

# DROPPING THE BALL: THE FAILURE OF THE NCAA TO ADDRESS CONCUSSIONS IN COLLEGE FOOTBALL

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“Football isn’t a contact sport—it’s a collision sport. Dancing is a contact sport.” –Duffy Daugherty, head football coach at Michigan State University, 1954–1972<sup>1</sup>

## INTRODUCTION

On August 22, 2011 Derek Sheely, a starting fullback on the football team at Frostburg State University, a 4755-student National Collegiate Athletic Association (NCAA) Division III school,<sup>2</sup> collapsed on the practice field after sustaining a blow to the head during full contact preseason drills.<sup>3</sup> Despite the best efforts of doctors to relieve the swelling in his brain, Sheely remained in a coma for six days before passing away.<sup>4</sup> Sheely’s head injury occurred while participating in what is known as an “Oklahoma drill,” where the fullback and linebacker are aligned on opposite sides of the ball and collide at full speed.<sup>5</sup> A common exercise in the first few weeks of practice at the high school and college levels, the Oklahoma drill is often used by

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1 THE LITTLE RED BOOK OF FOOTBALL WISDOM (Niels Aaboe ed., 2013).

2 *Undergraduate Admissions*, FROSTBURG STATE UNIV., <http://www.frostburg.edu/undergrad/admiss/> (last visited Apr. 7, 2014).

3 Dan Diamond, *A Head Injury in Practice Killed Derek Sheely. Is the NCAA To Blame?*, FORBES (Sept. 2, 2013, 7:47 AM), <http://www.forbes.com/sites/dandiamond/2013/09/02/a-head-injury-in-practice-killed-derek-sheely-is-the-ncaa-to-blame/>.

4 Nathan Fenno, *Death of Frostburg State Player Derek Sheely Due to ‘Egregious Misconduct,’ Lawsuit Says*, WASH. TIMES (Aug. 22, 2013), <http://www.washingtontimes.com/news/2013/aug/22/death-frostburg-state-player-derek-sheely-due-egreg/print/>.

5 *Id.*

coaches to determine which players are not afraid to hit.<sup>6</sup> “What the [Oklahoma] drill . . . showed was something simpler than technique or leverage . . . . It showed who had a hard nose for contact and, more importantly, who didn’t.”<sup>7</sup> However, the Oklahoma drill is now rarely used at the professional level, and many commentators have been sharply critical of what such drills actually accomplish, as in many situations, “[i]t’s not even about winning a one-on-one. It’s just about slamming into each other.”<sup>8</sup>

According to a wrongful death complaint filed by Sheely’s family against the university, as well the NCAA and the team trainer, Sheely’s head had begun bleeding profusely at least four separate times over three days of preseason practice.<sup>9</sup> The team trainer treated Sheely’s injuries by applying a bandage to his forehead and returning him to practice, allegedly without examining Sheely to determine if he might have a concussion.<sup>10</sup> During practice, Frostburg State running backs coach Jamie Schumacher purportedly encouraged his players to “lead with your head” and to hit “hat first,” reprimanding those players who refused to comply.<sup>11</sup> After one drill, Sheely allegedly complained to Schumacher that he “‘didn’t feel right’ and had a ‘headache,’”<sup>12</sup> to which the coach responded by yelling, “[s]top your bitching and moaning and quit acting like a pussy and get back out there Sheely!”<sup>13</sup> Other players alleged that teammates who reported or complained about injuries were treated as “grippers,” and were often forced to clean the practice field as punishment for complaining about their injuries.<sup>14</sup> All of these alleged actions constitute drastic violations of the medical community’s advocated best practices on concussion management.<sup>15</sup>

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6 Ron Borges, *Today’s Players Don’t Know the Drill*, BOS. GLOBE (July 29, 2006), [http://www.boston.com/sports/football/patriots/articles/2006/07/29/todays\\_players\\_dont\\_know\\_the\\_drill/](http://www.boston.com/sports/football/patriots/articles/2006/07/29/todays_players_dont_know_the_drill/).

7 *Id.*

8 David Steele, *‘Oklahoma’ Drill Used by Bengals is Dangerous and Archaic*, SPORTING NEWS (last updated Aug. 29, 2013, 7:08 PM), <http://www.sportingnews.com/nfl/story/2013-07-30/bengals-oklahoma-drill-concussions-chris-nowinski-mike-brown> (quoting Chris Nowinski, a co-founder of Boston University’s Center for the Study of Traumatic Encephalopathy and a former college football player).

9 See Fenno, *supra* note 4.

10 *Id.*

11 *Id.* (internal quotation marks omitted).

12 *Id.*

13 *Id.* (internal quotation marks omitted).

14 *Id.* (internal quotation marks omitted).

15 See Frederick O. Mueller & Bob Colgate, *Annual Survey of Football Injury Research 1931–2012*, NAT’L CTR. FOR CATASTROPHIC SPORT INJURY RESEARCH 7–9 (2013), available at <http://www.unc.edu/depts/nccsi/2012FBIinj.pdf>. See generally Amy W. Doolan et al., *A Review of Return to Play Issues and Sports-Related Concussion*, 40 ANNALS BIOMEDICAL ENG’G 106 (2012) (discussing the medical concerns behind returning an athlete to play too soon after a head injury); Kevin M. Guskiewicz, *When Treating Sport Concussion, Check the Boxes, But Also Go the Extra Mile*, 48 J. ATHLETIC TRAINING 441 (2013) (asserting that trainers must go beyond a simple checklist when treating concussions); Robert C. Lynall et al., *Concussion-Assessment and -Management Techniques Used by Athletic Trainers*, 48 J. ATHLETIC TRAINING 844

In December 2011, Kristen Sheely wrote a letter to NCAA President Mark Emmert regarding the death of her son, in which she asked for the NCAA's support in investigating the circumstances of Sheely's death.<sup>16</sup> The NCAA responded by stating that while "[p]art of the NCAA's core mission is to provide student-athletes with a competitive environment that is safe[,] . . . each school is responsible for the welfare of its student-athletes."<sup>17</sup> The response letter also noted, "[u]nfortunately, neither the NCAA nor any other organization can take the risk completely out of contact sports."<sup>18</sup> To this point, the NCAA has not investigated further into the death of Derek Sheely. Current NCAA bylaws mandate that member institutions maintain a concussion policy on file.<sup>19</sup> However, the NCAA only reviews the substance of each school's policy to determine if it meets the basic requirements of the bylaws. Further, the NCAA does not conduct oversight to ensure that member schools actually enforce or carry out their concussion policies.

As highlighted by Derek Sheely's tragic story, the NCAA has a great amount of work left to do in the regulation and management of head injuries. Its failure to properly regulate concussions has already exposed the NCAA to litigation, and will likely result in future court battles as more former college football players come forward to bring suits against the NCAA and its member institutions. Although the problem of head injuries is not unique to football, it is by far the sport in which concussions are most prevalent.<sup>20</sup> This Note focuses specifically on head injuries in college football. The issue of concussions in other college sports, although outside the scope of this Note, is certainly worthy of attention, and many of the policy adaptations recommended herein may be applicable to improving the regulation of head injuries by the NCAA in other sports.

Part I of this Note will examine the medical history of concussions, and the growing link between concussions suffered by football players and the development of long-term head injuries. Part II will discuss factors that exacerbate the concussion problem in football, as well as examine how the head

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(2013) (discussing current concussion management techniques); Ashley Murphy et al., *Concussion Evaluation Methods Among Washington State High School Football Coaches and Athletic Trainers*, 4 *PHYSICAL MED. & REHAB.* 419 (2012) (evaluating awareness of concussion assessment methods).

16 Letter from Kristin L. Sheely, Exec. Dir., The Derek Sheely Found., to Mark Emmert, NCAA Pres. (Dec. 30, 2011), *available at* <http://nflconcussionlitigation.com/?p=1067>.

17 Letter from David Klossner, NCAA Dir. of Health and Safety, to Kristin Sheely, Exec. Dir., The Derek Sheely Found. (Mar. 20, 2012), *available at* <http://nflconcussionlitigation.com/?p=1067>.

18 *Id.*

19 NAT'L COLLEGIATE ATHLETIC ASS'N, 2013–2014 NCAA DIVISION I MANUAL, art. 3, § 3.2.4.17 (2013).

20 See Report of Robert C. Cantu, M.A., M.D., F.A.C.S., F.A.C.S.M. at 58, *Arrington v. NCAA*, No. 11-cv-06356 (N.D. Ill. July 19, 2013) [hereinafter Report of Robert C. Cantu]. NCAA injury surveillance found more concussions occurred in football from 2004 to 2009 than in all other fall sports combined. *Id.*

injury issue is being addressed by the NCAA, the National Football League (NFL), and state legislatures. Part III will examine the NCAA's duty to protect student-athlete safety in light of the ongoing litigation against the NCAA, specifically the potential scope of legal liability for head injuries. Part IV will focus on what steps the NCAA can and should take to address the concussion issue, as well as the issue's potential threat to college football in its current form if the NCAA refuses to adapt to the latest scientific discoveries about the long-term consequences of repeated head injuries.

## I. THE LINK BETWEEN FOOTBALL AND LONG-TERM HEAD INJURIES

### A. *The Medical Background: Concussions*

The term concussion is derived from the Latin verb *concutere*, which means "to shake violently."<sup>21</sup> The American Association of Neurological Surgeons (AANS) defines a concussion as "a clinical syndrome characterized by immediate and transient alteration in brain function, including alteration of mental status and level of consciousness, resulting from mechanical force or trauma."<sup>22</sup> Although a concussion often involves a loss of consciousness, in many situations a person may suffer a concussion without losing consciousness at all.<sup>23</sup> These so-called "mild concussions" are dangerous because they are much more likely to go undiagnosed, yet may still result in the same complications as much more severe concussions. It is for this reason that neurosurgeons often emphasize that there is really no such thing as a "minor concussion," as all concussions carry the potential to cause long-term damage.<sup>24</sup>

One difficulty presented in concussion diagnosis is the wide range in type and severity of noticeable symptoms.<sup>25</sup> A player suffering from a concussion may experience dizziness, headaches, nausea, fatigue, loss of consciousness, difficulty concentrating, and memory loss.<sup>26</sup> The symptoms may last anywhere from a period of a few hours to months on end.<sup>27</sup> A concussion may only cause slight symptoms that are easily ignored by a player in the midst of a heated contest, while a similar injury in a different player may result in symptoms so severe that they prevent the continuation of an athletic

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21 Tareq Bey & Brian Ostick, *Second Impact Syndrome*, 10 W.J. EMERGENCY MED. 6, 7 (2009).

22 *Concussion*, AM. ASS'N NEUROLOGICAL SURGEONS, <http://www.aans.org/en/Patient%20Information/Conditions%20and%20Treatments/Concussion.aspx> (last updated Dec. 2011).

23 *Id.*

24 *Id.*

25 See Michael Makdissi et al., *Natural History of Concussion in Sport: Markers of Severity and Implications for Management*, 38 AM. J. SPORTS MED. 464, 464–65 (2010).

26 See Terry A. Adirim, *Concussions in Sports and Recreation*, 8 CLINICAL PEDIATRIC EMERGENCY MED. 2, 3 (2007).

27 *Id.*

career.<sup>28</sup> Every concussion case is unique, and thus the injury presents a challenge for medical professionals to properly diagnose, as well as for players to self-report their symptoms.

