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ANTHONY R. CARUSO*

Collegiate Collisions on the Field and in the Courtroom: Will Labor Peace Save Student-Athletes from Further Injury?

INTRODUCTION

SPORTS CONCUSSIONS HAVE LONG CONCERNED BOTH PARTICIPANTS AND SPECTATORS.¹ In recent years, as safety equipment has improved and athletes' sense of power and invincibility has grown, midair sports collisions have attracted even greater attention.² Lest we forget that competition has cranked up several notches, in step with athletes' ever-rising potential to earn multi-million dollar professional salaries.³

As money poured into the sports industry, one would think sports leagues would have developed plans to minimize on-field dangers.⁴ Their reluctance to do so

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1. See Travis Waldron, *The NCAA's History with Concussions: A Timeline*, THINK PROGRESS (Jul. 23, 2013), <http://thinkprogress.org/sports/2013/07/23/2339571/ncaa-concussion-timeline/> (providing that the NCAA "first acknowledge[d] the dangers of concussions" in 1933).

2. See Robert Franks, *Helmets, Mouthguards: Is There 'Concussion-Proof' Equipment for Fall Sports?*, PHILLY.COM (Aug. 28, 2013), <http://www.philly.com/philly/blogs/sportsdoc/Helmets-mouthguards-is-there-concussion-proof-equipment-for-fall-sports.html> (explaining that enhanced safety-equipment often spurs more aggressive play).

3. See Mihir Bhagat, *Do Professional Athletes Get Paid too Much Money?*, BLEACHER REP. (Mar. 21, 2010), <http://bleacherreport.com/articles/366795-do-athletes-get-paid-too-much-money> (claiming that "Alex Rodriguez earns the same amount of money as it would take to feed the nation's poor for a year").

4. See Joe Nocera, *Day of Reckoning for N.C.A.A.*, N.Y. TIMES, June 7, 2008, at A21, available at <http://www.nytimes.com/2014/06/07/opinion/nocera-day-of-reckoning-for-ncaa.html?hp&ref=opinion> ("Big-time college athletes . . . are a free labor force generating revenue in a multibillion dollar industry.").

makes particularly little sense in collegiate sports, where athletes' primary charge is to earn a degree, not win a championship. Against this backdrop, any discussion about sports concussions must focus on realistic avenues for change. This Article considers three such paths: first, new technologies that improve concussion-treatment, diagnosis, and on-field safety;⁵ second, laws, litigation, and rules that expand athletes' rights, protect players, and recover damages;⁶ and third, sports organizations' provision of health benefits and financial support to current and former players.⁷

First, new treatment, diagnosis, and equipment technologies promise to reduce the incidence and impact of sports concussions.⁸ Medical research has revealed not only concussions' cause and effect, but also misdiagnosis' long-term consequences.⁹ New technologies improve concussion treatment, minimize head impacts, and train young athletes to position their bodies to avoid dangerous blows.¹⁰

Second, a wave of medical developments and litigation have compelled the National Collegiate Athletic Association ("NCAA"), National Football League ("NFL"), and other sports organizations to implement long-overdue policies to safeguard players.¹¹ For too long, players and coaches in contact-sports have viewed reentry into play immediately following head injuries as a rite of passage.¹² Although

5. See discussion *infra*, Parts IV.A–B.

6. See discussion *infra*, Parts I, II, III.A, III.B.

7. See discussion *infra*, Parts IV–V.

8. See Conrad Wilson, *The Concussion Crisis Is Deadlier than Ever – Can Tech Solve It?*, MASHABLE (Feb. 2, 2014), available at <http://mashable.com/2014/02/02/concussions-are-bad/> (reporting that new technologies can prevent multiple concussions).

9. See Joseph Nordqvist, *Concussions Cause Long-Term Effects Lasting Decades*, MED. NEWS TODAY (Feb. 18, 2013), <http://www.medicalnewstoday.com/articles/256518.php> (asserting that misdiagnosed or undiagnosed concussions can result in chronic traumatic encephalopathy, a condition found in former professional athlete Ryan Freel and Junior Seau's brains after they committed suicide); see also 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 sustained a concussion are three times more likely to sustain another one).

10. See Shira Springer, *Sports Wearables Are the Wave of the Future*, BOS. GLOBE (May 25, 2014), available at <http://www.bostonglobe.com/sports/2014/05/24/sports-wearables-are-wave-future/4gwNDNBxPCEkD4h9yYf8K/story.html> (indicating that wearable technology will improve athletic training); see also Will Carroll, *How New Helmet Technology Will Make the NFL and NHL Safer*, BLEACHER REP. (Jun. 2, 2014), <http://bleacherreport.com/articles/2073748-how-new-helmet-technology-will-make-the-nfl-and-nhl-safer> (applauding Riddell and CCM's newly designed helmets, which alert medical personnel to big hits); Judy Woodruff, *A Hard-Hitting Story: Young Football Players Take Big-League Hits to Head*, PBS.ORG (Apr. 2, 2012), http://www.pbs.org/newshour/bb/health-jan-june12-footballhits_04-02/ (discussing a Virginia Tech study, which found that college football players sustain 80g brain impacts).

11. See generally Jon Solomon, *College Football and Concussions: A Talk with the NCAA's Chief Medical Officer*, AL.COM (Oct. 9, 2013), http://www.al.com/sports/index.ssf/2013/10/ncaa_and_concussions_a_talk_wi.html (critiquing the NCAA's hesitant response to concussion research).

12. Derrick Z. Jackson, *Ring the Bell About NFL Concussions*, BOS. GLOBE, Oct. 20, 2012, at A11, available at <http://www.bostonglobe.com/opinion/2012/10/19/ringing-bell-about-concussions/vysn4znVTF7gt1hcxV86JM/story.html> (quoting Detroit Lions wide-receiver Calvin Johnson's statement that concussions are "part of football. You get concussed, you gotta keep on playing").

sports culture has long portrayed an athlete who presses on after having his “bell rung” as a symbol of toughness and courage, doctors and sports leagues have come to appreciate the unequivocal dangers associated with this perception.¹³ To promote athletes’ health, safety, and welfare, sports leagues must inform the public’s misunderstandings about sports concussions.¹⁴ The time has come to adopt a safety-first approach, particularly at the youth level.¹⁵

Perhaps the most promising avenue for change, and the easiest to achieve in the short-term, involves the provision of health benefits and other financial cushions to student-athletes, without regard to “amateurism” and other archaic principles.¹⁶ This Article will expose the NCAA’s failures to prioritize concussion safety and appreciate concussions’ long-term consequences.¹⁷ After all, young athletes’ welfare should override any principle that would limit their access to health benefits.

Unsurprisingly, the NCAA considered rule changes only after litigation challenged its long-established “college model.”¹⁸ Plaintiffs have contested everything from college athletes’ employee status¹⁹ to the NCAA’s refusal to

13. See *id.* (observing that “fringe” pro players hit other players as hard as possible in practice to prove their toughness, though such hits produce painful headaches that led one player to contemplate suicide); Susan Jeffrey, *AAN Releases New Sports Concussion Guidelines*, MEDSCAPE (Mar. 18, 2013), <http://www.medscape.com/viewarticle/780973>.

14. See, e.g., Dan Diamond, *President Obama Puts NCAA on Notice: Protect Your Student-Athletes*, FORBES (Jan. 27, 2013), <http://www.forbes.com/sites/dandiamond/2013/01/27/president-obama-puts-ncaa-on-notice-protect-your-student-athletes/> (explaining that the President has criticized the NCAA’s inadequate efforts to protect student-athletes’ health).

15. See generally Sonali Basak & Alex Wayne, *Concussion Epidemic in Child Sports Spurs Push on Studies*, BUS. WEEK (May 29, 2014), <http://www.businessweek.com/news/2014-05-28/facing-death-at-19-from-football-in-concussion-epidemic> (describing President Obama’s \$86 million initiative to improve detection of concussions); Jackie Brockington, *In Depth: Sports-Related Concussions in Young Athletes*, NEWS 13 ORLANDO (Jun. 3, 2014), http://mynews13.com/content/news/cfnews13/news/article.html/content/news/articles/cfn/2014/6/3/in_depth_kids_concus.html (discussing Centers for Disease Control statistics, which revealed an estimated 435,000 emergency room visits every year for traumatic brain injuries to children younger than 14-years-old).

16. See Jon Solomon, *College Athletes’ Rights: NCAA Requires Health Insurance, but Schools Decide What to Pay*, AL.COM (Feb. 19, 2012), http://www.al.com/sports/index.ssf/2012/02/college_athletes_rights_ncaa_r.html (acknowledging that Auburn University now pays the balance of student athletes’ uncovered medical bills); *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Oct. 1, 2014).

17. See Kristina Peterson, *After Injuries, College Athletes Are Often Left to Pay the Bills*, N.Y. TIMES, July 15, 2009, at B14, available at <http://www.nytimes.com/2009/07/16/sports/16athletes.html?pagewanted=all>. “While some colleges accept considerable responsibility for medical claims, many others assume almost none.” *Id.*

18. Tim Dahlberg, *Judge Rules Against NCAA in O’Bannon Case*, YAHOO SPORTS (Aug. 8, 2014), <http://sports.yahoo.com/news/judge-rules-against-ncaa-obannon-223424475—ncaab.html>; see *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. C 09-3329 CW, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014) (finding that an agreement among colleges not to offer football or men’s basketball recruits more than the value of a full scholarship constituted “restraint of trade”); Bob Molinaro, *O’Bannon Suit Heralds Change in Amateurism*, VIRGINIAN-PILOT (Jun. 10, 2014), <http://hamptonroads.com/2014/06/obannon-suit-heralds-change-amateurism>.

19. Northwestern Univ., No. 13-RC-121359, 2014–15 NLRB Dec. (CCH) ¶ 15,781 (Mar. 26, 2014).

compensate players for its use of their names, images, and likenesses.²⁰ Although many believe the NCAA had every opportunity to prepare for these challenges, it chose not to adapt until litigation arose.²¹

For the most part, American student-athletes no longer are “book-toting” students who happen to dabble in sports.²² Rather, particularly in Division I team-sports, modern collegiate athletes are semi-professionals who happen to attend school.²³ Endless practice hours, team meetings, travel time, and game play dominate student-athletes’ lives.²⁴ No matter the outcome of pending legal challenges, student-athletes’ futures seem poised to change forever.²⁵ This prospect begs the question whether impending changes will be for the better.

The NCAA is a membership-driven organization whose mission is to safeguard student-athletes’ well-being and equip them with skills to succeed on the playing field, in the classroom, and throughout life.²⁶ Since March 31, 1906, the NCAA has integrated athletics and higher education, and encouraged learning through sports.²⁷ NCAA members—not only colleges and universities, but also conferences and affiliated groups—collaborate to establish rules for fair and safe competition, which NCAA national office staff administer.²⁸ The NCAA also provides resources to support 450,000 student-athletes and the schools they attend.²⁹ These resources include more than \$2.4 billion in athletic scholarships each year, access to medical care, academic support services, and first-class training opportunities.³⁰

20. *O’Bannon*, 2014 WL 3899815, at *10; see Sara Ganim, *As Testimony Starts in Former College Star’s Suit, NCAA Settles Another Suit*, CNN (Jun. 9, 2014), <http://www.cnn.com/2014/06/09/us/ed-obannon-ncaa-lawsuit/> (discussing *O’Bannon*).

21. Tim Dahlberg, *Trial That Could Reshape College Athletics Begins*, U-T SAN DIEGO (Jun. 8, 2014), <http://www.utsandiego.com/news/2014/jun/08/trial-that-could-reshape-college-athletics-begins/> (maintaining that the NCAA has refused to budge from its amateurism model).

22. See Editorial Board, *The Myth of the ‘Student-Athlete’ Is Laid to Rest*, N.Y. TIMES, Aug. 14, 2014, at A22, available at <http://www.nytimes.com/2014/08/14/opinion/the-obannon-ruling-student-athlete-is-history.html> (suggesting that the NCAA coined the term “student-athlete” to bolster its claim that players are not entitled to benefits). Athletes who play non-revenue sports prioritize their studies more than their revenue-sports counterparts. See Gary Cutting, *The Myth of the ‘Student Athlete’*, N.Y. TIMES (March 15, 2012), http://opinionator.blogs.nytimes.com/2012/03/15/the-myth-of-the-student-athlete/?_php=true&_type=blogs&_r=0.

23. See Cutting, *supra* note 22.

24. *Id.*

25. Kevin Trahan, *Forecasting the Future of College Sports, If O’Bannon Beats the NCAA*, SB NATION (May 14, 2014), <http://www.sbnation.com/college-football/2014/5/14/5710652/obannon-trial-ncaa-future-changes> (asserting that the *O’Bannon* case likely will upend the NCAA’s amateurism policies).

26. *Who We Are*, NCAA, <http://www.ncaa.org/about/who-we-are> (last visited Oct. 4, 2014).

27. *About*, NCAA, <http://www.ncaa.org/about> (last visited Sept. 6, 2014).

