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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 Matthews¹

Jordan Matthews vomits immediately after slamming his head against the turf in the 2013 season opener against Ole Miss.² The announcers praise advances in concussion protocol and Jordan’s performance that night, convinced he would not be returning.³ 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.⁴ The game was on the line and Jordan’s team needed him.⁵

Remarkably, despite never undergoing concussion testing, Matthews reenters just moments later.⁶ According to Vanderbilt, aside from the

¹ VUCommodores, *Townsend, Matthews & Woestmann - Austin Peay Week (Sept. 2, 2013)*, YOUTUBE (Sept. 2, 2013), <https://www.youtube.com/watch?v=2HBuIBIVTS0&feature=youtu.be>, archived at <https://perma.cc/QUB2-KFVE>.

² See SEC Football Games, *Vanderbilt vs Ole Miss 2013 FULL GAME HD* (Sept. 2, 2013), https://www.youtube.com/watch?v=YylkXvMfr_o, archived at <https://perma.cc/3ANH-JT34> (showing the ESPN televised broadcast of the Ole Miss Rebels facing the Vanderbilt Commodores at home on Aug. 29, 2013).

³ *Id.*

⁴ See Jason Kirk, *Vanderbilt’s Jordan Matthews Vomits on the Field, Then Makes This Clutch Catch*, SB NATION (Aug. 30, 2013), <http://www.sbnation.com/college-football/2013/8/30/4674808/jordan-matthews-catch>, archived at <http://perma.cc/MWY-8MCN> (referring to Jordan Matthews as the Commodores’ best player); SEC Football Games, *supra* note 2 (showing Vanderbilt down 32–28 with 3:12 left when the injury occurred).

⁵ See VUCommodores, *supra* note 1 (providing video of Matthews’ “heroics” in the defining moments of the game); Jeff Lockridge & Nick Cole, *Vanderbilt Receiver Explains Why He Got Sick on Field*, USA TODAY (Aug. 30, 2013, 10:18 AM), <http://www.usatoday.com/story/sports/ncaaf/sec/2013/08/30/jordan-matthews-vomit-vanderbilt-cramps/2737197/>, archived at <http://perma.cc/6NEQ-TZ7Y> (quoting Matthews saying, “[i]t was tough, but I knew I couldn’t come out because my team needed me”).

⁶ Sam Mellinger, *Death of Derek Sheely Shows Football’s Concussion Problems Extend Beyond NFL*, KANSAS CITY STAR (Aug. 31, 2013, 11:41 PM), available at <http://www.kansas.com/news/local/article326476/Death-of-Derek-Sheely-shows-football%E2%80%99s->

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concussion inducing hit and subsequent illness, he exhibited no concussion symptoms.⁷ Thus, it was impetuously determined that mandatory concussion testing was unnecessary and Jordan Matthews was cleared to play.⁸ Through its inaction, Vanderbilt decidedly evidenced its priorities.⁹

Matthews felt compelled to return to the game, uninterested in determining what induced his sudden illness.¹⁰ 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.¹¹ Finally, Jordan Matthews' last line of defense, the medical staff, neglected to perform any precautionary tests even though he undeniably displayed concussion symptoms.¹² It is this very

concussion-problems-extend-beyond-NFL.html, archived at <http://perma.cc/9S9W-A9K3>; Barry Petchesky, *Jordan Matthews Hit His Head, Vomited, and Stayed in the Game*, DEADSPIN (Aug. 30, 2013, 8:49 AM), <http://deadspin.com/jordan-matthews-hit-his-head-vomited-and-stayed-in-th-1226545337>, archived at <http://perma.cc/8KEE-T9D6>; see also SEC Football Games, *supra* note 2 (displaying Matthews returning after only one play, which baffles the announcers).

⁷ See Associated Press, *Jordan Matthews: No Concussion*, ESPN (Sept. 3, 2013, 5:29 PM), http://espn.go.com/college-football/story/_/id/9631350/vanderbilt-receiver-jordan-matthews-says-concussion, archived at <http://perma.cc/4EP-DQ9Z> [hereinafter *Jordan Matthews: No Concussion*] (reiterating that Matthews stated the medical staff "knew that there were no concussions symptoms").

⁸ See Chase Goodbread, *James Franklin Defends Handling of Jordan Matthews' Health*, NFL (Sept. 3, 2013, 12:46 PM), <http://www.nfl.com/news/story/0ap1000000237703/article/james-franklin-defends-handling-of-jordan-matthews-health>, archived at <http://perma.cc/VK7T-M3LE> (quoting former Vanderbilt coach, James Franklin, in his insistence that Jordan Matthews was properly cleared to play); VU Commodores, *supra* note 1 (showing Jordan Matthews contending that he definitely did not have a concussion); cf. Timothy Bella, *Explore: College Football Concussion Map*, ALJAZEERA AM. (Dec. 27, 2013), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/9/3/america-tonight-s201314collegefootballconcussiondatabase.html>, archived at <http://perma.cc/Q3HU-B4YL> (illustrating that Vanderbilt did not report a single concussion as of December 27, 2013). In the 2013 season, only 192 concussions were reported among 10,000 players; which, according to the NCAA's Injury Surveillance Program, should be closer to 4,000 reported concussions per year. Timothy Bella, *NCAA Head Games: The 'Very Skewed' Concussion Data in College Football*, ALJAZEERA AM. (Jan. 9, 2014, 5:30 PM), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2014/1/9/ncaa-head-games-theveryskewedconcussiondataincollegefootball.html>, archived at <http://perma.cc/C8G5-Y3F2>. Interestingly, of those 192, not a single Vanderbilt player was reported to have sustained a concussion. *Id.*

⁹ See, e.g., Petchesky, *supra* note 6 (criticizing Matthew's lack of recovery time).

¹⁰ Teresa M. Walker, *Vandy Receiver Insists He's Fine After Hard Hit*, ASSOCIATED PRESS (Sept. 3, 2013, 4:32 PM), <http://bigstory.ap.org/article/vandy-receiver-insists-hes-fine-after-hard-hit>, archived at <http://perma.cc/32KK-FTBP>.

¹¹ *Jordan Matthews: No Concussion*, *supra* note 7.

¹² Chris Huston, *Vanderbilt's Jordan Matthews Says He's OK After Hit*, NBC SPORTS (Sept. 3, 2013, 7:33 PM), <http://collegefootballdiscuss.com/2013/09/03/vanderbilts-jordan-matthews-says-hes-ok-after-hit/>, archived at <http://perma.cc/LAUZ-PEV9>; see also

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dichotomic situation that exemplifies the National Collegiate Athletic Association's ("NCAA") flawed NCAA Concussion Policy and Legislation ("Concussion Policy").¹³

This Note analyzes the current NCAA Concussion Policy's ineffectiveness.¹⁴ 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.¹⁵ 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.¹⁶

First, Part II illustrates the NCAA's pervasive failure with historical, legal, medical, and social background of the intercollegiate concussion controversy.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

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).

²⁰ ERIN IRICK, NAT'L COLL. ATHLETIC ASS'N, NCAA SPORTS SPONSORSHIP & PARTICIPATION RATES REP.: 1981-1982-2011-2012, 72 (2012), available at <http://www.ncaa.com/publications/productdownloads/PR2013.pdf>, archived at <http://perma.cc/DRK2->

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

36AA; see Andy Staples, *The Price of Head Injuries*, SPORTS ILLUSTRATED (Oct. 24, 2013), <http://mmqb.si.com/2013/10/24/nfl-draft-concussions-jahvid-best/>, archived at <http://perma.cc/TJ8A-SWNJ> (cautioning the desire to hide a concussion so to not hinder the probability of playing in the NFL).

²¹ *Taming Football*, in 10 THE WORLD TO-DAY 3 (Shalier Mathews, ed. 1906).

²² Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10-11 (2000).

²³ JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA’S FIRST CENTURY 1, 9 (2006).

²⁴ See Nathan Fenno, *Internal NCAA Emails Raise Questions About Concussion Policy*, WASH. TIMES (Jul. 20, 2013, 2:33 PM), <http://www.washingtontimes.com/blog/screen-play/2013/jul/20/internal-ncaa-emails-raise-questions-about-concuss/>, archived at <http://perma.cc/NCZ2-NUBL> [hereinafter *Emails Raise Questions*] (discussing the way the NCAA handles head injuries).

²⁵ JACKSON LEWIS LLP, CONCUSSIONS IN ATHLETES: WHERE WE ARE AND WHAT TO DO NOW? 3, 4 (Jan. 2010), available at www.naia.org/fls/27900/1NAIA/resources/trainers/NAIA_ConcussionsinAthletesSpecialReport.pdf, archived at <http://perma.cc/ZZ9R-WGVV>; *Emails Raise Questions*, supra note 24; see John Breech, *President Obama: I Wouldn’t Let My Son Play Pro Football*, CBS SPORTS (Jan. 19, 2014, 2:14 PM), <http://www.cbssports.com/nfl/eye-on-football/24414125/president-obama-i-wouldnt-let-my-son-play-pro-football>, archived at <http://perma.cc/7LYW-5YHS> (quoting President Obama who states, “if I had a son, I’d have to think long and hard before I let him play football”); see also Memorandum in Support of Motion for Class Certification at 10, *Arrington v. NCAA*, No. 11-cv-06356 (N.D. Ill. July 19, 2013), available at <http://sports.cbsimg.net/images/blogs/ncaa-concussions-2013-memo.pdf>, archived at <http://perma.cc/PPC2-9TSW> [hereinafter *Arrington Memo*] (providing the NCAA’s acknowledgement of concussion management at the various other levels); THE LYSTEDT LAW: A CONCUSSION SURVIVOR’S JOURNEY, CTR. DISEASE CONTROL (Mar. 12, 2010), <http://www.cdc.gov/media/subtopic/matte/pdf/031210-Zack-story.pdf>, archived at <http://perma.cc/J7SS-9VCP> (demonstrating that youth football has also employed guidelines for safer play); Gary Mihoces, *NFL Launches New Guidelines for Assessing Concussions*, USA TODAY (Mar. 30, 2011), http://usatoday30.usatoday.com/sports/football/nfl/2011-03-29-concussions-protocol_N.htm, archived at <http://perma.cc/M3Z9-GYZH> (outlining changes the NFL has implemented).

²⁶ *Emails Raise Questions*, supra note 24.

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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.²⁷ 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.²⁸ Part II.B discusses the epidemiology of a concussion, which further evidences the current Concussion Policy's impracticalities.²⁹ Finally, Part II.C presents the conflicting socio-ecological concerns that hinder concussion reporting.³⁰

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.³¹ In fact, the *New York Times* published an editorial that strongly advocated for this movement by associating college football with lynching.³² The campaign to eliminate the sport arose after eighteen college athletes died in just one season.³³ As a result, the NCAA was formed to mitigate the increased danger and nullify the subsequent crusade to eradicate football.³⁴ It is argued, however, that the Association has since disassociated from its founding principal.³⁵ 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).