For decades, the long-term implications of concussions remained poorly understood by the medical community, as it was often assumed that a concussion had not occurred without a loss of consciousness and that concussions caused no permanent damage to the brain.<sup>29</sup> The disparity in symptoms exhibited by players who suffered concussions made researchers skeptical of a correlation between concussions and long-term head injuries.<sup>30</sup> As recently as 1994, less than a quarter of surveyed neurologists believed that post-concussion syndrome could be clearly defined.<sup>31</sup> The lack of understanding surrounding the concussion issue resulted in little consensus on the best practices of concussion management in sports until the early 2000s.

While scientists had long recognized a connection between repeated blows to the head and long-term brain damage in boxers,<sup>32</sup> they were slow to recognize that athletes in other sports might also be at risk.<sup>33</sup> In 1986, well-

28 See *id.* (“[T]here may be a genetic vulnerability to increased severity of brain injury in certain individuals.”).

29 See David Orentlicher & William S. David, *Concussion and Football: Failures to Respond by the NFL and the Medical Profession*, 8 *FIU L. REV.* 23, 26–27 (2012).

30 *Id.* at 28.

31 *Id.*

32 See, e.g., Harrison S. Martland, *Punch Drunk*, 91 *J. AM. MED. ASS'N* 1103, 1103 (1928) (describing “punch drunk” boxers that exhibit periods of “slight mental confusion” and “unsteadiness” when walking). Boxers are known to develop a condition called “dementia pugilistica” or “punch drunk syndrome.” See Gareth W. Roberts et al., *The Occult Aftermath of Boxing*, 53 *J. NEUROL. NEUROSURG. & PSYCHIATRY* 373, 373 (1990). Athletes with punch drunk syndrome exhibit symptoms similar to those seen in Alzheimer’s disease and Parkinson’s disease, including tremors, loss of mental function, dementia, and the loss of coordination and balance. *Id.* Studies have demonstrated a link between the length of boxers’ careers and the development of permanent brain damage. See Ira R. Casson et al., *Neurological and CT Evaluation of Knocked-Out Boxers*, 45 *J. NEUROL. NEUROSURG. & PSYCHIATRY* 170, 174 (1982). Evidence of cerebral atrophy was most prominent in boxers who fought a greater numbers of bouts and were known as “sluggers,” a fighting style that entails a “great deal of battering punishment that [is] . . . received as well as given.” *Id.* It is important to note that while the objective in boxing is to knock out your opponent, the vast majority of blows that boxers receive are “sub-concussive,” or below the threshold necessary to cause a diagnosable concussion. The accumulation of such sub-concussive blows over time, however, likely contributes to the development of brain damage. See Ann C. McKee et al., *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy Following Repetitive Head Injury*, 68 *J. NEUROPATHOL. & EXP. NEUROL.* 709, 710 (2009). Recent studies suggest that boxers’ brains have suffered permanent damage before any symptoms even begin to manifest. See Lance Pugmire, *Fighters’ Brains Damaged Long Before Symptoms Emerge, Study Hints*, *L.A. TIMES* (Apr. 19, 2012), <http://articles.latimes.com/2012/apr/19/sports/la-sp-boxing-medical-study-20120419>. Brain cell death begins after fighting for as short a period as six years, with more pronounced and accelerated cell death occurring after twelve years. *Id.* Permanent, long-term brain damage due to repeated blows to the head is now more commonly termed “chronic traumatic encephalopathy.” McKee, *supra*, at 710.

33 See Orentlicher & David, *supra* note 29, at 33.

known neurologist Dr. Robert Cantu published a seminal set of guidelines on concussion management in sports, which recommended specified periods of time that athletes should be required to sit out after suffering a concussion.<sup>34</sup> Although no longer widely accepted, the guidelines were an important early step in developing protocols to handle head injuries. Yet Dr. Cantu remained ahead of his time. His concussion guidelines were not adopted in football at either the collegiate or professional level. Even after the American Academy of Neurology released its own set of concussion guidelines in 1997,<sup>35</sup> both the NFL and NCAA failed to adopt any sort of return-to-play guidelines for their players. It would take the discovery of long-term consequences of great magnitude to begin to truly wake up the world of football to the potential dangers of brain injury associated with the sport.

*B. Rise of the Crisis: Discovery of Chronic Traumatic Encephalitis in Football*

In 2000, Dr. Julian Bailes, a neurologist, lifelong football fan, and former Division I college football player,<sup>36</sup> conducted a survey of 1090 former professional football players, asking questions about a wide variety of injuries to avoid indicating to the participants that he was specifically interested in head injuries.<sup>37</sup> The results of the survey were shocking: sixty percent of players surveyed reported they had sustained at least one concussion during their career, and those players with concussions were experiencing neurological problems such as memory loss, speech loss, confusion, headaches, and hearing issues.<sup>38</sup> In retrospect, Dr. Bailes believes the results of the first survey were a revelation in magnitude similar to another groundbreaking medical discovery of which he was a part—the HIV epidemic of the 1980s.<sup>39</sup> While concussions had previously been recognized as injuries that must be properly diagnosed and managed, it was not thought that they had permanent consequences.<sup>40</sup>

Building upon his initial work, Dr. Bailes undertook a more comprehensive study, surveying 2552 former NFL players about their injuries.<sup>41</sup> The results furthered the link between concussions and long-term neurological problems; players who had suffered from three or more concussions were

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34 *Id.* at 28–29.

35 Quality Standards Subcomm., Am. Acad. of Neurology, *Practice Parameter: The Management of Concussion in Sports (Summary Statement)*, 48 *NEUROLOGY* 581 (1997).

36 See MARK FAINARU-WADA & STEVE FAINARU, *LEAGUE OF DENIAL* 67 (2013).

37 *Id.* at 68–69.

38 *Id.* at 69.

39 *Id.*

40 *Id.* (quoting researcher Michael Collins for the proposition that “[i]f you give the brain time to heal, there’s no reason to see long-term deficits”); see also Michael W. Collins et al., *Relationship Between Concussion and Neuropsychological Performance in College Football Players*, 282 *J. AM. MED. ASS’N* 964, 964–65 (1999) (discussing the lack of study on long-term outcomes of athletes suffering concussions).

41 Kevin M. Guskiewicz et al., *Association Between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players*, 57 *NEUROSURGERY* 719, 721 (2005).

five times more likely to report early signs of dementia, as well as more likely to be diagnosed with clinical depression.<sup>42</sup> In a third study, Bailes and his colleagues cemented the causative link between concussions and long-term brain damage in football players, finding that “[traumatic brain injuries] can result in diffuse lesions in the brain . . . . These lesions result in biochemical changes, including an increase in excitatory neurotransmitters, which has been implicated in neuronal loss and cell death.”<sup>43</sup> What remained was to determine the potential extent of the brain damage that could occur as a result of playing football.

The death at age fifty of former Pittsburgh Steelers center Mike Webster and the subsequent postmortem diagnosis of Chronic Traumatic Encephalopathy (CTE) in his brain launched the issue of concussions in football into the spotlight.<sup>44</sup> CTE is a disorder that was first recognized in the sport of boxing.<sup>45</sup> It is characterized by atrophy of the brain cells due to the development of extensive, condensed tau-protein tangles in regions of the brain, which occurs as the result of repeated traumatic brain injury.<sup>46</sup> The disease first manifests itself through symptoms such as diminished attention span, concentration, and memory, as well as dizziness and headaches.<sup>47</sup> As the disease progresses, lack of coordination, psychotic symptoms, depression, and overt dementia often become apparent.<sup>48</sup> Webster, once a Hall of Fame player for the Pittsburgh Steelers,<sup>49</sup> was homeless and suffering from severe dementia and paranoia at the time of his death.<sup>50</sup>

Since the discovery of CTE in Webster’s brain, other former NFL players have been diagnosed with the disease. Dr. Bennet Omalu, who studied Webster, also found CTE in the brains of former players Andre Waters and Terry Long. Both players tragically committed suicide; Waters shot himself, and Long consumed a bottle of antifreeze.<sup>51</sup> Former Chicago Bears safety Dave Duerson requested that his brain be donated to science because he believed

42 *Id.* at 721.

43 Kevin M. Guskiewicz et al., *Recurrent Concussion and Risk of Depression in Retired Professional Football Players*, 39 MED. & SCI. SPORTS & EXERCISE 903, 907 (2007).

44 See Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128, 129 (2005).

45 See *supra* note 32 and accompanying text.

46 See McKee et al., *supra* note 32, at 709. It is important to note that “traumatic brain injury” includes a concussion, but may also result from repeated sub-concussive blows to the head. *Id.* at 710. While CTE has been proven to result from multiple traumatic brain injuries, it remains unclear if the syndrome can develop as the result of a single brain injury.

47 *Id.* at 710.

48 *Id.* at 710–11.

49 *Mike Webster*, PRO FOOTBALL HALL OF FAME, [http://www.profootballhof.com/hof/member.aspx?PLAYER\\_ID=227](http://www.profootballhof.com/hof/member.aspx?PLAYER_ID=227) (last visited Apr. 8, 2014).

50 See FAINARU-WADA & FAINARU, *supra* note 36, at 47–62.

51 See *Document Says Former Steeler Drank Antifreeze in Suicide*, N.Y. TIMES, Jan. 27, 2006, at D4, available at <http://www.nytimes.com/2006/01/27/sports/football/27nfl.html?page-wanted=print>; Tom Farrey, *Pathologist Says Waters’ Brain Tissue Had Deteriorated*, ESPN.COM (updated Jan. 19, 2007, 6:24 PM), <http://sports.espn.go.com/nfl/news/story?id=2734941>

he was afflicted with CTE, which was confirmed after Duerson ended his own life by shooting himself in the chest.<sup>52</sup> In 2012, former San Diego Chargers linebacker Junior Seau committed suicide and his autopsy also revealed CTE.<sup>53</sup> While CTE cannot be conclusively determined as the direct cause of a person's choice to take his own life,<sup>54</sup> the symptoms of depression, mental instability, and psychosis associated with the disease are all major risk factors for suicide.<sup>55</sup> The growing trend of suicides amongst former players afflicted with CTE demonstrates the most devastating effects of the disease.

Recent research has revealed former players suffering from CTE who never played professionally—indicating that the disease may begin to develop from head injuries sustained at the youth, high school, and college levels.<sup>56</sup> The first of such diagnosis was Chris Borich, a former wide receiver at Western Illinois University, who died of a drug overdose at age forty-two in a severe bout of depression.<sup>57</sup> Dr. Ann McKee—the co-director of Boston University's Center for the Study of Traumatic Encephalopathy, where Borich's brain was diagnosed—stated, "I've looked at more than 1,000 brains, and I've never seen this in any individual living a normal life—its only through head trauma."<sup>58</sup> The recent CTE-related deaths of several former college football players<sup>59</sup> further indicate that the disease is not limited to

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(noting that "the condition of Waters' brain tissue was what would be expected in an 85-year old man").

52 See Julie Deardorff, *Duerson's Brain was Damaged, Study Shows*, CHI. TRIB. (May 2, 2011), [http://articles.chicagotribune.com/2011-05-02/sports/ct-spt-0503-duerson-brain-20110502\\_1\\_study-of-traumatic-encephalopathy-duerson-family-brain-bank](http://articles.chicagotribune.com/2011-05-02/sports/ct-spt-0503-duerson-brain-20110502_1_study-of-traumatic-encephalopathy-duerson-family-brain-bank).