28. *Core Purpose and Values*, NCAA, <http://www.ncaa.org/about/ncaa-core-purpose-and-values> (last visited Sept. 6, 2014).

29. See *NCAA Student-Athlete Participation Hits 450,000*, NCAA, <http://www.ncaa.org/about/resources/media-center/news/ncaa-student-athlete-participation-hits-450000> (last visited Sept. 6, 2014).

30. *What We Do*, NCAA, <http://www.ncaa.org/about/what-we-do> (last visited Oct. 4, 2014).

Notwithstanding the NCAA's proud origins, it often forgets its roots. At the NCAA's founding, the sport of football faced extinction.³¹ During the 1905 season, 18 college and amateur players died and more than 150 suffered injuries, leading many observers to believe that football was too dangerous to play.³² In response to public outcry, thirteen football representatives gathered at the White House, where President Theodore Roosevelt held two meetings, and attendees agreed on reforms.³³ Shortly thereafter, the NCAA's predecessor was born.³⁴

I. THE NCAA AND THE BIRTH OF THE TERM "STUDENT-ATHLETE"

More than 50 years ago, the NCAA created the term "student-athlete" both to preserve the principle of amateurism and reinforce the notion that college athletes are "students first, athletes second."³⁵ More often than not, this ideal is unrealized.³⁶ Athletics programs frequently require student-athletes to structure their class schedules around sports obligations and, in total, college football players spend more time on football than most Americans spend at their nine-to-five jobs.³⁷ In truth, the NCAA coined the term "student-athlete" primarily to shield itself from workers' compensation claims and other liabilities.³⁸

Despite the NCAA's goal "to protect young people from the dangerous and exploitative athletic practices of the time," in a recent court filing, the NCAA claimed no responsibility to protect student-athletes from physical harm.³⁹ This assertion raises an important question—how did the NCAA transform from an

31. See Katie Zezima, *How Teddy Roosevelt Helped Save Football*, WASH. POST (May 29, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/05/29/teddy-roosevelt-helped-save-football-with-a-white-house-meeting-in-1905/>.

32. *Id.*

33. *Id.*

34. *Id.* Theodore Roosevelt, along with Harvard football coach William T. Reid, Jr., and U.S. Naval Academy coach Paul Dashiell, formed a committee after the 1905 season to change football's rules. *Id.* The committee decided to allow forward passing, which spread players across the field and reduced dangerous scrums. *Id.*

35. *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Oct. 4, 2014). *But see* Dan Treadway, *Why Does the NCAA Exist?*, HUFFINGTON POST (Aug. 6, 2013), http://www.huffingtonpost.com/daniel-treadway/johnny-manziel-ncaa-eligibility_b_3020985.html (contending that, because the NCAA's founders believed a student-athlete could play "summer ball" to pay for college, amateurism was not a core founding principle).

36. See Christopher L. Gasper, *Time for NCAA to Pay Up and Let Athletes Benefit*, BOS. GLOBE (Apr. 02, 2014), <http://www.bostonglobe.com/sports/2014/04/01/payment-due-for-collegiate-athletes/aFDXYwUUuwKGgDak1qyc8N/story.html> ("[I]f you're playing football or men's or women's college basketball at the highest level, you are an athlete-employee-entertainer-student, in that order.").

37. *Id.*

38. See Jason Belzer, *Leveling the Playing Field: Student Athletes or Employee Athletes?*, FORBES (Sept. 9, 2013), <http://www.forbes.com/sites/jasonbelzer/2013/09/09/leveling-the-playing-field-student-athletes-or-employee-athletes/>.

39. See Nathan Fenno, *In Court Filing, NCAA Denies Legal Duty to Protect Athletes*, WASH. TIMES, Dec. 15, 2013, at C02 ("The NCAA denies that it has a legal duty to protect student-athletes.") (quoting NCAA filing in *Sheely v. NCAA*, No. 380-569V (Md. Cir. Ct. 2013)).

organization that prioritized player safety into a multi-million dollar enterprise whose sole concern seemingly is to ensure that student-athletes do not receive compensation for their skills?⁴⁰

According to the NCAA, Division I and Division II schools “provide more than \$2 billion in athletics scholarships annually to more than 126,000 student-athletes.”⁴¹ Although the NCAA permits schools to provide multi-year athletic scholarships, most scholarships extend only one academic year.⁴² Moreover, although athletic scholarships can cover tuition and fees, room and board, and required course-books, many student-athletes’ scholarships’ compensate only a portion of these costs.⁴³ Contrary to popular belief, most full-scholarship athletes do not receive a “free ride.”⁴⁴ The average shortfall, or out-of-pocket cost, for each Football Bowl Series “full scholarship” athlete in the 2011–12 academic year was \$3,285.⁴⁵ A disproportionate number of student-athletes’ families are financially disadvantaged, so athletes often struggle to cover the cost.⁴⁶

The NCAA’s financial aid programs provide scholarships to thousands of student-athletes,⁴⁷ but what about the thousands of others? What about athletes who lose their scholarships before they earn a college degree? The NCAA itself states that, in most cases, “coaches decide who receives a scholarship, what it will cover and whether it will be renewed.”⁴⁸ Essentially, an athlete who fails to satisfy his coach can lose his scholarship, regardless of the NCAA’s stance.⁴⁹

Undoubtedly, athletes who attend larger, more successful universities receive benefits not afforded to athletes at smaller schools.⁵⁰ In addition to tuition

40. See Treadway, *supra* note 35 (claiming that the NCAA operates under an outdated organizational model).

41. *How Do Athletic Scholarships Work?*, NCAA, <http://www.ncaa.org/sites/default/files/NCAA%20Athletics%20BScholarships.pdf> (last visited Oct. 4, 2014).

42. *Id.*

43. See *id.*

44. See Zach Gorwitz, *Money Madness: Why and How NCAA Athletes Should Be Paid*, DUKE POL. REV. (Oct. 1, 2013), <http://dukepoliticalreview.org/money-madness-why-and-how-ncaa-athletes-should-be-paid/> (noting that a so-called free ride “does not stock a refrigerator or buy toothpaste”).

45. *Id.*

46. *Id.* (“Many African-American student-athletes come from very financially disadvantaged backgrounds and are often much poorer than the general African-American college population.”) (emphasis removed) (quoting Richard Salgado, *Educating Someone Who Can’t or Doesn’t Want to Be Educated: The Shifting Fiduciary Duty Continuum of Big-Time College Sports*, 3 WILLAMETTE SPORTS L.J. 27, 36 (2006)).

47. See NCAA, *supra* note 41.

48. *Id.*

49. See Sadhbh Walshe, *The NCAA’s War on Student-Athletes Ends Now: Time to Unionize, Eat and Win*, THE GUARDIAN (Apr. 25, 2014, 7:25 AM), <http://www.theguardian.com/commentisfree/2014/apr/25/ncaa-student-athletes-unionize-northwestern-football-vote>. The NCAA admits that college coaches primarily determine the recipients, amounts, and lengths of athletic scholarships. *Id.*

50. See Jeffrey Dorfman, *Pay College Athletes? They’re Already Paid up to \$125,000 per Year*, FORBES (Aug. 29, 2013, 8:00 AM), <http://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/>.

scholarships, big-school athletes receive tutoring, academic counseling, life-skill training, and nutritional advice.⁵¹ They receive free coaching, strength and fitness training, and support from athletic trainers and physical therapists.⁵² These perks certainly constitute a form of “pay,” but what about student-athletes who do not attend major-conference schools? What about athletes who play non-revenue sports and do not receive tuition money or living expenses? Unfortunately, the NCAA has refused to provide benefits even to this group.⁵³

Recently, the NCAA approved unlimited meals and snacks for all Division I student-athletes, in “an effort to meet [their] nutritional needs”⁵⁴ Previously, scholarship student-athletes had received only three meals a day, or a food stipend.⁵⁵ Given the countless hours student-athletes devote to workouts alone, the NCAA’s policy change seems long overdue. Coaches rarely permit student-athletes to travel home for holidays,⁵⁶ and often force athletes to spend their summers at school.⁵⁷ Grueling summer two-a-day workouts often do not leave enough time for summer courses, rendering the athletes ineligible to collect scholarship money from during this period.⁵⁸ Despite the steady increase in athletics program demands on athletes, benefits to these athletes have shockingly remained unchanged since the NCAA’s birth.⁵⁹

Perhaps most troublingly, despite the NCAA’s nearly \$1 billion in annual revenue,⁶⁰ players too often foot the bill for injury-related medical expenses.⁶¹ Under

51. *See id.*

52. *See id.*

53. *See* discussion *infra* notes 59–63.

54. Michelle Brutlag Hosick, *Council Approves Meals, Other Student-Athlete Well-Being Rules*, NCAA (Apr. 15, 2014, 4:25 PM), <http://www.ncaa.org/about/resources/media-center/news/council-approves-meals-other-student-athlete-well-being-rules>; *see also* Tyler Conway, *NCAA Approves Unlimited Meals and Snacks for Division I Student-Athletes*, BLEACHER REP. (Apr. 15, 2014), <http://bleacherreport.com/articles/2030620-ncaa-approves-unlimited-meals-and-snacks-for-division-i-student-athletes> (questioning the timing of the NCAA announcement, which occurred two weeks after University of Connecticut basketball guard and Final Four Most Outstanding Player Shabazz Napier spoke about “going to bed hungry” during the season).

55. *See* Hosick, *supra* note 54.

56. *See* Chris Emma, *NCAA Change Can’t Come soon Enough*, CBS CHI. (July 29, 2014, 12:47 PM), <http://chicago.cbslocal.com/2014/07/29/emma-ncaa-change-cant-come-soon-enough/> (quoting University of Maryland head football coach Randy Edsall, who stated, “you’re not home for Thanksgiving, you’re not home for the summer anymore”).

57. *See* Dana O’Neil, *The View from the Inside*, ESPN (July 13, 2011), http://espn.go.com/college-sports/story/_/id/6762550/inside-look-full-scholarship-athlete-versus-typical-student (explaining that “football practice starts in earnest in late July/early August”).

58. *See id.*; e.g., UCLA INTERCOLLEGIATE ATHLETIC DEP’T, UNIV. OF CAL. L.A., STUDENT-ATHLETE HANDBOOK & DAY PLANNER 25 (2014) (“Summer school athletics aid is a privilege,” not a right).

59. *See* Emma, *supra* note 56 (questioning why NCAA athletic scholarships still cover only “room, board, books, tuition and fees,” given the drastic changes in college football players’ schedules since the 1970s).

60. Mark Alesia, *NCAA Approaching \$1 Billion per Year amid Challenges by Players*, INDYSTAR, Mar. 28, 2014, at A1, *available at* <http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-a-mid-challenges-players/6973767/>.

the NCAA's current rules, injured players can lose their scholarships, often must obtain their own insurance, and generally bear financial responsibility for on-field injury-related healthcare.⁶² The NCAA has demonstrated that, regardless of the billion-dollar revenues student-athletes generate, it will never voluntarily provide the basic protections athletes deserve.⁶³ This attitude has motivated several former and current student-athletes to file suit against the NCAA.⁶⁴

II. LITIGATION

A. *The Nemeth, State Fund, and Rensing Decisions*

Student-athletes' lawsuits against the NCAA usually stem from serious injuries.⁶⁵ In April 1950, for example, University of Denver football player Ernest Nemeth injured his back during team practice.⁶⁶ At the time, the University paid him \$50 per month for "certain work in and about the tennis court on its campus."⁶⁷ In *University of Denver v. Nemeth*, the Colorado Supreme Court concluded that, when Nemeth sustained the injury, he was "in the employ of the University, [and] was upon his employer's premises, occupying himself consistently with his contract of hire in a manner pertaining to or incidental to his employment."⁶⁸ The Court found a "sufficient relationship to the employment in the activity of Nemeth at the time of his injury to justify entitlement to compensation."⁶⁹ Because Nemeth's injuries "arose out of and in the course of his employment,"⁷⁰ he was an "employee" under the Colorado workers' compensation statute, and the Court ordered the University to compensate Nemeth for his injuries.⁷¹

61. See Ben Strauss, *A Fight to Keep College Athletes from the Pain of Injury Costs*, N.Y. TIMES, Apr. 24, 2014, at B10, available at <http://www.nytimes.com/2014/04/25/sports/a-fight-to-keep-college-athletes-from-the-pain-of-injury-costs.html> (lambasting universities that refuse to pay student-athletes' medical bills and that withdraw scholarships from injured athletes).

62. See *id.*

63. See *id.* ("N.C.A.A. lawyers wrote in a recent court filing that the organization itself denied having 'a legal duty to protect student-athletes.'" (quoting NCAA filing in *Sheely v. NCAA*, No. 380-569V (Md. Cir. Ct. 2013)); Fenno, *supra* note 39 (arguing that the NCAA believes "protection of college athletes isn't [its] legal responsibility").

64. See Fenno, *supra* note 39 ("Since September [2013], former college football players have filed 10 class-action lawsuits against the NCAA" over its "handling of concussions").

