

CAN COLLEGE SPORTS UNIONS SAVE COLLEGE SPORTS AND SAVE UNIONS?

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The National Collegiate Athletic Association (NCAA) appears on the brink of disaster.¹ Antitrust losses threaten the zero-wage cost structure of college sports; while those small number of wealthy schools which make money through college sports may be able to afford to compensate athletes for their labor and/or likeness, the likely result for many schools outside of that elite cohort will be a reevaluation of the benefits of Division I participation. Lawsuits relating to sports-induced brain injuries are in their infancy, and initial settlements are likely not the end of the story. Furthermore, the prospect of collective bargaining may still be on the horizon, even after the National Labor Relations Board (NLRB) declined to exercise jurisdiction in the Northwestern University case.

Even an organization with a strong sense of purpose and a reputation for integrity would find these kinds of challenges difficult to overcome; the NCAA, however, is not such an organization. Its high profile moralism in the Sandusky/Penn State matter helped turn the college sports conversation into one in which ethical arguments were at the forefront. But the NCAA's ethical positions on compensating student-athletes, on protecting their long term health through appropriate safety measures (which presumably would include a willingness to discuss whether some sports might be simply too dangerous to exist), and on athletes' rights to associate and bargain collectively, have been found wanting in the public's eye.²

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¹ Appearances can of course be deceptive, but a few predictions are in order—*O'Bannon* will not be the last.

² While the NCAA's institutional positions have been slow to evolve, the organization is, of course, composed of people, the vast majority of whom care deeply about the well-being and opportunities provided to college athletes. The problem is that the NCAA, like any bureaucracy, becomes a creature divorced from its parts.

The overlap between the *O'Bannon* and *Keller* antitrust cases and the Northwestern unionization drive has been noted and is obvious. The connection between nascent unionization and the potentially massive brain-injury liability facing colleges and conferences (not just in football, but likely to include other sports in the coming years) may be less obvious. This essay suggests there is in fact a connection.

By opening its arms to unionization, college sports can simultaneously solve both its antitrust and its brain injury problems. And interestingly, the result may also indirectly solve the public image problems facing the modern American labor movement.

However, the NCAA does not know how to *not* fight litigation and other legal initiatives by students. That may be to the organization's detriment. The Association—and the schools it encompasses—may be able to settle one antitrust lawsuit or another, but the truth is, college sports depend on collective restraints to make its business model work. Paying athletes even a fraction of the revenue they generate for schools would lead many colleges to reconsider their level of competition and the number of sports they support. Colleges need to consolidate efforts to suppress “wages” if they hope to continue to sponsor sports at the customary level.

Interestingly, unionization provides a solution. The NCAA does not need to convince Congress to grant it an antitrust exemption—the courts have already created one that the NCAA simply needs to adopt. As the public came to appreciate most recently in *Brady v. NFL*³, the non-statutory labor exemption from antitrust law protects from scrutiny multi-employer bargaining units (to a degree that may differ from one appellate circuit to another). If the NCAA accepted unions, its *O'Bannon* problem would go away.

Unionization also solves the concussion and brain injury problem—or at least, recognition of the “employment” status of athletes does. With student-athlete unionization, the schools would pay for athletes the same workers' compensation that they

³ *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011), overturned by *Brady v. Nat'l Football League*, 644 F.3d 661, 663 (8th Cir. 2011).

pay for professors and secretaries, deans and “deanlets.”⁴ Yes, that would cost money, but it would also mean that a student-athlete who, years later, develops early dementia or other conditions induced by brain injury could file a workers’ compensation claim instead of a lawsuit. The contingent nature of and unpredictable exposure associated with brain injury claims would become a thing of the past.

Right now, colleges should be carefully studying their potential liability, with the science and law of brain injuries still developing. While most college sports programs lose money for universities, they offer offsetting benefits in terms of alumni support, media coverage, name brand recognition, and leadership and personal development for participating student-athletes. Uncertain but massive liability exposure would tilt cost-benefit analysis; workers’ compensation, at least going forward, would provide far more definitive and predictable cost analysis and help schools make smart decisions about the future of college sports.