53 See Mary Pilon & Ken Belson, *Seau Had Brain Disease Found in Other Ex-Players*, N.Y. TIMES, Jan. 11, 2013, at B13, available at <http://www.nytimes.com/2013/01/11/sports/football/junior-seau-suffered-from-brain-disease.html>.

54 See Mike Fish, *Rushing to Find a Connection*, ESPN.COM (updated Nov. 27, 2012, 2:34 PM), [http://espn.go.com/espn/otl/story/\\_/page/Football%20at%20Crossroads2/when-former-football-players-commit-suicide-some-see-connection-brain-injuries-suffered-playing-days-experts-urge-caution](http://espn.go.com/espn/otl/story/_/page/Football%20at%20Crossroads2/when-former-football-players-commit-suicide-some-see-connection-brain-injuries-suffered-playing-days-experts-urge-caution).

55 See *Risk Factors and Warning Signs*, AM. FOUND. FOR SUICIDE PREVENTION, <http://www.afsp.org/preventing-suicide/risk-factors-and-warning-signs> (last visited Apr. 8, 2014).

56 See Ann C. McKee et al., *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 BRAIN 43, 48 (2013) (diagnosing nine former college football players with CTE).

57 See Alan Schwarz, *Case Suggests Safety Risk Goes Beyond the N.F.L.*, N.Y. TIMES, Oct. 22, 2009, at B14, available at [http://www.nytimes.com/2009/10/22/sports/ncaafotball/22concussions.html?\\_r=0](http://www.nytimes.com/2009/10/22/sports/ncaafotball/22concussions.html?_r=0).

58 *Id.*

59 See, e.g., Caleb Daniloff, *CTE Found in Dead College Football Player*, BU TODAY (Sept. 14, 2010), <http://www.bu.edu/today/2010/cte-found-in-dead-college-football-player/> (discussing autopsy findings that suggest former college football player Owen Thomas suffered from CTE); David Steele, *Cullen Finnerty's Cause of Death Revealed*, SPORTING NEWS (updated Aug. 8, 2013, 3:08 PM), <http://www.sportingnews.com/ncaa-football/story/2013-08-08/cullen-finnerty-cause-of-death-oxycodone-pneumonia-quarterback> (noting CTE as a contributing factor in former college quarterback Cullen Finnerty's death). The case of Owen Thomas was particularly unique, in that he was the first diagnosed case of CTE who was an active player at the time of his death. Daniloff, *supra*. Also, Thomas was never diagnosed with a concussion during his playing career, adding to the speculation among scientists



only those who have long professional careers. All of these tragic cases highlight the need for a comprehensive system of regulation to address the issue of head injuries in football.

## II. RECOGNIZING THE PROBLEM: HOW THE REGULATION OF CONCUSSIONS IN COLLEGE FOOTBALL HAS FALLEN BEHIND THE GAME AT OTHER LEVELS

Over the past few years there has been a dramatic increase in national attention given to the issue of concussions in football. Many public figures, perhaps most notably President Barack Obama,<sup>60</sup> but also many former professional football players, have questioned whether they would let their children play the sport.<sup>61</sup> The concern over the consequences of long-term head injuries has prompted legislators, medical professionals, and recently the NFL to take steps to address the issue. While the NCAA made some limited changes to its concussion policy in 2010, its attempts remain insufficient to address the scope of the problem.

### A. *Legislation to Address Concussions in Youth Football: "Lystedt Laws"*

In 2006, thirteen-year old Zackery Lystedt, a star player on his junior high football team, suffered a concussion while making a tackle just before halftime.<sup>62</sup> Lystedt returned to play in the second half despite the injury and later collapsed on the field.<sup>63</sup> He was rushed to a local hospital where doctors had to perform emergency surgery to relieve the swelling in his brain.<sup>64</sup> Although Lystedt survived, he suffered permanent brain damage.<sup>65</sup> The Washington state legislature recognized that Lystedt's case was symbolic of a bigger issue and subsequently passed the "Lystedt Law," which prevents any youth football player who is diagnosed with a concussion or shows concussive symptoms from returning to a game or practice until he has been cleared by

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that CTE can develop as the result of repeated sub-concussive hits. *Id.* It must be emphasized, however, that while CTE may be a contributing factor in a suicide, it cannot be conclusively linked as the direct cause.

60 See Cindy Boren, *Obama Uncertain if He'd Let a Son Play Football*, WASH. POST (Jan. 28, 2013), <http://www.washingtonpost.com/blogs/early-lead/wp/2013/01/28/obama-uncertain-if-hed-let-a-son-play-football> (quoting President Obama as stating "I'm a big football fan, but I have to tell you, if I had a son, I'd have to think long and hard before I let him play football") (internal quotation marks omitted).

61 See Bob Cook, *If Kurt Warner's Not So Sure His Kids Should Play Football, Should Your Kids Be Playing?*, FORBES (May 7, 2012), <http://www.forbes.com/sites/bobcook/2012/05/07/if-kurt-warners-not-so-sure-his-kids-should-play-football-should-your-kids-be-playing/> (discussing how the former Pro Bowl quarterback stated in a radio interview he would prefer if his kids did not play football).

62 See CTRS. FOR DISEASE CONTROL AND PREVENTION, *THE LYSTEDT LAW: A CONCUSSION SURVIVOR'S JOURNEY*, <http://www.cdc.gov/media/subtopic/matte/pdf/031210-Zack-story.pdf> (last visited Apr. 8, 2014).

63 *Id.*

64 *Id.*

65 *Id.*

a licensed medical professional.<sup>66</sup> Further, the law requires that school districts work with coaches, teachers, and trainers in order to promote education about concussions among student-athletes.<sup>67</sup>

Since the passage of Washington's Lystedt Law, all fifty states and the District of Columbia have passed similar legislation to address concussions in youth football.<sup>68</sup> All of these states have taken an approach similar to Washington, requiring players who suffer a concussion to sit out until they receive clearance from a medical professional, and mandating concussion education for youth athletes.<sup>69</sup> The education component is particularly important, as one of the biggest problems with diagnosing the injury may be the tendency of players to hide their symptoms in order to remain in the game. In a recent survey of high school football players, more than fifty percent of respondents said that they would ignore symptoms such as a headache in order to stay in a game.<sup>70</sup> Thus it is essential that coaches and trainers continue to increase student-athlete awareness about the consequences of sustaining multiple concussions, especially where the first injury has yet to heal. While not a complete solution, state legislation represents a critical step to addressing the problem in youth football by establishing firm requirements for return to play, and by promoting a better understanding of the severity of concussive injuries.

### B. *The National Football League*

Concussions have been a divisive topic in the world of professional football. The NFL has faced sharp criticism for its policies regarding head injuries, with some commentators going as far as accusing the league of conducting a "war"<sup>71</sup> against the science linking concussions to long-term brain damage. Although the league may not have been at the forefront in addressing the issue, over the past few years genuine change has been implemented in league policy to reduce the risks of concussions for players. The first major step was the creation of a strict return-to-play policy, which removes players from play even if they are only experiencing relatively minor symptoms and requires that the player be fully asymptomatic before

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66 WASH. REV. CODE ANN. § 28A.600.190 (West 2013).

67 *Id.*

68 See Joe Frolo Sun, *See Where Your State Stands on Concussion Law*, USA FOOTBALL (May 21, 2013), <http://usafootball.com/news/featured-articles/see-where-your-state-stands-concussion-law>.

69 See, e.g., MICH. COMP. LAWS ANN. § 333.9155 (West 2013) (providing for the adoption of Michigan's Concussion Awareness and Training Program); VA. CODE ANN. § 22.1-271.5 (West 2013) (providing for the adoption of a student-athlete concussion policy).

70 Carla Kemp, *High School Athletes Say Concussions Won't Sideline Them*, AAP NEWS, (May 6, 2013), <http://aapnews.aapublications.org/content/early/2013/05/06/aapnews.2013.0506-2.full.pdf+html>.

71 See FAINARU-WADA & FAINARU, *supra* note 36, at 2.

returning.<sup>72</sup> In 2011, the league updated its testing policy, requiring every player to undergo a baseline evaluation during the preseason that is then compared with the results of concussion tests conducted on the sideline during games.<sup>73</sup> The new sideline test is comprehensive and provides team medical staff with a clear, consistent manner of examining players for concussion symptoms.

Despite these policy changes, critics challenged that team doctors lack the objectivity necessary to properly protect the safety interests of players.<sup>74</sup> The NFL responded in the 2013 season by hiring independent neurologists to work each sideline, whose sole responsibility is to watch for symptoms of, and diagnose players with, head injuries.<sup>75</sup> Further, changes to the rules of the game have sought to specifically reduce blows to the head, including penalties for leading with the helmet and targeting the head of an opposing player.<sup>76</sup> Players now face strict discipline, including monetary fines and game suspensions for hits to the head.<sup>77</sup> NFL players have recognized, albeit in some cases reluctantly, that certain aspects of the game must change in order to improve safety.<sup>78</sup>

The NFL's current concussion policy is far from perfect, but it represents an effort on the part of the league to address the issue by altering both the way the game is played and how injuries are handled. Additionally, the league is supporting the effort to address head injuries throughout the sport, providing funding for concussion research as well as developing youth programs to teach proper tackling techniques.<sup>79</sup> In comparison to the NCAA,

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72 See Press Release, National Football League, NFL Adopts Stricter Statement on Return-to-Play Following Concussions (Dec. 2, 2009), available at [http://www.nfl.com/wordpress/wp-content/uploads/2013/03/nfl\\_adopts\\_stricter\\_statement\\_on\\_return-to-play\\_following\\_concussions-508.pdf](http://www.nfl.com/wordpress/wp-content/uploads/2013/03/nfl_adopts_stricter_statement_on_return-to-play_following_concussions-508.pdf).

73 See *Standardized Concussion Tests Coming to the NFL*, NFL.COM (updated July 26, 2012, 8:47 PM), <http://www.nfl.com/news/story/09000d5d81e76bed/article/standardized-concussion-tests-coming-to-the-nfl>.

74 See, e.g., Daniel S. Goldberg, *Concussions, Professional Sports, and Conflicts of Interest: Why the National Football League's Current Policies are Bad for Its (Players') Health*, 20 HEC FORUM 337, 351 (2008) (arguing that "structural conflicts of interest that affect NFL policy" must be removed to properly care for its players).

75 See Bill Bradley, *Independent Concussion Specialists Ready to Work NFL Sidelines*, NFL.COM (updated Sept. 3, 2013, 4:49 PM), <http://www.nfl.com/news/story/0ap100000237739/article/independent-concussion-specialists-ready-to-work-nfl-sidelines>.

76 N.F.L. RULES, Rule 12, § 1, art. 9(c).

77 See *Hits to Head Still Prevalent in NFL*, ESPN.COM (updated Dec. 10, 2013, 8:14 PM), [http://espn.go.com/nfl/story/\\_/id/10115901/study-hits-head-prevalent-nfl](http://espn.go.com/nfl/story/_/id/10115901/study-hits-head-prevalent-nfl) (noting that the NFL "makes a big splash out of suspensions and fines levied under the umbrella of protecting players").