65. See Jon Solomon, *Who's Suing the NCAA? AL.com Database of Concussion Lawsuits by Ex-Players*, AL.COM (Feb. 6, 2014, 3:59 PM) http://www.al.com/sports/index.ssf/2014/02/whos_suing_the_ncaa_alcom_dat_a.html (noting that the NCAA currently faces "at least 65 . . . pending lawsuits" filed by former players who suffered concussions").

66. See *Univ. of Denver v. Nemeth*, 257 P.2d 423, 424 (Colo. 1953) (en banc).

67. *Id.*

68. *Id.* at 429.

69. *Id.* at 430.

70. *Id.*

71. *Id.*

Four years later, in *State Compensation Insurance Fund v. Industrial Commission*,⁷² the Colorado Supreme Court again considered whether scholarship football players have a right to workers' compensation.⁷³ Ray Herbert Dennison, a student-athlete at Fort Lewis A & M College, suffered a head injury during a game's opening play and died two days later.⁷⁴ Dennison was a scholarship athlete and, like Nemeth, worked at the College in a non-athletic role.⁷⁵ Unlike Nemeth, however, the College did not condition Dennison's job on his football-team participation.⁷⁶ The Court distinguished *Nemeth* on this basis; it explained that Nemeth's employment "depended wholly on his playing football, and it is clear that if he failed to perform as a football player he would lose the job provided for him by the University."⁷⁷

The *State Fund* Court emphasized that, absent a contractual obligation to play football, no employer-employee relationship exists, and a player has no right to workers' compensation.⁷⁸ Although the Court did not overturn *Nemeth*, it denied Dennison's claim, and carved a gaping hole in *Nemeth*'s holding.⁷⁹

In *Nemeth* and *State Fund*'s wake, courts have generally found that student-athletes do not qualify as "employees" under workers' compensation statutes "unless they are also employed in a university job in addition to receiving scholarship benefits."⁸⁰ In *Rensing v. Indiana State University Board of Trustees*, the Supreme Court of Indiana held that no employer-employee relationship existed between the student and the University notwithstanding the student's football scholarship.⁸¹ Rensing, an Indiana State University varsity football player, suffered a serious injury during the team's spring football practice that rendered him a

72. 314 P.2d 289 (Colo. 1957).

73. *Id.* at 289–90.

74. *Id.* at 289.

75. *Id.*; *Univ. of Denver v. Nemeth*, 257 P.2d 423, 428 (Colo. 1953) (en banc) ("[Nemeth] was receiving \$50 per month from the University for certain work in and about the tennis court on its campus.").

76. *Compare State Comp. Ins. Fund*, 314 P.2d at 290, with *Nemeth*, 257 P.2d at 428 ("Nemeth, by not participating in football not only would endanger his position . . . he would lose his job.").

77. *State Comp. Ins. Fund*, 314 P.2d at 290.

78. *See id.* at 289 ("Since the evidence does not disclose any contractual obligation to play football, then the employer-employee relationship does not exist and there is no contract which would support a claim for compensation under the Act.").

79. *Id.* at 290. *State Fund* limited *Nemeth* to cases where (1) a university employs a student-athlete in a non-athletic capacity, and (2) such employment depends on the student-athlete's continued athletic participation. *Id.* at 289–90. The Court denied that receipt of an athletic scholarship can alone establish an employer-employee relationship. *Id.*

80. *See, e.g., Rensing v. Ind. State Univ. Bd. of Tr.*, 444 N.E.2d 1170, 1174 (Ind. 1983) (providing that student-athletes are "not considered professional athletes, musicians, or artists employed by the University for their skills"); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 227 (Mich. Ct. App. 1983) (denying a student-athlete's workers-compensation claim because he "did not have any part-time job with defendant's athletic department and was given neither an hourly wage nor a monthly fixed fee but was instead provided with a scholarship for the school year").

81. *Rensing*, 444 N.E.2d at 1173.

quadriplegic.⁸² Nevertheless, because Rensing's scholarship did not qualify as "pay" under the Workmen's Compensation Act, the Indiana Supreme Court ruled that an essential element of the employer-employee relationship did not exist.⁸³ The Court cited evidence that Rensing had enrolled at the University because he sought advanced educational opportunities, not because he expected compensation for his athletic abilities.⁸⁴ Rensing therefore was not entitled to workmen's compensation benefits.⁸⁵

The aforementioned landmark decisions barely scratched the surface of issues that have arisen in recent cases in which college athletes have endeavored to establish their employee rights. In the 60 years since *Nemeth*, the NCAA's record remains nearly undefeated in such lawsuits.⁸⁶ The tide has begun to turn, however, in student-athletes' favor.⁸⁷ Today, any rule that favors the NCAA or its member institutions typically attracts public backlash, which has forced the NCAA to loosen its hold on more archaic rules that have stymied athletes in the past.⁸⁸ If the *Rensing* and *State Fund* courts had ruled in favor of student-athletes and had set a precedent for player-friendly rulings, the NCAA might not be under siege today.

Instead, the fatalities continue. In 2011, Frostburg State University football player Derek Sheely died after he sustained a head injury during a summer practice.⁸⁹ Sheely's parents filed a wrongful death lawsuit against the NCAA, the head coach, assistant coach, assistant athletic trainer, and several companies that

82. *Id.* at 1170.

83. *Id.* at 1174.

84. *Id.* at 1175.

85. *Id.* (vacating the intermediate appellate court's judgment in favor of Rensing and affirming the Industrial Board's determination).

86. Lawrence White, *Will College Athletes Unionize?*, ASS'N OF GOVERNING BOARDS OF U. & COLLEGES, <http://agb.org/trusteeship/2014/3/will-college-athletes-unionize>; see, e.g., *Kemether v. Pennsylvania Interscholastic Athletics Ass'n*, 15 F. Supp. 2d 740, 759 (E.D. Pa. 1998) ("No federal court has defied common sense by holding student-athletes to be Title VII employees of their schools or an athletic association."); *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1091-92 (7th Cir. 1992) ("We fail to understand how the dissent can allege that NCAA colleges purchase labor through grant-in aid athletic scholarships offered to college payers when the value of the scholarship is based on the school's tuition and room and board, not by the supply and demand for players.").

87. See, e.g., Warren K. Zola, *Personnel Foul*, BOS. GLOBE (May 19, 2013), <http://www.bostonglobe.com/magazine/2013/05/18/ware-and-manziel-reasons-why-ncaa-should-pay-athletes/Cln9k7REgZs2ei4RPeCqul/story.html> ("You're an amateur because you aren't paid. You're not paid because you're an amateur. That's the essence of the [NCAA's] argument, and it's looking increasingly hypocritical."); Stefanie Loh, *NCAA Relenting a Little Toward Student-Athletes*, SAN DIEGO UNION-TRIBUNE, Apr. 20, 2014, at D2, available at <http://www.utsandiego.com/news/2014/apr/20/college-football-ncaa-student-athlete-rights/> ("Public opinion has turned in favor of student-athlete rights, and the NCAA knows it.").

88. Loh, *supra* note 87; see, e.g., *NCAA Committee Approves Expanded Meal Allowances for Athletes*, NCAA (Apr. 15, 2014, 9:32 PM), <http://www.ncaa.com/news/ncaa/article/2014-04-15/ncaa-committee-approves-expanded-meal-allowances-athletes> (removing limits on student-athletes' meal allowances).

89. See Paul Bisceglia, *Can Better Sports Coverage Reduce Football Injuries?*, PAC. STANDARD (June 3, 2014, 12:18 PM), <http://www.psmag.com/navigation/health-and-behavior/can-sports-news-reduce-football-injuries-82543/>.

manufacture and distribute helmets.⁹⁰ Although Sheely bled from his forehead during four consecutive practice sessions and had suffered a concussion the previous season, the team permitted him to return to the full-force collision drill where he sustained the initial injury.⁹¹ Notably, this event followed the NCAA's 2010 rulebook changes, which required each member-school to create a concussion policy.⁹² Notwithstanding this policy change, the NCAA did little to enforce the rule; "no school has been investigated or punished for violating [it]."⁹³

In another recent case, a class of former college football players alleged that the NCAA negligently and recklessly endangered them when it "failed to establish known protocols to prevent, mitigate, monitor, diagnose and treat brain injuries."⁹⁴ A survey of athletic trainers bolstered the plaintiffs' claim—53% reported "pressure from football coaches to return a student to play faster than they thought was in his best interest medically."⁹⁵ The suit sought various remedies, including court-supervised, NCAA-funded concussion monitoring programs.⁹⁶ Are such drastic measures really necessary to resolve the NCAA's concussion problem?

B. *The Northwestern Decision*

In January 2014, former college athletes established the College Athletes Players Association ("CAPA") to advocate for players' rights.⁹⁷ CAPA represents more than 17,000 Division I athletes, aims to secure their health, safety, and welfare, and seeks sports-related medical-expense coverage for current and former players.⁹⁸ Recently,

90. Maryclaire Dale, *NCAA Among Defendants in Concussion-Related Lawsuit*, USA TODAY (Aug. 27, 2013, 11:36 AM), <http://www.usatoday.com/story/sports/ncaaf/2013/08/27/frostburg-state-derek-sheely-ncaa-concussion-lawsuit/2706347/>.

91. *See id.*

92. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA 2011–12 DIVISION I MANUAL, art. 3.2.4.17, at 11–12 (2012), available at http://www.ncaapublications.com/productdownloads/D1_2012_01.pdf; see Mike Singer, *NCAA 'Denies Legal Duty' to Protect Student-Athletes, Court Filing Says*, CBS SPORTS (Dec. 19, 2013, 10:03 AM), <http://www.cbssports.com/general/eye-on-sports/24380786/ncaa-denies-legal-duty-to-protect-student-athletes-court-filing-says>.

93. 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-egre/?page=all>.

94. Class Action Complaint at 6–7, *Walker v. Nat'l College Athletic Ass'n*, No. 13-cv-00293 (E.D. Tenn. Sept. 3, 2013), 2013 WL 4734619.

95. 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>.

96. Class Action Complaint at 27, *Walker*, No. 13-cv-00293.

97. *Who We Are*, COLL. ATHLETES PLAYERS ASS'N (CAPA), <http://www.collegeathletespa.org/about> (last visited Oct. 4, 2014).

98. *See id.*; Tom Farrey, *Kain Coulter Starts Union Movement*, ESPN (Jan. 28, 2014, 9:08 AM), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union ("[CAPA] has pressed for better concussion and other medical protections, and for scholarships to cover the full cost of attendance.").

in an effort to create college sports' first athlete-specific union, CAPA petitioned the National Labor Relations Board ("NLRB") and asserted Northwestern University football players' labor rights.⁹⁹

To succeed, CAPA first had to show that the National Labor Relations Act ("NLRA"),¹⁰⁰ which covers private universities' private employees and guarantees them the right to form unions, applied to the student-athletes.¹⁰¹ The NLRB's determination depended on whether the players qualified as "employees" under the NLRA,¹⁰² which incorporates the term's common law definition.¹⁰³ Under the common law definition, an employee is "a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."¹⁰⁴

The players argued that they qualified as employees because they practiced up to 60 hours a week during a month-long training camp before the college semester began.¹⁰⁵ During the season, players prepared for games up to 50 hours a week, which left minimal time for academics.¹⁰⁶

III. STUDENT-ATHLETE UNIONIZATION

On March 26, 2014, Peter Sung Ohr, Regional Director of the NLRB's Chicago office, ruled in favor of the Northwestern University players, granted them the right to unionize, and set a precedent for student-athlete unionization and private college and universities across the nation.¹⁰⁷ Ohr reasoned that "[1] the letter of intent and scholarship offer is the employment contract, [2] the hours of practice and play that generates millions of dollars of revenue for the school are the employer's benefits, [3] the coach's rules are the control, and [4] the scholarship itself is the pay."¹⁰⁸

99. See Northwestern Univ., No. 13-RC-121359, 2014-15 NLRB Dec. (CCH) ¶ 15,781 (Mar. 26, 2014); Eben Novy-Williams & Scott Soshnick, *Northwestern University Football Players Seek to Form Union*, BLOOMBERG (Jan. 28, 2014), <http://www.bloomberg.com/news/2014-01-28/northwestern-university-football-players-seeking-to-form-union.html>.

100. 29 U.S.C. §§ 151-169 (2006).

101. See Travis Waldron, *Making Sense of the Labor Ruling Allowing Northwestern Football Players to Unionize*, THINKPROGRESS (Mar. 27, 2014), <http://thinkprogress.org/sports/2014/03/27/3419553/making-sense-of-the-labor-ruling-allowing-northwestern-football-players-to-unionize/> ("The National Labor Relations Act just covers private employers and private employees of those employers. If athletes at, say, Michigan State or the University of Michigan wanted to do the same thing they would have to proceed under state law.").

102. *Northwestern*, No. 13-RC-121359 at 2.

103. *Id.* at 13 (citing Nat'l Labor Relations Bd. v. Town & Country Electric, 516 U.S. 85, 94 (1995)).

