Deception, Degeneration, and the Delegation of Duty: Contracting Safety Obligations Between the NCAA, Member Institutions, and Student-Athletes

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DECEPTION, DEGENERATION, AND THE DELEGATION OF DUTY: CONTRACTING SAFETY OBLIGATIONS BETWEEN THE NCAA, MEMBER INSTITUTIONS, AND STUDENT-ATHLETES

I. INTRODUCTION

“At the end of the day it’s football, you only got so many opportunities, so I’m not going to let a little throw up[] keep me out of the game, you know, ‘cause the game’s on the line, everybody—I think . . . a lot of my teammates—they would’ve done the same thing.” — Jordan Matthews

Jordan Matthews vomits immediately after slamming his head against the turf in the 2013 season opener against Ole Miss. The announcers praise advances in concussion protocol and Jordan’s performance that night, convinced he would not be returning. However, Vanderbilt could not afford to have their best player benched with three minutes to go in the fourth quarter and just a four-point deficit. The game was on the line and Jordan’s team needed him.

Remarkably, despite never undergoing concussion testing, Matthews reenters just moments later. According to Vanderbilt, aside from the

3 Id.
concussion inducing hit and subsequent illness, he exhibited no concussion symptoms. Thus, it was impetuously determined that mandatory concussion testing was unnecessary and Jordan Matthews was cleared to play. Through its inaction, Vanderbilt decidedly evidenced its priorities.

Matthews felt compelled to return to the game, uninterested in determining what induced his sudden illness. Likewise, Vanderbilt coach James Franklin vehemently contended that he would never put his player’s health in jeopardy, yet conceded that Matthews was crucial to Vanderbilt's success. Finally, Jordan Matthews’ last line of defense, the medical staff, neglected to perform any precautionary tests even though he undeniably displayed concussion symptoms. It is this very...
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This Note analyzes the current NCAA Concussion Policy’s ineffectiveness. It argues that the NCAA’s effort to relieve itself from legal liability through its contractual relationship with universities that are members of the NCAA (“member institutions”) is not only greatly flawed, but seriously endangering the welfare of the student-athletes. To rectify this social wrong, the NCAA should redraft its Concussion Policy to incentivize student-athletes to disclose concussion symptoms, employ independent medical personnel to be present at every NCAA sanctioned football game, and establish an oversight body to ensure enforcement of the proposed policy.

First, Part II illustrates the NCAA’s pervasive failure with historical, legal, medical, and social background of the intercollegiate concussion controversy. Next, Part III assesses the inadequacy of the current NCAA Concussion Policy, specifically examining the NCAA’s failed performance of its promise to protect student-athletes as third-party beneficiaries of the NCAA and member institution’s contract. Last, Part IV proposes redrafting the current NCAA Concussion Policy, requiring independent medical personnel to be present at each game, and establishing an outside monitoring system to ensure proper implementation. Unquestionably, the NCAA’s unenforced and ineffective Concussion Policy must be restructured to alleviate the medical, social, and legal implications currently plaguing college football, leaving nearly seventy thousand athletes defenseless.

SEC Football Games, supra note 2 (providing the announcers’ reaction to Matthews’ injury with stating that anyone on a medical staff knows vomiting is the first indication of a concussion).

13 See infra Part II (demonstrating the conflicting incentives in intercollegiate football that impede success of the NCAA Concussion Policy).

14 See infra Part III (analyzing the NCAA’s current, ineffective concussion policy).

15 See infra Part II (establishing the contractual relationship, while illustrating its troubling application).

16 See infra Part IV (suggesting an outside governing body, independent medical personnel, and redrafting of the current language).

17 See infra Part II (providing background, which evidences the need for an improved monitoring system).

18 See infra Part III (assessing the current system’s shortcomings).

19 See infra Part IV (concluding that the issues surrounding the current NCAA Concussion Policy can only be resolved through third-party enforcement and redrafting of the current plan).

II. BACKGROUND

“From the President of the United States to the humblest member of a... college faculty there arises a general protest against this boy-killing, man-mutilating, money-making, gladiatorial sport.”21 Death and injury has plagued intercollegiate football since its creation, thus necessitating continuous regulation of the sport.22 The NCAA was established as a result of this exigency.23 Ironically, the Association has recently endured extensive criticism for its inconsistent regulation and erroneous protection of student-athletes.24 Just as was the case in the beginning, societal recognition and presidential condemnation of gridiron violence has since led the NCAA to reassess safety standards for athletes.25 However, the NCAA’s failure to enforce its concussion policy has left it susceptible to further denunciation and legal liability.26

21 Taming Football, in 10 THE WORLD TO-DAY 3 (Shalier Mathews, ed. 1906).
26 Emails Raise Questions, supra note 24.
This Part explores the NCAA’s largely criticized concussion management protocol by contextualizing the history and governance structure of the NCAA, the nuances of a head injury, as well as the social complexities involved in intercollegiate football. Part II.A provides background on the NCAA and its governance structure, which has given rise to legal liability, as well as explores the history of the NCAA’s current concussion legislation. Part II.B discusses the epidemiology of a concussion, which further evidences the current Concussion Policy’s impracticalities. Finally, Part II.C presents the conflicting socio-ecological concerns that hinder concussion reporting.

A. Two Curable Evils in American Life: Lynchings and Football

At the turn of the century, the American public sought to accomplish the now unimaginable—outlaw and abolish football. In fact, the New York Times published an editorial that strongly advocated for this movement by associating college football with lynching. The campaign to eliminate the sport arose after eighteen college athletes died in just one season. As a result, the NCAA was formed to mitigate the increased danger and nullify the subsequent crusade to eradicate football. It is argued, however, that the Association has since disassociated from its founding principal. Next, Part II.A.1 establishes the NCAA’s

27 See infra Part II (providing the history of concussions in the NCAA and the dangers posed to student-athletes).
28 See infra Part II.A (examining the NCAA’s establishment and transformation).
29 See infra Part II.B (detailing the physiology of a concussion).
30 See infra Part II.C (establishing the contradicting motives of coaches, student-athletes, and medical personnel).
33 CROWLEY, supra note 23, at 9; Smith, supra note 22. In addition to the deaths, 149 serious injuries arose out of the 1905 season alone. CROWLEY, supra.
35 See, e.g., Miller, supra note 34, at 1141–42 (illustrating the NCAA’s focal shift from safety to amateurism).
precarious governance scheme and the legal relationships that arise from the Association’s legislation.36 Then, Part II.A.2 examines the NCAA’s reliance on its governance structure to perpetuate its longstanding disregard for player safety, as well as discusses the current legal battles plaguing the NCAA.37

1. The 12th Man

The NCAA is a “membership-driven organization dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom and throughout life.”38 It is comprised of over 1000 member institutions with more than 400,000 athletes competing in three separate divisions.39 The Association regulates intercollegiate athletics by enacting, supervising, and enforcing legislation contained in its Constitution and bylaws.40 Each division’s NCAA Division Manual outlines the Association’s legislation and operates as a legal contract between the NCAA and member institutions.41 Compliance with NCAA legislation is regulated by a self-reporting system, which entrusts member institutions with exposing their own infractions to the Association by fully disclosing all information requested by the NCAA’s formal investigating staff.42

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36 See infra Part II.A.1 (providing the interworking of the NCAA governance structure and legal implications).
37 See infra Part II.A.2 (elaborating on the NCAA Concussion Policy’s defectiveness and subsequent lawsuits).
42 CROWLEY, supra note 23, at 83. However, the Association has safeguarded this system by also enacting a formal process responsible for formal investigations of rule violations. Maureen A. Weston, NCAA Sanctions: Assigning Blame Where It Belongs, 52 B.C. L. Rev. 551, 563 (2011).
In fact, everyone within an institution’s athletic program is contractually obligated to expose potential violations. In addition to requirements under the Division I Manual, failure to report infractions is also a violation of the NCAA’s Certification of Compliance for Staff Members of Athletic Departments form and can subject an institution to fines, loss of scholarships, or in extreme cases, removal from the NCAA. Student-athletes also benefit from this contractual relationship between the NCAA and member institutions.

The NCAA and member institution’s contractual relationship extends to student-athletes under several legal theories. As third-party beneficiaries, student-athletes may enforce assurances made under the Constitution and bylaws.

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45 See Oliver, 920 N.E.2d at 200 (noting the contract between the NCAA and member institutions in discussing student-athletes third-party beneficiary status); Joel Eckert, Student-Athlete Contract Rights in the Aftermath of Bloom v. NCAA, 59 VAND. L. REV. 905, 910 (2006) (stating that Bloom “marked the first time that a court acknowledged unequivocally that student-athletes have contract rights under the NCAA Constitution and bylaws”).


47 See Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 242 (D. Vt. 1994) (finding that a college has an obligation to act in a manner consistent with the terms of the Handbook). Moreover, additional documents may be incorporated if specifically referenced in the contract. See Knelman v. Middlebury Coll., 570 F. App’x 66, 68 (2d Cir. 2014) (citing Newton v. Smith Motors, Inc., 175 A.2d 514, 516 (1961)) (“[A] contract may be reached with reference to another writing, and the other document, or so much of it as is referred to, will be interpreted as a part of the main instrument,’ but ‘the extrinsic writing must be connected by specific reference or by such mutual knowledge and understanding.’”). See generally Leslie E. Wong, Comment, Our Blood, Our Sweat, Their Profit: Ed O’Bannon Takes on the NCAA for Infringing on the Former Student-Athlete’s Right of Publicity, 42 TEX. TECH L. REV. 1069, 1074 (2010) (defining a third-party beneficiary). The athlete’s right to enforce any promise is contingent upon the original contracting parties’ intent. See generally Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1320 (9th Cir. 1996) (articulating intent analysis). An individual attempting to show status as a third-party beneficiary cannot simply illustrate that he will benefit from performance of the contract, but must specifically demonstrate that the contracting parties intended to bestow a benefit upon him. McCarthy v. Azure, 22 F.3d 351, 362 (1st Cir. 1994).
party beneficiary status arises under the NCAA legislation, the finding has been confined to claims arising out of enforcement of eligibility requirements.\(^\text{48}\) This conclusion is based upon the notion that “member institutions agree to let the NCAA set the criteria and to abide by the NCAA’s final eligibility decision.”\(^\text{49}\) In turn, the student-athlete stands to directly benefit from the contract’s performance; therefore, he acquires rights under the agreement, as well as the ability to enforce the contract’s promises once the rights have vested.\(^\text{50}\)

Student-athletes, as third-party beneficiaries, may also bring a claim of good faith and fair dealing.\(^\text{51}\) The covenant of good faith is an “implied-in-law promise not to do anything to undermine or destroy [the plaintiff’s] rights to receive the benefit of the parties’ . . . agreement.”\(^\text{52}\) Negligence or refusal to fulfill a contractual obligation rises to the level of bad faith if it is prompted by an interested or sinister motive.\(^\text{53}\)

Under 2014–2015 NCAA Division I Manual (“Division I Manual”), the NCAA articulates a commitment to the well-being of student-athletes.\(^\text{54}\) The Association effectuates this promise through “uphold[ing] the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and

\(^{48}\) Knelman, 898 F. Supp. 2d at 715. See generally Hall, 985 F. Supp. at 797 (exemplifying a successful third-party beneficiary claim against the NCAA).

\(^{49}\) Knelman, 898 F. Supp. 2d at 715 (citing Oliver v. NCAA, 920 N.E.2d at 200).