³¹ Bob Greene, *The President Who Saved Football*, CNN (Feb. 5, 2012, 8:25 AM), <http://www.cnn.com/2012/02/05/opinion/greene-super-bowl/>, archived at <http://perma.cc/QA5G-G9NX>.

³² John J. Miller, *How Teddy Roosevelt Saved Football*, N.Y. POST (Apr. 17, 2011, 4:00 AM), available at <http://nypost.com/2011/04/17/how-teddy-roosevelt-saved-football/>, archived at <http://perma.cc/V26M-JZC2> (quoting the 1903 N.Y. Times headline regarding the "two curable evils"). "The New York Times fussed over football's trend toward 'mayhem and homicide' . . . [t]he first evil it addressed was the lynching of blacks, [t]he second was football." *Id.*

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*.

³⁴ CROWLEY, *supra* note 23, at 1; see also Mary Grace Miller, Comment, *The NCAA and the Student-Athlete: Reform is on the Horizon*, 46 U. RICH. L. REV. 1141, 1141-42 (2012) (elaborating on the early years of the NCAA and the reasons for its formation); St. Nicholas Stars, *Notable Educators Meet to Discuss the Uplifting of College Athletics*, N.Y. TIMES (Jan. 3, 1909), available at <http://query.nytimes.com/mem/archive-free/pdf?res=FB0813FC3E5D12738DDDA0894D9405B898CF1D3>, archived at <http://perma.cc/YDS8-D4RJ> (conferring the original intent for the NCAA).

³⁵ See, e.g., Miller, *supra* note 34, at 1141-42 (illustrating the NCAA's focal shift from safety to amateurism).

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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

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).

³⁸ *About the NCAA*, NCAA, <http://www.ncaa.org/about> (last visited Mar. 15, 2015), archived at <http://perma.cc/5L89-PH2K>.

³⁹ NCAA MEMBERSHIP REPORT: 2008-09, NCAA, 5 (2009); see also *NCAA College Athletics Statistics*, STATISTIC BRAIN (Apr. 26, 2014), <http://www.statisticbrain.com/ncaa-college-athletics-statistics/>, archived at <http://perma.cc/9W4U-E776> (calculating a total of 420,000 NCAA student-athletes as of May 8, 2012).

⁴⁰ NCAA ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, 2014-2015 NCAA DIV. I MANUAL viii, art. 1.2 (Jan. 2015), available at <http://www.ncaapublications.com/productdownloads/D115JAN.pdf>, archived at <http://perma.cc/SAN9-E9DE> [hereinafter *DIVISION I MANUAL*].

⁴¹ Connor J. Bush, *The Legal Shift of the NCAA's "Big 5" Member Conferences to Independent Athletic Associations: Combining NFL and Conference Governance Principles to Maintain the Unique Product of College Athletics*, 16 U. DENV. SPORTS & ENT. L. J. 5, 11 (2014); see *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 715 (D. Vt. 2012) (referring to the relationship between the NCAA and member institutions as contractual in nature); *Oliver v. NCAA*, 920 N.E.2d 203, 211 (Ohio Ct. Com. Pl. 2008) (specifying that a contract unquestionably exists between the NCAA and member institutions).

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).

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In fact, everyone within an institution's athletic program is contractually obligated to expose potential violations.⁴³ 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.⁴⁴ Student-athletes also benefit from this contractual relationship between the NCAA and member institutions.⁴⁵

The NCAA and member institution's contractual relationship extends to student-athletes under several legal theories.⁴⁶ As third-party beneficiaries, student-athletes may enforce assurances made under the Constitution and bylaws.⁴⁷ Although courts have determined a third-

⁴³ NCAA, *Certification of Compliance for Staff Members of Athletic Dept's 1* (2014), available at <http://www.ncaa.org/sites/default/files/DI%20Form%2014-2%20-%20Certification%20of%20Compliance%20for%20Staff%20Members%20of%20Athletics%20Departments.pdf>, archived at <http://perma.cc/AN4Y-HXCN>.

⁴⁴ Rodney K. Smith, *Increasing Presidential Accountability in Big-Time Intercollegiate Athletics*, 10 VILL. SPORTS & ENT. L.J. 297, 316 (2003); DUQ. U., *Investigating and Reporting NCAA Violations 1*, available at http://grfx.cstv.com/photos/schools/duqu/genrel/auto_pdf/violations.pdf (last visited Sept. 6, 2014), archived at <http://perma.cc/4CBB-X9UJ> [hereinafter *Investigating and Reporting NCAA Violations*].

⁴⁵ See *Oliver*, 920 N.E.2d at 200 (noting the contract between the NCAA and member instructions 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").

⁴⁶ See *Bloom v. NCAA*, 93 P.3d 621, 624 (Colo. App. 2004) (finding third-party beneficiary status); *Hall v. NCAA*, 985 F. Supp. 782, 796 (1997) (identifying a promissory estoppel claim); *Arrington v. Nat'l Collegiate Athletic Ass'n*, 11-cv-06356, at 74-94 (N.D. Ill. Feb. 12, 2013) [hereinafter *Second Amended Class Action Complaint*] (alleging several contract claims).

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).

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party beneficiary status arises under the NCAA legislation, the finding has been confined to claims arising out of enforcement of eligibility requirements.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.”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.⁵⁰

Student-athletes, as third-party beneficiaries, may also bring a claim of good faith and fair dealing.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.”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.⁵³

Under 2014–2015 NCAA Division I Manual (“Division I Manual”), the NCAA articulates a commitment to the well-being of student-athletes.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.”⁵⁵ 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.”⁵⁶ 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.⁵⁷ 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.”⁵⁸ However, prior to 2010, legislation specific to concussions was omitted from the NCAA’s Division I Manual.⁵⁹

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).

⁵⁶ DAVID KLOSSNER, 2013–14 NCAA SPORTS MEDICINE HANDBOOK 2, 63 (Aug. 2013), available at <http://www.ncaapublications.com/DownloadPublication.aspx?download=MD13.pdf>, archived at <http://perma.cc/7YS-QQJE> [hereinafter MEDICINE HANDBOOK]. Ultimately, the NCAA contends that everyone involved in intercollegiate athletics shares responsibility to reduce the risk of injury during competition. *Id.* The Association collects data and contributes recommendations to modify safety guidelines or rules of play to ensure safety. *Id.*

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”).

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2. The Castro of College Athletics

The NCAA is currently experiencing the most threatening coup d'état of its 100-year reign.⁶⁰ Its constituents are tirelessly attempting to overthrow its amateurism ideology, while seeking greater autonomy.⁶¹ In doing so, the most prominent governing body in all of sports has been publically disgraced as a self-serving dictatorship.⁶² Ironically, the governmental body responsible for protecting player health and safety is now associated with a form of leadership notorious for its brutality.⁶³ Accordingly, players have initiated lawsuits as a result of the NCAA's continued failure to secure their safety.⁶⁴ 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.⁶⁵

⁶⁰ See Stephen F. Ross et al., *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J.C. & U.L. 79, 96-97 (2014) (evaluating the impracticability of the NCAA's restitution rule in regards to student-athlete's eligibility); Peter Tornello & Gregg E. Clifton, *Concussion Injuries Controversy Not Restricted to Professional Athletics*, C. & PROF. SPORTS L. BLOG (Jan. 15, 2014), <http://www.collegeandprosportslaw.com/amateur-sports/concussion-injuries-controversy-not-restricted-to-professional-athletics/>, archived at <http://perma.cc/RL2Q-PWAA> (noting that the NCAA is involved in numerous lawsuits due to its alleged negligence).

⁶¹ See Dave Zirin, *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=tweetlnkushpmsg00000067, archived at <http://perma.cc/7FXZ-N4CS> (contextualizing Northwestern's attempt to form a union to bargain for medical coverage and scholarship terms).

⁶² Dave Zirin, *'Right Now the NCAA is Like a Dictatorship': Why the Northwestern Football Team Formed a Union*, NATION (Jan. 28, 2014, 11:07 PM), <http://www.thenation.com/blog/178142/right-now-ncaa-dictatorship-why-northwestern-football-team-formed-union>, archived at <http://perma.cc/KAA2-KUJC>.

⁶³ WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* 339 (2d ed. 2004). See generally Susana Narotzky, *The Project in the Model: Reciprocity, Social Capital, and the Politics of Ethnographic Realism*, 48 CURRENT ANTHROPOLOGY 403, 407 (2007) (conveying the suppression of rights that stem from a dictatorial government); see c.f. Milan W. Svobik, *Power Sharing and Leadership Dynamics in Authoritarian Regimes*, 53 AM. J. POL. SCI. 477, 477 (2009) (identifying Fidel Castro as the former dictator Cuba, retiring after fifty years in power).

⁶⁴ See Teddy Greenstein, *Kain Colter: Man Meets Moment*, CHI. TRIB. (Feb. 15, 2014), available at http://articles.chicagotribune.com/2014-02-15/sports/ct-kain-colter-college-union-spt-0216-20140216_1_kain-colter-northwestern-cap, archived at <http://perma.cc/D8AL-B7VF> (delineating the lawsuit filed against the NCAA for neglecting to ensure player safety).

⁶⁵ See *infra* Part II.A.2 (exploring the history of NCAA concussion management).

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On August 12, 2010, the Association enacted the NCAA Concussion Management Plan (“Concussion Plan”).⁶⁶ The Concussion Plan mandates that “[a]n active member institution shall have a Concussion Management Plan for its student-athletes.”⁶⁷ Additionally, each institution is responsible for drafting a plan, implementing the plan, and ensuring compliance on behalf of the entire institution.⁶⁸ Noncompliance is considered an institutional violation and subject to

⁶⁶ DIVISION I MANUAL, *supra* note 40, at art. 3.2.4.17. NCAA *Approach to Concussions: Behind the Blue Disk*, NCAA, <https://www.ncaa.org/about/resources/media-center/ncaa-approach-concussions> (last visited Sept. 7, 2014), *archived at* <http://perma.cc/67H3-E5AA>.

⁶⁷ DIVISION I MANUAL, *supra* note 40, at 3.2.4.17; Kevin Vaughan, *Did NCAA Ignore Concussion Issue?*, FOXSPORTS (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.

DIVISION I MANUAL, *supra* note 40, at art. 3.2.4.17.

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 DEPT OF ATHLETICS CONCUSSION GUIDELINES, UNIV. MIAMI (Aug. 1, 2014), *available at* <http://hurricanesports.com/fls/28700/files/2014%20University%20of%20Miami%20CONCUSSION%20POLICY.PDF>, *archived at* <http://perma.cc/6HQE-33B6> (exemplifying a member institution’s concussion management plan).

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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 LEGIS. 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-WDDDB> (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.