104. *Id.* (citing Brown Univ., 342 N.L.R.B. 483, 490 n. 27 (2004)). "An 'employee' is a person who [1] is under contract of hire to [2] perform service for another, [3] subject to the employer's control, and [4] in return for payment." Patrick Vint, *Explaining What the Northwestern College Football Union Decision Means*, SB NATION (Mar. 27, 2014), <http://www.sbnation.com/college-football/2014/3/27/5551014/college-football-players-union-northwestern-nlrb>.

105. *Northwestern*, No. 13-RC-121359 at 6.

106. *Id.*

107. *Id.* at 2.

108. Vint, *supra* note 104 (interpreting *Northwestern*, No. 13-RC-121359 at 14-19).

Following Ohr's ruling, Northwestern players immediately instituted unionization procedures.¹⁰⁹ The University had one week to submit to the NLRB a list of eligible scholarship-athletes' full names and addresses.¹¹⁰ These athletes then held a unionization vote.¹¹¹ The votes remain uncounted, however, as Northwestern appealed Ohr's decision to the full NLRB and secured a stay pending review.¹¹² If the NLRB upholds Ohr's ruling, Northwestern football players will qualify as employees, regardless of the unionization vote.¹¹³

What would unionization mean for college athletes? If student-athletes qualified as employees, they would become eligible for workers' compensation for their injuries, unless a state enacts legislation that exempts them from coverage.¹¹⁴ Would student-athletes then seek vacation time, base salaries, or better accommodations? The possibilities proceed to the near-absurd.

A. *Potential Issues Student-Athlete Unions Pose*

While college-athlete unions may sound appealing, particularly as a mechanism to provide better health care for student-athletes, that prospect raises several issues, especially with respect to gender equality. Under Title IX,¹¹⁵ schools must provide men and women equal opportunities to participate in sports.¹¹⁶ Thus, if schools pay only male athletes, their female counterparts can surely claim Title IX violations.¹¹⁷ Benefits such as safer football helmets, however, would not fall under the Title IX requirement.¹¹⁸

109. *Id.*

110. See Marc Edelman, *NLRB Ruling: Northwestern Football Players Are Employees and May Unionize*, FORBES (Mar. 26, 2014), http://www.forbes.com/sites/marcedelman/2014/03/26/nlr_b_ruling_northwestern_football_players_are_employee/.

111. See Vint, *supra* note 104 (The athletes "are nearly certain to get the number of votes needed to establish the union").

112. See Ben Strauss, *Waiting Game Follows Union Vote by Northwestern Players*, N.Y. TIMES, Apr. 26, 2014, at D4, available at http://www.nytimes.com/2014/04/26/sports/northwestern-football-players-cast-votes-on-union.html?_r=0; Daniel Uthman, *NLRB Will Hear Northwestern Appeal of Employee Decision*, USA TODAY (Apr. 24, 2014, 5:59 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/04/24/nlr-b-northwestern-football-union-labor-decision-appeal/8113143/>.

113. *See id.*

114. See Ivan Maisel, *Legal Issues Could Arise from Paying Student-Athletes*, ESPN (July 15, 2011), http://espn.go.com/college-sports/story/_/id/6768571/legal-issues-arise-paying-student-athletes.

115. 20 U.S.C. §§ 1681–1688 (2006).

116. *Title IX Frequently Asked Questions*, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> (last visited Oct. 4, 2014) (explaining that Title IX applies to all public and private educational institutions that receive federal funds).

117. See Joe Nocera, *Here's How to Pay Up Now*, N.Y. TIMES MAG., Jan. 1, 2012, at 35, available at <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all>.

118. See Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974) (codified at 20 U.S.C. §§ 1681–1688 (2006)) (requiring gender equality in collegiate athletics "considering the nature of particular sports"); Kevin Trahan, *Clarity Sought as Northwestern Football's Labor Effort Evolves*, USA TODAY (Mar. 31, 2014), <http://www.usatoday.com/story/sports/ncaaf/2014/03/31/college-football-nca-cap-nlr-b-chicago-northwestern-labor-union/7077455/>.

What about athletes who attend public universities? Because the NLRA governs only private employers and employees,¹¹⁹ public-university student-athletes cannot rely on *Northwestern*.¹²⁰ Instead, their efforts to unionize must proceed under state laws.¹²¹ This may pose a challenge, as the vast majority of Division I universities are public,¹²² and almost half the states limit, or outright deny public university employees the right to unionize.¹²³

Student-athlete unions also raise tax questions. Once student-athletes unionize, will they pay state and federal taxes? Many critics have contended that, if players qualify as employees, tax laws apply to their income.¹²⁴ The IRS, not the NLRB, will resolve this issue.¹²⁵

Although the college-athletics system certainly cries for change, student-athlete unions might not represent an ideal solution. Northwestern University Athletic Director Jim Phillips, for one, does not support his football players' efforts to unionize, but concedes that "college athletics . . . need[s] to be fixed."¹²⁶ Following the NLRB's ruling, Northwestern's Vice President for University Relations, Alan Cabbage, asserted that unionization and collective bargaining did not constitute appropriate methods to address student-athletes' concerns.¹²⁷ The NCAA released a

119. 29 U.S.C. § 152(2) (2006) ("The term 'employer' . . . shall not include . . . any State or political subdivision thereof. . . .").

120. See Mason Levinson, *Northwestern Football Ruling May Change U.S. College Sports*, BLOOMBERG (Mar. 27, 2014), <http://www.bloomberg.com/news/2014-03-26/northwestern-players-can-become-first-college-union-nlr-rules.html> (explaining that the ruling "only affects athletes at private schools and not at public universities").

121. Jacqueline Rabe Thomas, *UConn's Napier: 'We Do Have Hungry Nights'*, CT MIRROR (Apr. 7, 2014), <http://ctmirror.org/uconn-napier-on-altheletes-unionizing/> ("The NLRB ruling does not empower athletes at public universities like UConn to unionize, as public schools rely on state labor laws for such issues.").

122. Steven Greenhouse, *Union Effort at Northwestern May Not Mean Much for Public Colleges*, N.Y. TIMES, Apr. 27, 2014, at SP2, available at <http://www.nytimes.com/2014/04/27/sports/union-effort-at-northwestern-may-not-mean-much-for-public-colleges.html>. 109 of 126 universities in the Football Bowl subdivision are public. *Id.*

123. Jeffrey Brown, *Labor Board Rules Northwestern Football Players Are Entitled to Unionize as School Employees*, PBS.ORG (Mar. 26, 2014, 6:41 PM), <http://www.pbs.org/newshour/bb/labor-board-rules-northwestern-football-players-entitled-unionize-school-employees/>; see, e.g., TEX. GOV. CODE ANN. § 617.002 (West 2014) ("An official of the state or of a political subdivision of the state may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees."); VA. CODE ANN. § 40.1-57.2 (West 2014) ("No state, county, municipal, or like governmental officer, agent or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers . . .").

124. See, e.g., Darren Rovell, *Players Could Get Big Tax Bill*, ESPN (Mar. 27, 2014), http://espn.go.com/college-football/story/_/id/10683398/tax-implications-create-hurdle-players-union?src=mobile (speculating that the IRS may interpret scholarships as taxable compensation for services).

125. See Trahan, *supra* note 118.

126. Brendan Maloy, *Northwestern AD Jim Phillips: College Athletics 'Not in the Right Place,' but Unions Not the Answer*, SPORTS ILLUSTRATED WIRE (May 13, 2014), <http://tracking.si.com/2014/05/13/northwestern-ad-college-athletics-not-in-the-right-place-but-unions-not-the-answer/>.

127. Kevin Trahan, *Northwestern Football Players Win First Round in Bid to Unionize*, USA TODAY (Mar. 27, 2014), <http://www.usatoday.com/story/sports/ncaaf/2014/03/26/college-football-nlr-ruling-capa-northwestern-labor-union/6918719/>.

statement, which argued that the “attempt to turn student-athletes into employees undermines the purpose of college: an education.”¹²⁸

B. Proposed Rules and Regulations

The NCAA’s Division I board met in August to review proposed changes to its governance model.¹²⁹ The proposal aimed to “allow[] the division to be more nimble, streamlined and responsive to needs,” particularly student-athletes.¹³⁰ The proposed changes would create a Student-Athlete Advisory Committee, and afford student-athletes a greater voice in the NCAA’s decision-making process.¹³¹ Additionally, the changes would grant larger conferences, such as the Atlantic Coast Conference, Big 12, and Southeastern Conference, greater autonomy to define their own rules.¹³² Another conference, the Big Ten, recently expressed its desire to implement “a 21st century governance structure that preserves the collegiate model, while allowing each school to focus on improved student-athlete welfare.”¹³³

Thus far, NCAA member-schools generally support autonomy for the five major conferences in several areas: (1) financial aid, including full cost of attendance and scholarship guarantees, (2) insurance, including policies that protect future earnings, and (3) academic support, particularly for at-risk student athletes.¹³⁴

128. Donald Remy, *NCAA Responds to Union Proposal*, NCAA (Mar. 27, 2014), <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal>.

129. See Michelle Brutlag Hosick, *Division I Board Endorses Restructuring, Seeks Feedback from Schools*, NCAA (Apr. 24, 2014, 2:59 PM), <http://www.ncaa.org/about/resources/media-center/news/di-board-endorses-restructuring-seeks-feedback-schools>.

130. NAT’L COLLEGIATE ATHLETIC ASS’N, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 5 (2014), available at <http://www.ncaa.org/sites/default/files/DI%20Steering%20Committee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf>.

131. *Id.* at 18.

132. *Id.* at 31; see Ben Strauss, *Big Ten Joins Push to Retool N.C.A.A.*, N.Y. TIMES, June 25, 2014, at B16, available at http://www.nytimes.com/2014/06/25/sports/ncaafotball/big-ten-joins-pacific-12-in-pressing-ncaa-for-changes.html?_r=0.

133. Mike Carmin, *Big Ten Aligns with Pac-12 on NCAA Reform*, LAFAYETTE J. & COURIER (June 2, 2014, 10:36 AM), <http://www.jconline.com/story/mike-carmin/2014/06/02/big-ten-aligns-pac-12-on-ncaa-reform/9864123/> (“The Big Ten continues to strongly support full cost of attendance scholarships, reasonably on-going medical or insurance assistance to student-athletes, continued efforts to reduce the incidence of disabling injury, guaranteed scholarships to complete a bachelor’s degree . . . and counsel of agents and a meaningful role in governance for student-athletes.”).

134. Hosick *supra* note 129 (delineating these three points of consensus, plus a fourth point: “other support, such as travel for families, free tickets to athletics events, and expenses associated with practice and competition (such as parking)”).

IV. THE NEED TO MINIMIZE SPORTS-RELATED INJURIES

A. *Proposed Methods and Scientific Developments*

In 1988, the NCAA and the National Athletic Trainers' Association developed a system to compile trainers' injury reports.¹³⁵ Through 2004, trainers had filed 200,000 reports, which equates to roughly 12,500 athletic injuries per year.¹³⁶ Although these figures reveal widespread injuries of all types, many athletes' foremost medical concern is to avoid traumatic brain injury.¹³⁷ Thirty-four percent of football players have suffered at least one concussion, and thirty percent have suffered two or more.¹³⁸ Moreover, the University of Pittsburgh's Department of Neurological Surgery reported that "suffering a second blow to the head while recovering from an initial concussion can have catastrophic consequences . . . [and] has led to approximately 30–40 deaths over the past decade."¹³⁹ Other researchers have attributed 26 deaths to this "second impact syndrome."¹⁴⁰

In college athletes specifically, researchers have found that concussions cause learning disabilities and severe memory impairments.¹⁴¹ Though sports other than football, such as ice hockey and lacrosse, likewise involve body-to-body contact and collisions during play, football maintains the highest injury rate at 36 injuries per 1,000 male athletes.¹⁴²

135. "Play-By-Play" *Sport Specific Results and Recommendations 16-Year Review of NCAA Injury Surveillance System (ISS) Data*, NAT'L ATHLETIC TRAINERS' ASS'N, <http://www.nata.org/play-by-play>.

136. Jim Thomas, *Frequency of Injury Among College Athletes*, LIVESTRONG.COM (Feb. 4, 2014), <http://www.livestrong.com/article/513231-frequency-of-injury-among-college-athletes/> (noting that trainers file a report when an athlete misses a day or more of practice or competition).

137. See Paula Faris & Katie Hinman, *Football's Risk Factor: Brain Injuries Raise New Concerns for Young Athletes*, ABC NEWS (May 24, 2012), <http://abcnews.go.com/Health/footballs-risk-factor-brain-injuries-raise-concerns-young/story?id=16416737> (quoting several football players and parents' strong reactions to the news that Junior Seau, an NFL legend, may have committed suicide because he suffered from chronic traumatic encephalopathy).

138. *Concussion Patient Information*, AM. ASS'N OF NEUROLOGICAL SURGEONS, <http://www.aans.org/Patient%20Information/Conditions%20and%20Treatments/Concussion.aspx> (last visited Sept. 2, 2014).