\(^{50}\) Id. In considering whether terms gives rise to an intentional benefit, courts employ an objective analysis of the contract language, as well as evaluate extrinsic evidence interpreting that language, and all surrounding circumstances. Huff v. FirstEnergy Corp., 957 N.E.2d 3, 9 (2011). Put differently, courts consider whether “circumstances indicate that the promisee intend[ed] to give the beneficiary the benefit of the promised performance.” Knelman, 898 F. Supp. 2d at 714. Once intent is established and the student-athlete’s rights have vested, the NCAA and member institutions are bound to perform their contractual obligations. Oliver, 920 N.E.2d at 200. See generally Olson v. Etheridge, 686 N.E.2d 563, 570 (1997) (explaining that vesting occurs if the beneficiary knows of and has detrimentally relied on the rights, has expressly assented to the contract at the request of one of the parties, or if the beneficiary files a lawsuit to enforce the contract).

\(^{51}\) See Knelman, 898 F. Supp. 2d at 716 (elaborating on the duty of good faith).

\(^{52}\) Id. (citations omitted).

\(^{53}\) Id. at 714.

\(^{54}\) Division I Manual, supra note 40, at 348. Under Article 20.9.1.6 of the Division I Manual, the NCAA asserts its commitment to student-athlete well-being. Id. The Association directs: “Intercollegiate athletics programs shall be conducted in a manner designed to enhance the well-being of student-athletes who choose to participate . . . . Each member institution should also provide an environment that fosters fairness, sportsmanship, safety, honesty and positive relationships between student-athletes and representatives of the institution.” Id. (emphasis added). For purposes of efficiency, this Note will concentrate on legislation contained in the Division I Manual.
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bylaws of th[e] Association.” The NCAA further delineates that “student-athletes rightfully assume that those who sponsor intercollegiate athletics have taken reasonable precautions to minimize the risks of injury from athletics participation.” To effectuate its role in minimizing the risk of injuries, the NCAA ensures member institutions implement and enforce the Association’s legislation and subject noncompliant members to the infractions process. In regard to compliance with the NCAA’s Concussion Protocol, the NCAA articulates, “[a] violation of [the protocol] shall be considered an institutional violation per Constitution 2.8.1.” However, prior to 2010, legislation specific to concussions was omitted from the NCAA’s Division I Manual. 

55 DIVISION I MANUAL, supra note 40, at art. 1.2(b); see id. at art. 1.3.2 (“Member institutions shall be obligated to apply and enforce this legislation, and the infractions process of the Association shall be applied to an institution when it fails to fulfill this obligation.”); id. at art. 2.8.2 (“The Association shall assist the institution in its efforts to achieve full compliance with all rules and regulations and shall afford the institution, its staff and student-athletes fair procedures in the consideration of an identified or alleged failure in compliance.”); id. at art. 2.8.3 (“An institution found to have violated the Association’s rules shall be subject to such disciplinary and corrective actions as may be determined by the Association.”). The NCAA revised Article 1.3.2 on July 31, 2014, which previously read: “Member institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation.” Compare DIVISION I MANUAL, supra note 40, at art. 1.3.2, with NCAA ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, 2013–2014 NCAA DIVISION I MANUAL art. 1.3.2 (July 2013) (on file with author) (emphasis added). See generally Gene Marsh & Marie Robbins, Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation, 55 FLA. L. REV. 667, 668–69 (2003) (discussing the toll an institutional violation has on football programs).


57 See DIVISION I MANUAL, supra note 40, at art. 1.2(b) (“The purposes of this Association are . . . [t]o uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association.”).

58 MEDICINE HANDBOOK, supra note 56, at 63; see also infra note 67 and accompanying text (establishing shall as a mandatory, rather than directory, term).

59 See DIVISION I MANUAL, supra note 40, at 11 (indicating that it was enacted in 2010); see also JACKSON LEWIS LLP, supra note 25 (providing that “[f]or years, the NCAA’s guidance in the area of concussion management has been a few pages in the NCAA Sports Medicine Handbook”).
2. The Castro of College Athletics

The NCAA is currently experiencing the most threatening coup d'état of its 100-year reign. Its constituents are tirelessly attempting to overthrow its amateurism ideology, while seeking greater autonomy. In doing so, the most prominent governing body in all of sports has been publically disgraced as a self-serving dictatorship. Ironically, the governmental body responsible for protecting player health and safety is now associated with a form of leadership notorious for its brutality. Accordingly, players have initiated lawsuits as a result of the NCAA’s continued failure to secure their safety. Unfortunately, the NCAA has demonstrated a history of disingenuous efforts to create an illusion of protection, while attempting to negate its longstanding disregard for an athlete’s overall well-being.

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61 See Dave Jamieson & Emily Swanson, Public Backs College Football Players’ Grievances, But Not Their Union, HUFF. POST (Feb. 15, 2014, 8:42 AM), http://www.huffingtonpost.com/2014/02/15/college-football-players-union_n_4790136.html?ncid=tweetnkushpmg00000067, archived at http://perma.cc/7FXZ-N4CS (contextualizing Northwestern’s attempt to form a union to bargain for medical coverage and scholarship terms).


65 See infra Part II.A.2 (exploring the history of NCAA concussion management).
On August 12, 2010, the Association enacted the NCAA Concussion Management Plan (“Concussion Plan”). The Concussion Plan mandates that “[a]n active member institution shall have a Concussion Management Plan for its student-athletes.” Additionally, each institution is responsible for drafting a plan, implementing the plan, and ensuring compliance on behalf of the entire institution. Noncompliance is considered an institutional violation and subject to

67 DIVISION I MANUAL, supra note 40, at 3.2.4.17; Kevin Vaughan, Did NCAA Ignore Concussion Issue?, F OXSPO R TS (June 6, 2014, 3:07 PM), http://msn.foxsports.com/collegefootball/story/ncaa-concussion-lawsuit-mediation-harder-time-than-nfl-defending-itself-110413, archived at http://perma.cc/U5KP-DMY9 (delivering that enforcement was still left discretion to the institutions). See generally Arrington Memo, supra note 25, at 42 (illustrating the NCAA’s discussion of whether shall or should would be used and the implications it would have on the NCAA). The Director of Health and Safety ultimately informed member institutions that “[a]ll of the shalls will be should’s.” Id. at 42, 50. Generally, shall is mandatory and not directory. Village of Mundelein v. Hartnett, 454 N.E.2d 29, 33 (Ill. App. 2d 1983). The Plan further articulates that:

The plan shall include, but is not limited to, the following: (Adopted: 8/12/10)

(a) An annual process that ensures student-athletes are educated about the signs and symptoms of concussions. Student-athletes must acknowledge that they have received information about the signs and symptoms of concussions and that they have a responsibility to report concussion-related injuries and illnesses to a medical staff member;

(b) A process that ensures a student-athlete who exhibits signs, symptoms or behaviors consistent with a concussion shall be removed from athletics activities (e.g., competition, practice, conditioning sessions) and evaluated by a medical staff member (e.g., sports medicine staff, team physician) with experience in the evaluation and management of concussions;

(c) A policy that precludes a student-athlete diagnosed with a concussion from returning to athletics activity (e.g., competition, practice, conditioning sessions) for at least the remainder of that calendar day; and

(d) A policy that requires medical clearance for a student-athlete diagnosed with a concussion to return to the athletics activity (e.g., competition, practice, conditioning sessions) as determined by a physician (e.g., team physician) or the physician’s designee.

68 See DIVISION I MANUAL, supra note 40, at art. 3.2.4.17 (demonstrating that all obligations are on the member institution). See generally UNIV. OF MIAMI DEP’T OF ATHLETICS CONCUSSION GUIDELINES, UNIV. MIAMI (Aug. 1, 2014), available at http://hurricanesports.com/files/25700/files/2014%20University%20of%20Miami%20CONCUSSION%20POLICY.PDF, archived at http://perma.cc/6HQE-33B6 (exemplifying a member institution’s concussion management plan).
penalties imposed under the Constitution.69 However, member institutions often afford football programs greater protection because of their profitability; thus, universities will conceal violations that implicate its football program.70 To date, a member institution has never been charged with an infraction under the policy, despite blatant disregard.71

69 See MEDICINE HANDBOOK, supra note 56, at 2, 63 (enumerating the penalties for noncompliance). “A violation of Constitution 3.2.4.17 shall be considered an institutional violation per Constitution 2.8.1; however, the violation shall not affect the student-athlete’s eligibility.” Id. Although the document itself evidences enforcement, the NCAA has never actually effectuated any punishment. Emails Raise Questions, supra note 24; see also NCAA DIV. I ADOPTED LEGS. PROPOSAL NO. 2013-16, NCAA (Jan. 21, 2014), available at http://www.ncaa.org/sites/default/files/adopted_proposals_0114.pdf, archived at http://perma.cc/CB2W-WDDB (dictating that a violation of 3.2.4.17 is considered a violation of failing to designate a team physician); DIVISION I MANUAL, supra note 40, at 4 (establishing the responsibility of the institution). The manual states:

Each institution shall comply with all applicable rules and regulations of the Association in the conduct of its intercollegiate athletics programs. It shall monitor its programs to assure compliance and to identify and report to the Association instances in which compliance has not been achieved. In any such instance, the institution shall cooperate fully with the Association and shall take appropriate corrective actions. Members of an institution’s staff, student-athletes, and other individuals and groups representing the institution’s athletics interests shall comply with the applicable Association rules, and the Member Institution shall be responsible for such compliance.

Id.


71 See Brad Wolverton, Coach Makes the Call: Athletic Trainers Who Butt Heads with Coaches over Concussion Treatment Take Career Hits, CHRON. HIGHER EDUC. (Sept. 2, 2013), http://chronicle.com/article/Trainers-Butt-Heads-With/141333/, archived at http://perma.cc/DT6Z-YH6N (analyzing the stricter guidelines). The NCAA added language to its Handbook advising that “[u]nder no circumstances should a student-athlete diagnosed with a concussion return to a sports activity the same day.” Id. However, the NCAA’s Chief Medical Officer, Brian Hainline, contended that the NCAA “can say, [t]his is how we believe medical care should be delivered . . . but can’t just shift and say, now everyone’s going to do this.” Id. (internal quotation marks omitted). Nathan Fenno, NCAA’s Concussion Culture Rooted in Denial, WASH. TIMES (July 22, 2013), http://www.washingtontimes.com/news/2013/jul/22/ncaa-concussion-culture-rooted-
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Just one year after the 2010 amendments, Frostburg State fullback Derek Sheely died from head trauma he sustained on the field after being chastised by his coach to continue playing while concussed.72 Following his death, Derek’s mother wrote a letter to NCAA president, Mark Emmert, requesting the NCAA’s support in her quest to prevent catastrophic head injuries.73 The NCAA’s Director of Health and Safety, Dr. David Klossner responded on behalf of Mr. Emmert, stating that “[p]art of the NCAA’s core mission is to provide student-athletes with a denial/?page=all, archived at http://perma.cc/ZRJ5-MRUB [hereinafter NCAA’s Concussion Culture Rooted in Denial] (quoting the NCAA Director of Enforcement’s email to the NCAA President asserting it would be inappropriate to punish a coach for violating the concussion policy).

