

NCAA 2K25: Federal Oversight Edition

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INTRODUCTION

"This game is played between the ears" is a cliché used across many sports.¹ The takeaway is simple: an athlete's most valuable asset is their brain. Yet, the current state of concussion safety across the National Collegiate Athletic Association ("NCAA") and its member schools leaves student-athletes vulnerable to harm. Student-athlete exploitation, athletic programs undermining concussion safety, and lackluster enforcement of concussion protocols have led to countless injuries and a backlog in courts.² The NCAA was created through government action; yet, it has strayed from its purpose. The NCAA needs regulation to fall back in line. Despite prior litigation, schools will not cede power fast enough to protect students. The creation of a federal oversight committee will promote student-athlete safety. This piece looks at the NCAA's origins before unpacking concussions and student-athlete life. Next, the piece analyzes some seminal cases and some of their effects on modern day concussion safety. The piece also discusses past legislative efforts to protect student-athletes and an idea for a federal oversight committee. Finally, the piece analyzes the committee's potential benefits, shortcomings, and adjustments that could be made.

I. ORIGINS OF THE NCAA

A. *Presidential Mandate*

The 1905 college sports season was a painful one. With eighteen college and amateur players dead and more than 150 who suffered injuries, there was a public outcry.³ Matters reached a tipping point at Harvard freshman football practice when Teddy Roosevelt Jr.—the son of the sitting

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¹ AZ QUOTES, <https://www.azquotes.com/quote/1057783> (last visited Jan. 1, 2024).

² See, e.g., *Langston v. Mid-America Intercollegiate Athletic Ass'n*, 448 F. Supp. 3d 938, 944 (N.D. Ill. 2020); *Weston v. Big Sky Conf.*, 466 F. Supp. 3d 896, 901 (N.D. Ill. 2020); *Richardson v. Se. Conf.*, 612 F. Supp. 3d 753, 759 (N.D. Ill. 2020); *Rose v. Nat'l Collegiate Athletic Ass'n*, 346 F. Supp. 3d 1212, 1216 (N.D. Ill. 2018).

³ Anthony R. Caruso, *Collegiate Collisions on the Field and in the Courtroom: Will Labor Peace Save Student-Athletes from Further Injury?*, 10 J. BUS. & TECH. L. 15, 19 (2015).

president—was left bleeding from a cut above his eye.⁴ People wondered—not for the first or last time—whether football was too dangerous to play.⁵ Later that year, President Theodore Roosevelt held a conference at the White House on college sports regulation.⁶ The attendees eventually agreed on terms and an organization was born.⁷ Originally called the Intercollegiate Athletic Association of the United States (“IAAUS”), the NCAA was created to promote safety in college sports.⁸ As the IAAUS became the NCAA, the organization’s scope expanded to contain definitions of amateurism as well as athlete safety.⁹ The NCAA’s rules for amateurism and athletics, in general, were very buttoned up as athletes could not receive scholarships for athletics alone, coaches were absent from sidelines, and fans were not allowed to cheer.¹⁰ Although the aforementioned rules have gone away, the NCAA still reserves the right to define amateurism and control many aspects of athletes’ lives.¹¹

B. *Growth of Televised Sports*

The 1970s brought about a boom in televised college sports.¹² College sports were marketed like the professional leagues and they played a role in enticing prospective students.¹³ This growth led to *NCAA v. Board of Regents*, a real challenge to the NCAA’s authority.¹⁴ The Universities of Oklahoma and Georgia brought an antitrust lawsuit against the NCAA alleging that it unlawfully restricted the football games the schools could air on TV.¹⁵ The Supreme Court held the actions of NCAA member schools were subject to antitrust scrutiny and it was unlawful to limit to TV broadcasts¹⁶ The NCAA used the decision as an opportunity to lean into commercialization.¹⁷

It is difficult to study the NCAA without assessing the role football has played in its success. Men’s basketball and football are the highest earning sports, with media rights, bowl revenues, ticket sales, royalties and licensing,

⁴ John T. Holden, Marc Edelman, Thomas A. Baker III, & Andrew G. Shuman, *Reimagining the Governance of College Sports after Alston*, 74 FLA. L. REV. 427, 431 (2022).

⁵ Caruso, *supra* note 3, at 19.

⁶ *Id.*; Holden, *supra* note 4, at 431; Bryant Lee, *Knocked Unconscionable: College Football Scholarships and Traumatic Brain Injury*, 85 GEO. WASH. L. REV. 613, 620 (2017).

⁷ Lee, *supra* note 6, at 620.

⁸ *Id.*; K. Adam Pretty, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359, 2378 (2014).

⁹ Lee, *supra* note 6, at 620.

¹⁰ *Id.* at 620.

¹¹ *Id.* at 621.

¹² Holden, *supra* note 4, at 434.

¹³ *Id.* at 435.

¹⁴ *Id.* at 436 (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 88 (1984)).

¹⁵ *Id.* (citing *NCAA*, 468 U.S. at 88).

¹⁶ *Id.* (citing *NCAA*, 468 U.S. at 120).

¹⁷ *Id.*

donor contributions, and other sources making up revenue.¹⁸ In 2017, it was reported that the average revenue at the largest NCAA football schools was almost \$32 million.¹⁹ Consequently, this piece focuses on football because it is one of the NCAA's cash cows. Football is also one of the sports that produces the most concussions.²⁰

II. SPORT CONCUSSIONS

A. *What is a Concussion?*

The brain is made of a soft, fatty tissue like Jell-O.²¹ The brain is protected by the skull and other layers, but a sudden jolt can make it bump against the hard interior of the skull.²² Head trauma can damage the approximately 90 billion neurons that make up the brain's tissue.²³ Neurons are a fragile, wire-like network that communicates throughout the brain to control our bodies.²⁴ Trauma can cause neurons to stretch, tear, and release a toxin called tau.²⁵ Tau protein microtubules clump together when released

¹⁸ Andrew Zimbalist, *Analysis: Who is Winning in the High-Revenue World of College Sports?*, PBS NEWSHOUR (Mar. 18, 2023, 7:14 PM), <https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports>.

¹⁹ Cork Gaines & Mike Nudelman, *The Average College Football Team Makes More Money Than the Next 35 College Sports Combined*, BUS. INSIDER (Oct. 5, 2017, 3:36 PM), <https://www.businessinsider.com/college-sports-football-revenue-2017-10>.