⁷⁰ See, e.g., Marsh & Robbins, *supra* note 55, at 668–69 (stating that “[w]hat campus leaders know is that although some people in another league or another part of the country may view college football as only a game, for many people affiliated with the institution, it is THE GAME”); see c.f. Stephanie Taylor Christensen, *The Surprising Economics of College Football*, MINYANVILLE (Nov. 11, 2011, 2:10 PM), <http://www.minyanville.com/businessmarkets/articles/college-football-economics-penn-state-football/11/11/2011/id/37880>, archived at <http://perma.cc/8DRM-W2MM>, (demonstrating that “there’s a lot of money at stake in college football”); Alicia Jessup, *The Economics of College Football: A Look at the Top 25 Teams’ Revenues and Expenses*, FORBES (Aug. 31, 2013, 10:32 AM), <http://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/>, archived at <http://perma.cc/9AGH-U7B7> (providing the Department of Education’s data illustrating that college football programs often create the most revenue for an athletic department).

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/2013/12/17/5217634/sharing-derek-sheely-a-helmet-to-helmet-hit-took-the-life-of-a-22>, archived at <http://perma.cc/AZE3-VDDL>. 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-1188048031/1463651387>, archived at <http://perma.cc/F8XA-ZM6M> (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://nflconcussionlitigation.com/?p=1067>, archived at <http://perma.cc/39S2-WBAM>; Nathan Fenno, *Death of Frostburg State Player Derek Sheely Due to 'Egregious Misconduct,' Lawsuit Says*, WASH. TIMES (Aug. 22, 2013), available at <http://www.washingtontimes.com/news/2013/aug/22/death-frostburg-state-player-derek-sheely-due-egre/#ixzz2iKGL1OeG>, archived at <http://perma.cc/AX6P-UXJW>.

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competitive environment that is safe and ensures fair play.”⁷⁴ 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.⁷⁵ Ironically, Dr. Klossner’s evasive response to Derek Sheely’s death directly contradicts his original intent for the NCAA’s Concussion Policy.⁷⁶

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.⁷⁷ 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.⁷⁸ 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

⁷⁴ Letter from David Klossner, NCAA Dir. of Health and Safety, to Kristen Sheely, Exec. Dir., The Derek Sheely Fund. (Mar. 20, 2012), available at <http://nflconcussionlitigation.com/?p=1067>, archived at <http://perma.cc/39S2-WBAM>.

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.*

⁷⁷ *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, [] 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). “The NCAA denies that it has a legal duty to protect student-athletes,” but admits that it was “founded to protect young people from the dangerous and exploitative athletic practices of the time.” *Id.*

⁷⁸ *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 o]nly sixty-six percent of schools used baseline testing”).

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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.

⁸¹ Arrington Complaint, *supra* note 77; see Rachael Axon, *Does NCAA Face More Concussion Liability Than NFL?*, USA TODAY (July 25, 2013, 8:36 PM), available at <http://www.usatoday.com/story/sports/ncaaf/2013/07/25/ncaa-concussion-lawsuit-adrian-arrington/2588189/>, archived at <http://perma.cc/6M6Z-JNCZ> (narrating the story of Adrian Arrington, former college athlete and named plaintiff in the current class action suit against the NCAA who suffered a career-ending hit in 2009). See, e.g., Spencer Anderson, NCAA INSTITUTIONS AND A DUTY TO WARN FOOTBALL STUDENT-ATHLETES: A LOOK INTO THE ARRINGTON V. NCAA CASE 5–6, available at <http://nflconcussionlitigation.com/wp-content/uploads/2012/08/NCAA-Institutions-and-a-Duty-to-Warn-copy1.pdf>, (last visited Sept. 19, 2014), archived at <http://perma.cc/KUN5-L5JV> (providing additional information on the lawsuit).

⁸² Greg Ryan, *Ex-NCAA Players Take Page From NFL Concussion Suit*, LAW360 (Feb. 15, 2013, 7:39 PM), <http://www.law360.com/articles/416040/ex-ncaa-players-take-page-from-nfl-concussion-suit>, archived at <http://perma.cc/YT9S-ZGBJ>.

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then consolidated with the Arrington lawsuit.⁸³ On February 12, 2013, the Plaintiffs' complaint was further amended to include express and implied contract claims based upon several well-established contract theories.⁸⁴ 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.⁸⁵ 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.⁸⁶

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.⁸⁷ 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.⁸⁸ 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.⁸⁹

On January 17, 2015, the NCAA updated its Division I Manual to include an additional section on Concussion Safety Protocol.⁹⁰ The new protocol instituted a requirement that every institution annually submit its concussion guidelines to the Concussion Safety Protocol Committee.⁹¹

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.*

⁸⁷ *Concussion Guidelines*, NCAA, <http://www.ncaa.org/health-and-safety/concussion-guidelines>, (last visited Feb. 8, 2015), archived at <http://perma.cc/VT9A-RXUL>; Jake New, *Combating Concussions*, INSIDE HIGHER ED (Oct. 2, 2014), <https://www.insidehighered.com/news/2014/10/02/u-michigans-response-athletes-concussion-renews-regulation-debate>, archived at <https://perma.cc/CT9E-FUXT>. See e.g. Settlement Decision, *supra* note 83, at 5-8 (outlining the NCAA's agreed upon terms).

⁸⁸ Doug Lederman, *Playing Catch-up on Concussions*, INSIDE HIGHER ED (July 8, 2014), <https://www.insidehighered.com/news/2014/07/08/ncaa-publishes-guidelines-concussions-and-player-safety>, archived at <https://perma.cc/3KNV-JG4J>.

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:

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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.⁹² 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.⁹³

3.2.4.17.1 Concussion Safety Protocol. [A] 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. [A] 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 DIVISION 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 . . . [it] is a

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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.cbssports.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.*

⁹⁴ Rick Maese, *Concussions and Depression: Questions Renewed Over Whether There's a Link*, WASH. POST (Dec. 6, 2014), available at http://www.washingtonpost.com/sports/concussions-and-depression-questions-renewed-over-whether-theres-a-link/2014/12/06/1bbc8c3c-7c8e-11e4-8241-8cc0a3670239_story.html, archived at <http://perma.cc/3PZZ-WF9X>; see also Lindsey Adler, "This Disease was Eating Away at his Brain," BUZZFEED NEWS (Dec. 6, 2014, 1:35 PM), <http://www.buzzfeed.com/lindseyadler/youth-football-brain-disease-suicide#.sgwqYLMl5v>, archived at <http://perma.cc/TMB5-ULUT> (linking Joseph Chernach's suicide to CTE); Madison Park, *College Football Player Who Committed Suicide Had Brain Injury*, CNN (Sept. 14, 2010, 3:10 PM), <http://www.cnn.com/2010/HEALTH/09/14/thomas.football.brain/>, archived at <http://perma.cc/M762-6L8S> (providing Owen Thomas' story, who was diagnosed with CTE after his suicide).

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

⁹⁶ See Sara P. Chrisman & Laura P. Richardson, *Prevalence of Diagnosed Depression in Adolescents with History of Concussion*, 54 J. ADOLESCENT HEALTH 582, 584 (2014) (finding that teens who endure multiple concussions are three times more likely to suffer from depression than those who have never had a concussion); Tracey Covassin, David Stearne & Robert Elbin, *Concussion History and Postconcussion Neurocognitive Performance and Symptoms in Collegiate Athletes*, 43 J. ATHLETIC TRAINING 119, 122-23 (2008) (elaborating on the chemical effects of a concussion). "Recently, investigators have identified an emerging pattern of neurocognitive decrements commonly occurring . . . after a concussion [which] include visual-motor reaction time, memory, and attention." *Id.* at 123; Mary Elizabeth Dallas, *Concussions Tied to Verbal Memory Loss in Young Athletes*, HEALTHDAY (June 3, 2011), <http://consumer.healthday.com/cognitive-and-neurological-health-information-26/brain-health-news-80/concussions-tied-to-verbal-memory-loss-in-young-athletes-653570.html>, archived at <http://perma.cc/4Y4V-H2S5> (identifying decreased brain function and cognitive processing among students who sustained a concussion).

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determinants in preventing further senseless deaths.⁹⁷ Unfortunately, concussion identification is particularly problematic because of the inherent complexity involved in head injury diagnosis.⁹⁸ Yet, the current NCAA Concussion Policy delegates the near impossible task of recognizing a concussion to the student-athlete.⁹⁹ The physiological trepidation an athlete endures during a head injury is understood by explaining the epidemiology of a concussion.¹⁰⁰

A concussion is a very enigmatic injury because it is practically impossible to diagnose with the naked eye.¹⁰¹ When making a diagnosis, medical personnel look for disturbances in the level of consciousness,

⁹⁷ See Robert C. Cantu & Alissa D. Gean, *Second-Impact Syndrome and a Small Subdural Hematoma: An Uncommon Catastrophic Result of Repetitive Head Injury with a Characteristic Imaging Appearance*, 27 J. NEUROTRAUMA 1557, 1557–58 (2010) (demonstrating the importance of proper diagnosis); Julian Bailes, *Sports Concussion*, NORTHSHORE UNIV. HEALTHSYSTEM (2014), <http://www.northshore.org/orthopaedics/specialties/sports-medicine/sports-concussion/>, archived at <http://perma.cc/3MCK-QB97> (stressing the critical importance of proper diagnosis so that athletes do not risk worsening symptoms or prolonged recovery).

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).

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confusion, and amnesia.¹⁰² After a concussion, the brain's ability to regulate, transmit, and send signals that control thought process is disrupted.¹⁰³ As a result, decision-making, impulse control, and problem solving capabilities are significantly impaired.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.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.¹⁰⁶

The effects of concussions are potentially devastating.¹⁰⁷ Often, the occurrence of multiple concussions is most threatening to an athlete's

¹⁰² Christopher S. Sahler & Brian D. Greenwald, *Traumatic Brain Injury in Sports: A Review*, REHAB. RES. & PRAC. 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).

¹⁰³ Ivan Mulligan et al., *Prevalence of Neurocognitive and Balance Deficits in Collegiate Football Players Without Clinically Diagnosed Concussion*, 42 J. ORTHOPEDIC & SPORTS PHYSICAL THERAPY 625, 625–26 (2012); see Michelle Castillo, *Contact Sports May Put Athletes at Higher Risk of Memory Loss Even Without Concussions*, CBS NEWS (Dec. 12, 2013, 2:11 PM), <http://www.cbsnews.com/news/contact-sports-may-put-you-at-higher-risk-of-memory-learning-loss-even-without-concussions/>, archived at <http://perma.cc/5ENA-XU68> (finding that collegiate contact sport athletes are more likely to score lower on learning and memory tests at the end of the season).

¹⁰⁴ David B. Arciniegas et al., *Mild Traumatic Brain Injury: A Neuropsychiatric Approach to Diagnosis, Evaluation, and Treatment*, 1 NEUROPSYCHIATRIC DISEASE & TREATMENT 311, 322–23 (2005).