72 Matt Crossman, Sharing Derek Sheely: A Helmet-to-Helmet Hit Took the Life of a 22-Year-Old Football Player: Two Years Later, Friends and Family Keep His Memory Alive, One Story at a Time, SB NATION (Dec. 17, 2013) http://www.sbnation.com/longform/2013/12/17/5217644/sharing-derek-sheely-a-helmet-to-helmet-hit-took-the-life-of-a-22, archived at http://perma.cc/AZE3-VDL. Derek Sheely was just twenty-two years old when he sustained a blow to the head that cost him his life. Id. He endured two straight days of rigorous contact before informing his coaches that he “didn’t feel right.” Id. Unfortunately, his plea for help was met with demands to toughen up and “[g]et back out there.” Complaint at 7–8, Kristen L. Sheely et al. v. NCAA, No. 380569-V (Montgomery Cnty. Ct. Md. Aug. 22, 2013) [hereinafter Sheely Complaint] (noting that the word concussion was not mentioned a single time in the Frostburg’s team policies). Derek died from the brain injury he sustained during practice. Id.; see also Barry Patchesky, Why Did Derek Sheely Die?, DEADSPIN (Nov. 13, 2013, 10:37 AM), http://deadspin.com/family-of-player-killed-in-practice-sues-ncaa-coaches-1188048031/#ixzz2iKGL1OeG (illustrating the pervasive failure). “[J]ust about every authority failed [him], and neither the school nor the NCAA seem particularly keen on getting to the bottom of what happened.” Id. According to an anonymous letter sent to the Sheely’s after Derek’s death, the Frostburg coaches continued to yell at him even after he collapsed. Sara Ganim, Unnecessary Roughness? Players Question NCAA’s Record on Concussions, CNN (Oct. 30, 2014, 9:00 AM), http://www.cnn.com/interactive/2014/10/us/ncaa-concussions/, archived at http://perma.cc/THU6-U999. The complaint quotes:

We must distinguish between pain and injury . . . In the rare event you are injured, remember the following: . . .
5. If one cannot practice on Wednesday, he cannot start on SATURDAY.
6. If one cannot practice on a Thursday, he probably will not dress . . .
8. Great champions can distinguish between pain and injury.
Sheely Complaint, supra, at 13.

73 Letter from Kristen Sheely, Exec. Dir., The Derek Sheely Fund., to Mark Emmert, President, NCAA (Dec. 30, 2011), available at http://nflconcu...
competitive environment that is safe and ensures fair play." He assured her that the NCAA “will continue to devote [its] attention to health and safety issues and . . . enact change to its rules and standards when the medical evidence indicates it is appropriate to do so,” yet refused to investigate Derek’s death. Ironically, Dr. Klossner’s evasive response to Derek Sheely’s death directly contradicts his original intent for the NCAA’s Concussion Policy.

Initially, Dr. Klossner contended that the 2010 Concussion Plan would harshly punish coaches who knowingly returned a concussed athlete to play, but quickly retracted his statement and instead claimed infractions only be imposed in cases of systematic disregard. Yet, the NCAA admittedly did not have any oversight system in place to confirm that a member institution was following the Concussion Policy, nor did it enforce its requirement that each school have a concussion plan on file. According to the NCAA’s Director of Enforcement, Chris Strobel, “[t]he [concussion] legislation was specifically written to require institutions to have a plan and describe what minimum components had

75 Id.
76 See Sheely Complaint, supra note 72, at 24–27 (showing Dr. Klossner’s crusade to implement strict rules). Dr. Klossner was deterred from his initial ambition by fellow NCAA staff members’ fear of liability. Id. at 26. In an email thread, the Director of the Playing Rules Administration states, “Dave [Klossner] is hot/heavy on the concussion stuff. He’s been trying to force our rules committees to put in rules that are not good—I think I’ve finally convinced him to calm down.” Id. at 23–24. In particular, Strobel initially stated “[p]enalties will depend on the circumstances of the violation . . . a coach [who] requires a student-athlete to compete after being informed [he] has been diagnosed with a concussion, [I] would require a significant penalty.” Id. at 23. Yet, two hours later he claimed his emails were premature and was corrected that only “systematic or blatant disregard for the plan that would indicate a lack of institutional control” would most likely be considered a major violation. Id.; Nathan Fenno, NCAA Continues to Prove it is Hypocritical to the Core, WASH. TIMES (Dec. 24, 2013), available at http://www.washingtontimes.com/news/2013/dec/24/fenno-ncaa-continues-prove-it-hypocritical-core/?page=all, archived at http://perma.cc/JJS2-MU3U [hereinafter Hypocritical to the Core] (illustrating the NCAA’s evasiveness with regard to player safety).

77 Hypocritical to the Core, supra note 77; see Eye On College Football Staff, Report: NCAA Staffers Were Not on Board with Concussion Policy, CBS SPORTS (July 21, 2013, 12:59 PM), http://www.cbssports.com/collegefootball/eye-on-college-football/22837768/report-ncaa-staffers-were-not-on-board-with-concussion-policy, archived at http://perma.cc/CJH2-B5PU (stating an internal NCAA survey indicated that half of the member institutions “[did not] require a concussed athlete to see a doctor . . . [and] only sixty-six percent of schools used baseline testing”).
to be part of the plan—not about enforcing whether or not they were following their plan."79 Ultimately, however, increased societal awareness of concussion dangers, unrelenting criticism of the NCAA, and a class action lawsuit forced the Association to finally implement additional procedures.80

On September 12, 2011, former Eastern Illinois team captain, Adrian Arrington, filed a class action lawsuit against the NCAA for its mismanagement of concussions.81 The Plaintiffs alleged negligence, fraudulent concealment, medical monitoring, and unjust enrichment.82 Shortly thereafter, several other former NCAA athletes began filing lawsuits against the NCAA for concussion mismanagement, which were

79 Emails Raise Questions, supra note 24.
80 See Complaint, Arrington v. NCAA, No. 11CV06356 (N.D. Ill. Sept. 12, 2011) [hereinafter Arrington Complaint] (illustrating the motivation for the class action lawsuit); Arrington Memo, supra note 25, at 33 (exposing internal NCAA emails addressing societal pressure); Jon Solomon, Who's Suing the NCAA? AL.com Database of Concussion Lawsuits by Ex-Players, AL.COM (Feb. 6, 2014, 5:00 AM), http://www.al.com/sports/index.ssf/2014/02/whos_suing_the_ncaa_alcom_data.html, archived at http://perma.cc/Z44K-HPX5 (conveying further information on the lawsuits failed against the NCAA). The NCAA Managing Director of Government Relations, Abe Frank, cautioned his colleagues that “[t]he landscape has clearly changed around us, at the professional and high school levels, so the focus will remain on us as long as we do not have a rule that keeps a player out (at least same day) after a hit to the head. It probably is not inconsistent to both have a base line rule regarding return to play and still keep most of the decisions at the local institution level.” Arrington Memo, supra. The Director of Health and Safety then asserted that he did not understand why it was necessary by replying, “[a]nd if not, what is the fall out. I am not sure I have a grasp of not having a rule versus recommendations that favor institutional control.” Id. (internal quotation marks omitted). Correspondingly, the Associate Director of Government Relations replied:

I assume we will continue to get negative press and likely continued Congressional scrutiny in the short run. I do not expect the issue to go away soon as some baseline requirement... in this important area for the health and safety of our student-athletes is likely seen as a reasonable act to deter long term injury by many in the public.

Id. at 34.
then consolidated with the Arrington lawsuit. On February 12, 2013, the Plaintiffs’ complaint was further amended to include express and implied contract claims based upon several well-established contract theories. During this time, both the NCAA and the student-athletes mutually sought a stay of the court’s consideration in order to pursue settlement discussions. The negotiations resulted in a proposed and largely criticized $75 million settlement, which was ultimately rejected by United States District Court Judge John Z. Lee.

During the same month as the proposed settlement, the NCAA released updated guidelines on concussion management similar to the agreed upon conditions of the settlement. Under the recommendations, the NCAA proposed limiting live contact during practice, ensuring that players receive medical care from independent experts whose sole interest is the athlete’s well-being, and that member institutions make their concussion plans available to the public. As part of the settlement agreement, the NCAA also implemented a reporting process for member institutions to report diagnosed concussions, which was eventually enacted as legislation in the Division I Manual.

On January 17, 2015, the NCAA updated its Division I Manual to include an additional section on Concussion Safety Protocol. The new protocol instituted a requirement that every institution annually submit its concussion guidelines to the Concussion Safety Protocol Committee.

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83 In Re NCAA Student-Athlete Concussion Injury Litigation, No. 13 C 9116, at 3 (ND Ill. Dec. 17, 2014) [hereinafter Settlement Decision].
84 Second Amended Class Action Complaint, supra note 46, at 74–94.
85 Settlement Decision, supra note 83, at 3.
86 Ben Strauss, Judge Rejects $75 Million Settlement in Lawsuit Against N.C.A.A. on Head Injuries, N.Y. TIMES (Dec. 17, 2014), available at http://www.nytimes.com/2014/12/18/sports/judge-rejects-75-million-settlement-in-lawsuit-against-ncaa-on-head-injuries.html?_r=0, archived at http://perma.cc/W4LA-GAMX. Among his concerns, Judge Lee questioned the NCAA’s enforcement of penalties for member institutions that did not follow the stricter procedures. Id.
89 Settlement Decision, supra note 83.
90 DIVISION I MANUAL, supra note 40, at art. 3.2.4.17.1.
91 Id. The revised protocol states:
The protocol further mandates that institutions provide all relevant information to the committee, upon its request, concerning any incident where a student-athlete sustained a concussion. Yet, the new protocol still omits enforcement procedures and instead relies on student-athletes to disclose concussion symptoms and member institutions to self-report violations, a nearly impossible task considering the neurological impairments involved in a concussion.

3.2.4.17 Concussion Safety Protocol. An institution shall submit its Concussion Safety Protocol to the Concussion Safety Protocol Committee by May 1 of each year. The protocol shall be consistent with the Inter-Association Consensus: Diagnosis and Management of Sport-Related Concussion Guidelines and shall include: (Adopted: 1/17/15)
(a) Policies and procedures that meet the requirements of Constitution 3.2.4.17;
(b) Procedures for preparticipation baseline testing of each student-athlete;
(c) Procedures for reducing exposure to head injuries;
(d) Procedures for education about concussion, including a policy that addresses return-to-learn;
(e) Procedures to ensure that proper and appropriate concussion management, consistent with best known practices and the Inter-Association Consensus: Diagnosis and Management of Sport-Related Concussion Guidelines, is made available to any student-athlete who has suffered a concussion;
(f) Procedures requiring that the process of identifying, removing from game or practice, and assessing a student-athlete for a possible concussion are reviewed annually; and
(g) A written certificate of compliance signed by the institution’s athletics director.

3.2.4.17.1.1 Information to Concussion Safety Protocol Committee. An institution shall provide information to the Concussion Safety Protocol Committee, as the committee may request, concerning any incident in which a student-athlete may have suffered a concussion. (Adopted: 1/17/15).

Id. at arts. 3.2.4.17.1 & 3.2.4.17.1.1. The Concussion Safety Protocol Committee is comprised of six individuals, including NCAA’s Chief Medical Officer, Brian Hainline and University of North Carolina Researcher, Kevin Guskiewicz. Jon Solomon, Why the NCAA Won’t Adopt Concussion Penalties—At Least Not Yet, CBS SPORTS (Feb. 18, 2015, 4:58 PM), http://www.cbssports.com/collegefootball/writer/jon-solomon/25073014/why-the-ncaa-wont-adopt-concussion-penalties----at-least-not-yet, archived at http://perma.cc/6G5J-C7D4. It was created by the Power Five conferences and will only oversee those conferences for the time being. Id.

92 IVISION I MANUAL, supra note 40, at art. 3.2.4.17.1.1.
93 See NCAA Guidelines on Head Injuries Fall Short, N.Y. TIMES, July 12, 2014, at A16 (criticizing the new guidelines). “The NCAA is quite willing to enforce all manner of petty rules that have nothing to do with safety… [p]rotecting students should be a higher priority.” Id. The Executive Director of the Sports Legacy Institute, Chris Nowinski, feels the NCAA needs to reconsider its enforcement of concussion management, providing that it “is such an urgent problem that the national governing body needs to step up . . . [i]t is a
B. A Neurological Nightmare

Ohio State Defensive Lineman Kosta Karageorge is the most recent college athlete to fall victim to the concussion’s ruthless neurological havoc.94 Kosta, in his final cryptic message to his mother, indicated that concussions were the cause of his suicide.95 Yet, depression and suicidal tendencies are only two of the multitude of symptoms intrinsically linked to concussions.96 Recognition of all concussion symptoms is essential for proper diagnosis and treatment, which are crucial clear situation where athletes need to be protected, and [they are] not being protected.” Wolverton, supra note 71. Nowinski believes the NCAA needs to expand oversight of member institutions and create harsher punishments to deter coaches from questioning medical decisions. Id. Further advancements have been made by the Big Ten Conference, which has enhanced its concussion protocols to include reporting requirements, disciplinary actions with non-compliance, and greater accountability for member institutions in the Big Ten. Jon Solomon, Big Ten will Penalize for Not Complying with Concussion Standards, CBS NEWS (Dec. 8, 2014, 1:09 PM), http://www.cbsnews.com/collegefootball/writer/jon-solomon/24874744/big-ten-will-penalize-for-not-complying-with-concussion-standards, archived at http://perma.cc/9Y35-TNT3. Additionally, the Big Ten will employ an independent athletic trainer in the replay booth who can directly contact the officials on the field. Id.