78 *Id.* ("Defensive players acknowledged they have to do their part to make the game safer.").

79 See Rick Maese, *Tackling a Crisis*, WASH. POST (Oct. 24, 2013), <http://www.washingtonpost.com/sf/sports/wp/2013/10/24/tackling-a-crisis/> (describing the NFL's new partnership with USA Football, in which 90,000 youth coaches have signed up for "Heads Up" football, a program to promote the teaching of proper tackling fundamentals).

the NFL has moved to respond to the concussion crisis with vigor, which may be due in part to the disproportionate share of criticism that has fallen upon the league, particularly the pressure of congressional hearings.<sup>80</sup> The NFL's improvements to its concussion policies offer a framework for the NCAA to follow in implementing a detailed, comprehensive approach to treating concussions.

C. *The NCAA's Current Approach Fails to Protect Player Safety*

In 1905, over eighteen collegiate football players died on the field, and more than one hundred others sustained debilitating injuries.<sup>81</sup> University administrators debated whether football could in fact be regulated or if the sport would need to be outlawed altogether.<sup>82</sup> President Theodore Roosevelt convened a conference of major college administrators at the White House, where an effort to reform football in order to improve player safety gave birth to the NCAA.<sup>83</sup> The NCAA's website notes that the express purpose behind the association's founding was to "protect young people from the dangerous and exploitive athletics practices of the time."<sup>84</sup> As the association has developed over the past century, it has continued to promote the protection of college football players, through the implementation of rule changes, eligibility restrictions, and the evolution of required protective equipment.

The NCAA contends that part of its core mission is "to provide student-athletes with a competitive environment that is safe and ensures fair play."<sup>85</sup> However the very next line contains an important caveat: "While each school is responsible for the welfare of its student-athletes, the NCAA provides leadership by establishing safety guidelines, playing rules, . . . and research into the cause of injuries to assist decision making."<sup>86</sup> Thus a regulatory body that was established *for the very purpose* of protecting the safety of football players, and whose claimed mission is to promote safe play, refuses to do more than provide guidelines for its member institutions to follow.

Under the NCAA's current concussion policy, member schools are responsible for implementing their own concussion management plans,

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80 See Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 T. JEFFERSON L. REV. 127, 172-74 (2013) (describing how Congress's harsh criticisms of the NFL's handling of concussions during congressional hearings helped spur change on the issue).

81 Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000) (detailing the early history of the NCAA).

82 *Id.* at 11.

83 *Id.* at 12.

84 *Health And Safety*, NAT'L COLLEGIATE ATHLETIC ASS'N (last visited Apr. 8, 2014), <http://www.ncaa.org/health-and-safety>.

85 *Sports Injuries*, NAT'L COLLEGIATE ATHLETIC ASS'N (last visited Apr. 8, 2014), <http://www.ncaastudent.org/wps/wcm/connect/public/NCAA/Health+and+Safety/Sports+Injuries/>.

86 *Id.*

which only need to meet the NCAA's basic requirements.<sup>87</sup> This approach fails to recognize that player safety is often compromised when left to regulation by individual educational institutions.<sup>88</sup> Particularly in NCAA Division I, where the success of the football program often helps drive alumni support<sup>89</sup> and boosts enrollment,<sup>90</sup> the pressure to win is enormous. Undoubtedly there are schools that have up-to-date concussion management plans that are consistently implemented. Yet without a central, enforceable mandate from the NCAA, there will still be institutions that fail to protect the safety of their players, especially where some concussion protocols may create a competitive disadvantage.<sup>91</sup> Coaches cannot be relied upon to effectively police head injuries amongst their own players, as they have a strong incentive to ensure they field the best team possible every week—their livelihoods depend upon it.<sup>92</sup>

Team physicians and athletic trainers, who hold the primary responsibility for diagnosing and managing head injuries, are typically university employees or paid contractors, which creates a direct conflict of interest between their duty to their patients and their duty to their employer. Doctors and trainers may operate under tremendous pressure to clear a player to play despite reservations about his health, particularly when dealing with a star athlete crucial to the team's success.<sup>93</sup> The physician's duty is to determine what is in the best interest of the athlete. However, the objectivity nec-

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87 See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 19, at § 3.2.4.17.

88 See, e.g., *supra* notes 1–20 and accompanying text.

89 See Malcolm Getz & John Siegfried, *What Does Intercollegiate Athletics Do To or For Colleges and Universities?* 8 (Vand. Univ., Working Paper No. 10-W05, 2010), available at <http://www.vanderbilt.edu/econ/wparchive/workpaper/vu10-w05.pdf>.

90 See Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013), <http://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/>.

91 For example, an institution with strict return-to-play guidelines that require a player to be asymptomatic before returning, such as those now used in the NFL, will likely be forced to hold players out of games for longer than other institutions with more relaxed rules.

92 See Mark Schlabach, *Hot Seat Temp Rises for Coaches*, ESPN.COM (Aug. 15, 2012), [http://espn.go.com/college-football/preview12/story/\\_/id/8268623/college-football-expectations-win-now-coaches-hot-seat](http://espn.go.com/college-football/preview12/story/_/id/8268623/college-football-expectations-win-now-coaches-hot-seat) (describing the constant pressure on college football coaches to win and win immediately; their job performance is determined by wins and losses).

93 See, e.g., Craig A. Isaacs, Comment, *Conflicts of Interest for Team Physicians: A Retrospective in Light of Gathers v. Loyola Marymount University*, 2 ALB. L.J. SCI. & TECH. 147, 148–49 (1992) (discussing the case of Hank Gathers, a star basketball player at Loyola Marymount University who collapsed on the court and died during a game, after the team physician was pressured to lower the dosage of Gathers's heart medication because the team coach felt it was limiting his play); Kevin B. O'Reilly, *Put Me in, Doc: When Doctors Must Say No to Athletes*, AM. MED. NEWS (Oct. 18, 2010), <http://www.amednews.com/article/20101018/profession/310189942/4/> (describing the pressures placed on team physicians by coaching staffs). Texas Christian University's football team doctor Samuel J. Haraldson reported being screamed at by head coach Gary Patterson after holding star running back Ed Wesley out of the game when he showed signs of a concussion. *Id.* The altercation between Har-

essary to render a proper medical decision is lost when the interests of the university employing the doctor are at odds with that of the player.

Team doctors and trainers are inherently interested actors—such positions, particularly at big-time college football programs, are prestigious, often lucrative, and highly sought after within the sports medicine community.<sup>94</sup> This may result in trainers being pressured to bow to the demands of the team at the expense of players in the interest of maintaining their employment with the school. In the case of concussions, where the symptoms can be difficult to diagnose and may be easy for athletes to attempt to “play through,” there is an even greater need for an objective, independent decision maker to determine if the athlete may return to play.

The relationship between the team doctor and players is further complicated by the athlete’s interest in returning to play. College football players are never more than a single major injury away from losing their scholarship if coaches or athletic directors determine that the player has become expendable.<sup>95</sup> The pressure to play through injury is enormous—scholarships and starting positions are on the line. Further, the lure of multi-million dollar salaries at the professional level creates a strong incentive for players to play through injury in order to avoid hurting their stock in the NFL draft or earning the label of being “injury prone.”<sup>96</sup> Both of these factors may drive student-athletes to work against team doctors, as well as against their own best interests, by ignoring or playing through head injuries.

Football has long been characterized by a “warrior culture.”<sup>97</sup> Players are taught from a young age that there is a difference between “being hurt” and “being injured.” The team-oriented culture of the game pressures play-

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aldson and Patterson was captured on national television, but no action was taken to discipline the coach for his conduct. *Id.*

94 See Barry R. Furrow, *The Problem of the Sports Doctor: Serving Two (or is it Three or Four?) Masters*, 50 ST. LOUIS U. L.J. 165, 171 (2005) (“The sports doctor, often an intense sports fan, gets employment with teams and direct involvement in the sport. And if the physician is part of a medical group, the group gets tremendously valuable free advertising that will draw in other patients.”).

95 NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 19, at § 15.3.3.1(e). The NCAA’s requirements allow schools to grant scholarships between one and five years in length. *Id.*; see also Meghan Walsh, *I Trusted ‘Em’: When NCAA Schools Abandon Their Injured Athletes*, THE ATLANTIC (May 1, 2013), <http://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/> (“There is also no provision in the Division I Manual to prohibit a coach from revoking a scholarship the year after a recruit gets hurt.”).

96 See Paul Kuharsky, *Locker Doesn’t Combat Injury-Prone Talk*, ESPN.COM (Nov. 18, 2013, 9:43 AM), [http://espn.go.com/blog/nflnation/post/\\_/id/101581/locker-doesnt-combat-injury-prone-talk](http://espn.go.com/blog/nflnation/post/_/id/101581/locker-doesnt-combat-injury-prone-talk) (discussing how NFL quarterback Jake Locker has earned a negative label as “injury prone” after suffering three injuries in two seasons).

97 See LINDA CARROLL & DAVID ROSNER, *THE CONCUSSION CRISIS* 35 (2011) (“Americans liked their sports, especially football, the way they were . . . . The macho culture permeating the country insisted that the way to deal with a bump on the head was just to dust yourself off and keep going as if nothing had happened.”); Ken Belson, *Goodell Speaks of Changes Needed in N.F.L. Culture*, N.Y. TIMES, Nov. 16, 2012, at B13 (“[A] cultural shift [is]

ers to continue despite their injuries for fear of letting down their teammates.<sup>98</sup> Unless an independent authority exists to force players to sit out when they have suffered head injuries, athletes will continue to play through them.

In other arenas, particularly demarcating the line of “amateurism” in college sports, the NCAA has not shied away from aggressively regulating, investigating, and policing its member institutions.<sup>99</sup> If the NCAA is capable and willing to enforce its myriad system of rules regarding eligibility and recruiting, it is surely able to do a better job in addressing the issue of head injuries. Particularly at a time when many critics are beginning to question whether the NCAA should be so rigorously focused on enforcing amateurism in college athletics,<sup>100</sup> it appears facially hypocritical that the association would devote so little attention to an issue as paramount to its mission as player safety. The NCAA continues to ignore the calls of the medical profession, players, fans, and even administrators of its own member institutions, to

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needed to change the ‘warrior mentality’ of players unwilling to disclose when they are hurt.”).

98 See Jan Hoffman, *Don’t Tell Coach’: Playing Through Concussions*, N.Y. TIMES (Nov. 5, 2013, 12:01 PM), [http://well.blogs.nytimes.com/2013/11/05/dont-tell-coach-playing-through-concussions/?ref=headinjuries&gwh=ADECE1B85CBEA74C16BEB96318EF42D4&\\_r=0](http://well.blogs.nytimes.com/2013/11/05/dont-tell-coach-playing-through-concussions/?ref=headinjuries&gwh=ADECE1B85CBEA74C16BEB96318EF42D4&_r=0). Former college football player Chris Coyne recalled playing through multiple concussions and admitted that he would regularly avoid athletic trainers and hide symptoms from his coach. *Id.* “I put pressure on myself to do well and not to let my teammates down.” *Id.* (internal quotation marks omitted).