¹⁰⁵ Eric L. Legome & Rick Kulkarni, *Postconcussive Syndrome*, MEDSCAPE (May 13, 2013), <http://emedicine.medscape.com/article/828904-overview>, archived at <http://perma.cc/Z2TD-9NEE>; see RECOVERING FROM A CONCUSSION (HEAD INJURY); CORNELL UNIV., available at <http://www.gannett.cornell.edu/cms/pdf/upload/Concussion.pdf>, (last visited Sept. 18, 2014), archived at <http://perma.cc/UG47-LXHQ> (warning that symptoms can last for days, weeks, and even months).

¹⁰⁶ Anne Trafton, *Sensing When the Brain is Under Pressure*, MIT NEWS OFFICE (Apr. 11, 2012), <http://web.mit.edu/newsoffice/2012/intracranial-pressure-monitor-0411.html>, archived at <http://perma.cc/QPZ9-LQBJ>; see T. Mori, Y. Katayama & T. Kawamata, *Acute Hemispheric Swelling Associated with Thin Subdural Hematomas: Pathophysiology of Repetitive Head Injury in Sports*, 96 ACTA NEUROCHIRURGICA SUPP. 40, 41 (2006) (providing that second impact syndrome occurs because there is a lack of cerebral blood flow, which leads to blood vessel engorgement, increased intracranial pressure, and eventual herniation).

¹⁰⁷ See Jordan Gaines Lewis, *From Sacks to Suicidality: Chronic Traumatic Encephalopathy and the NFL*, SCITABLE (Nov. 21, 2013), http://www.nature.com/scitable/blog/mind-read/from_sacks_to_suicidality_chronic, archived at <http://perma.cc/XU56-DT2V> (illustrating the suicidal tendencies accompanying CTE); Josh Levs, Steve Almasy & Joe Sutton, *Paul Oliver's Suicide is Latest in a String Among Former NFL Players*, CNN (Sept. 26, 2013, 4:14 PM), <http://www.cnn.com/2013/09/25/us/former-nfl-player-suicide/>, archived at <http://perma.cc/4QSX-WUVY> (conveying the suicides of several NFL athletes with CTE); Loy. Univ. Health Sys., *Do Sports Concussions Really Cause Chronic Traumatic Encephalopathy?*, SCIENCE DAILY (Dec. 2, 2013), <http://www.sciencedaily.com/releases/>

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well-being.¹⁰⁸ 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.¹⁰⁹ Chronic Traumatic Encephalopathy (“CTE”) is a progressive disease also found in athletes with a history of repetitive brain trauma.¹¹⁰ 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.¹¹¹ Alarming, NCAA football players are three times more likely to experience CTE-like

2013/12/131202152036.htm, archived at <http://perma.cc/4JFF-9YRM> (demonstrating the severity of the long-term effects).

¹⁰⁸ See Jorge Castillo, *College Athlete Died of Head Trauma, Father Says*, N.Y. TIMES (Aug. 30, 2011), <http://www.nytimes.com/2011/08/31/sports/ncaafotball/college-football-player-died-from-head-trauma-father-says.html>, archived at <http://perma.cc/JH2B-H3PJ> (illustrating the detrimental effects of second-impact syndrome); Terry Zeigler, *Second Impact Syndrome*, SPORTSMED (2014), <http://www.sportsmd.com/articles/id/38.aspx#sthash.FwEr2blp.51kcX2uH.dpbs>, archived at <http://perma.cc/N8LX-RS8D> (providing further information on the deadly second-impact syndrome); David X. Cifu & Craig C. Young, *Repetitive Head Injury Syndrome*, MEDSCAPE (Mar. 27, 2014), <http://emedicine.medscape.com/article/92189-overview>, archived at perma.cc/P7H3-AFY8 (defining second-impact syndrome).

¹⁰⁹ Tareq Bey & Brian Ostick, *Second Impact Syndrome*, WEST J. EMERGENCY MED. (Feb. 10, 2009), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2672291/>, archived at <http://perma.cc/Y4VC-ATPF> (providing that “[i]f, within several weeks [of sustaining a first head injury], the athlete returns to play and sustains a second head injury, diffuse cerebral swelling, brain herniation, and death can occur [and] young, healthy patients may die within a few minutes”); Barry Willer & John J. Leddy, *Management of Concussion and Post-Concussion Syndrome*, 8 CURRENT TREATMENT OPTIONS NEUROLOGY 415, 421 (2006) (cautioning that even those athletes without symptoms may be at risk for second-impact syndrome).

¹¹⁰ See *What is CTE: Chronic Traumatic Encephalopathy*, SPORTS LEGACY INST., <http://www.sportslegacy.org/research/cte/>, archived at <http://perma.cc/W6C6-55WU> (2013) (elaborating that the multiple impacts trigger a progressive degeneration by stimulating the build-up of abnormal tau protein).

¹¹¹ Brandon E. Gavett, Robert A. Stern & Ann C. McKee, *Chronic Traumatic Encephalopathy: A Potential Late Effect of Sport-Related Concussive and Subconcussive Head Trauma*, 30 CLINICS SPORTS MED. 179, 188 (2011); see Johna K. Register-Mihalik et al., *Association Between Previous Concussion History and Symptom Endorsement During Preseason Baseline Testing in High School and Collegiate Athletes*, 1 SPORTS HEALTH 61, 64 (2009) (cautioning that “college athletes with a history of multiple concussions may be at risk for experiencing concussion-linked symptoms well beyond the acute stage of injury”); Park, *supra* note 94 (stating that college athlete “[Owen] Thomas had never been diagnosed with a concussion as far back to the age of [nine,]” yet was still diagnosed with CTE).

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symptoms than the general population.¹¹² Unfortunately, little is known about the onset of CTE, thus absolute prevention is nearly impossible.¹¹³

However, limiting exposure to head trauma is the most assured way to prevent any adverse effects.¹¹⁴ 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.¹¹⁵ In recent years, several athletes have felt the insurmountable pressure to play through the pain and have lost their lives as a result.¹¹⁶ A college athlete's decision to not disclose his concussion symptoms is largely influenced by several competing social factors.¹¹⁷

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).

¹¹⁴ See Christine M. Baugh et al., *Chronic Traumatic Encephalopathy: Neurodegeneration Following Repetitive Concussive and Subconcussive Brain Trauma*, BRAIN IMAGING & BEHAV. (May 3, 2012), <http://www.bu.edu/alzresearch/files/2013/02/Baugh-et-al-CTE-Review-Brain-Imaging-and-Behavior-5-2012.pdf>, archived at <http://perma.cc/F5NL-WMCB> (describing the harm caused by repeated head trauma).

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); Wolverson, *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").

¹¹⁶ See, e.g., Ryan Casey, *Signs Weren't Obvious in Concussion Death of Jake Snakenberg*, DENVER POST (Oct. 18, 2010, 4:16 PM), http://www.denverpost.com/ci_16358037, archived at <http://perma.cc/8S2A-WXGB> (conveying that Jake Snakenberg died from a "normal football hit" a week after sustaining a previous head injury); Andy Greder, *Dassel-Cokato Football Player in Serious Shape After Head Injury*, PIONEER PRESS (Sept. 9, 2013), <http://athletictrainers.org/2013/09/09/dassel-cokato-football-player-in-serious-shape-after-head-injury/>, archived at <http://perma.cc/8U6L-JTXW> (stating that Luke Nelson was in serious condition after sustaining a hit in his second game of the season); Thomas Zambito, *Montclair High School Trainer Faced Tough Questions in Football Player's 2008 Death*, STAR LEDGER (Sept. 22, 2013, 8:54 PM), http://www.nj.com/essex/index.ssf/2013/09/ryne_dougherty_lawsuit_montclair_high_school_trainer_faced_tough_questions_in_football_players_2008.html, archived at <http://perma.cc/3BZL-SKXN> (providing that Ryne Dougherty died twenty-five days after sustaining a hit during a football game).

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

2015] *Deception, Degeneration, and the Delegation of Duty* 1067C. *Cognitive Russian Roulette*

In the game of Russian roulette, competitors are individually responsible for evading a potentially deadly outcome.¹¹⁸ Participants often fail to comprehend the magnitude of their decision to partake in the activity, while outside influences entice continued engagement.¹¹⁹ It has been argued that a student-athlete faces a comparable impracticality under the NCAA Concussion Policy.¹²⁰ The Policy requires self-reporting of concussion symptoms, yet disclosure is inhibited by social implications.¹²¹ A myriad of socio-ecological factors are involved in the game of cognitive Russian roulette, hindering concussion reporting.¹²²

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.”¹²³ 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.*

¹¹⁹ See *Wickman v. Nw. Nat. Ins. Co.*, 908 F.2d 1077, 1087 (1st Cir. 1990) (reporting that individuals regularly participate in Russian roulette neither expecting nor intending to be killed); *People v. Hansen*, 59 Cal. App. 4th 473, 476–78 (1997) (demonstrating the external pressures on initiating and participating in a game of Russian roulette).

¹²⁰ See Associated Press, *NCAA Settles Head-Injury Lawsuit, Will Change Rules for Players*, CBS NEWS (July 29, 2014, 10:20 AM), <http://www.cbsnews.com/news/ncaa-settles-head-injury-lawsuit-will-change-rules-for-players/>, archived at <http://perma.cc/K2YA-RKSA> (criticizing the NCAA’s self-reporting system for concussions).

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.*

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concussed athlete should return to the game.¹²⁴ On an intrapersonal level, a student-athlete may choose not to disclose concussion symptoms either due to lack of awareness or internal pressures.¹²⁵ In compliance with the NCAA's stipulation, nearly 90% of universities require an athlete acknowledge his role in reporting a concussion.¹²⁶ However, only 71% actually provide athletes with concussion education materials.¹²⁷ Thus, athletes often fail to report concussion symptoms out of sheer ignorance.¹²⁸ 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.¹²⁹ Shortcomings in the NCAA Concussion Policy have been criticized as playing a role in this oblivion.¹³⁰

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). “[Forty-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.*

¹²⁶ Christine M. Baugh et al., *Concussion Management in United States College Sports: Compliance with National Collegiate Athletic Association Concussion Policy and Areas for Improvement*, 43 AM. J. SPORTS MED. 47, 54 (2014) [hereinafter *Concussion Management*]; see DIVISION I MANUAL, *supra* note 40, at 11 (quoting language that requires implementation of both steps). See, e.g., UNIV. UTAH SCH. MED., SPORTS CONCUSSION MANAGEMENT PLAN 8 (2011), available at <https://healthcare.utah.edu/orthopaedics/concussion-management-plan.pdf>, archived at <https://perma.cc/DJY4-X9UG> (exemplifying a member institution's concussion management plan). Under the plan, a student-athlete must acknowledge that it is his responsibility to report any concussion symptoms. *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: An*

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The NCAA Division I Manual provides little guidance on substance or delivery of the educational materials.¹³¹ 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.”¹³² Nevertheless, even with proper concussion education, some athletes still knowingly conceal their symptoms.¹³³ This blatant disregard is often a result of self-imposed demands.¹³⁴

An athlete’s internal pressure can cause him to set high, occasionally unrealistic, expectations.¹³⁵ As a result, athletes overexert their body in order to optimize performance.¹³⁶ Accordingly, their tenacity can

Ineffective Mandate, 48 BRITISH J. SPORTS MED. 135, 138–40 (2014) (concluding that the NCAA’s current education system is ineffective). The Handbook offers limited guidelines on concussion education: “[S]tudent-athletes must sign a statement in which they accept the responsibility for reporting their injuries and illnesses to the institutional medical staff, including signs and symptoms of concussions. During the review and signing process, student-athletes should be presented with educational material on concussions.” MEDICINE HANDBOOK, *supra* note 56, at 64.