95 See Maese, supra note 94 (texting, “I am sorry if I am an embarrassment but these concussions have my head all [expletive] up.”).

determinants in preventing further senseless deaths. Unfortunately, concussion identification is particularly problematic because of the inherent complexity involved in head injury diagnosis. Yet, the current NCAA Concussion Policy delegates the near impossible task of recognizing a concussion to the student-athlete. The physiological trepidation an athlete endures during a head injury is understood by explaining the epidemiology of a concussion.

A concussion is a very enigmatic injury because it is practically impossible to diagnose with the naked eye. When making a diagnosis, medical personnel look for disturbances in the level of consciousness.  


98 Zachary Y. Kerr et al., Disclosure and Non-Disclosure of Concussion and Concussion Symptoms in Athletes: Review and Application of the Socio-ecological Framework, 28 BRAIN INJURY 1009, 1009–10 (2014); see Christine M. Baugh et al., Perceived Coach Support and Concussion Symptom-Reporting: Differences Between Freshman and Non-Freshman College Football Players, 42 J.L. MED. & ETHICS 314, 315 (2014) [hereinafter Perceived Coach Support] (conveying that “[s]ome studies have estimated that over 50% of concussions go undiagnosed, in large part due to athletes failing to report symptoms” (citations omitted)). Baugh also attributes undiagnosed concussions to lacking and unmandated coach education. See id. at 320 (stating, “there appears to be variation in coaches’ abilities to recognize concussion . . . [a]lthough many state laws and sport league policies recommend coach concussion education, it is less frequently mandated”).

99 See Barbara Osborne, Principles of Liability for Athletic Trainers: Managing Sport-Related Concussion, 36 J. ATHLETIC TRAINING 316, 316 (2001) (emphasizing that recognizing and treating concussions is one of the most difficult problems facing even educated medical personnel). See generally Therese A. West & Donald W. Marion, Current Recommendations for the Diagnosis and Treatment of Concussion in Sport: A Comparison of Three New Guidelines, 31 J. NEUROTRAUMA 159, 166 (Jan. 15, 2014) (reiterating the debate surrounding proper diagnosis and treatment of concussions).

100 See infra Part II.B (discussing the concussion). Epidemiology is defined as “the study of the occurrence and distribution of health-related states or events in specified populations, including the study of the determinants influencing such states, and the application of this knowledge to control the health problems.” MIQUEL PORTA, A DICTIONARY OF EPIDEMIOLOGY 81 (2008).

101 See Heather J. McCrea et al., Concussion in Sports, 5 SPORTS HEALTH 160–63 (2013) (explaining that concussion diagnosis is difficult because objective measurements are lacking); Daniel H. Daneshvar et al., The Epidemiology of Sport-Related Concussion, 30 CLINICAL SPORTS MED. 1, 2 (2012) (stating that many concussions are not recognized by medical personnel and athletes); Paul McCrory et al., What is the Lowest Threshold to Make a Diagnosis of Concussion?, 47 B. J. SPORTS MED. 268–71 (2013) (conveying that concussion symptoms vary dramatically between athletes).
confusion, and amnesia.\textsuperscript{102} After a concussion, the brain’s ability to regulate, transmit, and send signals that control thought process is disrupted.\textsuperscript{103} As a result, decision-making, impulse control, and problem solving capabilities are significantly impaired.\textsuperscript{104} Moreover, the frenzied release of brain chemicals causes headaches, memory loss, anxiety, insomnia, and dizziness, which have been known to persist long after the initial impact.\textsuperscript{105} A head impact also causes intracranial pressure, thereby crushing brain tissue and cutting off the brain’s blood supply—a potentially catastrophic and deadly occurrence.\textsuperscript{106}

The effects of concussions are potentially devastating.\textsuperscript{107} Often, the occurrence of multiple concussions is most threatening to an athlete’s

\textsuperscript{102} Christopher S. Sahler & Brian D. Greenwald, Traumatic Brain Injury in Sports: A Review, REHAB. RES. & PRACT. 1, 2 (2012). See generally Cantu & Gean, supra note 97, at 1557–58 (reaffirming the importance of using a computerized tomography scan (“CT scan”) to ensure that damage is not immediately life-threatening).


well-being. Second-impact syndrome is a lethal phenomenon that occurs when an athlete who sustains a head injury endures a second head injury before symptoms associated with the first have fully cleared. Chronic Traumatic Encephalopathy ("CTE") is a progressive disease also found in athletes with a history of repetitive brain trauma. CTE can occur with even non-concussive hits to the head and can produce severe permanent consequences including paranoia, depression, dementia, aggression and suicidal tendencies. Alarmingly, NCAA football players are three times more likely to experience CTE-like
symptoms than the general population. Unfortunately, little is known about the onset of CTE, thus absolute prevention is nearly impossible. However, limiting exposure to head trauma is the most assured way to prevent any adverse effects. Nevertheless, it is common practice for an athlete to make the potentially fatal decision to ignore an injury, especially one as complex as a concussion. In recent years, several athletes have felt the insurmountable pressure to play through the pain and have lost their lives as a result. A college athlete’s decision to not disclose his concussion symptoms is largely influenced by several competing social factors.

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112 Expert Report of Bruce Deal Regarding the Medical Monitoring Fund at 12, In re Nat’l Collegiate Student-Athlete Concussion Injury Litig., No. 1:13-cv-09116 (N.D. Ill. July 28, 2014). It is also estimated that approximately 50–300 former college athletes will be diagnosed per year for those whose careers were from 1956 to 2008. Id. at 13.

113 See Ann C. McKee et al., Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy Following Repetitive Head Injury, 68 J. NEUROPATHOLOGY & EXPERIMENTAL NEUROLOGY 709, 710 (July 2009) (providing that the severity or recurrence of impact required to incite CTE remains unknown).


115 See Marc Lillibridge, Injured or Hurt: A Former Player’s Perspective on NFL Injuries, BLEACHER REP. (Aug. 20, 2012), http://bleacherreport.com/articles/1303698-injured-or-hurt-a-former-players-perspective-on-nfl-injuries, archived at http://perma.cc/7L3X-GPD8 (discussing the stigma surrounding admitting to an injury in the NFL); Wolverton, supra note 71 (providing that over fifty percent of collegiate athletic trainers have felt pressure to return an injured athlete to play faster than medically appropriate); Martin Roderick, Ivan Waddington & Graham Parker, Playing Hurt: Managing Injuries in English Professional Football, 35 INT’L R. SOC. SPORT 165 (June 2000) (specifying that “the almost unrelenting pressure on players to continue playing through injury exacts a heavy cost in terms of pain, injury [and] long-term chronic disability”).


117 See infra Part II.C (providing further explanation of the socio-ecological factors that influence disclosure).
C. Cognitive Russian Roulette

In the game of Russian roulette, competitors are individually responsible for evading a potentially deadly outcome. Participants often fail to comprehend the magnitude of their decision to partake in the activity, while outside influences entice continued engagement. It has been argued that a student-athlete faces a comparable impracticality under the NCAA Concussion Policy. The Policy requires self-reporting of concussion symptoms, yet disclosure is inhibited by social implications. A myriad of socio-ecological factors are involved in the game of cognitive Russian roulette, hindering concussion reporting.

The Division I Manual specifies that “[s]tudent-athletes must acknowledge that they have received information about the signs and symptoms of concussions and that they have a responsibility to report concussion-related injuries and illnesses to a medical staff member.” Some have voiced concern over the requirement, as it is believed that players and coaches are not in the best position to decide whether a

118 See Arnold v. Metro. Life Ins. Co., 970 F.2d 360, 361 (7th Cir. 1992) (defining Russian roulette). Russian roulette is “an act of bravado consisting of spinning the cylinder of a revolver loaded with one cartridge, pointing the muzzle at one’s own head, and pulling the trigger.” Id.


121 See infra Part II.C (exploring the social factors that hinder reporting); Kerr, supra note 98, at 1009–10 (elaborating on the socio-ecological factors involved in intercollegiate football); Kevin Young et al., Body Talk: Male Athletes Reflect on Sport, Injury and Pain, 11 SOC’Y SPORT J. 175, 175–76 (1994) [hereinafter Body Talk] (demonstrating further reasons for why athletes remain in play); Agnew v. NCAA, 683 F.3d 328, 332 (7th Cir. 2012) (giving a financial incentive to remain in play while symptomatic).

122 See infra Part II.C (illuminating the social ramifications involved in intercollegiate football).

123 DIVISION I MANUAL, supra note 40, at 11; MEDICINE HANDBOOK, supra note 56, at 64; see Anthony S. McCaskey & Kenneth W. Biedzynski, A Guide to the Legal Liability of Coaches for a Sports Participant’s Injuries, 6 SETON HALL J. SPORT L. 7, 33 (1996) (expressing the difficulty of keeping an injured athlete from competing); see also LSU, LSU ATHLETICS 2013–2014, at 32 (2013), available at http://compliance.lsu.edu/studentathletes/Documents/handbook%20201314.pdf, archived at http://perma.cc/9X2Z-6NJ4 (reaffirming a college’s issuance of responsibility to the athlete). “While we recognize that the medical staff plays an important role in the identification of concussions, the student-athlete is equally responsible for notifying the athletic training staff if they believe they may have suffered a concussion.” Id.
concussed athlete should return to the game. On an intrapersonal
level, a student-athlete may choose not to disclose concussion symptoms
either due to lack of awareness or internal pressures. In compliance
with the NCAA’s stipulation, nearly 90% of universities require an
athlete acknowledge his role in reporting a concussion. However, only
71% actually provide athletes with concussion education materials. Thus, athletes often fail to report concussion symptoms out of sheer ignorance. In fact, a 2002 study of college athletes indicated that only 20% of those who experienced a concussion actually recognized they had sustained the injury. Shortcomings in the NCAA Concussion Policy have been criticized as playing a role in this obliviousness.

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124 See NCAA Sport Science Institute, Concussion Symptoms and Return to Play: Student-Athlete Subjectivity, NCAA (Sept. 12, 2013), http://www.ncaa.org/health-and-safety/medical-conditions/concussion-symptoms-and-return-play-student-athlete, archived at http://perma.cc/MLY9-ZAFP [hereinafter Concussion Symptoms and Return to Play] (providing data as to the amount of athletes who report concussions). “[F]orty-three percent of student athletes with a history of concussion reported that they had knowingly hidden symptoms of a concussion to stay in a game; [twenty-two] percent indicated that they would be unlikely or very unlikely to report concussion symptoms to a coach or athletic trainer in the future.” Id. The study also found that “[m]ale athletes and athletes with a prior history of concussion were more likely to indicate that they would not report future concussion symptoms, despite acknowledging they had received formal education in concussion.” Id.