99 See, e.g., Jeffrey L. Seglin, *Should Colleges Pay Athletes to Play?*, CHI. TRIB. (Sept. 20, 2013), <http://www.chicagotribune.com/entertainment/sns-201306251100—tms—rite-thngctnr-t-20130625-20130625,0,4945501.story>. NCAA President Mark Emmert on “Pay for Play”: “As long as I’m president of the NCAA, we will not pay student athletes to play sports. Compensation for students is just something I’m adamantly opposed to.” *Id.* (internal quotation marks omitted). In October 2012, the NCAA implemented drastic changes to its enforcement scheme, including imposing a four-tiered system of violations and subsequent penalties to punish NCAA rules infractions. JEFF BENEDICT & ARMEN KETEVIAN, *THE SYSTEM* 198 (2013). Further, the NCAA has increased the size of its enforcement staff by fifty percent since 2010, now employing fifty-nine investigators as of spring 2013. *Id.* at 199. The majority of these enforcement personnel have law degrees, with backgrounds in civil and criminal litigation. *Id.* at 199–200. The central focus of this renewed emphasis on enforcement is to firmly send the message that “cheaters will not profit,” by punishing eligibility and recruiting rules violators. *Id.* at 201–14 (internal quotation marks omitted).

100 See, e.g., Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sep. 7, 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>. “[T]he real scandal is not that students are getting illegally paid or recruited, it’s that two of the noble principles on which the NCAA justifies its existence—‘amateurism’ and the ‘student-athlete’—are cynical hoaxes, legalistic confections propagated by universities . . . [to] exploit the skills and fame of young athletes.” *Id.*

take stronger leadership on head injuries in football and improve its policies to meet the current best practices on concussion management.<sup>101</sup>

If the NCAA continues to refuse to address the concussion issue, Congress has begun to evince willingness to force the association's hand legislatively. A bill titled the "Collegiate Student Athlete Protection Act"<sup>102</sup> was recently introduced into the House of Representatives.<sup>103</sup> The Act would require mandatory baseline concussion testing for all athletes, as well as prevent schools from revoking the scholarships of injured players.<sup>104</sup> The Act would be limited in its effect to schools whose athletic departments generate at least \$10 million in media rights fees annually, which would include most schools in major athletic conferences at the Division I level.<sup>105</sup> Although it remains unclear whether such legislation will gather enough support to be passed in the near future, the fact that Congress is debating such a bill further symbolizes that the NCAA has failed to adequately address concussions in college football.

### III. THE NCAA'S LEGAL LIABILITY FOR LONG-TERM HEAD INJURIES

In September 2011, former Eastern Illinois football player Adrian Arrington filed a class action complaint in federal court against the NCAA, alleging that the association acted negligently with regard to its policies on concussions, and that, as a result, a class of former college athletes has suffered permanent brain injuries.<sup>106</sup> Although individual schools have previously been sued on numerous occasions for their handling of head injuries,<sup>107</sup> Arrington was the first plaintiff to name the NCAA as a defendant. Several other plaintiffs subsequently filed similar suits against the association, which were consolidated into a single class action.<sup>108</sup> While the

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101 For the most recent statement on the best practices of concussion management, see generally Paul McCrory et al., *Consensus Statement on Concussion in Sport: The 4th International Conference on Concussion in Sport*, 48 J. ATHLETIC TRAINING 554 (2013).

102 H.R. 3545, 113th Cong. (2013).

103 See Steve Berkowitz, *Proposal Aims to Protect Athletes at the Wealthiest Schools*, USA TODAY (Nov. 20, 2013), <http://www.usatoday.com/story/sports/college/2013/11/20/ncaa-collegiate-student-athlete-protection-act-tony-cardenas/3649699/>.

104 *Id.*

105 *Id.*

106 See Second Amended Class Action Complaint at 87–90, *Arrington v. NCAA*, No. 11-CV-06356 (N.D. Ill. Mar. 11, 2013).

107 See, e.g., Complaint at 1–25, *Silk v. Bowling Green State Univ.*, No. 2012-06521 (Ct. Claim. Ohio Aug. 28, 2012), available at <http://cases.ohiocourtsofclaims.gov/cgi-bin/wspd.cgi.sh/streamfile.p?Serial=120829001300987&Seq=1> (suing the university, head football coach, head athletic trainer, and others for negligence and other claims after a series of concussions); Alan Schwarz, *La Salle Will Pay Ex-Player \$7.5 Million*, N.Y. TIMES, Dec. 1, 2009, at B14 (describing La Salle University's settlement with a football player who sustained brain damage as a result of head injuries).

108 See Rachel Axon, *NCAA Concussion Lawsuits Consolidated*, USA TODAY (Jan. 2, 2014), <http://www.usatoday.com/story/sports/college/2014/01/02/concussion-lawsuits-ncaa-consolidated-adrian-arrington/4293867/>; Fenno, *supra* note 4.



NCAA continues to deny liability for the plaintiffs' injuries, it likely recognizes the reputational damage that may accompany a long and protracted fight in court. As of this writing, the NCAA is attempting to negotiate a settlement agreement with the plaintiffs.<sup>109</sup>

A. *Does the NCAA Have a Duty to Protect Its Student-Athletes from Head Injuries?*

The plaintiff class in *Arrington* contends that the NCAA, operating as the regulatory body for college athletics, has a duty toward the plaintiff class “to supervise, regulate, monitor and provide reasonable and appropriate rules to minimize the risk of injury to the players.”<sup>110</sup> Under the doctrine of negligence, the general rule imposes no affirmative duty to act: “The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”<sup>111</sup> The NCAA insists that it is solely the duty of its member institutions to protect player safety. As NCAA Director of Health & Safety David Klossner stated, “Our membership is in charge of educating student-athletes and providing medical care autonomously.”<sup>112</sup> The question of whether the NCAA actually has a duty to provide any protection to its student-athletes against concussions is thus central to whether any legal liability may be imposed on the association for its failure to act.

1. A Special Relationship Exists Between the NCAA and Student-Athletes

An exception to the general rule of an actor having no affirmative duty to act exists where a special relationship between an actor and another party “[i]mpose[s] upon the actor the duty to take affirmative precautions for the aid or protection of the other.”<sup>113</sup> This “special relationship” exception applies only where a “relation exists between the parties, and the risk of harm . . . arises in the course of that relation.”<sup>114</sup> Although *The Restatement* lists specific categories of special relationships that are presumed to constitute exceptions to the general rule, it also notes that “[t]he law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence.”<sup>115</sup>

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109 See Jon Solomon, *NCAA Agrees to Settlement Talks Over Concussions with 2nd Set of Ex-Players*, AL.COM (updated Oct. 21, 2013, 11:17 PM), [http://www.al.com/sports/index.ssf/2013/10/ncaa\\_agrees\\_to\\_mediation\\_with.html](http://www.al.com/sports/index.ssf/2013/10/ncaa_agrees_to_mediation_with.html).

110 See Second Amended Class Action Complaint, *supra* note 106, at 87.

111 RESTATEMENT (SECOND) OF TORTS § 314 (1965).

112 See Schwarz, *supra* note 107, at B14.

113 RESTATEMENT (SECOND) OF TORTS § 314 cmt. a (1965).

114 *Id.* § 314A cmt. c.

115 *Id.* § 314A cmt. b.

Over time, courts have gradually expanded the scope of the “special relationship” exception to the no-duty rule.<sup>116</sup> It has generally been recognized that “legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done.”<sup>117</sup> In his treatise on torts, Professor Dobbs lists numerous factors that courts generally consider in determining whether a duty exists, such as the relationship between the parties, whether the harm was reasonably foreseeable to the defendant, the defendant’s moral blame for the harm, and the closeness of the connection between the defendant’s conduct and the harm caused.<sup>118</sup>

Given the information available to the NCAA, it appears likely that a court would find it “reasonably foreseeable” that players might suffer long-term health consequences if head injuries are handled improperly. The NCAA has been collecting concussion injury rates in college football since 1986.<sup>119</sup> In addition, it has been aware of the dangers of sustaining multiple concussions since at least 2003.<sup>120</sup> Because the NCAA is the supreme regulatory body in college athletics and possesses the most comprehensive injury data and latest scientific information, it was certainly reasonably foreseeable that players might suffer long-term injuries if the NCAA failed to take reasonable steps to address the handling of concussions.

The relationship between the NCAA and its student-athletes also supports the recognition of a legal duty of care to protect athlete health and safety. In carrying out its mission of preserving amateurism,<sup>121</sup> the NCAA assumes a vast degree of control over its student-athletes. It has the authority to legislate rules governing conduct, academic standards, and the ability of athletes to profit from their own brand and likeness. While the student-athlete is strictly prevented from receiving any type of financial gain for participation in college athletics, the NCAA and its member institutions profit immensely from college football.<sup>122</sup>

The student-athlete submits himself to this relationship in exchange for the perceived benefits of development as a student-athlete, a subsidized college education, and preparation for future success in society. As part of sub-

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116 See John M. Adler, *Relying upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 896–98.

117 *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976).

118 DAN B. DOBBS, *THE LAW OF TORTS* § 229 (2000).

119 See Report of Robert C. Cantu, *supra* note 20, at 14.

120 See Kevin M. Guskiewicz et al., *Cumulative Effects Associated with Recurrent Concussion in Collegiate Football Players*, 290 J. AM. MED. ASS’N 2549, 2552 (2003) (finding that football players who have previously suffered a concussion are three times more likely to suffer another concussion and noting the implications of these findings for return-to-play guidelines). The NCAA partially funded the Guskiewicz study. *Id.* at 2554.

121 See *supra* note 99 and accompanying text.

122 See BENEDICT & KETEYAN, *supra* note 99, at 197. The NCAA was expected to generate \$800 million in revenue in 2012, ninety-five percent of which comes from media rights payments. *Id.*

mitting to the authority of the NCAA, student-athletes place substantial confidence in the association to exercise its power to promote their well-being<sup>123</sup> and best interests. Thus the NCAA enters into a special relationship with its student-athletes—student-athletes place trust and confidence in the NCAA as the governing body of collegiate sports to promote their best interests as amateur athletes, while simultaneously giving the NCAA vast control to regulate their conduct.

The relationship between the NCAA and its student-athletes also places students in a position of inferior bargaining power. Those students who choose to participate in college athletics have almost no power to alter the level of control that the NCAA may exert over them—by accepting a scholarship they agree to be subject to the association’s numerous rules and regulations. Since the NFL places an age restriction on draft eligibility<sup>124</sup> and no viable minor league system exists, high school football players with aspirations of playing professionally have no real options besides playing college football.<sup>125</sup> Further, student-athletes are adolescents growing into adulthood. Although college students are generally considered adults, courts have consistently recognized that students still have a reasonable expectation that colleges will provide them protection from foreseeable harm.<sup>126</sup> It is only reasonable that college athletes have a similar expectation toward the NCAA. Unlike professional players, who have the protections of a powerful players’ union and collective bargaining rights, college football players depend upon the NCAA to protect their best interests.

The NCAA justifies its continued preservation of the system of amateurism on the basis that student-athletes need protection from “exploitation by commercial and professional enterprises.”<sup>127</sup> Thus the relationship into which the NCAA enters with its student-athletes is based on central principles

123 See *Office of the President: On the Mark*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/about/who-we-are/office-president/office-president-mark> (last visited Apr. 9, 2014). NCAA President Mark Emmert states that one of the “priorities” of the association is “student-athlete well-being.” *Id.* (internal quotation marks omitted).