²⁰ Complete Concussions, *What Sport Has the Most Concussions?*, COMPLETE CONCUSSIONS (Dec. 6, 2018), <https://completeconcussions.com/concussion-research/concussion-rates-what-sport-most-concussions/>.

²¹ *A Surgeon's-Eye View of the Brain*, NPR (May 10, 2006) (quoting excerpts from KATRINA FIRLIK, *ANOTHER DAY IN THE FRONTAL LOBE: A BRAIN SURGEON EXPOSES LIFE ON THE INSIDE* (2007)), <https://web.archive.org/web/20171107023155/http://www.npr.org/templates/story/story.php?storyId=5396115>; see also Colin Schultz, *Fresh Brains Are Way Squishier Than You Think*, SMITHSONIAN MAG. (Nov. 20, 2013), <https://www.smithsonianmag.com/smart-news/fresh-brains-are-way-squishier-than-you-thought-180947787/>; Ted-Ed, *What Happens When You Have a Concussion? - Clifford Robbins*, YOUTUBE (Jul. 27, 2017), <https://www.youtube.com/watch?v=xvjK-4NXRSM&t=1s> [hereinafter Robbins].

²² *Mild TBI and Concussion*, CDC INJURY CENTER (Nov. 14, 2022), <https://www.cdc.gov/traumaticbraininjury/concussion/index.html> [hereinafter *CDC 1*]; *Brain Basics: Know Your Brain*, NAT'L INST. HEALTH, <https://www.ninds.nih.gov/health-information/public-education/brain-basics/brain-basics-know-your-brain> (last visited Mar. 5, 2024); see also, Schultz, *supra* note 21.

²³ Ann C. McKee, Robert C. Catu, Christopher J. Nowinski, E. Tessa Hedley-Whyte, Brandon E. Gavett, Andrew E. Budson, Veronica E. Santini, Hyo-Soon Lee, Caroline A. Kubilus, Robert A. Stern, *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy After Repetitive Head Injury*, 68 J. NEUROPATHOLOGY & EXPERIMENTAL NEUROLOGY 709, 720, 731, 733 (2009) [hereinafter McKee 1]; see also Ann McKee, Robert A. Stern, Christopher J. Nowinski, Thor D. Stein, Victor E. Alvarez, Daniel H. Daneshvar, Hyo-Soon Lee, Sydney M. Wojtowicz, Garth Hall, Christine M. Baugh, David O. Riley, Caroline A. Kubilus, Kerry A. Cormier, Matthew A. Jacobs, Brett R. Martin, Carmela R. Abraham, Tsuneya Ikezu, Robert Ross Reichard, Benjamin L. Wolozin, Andrew E. Budson, Lee E. Goldstein, Neil W. Kowall, Robert C. Cantu, *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 BRAIN 43, 61 (2013) [hereinafter McKee 2]; see also Michael Saulle & Brian Greenwald, *Chronic Traumatic Encephalopathy: A Review*, REHAB. RSCH. AND PRAC. 1, 4 (2012).

²⁴ Robbins, *supra* note 21; *CDC 1*, *supra* note 22.

²⁵ Robbins, *supra* note 21. See Saulle & Greenwald, *supra* note 23, at 4–5. See also McKee 1, *supra* note 23, at 726 (axons do not always tear on impact, but they are damaged); McKee 2, *supra* note 23, at 45, 60 (noting “[t]au is primarily associated with microtubules in axons, where it is neither toxic nor

into the brain, disrupting signals attempting to travel through the axons from neurons, which results in a concussion, a form of traumatic brain injury (TBI).²⁶

Due to differences in human brains, concussions are hard to diagnose and symptoms manifest in a variety of ways over time.²⁷ Concussions can affect how one thinks, learns, feels, acts, and sleeps.²⁸ Physically, concussions can cause dizziness, headaches, balance problems, and vision problems.²⁹ Regarding thinking and memory, concussions can cause issues with attention, memory, and clarity of thought.³⁰ Regarding social and emotional abilities, concussions can cause anxiety and irritability, among other issues.³¹

Recovery can take days or weeks with rest and a gradual return to activities.³² Brain cells are very sensitive after a concussion and are susceptible to further damage.³³ Second Impact Syndrome (SIS) can manifest in the form of constant headaches, difficulty learning and behavioral issues.³⁴ SIS often occurs due to athletes being rushed back to play too soon after a concussion.³⁵ If mismanaged, SIS can persist for months or years after the initial concussion.³⁶

Sub-concussive hits are lesser impacts to the head that do not rise to the level of a concussion.³⁷ They may never result in a concussion or symptoms, but they may lead to severe degenerative brain disease overtime.³⁸

B. Concussions and Football

Three forms of TBI are linked to football: concussions, SIS, and chronic traumatic encephalopathy (“CTE”).³⁹ CTE is the most advanced of the aforementioned TBIs. Some CTE researchers believe the disorder is

associated with neurofibrillary pathology” and tau can be toxic when it is exposed to the interior of the brain).

²⁶ Robbins, *supra* note 21; McKee 1, *supra* note 22, at 726; McKee 2, *supra* note 22, at 44–45, 61 (highlighting “the frequent association of chronic traumatic encephalopathy with other neurodegenerative disorders suggests that repetitive brain trauma and hyperphosphorylated tau protein deposition promote the accumulation of other abnormally aggregated proteins . . .” and that it is “likely that axonal dysfunction and loss contribute to the production of clinical symptoms . . .”); Saullé & Greenwald, *supra* note 23, at 4.

²⁷ CDC 1, *supra* note 22.

²⁸ *Id.*

²⁹ *Id.*; Robbins, *supra* note 21.

³⁰ *Symptoms of Mild TBI and Concussion*, CDC INJURY CENTER, <https://www.cdc.gov/traumaticbraininjury/concussion/symptoms.html> (last visited Oct. 10, 2023) [hereinafter CDC 2]; Robbins, *supra* note 21.

³¹ CDC 2, *supra* note 30; Robbins, *supra* note 21.

³² CDC 2, *supra* note 30.

³³ Aaron Caputo, Note, *The Bell Has Rung: Answering the Door for Student-Athlete Concussion Issues in the National Collegiate Athletic Association*, 32 J. L. & HEALTH 58, 62 (2019).

³⁴ Robbins, *supra* note 21.

³⁵ Caputo, *supra* note 33, at 64; Robbins, *supra* note 21.

³⁶ Robbins, *supra* note 21.