125 Id.


127 Concussion Management, supra note 126, at 54.

128 Kerr, supra note 98, at 1015. Athletes often remain in play while concussed because they believe their head injury is not serious enough to report. Id. In one study of high school athletes, only thirteen percent of “bell-ringer” type hits were reported because the athlete perceived the injury to be insignificant, even though they are still capable of producing concussive symptoms. Id. Approximately ninety percent of sport-related concussions are considered mild and characterized by subtle symptoms. Gordon A. Bloom et al., The Prevalence and Recovery of Concussed Male and Female Collegiate Athletes, 8 EUR. J. SPORT SCI. 295, 296 (2008) (citing J. Scott Delaney et al., Concussions Among University Football and Soccer Players, 12 CLINICAL J. SPORTS MED. 331 (2002)). Nevertheless, athletes were better able to recognize they had sustained a concussion after being educated on the issue. See Kerr, supra note 98, at 1015 (providing multiple findings that concussion education slightly improved reporting).

129 Bloom et al., supra note 128, at 296. The majority of athletes continued to play while symptomatic because they were not aware that the symptoms were indicative of a concussion. Id.; see Emily Kroshus et al., NCAA Concussion Education in Ice Hockey:
The NCAA Division I Manual provides little guidance on substance or delivery of the educational materials. In addressing this issue, the NCAA conceded that “concussion education needs to be improved and evaluated [to] better ensure that we are having an impact on behavior . . . the NCAA Sport Science Institute hopes that we will achieve this necessary cultural shift through a more robust and evidence-driven educational paradigm.” Nevertheless, even with proper concussion education, some athletes still knowingly conceal their symptoms. This blatant disregard is often a result of self-imposed demands.

An athlete’s internal pressure can cause him to set high, occasionally unrealistic, expectations. As a result, athletes overexert their body in order to optimize performance. Accordingly, their tenacity can
influence how they respond to an injury. An athlete’s devotion to success and perfection, coupled with a fear of failure and shame, may cause him to ignore critical symptoms. Athletes are also motivated by their desire to advance to the next level, where admitting pain suggests weakness and tarnishes the player’s reputation.

Injured athletes are frequently stigmatized; thus, an injury has been known to greatly hinder the possibility of playing in the NFL. Recently, the NFL draft has seen a large influx of younger college athletes. Student-athletes often enter the draft early to preempt any injury that could jeopardize a possible professional career. It is a level achieved by few athletes, yet most continue to compromise their mental and physical health in an attempt to realize their aspirations.

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> In today’s era of athletic competition where money, fame, and whole industries are on the line, admitting pain or discomfort suggests weakness and can have severe consequences for the player and the team. Thus, players often rack up multiple concussions throughout their career. Data suggests that head injuries are significantly underreported by players, who often dismiss concussive symptoms. These are all direct contributors to a robust concussion culture in contact.

Id.

140 Lillibridge, *supra* note 115.


Unfortunately, outside inducements may further encourage this behavior. Non-disclosure can result from environmental influences, which include cultural implications and interpersonal relationships. Understandably, financial retention can induce a scholarship athlete to conceal concussive symptoms, which may be revoked if he is unable to play the year following an injury. Upon choosing a college, the

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144 See Kerr, supra note 98, at 1016 (stating, “studies support that an athlete’s decision to disclose, as well as their general concussion knowledge, is influenced by other individuals within a sports organization”).

145 Id.


- Depending on various circumstances, a school can choose not to renew or cancel a student-athlete’s scholarship[]. The school has the choice to reduce or cancel the scholarship at the end of the period of the award. The school could also cancel the scholarship during the period of the award under the following circumstances: [1] Student-athlete becomes ineligible, [2] Student-athlete commits fraud, [3] Misconduct, [4] Quits the team for personal reasons.

Frequently Asked Questions About the NCAA, supra.
student-athlete signs the National Letter of Intent (“NLI”), which binds him to the institution.  


Likewise, the Division I Manual allows member institutions to penalize a student athlete if he “[v]oluntarily withdraws from a sport at any time for personal reasons” by reducing or cancelling his financial aid.


150 Sara P. Chrisman et al., Qualitative Study of Barriers to Concussive Symptom Reporting in High School Athletics, 52 J. ADOLESCENT HEALTH 330, 333 (2013) (hereinafter Qualitative Study of Barriers); Rob Hughes, Time to Remove Coaches from Concussion Decisions, N.Y. TIMES (Nov. 5, 2013), http://www.nytimes.com/2013/11/06/sports/soccer/time-to-remove-coaches-from-concussion-decisions.html?_r=0, archived at http://perma.cc/EY9N-V2SS (specifying that society applauds risky behaviors in football). According to Hughes, coaches and athletes are driven by adrenaline and are certainly not qualified in such medical matters. Id. Chrisman contributes that “[a]thletes [] described times when they
“‘real’ men play sport[s] in an intensely confrontational manner” is engrained in contact sport athletes. In furthering this ideal, athletes are often encouraged to suppress an injury. This behavior is recognized as being considerably perpetrated by the coach. Coaches that support injury reporting are crucial for facilitating increased team concussion safety; an ideal that is articulated in the Division I Manual.

The NCAA Division I Manual maintains that “it is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes.” Unfortunately, large salaries and sizeable performance-based bonuses incentivize most coaches. Further, profitability of the athletic program and job retention can inflict undue pressure on the coach to win, occasionally at the expense of the athlete. As one study thought they were concussed, but didn’t report symptoms. They felt it was not acceptable to leave the game . . . because it made them look weak.” Qualitative Study of Barriers, supra.

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<td>See also Chris Fuhrmeister, ‘The NCAA Denies That it Has Legal Duty to Protect Student Athletes’, SB NATION (Dec. 19, 2013, 11:09 AM), <a href="http://www.sbnation.com/college-football/2013/12/19/5227480/ncaa-concussion-lawsuits-derek-sheely">http://www.sbnation.com/college-football/2013/12/19/5227480/ncaa-concussion-lawsuits-derek-sheely</a>, archived at <a href="http://perma.cc/5L2N-E5F7">http://perma.cc/5L2N-E5F7</a> (providing the NCAA’s position that player safety is the responsibility of member institutions). The NCAA agrees that safety is an issue, but contends that it cannot be held liable for individual injuries.</td>
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indicated, athletes admitted to receiving negative feedback from their coach for reporting an injury. Others were blamed for the team’s loss. However, beyond actual reprimands, an athlete’s perceived fear of repercussions from the coach can, itself, deter disclosure of concussion symptoms. Likewise, injury concealment is also effectuated through the coach’s dominance over the team’s medical personnel.

Under the Medicine Handbook, an institution is to employ a health care provider to ensure the safety and well-being of student-athletes. It also specifies that a coach must not have a “primary hiring or firing role” in the medical staff’s employment. However, a recent survey of college athletic trainers found that nearly one-third of respondents indicated the football coaching staff had influence over their employment. As a result, trainers are admittedly pressured to prematurely allow student-athletes to return to play faster than medically appropriate. Similar to the athlete, an athletic trainer’s...
perception of the coach can also influence return to play decisions. Restructuring the current hierarchy to allow medical personnel to report directly to the health department may cure this conflict. Promisingly, some programs are implementing this hypothesized model with significant success. However, most continue to be plagued by injury concealment and concussion underreporting as a result of the NCAA Concussion Policy’s deficiencies.

Just one year after Jordan Matthews’ tribulation, University of Michigan quarterback Shane Morris endured a direct hit to his head in the season opener against the University of Minnesota. Following the blow, Shane unsteadily rose to his feet, stumbled, and was caught by offensive lineman Ben Braden. Although he struggled to raise his head, Shane signaled to the sideline that he did not need a...
substitution. He made just one more incomplete pass before being replaced, only to return two plays later. When criticized for mishandling Shane’s concussion, Michigan head coach Brady Hoke claimed that “[Shane] wanted to be the quarterback . . . if he didn’t want to be, he would have come to the sideline, or stayed down.” Coach Hoke’s nonsensical logic, Shane Morris’ conviction to remain in the game, and the NCAA’s noticeably absent response, all epitomize the NCAA’s pervasively flawed Concussion Policy.

III. ANALYSIS

The NCAA’s Concussion Policy is an unworkable solution to a calamitous issue. The meticulously drafted Policy appears to allocate the NCAA’s concussion liability to member institutions. In turn, the institutions apportion responsibility of concussion recognition to the student-athletes. Yet, the NCAA’s repeated promise of protection,

172 Id.
176 See Wolverton, supra note 71 (“[The failed concussion system] is such an urgent problem that the national governing body needs to step up . . . a clear situation where athletes need to be protected, and they’re not being protected.”) (quoting Chris Nowinske’s criticism of the NCAA) (internal quotation marks omitted).
177 See supra note 93 and accompanying text (delegating responsibility to the member institution under the Division I Manual).
178 See DIVISION I MANUAL, supra note 40, at 11–12 (asserting that member institutions allocate concussion diagnosis to the student-athlete); LSU STUDENT ATHLETES, supra note 149, at 32 (articulating that a student-athlete is equally as responsible for concussion
coupled with the contractual language, instead articulates a shared responsibility to protect the student-athlete from head injuries. Nevertheless, neither the member institution nor the NCAA is upholding its duty to protect the athlete. In fact, both the Association and its members unscrupulously attempt to circumvent their obligations in order to avoid liability. Ironically, it is this contravention that has imposed the very accountability the NCAA was trying to avoid.

This Part examines the current NCAA Concussion Policy’s inadequacy and establishes the contractual liability that arises from its intentional defectiveness. First, Part III.A addresses how the NCAA’s drafting of the Policy, coupled with its illusion of protection, established its legal liability. Then, Part III.B analyzes how the NCAA’s apportionment of accountability and ineffective implementation resulted in its failed performance. Although the NCAA continuously reaffirmed its commitment to protecting student-athletes throughout its existence, it unfortunately systematically failed to perform its duty when it was most essential.

See infra note 123 and accompanying text (articulating that the student-athlete is responsible for his concussion); supra note 67 and accompanying text (discussing whether to use shall or should so to avoid liability).

See infra Part III.B (explaining the NCAA’s failed performance); see also supra notes 51–53 and accompanying text (elaborating on the implied duty of good faith and fair dealing).

See infra Part III (establishing how the failed plan caused the NCAA and member institutions to breach their contractual obligations).

See infra Part III.A (interpreting the NCAA legislation).

See infra Part III.B.1 (demonstrating NCAA’s failed performance in allocating oversight to the member institutions); infra Part III.B.2 (establishing that the NCAA breached when it apportioned concussion recognition and disclosure to the student-athlete).

See supra notes 31–34 and accompanying text (conveying the history of the NCAA’s creation); supra notes 66–92 and accompanying text (illustrating the NCAA’s continued promise of health and safety); supra notes 64 (demonstrating the NCAA’s continued inaction after the death of Derek Sheely); supra note 93 and accompanying text (evidencing that the 2015 revisions still neglect enforcement).
A. Flea Flickering a Façade

The NCAA Concussion Policy is, essentially, a fallacy. However, its lack of enforcement does not negate that it is a legally binding document. Thus, when the Association drafted the Policy to hold member institutions responsible for protecting against head injuries, it reaffirmed its commitment to safeguarding the athlete’s well-being. In doing so, the NCAA promised student-athletes that they would receive appropriate care for head injuries. Yet, the Association continuously evaded enforcement and apportioned oversight of concussion management to the very institutions that needed overseeing. Next, this Note analyzes the concussion legislation to establish a third-party beneficiary status in the student-athlete, despite equivocation in the agreement.

