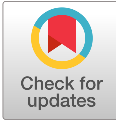


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*This chapter provides an overview of current legal issues in college sports and offers implications for supporting student-athletes and the academic mission of higher education institutions.*

# Playing Outside the Lines: Contemporary Legal Issues in College Sports

*Joy Gaston Gayles, Joy Blanchard*

Given the magnitude of the scandals, abuses, and legal issues in college sports, a looming question is whether there will be a case that results in the ultimate demise of an enterprise that enjoys a long-standing history and connection to higher education institutions. In 2013, *USA Today* published the most significant scandals in college sports ranging from corrupt pay for play systems to cases involving sexual assault. One of the most recent investigations is a federal investigation of men's basketball players at top research universities who received money and other benefits through sport agents and participated in illegal recruiting in violation of NCAA rules (Tracy, 2018). Although misconduct has been a part of the fabric of intercollegiate athletics since the 1800s, the ever escalating nature of corruption in college sports continues to raise questions about the integrity of amateur sports as a part of our higher education system and the prioritization of market driven behavior over educational values and student well-being (Harper & Donnor, 2017; Nwadike, Baker, Brackebusch, & Hawkins, 2015; Smith, 1990). As a result, growth of abuses in college sports raises questions about how to best serve student-athletes who navigate both academic and athletic spaces with competing values and interests.

More court cases exist involving the National Collegiate Athletic Association (NCAA), athletic conferences, academic institutions, and student-athletes than ever before. This chapter presents the escalation of legal issues in college sports within the context of operating a revenue-generating system of college athletics within institutions of higher education. Over the years, there has been little success with aligning the purpose and values of intercollegiate athletics with the academic mission of colleges and universities, as evident by increasing incidences of scandals and corruption. The bulk of the chapter discusses three of the most pressing categories of legal issues facing intercollegiate athletics today including: 1) negligence claims; 2) anti-trust, pay for play, and right to publicity; and 3) sexual assault. Many of

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these issues represent ongoing cases, and there have been appeals, scrutiny of legal dissents, and additional lawsuits filed. These categories of legal issues are unique because they arise due to the growth of commercialism in college sports and have gone unchecked due to the neoliberal capitalist context in which college athletics exists. Yet, the very nature of these legal issues and their pending outcomes has the potential to shift the philosophical principles that intended to guide athletics to align intercollegiate athletics with higher education institutions. The chapter concludes with implications for policy and practice for serving and protecting student-athletes.

## Alignment of Intercollegiate Athletics and Higher Education

The legal issues, scandals, and abuses in intercollegiate athletics today are not new and continue to challenge the amateur model that governs college sports and call into question the integrity of higher education institutions (Harper & Donnor, 2017). The underlying principle of amateurism, adopted by the NCAA when it was founded, implies that college student-athletes participate for the physical, mental, and social benefits of sport competition and should not receive direct financial incentives or compensation for play (Duderstadt, 2009; Hawkins, Baker, & Brackebusch, 2015). However, professionalism in college sports is a persistent and historical problem. As early as 1929 the Carnegie Foundation published a report titled *American College Athletics* that exposed abuses in conduct for players and coaches including illegal recruitment and payment of college athletes (Fleisher, Goff, & Tollison, 1992). Although the NCAA was established in 1906 to control and govern college sports, the organization continued to lack rules and regulations regarding academic standards and ethical conduct for players and coaches (Thelin, 2002). After World War II, abuses in college sports escalated so much that congress was forced to consider the issue of oversight for intercollegiate athletic programs and granted the NCAA real power to regulate college sports. In addition to sponsoring championships and tournaments, the NCAA became responsible for enforcing regulations to control intercollegiate athletics on college campuses (Duderstadt, 2009).

The NCAA first adopted the term "student-athlete" in 1953 under the leadership of Walter Byers in response to a lawsuit regarding workers compensation for a university football player (Byers, 1997; McCormick & McCormick, 2006; Sperber, 1990). By coining the term student-athlete, the NCAA has been able to avoid any association of student-athletes as employees of the university, which protects the institution (not the student-athlete) from workers compensation and injury claims, as well as from having to compensate student-athletes who generate large sums of revenue for athletics programs. As a result, with the exception of scholarships, student-athletes do not receive any form of direct compensation for their participation in college sports: in fact, it is a violation of NCAA rules and regulations for players to receive money from anyone associated with the university.