124 NAT’L FOOTBALL LEAGUE, ELIGIBILITY RULES (n.d.), available at <https://www.nflregionalcombines.com/Docs/Eligibility%20rules.pdf>.

125 See Gerry DiNardo, *Why Not Let 18-Year-Olds Head Straight for the Pros?*, N.Y. TIMES, Aug. 28, 2011, at SP15, available at [http://www.nytimes.com/2011/08/28/sports/ncaafootball/why-not-let-18-year-olds-head-straight-for-the-pros.html?\\_r=0](http://www.nytimes.com/2011/08/28/sports/ncaafootball/why-not-let-18-year-olds-head-straight-for-the-pros.html?_r=0). A former college football coach, DiNardo argues that aspiring professional players ought to have options besides college football. *Id.* “Maybe we are not listening to the players who are saying, ‘I really don’t want to be in college, but what alternative do I have if I want to play professional football?’” *Id.*; see also Tim Keown, *Injustice of NFL Draft Restriction*, ESPN.COM (updated Feb. 13, 2013, 2:56 PM), [http://espn.go.com/nfl/draft2013/story/\\_/id/8943142/draft-restriction-makes-sense-colleges-nfl-not-players](http://espn.go.com/nfl/draft2013/story/_/id/8943142/draft-restriction-makes-sense-colleges-nfl-not-players) (“What will the players do? They will go back to school. They have no choice.”).

126 *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336 (Mass. 1983) (“Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.”).

127 NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 19, at § 2.15.

of protection and dependence; the NCAA agrees to protect the best interests of student-athletes and foster their development, while student-athletes agree to forgo certain rights (e.g., the ability to profit in any manner on their endeavors as an athlete) in order to preserve the character and quality of the overall product<sup>128</sup>—the amateur student-athlete ideal. In entering this relationship, the NCAA has assumed the duty to provide reasonable protection for the well-being of student-athletes. The scope of this duty implicitly includes physical well-being—as the protection of student-athletes’ financial and educational well-being would be rendered meaningless if their physical well-being is allowed to suffer in the process.

## 2. Undertaking of a Duty to Provide Reasonable Care

Another exception to the general rule of an actor having no affirmative duty to act provides that “[o]ne who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care . . . .”<sup>129</sup> Liability will only be imposed if the failure to exercise care either increases the risk of harm or if the harm is suffered because of the other party’s reliance on the undertaking.<sup>130</sup> An undertaking may include express promises as well as actions that imply an intention or commitment to act.<sup>131</sup>

The NCAA was founded on the principle of protecting player safety.<sup>132</sup> Due to the inability of individual universities to effectively regulate safety in the game of football, administrators came together to create a regulatory body that could govern the sport as a whole. On its website, the NCAA states, “student-athlete health, safety and well-being remain among our top priorities.”<sup>133</sup> Since its founding, the NCAA has consistently exercised its power to protect student-athlete safety<sup>134</sup>—from mandating that football players wear

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128 See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984) (noting that “the NCAA seeks to market a particular brand of football—college football”). “The identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports . . . . [T]o preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.” *Id.* at 101–02.

129 RESTATEMENT (SECOND) OF TORTS § 323 (1965).

130 *Id.*

131 See *Florence v. Goldberg*, 375 N.E.2d 763, 767 (N.Y. 1978) (recognizing an undertaking and subsequent reliance where police consistently provided crossing guards, upon whom parents relied in assisting children to cross the street).

132 See *supra* notes 84–88 and accompanying text.

133 *Health and Safety*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/health-and-safety> (last visited Apr. 9, 2014).

134 See Rachel Axon, *Does NCAA Face More Concussion Liability than NFL?*, USA TODAY (July 25, 2013), <http://www.usatoday.com/story/sports/ncaaf/2013/07/25/ncaa-concussion-lawsuit-adrian-arrington/2588189/>. In a statement in response to the filing of the Arrington lawsuit, NCAA spokeswoman Stacey Osburn indicated the association’s commitment to player safety: “The NCAA has been at the forefront of safety issues throughout its

helmets,<sup>135</sup> to requiring that schools have a concussion management plan on file,<sup>136</sup> to the most recent change, a new rule specifically created to prevent head injuries, which allows referees to eject a player from a game for a targeted hit to the head of an opponent.<sup>137</sup> The NCAA has thus made an explicit commitment to fostering player health and safety and affirmed this commitment through its actions.

Based on its inception as a regulatory body to promote safety in collegiate athletics, as well as the consistent historical application of its regulatory power over member institutions to protect student-athletes' health, the NCAA has undertaken a duty to provide reasonable protections for its student-athletes against injury. Although the NCAA seeks to pass off this duty to its member schools, the *very purpose* of the NCAA's founding was to address safety issues in sports that individual universities were incapable of handling themselves. Student-athletes place reliance upon the NCAA's superior knowledge and position of authority to provide them reasonable protection from long-term injury. The NCAA has explicitly acknowledged this reliance, stating in its sports medicine handbook, "[S]tudent-athletes rightfully assume that those who sponsor intercollegiate athletics have taken reasonable precaution to minimize the risks of injury from athletics."<sup>138</sup> In undertaking to regulate safety in college football, the NCAA assumed a legal duty to provide reasonable protections to college football players against long-term head injuries.

### B. *Did the NCAA Violate Its Duty of Care?*

Where a legal obligation to act is imposed, the defendant is not required to provide complete or perfect care, but rather is held to a standard of reasonable care under the circumstances.<sup>139</sup> However, in situations involving sports, a defendant's duty of care may be qualified even further, as it is recognized that a participant consents to those commonly appreciated risks inherent in the nature of a sport.<sup>140</sup> While suffering a head injury in the course of playing football is certainly a danger inherent to the sport, the negligent treatment and management of such injuries, leading to further or long-term damage, is beyond the scope of inherent risk assumed by players. Courts have recognized a failure to supervise a high school football player's injury as beyond the scope of inherent risk and imposed the normal duty of reason-

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existence . . . . [W]e continue to believe our policies and rules address student-athlete safety." *Id.* (internal quotation marks omitted).

135 See Jeff Miller, *The College Football Helmet Has Come a Long Way*, ALL STUDENT ATHLETES (Sept. 27, 2010), <http://www.allstudentathletes.com/Blogs/CollegeFootballHelmet>.

136 NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 19, at § 3.2.4.17.

137 NAT'L COLLEGIATE ATHLETIC ASS'N, 2013 AND 2014 NCAA FOOTBALL RULES AND INTERPRETATIONS, Rule 9, § 1, art. 3 (2013).

138 See Second Amended Class Action Complaint, *supra* note 106, at 65 (quoting NAT'L COLLEGIATE ATHLETIC ASS'N, 2010–11 NCAA SPORTS MEDICINE HANDBOOK 4 (2010)).

139 See DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 410 (2d ed. 2013).

140 See *Morgan v. State*, 685 N.E.2d 202, 207 (N.Y. 1997).

ble care.<sup>141</sup> In the context of collegiate football, a court would likely hold the NCAA to a standard of providing reasonable protection to student-athletes in the management and treatment of head injuries.

### 1. Prior to 2010

It is on the point of *reasonableness* that the NCAA's concussion policies fall short. Between 2002 and 2010, the NCAA consistently failed to update its concussion policies to reflect the consensus best practice standards for concussion management. In 2002, the first International Symposium on Concussion in Sport was held in Vienna. The symposium resulted in the publication of consensus best practices in concussion management at the time (hereinafter "Vienna Protocol").<sup>142</sup> The Vienna Protocol advocated the importance of a specific, stepwise return-to-play scheme, which provided that if any symptoms occur after exertion, the patient should drop back to the previous level and try to progress again after twenty-four hours.<sup>143</sup> The consensus also found that "neuropsychological testing is one of the cornerstones of concussion evaluation and contributes significantly to both understanding of the injury and management of the individual."<sup>144</sup>

The best practices developed in Vienna were affirmed by a second consensus statement at the Prague symposium on concussions in 2004 (hereinafter "Prague Protocol").<sup>145</sup> The Prague Protocol added a specific recommendation that baseline testing be adopted, particularly in high-risk sports.<sup>146</sup> Additional emphasis was also placed on the importance of education, describing it as the "mainstay of progress in this field."<sup>147</sup> The statement guides that "[a]thletes *and* their healthcare providers must be educated about the detection of concussion, its clinical features, . . . and principles of safe return to play."<sup>148</sup> Another important example of best practices, the National Athletic Trainers Association (NATA) position statement, affirmed the Vienna and Prague Protocols and added a recommendation that in most instances athletes who suffer a concussion should be referred to a physician.<sup>149</sup>

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141 See *Zalkin v. Am. Learning Sys. Inc.*, 639 So. 2d 1020, 1020–21 (Fla. Dist. Ct. App. 1994).

142 M. Aubry et al., *Summary and Agreement Statement of the First International Conference on Concussion in Sport, Vienna 2001*, 36 BRIT. J. SPORTS MED. 6 (2002) (summarizing the Vienna Protocol).

143 *Id.* at 9.

144 *Id.* at 8.

145 See P. McCrory et al., *Summary and Agreement Statement of the 2nd International Conference on Concussion in Sport, Prague 2004*, 39 BRIT. J. SPORTS MED. 196 (2005) (summarizing the Prague Protocol).

146 *Id.* at 198.

147 *Id.* at 202.

148 *Id.* (emphasis added).

149 See Kevin M. Guskiewicz et al., *National Athletic Trainers' Association Position Statement: Management of Sport-Related Concussion*, 39 J. ATHLETIC TRAINING 280, 282, 286 (2004) (providing the NATA 2004 Statement).

In its Sports Medicine Handbook (“Handbook”) from 2002 to 2007, the NCAA dismissed the specific stepwise return-to-play guidelines outlined in Vienna and Prague, claiming that “[t]he duration of time that an athlete should be kept out of physical activity is unclear, and in most instances, individualized return to play decisions should be made.”<sup>150</sup> Further, the NCAA encouraged medical personnel not to rely on neuropsychological testing, but rather to use “[their] clinical skills in evaluating the head injured athlete to the best of [their] ability.”<sup>151</sup> No mention is made in the Handbook of concussion education techniques for players, coaches, or healthcare providers. Up until 2010, the NCAA failed to recommend in its guidelines that athletes who suffer head injuries should be referred to a physician. The NCAA’s refusal to update its guidelines to reflect the consensus best practices in the Vienna and Prague Protocols, as well as the NATA 2004 statement was thus a violation of its duty to provide reasonable care to protect student-athletes against head injuries.

## 2. After 2010: Addition of the Concussion Management Plan Requirement

Although the NCAA’s move to require all member institutions to keep a concussion management plan on file is a step in the right direction, it still fails to provide reasonable protections to student-athletes. Based on internal surveys, the NCAA is well aware of the deficiencies that still exist in its policy. Survey results from head athletic trainers at 512 responding NCAA schools indicate that only sixty-six percent employ baseline testing, less than fifty percent require a physician to see all student-athletes, and perhaps most disturbingly, that forty-one percent would allow a student-athlete to return to play in the same game after a concussion.<sup>152</sup> These results indicate that many individual NCAA member institutions fall well short of meeting the standards of the most current best practices.<sup>153</sup>

Because the policy lacks any enforcement mechanism, there is nothing to ensure that member schools actually implement and enforce the concussion policies they keep on file. Without a centrally enforceable mandate from the NCAA, some member institutions will continue to fail to meet the standards of best practices in handling head injuries. As evidenced by the case of Derek Sheely,<sup>154</sup> merely having a plan on file is not enough to provide reasonable protection to student-athletes.