The NCAA is contractually liable to keep its commitments made to the student-athletes under the NCAA legislation. However, in order to hold the NCAA accountable for its role in the concussion legislation,
an intentional benefit must first be established. 194 Thus, further interpretation of the concussion legislation is required to determine whether the NCAA is contractually liable under the policy. 195 For this determination, an analysis of the contract language, as well as all extrinsic circumstances surrounding the agreement, must be employed. 196

The NCAA legislation delineates that student-athletes are correct to assume sponsors of intercollegiate athletics will reasonably minimize any risk of injury resulting from his participation. 197 Accordingly, the NCAA drafted its Concussion Policy in an attempt to perform its obligation of reasonably minimizing the inherent risk of head injuries in intercollegiate football. 198 In addition to implementing concussion guidelines, the Association further promised that it would also enforce its Concussion Policy by investigating and punishing members that are in violation of the legislation. 199 Accordingly, under the NCAA Concussion Policy, member institutions are required to implement concussion protocols established by the NCAA and abide by any decisions the Association makes pertaining to the concussion legislation. 200 As courts have previously held, third-party beneficiary status is evidenced if, under a promise in the NCAA legislation, “member institutions agree to let the NCAA set the criteria and to abide by the NCAA's final [] decision.” 201 Therefore, in drafting the Concussion Policy, the NCAA has committed itself to ensuring student-

194 See McCarthy v. Azure, 22 F.3d 351, 362 (1st Cir. 1994) (discussing the need to demonstrate an intentional benefit for third-party beneficiary status).
197 MEDICINE HANDBOOK, supra note 56, at 2.
198 See supra note 67 and accompanying text (discussing the NCAA Concussion Policy’s initial drafting).
199 MEDICINE HANDBOOK, supra note 56, at 63.
200 See UNIV. OF MIAMI DEP’T OF ATHLETICS CONCUSSION GUIDELINES, supra note 68, at 8–9 (illustrating the acknowledgement form coaches and medical personnel must sign, agreeing to abide by the NCAA Concussion legislation); Investigating and Reporting NCAA Violations, supra note 44 (providing the document agents of member institutions must sign, acknowledging their compliance with the NCAA legislation); MEDICINE HANDBOOK, supra note 56, at 2, 63 (“A violation of Constitution 3.2.4.17 shall be considered an institutional violation per Constitution 2.8.1; however, the violation shall not affect the student-athlete's eligibility.”).
201 Knelman, 898 F. Supp. 2d at 715 (citing Oliver v. NCAA, 920 N.E.2d at 200). As a result of these requirements, student-athletes intentionally benefit; therefore, can enforce any assurances made under the contract. Id.
athlete well-being by implementing concussion protocol and expressly instituting a punishment for noncompliance.202

Outside of the actual contract language, the NCAA also extrinsically affirms its role as an organization that protects student-athletes from head injuries.203 First, the Association was established as an oversight and enforcement body to protect student-athletes by regulating college football programs and ensuring that athletes were protected from fatal head injuries.204 The NCAA has maintained its status as the gatekeeper of safety and continued assurer of protection throughout its existence.205 Moreover, the Association continued to acknowledge its commitment to student-athlete safety when it drafted the NCAA Concussion Policy.206

By implementing a Concussion Policy and instituting a punishment for noncompliance, it acknowledged the criticality of concussion management and assured that student-athletes would be protected from such injury.207 After drafting the policy, it proclaimed that securing a

202 See generally DIVISION I MANUAL, supra note 40, at 347 (committing itself to student-athlete well-being); see also McCarthy v. Azure, 22 F.3d 351, 362 (1st Cir. 1994) (demonstrating that third-party beneficiary status arises when the contracting parties intend to bestow a benefit); supra note 47 and accompanying text (elaborating on circumstances necessary for determining an intentional benefit)

203 See supra Part II.A (demonstrating the control the NCAA has over member institutions with regard to violations and penalties of student-athlete safety); see, e.g., Emails Raise Questions, supra note 24 (illustrating the conversations between NCAA staffers when deciding to implement a concussion policy); Letter from David Klossner, supra note 74 (conveying that student-athlete well-being is essential to the NCAA); Wolverton, supra note 71 (providing language from the NCAA that under no circumstances should an athlete return to play the same day).

204 See Smith, supra note 22, at 10–11 (providing a historical background of college football violence); CROWLEY, supra note 23, at 9 (articulating that the NCAA was created to protect college athletes from football deaths).


206 See supra notes 71–75 and accompanying text (showing the correspondence between Dr. Klossner and Kristen Sheely). In his 2012 letter, Dr. Klossner asserted that one of the NCAA’s core missions is to provide student-athletes with a safe environment for competition. Letter from David Klossner, supra note 74; supra notes 86–88 and accompanying text (evidencing the NCAA’s updated guidelines to improve concussion safety).

207 See supra note 80 and accompanying text (evidencing that the policy was implemented as a result of external pressure to protect the athlete); supra Part II.A (demonstrating the control the NCAA has over member institutions with regard to violations and penalties); see, e.g., Emails Raise Questions, supra note 24 (illustrating the conversations between NCAA staffers when considering the Concussion Management Plan and evidencing its reluctance to accept liability).
safe environment for student-athletes was one of its “core principles.”
Moreover, the NCAA further reaffirmed this commitment when it amended
the Concussion Policy to enact more stringent guidelines. In doing so,
the NCAA further dedicated itself to defending the student-athletes’ well-being,
under the guise of legislating its members. Thus, evidencing its intent to ensure
student-athletes are protected under the NCAA Concussion Policy.

Correspondingly, although the NCAA Concussion Policy does not affect eligibility,
student-athletes still stand to directly benefit from its performance. Without enforcement of the contractual promises, a student-athlete is left to not only recognize when he sustained a concussion, but also to convey this information to an often unreceptive coach. This type of self-reporting, without safeguards, leaves the student-athlete susceptible to unreasonable punishments, aggravated injuries, and possibly even death. Accordingly, enforcement of the contractual promises would undoubtedly directly benefit the student-athlete; thus, creating third-party beneficiary status in the athlete and imposing a duty on the NCAA to perform its contractual obligations under the NCAA Concussion Policy.

208 Letter from David Klossner, supra note 74.
209 See supra note 84 and accompanying text (providing the revised NCAA Concussion Policy).
210 See DIVISION I MANUAL, supra note 40, at 347 (committing itself to the student-athlete’s well-being).
211 See Hall v. NCAA, 985 F. Supp. 782, 796–97 (1997) (conveying determinative factors of incidental and intentional benefits). But see NCAA Guidelines on Head Injuries Fall Short, supra note 93, at A16 (denouncing the NCAA’s newly drafted guidelines for lacking oversight and enforcement); Strauss, supra note 86 (illustrating Judge Lee’s concern with the NCAA’s enforcement of its concussion policy).
212 See MEDICINE HANDBOOK, supra note 56, at 63 (“violation shall not affect the student-athlete’s eligibility”; see also supra Part II.B (illustrating the devastating effects of a concussion and the importance of proper diagnosis and treatment). It could be argued that the Policy purposefully omitted any negative effect on eligibility to avoid legal liability, as, to date, courts have only found third-party beneficiary status when eligibility is affected. See Knelman v. Middlebury Coll., 898 F. Supp. 2d 697, 715 (D. Vt. 2012) (stating that third-party beneficiary status under the NCAA legislation is confined to eligibility claims).
213 See supra note 101 and accompanying text (demonstrating the impossibility of concussion diagnosis, even for an educated medical personnel); supra notes 158–61 (providing the conflicting incentives of college coaches).
214 See supra Part II.C (illustrating the impossibilities student-athletes face without NCAA oversight); see also supra note 75 and accompanying text (demonstrating how the NCAA’s inaction attributed to Derek Sheely’s death).
215 See Wolverton, supra note 71 (articulating the importance of enforcement); supra note 50 and accompanying text (affirming that upon establishing intent, third-party beneficiaries may seek to enforce the contract after the rights vest). In the present case, these rights vested with the student-athlete’s signed affirmation that he has read the NCAA Division I Manual and acknowledges he is responsible for disclosing concussion symptoms. See
Unfortunately, the NCAA’s performance has been noticeably flawed. When the Association attempted to delegate its duty to the member institutions, it created an inconsistent system of protection. First, the NCAA both negligently allowed noncompliance and knowingly ignored its promise of protection by declaring that it would punish those who systematically violated the Policy while, in practice, never actually investigating even seemingly blatant disregard. Further, the NCAA abandoned its duty to protect student-athlete’s well-being by delegating responsibility of concussion recognition, diagnosis, and disclosure to the student-athlete; therefore, deviating from its express promise, as well as its implied duty of good faith and fair dealing under the contract.

B. Poor Performance

Illogicalities arise when looking at the NCAA Concussion Policy. A member institution is charged with creating and implementing a plan, while monitoring itself to assure it is not in violation of the policy. In turn, an athlete is responsible for recognizing, diagnosing, and disclosing his concussion, which is challenging even to trained medical personnel. Accordingly, contradicting incentives of coaches, athletic
trainers, and student-athletes impede success of the current Policy. Therefore, while a properly implemented system may have sufficed for acceptable performance of the NCAA’s “core mission,” the intentionally vague and indiscriminately enforced plan instead constitutes inadequate performance.

1. Intentional Grounding

As a response to societal pressure, the NCAA scrupulously redrafted its legislation to include a guise of protection, yet never actually intended to implement its enforcement responsibility. Although the NCAA is ordinarily the monitoring and enforcement body of college athletics, its Concussion Management Policy has no reliable system to ensure that member institutions are conducting concussion screening or following their Concussion Management Plans. The NCAA has instead contended that enforcement is the responsibility of the member institution. However, the member institution is not likely in the best position to monitor itself for concussion management. Thus, several

223 See supra Part II.C (discussing the implications that arise from the conflicting incentives).
224 See Letter from David Klossner, supra note 74 (relaying that providing a safe environment for the student-athlete is part of the NCAA’s “core mission”); Emails Raise Questions, supra note 24 (contending that the NCAA has yet to, nor does it have any intent to, actually enforce or punish an institution for noncompliance).
226 Vaughan, supra note 67 (conveying that member institutions still have discretion as to enforcement); Emails Raise Questions, supra note 24 (demonstrating that the NCAA has no intent to enforce the policy).
227 MEDICINE HANDBOOK, supra note 56, at 2; see NCAA’s Concussion Culture Rooted in Denial, supra note 71 (quoting the NCAA Director of Enforcement that “it would not be appropriate for enforcement to suspend or otherwise penalize a coach...even if the student-athlete was required to participate after having been diagnosed”); Wolverton, supra note 71 (citing the NCAA’s Chief Medical Officer’s contention that the NCAA has no authority to demand implementation of its concussion policy).
228 See Marsh & Robbins, supra note 55, at 668–69 (contending that athletic departments often afford football programs greater leniency because of their profitability); McCaskey & Biedynski, supra note 123, at 12 n.9 (finding that member institutions may be held liable for the tortious conduct of the coach).
contradictions arise when considering the NCAA’s attempted enforcement of its concussion management policy.229

Since the NCAA Concussion Policy’s implementation, a member institution has yet to report a violation to the NCAA, absent any public awareness.230 Presumably, the institution does not want to show lack of institutional control, nor does it want to be charged with a possible infraction.231 Similarly, an institution could likely be subjected to additional litigation if it were to report a negligent coach; thus, incentivizing it to conceal violations of its concussion policy, regardless of its commitment to the NCAA.232

Likewise, coaches and medical personnel are expected to report any possible infraction, yet both have contradictory abilities and interests.233 Many coaches are unable to recognize a concussion due to unmandated concussion education.234 Therefore, coaches may unwittingly allow a concussed player to remain in play, naively jeopardizing the athlete’s well-being.235 Assuming the coach is properly educated in concussion management, he may nevertheless be deterred from disclosure by salary increases or possible termination of employment.236 As a result, the coach often is more incentivized by winning than by ensuring an athlete’s safety.237

Moreover, although, medical personnel are undoubtedly the most medically qualified in concussion diagnosis, yet unfortunately they, too, have conflicting interests.238 Athletic trainers often feel pressure from

