGAZINE, Oct. 21, 1996, at 94.
24 See ZIMBALIST, supra note 4, at 20.
not recognize the tremendous number of hours that athletes dedicate to their sport, leaving few for academic endeavors. NCAA bylaws limit a student to four hours a day and twenty hours a week of “athletically-related activities.” Needless to say, universities have found a way around this rule, primarily through the implementation of “optional sessions” and captain-led practices—which players are obligated to attend in order to retain their scholarship. It is actually estimated that athletes devote anywhere between thirty to sixty hours per week to their sport.

Furthermore, the “free-ride” scholarship packages athletes receive are never sufficient to cover all of the typical expenses a college student incurs. By NCAA regulation, scholarships can include tuition, room, books, board, and nothing else (like spending money, laundry money, movie money, etc.). Coupled with the fact that many come from disadvantaged backgrounds and are forbidden to accept money from anyone upon whom they are not legally dependent, it is clear why athletes complain that they are not students in that they cannot afford to participate in common collegiate practices, like going on a date or buying a pizza. Most do not even have the option of supplementing their scholarship through outside employment. Even though the NCAA does allow players to have outside employment, they are limited to earning no more than $2,000 during the season. Moreover, most college athletes do not work because their potential working hours have already been spoken for.

The NCAA also limits the number of scholarships a university may grant. Athletes without a scholarship, commonly referred to as walk-on athletes, practice, train, and play just like scholarship athletes but receive no compensation whatsoever. Although walk-ons are traditionally not the “stars,” they play an integral role in the success

27 Skidmore, supra note 11, at 325.
28 Zimbalist, supra note 4, at 37.
29 Telander, supra note 17, at 72. See also id. at 69.
30 Wulf, supra note 23, at 94.
32 Greenlee, supra note 9, at 1.
of a team. A recent lawsuit complained that the NCAA permits universities to grant only 85 football scholarships. With an average of about 117 players on a Division I-A football roster, this leaves 25% of the athletes participating without any form of material compensation.

To answer critics it also helps to look at the academic success of these athletes. Men's football and basketball players, on average, have lower GPAs and SAT scores than all other college athletes, and they are significantly inferior to the averages of their respective student bodies. Graduation rates are also much lower than national averages. The Knight Commission II in 2001 reported the graduation rate of men's football players at 48% and that of men's basketball players at an appalling 34%. The rates have dropped even more in recent years. This would not be the case if universities actually valued education more than athletic success. Even more damaging to the university's image are the reports of rampant cheating on the behalf of athletes, the purpose being to sidestep the modest NCAA mandated academic requirements in order to help them maintain eligibility. One woman admitted to doing more than 400 pieces of coursework for athletes at her school. Many athletes receive preferential treatment from professors -- earning C's even though they never even show up for class. Although they are rarely caught and sanctioned for such action, "Presidents, boards of trustees, faculty, conferences, athletic departments, and coaches have all played a role in subverting the educational mission."

34 Zimbalist, supra note 4, at 39.
36 See Zimbalist, supra note 4, at 4.
38 Staudochar & Zepel, supra note 35, at 38.
The issue of the treatment of revenue-producing college athletes is not just an ethical one—it is also a serious legal one. For years athletes have been crusading to be recognized as employees of a university, and not just students. The benefits of such legal recognition are two-fold: first, athletes would be able to receive adequate compensation, thus eliminating exploitation issues, and second, athletes would be eligible for workers' compensation in case of serious injury in the course of play. One of the major legal flaws of the current system is the lack of coverage for student-athletes; if an athlete with recognized professional potential incurs a career-ending injury in the course of play or practice, he is entitled to very little, if any, money from the university. Even though he put his time, future, and livelihood on the line for a university, he receives nothing in return. Remembering the fact that the majority of successful athletes underperform in the academic arena, this injured athlete has practically no future prospects. It is precisely for this reason that athletes have battled universities and the NCAA in court for better coverage.

Players have won two major court battles during the past fifty years, the first in the case of *University of Denver v. Nemeth*. The court held that a football player injured during practice was an employee of the university and was therefore entitled to benefits under applicable workers' compensation statutes. It was resolved on the fact that Nemeth was employed in maintenance at the campus tennis center contingent on his success in playing football for the university. Nemeth was even told that "it would be decided on the football field who receives the meals and the jobs." The court was "willing to look beyond the 'fictional' records of a student employed to maintain a tennis court to the reality of the relationship between the employment and the student's athletic participation."
Proponents of pay-for-play gained an even bigger victory in *Van Horn v. Industrial Accident Commission*. Edward Gary Van Horn was on scholarship to play football for a university and held no other employment. He was killed in an airplane crash returning from a regularly scheduled college football game. His wife and children sued for benefits under the Workmen’s Compensation Act and was initially denied by the California Industrial Accident Commission, but a California Appeals Court overturned that decision. The court wrote, “There is authority for the proposition that one who participates for compensation as a member of an athletic team may be an employee within the statutory scheme of the Workmen’s Compensation Act.” The form of remuneration—the fact that Van Horn was compensated in the form of a scholarship—was “immaterial.” It was also held that “one may have the dual capacity of student and employee in respect to an activity.”