139. *Sports-Related Concussions: Background and Signs*, U. PITT., <http://www.neurosurgery.pitt.edu/centers-excellence/brain-and-spine-injury/concussions> (last visited Oct. 4, 2014).

140. *26 Deaths Have Been Attributed to Second Impact Syndrome*, JUST GO PRODUCTS (Jan. 25, 2013), <http://justgoproducts.com/26-deaths-have-been-attributed-to-second-impact-syndrome/>.

141. Roy Lubit, *Postconcussive Syndrome*, MEDSCAPE, <http://emedicine.medscape.com/article/292326-overview> (last updated June 3, 2013) ("Traumatic brain injury can lead to deficits in 5 general areas: (1) short-term memory impairment, (2) slowed processing speed, (3) impaired executive function, (4) disrupted abilities of attention and concentration (which likely contributes to the deficits noted in the first 3 categories), and (5) emotional dysregulation.").

142. Randall Dick et al., *Descriptive Epidemiology of Collegiate Men's Football Injuries: National Collegiate Athletic Association Injury Surveillance System, 1988–1989 Through 2003–2004*, 42(2) J. ATHL. TRAIN. 221, 223 (2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1941296/?report=classic> (describing a 16-year study that covered about 19% of NCAA Division I, II, and III football teams).

Many observers agree that concussion mismanagement poses a greater problem than concussions themselves.¹⁴³ Physicians, athletic trainers, and coaches often misunderstand concussion symptoms, and fail to respond appropriately.¹⁴⁴ This problem extends not only to these groups, but also to players themselves.¹⁴⁵ Notwithstanding the athletic community's shared responsibility, many believe meaningful change will not occur until the NCAA updates its safety regulations.¹⁴⁶ Commentators have proposed several measures, including limits on physical contact in practices,¹⁴⁷ independent concussion experts to evaluate athletes during games,¹⁴⁸ and a uniform return-to-play protocol.¹⁴⁹

University of Arkansas researchers have developed a technology that could mitigate concussions' long-term health effects.¹⁵⁰ Their wireless health-monitoring system allows team physicians to monitor many players simultaneously.¹⁵¹ The system utilizes a network of sensors, woven or printed into a skullcap and worn under a helmet, to detect physiological signs of concussion.¹⁵² It transmits the data via a wireless network to a remote server or monitor, such as a computer or smartphone.¹⁵³

143. See, e.g., Robert C. Cantu, *Consequence of Ignorance and Arrogance for Mismanagement of Sports-Related Concussions: Short- and Long-Term Complications*, in CONCUSSIONS IN ATHLETICS: FROM BRAIN TO BEHAVIOR 23, 24 (Wayne J. Sebastianelli & Semyon M. Slobunov eds., 2014); *Diagnosing and Treating Sports-Related Concussion*, MAYO CLINIC, <http://www.mayoclinic.org/medical-professionals/clinical-updates/general-medical/diagnosing-treating-sports-related-concussion> (last visited Sept. 9, 2014) (“Concussions that are unrecognized or are mismanaged put athletes at considerable risk of potentially catastrophic sequelae from re-injury.”).

144. John J. Miller et al., *Implications for Concussion Assessments and Return-to-Play Standards in Intercollegiate Football*, J. SPORTS ADMIN. & SUPERVISION, Sept. 2011, at 91, available at <http://quod.lib.umich.edu/j/jsas/6776111.0003.116?view=text;rgn=main>.

145. *Id.* (noting that college football players often disregard concussion symptoms and “try to persuade medical staff that they feel fine” because they fail to appreciate potentially severe consequences).

146. See *Experts: NCAA Should Mull NFL Policy*, ESPN (Dec. 5, 2009, 3:54 PM), <http://sports.espn.go.com/nfl/news/story?id=4716262> (arguing that the NCAA should adopt the measures the NFL recently implemented, including stricter “return-to-play” policies when medical staff detect concussion symptoms).

147. Ken Belson, *Ivy League to Limit Full-Contact Football Practices*, N.Y. TIMES, July 20, 2011, at B17, available at http://www.nytimes.com/2011/07/20/sports/ncaafootball/college-football-to-protect-players-ivy-league-to-reduce-contact.html?_r=0 (reporting that the Ivy League recently limited the number of full-contact practices teams may hold).

148. Patrick Hruby, *Head Games: How the NCAA Is Failing the Concussion Test*, SPORTS ON EARTH (Jan. 16, 2013), <http://www.sportsonearth.com/article/40980196#!Pi1qd>.

149. See Ashley Dunkak, *Follow the Money—NFL more Worried About Uniform Violations than Concussion Protocol?*, CBS DETROIT (Jan. 13, 2014, 11:08 AM), <http://detroit.cbslocal.com/2014/01/13/follow-the-money-nfl-more-worried-about-uniform-violations-than-concussion-protocol/> (criticizing the NFL's failure to enforce its return-to-play protocol).

150. Matt McGowan, *New Sensor System Detects Early Signs of Concussion in Real Time*, U. ARK. NEWSWIRE (May 1, 2014), <http://newswire.uark.edu/articles/24226/new-sensor-system-detects-early-signs-of-concussion-in-real-time>.

151. *Id.*

152. *Id.*

153. *Id.*

In 2014, Kent State University football players began to use another promising technology, the “intelligent mouth guard.”¹⁵⁴ The device measures head impacts as they occur, and transmits data about head orientation, position, velocity, and acceleration.¹⁵⁵ Researchers hope the device will gather data that enables them to design a safer helmet.¹⁵⁶

B. *The NFL’s Role*

The NFL has acknowledged, albeit hesitantly, the need to address concussion risks.¹⁵⁷ On the heels of President Barack Obama’s Healthy Kids and Safe Sports Concussion Summit, the NFL committed \$25 million to promote youth sports safety.¹⁵⁸ The grant funded new, long-overdue programs to place more athletic trainers in high schools nationwide.¹⁵⁹

Over the years, the NFL and its teams have paid millions of dollars in settlement money to players who have sustained concussions and other brain injuries.¹⁶⁰ The NFL’s own study revealed that retired players suffer from dementia, Alzheimer’s, and other neurological diseases at a much higher rate than the general population.¹⁶¹ In August 2013, the NFL reached a \$765 million settlement to resolve approximately 5,000 former players’ claims that the league “deliberately ignored and actively concealed” information about “the pathological and debilitating effects of mild traumatic brain injuries . . . that have afflicted former professional football players.”¹⁶² The agreement created a \$675 million award fund to compensate players

154. Monica Robins, *Intelligent Mouthguard May Lead to Concussion-Proof Helmets*, WKYC.COM (May 15, 2014), <http://www.wkyc.com/story/news/health/concussions/2014/05/15/cleveland-clinic-intelligent-mouthguard/9088749/>.

155. *Id.*

156. *Id.*

157. See discussion *infra* notes 170–73.

158. See *Obama to Address Sports Safety; NFL to Donate \$25M to Cause*, NFL (May 29, 2014, 2:56 AM), <http://www.nfl.com/news/story/0ap2000000354205/article/obama-to-address-sports-safety-nfl-to-donate-25m-to-cause>; David Hudson, *President Obama Hosts the Healthy Kids and Safe Sports Concussion Summit*, WHITE HOUSE BLOG (May 29, 2014, 6:18 PM), <http://www.whitehouse.gov/blog/2014/05/29/president-obama-hosts-healthy-kids-and-safe-sports-concussion-summit>.

159. Michelle Vryhof, *An Update on the NFL’s Athletic Training Initiative*, NAT’L ATHLETIC TRAINERS’ ASS’N (June 18, 2014), <http://www.nata.org/nata-news-blog/update-nfls-athletic-training-initiative>.

160. See Alan Schwarz, *Case Will Test NFL Teams’ Liability in Dementia*, N.Y. TIMES, Apr. 6, 2010, at A1, available at <http://www.nytimes.com/2010/04/06/sports/football/06worker.html> (“About 700 former N.F.L. players are pursuing cases in California, according to state records, with most of them in line to receive routine lump-sum settlements of about \$100,000 to \$200,000.”).

161. Alan Schwarz, *Dementia Risk Seen in Players in N.F.L. Study*, N.Y. TIMES, Sept. 30, 2009, at A1, available at <http://www.nytimes.com/2009/09/30/sports/football/30dementia.html?pagewanted=all>; see also Juliet Macur, *For a Cowboys Star with Dementia, Time Is Running Out*, N.Y. TIMES, Jan. 27, 2014, at D1, available at http://www.nytimes.com/2014/01/27/sports/football/for-a-cowboys-star-with-dementia-time-is-running-out.html?_r=0 (indicating that retired NFL players suffer from Alzheimer’s disease and other memory-related diseases at a rate 19-times greater than the general population).

162. Plaintiffs’ Master Administrative Long-Form Complaint at 1, *In re Nat’l Football League Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2014) (No. 2:12-md-02323-AB); see Gary Mihoces,

with brain impairments.¹⁶³ Nevertheless, U.S. District Court Judge Anita B. Brody found that the sum did not suffice to compensate the plaintiffs' injuries, and she rejected the deal.¹⁶⁴ A revised agreement lifted the monetary cap.¹⁶⁵ Per the settlement, players may receive compensation for a 65-year maximum,¹⁶⁶ a crucial step in the right direction for the league and injured players. Despite this positive step, no legal settlement or monetary sum can eliminate football's intrinsic violence.¹⁶⁷

Recently, medical researchers found a clear connection between football and Chronic Traumatic Encephalopathy ("CTE"), a progressive, degenerative brain disease that stems from multiple concussions or cumulative contact.¹⁶⁸ Essentially, over time, tackling and blocking can cause long-term brain damage, even if a player never sustains a concussion.¹⁶⁹ In response to these revelations, the NFL implemented rule changes.¹⁷⁰ The new rules, which ban hits with the crown of the helmet and place independent neurological experts on sidelines during games,¹⁷¹ reduced NFL concussions by 13% from 2012 to 2013.¹⁷² The NFL did not stop there. To minimize the risk of long-term brain damage associated with cumulative hits,

Revised Settlement Reached in Concussion Suit vs. NFL, USA TODAY (June 25, 2014, 6:42 PM), <http://www.usatoday.com/story/sports/nfl/2014/06/25/concussion-settlement-no-monetary-cap-head-injuries-ex-players-anita-brody/11356645/>.

163. Louis Bien, *NFL, Former Players Agree to Revised Concussion Settlement*, SB NATION (June 25, 2014), <http://www.sbnation.com/nfl/2014/6/25/5842018/nfl-concussion-settlement-former-retired-players>.

164. See Michael O'Keefe, *NFL Agrees to Remove Cap on Concussion Damages in Proposed Settlement of Lawsuit Filed by Ex-Players*, N.Y. DAILY NEWS (June 25, 2014, 5:31 PM), <http://www.nydailynews.com/sports/football/nfl-agrees-remove-cap-concussion-damages-article-1.1843463>.

165. See Class Action Settlement Agreement as of June 25, 2014, *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2014) (No. 2:12-md-02323-AB), available at https://www.nflconcussionsettlement.com/Documents/Class_Action_Settlement_Agreement_with_Exhibits.pdf.

166. *Id.* at 37.

167. Paul M. Barrett, *NFL Accepts More Generous Concussion Settlement with Former Players*, BLOOMBERG BUSINESSWEEK (June 25, 2014), <http://www.businessweek.com/articles/2014-06-25/nfl-accepts-more-generous-concussion-settlement-with-former-players>.

168. Robert A. Stern et al., *Clinical Presentation of Chronic Traumatic Encephalopathy*, 81 NEUROLOGY 1122, 1122 (2013), available at <http://www.bu.edu/cte/files/2013/09/CTE-Neurology-2013-Stern-1122-9.pdf>.

169. See *id.*

170. See NAT'L FOOTBALL LEAGUE, OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE 68, r. 12, sec. 2, art. 8 (2013), available at <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2013%20-%20Rule%20Book.pdf>.

171. *Id.*; *NFL Head, Neck and Spine Committee's Protocols Regarding Diagnosis and Management of Concussion*, at 4, <http://static.nfl.com/static/content/public/photo/2013/10/01/0ap2000000254002.pdf> (last visited Oct. 1, 2014).

172. *NFL: 13 Percent Fewer Concussions*, ESPN, http://espn.go.com/nfl/story/_/id/10377147/nfl-says-13-percent-fewer-concussions-season (last updated Jan. 30, 2014).

the NFL prohibited live contact and forbid players to wear pads during offseason practices.¹⁷³

In response to an American Football Coaches Association recommendation, the NCAA also adjusted its rules.¹⁷⁴ The new rules punish players who hit “above the shoulders” or target opponents.¹⁷⁵ Although the NCAA’s rule changes combated concussion hits, they did not address cumulative offseason contact.¹⁷⁶ Compared to the NFL’s regular-season practice rules, the NCAA’s rules set an unjustifiably deferential standard; individual coaches, not the NCAA, prescribe permissible contact.¹⁷⁷

College players’ brains are less developed, and more injury prone, than their NFL counterparts’.¹⁷⁸ Because 35-times more athletes play NCAA football than NFL football,¹⁷⁹ the NCAA’s prospective head-injury liability forebodes bankruptcy. At the high school level, where players’ brains remain in formative stages through their teenage years, injury risks are greater still.¹⁸⁰ A recipe for disaster materializes when one factors in high-school athletes’ often less-than-stellar protective equipment.¹⁸¹

Given recent revelations as to the dangers of cumulative contact,¹⁸² the NCAA’s failure to implement stricter rules makes little sense. Although college athletes

173. NATIONAL FOOTBALL LEAGUE-NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT 139, art. 2, sec. 5 (Aug. 4, 2011), available at <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [hereinafter NFL COLLECTIVE BARGAINING AGREEMENT].