229 See supra Part II.C (providing further discussion on the contradictions present in college football).
230 See supra note 71 and accompanying text (discussing the failed reporting system).
231 Marsh & Robbins, supra note 55, at 668.
232 McCaskey & Biedzynski, supra note 123, at 12 n.9 (maintaining that member institutions may also be liable for the coaches’ actions).
233 See LSU STUDENT ATHLETES, supra note 149, at 32 (allotting responsibility to the athlete); UNIV. OF MIAMI DEPT OF ATHLETICS CONCUSSION GUIDELINES, supra note 68, at 7 (providing the Concussion and Injury Reporting Acknowledgement Student-Athlete Concussion Statement that each athlete is to sign, indicating he accepts responsibility for disclosure); UNIV. UTAH SCH. MED., supra note 123, at 8 (demonstrating that disclosure of concussion symptoms is the athlete’s responsibility).
234 Perceived Coach Support, supra note 98, at 320.
235 See id. (conveying the criticality of a coach’s concussion education). Baugh affirms, “Ensuring that [coaches] have the knowledge to positively affect the concussion identification and management process is critical.” Id.
236 See Baumbach, supra note 156 (conveying that coaches are often influenced by bonuses and salary increases).
237 Id. See generally Hughes, supra note 150 (contending a coach is often driven by adrenaline, thus unable to make qualified medical decisions).
238 See Wolverton, supra note 71 (discussing the medical staff’s subordinate position); Rigby et al., supra note 161, at 640 (demonstrating the conflicting interests of the medical
coaches to return an athlete to play quicker than medically appropriate.\textsuperscript{239} Additionally, employment hierarchy complicates return-to-play decisions as many coaches have influence over the personnel’s employment.\textsuperscript{240} Therefore, the medical personnel are forced to weigh employment retention against the student-athlete’s health—a conflict that inhibits the athletic trainer from effectively performing his duties.\textsuperscript{241} Accordingly, a member institution is unfortunately incapable of self-policing with regard to concussion management.\textsuperscript{242}

Thus, the NCAA failed to perform its duty when it delegated member institutions the responsibility to introduce, implement, and enforce the Concussion Policy.\textsuperscript{243} Although self-reporting is the standard enforcement system of the NCAA, the Association failed its duty by never actually requiring execution of the plan.\textsuperscript{244} In fact, despite several athletes sustaining life-altering head injuries and others succumbing to their concussion, the NCAA has yet to investigate any of these incidents.\textsuperscript{245} The Association had a duty to perform its promise of protecting student-athletes, yet it failed by creating a knowingly flawed system that delegated oversight to member institutions and made student-athletes responsible for concussion reporting.\textsuperscript{246}

2. Institutions Call an Audible

Unfortunately, the NCAA also failed to perform when it recommended allotting the responsibility of concussion diagnosis to the most vulnerable party in the contractual agreement.\textsuperscript{247} Student-athletes personnel); \textsuperscript{supra} notes 162–69 and accompanying text (elaborating on the confictions of the medical personnel).
\textsuperscript{239} Wolverton, \textsuperscript{supra} note 71.
\textsuperscript{240} Id.
\textsuperscript{241} See id. (providing the confictions that prevent athletic trainers from removing an athlete from play if medically appropriate).
\textsuperscript{242} See generally Wolverton, \textsuperscript{supra} note 71 (illustrating the member institution’s inability to police concussions).
\textsuperscript{243} See \textsuperscript{supra} note 80 and accompanying text (demonstrating the NCAA’s motivation behind implementing a plan, while allotting responsibility of its enforcement to the member institutions).
\textsuperscript{244} See Sheely Complaint, \textsuperscript{supra} note 72, at 23–24 (quoting Chris Strobel’s admission that the NCAA does not enforce the concussion policy).
\textsuperscript{245} See, e.g., Patchesky, \textsuperscript{supra} note 72 (providing that every authority, including the NCAA, failed Derek Sheely).
\textsuperscript{246} See generally MEDICINE HANDBOOK, \textsuperscript{supra} note 56, at 64 (demonstrating the apportionment of accountability); \textsuperscript{supra} note 77 and accompanying text (illustrating the NCAA’s desire to remove itself from any liability).
\textsuperscript{247} See DIVISION I MANUAL, \textsuperscript{supra} note 40, at 11–12 (quoting the NCAA Concussion Policy that it is the responsibility of the student-athlete to acknowledge he has received the proper forms and that he has the duty to report a concussion to medical personnel); \textsuperscript{supra} Part II.C. (illustrating the conflicting incentives of the student-athlete).
were designated the important task to self-diagnose and report a concussion. However, several competing factors play into the athlete's ability to fulfill its role. Self-incentives and outside forces deter an athlete from guaranteeing his health and safety is protected. Nevertheless, the NCAA still determined the student-athlete was in the best position to fulfill the most critical role under the contract.

The current Concussion Policy mandates that student-athletes acknowledge it is their responsibility to report concussion-related injuries to a medical staff member. However, an athlete is the individual least able to make an informed diagnosis. First, student-athletes receive inconsistent education on concussion diagnosis and management. Moreover, the student-athlete is incentivized by fear of scholarship loss, desire to play in the NFL, and need to maintain his masculine ideology. All create a conflict unique to the student-athlete, hindering his ability to perform the obligation imposed on him by the NCAA.

Arguably, student-athletes are uneducated as to prevention, diagnosis, treatment, and long-term effects of head injuries. The NCAA publishes concussion guidelines in its Medicine Handbook, yet it fails to distribute the publication to the athletes. Thus, the responsibility to educate the athletes is left to the discretion of the

248 Division I Manual, supra note 40, at 11–12.
249 See supra notes 123–54 (detailing the conflicts of the student-athlete, which include his desire to play professionally, to uphold his masculinity, and to maintain his scholarship).
250 See supra note 113 (listing athletes whose lives were permanently impacted from concussions).
251 Division I Manual, supra note 40, at 11–12.
252 Medicine Handbook, supra note 56, at 64; see LSU Student Athletes, supra note 149, at 32 (affirming this responsibility); Univ. of Miami Dep't of Athletics Concussion Guidelines, supra note 68, at 7 (confering responsibility on the athlete).
253 See Concussion Symptoms and Return to Play, supra note 124 (demonstrating an athlete is not likely to disclose a concussion “despite acknowledging they had received formal education in concussion”); Kerr, supra note 98, at 1015 (providing that football players are more likely than other athletes to remain playing after being concussed).
254 See Medicine Handbook, supra note 56, at 2 (illustrating that the NCAA Concussion Policy, although demonstrates the signs and symptoms of a concussion, is not distributed to student-athletes); Kroshus, supra note 126 (finding that the education system is arbitrary and ineffective).
255 See Kerr, supra note 98, at 1009–18 (providing the socio-ecological influences on concussion reporting).
256 See supra Part II.C (providing further context on the student-athlete dichotomy).
257 Concussion Symptoms and Return to Play, supra note 124.
258 See Medicine Handbook, supra note 56, at 2 (omitting student-athletes from the distribution list).
member institution.\textsuperscript{259} However, there is no enforcement mechanism to ensure the member institutions are actually complying with the NCAA’s required guidelines.\textsuperscript{260} Therefore, the member institutions arbitrarily decide not only whether to educate the athletes, but also to what extent the athletes should be educated.\textsuperscript{261} However, even with proper education and the recently enhanced media coverage of the potential catastrophic results of concussions, student-athletes are still not in the best position to appreciate the risk.\textsuperscript{262}

Assuming an athlete has been educated on the devastating effects of a head injury, he is unlikely to willfully remove himself from competition.\textsuperscript{263} Concussion symptoms alone produce a neurological state of confusion, delayed cognitive ability, and impairment of problem solving capability; therefore, physiologically hindering an athlete’s ability to make a sound health decision.\textsuperscript{264} Moreover, an athlete rarely considers the long-term repercussions of his decisions in the heat of competition.\textsuperscript{265} Yet, unfortunately, the most significant consequences of concussions often arise much later in life.\textsuperscript{266} Therefore, it is unlikely that an athlete is considering the long-term risk of ‘shaking it off’ with the short-term benefits of remaining in the competition.\textsuperscript{267} This is especially true as athletes are incentivized by football-contingent scholarships, NFL expectations, and masculine ideology.\textsuperscript{268}

\begin{thebibliography}{9}
\bibitem{259} See Fuhrmeister, \textit{supra} note 155 (demonstrating the NCAA contends that it “attempts to educate schools on how to properly keep their players safe, but it’s up to said schools to actually implement the proper precautions and create a safe environment”).
\bibitem{260} See \textit{Emails Raise Questions}, \textit{supra} note 24 (delivering that the NCAA Concussion Policy remains unenforced, despite evidence of enforcement in the language); Vaughan, \textit{supra} note 67 (establishing the lack of enforcement).
\bibitem{261} See \textit{id.} (illustrating that due to this lack of enforcement and the NCAA’s admitted powerlessness, the member institutions can arbitrarily do what they wish without repercussions).
\bibitem{262} See \textit{Concussion Symptoms and Return to Play}, \textit{supra} note 54 (illustrating that student-athletes will admittedly remain in play even though he has been educated as to the negative side effects).
\bibitem{263} \textit{Id.}
\bibitem{264} See \textit{supra} notes 103–04 and accompanying text (demonstrating the immediate effects of a concussion).
\bibitem{265} See Kerr, \textit{supra} note 98, at 1015 (explaining that athletes often remain in play while concussed because they do not appreciate the head injury’s seriousness).
\bibitem{266} See \textit{supra} notes 107–13 (articulating the long-term effects of concussion and illustrating the devastating effects of chronic traumatic encephalopathy).
\bibitem{267} See generally \textit{supra} note 128 and accompanying text (illustrating an athlete’s disregard of the significance of his head injury).
\bibitem{268} See \textit{supra} Part II.C (elaborating further on the student-athlete’s conflictions).
\end{thebibliography}
A student-athlete’s lack of control over his financial situation further impedes concussion disclosure.\textsuperscript{269} Student-athletes’ are often given scholarships that are conditioned upon participation in the sport and considered binding on the athlete.\textsuperscript{270} As a result, athletes are forced to participate, unable to withdraw from the sport even if it is in his best interest.\textsuperscript{271} Foregoing a scholarship is simply not a realistic option for the athlete who is only able to attend college because of financial aid.\textsuperscript{272} Moreover, an athlete is further confined by the National Letter of Intent, which compels an athlete to remain at his particular institution for at least one year.\textsuperscript{273} Thus, if an athlete has a coach who is unwilling to implement a concussion plan, which compromises his safety, the athlete is unable to transfer without sacrificing his scholarship.\textsuperscript{274}

Furthermore, the NCAA’s delegation of responsibility is illogical because student-athletes often hide injuries due to the stigma attached.\textsuperscript{275} Athletes have been known to continue playing, despite an injury, out of fear placed upon them by a coach.\textsuperscript{276} Student-athletes overwhelmingly

\textsuperscript{269} See Huma, supra note 143 (arguing that the NCAA and college presidents create conditions for the student-athletes so that they remain indebted to both institutions).

\textsuperscript{270} See Frequently Asked Questions About the NCAA, supra note 144 (explaining that Universities can cancel athletic scholarships at anytime if the athlete “[q]uits the team for personal reasons”); see also Cozzillo, supra note 147, at 1300 (conveying that several courts have held the NLI is binding on the student-athlete); Wolverton, supra note 71 (stating that concussion underreporting is attributable to an athlete’s fear of having his scholarship revoked).

\textsuperscript{271} See generally DIVISION I MANUAL, supra note 40, at 196 (conveying that member institutions can reduce or cancel financial aid for voluntarily withdrawing from a sport for personal reasons); LSU STUDENT-ATHLETES, supra note 146, at 5 (demonstrating language from the member institution that allows it to revoke a student-athlete’s scholarship).


\textsuperscript{273} See Burke & Grube, supra note 147 (providing that under the National Letter of Intent a student-athlete is unable to retract his commitment to the athletic program without the risk of losing his scholarship and being penalized for breaching the agreement); Plaintiffs Want Judge Removed, supra note 146 (describing a movement to eliminate the one-year scholarship agreement to alleviate pressure on the athlete).

\textsuperscript{274} See DIVISION I MANUAL, supra note 40, at 196 (indicating that an athlete cannot leave for voluntary reasons or his scholarship can terminated).