This precedent was not followed for long. More recent decisions in other states have held just the opposite. In both *Rensing v. Indiana State Board of Trustees* and *Coleman v. Western Michigan University*, it was determined that athletes on scholarship were not employees of their respective universities. The first court based its decision on “the weight with which the NCAA regards amateurism…and the broader educational-based priority the NCAA touts as its chief concern for student-athletes.” The second court refused to find that “the ‘work performed’ (playing football), was an integral part of defendant’s ‘business’ (education).” These claims have already been addressed; NCAA players are disguised as amateurs, the education-as-a-priority ideal is untrue, and football and basketball provide a fundamental part of improving a university’s image and pocketbook. As the scope of college sports continues to become more commercial, courts may very well return to the original idea of players as employees, thereby proportioning a means for athletes to receive wages and workers’ compensation benefits.

VI. ANTITRUST ISSUES

A second major legal issue facing college sports relates to the Sherman Antitrust Act, which expressly prohibits "[e]very contract, combination…or conspiracy, in restraint of trade or commerce." The NCAA amateurism rules, specifically the no-compensation rule, in many ways represent an unreasonable restraint of trade, and by the "rule of reason" should be deemed illegal by the courts. NCAA rules have twice been challenged unsuccessfully in the courts, but the growing business aspects of college athletics may alter the court's decisions in the future.

It was originally assumed that the NCAA was not subject to antitrust scrutiny because of its non-profit nature, but the Supreme Court ended such speculation with its ruling in NCAA v. Board of Regents. Although the case did not concern amateurism rules specifically, the Supreme Court maintained that the NCAA's current television plan had a "significant potential for anticompetitive effects," thus opening the NCAA up to antitrust litigation on other fronts. In both McCormack v. NCAA and Banks v. NCAA it was held that the NCAA was not guilty of antitrust violations in regards to its enforcement of its amateurism rules. The courts supposed that NCAA bylaws were not unreasonable restraints of trade on the grounds that they promote competition, encourage educational pursuits, prevent commercialism, and preserve the amateur nature of college athletics. More specifically, the courts determined that NCAA rules and actions ought to be analyzed under the "rule of reason," which requires a determination on an action's "impact on competition." This paper has already addressed the issues of commercialism, amateurism, and education in college athletics. The only remaining argument is the notion that NCAA bylaws foster competition and are necessary to maintain the character of college sports.

As stated previously, a number of economists view the NCAA as a successful labor cartel. One of the purposes of a cartel is to control the market by controlling input prices—a violation of the Sherman

44 HADEN, supra note 42, at 673.
46 Id. at 611.
Antitrust Act. Specifically, the NCAA, by requiring each institution to offer recruits the same compensation package, limits competition in the input market, thereby violating antitrust laws.\(^4\) Moreover, the NCAA, in cooperation with all member institutions, maintains a monopoly over amateur athletics; there is no alternative to participating in college sports. Both the NFL and the NBA do not permit athletes to enter their leagues straight from high school. A young athlete is forced to develop his talents in an amateur league where compensation is strictly forbidden, “restraining [his] ability to market his services to competing institutions.”\(^48\) Justice White, although dissenting to the Board of Regents decision, agreed, “[T]he NCAA imposes numerous controls...many of which ‘are similar to those which are summarily condemned when undertaken in a more traditional business setting.”\(^49\) Also detrimental to the NCAA’s position is a study done by Craig A. Depken and Dennis P. Wilson that shows that the enforcement of NCAA rules many times unintentionally leads to a reduction in competitive balance between teams.\(^50\) Another study demonstrated that many NCAA institutional changes, many having to do with the preservation of amateurism, most likely have a “rent-seeking explanation”–they reduce competitive balance and seem to have a financial motivation above all else.\(^51\)

On the issue that the no-compensation rule is necessary to maintain the character of college sports, what the courts failed to realize was that even as the system is now, many universities


\(^{50}\) Craig A. Depken II & Dennis P. Wilson, The Impact of Cartel Enforcement in NCAA Division I-A Football, in ECONOMICS OF COLLEGE SPORTS 225, 241 (John Fizel & Rodney Fort eds., 2004).