174. See Rod Gilmore, *College Football Should Follow NFL’s Lead on Contact in Practice*, ESPN (Apr. 30, 2013), http://espn.go.com/college-football/story/_/id/9224807/college-football-follow-nfl-lead-contact-practice.

175. *Id.*; NAT’L COLLEGIATE ATHLETIC ASS’N, 2014 NCAA FOOTBALL RULES AND INTERPRETATIONS 87, r. 9, sec. 1, art. 4 (2014), available at : <http://www.ncaapublications.com/productdownloads/FR14.pdf> [hereinafter NCAA FOOTBALL RULES].

176. See Gilmore, *supra* note 174; NCAA FOOTBALL RULES, *supra* note 175, at 87, 121–22.

177. Compare NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 173, at 143, art. 24, sec. 1(a) (“During the regular season, padded practices for all players shall be limited to a total of fourteen, eleven of which must be held during the first eleven weeks of the regular season, and three of which must be held during the remaining six weeks of the regular season.”), with *Football Practice Guidelines*, NCAA, <http://www.ncaa.org/health-and-safety/football-practice-guidelines> (last visited Oct. 1, 2014) (“In-season practice: No current NCAA legislation addresses contact during inseason practices.”).

178. Rodney K. Smith, *Fix or Nix College Football; NCAA Sports Need Fundamental Reform in Face of Growing Legal and Financial Threats*, USA TODAY, Apr. 23, 2014, at 6A, available at <http://www.athleticbusiness.com/more-news/opinion-ncaa-needs-to-fix-or-nix-college-football.html>.

179. *Id.*

180. Leigh Steinberg, *Urgent Need to Protect HS Football Players from Brain Injury!*, FORBES (June 21, 2014, 9:00 AM), <http://www.forbes.com/sites/leighsteinberg/2014/06/21/urgent-need-to-protect-hs-football-players-from-brain-injury/>.

181. *Id.*; see, e.g., Lauren Leamanczyk, *I-Team: Local Schools Using Subpar Football Helmets*, CBS BOS. (Sept. 23, 2014, 11:24 PM), <http://boston.cbslocal.com/2014/09/23/i-team-local-schools-using-subpar-football-helmets/> (“According to data provided by BPS, at least one quarter of Boston’s helmets rank as 2 stars or lower. That includes 29 of the worst zero star helmets.”); Mark Stevens, *TV-6 Investigates: Football Helmet Ratings*, KWQC IOWA (Sept. 30, 2014, 6:10 PM), <http://www.kwqc.com/story/26669858/tv-6-investigates-football-helmet-ratings> (“Danville Athletic Director Kirk Soukup says replacing all 38 of his two star helmets costs too much.”).

182. See Stern, *supra* note 168, at 1122.

arguably need more blocking and tackling practice than NFL players, the NCAA should adopt the NFL model and eliminate preseason contact.¹⁸³ Alternatively, the NCAA could limit preseason and regular-season practice contact.¹⁸⁴ Several high school and middle school teams have already done so.¹⁸⁵ While NFL, high school, and middle school officials have taken action, the NCAA has seemingly ignored concussions' serious risks.¹⁸⁶

C. *Political Involvement*

President Obama has urged the NCAA to implement safety reforms.¹⁸⁷ In an interview with the *New Republic*, the President stated:

*I tend to be more worried about college players than NFL players in the sense that the NFL players have a union, they're grown men, they can make some of these decisions on their own, and most of them are well-compensated for the violence they do to their bodies. You read some of these stories about college players who undergo some of these same problems with concussions and so forth and then have nothing to fall back on. That's something that I'd like to see the NCAA think about.*¹⁸⁸

The President recently hosted a summit to raise awareness and money for concussion diagnosis, treatment, prevention, and research.¹⁸⁹ Attendees included young athletes, parents, coaches, professional players, military service members, and medical experts.¹⁹⁰ At the summit, the President advocated a shift in American sports culture away from a "suck it up" mentality.¹⁹¹

United States Senators have also entered the concussion debate. For example, the Senate Committee on Commerce, Science and Transportation sent a letter to NCAA President Mark Emmert, urging him to "protect student-athletes from

183. Gilmore, *supra* note 174.

184. *Id.*

185. *Limit Full-Contact Football Practice*, SPORTS LEGACY INST., <http://www.sportslegacy.org/policy/calls-to-action/limit-full-contact-football-practice/> (last visited Sept. 7, 2014); *see also* Steinberg, *supra* note 180 (lauding California State Assemblyman Ken Cooley, who proposed a law that would prohibit full contact drills in high-school and middle-school off-season football practices, and limit them during the regular season).

186. Gilmore, *supra* note 174.

187. *See* Franklin Foer & Chris Hughes, *Barack Obama Is Not Pleased*, NEW REPUBLIC (Jan. 27, 2013), <http://www.newrepublic.com/article/112190/obama-interview-2013-sit-down-president>.

188. *Id.*

189. Hudson, *supra* note 158.

190. David Jackson, *Obama to Host Concussion Conference*, USA TODAY (May 16, 2014, 3:59 PM), <http://www.usatoday.com/story/theoval/2014/05/16/obama-concussions-football-white-house-summit/9178645/>.

191. Juliet Eilperin, *White House Conference Focuses on Concussions*, WASH. POST, May 30, 2014, at A.2, available at http://www.washingtonpost.com/politics/first-ever-summit-on-sports-concussions-held-at-the-white-house/2014/05/29/bec19bec-e74d-11e3-a86b-362fd5443d19_story.html.

exploitation” on college campuses.¹⁹² The Committee expressed concern that the NCAA “defers to member institutions on most matters potentially leaving student-athletes vulnerable to the very abuses the NCAA was created to protect against.”¹⁹³

On the state level, 49 states have passed laws to raise concussion awareness and ensure that young athletes receive proper treatment.¹⁹⁴ For example, many states have enacted “return-to-play” restrictions, which provide that an athlete who manifests concussion symptoms may not participate in games or practices until a medical professional clears him or her.¹⁹⁵ In addition, the NCAA and Department of Defense recently launched a \$30 million concussion database, which “will attempt to comprehensively track the natural histories of concussions.”¹⁹⁶ The database will compile concussion treatment data, facilitate research, and hopefully lead to medical advances.¹⁹⁷ Unfortunately, in the database’s initial phase, athletes at only ten universities will participate;¹⁹⁸ ultimately, the database will collect data from just 37,000 of 450,000 collegiate athletes.¹⁹⁹ That said, is the database too little, too late?

V. METHOD TO THE MADNESS?

Recently, the NCAA and videogame producer Electronic Arts settled a former student-athletes’ class action claim that the defendants unlawfully used the athletes’ likenesses in videogames.²⁰⁰ The settlement’s effect on student-athlete compensation

192. Letter from U.S. Senate Comm. On Commerce, Sci., and Transp. to Mark Emmert, President, Nat’l Collegiate Athletic Ass’n 1 (May 5, 2014), available at <http://www.mccaskill.senate.gov/pdf/050514LetterCommiteelettertoNCAAonexploitation.pdf>.

193. *Id.*

194. Josh Weir, *States Adopting Concussion Laws, but Politics, Money Key to National Policy*, PEORIA J. STAR (Aug. 21, 2013, 12:01 AM), <http://www.pjstar.com/x1155153670/States-adopting-laws-but-politics-money-key-to-national-policy>.

195. See, e.g., MICH. COMP. LAWS § 333.9156(3) (2014) (“A youth athlete who has been removed from physical participation in an athletic activity under this subsection shall not return to physical activity until he or she has been evaluated by an appropriate health professional and receives written clearance from that health professional authorizing the youth athlete’s return to physical participation in the athletic activity.”); VT. STAT. ANN. tit. 16, § 1431(d)(2) (2014) (“Neither a coach nor a health care provider shall permit a youth athlete who has been prohibited from training or competing pursuant to subdivision (1) of this subsection to train or compete with a school athletic team until the athlete has been examined by and received written permission to participate in athletic activities from a health care provider.”).

196. Nadia Kounang, *White House to Talk Concussion Prevention at Summit*, CNN (May 28, 2014, 8:46 PM), <http://www.cnn.com/2014/05/28/health/white-house-concussion-summit/>.

197. *Id.*

198. *Id.*

199. Associated Press, *IU Medical School Helping to Lead Concussion Study*, WASH. TIMES (May 30, 2014), <http://www.washingtontimes.com/news/2014/may/30/iu-medical-school-helping-to-lead-concussion-study/> (estimating 37,000 eventual participants); Solomon, *supra* note 16 (quantifying the total number of collegiate athletes).

200. See Class Action Complaint at 1, *Keller v. Elec. Arts, Inc.*, No. CW-09-1967 (N.D. Cal. May 5, 2009), available at http://www.hbsslaw.com/Templates/media/files/case_pdfs/NCAA%20Video%20Games/Filed%20SComplaint%20050509.pdf; Michael Marot, *NCAA Reaches \$20M Settlement in Keller’s Video-Games Suit*, FOX SPORTS (June 10, 2014, 7:55 PM), <http://msn.foxsports.com/arizona/story/ncaa-reaches-20m-settlement-in->

is not yet clear, but a line has been drawn. The NCAA has effectively admitted that college athletes no longer merely dabble in sports.

While this admission is meaningful in itself, it potentially lays the groundwork for even greater change.²⁰¹ The student-athletes that Americans so proudly honor deserve full, complete, and lasting protection of their health, safety, and welfare. Without further hesitation, regulators and lawmakers should provide such assurances to student-athletes from the day they step on the field.

First and foremost, student-athletes merit full protection against all forms of sports-related disability and death.²⁰² Legislators or the NCAA should create a massive, far-reaching insurance fund for all student-athletes, without regard to sport or division.²⁰³ This package would provide a safety net to collegiate competitors, and ensure their dedication no longer returns only partial reward.

Second, critics should bury at sea the argument that student-athletes warrant monetary compensation. Instead, advocates should focus on student-athletes' need to prioritize their studies above athletics.²⁰⁴ The NCAA must limit the countless hours college athletes devote to team activities.²⁰⁵ Also, it should close the "voluntary" practice loophole,²⁰⁶ to maintain a level playing field among college teams, and enable student-athletes to engage more fully in their educations.

In lieu of compensation, the NCAA should fulfill its "obligation to protect both the health and well-being of its student-athletes in return for the physical demands constantly placed upon them."²⁰⁷ Student-athletes desperately need greater financial support from the NCAA.²⁰⁸ Such support should include irrevocable four-year

keller-s-video-games-suit-061014 (discussing the NCAA's agreement to pay \$20 million to former athletes featured in videogames).

201. See Associated Press, *As N.C.A.A. Pie Expands, a Call for Players to Be Paid*, N.Y. TIMES (June 14, 2014), http://www.nytimes.com/2014/06/15/sports/as-ncaa-pie-expands-a-call-for-players-to-be-paid.html?_r=0.

202. See generally Mark Emmert, *When College Athletes Get Hurt, Whose Wallet Should Feel the Pain?*, PORTLAND PRESS HERALD (June 22, 2014), <http://www.pressherald.com/2014/06/22/when-college-athletes-get-hurt-whose-wallet-should-feel-the-pain/> (considering medical care coverage alternative for injured athletes in a near billion-dollar college sports industry).

203. See generally *id.* ("In California, a 2012 law established a 'student-athlete bill of rights,' including a requirement that the state's four Pac-12 universities — Cal-Berkeley, Stanford, UCLA and USC — pay for sports-related medical expenses.") (quoting CAL. EDUC. CODE § 67453(a)(2) (2014)).

204. See Jeff Morganteen, *Why College Athletes Don't Need Paychecks*, CNBC (Mar. 26, 2014, 8:58 AM), <http://www.cnbc.com/id/101526106> (quoting NCAA president Mark Emmert) ("We want to make sure they get degrees, and that they really have the education that sets them up for life. . . . That's the game-changer here.").

205. Sharon Terlep, *Big Ten Commissioner Says College Athletes Are Overworked*, WALL ST. J. (June 20, 2014, 5:12 PM), <http://online.wsj.com/articles/big-ten-commissioner-college-athletes-are-overworked-1403298764>.

206. Bud Withers, *State Presidents Sound Off on Pac-12's Plan for Future of NCAA Athletics*, SEATTLE TIMES (June 4, 2014, 8:19 PM), http://seattletimes.com/html/huskies/2023769848_wITHERSNCAA05.xml.html.