³⁷ *Id.*

³⁸ *Id.*; see McKee 1, *supra* note 23, at 710.

³⁹ Lee, *supra* note 6, at 623.

linked to excessive tau leakage in the brain.⁴⁰ The brain goes from a pink and squishy consistency to shriveled and brown.⁴¹ CTE can cause heightened issues with mood swings, issues with thinking and memory, and dementia.⁴² Although CTE symptoms usually manifest in athletes' thirties and forties, it has been found in people who did not have long professional careers.⁴³ Such findings suggest the disease develops earlier, perhaps at the youth or college levels.⁴⁴ A 2017 study of 202 deceased football players found CTE in ninety-nine percent of the sample NFL players, ninety-one percent of the sample college football players, and twenty-one percent of the sample high school players.⁴⁵ A notable case is former New England Patriot, Aaron Hernandez, who had stage three CTE at just twenty-seven.⁴⁶

Dr. Bennet Omalu, a Nigerian-American physician, is credited as the first to find a link between football and CTE.⁴⁷ After the death of former Pittsburgh Steelers center, Mike Webster, Dr. Omalu discovered excessive tau leakage in Webster's brain.⁴⁸ Boston University has emerged as a leader in CTE research and built on Dr. Omalu's work.⁴⁹ Although the discovery was groundbreaking, the findings of Dr. Omalu and others were often met with firm pushback from the National Football League (NFL).⁵⁰ Despite their protests, the NFL and NCAA have known of the risks associated with

⁴⁰ Robbins, *supra* note 21; McKee 1, *supra* note 23, at 710, 726, 731–32 (noting axons do not always tear on impact and “CTE is characterized by cerebral . . . extensive tau-immunoreactive pathology throughout the neo-cortex, medial temporal lobe, diencephalon, brainstem, and spinal cord.”).

⁴¹ Robbins, *supra* note 21; McKee 1, *supra* note 23, at 720; McKee 2, *supra* note 23, at 47 fig. 1, 52 fig. 3.

⁴² Robbins, *supra* note 21; McKee 1 *supra* note 23, at 710; McKee 2, *supra* note 23, at 44; Saulle & Greenwald, *supra* note 23, at 3–4, 6. *See also* McKee 2, *supra* note 23, at 2, 52, 55–56, 58–59 (including information on clinical symptoms).

⁴³ Pretty, *supra* note 8, at 2366.

⁴⁴ *Id.* (noting that the first case of CTE in a college player belonged to Chris Borich. Borich, a former wide receiver at Western Illinois University, died of a drug overdose after a battle with depression).

⁴⁵ Jesse Mez, Daniel H. Daneshvar, Patrick T. Kiernan, Bobak Abdolmohammadi, Victor E. Alvarez, Bertrand R. Huber, Michael L. Alosco, Todd M. Solomon, Christopher J. Nowinski, Lisa McHale, Kerry A. Cormier, Caroline A. Kubilus, Brett M. Martin, Lauren Murphy, Christine M. Baugh, Phillip H. Montenegro, Christine E. Chaisson, Yorghos Tripodis, Neil W. Kowall, Jennifer Weuve, Michael D. McClean, Robert C. Cantu, Lee E. Goldstein, Douglas I. Katz, Robert A. Stern, Thor D. Stein, Ann C. McKee, *Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football*, 318 JAMA 360, 362 (2017) [hereinafter Mez].

⁴⁶ Caputo, *supra* note 33, at 63.

⁴⁷ *See generally* UW Epi News, *Dr. Bennet Omalu Spotlights a Profoundly Inconvenient Truth*, UNIV. WASH., DEP'T OF EPIDEMIOLOGY (Sept. 28, 2017), <https://perma.cc/DD8E-H8JN>.

⁴⁸ *Id.*

⁴⁹ *See, e.g.*, Mez, *supra* note 45, at 369–70; Lee E. Goldstein, Andrew M. Fisher, Chad A. Tagge, Xiao-Lei Zhang, Libor Velisek, John A. Sullivan, Chirag Upreti, Jonathan M. Kracht, Maria Ericsson, Mark W. Wojnarowicz, Cezar J. Goletiani, Giorgi M. Maglakelidze, Noel Casey, Juliet A. Moncaster, Olga Minaeva, Robert D. Moir, Christopher J. Nowinski, Robert A. Stern, Robert C. Cantu, James Geiling, Jan K. Blusztajn, Benjamin L. Wolozin, Tsuneya Ikezu, Thor D. Stein, Andrew E. Budson, Neil W. Kowall, David Chargin, Andre Sharon, Sudad Saman, Garth F. Hall, William C. Moss, Robin O. Cleveland, Rudolph E. Tanzi, Patric K. Stanton, & Ann C. McKee, *Chronic Traumatic Encephalopathy in Blast-Exposed Military Veterans and a Blast Neurotrauma Mouse Model*, 4 SCI. TRANSLATIONAL MED. 1, 11–12 (2012) (finding that CTE found in military veterans who had repeated blast exposure mirrored CTE in football players).

⁵⁰ UW Epi News, *supra* note 47.

football and TBIs for some time.⁵¹ There is still a debate among scientists regarding a causal relationship between football and TBIs in general.⁵² However, those who argue that there is no causal link are “increasingly in the minority.”⁵³

III. STUDENT-ATHLETE LIFE

Student-Athlete Life is often set against a backdrop of coaches’ being desperate to win. A fish rots from the head and coaches are at least the figurehead of programs across the nation. Consequently, coaches’ desire to win can lead to their encouraging academic dishonesty, turning a blind eye to athlete injuries, and influencing the judgement of medical professionals.⁵⁴ Such behavior is often enabled by all parties, students, coaches, and medical professionals, having a vested interest in athletes being fit enough to play.⁵⁵

A. Finances

Despite the glamorous picture of the NCAA student-athlete life that can be seen on TV, the financial realities can be a stark contrast. Although the term “full ride” is often associated with college sports, most student-athletes do not receive such scholarships.⁵⁶ In fact, athlete compensation has been restricted to institutions providing tuition and fees, room, board and course-related materials.⁵⁷ Furthermore, the perks one can experience at larger schools, such as a nutritionist or professional-grade training facilities, are not enjoyed by all athletes.⁵⁸ It helps that student-athletes are now able to profit off of their name, image, and likeness (NIL),⁵⁹ but such deals are concentrated among a small number relative to athletes in Divisions I-III.⁶⁰ Despite bringing in millions for NCAA schools, many college athletes had to wonder where their next meal was coming from.⁶¹ En route to the 2014 NCAA Men’s Basketball Championship, UConn player Shabazz Napier spoke about the many nights he went to bed hungry.⁶² Two weeks later, the NCAA approved unlimited meals for athletes.⁶³

⁵¹ Caputo, *supra* note 33, at 65.