\(^{51}\) See Craig A. Depken II & Dennis P. Wilson, Institutional Change in the NCAA and Competitive Balance in Intercollegiate Football, in ECONOMICS OF COLLEGE SPORTS 197, 198 (John Fizel & Rodney Fort eds., 2004).
frequently violate or find convenient ways around the rule. Over the period of one decade it was found that at least 57% of all NCAA Division I-A football teams violated compensation rules. Players are not amateurs and the public knows this, yet consumer demand for college sports continues to flourish like never before. In some cases, teams sanctioned by the NCAA received even more support for their programs than before being sanctioned. The anticompetitive nature of the NCAA rules has brought the organization under fire before; it is up to future courts to dig beneath the NCAA’s claims of amateurism, education, and competition and declare its actions anticompetitive.

VII. BENEFITS OF A PAY-FOR-PLAY SYSTEM

Many experts have attempted to design a pay-for-play system that’s both fair to all involved (athletes, universities, and the NCAA) and that maintains the unique qualities of college athletics that make it so immensely popular. The proposed systems vary widely, with ingredients such as salary caps, trust funds for athletes, revenue sharing, and much more. It is not the intent of this paper to propose a new system; rather, it is to show the specific benefits inherent in any pay-for-play system, thus furthering the argument against amateurism rules.

One strong argument in favor of a new system rests on the premise that if an athlete already received compensation above a traditional scholarship and had adequate medical coverage in case of severe injury, there would be less motivation to leave college early to play professional sports, thereby better fulfilling the NCAA’s primary ideal of education. More than half of all student-athletes in revenue producing sports do not graduate—many because they leave school early for an opportunity to play on the professional level. Some succeed but many do not, leaving them young, unemployed, and uneducated. The National Football League Players Association reports that the

53 Id. at 1313.
54 STAUDOHR & ZEPEL, supra note 25, at 45.
average length of an NFL career is only three and a half seasons.\textsuperscript{55} Exacerbating the problem is the fact that most young players do not plan for the future. After taxes of about 30\% and extravagant spending, which is all too common for young athletes, many athletes are left with small income and large debt.\textsuperscript{56} In order to survive financially, athletes must either invest their money well or have plans for another career when they can no longer play professionally.\textsuperscript{57} Few would doubt that the best contingency plan would be to remain in college until graduation.

It should also be noted that the abolition of amateurism rules would allow student-athletes to accept outside endorsements, possibly making the earnings of the most talented athletes attractive enough to remain in school. While universities would only be required to pay moderate hourly wages, national companies affiliated with college sports and even local companies looking to advertise could provide more lucrative compensation to athletes according to market demand.\textsuperscript{58}

In fact, it would be mutually beneficial for these athletes to remain in school because universities have much to gain from these talented young men. By economic estimates, universities themselves lose between $400,000 and $1.2 million a year when talented stars declare for the draft early.\textsuperscript{59} Moreover, the underclassmen who leave school early are more often than not the most talented – the Reggie Bushes of the world – and bring the excitement to college sports that fans attend games to see. It is not a stretch to say that the sports of college football and basketball would be greatly improved if the high-profile athletes participated for all four years of eligibility. This would most likely lead to higher viewership, and therefore more revenue for advertisers, TV stations, and the NCAA. Only this time it wouldn’t be at the expense of university slaves.

\begin{footnotes}
\item[57] NFL Players Association, \textit{supra} note 55.
\item[58] \textit{Murphy & Pace}, \textit{supra} note 26, at 181.
\item[59] \textit{Brown & Jewell}, \textit{supra} note 22, at 153-54.
\end{footnotes}
When asked about the accusations made against Reggie Bush, Joe Horn, a new teammate of Bush's, made an interesting comment, “I don’t think Reggie did that, but if he did, I would have done it too.” Regardless of the veracity of the claims made against Bush, the question remains: Can you really blame Reggie Bush, or any other student-athlete for that matter, for accepting improper benefits? Does the system really seem fair? Over the course of ninety years, the NCAA has created a system that flourishes on uncompensated student labor. And over the past twenty-five years, the majority of these students have been low-income minorities. Although all have an opportunity at the incomparable benefit of a university education, the majority of athletes overlook academics and instead focus on the prospect of playing their sport at a professional level. Sadly, the NCAA, universities, and commercial enterprises thrive on such “student-athletes.” The Wall Street Journal commented almost a half century ago that in many cases universities “have come to see—and treat—athletes less as students than as tools to be manipulated for profit.” Whether changes to the present system will be initiated by the courts, the NCAA, or member institutions themselves is yet to be seen, but it seems fairly certain that significant changes are in order so that future athletes and their families can trust the NCAA, and so that fans can continue to enjoy college sports in all of the tradition and excitement that have existed for years.

61 CARPENTER, supra note 40, at 450.