207. Pat Forde, *O'Bannon Trial: NCAA Once Again Ignores Voice of Student-Athletes*, YAHOO! SPORTS (June 25, 2014, 3:32 PM), <http://sports.yahoo.com/news/o-bannon-trial-ncaa-once-again-ignores-voice-of-student-athletes-193258325.html>.

208. See Strauss, *supra* note 61 (lamenting the hardships injured players face).

scholarships, scholarships that cover the full cost of attendance, and improved medical coverage, including those athletes who sustain career-ending injuries.

VI. THE FUTURE OF COLLEGE ATHLETICS

Looking to the future, college athletics' fate is uncertain. What is apparent, however, is that colleges and universities will not expose themselves to liability without a fight.²⁰⁹ Pacific-12 Conference ("Pac-12") university presidents,²¹⁰ unhappy with the current state of affairs and desperate to express their voices, proposed sweeping NCAA reforms in a letter to the presidents of other Football Bowl Subdivision schools.²¹¹ The letter, spurred in part by Northwestern University's football players' effort to unionize,²¹² proposed ten changes to the NCAA model, and urged other presidents to support their reform agenda.²¹³

The letter asked the NCAA to: "[p]ermit institutions to make scholarship awards up to the full cost of attendance;" "[p]rovide reasonable on-going medical or insurance assistance for student-athletes who suffer an incapacitating injury in competition or practice;" "[c]ontinue efforts to reduce the incidence of disabling injury;" and "[g]uarantee scholarships for enough time to complete a bachelor's degree, provided that the student remains in good academic standing."²¹⁴ Also, the letter sought to "[d]ecrease the time demands placed on the student-athlete in-season, and correspondingly enlarge the time available for studies and full engagement in campus life."²¹⁵ Essentially, the presidents prompted the NCAA to realize its "student-athlete" ideal.²¹⁶ The letter also noted that while many of its "core objectives could prove to be expensive and controversial, . . . the risks of inaction or moving too slowly are far greater."²¹⁷ Importantly, the presidents contended that "[t]he time for tinkering with the rules and making small adjustments is over."²¹⁸

209. See *infra* text accompanying notes 210–16.

210. The Pacific-12 Conference is an NCAA Division I athletic conference in the Western United States. See *About Pac-12 Conference*, PAC-12.COM, <http://pac-12.com/content/about-pac-12-conference> (last visited Sep. 19, 2014).

211. Letter from Ann Weaver Hart et al., Pacific-12 Conference Univ. Presidents, to Colleagues (May 22, 2014), available at <http://pac-12.com/article/2014/05/21/letter-pac-12-presidents>; see Jerry Hinnen, *Pac-12 Presidents Send Letter Asking Other Leagues to Back Reforms*, CBS SPORTS (May 20, 2014, 9:39 PM), <http://www.cbssports.com/collegefootball/eye-on-college-football/24568341/pac-12-presidents-send-letter-asking-other-leagues-to-back-reforms>.

212. See *supra* text accompanying notes 105–14.

213. Letter from Ann Weaver Hart et al. to Colleagues, *supra* note 211.

214. *Id.*

215. *Id.*

216. *Id.* ("[T]he time has come for a meaningful response both to the student-athletes' grievances and the need to reassert the academic primacy of our mission.").

217. *Id.*

218. *Id.*; see also Brian Leigh, *Pac-12 Presidents Reportedly Propose Sweeping Changes to NCAA*, BLEACHER REP. (May 21, 2014), <http://bleacherreport.com/articles/2070951-pac-12-presidents-reportedly-propose-sweep>

Regardless of the *Northwestern* case's outcome,²¹⁹ the letter will likely spur positive change. Although NCAA reforms are unquestionably necessary, student-athlete unions go too far.²²⁰ Instead, the NCAA should adopt the Pac-12 presidents' suggestions, provide funds for injured players' long-term medical treatment, and ensure that injured athletes can afford to complete their degrees even when schools terminate their athletic eligibility and scholarships.²²¹ Unpaid college athletes generate hundreds-of-millions of dollars for NCAA universities, yet too often, athletes foot the bill for their sports-related injuries.²²²

Since 2005, the NCAA has required universities to certify that athletes have obtained insurance for on-field injuries.²²³ When parents' policies do not cover an athlete, colleges offer the athlete the same policy they offer to other students.²²⁴ These standard policies, however, are not tailored to sport-related injuries or the specialized surgeries, rehabilitative procedures, and expensive tests that often follow.²²⁵ Secondary insurance coverage could cover these costs, but many schools decline to offer it.²²⁶ Meanwhile, the NCAA operates a catastrophic insurance program, yet few injuries surpass its \$90,000 deductible.²²⁷ No government entity or organization has forced institutions to close the coverage gap.²²⁸ The time for change has come.

Generally, once a student-athlete leaves college, NCAA and school medical insurance no longer cover injuries the athlete sustained as a player, even injuries that develop into chronic conditions.²²⁹ Some universities extend athletes' medical

ing-changes-to-ncaa ("If nothing is done soon—and 'something,' in this case, does not include unlimited pasta—the rabbles for reform could cast a pall over the upcoming college football season.").

219. See *supra* text accompanying notes 105–14.

220. See Will Femia, *NCAA Prez: Unionizing Student Athletes Is Wrong*, MSNBC (Mar. 30, 2014, 5:10 PM), <http://www.msnbc.com/msnbc/ncaa-prez-mark-emmert-unionizing-student-athletes-wrong>.

221. Alan Robinson, *Reform Coming?*, PITTSBURG TRIB. REV. (May 24, 2014), <http://triblive.com/sports/nfl/6128120-74/ncaa-college-players#axzz34LESEonW>.

222. See Strauss, *supra* note 61.

223. See Solomon, *supra* note 16.

224. Bill Pennington, *In a Moment It Can All Be Gone*, N.Y. TIMES, Apr. 5, 2013, at B11, available at http://www.nytimes.com/2013/04/05/sports/ncaabasketball/broken-leg-renews-focus-on-college-athletes-health-insurance.html?_r=0.

225. *Id.*

226. Meghan E. Irons, *Zakim Proposes Bills for Injured College Athletes; Says Coverage Would Fill Treatment Gap*, BOS. GLOBE, May 21, 2014, at B1, B4, available at <http://www.bostonglobe.com/metro/2014/05/20/council-or-josh-zakim-pushes-bill-rights-extended-health-coverage-for-college-athletes/EszprGwMjAZjphO9LZUVPO/story.html>; Pennington, *supra* note 224.

227. See Pennington, *supra* note 224.

228. See Peterson, *supra* note 17.

229. Pennington, *supra* note 224.

coverage one year past graduation,²³⁰ but when athletes do not receive coverage, the financial burden can devastate them and their families.²³¹

A former athlete's inability to afford adequate care poses a significant enough problem when injuries limit the athlete's mobility, quality of life, and job prospects.²³² An even greater danger, however, stems from the fact that concussions often manifest their debilitating effects on brains years after athletes' careers end.²³³ Despite the NCAA's claims that it "has specifically addressed the issue of head injuries through a combination of playing rules, equipment requirements and medical best practices," it needs to accomplish much more.²³⁴

College athletes have undertaken a strong effort to compel the NCAA to provide concussion-management training and evaluation for current players, and follow-up care for former players.²³⁵ While many critics concede that NCAA medical coverage has improved in recent years, athletic departments continue to assume far too little responsibility for athletes.²³⁶ Their failures often generate confusion and frustration, as most players never imagined they would pay exorbitant medical bills from their own pockets.²³⁷

A. *Recent Advances*

On July 29, 2014, the NCAA agreed to pay \$75 million to settle former college athletes' concussion-related class action claims.²³⁸ The proposed settlement requires the NCAA to monitor an estimated 4.2 million players who suffered serious head

230. See Strauss, *supra* note 61.

231. Meghan Walsh, 'I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes, ATLANTIC (May 1, 2013, 8:38 AM), <http://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/2/>.

232. Cory McCune, *NCAA Policies for Student-Athlete Medical Insurance Breakdown*, BLEACHER REP. (Apr. 8, 2013), <http://bleacherreport.com/articles/1595326-ncaa-policies-for-student-athlete-medical-insurance-breakdown>.

233. Neil H. Buchanan, *College Football Needs to Change, but Player Salaries Are Not the Answer*, JUSTIA (Jan. 5, 2012), <http://verdict.justia.com/2012/01/05/college-football-needs-to-change-but-player-salaries-are-not-the-answer>.

234. See Rachel Axon, *Concussion Suit Could Jolt NCAA; E-mails Key in Case Alleging Association Failed in Duty to Protect Athletes*, USA TODAY, July 26, 2013, at 1C, available at <http://www.usatoday.com/story/sports/ncaa/2013/07/25/ncaa-concussion-lawsuit-adrian-arrington/2588189/> (quoting NCAA spokesperson Stacy Osburn's statement).

235. George Vecsey, *College Athletes Move Concussions into the Courtroom*, N.Y. TIMES, Nov. 30, 2011, at B18, available at <http://www.nytimes.com/2011/11/30/sports/ncaafootball/college-players-move-concussions-issue-into-the-courtroom.html?pagewanted=all>.

236. Solomon, *supra* note 16.

237. *Id.*

238. Class Action Settlement Agreement and Release at 16, *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Injury Litig.*, No. 13-cv-09116 (N.D. Ill. July 28, 2014), available at http://www.ncaa.org/sites/default/files/NCAA%20MDL%20—%20Final%20Settlement%20Agreement%281832814_21_CH%29.pdf; see *NCAA Reaches Proposed Settlement in Concussion Lawsuit*, NCAA, <http://www.ncaa.com/news/ncaa/article/2014-07-29/ncaa-reaches-proposed-settlement-concussion-lawsuit> (last updated July 30, 2014).

injuries.²³⁹ It also compels the NCAA to implement standard concussion-management procedures for athletes who sustain concussions during games or practices.²⁴⁰ The agreement mandates concussion education initiatives,²⁴¹ as well as a \$5 million NCAA contribution to a concussion research fund.²⁴² In exchange, the class plaintiffs agreed not to pursue further claims against the NCAA.²⁴³

Per the proposed settlement, “all current and former NCAA student-athletes in all sports and divisions who competed at an NCAA member school within the past fifty years may qualify for physical examination, neurological measurements and neurocognitive assessment.”²⁴⁴ Further, specially trained medical personnel must attend all “contact” sports games and practices, defined to include football, ice hockey, wrestling, lacrosse, field hockey, soccer, and basketball.²⁴⁵

The settlement also requires the NCAA to set strict return-to-play guidelines and provide academic accommodations to student-athletes who sustain concussions.²⁴⁶ Team physicians must run preseason baseline tests on student-athletes, and clear athletes who suffer concussions before they participate in games or practices.²⁴⁷ NCAA member schools also must report concussion diagnoses and their resolution.²⁴⁸ The settlement’s terms represent a major shift from the NCAA’s prior concussion guidelines, adopted in 2010.²⁴⁹ These guidelines allowed schools to set

239. Class Action Settlement Agreement and Release, *supra* note 238, at 16; see Associated Press, *NCAA Settles Head-Injury Lawsuit*, ESPN (July 29, 2014, 3:01 PM), http://espn.go.com/chicago/college-sports/story/_/id/11279710/ncaa-settles-head-injury-lawsuit-create-70-million-fund.

240. Class Action Settlement Agreement and Release, *supra* note 238, at 32–33.

241. *Id.* at 33–34 (“The NCAA will require that member institutions provide concussion education training approved by the NCAA to student-athletes, coaches and athletic trainers before every season.”).

242. *Id.* at 34.

243. *Id.* at 38–39; see also John Keilman & Michelle Manchir, *NCAA Proposal Has Its Critics; Settlement Would Fund Testing, Research but Bar Future Class-Action Suits*, CHI. TRIB., July 30, 2014, at C1, available at <http://www.chicagotribune.com/news/local/breaking/chi-ncaa-reaches-75-million-settlement-in-concussion-lawsuit-20140729,0,7722870.story> (“[T]he \$75 million deal would protect the NCAA from the type of costly settlement the NFL is negotiating with its retired players.”).

244. Mike Huguenin, *NCAA Reaches a Proposed Settlement in Concussion Lawsuit*, NFL.COM (July 29, 2014, 10:11 AM), <http://www.nfl.com/news/story/0ap2000000370908/article/ncaa-reaches-a-proposed-settlement-in-concussion-lawsuit>.

245. Class Action Settlement Agreement and Release, *supra* note 238, at 8, 32–33.

246. *Id.* at 32–34.

247. *Id.* at 32.

248. *Id.* at 33.