⁵² Lee, *supra* note 6, at 618; Steve Fainaru, *NFL Acknowledges, for First Time, Link Between Football, Brain Disease*, ESPN, (Mar. 14, 2016) http://espn.go.com/espn/otl/story/_/id/14972296/top-nfl-official-acknowledges-link-football-related-head-trauma-cte-first.

⁵³ Lee, *supra* note 6, at 618; see Fainaru, *supra* note 52.

⁵⁴ Holden, *supra* note 4, at 447–48.

⁵⁵ *Id.*

⁵⁶ Caruso, *supra* note 3, at 20.

⁵⁷ Lee, *supra* note 6, at 621.

⁵⁸ Caruso, *supra* note 3, at 20–21.

⁵⁹ Holden, *supra* note 4, at 454–55.

⁶⁰ See generally Holden, *supra* note 4.

⁶¹ Sara Ganim, *UConn Guard On Unions: I Go to Bed ‘Starving’* CNN (Apr. 8, 2014, 1:24 PM), <https://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html>.

⁶² *Id.*

⁶³ *Id.*; Tyler Conway, *NCAA Approves Unlimited Meals and Snacks for Division I Student-Athletes*, BLEACHER REPORT (Apr. 15, 2014), <https://bleacherreport.com/articles/2030620-ncaa-approves->

B. “Walk It Off”

NCAA schools control so many aspects of student lives: when to wake up, when to eat, when to study, how much they can weigh (in many cases); yet, many schools use this relationship to exploit, instead of protect.⁶⁴ Such exploitation has manifested through a long history of programs encouraging athletes to play through injuries, especially TBIs.⁶⁵ Playing through TBIs has resulted in serious injury and even death for many student-athletes.⁶⁶

The Oklahoma drill is an exercise usually done during the first few weeks of football practice.⁶⁷ A fullback and linebacker line up opposite each other and collide headfirst.⁶⁸ There is no technique being honed by the drill; coaches simply use it to assess whether players are afraid of being hit.⁶⁹ Derek Sheely was a fullback on Frostburg State University's football team.⁷⁰ In 2011, the Oklahoma drill was a part of Frostburg's preseason training.⁷¹ During the drill, a cut on Sheely's head opened for the fourth time in three days.⁷² Despite his injuries, Sheely's team trainer made him return to practice.⁷³ Following the drill, Sheely allegedly complained to his coach that he “‘didn't feel right’ and had a ‘headache’”⁷⁴ In response, the coach yelled, “stop your b-tching and moaning and quit acting like a p-ssy and get back out there Sheely!”⁷⁵ Sheely's teammates alleged that those who reported or complained about injuries were looked down upon.⁷⁶ Student-athletes who sought to tend to their injuries were ostracized by the coaching staff and the rest of the team; they were often forced to clean the practice facilities as a form of punishment.⁷⁷ Such practices fly in the face of best practices put forward by the medical community.⁷⁸

unlimited-meals-and-snacks-for-division-i-student-athletes (noting some skeptical observers felt the move was only due to backlash caused by Napier's comments).

⁶⁴ Ted Tatos, *Abuse and Mistreatment of Athletes at U.S. Universities: Legal Implications for Institutional Duty-to-Protect*, 21 TEX. REV. ENT. & SPORTS L. 1, 34, 46–47 (2020).

⁶⁵ Holden, *supra* note 4, at 447–48; Pretty, *supra* note 8, at 2371.

⁶⁶ Holden, *supra* note 4, at 447–48; Pretty, *supra* note 8, at 2365–66, 2371.

⁶⁷ Pretty, *supra* note 8, at 2359–60.

⁶⁸ *Id.*

⁶⁹ *Id.*; Dan Diamond, *A Head Injury in Practice Killed Derek Sheely. Is the NCAA to Blame?*, FORBES (Sept. 2, 2013, 7:47 AM), <https://www.forbes.com/sites/dandiamond/2013/09/02/a-head-injury-in-practice-killed-derek-sheely-is-the-ncaa-to-blame/>.

⁷⁰ Pretty, *supra* note 8, at 2359; Diamond, *supra* note 69.

⁷¹ Pretty, *supra* note 8, at 2359.

⁷² *Id.* at 2360; Diamond, *supra* note 69.

⁷³ Pretty, *supra* note 8, at 2360; Diamond, *supra* note 69.

⁷⁴ Pretty, *supra* note 8, at 2360.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See Breton M. Asken, Michael A. McCrea, James R. Clugston, Aliyah R. Snyder, Zachary M. Houck, & Russel M. Bauer, “Playing Through It”: *Delayed Reporting & Removal From Athletic Activity After Concussion Predicts Prolonged Recovery* 51 J. ATHLETIC TRAINING 329, 333 (2016) (“Athletes who do not immediately report symptoms of a concussion and continue to participate in athletic activity are at risk for longer recoveries than athletes who immediately report symptoms and are immediately removed from activity.”). Further, athletes who are pressured to remain in play are at greater risk of further injury. *Id.* at 329 (“One significant implication of these findings relates to educating athletes and

Shortly after, Sheely collapsed after another blow to the head.⁷⁹ Sheely never woke up.⁸⁰ Sheely experienced significant brain swelling and sadly passed away after six days in a coma.⁸¹ Unfortunately, there have been many Derek Sheely's under the watch of the NCAA and its member institutions.⁸² Yet, even more cases go unreported due to a toxic culture around playing through injuries in football and other sports.⁸³ Although schools often contribute to that harm that comes from playing through injuries, such instances rarely spawn the substantive change needed to protect athletes.⁸⁴

For neither the first nor the last time, we see a student-athlete unable to defend themselves in the face of abuse and exploitation. Student-athletes are a vulnerable group who cannot be expected to uphold safety protocols all by themselves. Since the current framework is defective, it is time to reassess how far we are willing to go to protect young people.