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150 See Report of Robert C. Cantu, *supra* note 20, at 50 (emphasis omitted) (quoting NAT’L COLLEGIATE ATHLETIC ASS’N, 2006–07 NCAA SPORTS MEDICINE HANDBOOK 48–49 (2006)).

151 *Id.* at 51 (quoting NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 150, at 48).

152 See *id.* at 58–60.

153 See McCrory et al., *supra* note 101, at 556–59 (detailing current concussion investigation and management techniques).

154 See *supra* notes 1–20 and accompanying text.

Given the conflicts of interest that exist for team physicians and student-athletes in the context of diagnosing and treating concussions,<sup>155</sup> the NCAA's current policy is unreasonable in placing the burden upon these parties to prevent such injuries. Without any type of oversight or independence, doctors may continue to bow to pressure from coaches to return athletes to play before they have fully recovered. Currently, a school that fails to enforce its concussion management plan is technically (it has never been enforced in practice)<sup>156</sup> guilty of a "secondary" level violation.<sup>157</sup> Comparatively, examples of other secondary violations include where a coach inadvertently calls a recruit or communicates on Facebook during a no-contact period.<sup>158</sup> The NCAA's policy thus provides no reasonable protection to student-athletes—as long as each member institution keeps a concussion management plan on file, the NCAA does not provide any oversight to determine whether its terms are enforced or adequate to meet best standards.

### C. Potential Roadblocks for the Plaintiff's Case

#### 1. Causation

Perhaps the greatest challenge that the plaintiffs in *Arrington* may face is the issue of causation. The players must be able to demonstrate it is more likely than not that the harms for which they are suing are the result of head injuries sustained while playing college football. The NCAA will almost

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155 See *supra* notes 87–98 and accompanying text.

156 See Nathan Fenno, *Internal NCAA Emails Raise Questions About Concussion Policy*, WASH. TIMES (updated July 20, 2013, 2:33 PM), <http://www.washingtontimes.com/blog/screen-play/2013/jul/20/internal-ncaa-emails-raise-questions-about-concuss/>. The NCAA's legislative requirement is merely that each school must have a concussion plan on file. *Id.* NCAA director of enforcement Chris Strobel stated in an email obtained during discovery in the *Arrington* case that "the legislation was specifically written to require institutions to have a plan . . . not about enforcing whether or not they were following their plan—except for those isolated circumstances of systemic or blatant violations." *Id.* (internal quotation marks omitted). A school would be guilty of a secondary violation if it did not have a plan on file. Only in a drastic situation, where the NCAA could claim "lack of institutional control," could the NCAA bring an enforcement action for a school's failure to follow the plan on file. See *id.* David Klossner, the NCAA Director of Health & Safety, stated in a deposition that the NCAA had never disciplined a member school regarding a concussion management plan and was not considering doing so in the future. *Id.*

157 *Id.*

158 See, e.g., James Crepea, *Auburn Releases Documents on Secondary Violations*, USA TODAY (Nov. 17, 2013), <http://www.usatoday.com/story/sports/college/2013/11/17/auburn-athletics-releases-documents-16-secondary-ncaa-violations/3618235/> ("The [secondary] violations ranged from impermissible calls by assistant coaches to improper use of Twitter by a student manager to promote a recruit's official visit to campus."); Jeremy Fowler, *Florida Football Misuses Facebook, Commits Four Minor NCAA Violations*, ORLANDO SENTINEL (July 12, 2010), [http://articles.orlandosentinel.com/2010-07-12/sports/os-florida-ncaa-violation-facebook-0720100712\\_1\\_facebook-recruit-ole-miss](http://articles.orlandosentinel.com/2010-07-12/sports/os-florida-ncaa-violation-facebook-0720100712_1_facebook-recruit-ole-miss) (stating that "Southeastern Conference schools . . . have faced secondary NCAA violations for coaches posting messages on a recruit's Facebook wall").



surely argue that the players may have sustained concussions at many different points during their playing career—any time from Pop Warner through high school. Given the difficulty in diagnosing concussions, it may be problematic to show that injuries sustained prior to college were not a major causal factor in the development of long-term effects that a plaintiff is exhibiting.

There is no clear formula underlying the exact number of concussive blows that lead to long-term head injuries. The lack of clarity surrounding the mechanism of these injuries adds to the challenge of the plaintiffs' case. Until very recent advances,<sup>159</sup> CTE could only be conclusively discovered in a post-mortem examination. Further complicating the causal link is that many symptoms of long-term head injuries—depression, dementia, dizziness, and headaches—are not readily apparent injuries and may be suspect to claims of being faked.

The issue of causation played a major role in prompting the settlement of the recent class action lawsuit by former NFL players against the league.<sup>160</sup> Former college athlete plaintiffs such as Arrington would likely face a similar uphill battle to establish the direct causal linkage between their long-term head injuries and the alleged misconduct of the NCAA. The difficulty presented by the issue of causation may provide the plaintiffs with an incentive to accept a settlement offer from the NCAA in lieu of risking an unfavorable trial verdict.

## 2. Assumption of the Risk

The NCAA will be likely to contend that by passing its concussion management plan requirement and publishing it in its Sports Medicine Handbook,<sup>161</sup> as well as through the media coverage devoted to the issue, college football players have been notified of the risks associated with concussions. The NCAA concussion policy also mandates that every member school have athletes sign a statement in which they accept responsibility for reporting

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159 See Gary W. Small et al., *PET Scanning of Brain Tau in Retired National Football League Players: Preliminary Findings*, 21 AM. J. GERIATRIC PSYCHIATRY 138, 138 (2013) (noting that while the initial sample size of the study is small and further research is required, FDDNP-PET testing may offer a method of diagnosing CTE in the brain tissue of living former athletes); see also William Weinbaum & Steve Delsohn, *Dorsett, Others Show Signs of CTE*, ESPN.COM (updated Apr. 5, 2014, 6:05 PM), [http://espn.go.com/espn/otl/story/\\_/id/9931754/former-nfl-stars-tony-dorsett-leonard-marshall-joe-delameilleure-show-indicators-cte-resulting-football-concussions](http://espn.go.com/espn/otl/story/_/id/9931754/former-nfl-stars-tony-dorsett-leonard-marshall-joe-delameilleure-show-indicators-cte-resulting-football-concussions) (explaining that UCLA is in the “very early” stages of testing a brain scan that “uses a radioactive marker to identify the signs of CTE in the living”) (internal quotation marks omitted).

160 For a discussion of the difficulties in proving causation for the NFL class action plaintiffs, see David S. Cerra, Note, *Unringing the Bell: Former Players Sue NFL and Helmet Manufacturers over Concussion Risks in Maxwell v. NFL*, 16 MICH. ST. U. J. MED. & L. 265, 289–91 (2012).

161 NAT'L COLLEGIATE ATHLETIC ASS'N, 2013–14 NCAA SPORTS MEDICINE HANDBOOK 64 (2013), available at <http://www.ncaapublications.com/p-4328-2013-14-ncaa-sports-medicine-handbook.aspx>.

head injuries to team medical staff, as well as a requirement to provide players with educational materials regarding concussions.<sup>162</sup> By providing student-athletes with information on the dangers of concussions and requiring them to take responsibility, the NCAA will argue that student-athletes assumed the risk that they might sustain long-term head injuries from playing football.

An assumption of the risk defense may be plausible for the NCAA, however their education policies are relatively new and likely not effective enough at informing students with concussions to absolve the association of legal liability. The Handbook is available online and distributed to the head athletic trainer at all member institutions, but it is not provided directly to student-athletes.<sup>163</sup> Although students are supposed to take responsibility for reporting head injuries, education programs are left up to the individual member schools, with no oversight by the NCAA on implementation or content.

Studies have demonstrated that the concussion education provided to student-athletes is divergent, limited, and largely ineffective at changing players' attitudes to promote the self-reporting of concussion symptoms.<sup>164</sup> Internal NCAA surveys in 2010 found that only thirteen percent of all student-athletes, and seventeen percent of athletes in high-risk sports such as football, had been required to receive any concussion management education in the previous two years.<sup>165</sup> Just twenty-four percent of coaches reported being required to receive any concussion management education at all,<sup>166</sup> in direct contrast to consensus best practices suggesting that players, coaches, and medical staff all receive regular education.<sup>167</sup>

If student-athletes are provided with only very limited information about the risks associated with concussions, it would be difficult for a court to conclude that they have assumed those risks for which they remain unaware. Further, student-athletes cannot be asked to take responsibility for reporting their own head injuries if they are inadequately equipped with the information necessary to do so. By placing this responsibility on student-athletes, the NCAA is putting its students in a situation of direct conflict of interest between maintaining their scholarships and their own well-being.<sup>168</sup>

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162 *Id.*

163 *See id.* at 1.

164 *See* Emily Kroshus et al., *NCAA Concussion Education in Ice Hockey: An Ineffective Mandate*, 48 BRIT. J. SPORTS MED. 135, 137–40 (2014) (finding that the NCAA's general education mandate was divergently enacted and resulted in no significant improvements in knowledge).

165 *See* Report of Robert C. Cantu, *supra* note 20, at 60.

166 *Id.* at 61.

167 *See* McCrory et al., *supra* note 101, at 560.

168 *See supra* notes 94–101 and accompanying text.

#### D. *The Scope of NCAA Legal Liability*

Based on the difficult issue of causation for the plaintiffs, as well as the NCAA's incentives to settle the case, it appears improbable that the *Arrington* lawsuit will go to trial. Currently the entire structure of the NCAA sits on shaky ground, as the association faces a major lawsuit challenging it on anti-trust grounds,<sup>169</sup> as well as internal pressure from players advocating for reform.<sup>170</sup> The NCAA thus has a strong incentive to settle the *Arrington* case, as it very likely wants to avoid a drawn out trial with the associated negative publicity and potential for damaging facts to come to light. A trial verdict also presents the risk that the plaintiffs will be awarded a far greater amount than the NCAA might be able to achieve through settlement, plus the additional legal costs.

Over the past fifty years, it is "estimated that more than 500,000 men have played college football."<sup>171</sup> The NCAA's own injury surveillance system has reported that more than 29,000 concussions were suffered in college sports between 2004 and 2009, more than half of which occurred in football.<sup>172</sup> It was also found that the number of concussions reported was increasing at seven percent a year<sup>173</sup>—a figure that may continue to rise as awareness of the concussion issue spreads, given that the injury is consistently underreported.<sup>174</sup> Thus the pool of potential class action plaintiffs is staggering in size—thousands of former college football players have likely suffered concussions during their playing careers.

Legal liability for long-term head injuries thus poses a major threat to the NCAA. The NFL's considerable wealth allows it to insulate itself to a degree, as it can afford to pay out large settlements in order to avoid admitting wrongdoing and protect its brand. By comparison, a settlement or judgment against the NCAA would likely have a major reputational and financial impact on an organization that has already been the subject of harsh public criticism.<sup>175</sup> It is critical that the NCAA takes a proactive approach and

169 *O'Bannon v. NCAA*, Nos. C 09–1967 CW, C 09–3329 CW, C 09–4882 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010).