249. See NAT’L COLLEGIATE ATHLETIC ASS’N, 2011–12 SPORTS MEDICINE HANDBOOK 56 (2011), available at <http://www.ncaapublications.com/DownloadPublication.aspx?download=MD11.pdf>; Kevin Vaughan, *NCAA Agrees to Settle Concussion Lawsuits, Impose New Guidelines*, FOX SPORTS (July 29, 2014, 9:15 AM), <http://www.foxsports.com/college-football/story/ncaa-agrees-to-settle-concussion-lawsuits-impose-new-guidelines-072914> (explaining that the 2010 guidelines “simply instituted a rule that said each member school had to adopt its own plan for dealing with head injuries. It imposed no uniform standards for dealing with concussions, and specific protocols varied widely from school to school”).

their own concussion management plans, and permitted non-doctors to clear athletes to return to play.²⁵⁰

The NCAA settlement comes on the heels of the NFL's recent agreement to compensate former players for their concussion-related injuries.²⁵¹ The settlements differ in several respects, including price tag.²⁵² Unlike the NFL's uncapped pact, which may require payments upwards of \$900 million, the NCAA dollar figure seems miniscule.²⁵³ Also, while the NFL settlement sets damage awards for a list of concussion-related ailments,²⁵⁴ the NCAA merely agreed to provide medical testing to evaluate future claims, as opposed to actual treatment.²⁵⁵

In contrast to the NFL settlement, the NCAA agreement does not foreclose individual lawsuits.²⁵⁶ However, class actions typically carry much greater weight than single-plaintiff claims.²⁵⁷ If U.S. District Court Judge John Lee accepts the proposed settlement, it will shield the NCAA from costly class actions.²⁵⁸

The settlement is not yet final.²⁵⁹ Before Judge Lee can approve it, he must hold a "fairness hearing," where players may voice "questions, criticisms or objections."²⁶⁰ However, because players may file individual claims notwithstanding the settlement,²⁶¹ few will likely object.²⁶²

Though the proposed settlement reflects the NCAA's growing will to consider reforms and acknowledge student-athletes' rights, many critics question whether it will produce meaningful change.²⁶³ After all, several collegiate athletics programs,

250. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 249, at 56.

251. Class Action Settlement Agreement as of June 25, 2014, *supra* note 165; see Cindy Boren, *NFL Agrees to Remove Cap on Concussion Damages in Retirees' Settlement*, WASH. POST BLOG (June 25, 2014), <http://www.washingtonpost.com/blogs/early-lead/wp/2014/06/25/nfl-agrees-to-remove-cap-on-concussion-damages-in-retirees-settlement/>. The parties initially capped the settlement fund at \$765 million, but removed the cap after U.S. District Court Judge Anita B. Brody disapproved. *See id.*

252. See Paul M. Barrett, *The Fine Print on the NCAA's Cheap Concussion Settlement*, BLOOMBERG BUSINESSWEEK (July 29, 2014), available at <http://www.businessweek.com/articles/2014-07-29/ncaa-concussion-settlement-the-fine-print-on-a-70-million-deal> ("The main difference . . . is that the NCAA wouldn't be protected against future head-injury suits brought by individual athletes.").

253. *Id.*

254. Class Action Settlement Agreement as of June 25, 2014, *supra* note 165, at Exhibit B-3.

255. Class Action Settlement Agreement and Release, *supra* note 238, at 9, 16 (requiring the NCAA to establish a Medical Monitoring Fund and providing that "medical monitoring does not mean rendering medical care").

256. See Barrett, *supra* note 252.

257. Keilman & Manchir, *supra* note 243.

258. *Id.*

259. Lester Munson, *NCAA Concussion Deal: What to Know*, ESPN (July 29, 2014, 5:11 PM), http://espn.go.com/espn/otl/story/_id/11281042/questions-answers-ncaa-concussion-settlement.

260. *Id.*

261. See Barrett, *supra* note 252.

262. Munson, *supra* note 259.

263. See Bill Nichols, *NCAA Settlement on Concussion Lawsuit Is Hailed, Panned*, DALL. MORNING NEWS (July 30, 2014, 12:04 AM), <http://www.dallasnews.com/news/local-news/20140729-ncaa-settlement-on-concussion-lawsuit-is-hailed-panned.ece> (comparing commentators' varied reactions).

and high school programs too,²⁶⁴ have already implemented concussion-management programs like the program the settlement proposes.²⁶⁵ For example, in 2010, the Big Ten Conference instituted a nearly identical concussion-management plan.²⁶⁶ As the largest collegiate sports organization in the country,²⁶⁷ the NCAA should lead the concussion-safety movement, not play catch-up.

Per the proposed settlement, the NCAA need not provide a medical examination to evaluate a former athlete's injuries until the athlete completes a questionnaire.²⁶⁸ This provision effectively limits athletes' eligibility to receive exams, as athletes "may complete the Screening Questionnaire not more than once every five (5) years until the age of fifty (50), and then not more than once every two (2) years after the age of fifty (50) until the end of the fifty (50) year Medical Monitoring Period."²⁶⁹ Further, athletes may complete no more than five questionnaires during this period.²⁷⁰ If the NCAA truly valued student-athletes' health and well-being, would it have imposed such restrictions?

Because the plaintiffs' filings allege that more than ten thousand athletes may qualify for damages under the settlement,²⁷¹ a crucial question is whether \$75 million will suffice.²⁷² Importantly, attorneys' fees and litigation expenses could extract up to \$15.75 million, twenty-three percent of the settlement fund.²⁷³ Moreover, \$5 million will pay for concussion-related research.²⁷⁴ If the fund fails to compensate the plaintiffs' injuries, they may request additional payments; however, the settlement does not require the NCAA or its insurers to satisfy such pleas.²⁷⁵

The settlement demonstrates that the NCAA, which admits no wrongdoing and denies that it understated concussions' dangers,²⁷⁶ will go only so far. The settlement

264. Elizabeth Landau, *High Schools Tackle Football Concussions*, CNN (Sept. 2, 2013, 10:32 AM), <http://www.cnn.com/2013/08/30/health/high-school-football-safety/>.

265. Keilman & Manchir, *supra* note 243.

266. *See id.*

267. *See NCAA Sports Contracts and Amateurism*, USLEGAL.COM, <http://sportslaw.uslegal.com/sports-agents-and-contracts/ncaa-sports-contracts-and-amateurism/> (last visited Sept. 19, 2014) ("The [NCAA] has grown to become the largest amateur organization in the United States related to the regulation of athletes.").

268. Class Action Settlement Agreement and Release, *supra* note 238, at 21.

269. *Id.* at 23.

270. *Id.*

271. Associated Press, *supra* note 239.

272. *See* Rachel Axon, *NCAA Concussion Settlement Criticized for What It Lacks*, USA TODAY (July 29, 2014, 8:46 PM), <http://www.usatoday.com/story/sports/college/2014/07/29/ncaa-concussion-lawsuit-proposed-settlement-adrian-arrington-damages/13341659/> (lamenting that a sizable chunk of settlement funds will cover attorneys' fees).

273. Solomon, *supra* note 16.

274. *Id.*

275. *Id.*

276. *See* Michael Tarm, *NCAA Settles Concussion Lawsuit, Creating \$70 Million Fund to Diagnose Head Injuries*, HUFFINGTON POST (July 29, 2014), http://www.huffingtonpost.com/2014/07/29/ncaa-concussion-lawsuit-it_n_5629926.html.

does not even require the NCAA to immediately adopt protective measures.²⁷⁷ Instead, it merely provides that the NCAA's Executive Committee "will recommend that the governing bodies of Divisions I, II, and III pass legislation requiring member schools to certify that they have a concussion management plan in place . . ." ²⁷⁸ Though the NCAA has agreed to fund claimants' diagnostic tests, it will neither pay damages nor provide medical treatment until players sue and win judgments, assuming they can afford to do so.²⁷⁹ Furthermore, the NCAA has not wavered in its refusal to compensate athletes for its use of their names, images, and likenesses.²⁸⁰

While the NCAA settlement will by no means make college football safe, it will, at the very least, make it marginally less dangerous.²⁸¹ Notwithstanding these slight improvements, the NCAA must do more to honor student-athletes' sacrifices, and to protect them to the best of its ability. The NCAA's obligations should endure beyond athletes' college careers, for as long as they continue to suffer the consequences of their injuries.

CONCLUSION

As discussed above, *Northwestern University* is one of several ongoing cases involving challenges to the traditional model of intercollegiate athletics as historically advanced by the NCAA.²⁸² A victory for Northwestern University will diffuse this recent salvo against the longstanding definition of student athlete. Defeat would allow the players to vote in favor of a union, and the NLRB would invariably order Northwestern to take a seat at the bargaining table across from this newly formed student athlete union. Failure to comply may open the door to an unfair labor practice charge alleging an unlawful refusal to bargain.²⁸³ It is most probable that a defeat for the University would allow the trend of student athlete unionization to flourish, albeit perhaps with the limitation of applying only to those private universities from the big five conferences. Are we still talking about college sports?

Big-time college sports epitomize pure competition, without the excessive salaries, pampered athletes, and inflated egos that characterize professional leagues.²⁸⁴ Loyal alumni and feverish fans value student-athletes' commitment to

277. See Class Action Settlement Agreement and Release, *supra* note 238, at 33.

278. *Id.*

279. Keilman & Manchir, *supra* note 243.

280. See Munson, *supra* note 259.

281. Barrett, *supra* note 252.

282. See *supra* Part II.

283. See 29 U.S.C. § 158 (2006).

284. See Gasper, *supra* note 36 (describing public perception of college athletes); Ivan Maisel, *Passion, Tradition Elevate College Football over NFL*, ESPN, <http://sports.espn.go.com/nfl/preview06/columns/story?id=2549750> (commending college football players' humility in comparison to NFL professionals).

excellence on the field and in the classroom. Yet, college athletes risk injury every time they compete.²⁸⁵ Concussions pose a special threat, particularly in the absence of proper diagnosis and treatment protocol.²⁸⁶ Surely, young athletes deserve greater protections and benefits than professionals for physical and mental injuries. However, the reality does not match this ideal.²⁸⁷ As college sports revenues continue to rise, why has the NCAA not developed a cohesive plan to address the concussion issue?

The NCAA desperately needs to rethink its outdated model. Though its amateurism principle retains value, the principle should not foreclose reforms that advance student-athletes' health, safety, and welfare. Undoubtedly, the NCAA should have taken action long before it confronted a bevy of lawsuits.

Until recently, no one would have imagined that college athletes would unionize and share in revenues from the use of their names and likenesses. Who would have thought that the NCAA, under threat of defection, would free the major conferences to set their own rules? Has the NCAA acted proactively, reactively, or has it simply tossed a "Hail Mary" pass?²⁸⁸

Student-athlete unions will not resolve college sports' problems.²⁸⁹ Likewise, monetary compensation for college athletes is not the answer.²⁹⁰ On the other hand, no one who understands the stakes would dispute the need to provide first-rate health benefits, life and long-term disability insurance, and a myriad of counseling, training, career-placement, and other services to student-athletes.²⁹¹ Nothing less befits youths who entertain millions while they pursue their educations.²⁹²

Regulators and lawmakers need to get a grip on a system they have let slip for too many years. Is the amateurism model's tradition paramount to student-athletes' well-being? I think not.

The pending NCAA settlement with college athletes regarding the concussion class action lawsuit should be carefully monitored. The medical affirmation that concussions can potentially have long term effects, and the mandate that the NCAA should focus on concussion management policies for the student athlete, are promising trends.²⁹³

285. See Smith, *supra* note 178 ("[T]he brains of college players are less developed [than NFL players'] and more susceptible to serious head injury.").

286. See *supra* notes 9, 143–44 and accompanying text.

287. See discussion *supra* notes 251–55 (discussing the NFL and NCAA concussion settlements).

288. A "Hail Mary" is "a long forward pass in football, especially as a last-ditch attempt at the end of a game, where completion is considered unlikely." DICTIONARY.COM, <http://dictionary.reference.com/browse/hail+mary> (last visited Sept. 30, 2014).

289. See Femia, *supra* note 220 (relaying NCAA President Mark Emmert's opinion that unions would detract from collegiate athletics).

290. Buchanan, *supra* note 233.

291. See *supra* Part IV.

292. See Gasper, *supra* note 36 and accompanying text.

293. See *supra* Parts IV.A, VI.A.

COLLEGIATE COLLISIONS ON THE FIELD AND IN THE COURTROOM

Regardless, if the NCAA and its member-institutions fail to be more proactive before litigation advances, college sports face grave danger.²⁹⁴ Players will sustain further injuries, and lawsuits will continue to fester. Then again, if the NCAA acts quickly to tackle pressing issues, collegiate athletics may survive.²⁹⁵ Plaintiffs should agree to cease litigation, so the NCAA can revamp its governing body and committees. The NCAA should not do so reactively, but rather in a thoughtful, visionary manner that advances both athletes' and universities' interests. Notwithstanding its arguments to the contrary,²⁹⁶ the NCAA holds a duty to safeguard student-athletes' health.²⁹⁷ Technological advancements, medical research, and even common sense dictate that the NCAA must do more to protect athletes from injury. If the NCAA values its survival, it will heed the medical community's warnings, support injured athletes, and devise innovative safety solutions, before judges and juries wrest control.

294. Trahan, *supra* note 25.

295. See Smith, *supra* note 178.

296. See Fenno, *supra* note 39 and accompanying text.

297. NCAA, *supra* note 27 ("The [NCAA] is... dedicated to safeguarding the well-being of student athletes.").