IV. NCAA INJURY JURISPRUDENCE

For much of the NCAA's existence, they rarely lost in court.⁸⁵ Similar to academic deference, courts let the NCAA—who are responsible for student safety—do what they thought was best.⁸⁶ Yet, the tide took a significant turn in 2016.

coaches. Athletes are sometimes motivated to hide their symptoms because of both internal and external pressure to perform."); *see also* Emily Kroshus, Bernice Garnett, Matt Hawrilenko, Christine M. Baugh, Jerel P. Calzo, *Concussion Under-Reporting and Pressure from Coaches, Teammates, Fans, and Parents*, 134 SOC. SCI. MED. 66, 66–75 (2015); Saull & Greenwald, *supra* note 23, at 1–2 (noting pressures on athletes to ignore their own injuries and perform); Pretty, *supra* note 8, at 2363 (noting "every concussion is case is unique, and thus the injury presents a challenge for medical professionals to properly diagnose, as well as for players to self-report their symptoms"); Pretty, *supra* note 8, at 2389 ("[I]t is imperative that athletes understand not only the symptoms of a concussion, but also the absolute necessity of reporting their symptoms, rather than hiding them."); Kelly G. Kilcoyne, Jonathan F. Dickens, Steven J. Svoboda, Brett D. Owens, Kenneth L. Cameron, Robert T. Sullivan, & John-Paul Rue, *Reported Concussion Rates for Three Division I Football Programs*, 6 SPORTS HEALTH 402–05 (2014) (noting "athletes, for various reasons, often underreport and minimize the importance of concussions" and "In other instances, the athlete may not want to report symptoms for fear of missing current and future games.").

⁷⁹ *Id.*; Diamond, *supra* note 69.

⁸⁰ Pretty, *supra* note 8, at 2359; Diamond, *supra* note 69.

⁸¹ Pretty, *supra* note 8, at 2359; Diamond, *supra* note 69.

⁸² Matthew Rubino, *Gridlocked on the Gridiron: Medical Monitoring Is the Incorrect Response to the NCAA Concussion Litigation*, 93 TEMP. L. REV. 423, 424 (2021); *see infra* note 83.

⁸³ Christine M. Baugh, William P. Meehan III, Emily Kroshus, Thomas G. McGuire, & Laura T. Hatfield, *College Football Players Less Likely to Report Concussions and Other Injuries with Increased Injury Accumulation*, 36 J. NEUROTRAUMA 2065, 2065 (2019) (stating approximately fifty percent of injuries go unreported). *See, e.g.*, Caputo, *supra* note 33, at 59–60. Angel Mitchel was a soccer player at Ouachita Baptist University. *Id.* Mitchel was concussed after colliding with a player, and her condition was poorly managed by the school. *Id.* Mitchel wisely went to the hospital, against the wishes of her coaches, and never played for the school again. *Id.*

⁸⁴ Pretty, *supra* note 8, at 2367.

⁸⁵ Caruso, *supra* note 3, at 24.

⁸⁶ *See generally id.* at 22–26; *Univ. of Denver v. Nemeth*, 257 P.2d 423, 424 (1953) (en banc); *Rensing v. Ind. State Univ. Bd. Trs.*, 444 N.E.2d 1170, 1174 (1983).

A. *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation (In re NCAA)*

In re NCAA was the first class action settlement concerning the NCAA and concussions.⁸⁷ The class contended the NCAA breached their duty of reasonable care due to insufficient concussion rules and enforcement.⁸⁸ The first member of the class was Adrian Arrington, a former football player for Eastern Illinois University.⁸⁹ Similarly situated athletes throughout the country filed class actions.⁹⁰ The Multidistrict Litigation (MDL) Panel consolidated the cases into the Northern District of Illinois, under U.S. District Judge John Z. Lee (Judge Lee).⁹¹ The class alleged the NCAA failed to: address improper coaching as it relates to tackling; properly educate coaches, other team staff, and student-athletes as to concussion-related symptoms; implement adequate return-to-play guidelines; and implement guidelines for the screening and detection of concussions.⁹² The class demanded corrective measures, such as medical monitoring and an improved concussion protocols.⁹³

After failing to agree on the first proposed settlement, the second settlement was approved by the court.⁹⁴ The settlement, agreed for \$75 million, defined the settlement class as “All Persons who played an NCAA-sanctioned sport at an NCAA member institution on or prior to [July 15, 2016.]”⁹⁵ As a result, the class does not include present or future athletes. There were four key components to the settlement: (1) the medical monitoring fund, (2) changes to NCAA concussion management policies, (3) release of certain claims, and (4) fees and awards.⁹⁶ The medical monitoring program and concussion protocol changes are discussed below.⁹⁷ This case was a massive win for student-athletes against the previously untouchable NCAA. Not only was the class able to receive some form of relief, but the NCAA had to change the way concussions were handled on paper; concussion management in practice is a different discussion entirely.

⁸⁷ *In re Nat’l Collegiate Athletic Ass’n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. 202, 202 (N.D. Ill. 2019).

⁸⁸ *Id.* at 208.

⁸⁹ Rubino, *supra* note 80, at 431–32. After Arrington’s first three concussions at Eastern Illinois, the team’s medical staff allowed him to return to play the very next day. *Id.* Arrington subsequently experienced memory loss and seizures. *Id.*

⁹⁰ *Id.*

⁹¹ See generally *In re Nat’l Collegiate Athletic Ass’n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. at 222.

⁹² Rubino, *supra* note 80, at 432.

⁹³ *Id.*

⁹⁴ *Id.* Another class member objected to how contact and non-contact sports were treated differently under the first proposed settlement. It was argued that both types would need medical professionals to handle head injuries.

⁹⁵ *In re Nat’l Collegiate Athletic Ass’n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. at 209–10.

⁹⁶ Rubino, *supra* note 80, at 435, 437.

⁹⁷ See *infra* Part III.C–D.