¹³⁰ *Concussion Management*, *supra* note 126, at 54 (citing Emily Kroshus et al., *NCAA Concussion Education in Ice Hockey: An Ineffective Mandate*, 48 BRITISH J. SPORTS MED. 135, 138–40 (2014)).

¹³¹ *Concussion Management*, *supra* note 126, at 54; *see also* MEDICINE HANDBOOK, *supra* note 56, at 64 (articulating that “[d]uring the review and signing process, student-athletes should be presented with educational material on concussions”).

¹³² *Concussion Symptoms and Return to Play*, *supra* note 124.

¹³³ Kerr, *supra* note 98, at 1015; *Concussion Symptoms and Return to Play*, *supra* note 124. College football players are significantly more likely to conceal a concussion than other surveyed athletes. Kerr, *supra*. The football players indicated that, after being hit in the head, 61% still played with concussive symptoms in a championship game, compared to 30% of other college athletes. *Id.*

¹³⁴ Kerr, *supra* note 98, at 1015.

Current findings suggest that athletes may be reluctant to disclose concussions if it results in removal from sports participation. Because athletes may believe reporting concussions is stigmatizing, it is essential that sports organizations utilize interventions to, first, educate athletes on how to recognize concussion symptoms and, second, emphasize the long-term health benefits of reporting concussions as well as the risks of playing while concussed.

Id. (citations omitted).

¹³⁵ Melinda Halpern, *Managing Internal and External Pressures*, GRIT PERFORMANCE (Feb. 14, 2013), <http://gritperformance.com/blog/2013/2/14/managing-internal-and-external-pressures>, archived at <http://perma.cc/LDZ8-QH73>.

¹³⁶ Kerr, *supra* note 98, at 1018 (citing Declan Connaughton, et al., *The Development and Maintenance of Mental Toughness: Perceptions of Elite Performers*, 26 J. SPORTS SCIS. 83 (2008)).

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influence how they respond to an injury.¹³⁷ An athlete's devotion to success and perfection, coupled with a fear of failure and shame, may cause him to ignore critical symptoms.¹³⁸ Athletes are also motivated by their desire to advance to the next level, where admitting pain suggests weakness and tarnishes the player's reputation.¹³⁹

Injured athletes are frequently stigmatized; thus, an injury has been known to greatly hinder the possibility of playing in the NFL.¹⁴⁰ Recently, the NFL draft has seen a large influx of younger college athletes.¹⁴¹ Student-athletes often enter the draft early to preempt any injury that could jeopardize a possible professional career.¹⁴² 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.¹⁴³

¹³⁷ Declan Connaughton, et al., *The Development and Maintenance of Mental Toughness: Perceptions of Elite Performers*, 26 J. SPORTS SCIS. 89 (2008). Connaughton and colleagues reasoned, "having an insatiable desire and internalized motives to succeed . . . was [] assumed to influence [responses] to sport-related injuries." *Id.*

¹³⁸ Kerr, *supra* note 98, at 1018 (citing Sam S. Sagar & Joachim Stoeber, *Perfectionism, Fear of Failure, and Affective Responses to Success and Failure: The Central Role of Fear of Experiencing Shame and Embarrassment*, 31 J. SPORT & EXERCISE PSYCHOL. 602, 602-27 (2009)).

¹³⁹ See Anand Veeravagu, *What's Really Killing Athletes with Concussions?*, DAILY BEAST (Dec. 26, 2013), <http://www.thedailybeast.com/articles/2013/12/26/what-s-killing-concussed-players-who-left-the-nfl.html>, archived at <http://perma.cc/EPK4-5GV5> (contextualizing the pressures associated with hiding an injury). Dr. Veeravagu provides that:

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.

¹⁴¹ Kevin Clark, *NFL Draft: College Football's NFL Problem: Why are Underclassmen Suddenly Leaving in Droves for the NFL Draft?*, WALL ST. J. (Mar. 2, 2014, 10:24 PM), <http://online.wsj.com/news/articles/SB10001424052702304585004579415241023161788?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304585004579415241023161788.html>, archived at <http://perma.cc/BYK7-4BA8> (cautioning that younger athletes are given incentives to enter the NFL draft as early as sophomore year).

¹⁴² Jason Clary, *College vs. Pros: Should Athletes Leave School Early?*, BLEACHER REP. (Dec. 13, 2009), <http://bleacherreport.com/articles/307746-college-vs-pros-should-athletes-be-allowed-to-leave-school-early>, archived at <http://perma.cc/8YDT-XWEF>.

¹⁴³ See Megan McArdle, *Head Injuries Make Football a Bad Bet*, BLOOMBERG VIEW (Nov. 13, 2013, 11:22 AM), <http://www.bloombergview.com/articles/2013-11-13/head-injuries-make-football-a-bad-bet>, archived at <http://perma.cc/X5HF-G3VK> (cautioning that dozens of athletes risk their health for one spot in the NFL); see also LYDIA BELL ET AL., SELF-REPORTED CONCUSSION AMONG NCAA STUDENT-ATHLETES: EXECUTIVE SUMMARY (Feb. 2014), available at <http://naaa.org/sites/default/files/Concussion%20%20GOALS%20Exec>

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Unfortunately, outside inducements may further encourage this behavior.¹⁴⁴

Non-disclosure can result from environmental influences, which include cultural implications and interpersonal relationships.¹⁴⁵ 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.¹⁴⁶ Upon choosing a college, the

%20Summary_Feb_12_2014_FINALpost.pdf, archived at <http://perma.cc/N246-FLQY> (concluding that year in school and first-team status directly correlate with concussion reporting); Michael McCrea et al., *Unreported Concussion in High School Football Players: Implications For Prevention*, 14 CLINICAL J. SPORTS MED. 13, 15 (2004) (finding that motivation not to be withheld from competition made up forty-one percent of unreported concussions among varsity football players and disregard for seriousness made up sixty-six percent of unreported concussions); Doug Brown, "Dangerously Excessive": How Washington State Football Confronted, and Didn't Confront the First Bad News of the Mike Leach Era, DEADSPIN (Jan. 8, 2013, 1:15 PM), <http://deadspin.com/5974159/dangerously-excessive-how-washington-state-football-confronted-and-didnt-confront-the-first-bad-news-of-the-mike-leach-era>, archived at <http://perma.cc/U8UX-ZG4F> (illuminating incentives placed on athletes to conceal an injury).

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.*

¹⁴⁶ *Frequently Asked Questions About the NCAA*, NCAA, <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa>, archived at <http://perma.cc/SMF8-ASTM> (Jan. 24, 2014); see Wolverton, *supra* note 71 (providing that recent studies have shown that athletes are underreporting concussions because they do not want to risk having their scholarships revoked); Jon Solomon, *Plaintiffs Want Judge Removed in John Rock v. NCAA Scholarship Case*, CBS SPORTS (Dec. 12, 2014, 1:34 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24882488/plaintiffs-want-judge-removed-in-john-rock-v-ncaa-scholarship-case>, archived at <http://perma.cc/LU8K-WPBE> [hereinafter *Plaintiffs Want Judge Removed*] (relaying further information on the one-year scholarship rule and the push to eliminate it). See generally RAMOGI HUMA & ELLEN J. STAUROWSKI, NAT'L COLLEGE PLAYERS ASS'N, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORTS 20 (2011), available at <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>, archived at <http://perma.cc/Q2XP-EMA7> (demonstrating the necessity of scholarship money by providing that "[t]hrough the NCAA, college presidents mandate impoverished conditions for young, valuable players and throw money around to all other college sports stakeholders when those players perform well, a formula that drives the powerful black market that thrives at so many universities nationwide"). Since 2002, universities have had the option to provide multi-year scholarships, though many still keep the agreements to one year. *Plaintiffs Want Judge Removed, supra*. The NCAA reiterates that:

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.

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student-athlete signs the National Letter of Intent (“NLI”), which binds him to the institution.¹⁴⁷ Although the athlete is unable to retract his commitment to the athletic program, member institutions can arbitrarily revoke a previously made promise of financial aid under the contract.¹⁴⁸ 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.¹⁴⁹

Additionally, masculine perception and associating concussion reporting with weakness can influence an athlete.¹⁵⁰ The notion that

¹⁴⁷ See Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1300 (1989) (stating that “the Letter of Intent . . . has served as a partial predicate for judicial recognition of the contractual relationship between university and student”). See generally *National Letter of Intent (NLI)*, NAT’L LETTER INTENT (2014), <http://www.nationalletter.org/>, archived at <http://perma.cc/4HM5-8E8L> (providing background on the NLI); see c.f. Debra D. Burke & Angela J. Grube, *The NCAA Letter of Intent: A Voidable Agreement for Minors?*, 81 MISS. L.J. 265, 275 n.60 (2011) (demonstrating legal obligations imposed under the NLI); *Agnew v. NCAA*, 683 F.3d 328, 332 (7th Cir. 2012) (illustrating two accounts of scholarship athletes who lost their financial aid after sustaining an injury); Sean Hanlon & Ray Yasser, “*J.J. Morrison*” and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241, 283 (2008) (identifying the NLI as a form contract).

¹⁴⁸ See Stephen F. Ross & Lindsay Berkstresser, *Using Contract Law to Tackle the Coaching Carousel*, 47 U.S.F.L. REV. 709, 713–14, 726–27 (2013) (establishing inconsistency with NLI enforcement). C.f. Sean M. Hanlon, Student Article, *Athletic Scholarships As Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS L. J. 41, 71–72 (2006) (arguing the National Letter of Intent is unconscionable); *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (1976) (finding that unconscionability is determined by considering whether a “real and voluntary meeting of the minds” is evidenced).