\textsuperscript{275} See Kerr, supra note 98, at 1015 (relaying that “athletes may believe reporting concussions is stigmatizing”); Lillbridge, supra note 115 (illustrating that an injury has a stigma attached to it at any level and athlete’s often hide their injured status as a way to continue playing without repercussions).

\textsuperscript{276} See Brown, supra note 143 (demonstrating the fear coaches attempted to instill in their athletes by threatening to cut an athlete from the team if he got hurt); Burnsed, supra note 150 (indicating that coaches have more influence over any other factor as to whether the college athlete perceives his experience as positive or negative); Steinfeldt, supra note 153, at 257 (warning of the influence that coaches have on their athletes). C.f. Sheely Complaint,
report that they have previously not disclosed a concussion in fear of being removed from a game and ultimately losing their starting spot.\footnote{277}{See Malinauskas, supra note 160 (finding that injured athletes frequently cite fear of being brushed aside by coaches as a negative consequence of injury); see also Brown, supra note 143 (exemplifying this by elaborating on the conditions at Washington State where there was a feeling of punishment for being injured; thus, an athlete would frequently "hide his injury because he [did not] want to lose his spot").} Certainly, a demotion in position also jeopardizes an athlete’s chance of being recruited by the NFL.\footnote{278}{See Lillibridge, supra note 115 (delivering that the same stigmatization is true of injuries in the NFL where club executives would "avoid players with that label like the plague").} Competitiveness, societal influences, and proper education all interfere with the player’s ability to properly diagnose and remove himself from the competition; yet, the NCAA continues to unreasonably place responsibility on the student-athlete to voluntarily diagnose and disclose his concussion.\footnote{279}{See supra note 91 (providing the revised concussion policy, which still instills that student-athletes are responsible for diagnosis, without ensuring any safeguards); supra Part II.C (revealing the student-athlete’s contradicting incentives).}

The NCAA attempted to avoid contractual liability by distancing itself from the implementation of its Concussion Policy.\footnote{280}{See supra notes 77–80 and accompanying text (displaying the NCAA’s discussion regarding how to best avoid liability while still implementing a plan).} However, the NCAA evidenced its intent to protect student-athletes from head injuries in the contract terms and in its actions.\footnote{281}{See supra Part III.A (articulating further analysis as to the NCAA’s promise to protect student-athletes).} Nevertheless, the Association knowingly delegated this duty to the member institutions that have conflicting motivations.\footnote{282}{See supra Part III.B.1 (assessing the NCAA’s delegation of duty to the member institutions).} Therefore, although the institutions are required to ensure the NCAA Concussion Policy is properly implemented, they are instead actually perpetuating its indifference.\footnote{283}{See supra Part III.B.2 (illustrating that the member institutions apportioned diagnosis and concussions to the student-athletes, as encouraged by the NCAA).} In turn, the member institutions, as encouraged by the NCAA, allot responsibility of voluntary concussion disclosure and diagnosis to the very individuals that need protection.\footnote{284}{See DIVISION I MANUAL, supra note 40, at 11–12 (apportioning liability to the student athlete under the NCAA Concussion Policy); LSU STUDENT ATHLETES, supra note 123, at 32 (allocating recognition and disclosure to the athlete); UNIV. OF MIAMI DEPT’ OF ATHLETICS CONCUSSION GUIDELINES, supra note 68, at 7 (exhibiting that each student-athlete must sign an acknowledgement of his responsibility); UNIV. UTAH SCH. MED., supra note 123, at 8 (providing an example of a school policy that prohibited the team from reporting an injury).} It is because of the illogical allocation of its responsibility that the NCAA inevitably breached.\footnote{285}{supra note 72 (giving an example of a team policy that threatened loss of playing time for disclosing an injury).}
IV. CONTRIBUTION

The NCAA created the dichotomy that failed Jordan Matthews. In establishing a loosely drafted Concussion Policy, the Association affirmed its commitment to safeguarding the student-athlete’s well-being. However, it purposefully negated its promise of protection by delegating concussion recognition, diagnosis, and disclosure to those who were least able to fulfill the requirement, while doing little to ensure implementation.286 By drafting a system that mandated oversight and enforcement, while refusing to monitor its enforcement, the NCAA indisputably failed the student-athletes. Correspondingly, redrafting and reimplementation is necessary to guarantee that the NCAA no longer violates its contractual obligations and, most importantly, that the student-athletes are no longer placed in imminent peril.

A. The Game Plan

The NCAA’s Concussion Policy must first be revised so that an athlete’s eligibility is affected by nondisclosure. Under the current policy, various socio-ecological influences incentivize athletes to refrain from disclosing concussion symptoms. Conditioning eligibility on disclosure will instead persuade an athlete to reveal even the slightest indication of a concussion. It will additionally eliminate an athlete’s fear of retaliation for disclosing an injury and resolve any threat to his playing position. Moreover, it will ensure that a concussed athlete is removed from play for the appropriate time in order to guarantee he is fully healed from his head injury.

The redrafting would simply change language from “violation of Constitution 3.2.4.16 shall be considered an institutional violation per Constitution 2.8.1; however, the violation shall not affect the student-athlete’s eligibility” to a violation of Constitution 3.2.4.16 shall be considered an institutional violation per Constitution 2.8.1; additionally, violation of such shall affect the student-athlete’s eligibility. Under the redrafted policy, only intentional nondisclosure will be penalized and will not apply to an athlete who unwittingly fails to disclose his symptoms. This will guarantee that an athlete is not punished for a member institution’s failure to provide adequate education. Moreover,

(affirming the student-athlete’s responsibility); see also supra Part III.B.2 (evidencing a need to protect student-athletes).


286 See DIVISION I MANUAL, supra note 40, at 11–12 (demonstrating that enforcement is delegated to institutions).
the athlete shall disclose his symptoms to independent medical personnel who are present at every game, as further established in the Proposed Concussion Policy.

Second, an unaffiliated medical specialist, such as an athletic trainer, should be on the sidelines at every NCAA sanctioned event to oversee all potential concussion cases during gameplay. This individual would have no attachment to any member institution and would be required to remove players that exhibit signs of a concussion from the game. The independent medical specialist would have unquestioned authority over any individual within the athletic programs and would receive compensation from the NCAA. The compensation would constitute a small fee in terms of annual revenues produced by massive televisions and radio broadcasting contracts and could be implemented as a provision of those contracts. Moreover, the independent medical specialist would not eliminate medical personnel affiliated with the team, but would act as a monitoring body at each game to ensure that all of the presently conflicting incentives are reduced and possibly eliminated.

Finally, a systematic revision of the NCAA’s enforcement branch must occur to ensure compliance with the Proposed Policy. The NCAA should first undertake a rigorous annual scientific evaluations of rules, techniques, and standards in reducing concussions. Additionally, the NCAA should develop a board of unbiased experts from various health fields including physicians, public health specialists, neuropsychologists, and various other research specialists to review all current protocols. The panel’s responsibilities would include compiling the most current data on concussions to implement stringent management systems on the field, as well as off the field treatments. The panel will be funded, each year, by contributions from member institutions as an increase in its membership fee. The institutions will be required to pay a percentage deemed appropriate based upon the annual revenue of its football program. Thus, this model will allow contributions without crippling smaller programs’ athletic budgets.

The current design and regulation of the NCAA Concussion Policy is indifferent at best. The inherent nature of a concussion and the culture of football deter athletes from making informed, voluntary decisions about their health. Moreover, teams are likely to adhere to the pressure of coaches and a desire to win without any repercussions from the NCAA. The Proposed Policy will increase the likelihood of both disclosure and treatment of head injuries, saving an athlete from a potentially life threatening hit. Additionally, employing independent medical personnel at each game will assure that concussion diagnosis
and treatment is allocated to an individual best able to make an informed decision. Finally, an independent governing body will guarantee that the proposed policy is being implemented and that those in violation are in fact subject to penalties.

B. Defensive Strategies

Several arguments may arise in opposition of this Proposed Policy. First, opponents may argue that the Policy will be ineffective because athletes will continue to be persuaded by their coach, as well as their own internal aspirations and ideology, regardless of eligibility implications. Opponents may further contend that coaches ultimately retain discretion over playing time, therefore creating an additional impediment by forcing an athlete to sit out for possibly a minor injury while additionally risking his spot on the team. However, this is inaccurate.

While an athlete will likely always retain the drive to remain in play regardless of any detrimental health consequences, the proposed policy seeks to counteract this mentality by creating a system that incentivizes an athlete to disclose concussion symptoms. This is effectuated not only through a risk of losing eligibility, but also through the implementation of an independent medical authority with ultimate discretion. Additionally, if an athlete does properly disclose his symptoms, he is only removed from play if it is determined that he has sustained a concussion. Therefore, it is assured that the athlete is receiving adequate post-concussion care and any effect on playing time is an inferior concern. Finally, a coach who retaliates against an athlete for concussion disclosure will ultimately be in violation of the Proposed Policy by hindering its implementation; thus, subject to penalties.

Next, others may argue the Proposed Policy will not work because concussion research is in its infancy. The extent of damage that immediate and long-term impacts have on the brain is still contested and the susceptibility of certain individuals to concussions, as compared to others, remains unknown. Thus, opponents may further contend that the impact of the plan will be minimal, as even educated medical personnel cannot conclusively determine if an athlete has sustained a concussion. Nevertheless, the third-party medical personnel will greatly limit the occurrences of concussions, as the individual is formally educated on concussion recognition and diagnosis; therefore, eliminating any impact that inadequate education has on disclosure and treatment. Correspondingly, the medical specialist will be able to affirmatively determine the severity of an injury rather than simply disregarding any symptoms, as is currently the case.
Although the inherently violent, man-making culture of football will arguably never be eliminated, the Proposed Policy will help to alleviate some of the most unfortunate consequences that result. Under the Proposed Policy, a student-athlete will be more incentivized to disclose his symptoms to ensure that his eligibility is not affected. Additionally, the independent medical specialist will guarantee that no concussion-causing hit will go unexamined. Finally, the proposed policy will assure that the NCAA is upholding its promise to protect those most vulnerable in college football.

V. CONCLUSION

Jordan Matthews was a casualty of the current NCAA Concussion Policy when he readily sacrificed his physical and mental well-being for his team, just as any athlete would.\textsuperscript{287} Evidently, the win at Vanderbilt’s fingertips was more important than Matthews’ health.\textsuperscript{288} Ultimately, however, Vanderbilt lost.\textsuperscript{289} In his post-game interview, Matthews contended that the vomiting was likely due to rehydrating with intravenous (“IV”) fluids in the third quarter.\textsuperscript{290} Whether an IV or a concussion prompted his nausea is irrelevant.\textsuperscript{291} A symptomatic, star athlete was allowed to remain in play without ever undergoing concussion testing—an increasingly familiar situation with an often unfavorable outcome.\textsuperscript{292}

The current NCAA Concussion Policy must be revised to alleviate its ineffectiveness and ensure added safeguards. The NCAA must redraft...
the current Policy to make eligibility contingent upon an athlete reporting his concussion symptoms in order to disincentivize nondisclosure, as well as minimize outside influences on his reporting. Moreover, unassociated medical specialists should be provided at each game to reduce the occurrence of multiple head traumas and to eliminate the added pressure of coaches and member institutions on an affiliated medical personnel’s return-to-play decisions. Finally, the newly implemented system must be annually evaluated to ensure athletes are receiving the most effective treatment. Thus, creating a system that allows the NCAA to perform the very duty it was created to maintain.

At the end of the day, it’s football. When the game is on the line, most athletes would likely make the same decision as Jordan Matthews. However, it is a decision that should not have been Matthews’ to make. Therefore, although the culture of football may never change, and it may always maintain a man-mutilating, money-making, gladiatorial reputation, death by football is undoubtedly a curable evil.

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