B. Sheely v. NCAA

After the events that led up to Derek Sheely's death,⁹⁸ his family filed a wrongful death lawsuit in 2013 against the NCAA, members of the Frostburg State coaching staff, and the helmet manufacturer Schutt.⁹⁹ The Sheelys alleged the NCAA's negligence led to Derek's death by failing to enforce or investigate its concussion rules.¹⁰⁰ The case focused on the NCAA's knowledge about second-impact syndrome and whether it did enough to inform member institutions about how to prevent it.¹⁰¹ Montgomery County Circuit Court Judge David Boynton held the NCAA has a "special relationship" with athletes due to its mission statement and had a legal duty to protect them.¹⁰² Judge Boynton stated SIS is not inherent to football, so a duty to warn exists.¹⁰³ Judge Boynton denied the NCAA's motion for summary judgment, potentially setting up a trial, but the parties settled for \$1.2 million.¹⁰⁴ Majority of the settlement amount went to the Sheely Foundation.¹⁰⁵ This case is considered noteworthy because it is the first TBI case that the NCAA agreed to pay a significant amount of money to settle.¹⁰⁶ After the settlement, Derek's mother said, "You can have all the rules you want, but if you don't enforce them, they're useless . . . I don't know what it's going to take to change things."¹⁰⁷

C. The Bellwether Cases

Due to *In re NCAA*, hundreds of subsequent cases were consolidated as part of an MDL.¹⁰⁸ Judge Lee, from *In re NCAA*, wrote opinions on the motions to dismiss that comprise the bellwether cases. The four sample cases were supposed to be representative of conclusion claims against NCAA and member schools.¹⁰⁹ The cases are, (1) *Langston et al. v. Mid-America Intercollegiate Athletics Association* (*Langston*);¹¹⁰ (2) *Weston v. Big Sky*

⁹⁸ See *supra* Part IV.B.

⁹⁹ Caputo, *supra* note 33, at 72.

¹⁰⁰ *Id.* at 72–73.

¹⁰¹ Michael Dresser, *NCAA, State Reach Settlement in Case of Frostburg Football Player who Died after Head Injury*, BALTIMORE SUN (July 27, 2016, 12:15 PM), <https://www.baltimoresun.com/politics/bs-md-ncaa-lawsuit-20160725-story.html>.

¹⁰² Jon Solomon, *NCAA and Other Co-Defendants Reach \$1.2 Million Settlement in Football Player's Death*, CBSSPORTS.COM (Aug. 8, 2016, 5:24 PM), <https://www.cbssports.com/college-football/news/ncaa-and-other-co-defendants-reach-1-2-million-settlement-in-football-players-death/>.

¹⁰³ *Id.* The Sheelys alleged the NCAA had known about SIS since 1993; NCAA then-president Mark Emmert denied this during a deposition. Dresser, *supra* note 101.

¹⁰⁴ Caputo, *supra* note 33, at 73; Solomon, *supra* note 102.

¹⁰⁵ Solomon, *supra* note 102. The NCAA and Frostburg state also provided a grant to support catastrophic risk research. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Caputo, *supra* note 33, at 74.

¹⁰⁹ *Id.*

¹¹⁰ Zack Langston played outside linebacker for Pittsburg State University from 2007 to 2010. *Langston v. Mid-America Intercollegiate Athletic Ass'n*, 448 F. Supp. 3d 938, 944 (N.D. Ill. 2020). During practices and games, he suffered repeated concussive and sub-concussive hits; he was told to

Conference, Inc. (Weston);¹¹¹ (3) *Richardson v. Southeastern Conference (Richardson)*;¹¹² and (4) *Rose v. National Collegiate Athletic Association*.¹¹³ The outcomes of three of the former cases are detailed below.

There are a number of takeaways from the bellwether cases. Judge Lee assessing another set of concussion related claims allows for insights into what makes a successful case against the NCAA and affiliates. First, the facts need to draw a clear line between the plaintiffs and the NCAA; when they do, the court is very sympathetic. Judge Lee often cited the NCAA's primary principle of safeguarding athlete's mental and physical wellbeing¹¹⁴ As a result, Judge Lee concluded the NCAA and affiliates owed student-athletes a duty of care.¹¹⁵ After establishing a duty, the court was open to arguments regarding various claims such as: fraudulent concealment, breach of contract, and unjust enrichment.¹¹⁶ Yet, the court will not entertain parties who try to sue the NCAA in states that have no ties to where the alleged injuries occurred.¹¹⁷ Instead, it is advantageous for parties to pursue lawsuits in states where their competitions and trainings occurred or took place and claim those courts have supplemental jurisdiction over the NCAA.¹¹⁸ Parties equipped with injuries from activities overseen by the NCAA, jurisdiction appropriate claims, and facts that demonstrate negligent concussion protocol enforcement are at least likely to survive summary judgement where the NCAA are headquartered.

walk them off. *Id.* After suffering from mental issues, Langston shot himself at the age of twenty-six. *Id.* An examination at Boston University's Chronic Traumatic Encephalopathy Center revealed Langston had stage II/IV CTE. *Id.*

¹¹¹ Eric Weston played defensive end for WSU University in Utah from 1996 to 1997. *Weston v. Big Sky Conf.*, 466 F. Supp. 3d 896, 901 (N.D. Ill. 2020). In that role, he sustained concussive and sub-concussive hits during practices and games. *Id.* The hits would sometimes leave Weston unable to remember the game he was playing in. *Id.* Coaches had him return to play shortly after. *Id.* Consequently, Weston suffers from an array of mental and physical health issues. *Id.*

¹¹² Jamie Richardson played wide receiver for the University of Florida football team from 1994 to 1996. *Richardson v. Se. Conf.*, 612 F. Supp. 3d 753, 759 (N.D. Ill. 2020). During practices and games, he suffered repeated concussive and sub-concussive hits. *Id.* Consequently, Richardson suffers from an array of mental and physical health issues. *Id.*

¹¹³ Michael Rose and Timothy Stratton were football players at Purdue University from 1996 to 2001. *Rose v. Nat'l Collegiate Athletic Ass'n*, 346 F. Supp. 3d 1212, 1216 (N.D. Ill. 2018). The men suffered from thousands of repetitive concussive and subconcussive impacts to the head. *Id.* At the time of the case, as a result of repetitive brain trauma, the two are suffering with debilitating with both debilitating cognitive impairments and neurodegenerative disorders. *Id.*

¹¹⁴ *Langston*, 448 F. Supp. 3d at 945; *Weston*, 466 F. Supp. 3d at 901; *Richardson*, 612 F. Supp. 3d at 760.

¹¹⁵ *Langston*, 448 F. Supp. 3d at 945; *Weston*, 466 F. Supp. 3d at 901; *Richardson*, 612 F. Supp. 3d at 760.

¹¹⁶ *See Langston*, 448 F. Supp. 3d at 950; *Weston*, 466 F. Supp. 3d at 904; *Richardson*, 612 F. Supp. 3d at 760.