The use of the term student-athlete over the past 60 years has also helped the NCAA uphold the amateur principle of college sports in theory despite the increasing commercialism associated with big-time college sport programs today (Hawkins et al., 2015). The principle of amateurism suggests that there is a difference between college athletes and professional athletes (Meggyesy, 2000). However, the use of the term to characterize college sports is frequently called into question as the commercial nature of college sports comes into direct conflict with the educational mission of the academic institution (Dennie & Gurney, 2012; Hawkins et al., 2015; Sperber, 1990; Van Rheenen, 2013). Over time, the pressure to win at all costs has led to countless academic scandals and other legal issues and abuses involving student-athletes and coaches (Harper & Donnor, 2017), including a recent case at the University of North Carolina in which faculty and administrators knowingly and willingly created approximately 200 independent study and "shadow" courses in order to keep student-athletes academically eligible for athletic competition (Tracy, 2017).

## Growth of Legal Issues

Although critics contend that the amateur status of college sports is a false representation of the enterprise (Duderstadt, 2009; Hawkins et al., 2015; Meggyesy, 2000), institutions have yet to part from this principle as it is necessary to maintain alignment between intercollegiate athletics and higher education and hold on to the ideal that student-athletes are also students in addition to competitive athletes. As a result, legal issues have surfaced as an attempt to challenge the status quo and consider the rights of student-athletes who compete in college sport programs.

**Negligence Claims.** An area of litigation that the NCAA persistently must defend is negligence claims. A negligence claim, or tort, is a noncriminal offense that, because of someone's failure to act appropriately, results in injury. From heat strokes suffered during off-season drills to broken bones and heart attacks, student-athletes consistently challenge the level of protection and care legally owed to them by their institutions and the NCAA. Courts often decide these cases on the premise that institutions exert an enormously high level of control over student-athletes in their day-to-day lives and that a special legal relationship—resulting in a legal duty to provide care—is created when institutions recruit scholarship student-athletes. Courts tend to rule in favor of injured college student-athletes more often than in similar cases from the K-12 sector because of the special legal relationship created between an institution and a scholarship student-athlete (Blanchard, 2012).

Beginning most notably with the *Kleinknecht v. Gettysburg College* (1993) case, courts have affirmed negligence claims in which the institution did not exercise prudent and due care in preventing and caring for bodily injuries to student-athletes. In this case, the family of a deceased lacrosse

player won its suit after their son died of a heart attack at practice. The college did not have appropriate staff and equipment on standby to treat what the court deemed a potential foreseeable occurrence. Twenty-five years later, the volume of judgments against NCAA member institutions has risen. In 2016, a federal judge affirmed a 2014 class action settlement that required the NCAA to establish a $70 million fund to provide testing to current and former student-athletes from the past 50 years in order to diagnose and treat head injuries (New, 2016a). The settlement stipulated that an additional $5 million must be spent on concussion research and education (New, 2014). Current pending class action lawsuits claim that the NCAA, athletic conferences, and member institutions negligently handled players' head injuries (New, 2016b).

The NCAA could possibly anticipate more challenges, as complications from head injuries have been linked to Lou Gehrig's disease, Parkinson's disease, Alzheimer's disease, dementia, and chronic traumatic encephalopathy (the disease diagnosed postmortem, commonly referred to as CTE). The NFL has agreed to a settlement estimated at $1 billion that will cover approximately 30% of former NFL players over the next 65 years who are expected to develop some type of ailment associated with head injuries sustained while playing professional football (Belson, 2016).

**Anti-trust, Pay for Play, and the Right to Publicity.** As discussed earlier in the chapter, the term student-athlete was conceived for many reasons, one of which was to head off lawsuits brought by college athletes and their families. If student-athletes were to receive pay for their play, it would destroy the amateur model of intercollegiate athletics and expose academic institutions to a host of legal challenges, including claims for workers' compensation and the right to collective bargaining. Further, student-athletes as employees of the institution could potentially increase liability for sexual assault committed by student-athletes against other students. Under Title VII, employers can be liable for sexual harassment and assault committed by its employees. However, under Title IX, the law that governs academic institutions, in order for an institution to be liable it must know about the misconduct and fail to act appropriately, which is a much lower legal threshold. Student-athletes continue to challenge in court the notion that college sports is an amateur endeavor, not a commercial enterprise. If they were to win, the rights that they could gain—particularly as it relates to compensation—would be significant, including the ability to negotiate scholarship packages, work conditions, medical care, and support for degree completion even after competitive eligibility expires.

For several years, college players have sought the right to unionize. In 2014, the National Labor Relations Board (NLRB) examined the petition from football players at Northwestern University to organize a collective bargaining unit in order to negotiate athletic scholarships that covered full cost of attendance and to receive assistance to finish their degrees once athletic eligibility expired, as well as to expand and improve the medical

treatment available to them (Brief for Petitioner, 2014). At the time, the NCAA restricted athletic scholarships to just tuition, room and board, and books—meanwhile, federal financial aid estimated full cost of attendance to be between $3,000 and $6,000 more than what athletic scholarships covered on average nationally. According to the College Athletes Players Association, approximately 85% of student-athletes receiving a full athletic scholarship could be categorized as living below the federal poverty level (National College Players Association, 2011).