¹⁴⁹ DIVISION I MANUAL, *supra* note 40, at art. 15.3.4.2(d); see Ben Strauss, *A Fight to Keep College Athletes from the Pain of Injury Costs*, N.Y. TIMES (Apr. 24, 2014), http://www.nytimes.com/2014/04/25/sports/a-fight-to-keep-college-athletes-from-the-pain-of-injury-costs.html?_r=0, archived at <http://perma.cc/P2MR-RAZM> (narrating several circumstances where athletes lost their scholarship due to an injury); see, e.g., STUDENT-ATHLETES: FINANCIAL AID, LOUISIANA STATE UNIV. 502D: 5 (Nov. 2006), available at <http://www.lsusports.net/src/data/lsu/assets/docs/ad/policymanual/pdf/502D.pdf>, archived at <http://perma.cc/V6W3-NMYC> [hereinafter LSU STUDENT ATHLETES] (providing that “the renewal of aid may be denied if the student-athlete: . . . [v]oluntarily withdraws from participation in a sport for personal reasons”); *Jackson v. Drake Univ.*, 778 F. Supp. 1490, 1493 (S.D. Iowa 1991) (construing all financial aid agreements as valid contracts); *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 946–47 (D. Kan. 1987) (defining documents signed by a prospect as “written scholarship contracts”).

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

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“‘real’ men play sport[s] in an intensely confrontational manner” is engrained in contact sport athletes.¹⁵¹ In furthering this ideal, athletes are often encouraged to suppress an injury.¹⁵² This behavior is recognized as being considerably perpetrated by the coach.¹⁵³ Coaches that support injury reporting are crucial for facilitating increased team concussion safety; an ideal that is articulated in the Division I Manual.¹⁵⁴

The NCAA Division I Manual maintains that “[i]t is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes.”¹⁵⁵ Unfortunately, large salaries and sizeable performance-based bonuses incentivize most coaches.¹⁵⁶ 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.¹⁵⁷ 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*.

¹⁵¹ *Body Talk, supra* note 121, at 175–76 (emphasis added).

¹⁵² Sheely Complaint, *supra* note 72, at 7–8; *Body Talk, supra* note 121, at 175–76.

¹⁵³ See Jesse A. Steinfeldt et al., *Masculinity Socialization in Sports: Influence of College Football Coaches*, 12 PSYCHOL. MEN & MASCULINITY 247, 257 (2011) (stressing the influence coaches have on athletes); Brian Burnsed, *NCAA Mental Health Task Force Holds First Meeting*, NCAA (Nov. 26, 2013, 12:00 AM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-mental-health-task-force-holds-first-meeting>, archived at <http://perma.cc/3F63-JVSS> (admitting the influence that coaches have over an athlete’s mental health).

¹⁵⁴ *Perceived Coach Support, supra* note 98, at 320; DIVISION I MANUAL, *supra* note 40, at art. 2.2.3.

¹⁵⁵ DIVISION I MANUAL, *supra* note 40, at art. 2.2.3; see also Chris Fuhrmeister, ‘The NCAA Denies That it Has Legal Duty to Protect Student Athletes’, SB NATION (Dec. 19, 2013, 11:09 AM), <http://www.sbnation.com/college-football/2013/12/19/5227480/ncaa-concussion-lawsuits-derek-sheely>, archived at <http://perma.cc/5L2N-ESF7> (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. *Id.* The NCAA further asserts 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.” *Id.* But see MEDICINE HANDBOOK, *supra* note 56, at 2 (stating that student-athletes rightfully assume that it is the shared responsibility of all who sponsor intercollegiate athletics to minimize the inherent risks of the sport).

¹⁵⁶ *Perceived Coach Support, supra* note 98, at 315 (citing Steve Berkowitz et al, *NCAA Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries> (last visited Jan. 24, 2015), archived at <http://perma.cc/NB22-LP76>); see also Jim Baumbach, *Special Report: College Football Coaches Salaries’ and Perks are Soaring*, NEWSDAY (Oct. 4, 2014, 6:25 PM), <http://www.newsday.com/sports/college/college-football/fbs-college-football-coaches-salaries-are-perks-are-soaring-newsday-special-report-1.9461669>, archived at <http://perma.cc/J6Q3-FSMH> (providing insight on coach incentives, including five-figure bonuses with a bowl appearance or a requisite amount of regular season wins).

¹⁵⁷ Mark Koba, *College Football: Why Pressure to Win is So Big*, CNBC (Dec. 1, 2012, 3:48 AM), <http://www.cnn.com/id/50025280#>, archived at <http://perma.cc/EA6F-DK6Z>. “Coaches are going to be gone much sooner than in the past if they don’t win and they’ll be under so much pressure to recruit the best players, and the players will have to perform

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indicated, athletes admitted to receiving negative feedback from their coach for reporting an injury.¹⁵⁸ Others were blamed for the team's loss.¹⁵⁹ However, beyond actual reprimands, an athlete's perceived fear of repercussions from the coach can, itself, deter disclosure of concussion symptoms.¹⁶⁰ Likewise, injury concealment is also effectuated through the coach's dominance over the team's medical personnel.¹⁶¹

Under the Medicine Handbook, an institution is to employ a health care provider to ensure the safety and well-being of student-athletes.¹⁶² It also specifies that a coach must not have a "primary hiring or firing role" in the medical staff's employment.¹⁶³ 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.¹⁶⁴ As a result, trainers are admittedly pressured to prematurely allow student-athletes to return to play faster than medically appropriate.¹⁶⁵ Similar to the athlete, an athletic trainer's

well . . . [t]he competition is going to be fierce." *Id.*; see also McCaskey & Biedzynski, *supra* note 123, at 12 n.9 (conveying that "[b]ecause of such tort doctrines as respondeat superior, vicarious liability, and sovereign immunity, a coach's tortious conduct may result in liability against the coach's employer").

¹⁵⁸ Kerr, *supra* note 98, at 1016 (citing *Qualitative Study of Barriers*, *supra* note 147, at 330-35).

¹⁵⁹ *Id.*

¹⁶⁰ Kerr, *supra* note 98, at 1017. "An often-mentioned fear of injured athletes is that they will be 'brushed aside', and the loss of attention from coaches enhances the negative consequences of injury." R. Malinauskas, *College Athletes' Perceptions of Social Support Provided by their Coach Before Injury and After it*, 48 J. SPORTS MED. & PHYSICAL FITNESS 107, 111 (2008). Data indicates "coaches have more influence than any other factor over whether student-athletes view their college experience as positive or negative." Burnsed, *supra* note 153.

¹⁶¹ Justin Rigby et al., *Understanding Athletic Trainers' Belief Toward a Multifaceted Sport-Related Concussion Approach: Application of the Theory of Planned Behavior*, 48 J. ATHLETIC TRAINING 636, 640 (2013); see Wolverton, *supra* note 71 (illustrating the control coaches have over medical personnel). Before the 1990's, medical personnel often survived multiple coaching changes, but increasing profits have allotted coaches more discretion in choosing their staff, which for many includes medical personnel. Wolverton, *supra*; see also Brown, *supra* note 143 (illustrating confrontation between trainers and coaches).

¹⁶² MEDICINE HANDBOOK, *supra* note 56, at 8.

¹⁶³ *Id.*

¹⁶⁴ Wolverton, *supra* note 71.

¹⁶⁵ *Id.* Of the fifty-three who confided that they felt pressure to return a player faster than medically necessary, forty-two stated that they felt pressure from the coach even when the injury was a concussion. *Id.*; see Arrington Memo, *supra* note 25, at 36 (providing the University of Georgia's assistant athletic trainer's observations and expressed concerns with neglected return to play guidelines). The trainer states that "we all know that there are times where athletes are returned to games with concussions . . . I personally have seen an athlete knocked unconscious and return in the same quarter in recent years." *Id.*

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perception of the coach can also influence return to play decisions.¹⁶⁶ Restructuring the current hierarchy to allow medical personnel to report directly to the health department may cure this conflict.¹⁶⁷ Promisingly, some programs are implementing this hypothesized model with significant success.¹⁶⁸ However, most continue to be plagued by injury concealment and concussion underreporting as a result of the NCAA Concussion Policy's deficiencies.¹⁶⁹

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.¹⁷⁰ Following the blow, Shane unsteadily rose to his feet, stumbled, and was caught by offensive lineman Ben Braden.¹⁷¹ Although he struggled to raise his head, Shane signaled to the sideline that he did not need a

¹⁶⁶ See generally Rigby et al., *supra* note 161, at 640 (attributing underreported concussions to the medical personnel's believed absence of authority). Under the current system, athletic trainers "feel they lack complete authority to implement the recommended guidelines." *Id.* at 640.

¹⁶⁷ *Id.* at 641. The idea is that medical personnel will benefit from being surrounded with a support system of individuals who better understand concussions, rather than reporting to athletic directors who likely have more of a coaches' mentality. *Id.*; see *Big 12 Announces Concussion Diagnosis and Management Policy*, XII (Feb. 12, 2015), http://www.big12sports.com/ViewArticle.dbml?DB_OEM_ID=10410&ATCLID=209895746, archived at <http://perma.cc/V3WE-KYBA> (providing the Big 12 Conferences new concussion protocol). The Big 12 Conferences' protocol emphasizes that coaches will not have any influence on the unchallengeable decisions of the medical personnel. *Id.*

¹⁶⁸ See generally Darrin Scheid, *Room for Change*, NAT'L ATHLETIC TRAINING ASS'N 10-14 (Mar. 2011), available at <http://www.nata.org/sites/default/files/Collegiate-Healthcare-Model-Article.pdf>, archived at <http://perma.cc/2NG2-FULW> (conveying the benefits of moving athletic trainers from the athletic department to campus health services). Renard Sacco, Coordinator of Sports Medicine at Kutztown University explains:

Athletic trainers, by and large, haven't had somebody in the athletic department to champion their cause . . . [a] big percentage of athletic directors, are former coaches who don't have the same view or approach to athletic medicine as the athletic trainer or other medical professionals. That actually hurts athletic trainers moving forward, especially if they're trying to get their work environment better organized and more efficiently run.

Id. at 11.

¹⁶⁹ See Jon Solomon, *Congressman Urges NCAA to Have Concussion Penalties*, CBS SPORTS (Nov. 12, 2014, 3:13 PM), available at <http://www.cbssports.com/collegefootball/writer/jon-solomon/24801901/congressman-urges-ncaa-to-have-concussion-penalties>, archived at <http://perma.cc/8XSE-9VVP> (critiquing the NCAA's shortcomings).

¹⁷⁰ Drew Hallett, *The Fireable Offense of Brady Hoke*, SB NATION (Sept. 28, 2014, 9:07 AM), <http://www.maizenbrew.com/2014/9/28/6855989/2014-michigan-wolverines-football-fire-brady-hoke-hot-seat-shane-morris-concussion>, archived at <http://perma.cc/8WB9-V2TM>.

¹⁷¹ *Id.*

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substitution.¹⁷² He made just one more incomplete pass before being replaced, only to return two plays later.¹⁷³ 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."¹⁷⁴ 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.¹⁷⁵

III. ANALYSIS

The NCAA's Concussion Policy is an unworkable solution to a calamitous issue.¹⁷⁶ The meticulously drafted Policy appears to allocate the NCAA's concussion liability to member institutions.¹⁷⁷ In turn, the institutions apportion responsibility of concussion recognition to the student-athletes.¹⁷⁸ Yet, the NCAA's repeated promise of protection,

¹⁷² *Id.*

¹⁷³ Mark Sandritter, *Brady Hoke 'Confident' Michigan Acted Correctly in Playing an Injured Shane Morris*, SB NATION (Sept. 28, 2014, 9:22 PM), <http://www.sbnation.com/college-football/2014/9/28/6860739/brady-hoke-shane-morris-concussion-injury>, archived at <http://perma.cc/HGJ6-9N93>.