¹¹⁷ *Weston*, 466 F. Supp. 3d at 906. Due to the NCAA being headquartered in Indiana, various parties will seek redress under those state laws instead of the state where their respective school is based; the court has not rewarded forum shopping. *Id.*

¹¹⁸ *Richardson*, 612 F. Supp. 3d at 767.

D. Effects

1. Medical monitoring

Medical monitoring is a key part of the *In re NCAA* settlement. Medical monitoring is “a form of surveillance based on repetitive use of the same test or test group to detect a specified change in the patient indicating a change in [their] prognosis or need for . . . a change in [their] treatment.”¹¹⁹ To enable this program, a portion of the \$70 million settlement will be used to pay for resources such as medical screening, questionnaire costs, and administrative costs.¹²⁰ The medical monitoring program will last fifty years and consists of a number of components to monitor the health of class members.¹²¹ Medical monitoring is helpful partly because it gives class members access to medical testing and aids early diagnosis.¹²² Such programs can also help those who would normally need to pay for their injuries out of pocket.¹²³

Despite its merits, medical monitoring is a less than ideal way to take care of student-athletes who pursue concussion litigation. A main concern is the additional pressure put on courts to give student-athletes relief. In the immediate wake of *In re NCAA*, the NCAA was facing over 300 concussion related class-action lawsuits on behalf of former student-athletes.¹²⁴ The steady stream of new concussion litigation shows that medical monitoring programs are not enough to prevent harm going forward.¹²⁵

¹¹⁹ Rubino, *supra* note 80, at 439 (quoting Victor E. Schwartz, Leah Lorber, & Emily J. Laird, *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349, 351 (2005) [hereinafter Schwartz]).

¹²⁰ *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. at 211. Other costs include, but are not limited to, notice and administrative costs, medical science committee costs, approved attorneys' fees, and class representative compensation. *Id.*

¹²¹ Rubino, *supra* note 80, at 435. The program has two different assessment phases: screening and evaluation. *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. at 211. Screening is conducted via a questionnaire that seeks to analyze class members' CTE symptoms. *Id.* Class members may seek an analysis of their symptoms once every five years until they reach age fifty. *Id.* Evaluation assesses post-concussion syndrome symptoms, which are early indicators of neurodegenerative diseases like CTE. *Id.* at 212. The medical monitoring medical committee may make annual recommendations and aids with the intricacies of evaluations. *Id.* Class members may be evaluated twice a year during a fifty-year period and can appeal for a third evaluation. *Id.* Alternatively, members can be given extra care if they display suicidal tendencies. Rubino, *supra* note 80, at 437.

¹²² David I. W. Hamer, *Medical Monitoring in North America: Does This Horse Have Legs*, 77 DEF. COUNS. J. 50, 51 (2010).

¹²³ *Id.* See generally Caruso, *supra* note 3, at 20–22.

¹²⁴ Caputo, *supra* note 33, at 72.

¹²⁵ Even if failure to protect student-athletes going forward was not enough to write off medical monitoring, there are other issues inherent to the resource. From a legal standpoint, concussions are not an ideal fit for medical monitoring. Rubino, *supra* note 80, at 441–42. The NCAA has a stronger case for student-athlete assumption of risk; the causal link between football and TBIs is slightly weaker than a regular instance of an entity exposing others to dangerous conditions; and there are concerns about those without CTE symptoms creating a backlog in courts. *Id.* Medically, information about CTE can only be gathered after one has died. *Id.* at 447. There are also concerns about the limited pie a medical monitoring fund program provides. See generally Schwartz, *supra* note 119; Hamer, *supra* note 122.

2. Concussion protocol changes

In re NCAA brought about a number of changes to the NCAA's concussion protocol. The court announced that the NCAA agreed—via the settlement—to adopt some best practices for concussion safety.¹²⁶ Member schools would need to: (1) administer baseline concussion tests among athletes so the pre-season results can be compared to results post-trauma;¹²⁷ (2) ensure there is no return to play on the same day as a concussion diagnosis; (3) require physician clearance to return to play post-diagnosis; (4) require medical personnel trained in concussion-related diagnosis, treatment, and management at all contact sports games; and (5) have such medical professionals with concussion training present at all practices.¹²⁸

There are additional conditions the NCAA must meet due to the settlement: (1) member schools must submit return to play protocols to the NCAA six months after the effective date of the settlement; (2) the NCAA must establish a reporting process where schools report diagnosed concussions and track their progress until resolution; (3) the NCAA must also establish process where third parties, such as athletes or their parents, can do the same; (4) the NCAA member institutions must distribute NCAA-supplied information to faculty in the event a student-athlete needs academic concussion accommodations; (5) the NCAA member institutions must provide NCAA-approved concussion education to all student-athletes, coaches, and athletic trainers before each season throughout the medical monitoring period.¹²⁹ The court also implemented processes where member schools and third parties, such as student-athletes or their parents, are able to file reports regarding settlement compliance directly to the NCAA.¹³⁰

Changes to the concussion protocol may bring about a number of benefits, perceived or otherwise. Improved concussion education is key; some consider it the most important way to protect student-athletes going forward.¹³¹ Improved education can clear up concussion misconceptions, help schools stay up to date regarding advancements in concussion safety, and puts parties closest to concussions in a better position to spot them. Additionally, the protocols require schools to put procedures on record.¹³² This enables parties to point out any violations should they assert a school must be punished.¹³³

¹²⁶ *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. at 218.

¹²⁷ *Id.* at 212; Rubino, *supra* note 80, at 437.

¹²⁸ *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. at 212.

¹²⁹ *Id.* at 212–13.

¹³⁰ *Id.* The court also implemented processes where member schools and third parties, such as student-athletes or their parents, are able to file reports regarding settlement compliance directly to the NCAA. *Id.* at 213.

¹³¹ “The only way to break the current culture of playing through concussions in football is an education system that continually inundates players with information about the associated risks, especially the danger of returning to play after sustaining a concussion.” Pretty, *supra* note 8, at 2389.

¹³² *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. at 212.

¹³³ *Id.* at 213.

Despite benefits from the new concussion protocols, there are a number of drawbacks. The protocols rely primarily on the member schools to administer concussion management procedures.¹³⁴ As student-athlete safety can often be secondary to member schools, quality in concussion management varies.¹³⁵ Institutions often see concussion protocols as a hurdle to overcome instead of an essential part of keeping student-athletes safe.¹³⁶ Although there are a number of weak points in the protocols,¹³⁷ my main concern is a trio of conflicting interests that significantly weaken them.