In the initial ruling on the matter, the regional office of the NLRB found that student-athletes should be considered employees under the National Labor Relations Act and called for elections for the football players at Northwestern University to decide if they wished to form a labor union. The ruling cited that athletic scholarships are linked to services performed as a student-athlete and can be revoked if a student is dismissed from the team. The court also noted that universities control the "location, duration and manner in which the players carry out their football duties and all are within the control of the football coaches" (*Northwestern University v. College Athletes Players Association*, 2014, p. 6).

In August 2015, the NLRB declined to assert jurisdiction over the case—effectively ending the unionization efforts of the Northwestern University football players. The NLRB noted the unusual circumstances of the case, which sought to unionize a single team instead of all NCAA teams under their jurisdiction (private institutions are subject to federal labor laws, while public universities are subject to their respective state labor laws) and commented that deciding the case would not promote stability within the NCAA (*Northwestern University v. College Athletes Players Association*, 2015).

Around the same time as the *Northwestern* case, another case that was forecast to potentially disrupt and forever change the relationship between NCAA and its student-athletes was making its way through the courts. Ed O'Bannon, a UCLA men's basketball standout from the 1990s, filed a lawsuit challenging provisions that prohibited student-athletes from ever benefitting from the use of their image and likeness—specifically in the lucrative video game market. Though O'Bannon had not been an NCAA athlete for nearly 20 years, the provisions of his athletic scholarship bound him in perpetuity to relinquish the rights to his image and likeness to the NCAA, which was profiting from his and other current and former student-athletes' likeness in the popular EA Sports football and basketball video games. In 2013, EA Sports, the producer of the video games, settled a separate lawsuit with student-athletes for $40 million (Berkowitz, 2014).

In a 2014 federal district court ruling, a judge did not find the NCAA restrictions on entertainment products violated antitrust law provisions against unfairly restricting trade; however, the judge found that NCAA restrictions on the amount that could be awarded to student-athletes via an athletic scholarship did unduly restrict trade. Likening these restrictions to

price fixing, the judge stated that "[t]here are no professional football or basketball leagues capable of supplying a substitute for the bundle of goods and services that Football Bowl Subdivision (FBS) and Division I basketball schools provide" (*O'Bannon v. NCAA*, 2014, p. 968). The ruling allowed for Division I basketball and FBS institutions to deposit in trust $5,000 for every year that each student-athlete was academically eligible for competition. A 2015 9th Circuit Court of Appeals ruling affirmed some of the findings of the district court, but reversed some of the major victories garnered by the student-athletes. Two of the three judges on the appellate panel reversed the provision allowing for the establishment of a trust to benefit student-athletes, noting that it did not align with the NCAA's historic mission of promoting and preserving amateurism (*O'Bannon v. NCAA*, 2015).

The rulings in the case from Northwestern University and the *O'Bannon* case were among the most pivotal in recent years—as a ruling against the NCAA would have shattered the amateur model that has shaped college sports since its inception. Had the players at Northwestern University been allowed to unionize, not only would scholarship student-athletes for the first time ever have been able to lobby for additional compensation outside of what was dictated by NCAA regulations, but also there would have been an upheaval in the previously tightly regulated system that sought to equalize student-athlete scholarship packages—as players at private institutions would have been enabled to form collective bargaining units, while student-athletes at public universities would have been left subject to the labor laws of their respective states and, thus, truly creating the start of an arms race for the most-prized athletic recruits to seek out the most lucrative scholarship packages. Likewise, had the ruling in *O'Bannon* gone in favor of the plaintiffs, NCAA member-institutions would have had to begin sharing in the profits they receive from athletic broadcasts and other enterprises which reap them profits while using the image and likeness of student-athletes who are only compensated with free tuition, room and board, and books.

**Sexual Assault.** Though the *O'Bannon* and *Northwestern* cases did not create the changes within college athletics that some wanted—or feared—the legal issue that continues to plague the NCAA and member institutions is potential liability stemming from Title IX claims and sexual assault committed by student-athletes. Title IX of the Education Amendments of 1972 prohibits discrimination of any sort based on gender in an educational program. Over the years, this has included an adjudication of sexual assault cases on college campuses.

Nearly a third of the sexual assaults reported on college campuses are alleged to be committed by student-athletes (Siers-Poisson, 2014). Blanchard (2007) questioned whether institutions could be held liable for the known past allegations of sexual assault by student-athletes they recruit. In 2006, the 11th Circuit Court of Appeals allowed a suit to go forward in which a former female student at the University of Georgia, who was raped by three student-athletes, alleged the university was negligent when

it knowingly recruited a student-athlete who had been dismissed from two previous institutions for allegations of sexual misconduct (*Williams v. Board of Regents*, 2007).