¹⁷⁴ Mark Snyder, *Brady Hoke Questioned for Handling of Shane Morris Injury*, USA TODAY (Sept. 29, 2014, 11:41 PM), available at <http://www.usatoday.com/story/sports/ncaaf/2014/09/28/brady-hoke-shane-morris-injury-michigan/16390915/>, archived at <http://perma.cc/6BA7-8AMC>.

¹⁷⁵ See Jon Solomon, *Brady Hoke Defends Actions After Shane Morris Hit to the Head*, CBS SPORTS (Sept. 29, 2014, 10:56 AM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24730378/brady-hoke-defends-actions-after-shane-morris-hit-to-the-head>, archived at <http://perma.cc/6CLC-YENS> [hereinafter *Hoke Defends Actions*] (criticizing the NCAA's unenforceable plan). Solomon relays: "Even if the NCAA determined that Michigan mishandled Morris' situation, it's not clear what, if anything, the NCAA could do . . . [s]chools and the NCAA have been fearful of liability issues by putting in enforceable requirements." *Id.*; Paul Anderson Consulting, LLC, *An 'Appalling' Saturday*, NFL CONCUSSION LITIG. (Sept. 28, 2014), <http://nflconcussionlitigation.com/>, archived at <http://perma.cc/9Q45-QMDK> (expressing distaste for the NCAA, Michigan, and Brady Hoke's reaction). "The NCAA has failed. Michigan has failed. Brady Hoke has failed. Shane Morris was abused. His health and safety was recklessly disregarded. And for what? Michigan was taking a shellacking. Morris' brain and body took a needless beating . . . Hoke's response punctuates why the NCAA's concussion policy is a failure." *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

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coupled with the contractual language, instead articulates a shared responsibility to protect the student-athlete from head injuries.¹⁷⁹ Nevertheless, neither the member institution nor the NCAA is upholding its duty to protect the athlete.¹⁸⁰ In fact, both the Association and its members unscrupulously attempt to circumvent their obligations in order to avoid liability.¹⁸¹ Ironically, it is this contravention that has imposed the very accountability the NCAA was trying to avoid.¹⁸²

This Part examines the current NCAA Concussion Policy's inadequacy and establishes the contractual liability that arises from its intentional defectiveness.¹⁸³ First, Part III.A addresses how the NCAA's drafting of the Policy, coupled with its illusion of protection, established its legal liability.¹⁸⁴ Then, Part III.B analyzes how the NCAA's apportionment of accountability and ineffective implementation resulted in its failed performance.¹⁸⁵ 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.¹⁸⁶

recognition as trained medical personnel); UNIV. OF MIAMI DEP'T OF ATHLETICS CONCUSSION GUIDELINES, *supra* note 68, at 7 (illustrating that student-athletes are to sign an acknowledgment form that accepts responsibility for disclosure).

¹⁷⁹ See *infra* Part III.A.1 (analyzing the contract language and extrinsic evidence that give rise to the NCAA's liability).

¹⁸⁰ See Patchesky, *supra* note 72 (exemplifying this failure with Derek Sheely's death); *supra* note 56 and accompanying text (illustrating the Association and member institution's inaction).

¹⁸¹ See *supra* 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).

¹⁸² 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).

¹⁸³ See *infra* Part III (establishing how the failed plan caused the NCAA and member institutions to breach their contractual obligations).

¹⁸⁴ See *infra* Part III.A (interpreting the NCAA legislation).

¹⁸⁵ 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).

¹⁸⁶ 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).

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A. *Flea Flickering a Façade*

The NCAA Concussion Policy is, essentially, a fallacy.¹⁸⁷ However, its lack of enforcement does not negate that it is a legally binding document.¹⁸⁸ 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.¹⁸⁹ In doing so, the NCAA promised student-athletes that they would receive appropriate care for head injuries.¹⁹⁰ Yet, the Association continuously evaded enforcement and apportioned oversight of concussion management to the very institutions that needed overseeing.¹⁹¹ Next, this Note analyzes the concussion legislation to establish a third-party beneficiary status in the student-athlete, despite equivocation in the agreement.¹⁹²

The NCAA is contractually liable to keep its commitments made to the student-athletes under the NCAA legislation.¹⁹³ However, in order to hold the NCAA accountable for its role in the concussion legislation,

¹⁸⁷ See *supra* notes 76–77 and accompanying text (illustrating the NCAA never intended to enforce its policy); *Hypocritical to the Core*, *supra* note 77 (affirming that the NCAA has never enforced its policy). The Director of Enforcement reasoned that enforcing a suspension or penalizing a coach for playing a concussed athlete would be inappropriate. *Id.*

¹⁸⁸ See *supra* Part II.D (establishing that courts have held a contract exists between the NCAA and member institutions, to which student-athletes have third-party beneficiary status); *Bloom v. NCAA*, 93 P.3d 621, 623–24 (Colo. App. 2004) (providing the student-athlete's third-party beneficiary status to the contract); *Hall v. NCAA*, 985 F. Supp. 782, 796–97 (N.D. Ill. E. Div. 1997) (referring to the NCAA and all members as having a contractual relationship); see also *Wolverton*, *supra* note 71 (demonstrating that a member institution has yet to be charged with violating the concussion policy).

¹⁸⁹ See generally *supra* Part II.B (delineating the drafting process of the NCAA Concussion Policy); Arrington Memo, *supra* note 25, at 33, 34, 42 (providing internal emails discussing what language should be used in the Concussion Policy).

¹⁹⁰ See *infra* Part III.A (establishing third-party beneficiary status in the student-athlete). See generally *supra* text accompanying notes 66–68; 76–77 (pronouncing the NCAA's commitment to student-athlete safety).

¹⁹¹ See *Hoke Defends Actions*, *supra* note 175 (criticizing the University of Michigan for not implementing enforceable requirements, thus jeopardizing Shane Morris' health); see also *MEDICINE HANDBOOK*, *supra* note 56, at 64 (providing “[a]n active member institution shall have a Concussion Management Plan for its student-athletes”); *infra* Part II.C.2 (presenting the conflicting incentives of member institutions and its agents).

¹⁹² See *infra* Part III.A.1 (interpreting the NCAA's Constitution and bylaws).

¹⁹³ See *Bloom v. NCAA*, 93 P.3d 621, 623–24 (Colo. App. 2004) (demonstrating when liability arises); see, e.g., *supra* notes 43–44 and accompanying text (discussing cases that found student-athletes have third-party beneficiary status under NCAA legislation). “[T]he NCAA's constitution, bylaws, and regulations evidence a clear intent to benefit student-athletes. And because each student-athlete's eligibility to compete is determined by the NCAA, we conclude that Bloom had standing . . . to contest the meaning or applicability of NCAA eligibility restrictions.” *Bloom*, 93 P.3d at 623–24.

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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).

¹⁹⁵ See *Hall v. NCAA*, 985 F. Supp. 782, 796-97 (1997) (distinguishing intent from incidental).

¹⁹⁶ See, e.g., *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 714 (D. Vt. 2012) (explaining that both the language of the document and extrinsic circumstances are considered to determine intent).

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.*

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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); Wolverson, *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).

²⁰⁵ See NCAA Sports Science Institute, *Health and Safety*, NCAA, <http://www.ncaa.org/health-and-safety>, (last visited Mar. 15, 2015), archived at <http://www.ncaa.org/health-and-safety> (conveying that the NCAA Sports Science Institute “is devoted to . . . [the] best practice guidelines that will benefit the safety, excellence and wellness of the intercollegiate student athlete”).

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).

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safe environment for student-athletes was one of its “core principles.”²⁰⁸ Moreover, the NCAA further reaffirmed this commitment when it amended the Concussion Policy to enact more stringent guidelines.²⁰⁹ In doing so, the NCAA further dedicated itself to defending the student-athletes’ well-being, under the guise of legislating its members.²¹⁰ Thus, evidencing its intent to ensure student-athletes are protected under the NCAA Concussion Policy.²¹¹

Correspondingly, although the NCAA Concussion Policy does not affect eligibility, student-athletes still stand to directly benefit from its performance.²¹² 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.²¹³ This type of self-reporting, without safeguards, leaves the student-athlete susceptible to unreasonable punishments, aggravated injuries, and possibly even death.²¹⁴ 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.²¹⁵

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

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Unfortunately, the NCAA's performance has been noticeably flawed.²¹⁶ When the Association attempted to delegate its duty to the member institutions, it created an inconsistent system of protection.²¹⁷ 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.²¹⁸ 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.²¹⁹

B. Poor Performance

Illogicalities arise when looking at the NCAA Concussion Policy.²²⁰ A member institution is charged with creating and implementing a plan, while monitoring itself to assure it is not in violation of the policy.²²¹ In turn, an athlete is responsible for recognizing, diagnosing, and disclosing his concussion, which is challenging even to trained medical personnel.²²² Accordingly, contradicting incentives of coaches, athletic

UNIV. OF MIAMI DEP'T OF ATHLETICS CONCUSSION GUIDELINES, *supra* note 68, at 7 (providing an example of the acknowledgement form). The student-athletes rights may additionally vest if he is injured because of his detrimental reliance on the NCAA's promise of protection or upon filing a lawsuit. *Olson v. Etheridge*, 686 N.E.2d 563, 570 (1997).

²¹⁶ See *supra* notes 73–74 (documenting NCAA agents' statements that the organization has no intention of enforcing the legislation, thus protecting the athlete).

²¹⁷ See *NCAA Guidelines on Head Injuries Fall Short*, *supra* note 94, at A16 (criticizing the new guidelines, while arguing that "[p]rotecting students should be a higher priority"); *Wolverton*, *supra* note 71 (illustrating that oversight is lacking); *supra* note 172 and accompanying text (exemplifying its inconsistency).

²¹⁸ See *Sheely Complaint*, *supra* note 72, at 23 (quoting NCAA's Director of Enforcement that only "systematic or blatant disregard for the plan that would indicate a lack of institutional control"); *infra* Part III.B.1 (elaborating on the impracticality of a self-monitoring system); see also *Patchesky*, *supra* note 72 (demonstrating that neither the school nor the NCAA investigated Derek Sheely's death).

²¹⁹ See *supra* Part II.B.1 (providing background on contract analysis); *infra* Part III.B.2 (analyzing the NCAA's disregard for student-athlete safety).

²²⁰ See *supra* Part II.C (demonstrating the conflicting incentives of the coaches and student-athletes).

²²¹ See *MEDICINE HANDBOOK*, *supra* note 56, at 8; *supra* notes 64–68 and accompanying text (discussing the self-reporting system); *Emails Raise Questions*, *supra* note 24 (illustrating that creations of plans are arbitrary and that inconsistency arises from member institutions having this responsibility).