170 See Rachel Bachman, *Northwestern Players Seek to Be Unionized*, WALL ST. J. (updated Jan. 28, 2014, 4:37 PM), <http://online.wsj.com/news/articles/SB10001424052702303277704579348751496028342>.

171 Kevin Vaughan, *Did NCAA Ignore Concussion Issue?*, FOX SPORTS (updated Nov. 5, 2013, 2:56 PM), <http://msn.foxsports.com/collegefootball/story/ncaa-concussion-lawsuit-mediation-harder-time-than-nfl-defending-itself-110413>.

172 *Id.*

173 *Id.*

174 See Kelly G. Kilcoyne et al., *Reported Concussion Rates for Three Division I Football Programs: An Evaluation of the New NCAA Concussion Policy*, SPORTS HEALTH (forthcoming) (manuscript at 1), available at <http://sph.sagepub.com/content/early/2013/06/04/1941738113491545.full.pdfhtml> (“[A]thletes, for various reasons, often underreport and minimize the importance of concussion[s].”).

175 See generally BENEDICT & KETEYAN, *supra* note 99 (exploring the “darker truths” behind the operation of the NCAA); KEITH DUNNAVANT, *THE FIFTY YEAR SEDUCTION* (2004) (detailing the symbiotic relationship between television, college football, and the NCAA,

implements comprehensive reform to its concussion policies in order to better protect its student-athletes.

#### IV. WHAT THE NCAA CAN DO: POTENTIAL REFORMS TO CURRENT CONCUSSION POLICY

##### A. *Give the Current Policy Teeth: Add an Enforcement Mechanism*

While NCAA member institutions are currently required to have a concussion management plan on file, the NCAA provides no oversight to determine whether the plan is actually implemented. The NCAA should adopt legislation that holds member institutions accountable to abide by the concussion management standards that they adopt.

The NCAA should require member institutions to file a copy of their plan with the NCAA's enforcement division and provide that any failure to implement the substance of the plan will result in at least a level II violation, termed a "significant breach of conduct."<sup>176</sup> This would effectively treat a failure to properly abide by a concussion management plan in a similar manner to recruiting and eligibility violations. Member institutions that fail to remain accountable to their plans would be punished with penalties typically imposed for level II violations, such as fines, competition sanctions, and scholarship reductions.<sup>177</sup>

Recent changes to the bylaws have focused on holding coaches accountable for NCAA violations by punishing coaches who fail to properly oversee their programs.<sup>178</sup> The use of head coach penalties as punishment would be particularly useful to address compliance with concussion management plans. Since football coaches are often the primary party responsible for pressuring players to return to play after a head injury,<sup>179</sup> direct penalties for

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and how this relationship fostered the game's rise as a big business); Mary Grace Miller, Comment, *The NCAA and the Student-Athlete: Reform Is on the Horizon*, 46 U. RICH. L. REV. 1141 (2011) (arguing that the NCAA in its current form is at least immoral, if not illegal, and deeply in need of reform); Branch, *supra* note 100 ("[C]orporations offer money so they can profit from the glory of college athletes, and the universities grab it.").

176 NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 19, at § 19.1.2.

177 *Id.* § 19.9.5. The "Core Penalties for Level I and Level II Violations" include competition penalties, financial penalties, scholarship reductions, show-cause orders, head coach restrictions, recruiting restrictions, and probation. *Id.*

178 See *Meaningful Penalties Align with Significance of Wrongdoing*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 1, 2013), <http://www.ncaa.org/about/resources/media-center/news/meaningful-penalties-align-significance-wrongdoing> ("The new structure enhances head coach responsibility/accountability and potential consequences for head coaches who fail to promote compliance within their programs.").

179 See, e.g., O'Reilly, *supra* note 93 ("[T]eam physicians can face demands from coaches . . . to return players to action prematurely."); see also 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/> (describing reports from anonymous athletic trainers who allege they were terminated from their positions after disagreements with coaches over the handling of head injuries).

violations of concussion management protocol would force coaches to think twice before influencing return-to-play decisions, which rightfully should be left to the discretion of the team doctor or athletic trainer.

If coaches, trainers, and athletic directors know that a failure to comply with the terms of their concussion plans could expose their football programs to serious penalties, it would provide a strong incentive for all parties to ensure that head injuries receive proper attention. A football program with a relatively relaxed culture toward treating head injuries would be forced to choose between emphasizing stricter application of their concussion plan or facing penalties that could reduce the competitiveness of the program.<sup>180</sup> Such an enforcement mechanism would harness the intensely competitive atmosphere that surrounds college football to work in the best interests of student-athletes—the players upon whom the game is built.

### *B. Require Independent Team Physicians*

In order to eliminate the conflict of interest inherent for team doctors who are also university employees, the NCAA should hire its own independent physicians to handle head injuries. A single physician could be assigned to each college football game, with the sole responsibility of diagnosing and treating players who exhibit symptoms of concussions. The physician would be able to exercise his professional medical judgment objectively, free from the conflict of interest created by simultaneously considering the interests of his employer and his patients, the players.

One practical objection to implementing a system of independent concussion physicians to work college football games is cost. However, the NCAA could require each member institution to contribute annually to a fund that would pay the salaries of the independent physicians. Universities could then build this cost into their existing budgets for medical staff and trainers, as the independent NCAA-hired concussion physician would take on some of the duties typically covered by team medical staff during games.

### *C. Require Mandatory Baseline Testing and Enhanced Limits on Full Contact Practices*

Baseline testing is one of the most important tools available to medical professionals today in diagnosing concussions. By requiring every player to take a baseline cognitive exam before the season starts, a trainer or doctor then has a basis of comparison for the results of a sideline test administered to a player exhibiting signs of a concussion. The presence of a baseline stan-

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180 NCAA penalties, particularly the loss of scholarships and recruiting restrictions, can have a major effect on football programs, as they limit the depth of the team's roster as well as the team's ability to compete with other schools for recruits. See, e.g., Gary Klein, *USC Football, Coach Lane Kiffin Try to Weather Recruiting Storm*, L.A. TIMES (Jan. 31, 2012), <http://articles.latimes.com/2012/jan/31/sports/la-sp-0201-usc-football-20120201> (“[T]his kind of stretch without a full complement of scholarships has at least temporarily sunk programs before.”).

dard allows for the characterization of small concussion-related abnormalities that might otherwise pass undetected.<sup>181</sup> Internal NCAA surveys indicate that around two-thirds of responding schools already use baseline testing.<sup>182</sup> By mandating that all schools implement baseline testing programs, the NCAA can greatly improve on the ability of team doctors to diagnose players during a game. Given the variation in noticeable symptoms that may be exhibited by a concussed athlete, as well as the tendency of players to understate or hide their symptoms, it is imperative that team doctors have an objective tool available to assist in diagnosis.

Among NCAA athletic conferences, the Ivy League has led the way in addressing head injuries, recently implementing new rules to strictly limit the allowed number of full contact practices.<sup>183</sup> Under the new Ivy League rules, during the season football teams may hold only two full contact practices per week, compared with the NCAA limit of five.<sup>184</sup> The new rules are specifically designed to limit the total number of hits that players are exposed to over the course of a season.

The NCAA should follow the Ivy League's lead and implement stricter limits on the number of full contact practices that football teams are allowed to conduct, both during the season and in preseason camp. Over the course of a season, one study has estimated that a college football player may sustain up to 1444 head impacts, with an average of 6.3 head impacts per practice.<sup>185</sup> While it may be difficult to limit the number of blows to the head a player receives during games without drastic changes to the rules of play, limiting the allowable number of full contact practices can immediately reduce players' overall exposure to hits throughout the season. Coaches may have to adjust the way in which they teach the game and implement their playbooks in response to the rule, but this is simply a necessary part of the evolution of the sport in light of the growing understanding of the long-term risks associated with head injuries.

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181 See TAMERAH N. HUNT, *CRAM SESSION IN EVALUATION OF SPORTS CONCUSSION* 36 (2013).

182 See Fenno, *supra* note 4.

183 Report of Robert C. Cantu, *supra* note 20, at 62.

184 See *id.*

185 Joseph J. Crisco et al., *Frequency and Location of Head Impact Exposures in Individual Collegiate Football Players*, 45 J. ATHLETIC TRAINING 549, 549 (2010). It is important to note that not all of these blows to the head rise to the level of what is considered a "concussive impact." However, given the documented cases of CTE in athletes who were never diagnosed with a concussion, it is critical to place restrictions on the number of blows to the head whenever possible. See Daniloff, *supra* note 59. While the exact role of subconcussive blows in the development of CTE is still being explored, exposure over time to brain trauma has consistently been linked to the disease. See Christine M. Baugh, *Chronic Traumatic Encephalopathy: Neurodegeneration Following Repetitive Concussive and Subconcussive Brain Trauma*, 6 BRAIN IMAGING & BEHAVIOR 244, 252 (2012).

#### D. Education

The medical profession has consistently emphasized that education may be the single most important component of any concussion management plan.<sup>186</sup> Even if the initial injury cannot be prevented, a detailed and well-emphasized education program may provide athletes with the ability to better recognize their symptoms and report them to medical personnel.<sup>187</sup> Current NCAA policy dictates that member institutions must have an education component included in their concussion management plan.<sup>188</sup> However, the NCAA does not require any specific substance to the provided education, only that there is an “annual process that ensures student-athletes are educated about the signs and symptoms of concussions.”<sup>189</sup> Notably, there is no requirement that student-athletes are educated about the potential long-term *effects* of concussions or the dangers of continuing to play after sustaining one. Given the recent studies demonstrating the devastating consequences of CTE in former athletes, it is imperative that athletes understand not only the symptoms of a concussion, but also the absolute necessity of reporting their symptoms, rather than hiding them.

The NCAA should develop its own detailed concussion education program and require every member institution to provide the program for all student-athletes, coaches, trainers, and team staff. The program should include exhaustive information on concussion symptoms, side effects, management, and potential long-term effects. Particular emphasis should be placed on the risks associated with returning to play before a concussion has fully healed, as well as the risks of long-term brain damage as a result of multiple concussions. The only way to break the current culture of playing through concussions in football is an education system that continually inundates players with information about the associated risks, especially the danger of returning to play after sustaining a concussion.

In order to complete the program, players should be required to sign a statement fully acknowledging their responsibility to report their own symptoms, as well as those of their teammates, to medical staff. Coaches should also be required to sign a statement acknowledging their obligation to refer any player exhibiting symptoms to the team trainer. Improving the concussion awareness education provided to student-athletes is perhaps the most critical reform the NCAA can make in its concussion policy. A comprehensive, detailed education plan is certainly within the capabilities of an organization that is well-known for micromanaging the lives of its student-athletes.<sup>190</sup> Even if the NCAA has held back from aggressively taking action

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186 See McCrory et al., *supra* note 101, at 560. “As the ability to treat or reduce the effects of concussive injury after the event is minimal, education of athletes, colleagues, and the general public is a mainstay of progress in this field.” *Id.*

187 See HUNT, *supra* note 181, at 121–22.

188 See NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 19, at § 3.2.4.17.

189 *Id.*

190 See, e.g., Brad Wolverton, *NCAA Adopts Changes Aimed at Streamlining Its Rule Book*, CHRON. HIGHER EDUC. (Jan. 20, 2013), <http://chronicle.com/blogs/players/ncaa-adopts->