Greater numbers of cases have been brought against universities in which victims have claimed that either the university knowingly recruited a student-athlete with a history of sexual misconduct or that the university did not adequately investigate accusations against student-athletes. Regarding the issue of potential liability for recruiting student-athletes with past charges for sexual misconduct, in 2017 a federal district court in Texas ruled that Baylor University, which has recently been under pressure from allegations that it failed to act upon numerous allegations of sexual assault by student-athletes, could stand trial for allegations that it violated Title IX. In this case, Baylor allegedly failed to protect a student who was sexually assaulted by a student-athlete and who the university knew had previous charges of sexual violence levied against him (*Hernandez v. Baylor University*, 2017).

The case at Baylor added to an already lengthy list in which institutions have been assigned some liability for the sexual misconduct of their student-athletes. In recent years, the University of Colorado (*Simpson v. University of Colorado,* 2017*)* and Arizona State University have been among those institutions that reached monetary settlements for not appropriately investigating and sanctioning student-athletes charged with raping female students. In the case at Arizona State University, the university paid $850,000 to a female student after she was raped by a football player who was expelled for sexual misconduct yet reinstated at the request of his coach (Munson, 2009). Florida State University received much criticism for how it handled allegations that star quarterback and Heisman Trophy winner Jameis Winston raped a female student, including misconduct by FSU and Tallahassee police (Bogdanich, 2014). The Office of Civil Rights within the U.S. Department of Education has stated that all procedures for investigating complaints against student-athletes must mirror those utilized in investigating complaints made against nonathletes.

## Implications for Supporting and Serving Student-Athletes

Given the severity of the legal issues discussed in this chapter and the need to better align the goals and values of intercollegiate athletics and higher education, we offer recommendations for policy and practice that serve and protect all students. Regarding negligence claims, institutions should provide training to all coaches, staff, and players on emergency response plans, as needed. Further, the NCAA must mandate baseline medical equipment and technology be available at all games, practices, and workouts. Given the lifelong complications from injuries like concussions, the National Football League (NFL) has toughened its restrictions regarding "return to play" policies; yet, the NCAA has not kept pace. The NCAA and athletic conferences

should mandate that only physicians can clear a player who has suffered a head injury to return to play.

A few years ago, the NCAA and the U.S. Department of Education (2014) collaborated to put into place better health and safety standards for student-athletes. This collaborative effort involved a comprehensive study of concussions and head injuries and increasing education and research through the Mind Matters Challenge program designed to implement changes in reporting and managing head injuries. Science can also be used to teach student-athletes how to play safely. For example, football players can be taught how to make safer tackles to prevent head injuries. Some critics suggest that if the NCAA, athletic conferences, and academic institutions fail to address how best to protect student-athletes against negligence and injury, this could result in the end of college sports as we know it.

The question of whether or not student-athletes should receive compensation for play is a major issue that athletics departments will need to resolve in the near future. The NCAA has expanded the amount allowed per athletic scholarship, but it needs to expand these benefits beyond the Power Five conferences (e.g., conferences consisting of institutions at the highest level of collegiate football and that generate large sums of revenue) and beyond revenue-producing sports, such as football and men's basketball. The NCAA was founded to govern and control college sports in equitable ways, and the organization—which represents its member institutions—will be expected to pay all student-athletes fairly to allow all institutions, regardless of conference, division level, or sport, to expand the amount available via athletic scholarships. If the unionization efforts of football players ever succeed in courts, the patchwork of rules and benefits predicted by some legal commentators would be difficult to manage. Players at private institutions would be able to negotiate scholarship and payments, "work conditions," and other amenities, while student-athletes at public institutions would be at the mercy of what their respective state labor laws allow regarding forming collective bargaining units. Athletic programs that are able to put together better compensation packages will have a competitive edge over institutions with less lucrative budgets, which will be problematic for NCAA institutional members.

Lastly, ensuring the safety and well-being of all students and creating a supportive culture and environment for learning and personal development is a major responsibility for higher education institutions. Regarding sexual assault, the NCAA should invest in programming and research that works to mitigate the social norms that allow sexual misconduct to become so prevalent among student-athletes (Harper & Donnor, 2017). Academic institutions and athletic programs must examine the development of masculinity and the promotion of hypermasculinity and aggression through sport (see Chapter 5). Such attitudes and behaviors, rooted in social constructions of what it means to be male and female and the societal expectations to

conform, must be deconstructed and checked through increased awareness and knowledge and clearly articulated policies and practices that enforce disciplinary procedures for sexual misconduct and assault when it occurs.

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