²²² See *infra* Part III.B.2 (elaborating on the impracticality of allocating responsibility to the student-athlete).

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trainers, and student-athletes impede success of the current Policy.²²³ 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.²²⁴

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.²²⁵ 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.²²⁶ The NCAA has instead contended that enforcement is the responsibility of the member institution.²²⁷ However, the member institution is not likely in the best position to monitor itself for concussion management.²²⁸ 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).

²²⁵ See Arrington Memo, *supra* note 25, at 33–34 (demonstrating the NCAA's discussion of the pressure to implement a policy); *Emails Raise Questions*, *supra* note 24 (quoting the NCAA's Director of Enforcement). See generally RODGER GOODELL, 2013 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE 48 (2013), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2013%20-%20Rule%20Book.pdf>, archived at <http://perma.cc/NTA9-PSFB> (defining intentional grounding). "It is a foul for intentional grounding if a passer, facing an imminent loss of yardage because of pressure from the defense, throws a forward pass without a realistic chance of completion." *Id.*

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 & Biedzynski, *supra* note 123, at 12 n.9 (finding that member institutions may be held liable for the tortious conduct of the coach).

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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 DEP'T 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 Wolverson, *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

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coaches to return an athlete to play quicker than medically appropriate.²³⁹ Additionally, employment hierarchy complicates return-to-play decisions as many coaches have influence over the personnel's employment.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.²⁴¹ Accordingly, a member institution is unfortunately incapable of self-policing with regard to concussion management.²⁴²

Thus, the NCAA failed to perform its duty when it delegated member institutions the responsibility to introduce, implement, and enforce the Concussion Policy.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.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.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.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.²⁴⁷ Student-athletes

personnel); *supra* notes 162–69 and accompanying text (elaborating on the confictions of the medical personnel).

²³⁹ Wolverton, *supra* note 71.

²⁴⁰ *Id.*

²⁴¹ *See id.* (providing the confictions that prevent athletic trainers from removing an athlete from play if medically appropriate).

²⁴² *See generally* Wolverton, *supra* note 71 (illustrating the member institution's inability to police concussions).

²⁴³ *See 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).

²⁴⁴ *See* Sheely Complaint, *supra* note 72, at 23–24 (quoting Chris Strobel's admission that the NCAA does not enforce the concussion policy).

²⁴⁵ *See, e.g.,* Patchesky, *supra* note 72 (providing that every authority, including the NCAA, failed Derek Sheely).

²⁴⁶ *See generally* MEDICINE HANDBOOK, *supra* note 56, at 64 (demonstrating the apportionment of accountability); *supra* note 77 and accompanying text (illustrating the NCAA's desire to remove itself from any liability).

²⁴⁷ *See* DIVISION I MANUAL, *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); *supra* Part II.C (illustrating the conflicting incentives of the student-athlete).

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were designated the important task to self-diagnose and report a concussion.²⁴⁸ However, several competing factors play into the athlete's ability to fulfill its role.²⁴⁹ Self-incentives and outside forces deter an athlete from guaranteeing his health and safety is protected.²⁵⁰ Nevertheless, the NCAA still determined the student-athlete was in the best position to fulfill the most critical role under the contract.²⁵¹

The current Concussion Policy mandates that student-athletes acknowledge it is their responsibility to report concussion-related injuries to a medical staff member.²⁵² However, an athlete is the individual least able to make an informed diagnosis.²⁵³ First, student-athletes receive inconsistent education on concussion diagnosis and management.²⁵⁴ Moreover, the student-athlete is incentivized by fear of scholarship loss, desire to play in the NFL, and need to maintain his masculine ideology.²⁵⁵ All create a conflict unique to the student-athlete, hindering his ability to perform the obligation imposed on him by the NCAA.²⁵⁶

Arguably, student-athletes are uneducated as to prevention, diagnosis, treatment, and long-term effects of head injuries.²⁵⁷ The NCAA publishes concussion guidelines in its Medicine Handbook, yet it fails to distribute the publication to the athletes.²⁵⁸ 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 (conferring 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).

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member institution.²⁵⁹ However, there is no enforcement mechanism to ensure the member institutions are actually complying with the NCAA's required guidelines.²⁶⁰ Therefore, the member institutions arbitrarily decide not only whether to educate the athletes, but also to what extent the athletes should be educated.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.²⁶²

Assuming an athlete has been educated on the devastating effects of a head injury, he is unlikely to willfully remove himself from competition.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.²⁶⁴ Moreover, an athlete rarely considers the long-term repercussions of his decisions in the heat of competition.²⁶⁵ Yet, unfortunately, the most significant consequences of concussions often arise much later in life.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.²⁶⁷ This is especially true as athletes are incentivized by football-contingent scholarships, NFL expectations, and masculine ideology.²⁶⁸

²⁵⁹ See Fuhrmeister, *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").

²⁶⁰ See *Emails Raise Questions*, *supra* note 24 (delivering that the NCAA Concussion Policy remains unenforced, despite evidence of enforcement in the language); Vaughan, *supra* note 67 (establishing the lack of enforcement).

²⁶¹ See *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).

²⁶² See *Concussion Symptoms and Return to Play*, *supra* note 54 (illustrating that student-athletes will admittedly remain in play even though he has been educated as to the negative side effects).

²⁶³ *Id.*

²⁶⁴ See *supra* notes 103–04 and accompanying text (demonstrating the immediate effects of a concussion).

²⁶⁵ See Kerr, *supra* note 98, at 1015 (explaining that athletes often remain in play while concussed because they do not appreciate the head injury's seriousness).

²⁶⁶ See *supra* notes 107–13 (articulating the long-term effects of concussion and illustrating the devastating effects of chronic traumatic encephalopathy).

²⁶⁷ See generally *supra* note 128 and accompanying text (illustrating an athlete's disregard of the significance of his head injury).

²⁶⁸ See *supra* Part II.C (elaborating further on the student-athlete's conflicts).

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A student-athlete's lack of control over his financial situation further impedes concussion disclosure.²⁶⁹ Student-athletes' are often given scholarships that are conditioned upon participation in the sport and considered binding on the athlete.²⁷⁰ As a result, athletes are forced to participate, unable to withdraw from the sport even if it is in his best interest.²⁷¹ Foregoing a scholarship is simply not a realistic option for the athlete who is only able to attend college because of financial aid.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.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.²⁷⁴

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

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).

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).

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).

²⁷² Huma, *supra* note 143; see also Taylor Branch, *The Shame of College Sports*, ATLANTIC (Sept. 7, 2011, 11:28 AM), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>, archived at <http://perma.cc/8ZHJ-H3EG> (recognizing that most of these athletes are intentionally impoverished).

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).

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

²⁷⁵ See Kerr, *supra* note 98, at 1015 (relaying that "athletes may believe reporting concussions is stigmatizing"); Lillibridge, *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).

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,

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report that they have previously not disclosed a concussion in fear of being removed from a game and ultimately losing their starting spot.²⁷⁷ Certainly, a demotion in position also jeopardizes an athlete's chance of being recruited by the NFL.²⁷⁸ 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.²⁷⁹

The NCAA attempted to avoid contractual liability by distancing itself from the implementation of its Concussion Policy.²⁸⁰ However, the NCAA evidenced its intent to protect student-athletes from head injuries in the contract terms and in its actions.²⁸¹ Nevertheless, the Association knowingly delegated this duty to the member institutions that have conflicting motivations.²⁸² Therefore, although the institutions are required to ensure the NCAA Concussion Policy is properly implemented, they are instead actually perpetuating its indifference.²⁸³ 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.²⁸⁴ It is because of the illogical allocation of its responsibility that the NCAA inevitably breached.²⁸⁵

supra note 72 (giving an example of a team policy that threatened loss of playing time for disclosing an injury).

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").

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").

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).

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).

²⁸¹ See *supra* Part III.A (articulating further analysis as to the NCAA's promise to protect student-athletes).

²⁸² See *supra* Part III.B.1 (assessing the NCAA's delegation of duty to the member institutions).

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).

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 DEP'T 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

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).

²⁸⁵ *See generally* Bernard v. Rockhill Dev. Co., 734 P.2d 1238, 1240 (Nev. 1987) (defining a breach of contract as a "material failure of performance of a duty arising under or imposed by the agreement").

²⁸⁶ *See* DIVISION I MANUAL, *supra* note 40, at 11-12 (demonstrating that enforcement is delegated to institutions).

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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

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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 of 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.

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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.²⁸⁷ Evidently, the win at Vanderbilt's fingertips was more important than Matthews' health.²⁸⁸ Ultimately, however, Vanderbilt lost.²⁸⁹ In his post-game interview, Matthews contended that the vomiting was likely due to rehydrating with intravenous ("IV") fluids in the third quarter.²⁹⁰ Whether an IV or a concussion prompted his nausea is irrelevant.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.²⁹²

The current NCAA Concussion Policy must be revised to alleviate its ineffectiveness and ensure added safeguards. The NCAA must redraft

²⁸⁷ See Kevin Kaut et al., *Reports of Head Injury and Symptom Knowledge Among College Athletes: Implications for Assessment and Educational Intervention*, CLINICAL J. SPORTS MED. 213 (2003) ("Of considerable concern is the tendency [of athletes] to play while symptomatic (e.g. headache, dizziness) and the failure to report symptoms while playing—especially among football players").

²⁸⁸ Jonathan Guenther, *When Winning is Everything*, JONATHAN GUENTHER BLOG (Aug. 31, 2013), <http://www.jonathanguenther.com/blog/2013/08/when-winning-is-everything/>, archived at <http://perma.cc/D8VV-L9K8>.

²⁸⁹ *Vanderbilt Commodores Schedule 2013*, ESPN, http://espn.go.com/college-football/team/schedule/_/id/238/year/2013/vanderbilt-commo-dores (last visited May 19, 2015), archived at <http://perma.cc/36CG-6DRS>.

²⁹⁰ Lockridge & Cole, *supra* note 5.

²⁹¹ See, e.g., Petchesky, *supra* note 6 (criticizing Matthew's lack of recovery time). "What's worrying is that he wasn't out for nearly long enough for Vanderbilt staff to give him the mandated concussion tests. Was he knocked silly? We don't know. But Vandy didn't either." *Id.*

²⁹² See Isaac Rauch, "What A Man": *Reactions to the University of Arizona's Negligent Treatment of Matt Scott's Concussion*, DEADSPIN (Oct. 28, 2012, 11:03 AM), <http://deadspin.com/5955530/what-a-man-reactions-to-the-university-of-arizonas-negligent-treatment-of-matt-scotts-concussion>, archived at <http://perma.cc/8TWQ-8RBW> (criticizing quarterback Matt Scott's reentry after two blows to the head followed by profuse vomiting); Sandritter, *supra* note 173 (elaborating on Shane Morris' quick return).

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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 can undoubtedly be a curable evil.

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