

REPLY TO SACK AND STAUROWSKY

TIMOTHY DAVIS*

In *Intercollegiate Athletics in the Next Millennium: A Framework for Evaluating Reform Proposals*,¹ I propose, as the title of the article suggests, a framework for analyzing proposals calling for the structural reform of intercollegiate athletics. Although I identify various proposals, my analysis focused on a reform proposal that appears in a book authored by Professors Allen Sack and Ellen Staurowsky, *College Athletes for Hire: The Evolution and Legacy of the NCAA's Amateur Myth*.² In *College Athletes for Hire*, Sack and Staurowsky propose a professional model of intercollegiate athletics to replace what they characterize as the corporate model. I focused on the Sack and Staurowsky proposal because it represents the most radical of recent reform proposals and thus provides an appropriate vehicle for attempting to develop a set of variables to consider in evaluating reform initiatives.

In their rejoinder, Sack and Staurowsky take exception to my analysis of their proposed model. Yet much of their criticism stems from their incorrect assertion that my framework for evaluating proposals to reform intercollegiate athletics is premised on the "assumption that scholarship athletes are amateurs pursuing sport during their free or discretionary time. Once this premise has been established a priori, any effort at reform that supports open professionalism . . . can be easily dismissed on the grounds that the primary mission of colleges and universities is education, not professional entertainment."³

At the outset, I wish to acknowledge that the depth of Sack and Staurowsky's analysis of amateurism in *College Athletes for Hire* represents an important addition to the scholarship on this subject. However, their thesis that the notion of amateurism, which plays such a critical role in maintaining the current structure of intercollegiate, constitutes an illusion is not novel. In this regard, I refer them to the text of note 12 of *Intercollegiate Athletics in the Next Millennium*.⁴ I now regret that I did

* Professor of Law at Wake Forest University Law School.

1. 9 MARQ. SPORTS L.J. 253 (1999).

2. ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH* (1998).

3. Allen L. Sack & Ellen J. Staurowsky, A REJOINDER TO TIMOTHY DAVIS, *INTERCOLLEGIATE ATHLETICS IN THE NEXT MILLENNIUM: A FRAMEWORK FOR EVALUATING PROPOSALS*, 9 MARQ. SPORTS L.J. 253, 10 Marq. Sports L.J. (1999).

4. Davis, *supra* note 1, at 255 n.12.

not devote more time to a discussion of a concept — amateurism — which has been so thoroughly exposed for the myth that it is. To avoid any further confusion, I expressly state that amateurism is a myth. Moreover, amateurism *improperly* serves as major premise of and convenient justification for the rules and regulations relied on to govern the current system of intercollegiate athletics. Yet exposing the illusion of amateurism and rejection of the amateurism principle on which the current system of intercollegiate athletics is based, in part,⁵ does not necessarily support replacing the current system with one that has at its core the notion of professionalism.

I am surprised by Sack and Staurowsky's misunderstanding of the central tenet of my framework, which is educational primacy, not amateurism. I assumed, in establishing the framework, that education is the primary mission of our colleges and universities. Whether this constitutes a correct assumption is a prime candidate for critical examination. Until it is otherwise established, however, any reform proposal for intercollegiate athletics should address the extent to which it aligns with the educational mission. Perhaps, the source of Sack and Staurowsky's confusion lies in their belief that my focus on education primacy validates the notion of amateurism. However, giving primacy to the educational value is not synonymous with an "embrace" or validation of the amateurism value.⁶

In short, as the text of *Intercollegiate Athletics in the Next Millennium* clearly indicates, my framework for analyzing the Sack and Staurowsky model was not premised on the adoption or "embrace" of the concept of amateurism. Rather the gist of my criticism of the proposed professional model for college sports resides in the fact that in their virulent attack on the notion of amateurism, Sack and Staurowsky fail adequately to address other important variables that are relevant in assessing any proposed reform of college athletics. I willingly concede that at some point in the future we may find that Sack and Staurowsky's proposed professional model or some version thereof represents the best alternative for addressing, in a structurally significant way, the ethical, academic and economic problems confronting intercollegiate athletics.

5. See generally, Rodney K. Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics*, 67 DENV. U. L. REV. 213 (1990) (identifying amateurism, the educational value and competitive equity as the three principles that serve as the foundation for big-time intercollegiate athletics. Professor Smith argues for a rejection of amateurism and increased focus on educational primacy as the core principle for governing intercollegiate athletics).

6. *Id.*

Yet adoption of the Sack and Staurowsky model must be forestalled until it is critically evaluated in the context of the numerous variables that are identified in *Intercollegiate Athletics in the Next Millennium*. Particularly important considerations, include:

- 1) a reexamination of the primary mission of colleges and universities — is education the primary mission of colleges and universities;
- 2) is intercollegiate athletics, and more precisely, a professional model of intercollegiate athletics, consistent with the primary mission of colleges and universities, whether that mission be identified as education or as something else?;
- 3) the impact of a professional model on the popularity, profitability and competitiveness of sports within and outside of the professional division;
- 4) the allocation and use of revenues generated in the professional division; the structural organization of a professional division, including criterion for admission to and possible expulsion from such a division;
- 6) the role of faculty and presidents in governing a professional division; the impact of a professional division on the autonomy of athletic departments and implications of increased athletic department autonomy; and,
- 7) The impact on the proposed model on African American student-athletes. In regard to this point, a particularly significant omission on the part of Sack and Staurowsky was their failure, in any substantively significant way in *College Athletes for Hire*, to address the impact of their proposed model on African American student-athletes — who, as a group, are likely to comprise the majority of the athletes competing in a professional league.⁷ Such an omission is quite regrettable given that African American student-athletes are most likely to be subjected to the educational and economic exploitation discussed in *Colleges Athletes for Hire* and numerous other scholarly works.⁸ I am, however, encouraged by Sack and Staurowsky's attempt to respond to this issue in their rejoinder. Yet, I encourage them to undertake a more thorough assessment of the impact of their model on African American student-athletes and not to rely on the unsupported assumption that their model will inure to the benefit of this group of athletes.

7. Davis, *supra* note 1, at 267.

8. See, e.g., Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 *FORDHAM URBAN L. J.* 615 (1995); Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 *How. L. J.* 259 (1993).

It is also regrettable and surprising that Sack and Staurowsky assert that the framework proposed in *Intercollegiate Athletics in the Next Millennium* is not the type of "reasoned and dispassionate discussion" that will advance the dialogue concerning alternate proposals. I take exception to such an attack which is made all the worse by Sack and Staurowsky's misunderstanding of the rather obvious theme of *Intercollegiate Athletics in the Next Millennium*. Such sentiments on their part reflect an unjustified defensive posture, that among other things, brings into question whether they truly want to "stimulate" the type of dialogue identified as one of their "major goals" in writing *College Athletes for Hire*. Rather than attempting to limit discussion, *Intercollegiate Athletics in the Next Millennium* attempts to establish a framework that will broaden the debate by not simply focusing on amateurism but on a range of factors that are critically important in evaluating reform proposals.

In conclusion, the premise of *Intercollegiate Athletics in the Next Millennium*, is not that a professional model may not ultimately prove to be the preferred model of governance for intercollegiate athletics. I simply assert that in *College Athletes for Hire*, Sack and Staurowsky have not presented a convincing case for its adoption. This arises from Sack and Staurowsky's failure to address many of the difficult questions triggered by their proposed professional model. Perhaps, this dialogue will provide the impetus for Sack and Staurowsky to reexamine and to provide more details of their proposed model so that we can begin the process of thoroughly, yet honestly, evaluating it in the context of all relevant considerations.