College sports unions might also help save the American union. Membership has been declining for years, and politicians frequently target unions for political rage. According to Gallup polling, in the early 1950s, 75% of Americans approved of labor unions and only 18% disapproved of unions. Today, only 53% of Americans approve of unions and 38% disapprove (down a bit from a 45% disapproval level in the middle of the last decade). Over a thirty-year period, union membership has fallen from 20% of the workforce to 11% of the workforce.

Doubtless, there are many reasons for this decline in support and levels of representation. But professional sports unions have not helped. While professional sports unions have been exceptionally effective in raising the professional players’ economic share of professional sports revenues, they have also, understandably and properly, taken unpopular positions in regard to misconduct, illegality, cheating, and the like, giving unions something of a bad image. The most prominent unions in America—from a media perspective—are the players associations

⁴ Dan Berrett, *The Fall of the Faculty*, INSIDE HIGHER ED (July 14, 2011, 3:00 AM), https://www.insidehighered.com/news/2011/07/14/new_book_argues_bloated_administration_is_what_ails_higher_education (book review).

in the three major sports leagues, and they keep newsfeeds buzzing for dragging their feet on steroid issues or objecting to punishment of athletes accused of serious crimes, including domestic violence. Compounding this image problem is the fact that these player associations do not represent employees of ordinary means, but rather those with vast wealth. Although one must acknowledge that it is a sports union's job to go to bat for the Adrian Petersons and Tom Bradys of the world, to the average American, these efforts may leave a sour aftertaste.

College sports unions, on the other hand, would represent a more sympathetic group of employees. They might focus initially on safety concerns, access to academic programs (a frequent discussion topic at the Southeastern Association of Law Schools Discussion Group organized by Professor Berry), and required time for practices. They would surely eventually get to wages, but their demands would likely be far more modest than the doomsday predictions some have offered. Focusing on safety concerns and player health, these new college unions will be reminiscent of the unions that first drew widespread public support in the early twentieth century (with a focus on workplace safety, such as mine safety, insurance, and the like). This may help shift the image and reception of unions more broadly.

Negotiating in a meaningful, professional manner with unionized college athletes might help strengthen the NCAA's position on a moral level. As I discuss in my recent article on Penn State, the NCAA infractions process is characterized by a distinctive lack of adversarialism: as a private association, the NCAA can act with virtual impunity. Possessing the power to impose draconian punishments does not make it necessarily right to do so, especially if no discourse precedes the punishments. But by opening the door to dialogue and ensuring more meaningful representation of student-athletes, the NCAA could shift perception that it is unwilling to consider any other way of operating a college sports industry.

At the end of the day, college sports traditionalists just cannot seem to accept the idea of students negotiating, on their own behalf, within the confines of a legal framework and perhaps supported by the next Marvin Miller. Coaches (and athletic

directors, who often started years or decades ago as coaches) are supposed to yell and be in their athletes' faces (in a non-threatening and non-abusive way). They are not supposed to *negotiate* with their players.

Overcoming that mental block may be the hardest thing that has to happen for the college sports labor movement to achieve its goals. One path to consider is to continue emphasizing what college is supposed to be all about: learning. The opportunity for student-athletes to identify problems and negotiate terms in the development of a collective bargaining agreement could be seen as a teachable moment for the schools with which they negotiate. Athletes may end up working as entrepreneurs, attorneys, policymakers, and other professionals where acquired negotiation and conflict resolution skills will serve them well. At the same time, the opportunity for universities to negotiate with student-athletes will be a teachable moment, both for the athletes and for the public at large.

I have described the NCAA as facing its own Four Horsemen of the Apocalypse—Penn State/Sandusky, brain injury liability, antitrust lawsuits, and unionization—in prior articles and presentations, but unionization might actually be a path around the other challenges the NCAA faces.