The three actors closest to injuries are: players, medical staff, and coaches. They are key to enforcement because they must be educated and ensure the protocols are being followed.¹³⁸ First, players want to be seen as tough and avoid being labelled as "injury-prone," hurting their NFL draft stock.¹³⁹ Medical staff are at the forefront of concussion safety because schools often use team doctors to enforce protocols.¹⁴⁰ Medical staff often want to end up at or have job safety within large college football programs.¹⁴¹ Such positions are "prestigious, often lucrative, and highly sought after within the sports medicine community."¹⁴² Consequently, medical staff are highly invested in clearing student-athletes and not being blamed for their unavailability. Coaches are similarly biased and can be unreliable when it comes to enforcing concussion protocols. They have a vested interest in fielding the best team possible so they can win games and keep their job.¹⁴³ To this end, they may put pressure on players to be available and medical staff to clear them. An equilateral triangle is the strongest shape only when all three sides maintain their integrity; the aforementioned trio are all compromised.¹⁴⁴ As a result, an independent authority is needed so players are as safe as they can be.

V. LEGISLATIVE SOLUTION ANALYSIS

There has been a variety of creative solutions suggested to protect student-athletes. Some scholars have written about the *in loco parentis*

¹³⁴ See Holden, *supra* note 4, at 447 (noting the NCAA's concussion management plan relies on individual schools enforcing policies, and this can lead to different degrees of policy enforcement); Caputo, *supra* note 33, at 68 (noting the NCAA has required member schools to keep concussion management plans on file, but they may be ineffective without an enforcement mechanism).

¹³⁵ Holden, *supra* note 4, at 447; Pretty, *supra* note 8, at 2373, 2381.

¹³⁶ See generally Tatos, *supra* note 64, at 46–47.

¹³⁷ For example, the NCAA does not require concussion protocols to be uniform across all institutions. Caputo, *supra* note 33, at 68. "Power 5" schools must submit to committee, but over 1,000 schools still fall through cracks. *Id.*

¹³⁸ Pretty, *supra* note 8, at 2371–73.

¹³⁹ *Id.* at 2372. "College football players are never more than a single major injury away from losing their scholarship if coaches or athletic directors determine that the player has become expendable." *Id.*

¹⁴⁰ Holden, *supra* note 4, at 447.

¹⁴¹ Pretty, *supra* note 8, at 2372.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ This is not a slight to the aforementioned parties; their burdens just need to be eased.

doctrine,¹⁴⁵ special relationships between the NCAA and athletes,¹⁴⁶ holding institutions responsible along with the NCAA,¹⁴⁷ independent medical professionals,¹⁴⁸ unconscionability,¹⁴⁹ and a number of tort theories. Yet, a solution must ease the burden on courts. Legislation allows for a deeper dive into the issue and the option to be proactive.

A. Past Efforts

Congress has appeared open to acting to protect student-athletes. There have been a number of efforts in the past,¹⁵⁰ including a college athlete bill of rights (CA Bill of Rights).¹⁵¹ In June 2021, Martin McNair testified at a congressional hearing regarding the future of college sports.¹⁵² McNair is the father of Jordan McNair, a Maryland football player who died of heatstroke due to a training drill.¹⁵³ He testified in support of a CA Bill of Rights and his calls were heeded by some when the bill was introduced.¹⁵⁴ The bill's main sponsor is Senator Corey Booker (D-NJ), a former Stanford University football player.¹⁵⁵ The bill seeks to remedy issues regarding rights to compensation, health and safety standards, and educational opportunities for student-athletes.¹⁵⁶ Among other functions, the bill would penalize schools, athletic associations, and conferences that violate specified protections for student-athletes.¹⁵⁷ Furthermore, the bill would "direct the Centers for Disease Control and Prevention to establish health, wellness, and safety standards for intercollegiate athletic programs."¹⁵⁸ In August 2022, Senator Booker reintroduced the proposal to the Senate Judiciary Committee.¹⁵⁹ Although the bill was introduced, it did not make it past the first committee; it has yet to gain bipartisan support.¹⁶⁰ My main concern regarding the CA Bill of Rights is that once it is created, parties will look to courts for enforcement. Although flawed, the CA Bill of Rights is a measure that can be taken in addition to independent oversight.

¹⁴⁵ See generally Tatos, *supra* note 64.

¹⁴⁶ See generally Pretty, *supra* note 8.

¹⁴⁷ Tatos, *supra* note 64, at 52.

¹⁴⁸ Holden, *supra* note 4, at 466.

¹⁴⁹ See generally Lee, *supra* note 6.

¹⁵⁰ Pretty, *supra* note 8, at 2374. Protections "would be limited[] to schools whose athletics generate at least \$10 million in media rights fees annually." *Id.*

¹⁵¹ Holden, *supra* note 4, at 457–58; S. 4724, 117th Cong. (2022).

¹⁵² See NCAA Student Athletes and NIL Rights: Hearing Before the S. Comm. on Com., Sci. & Transp., 117th Cong. (2021) [hereinafter *NIL Hearing*].

¹⁵³ Heather Dinich, *Sources: Maryland OL Jordan McNair Showed Signs of Extreme Exhaustion*, ESPN (Aug. 10, 2018, 5:00 PM), https://www.espn.com/college-football/story/_/id/24343021/jordan-mcnair-maryland-terrapins-died-heatstroke-team-workout.

¹⁵⁴ *NIL Hearing*, *supra* note 152; S. 4724.

¹⁵⁵ Holden, *supra* note 4, at 458.

¹⁵⁶ S. 4724.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

B. Framework of the Oversight Committee

One idea to keep student-athletes safe stands out: the Concussion Safety Oversight Committee (CSOC).¹⁶¹ Aaron Caputo elaborated on this idea in *The Journal of Law and Health*.¹⁶² The idea of a CSOC has since been championed by Senator Booker in his most recent proposal for the College Athlete Bill of Rights.¹⁶³ The proposed legislation would create a Commission on College Athletics to protect the economic, health, and safety interests of college athletes.¹⁶⁴ A more robust version of Caputo's CSOC, more in line with proposed legislation, would be ideal.

Such a committee can regulate, investigate and penalize member institutions for violating the NCAA's concussion protocols.¹⁶⁵ Instead of the current framework for reporting violations—student-athletes and third-parties reporting to the NCAA—parties can report to the Committee concurrently.¹⁶⁶ Penalties should include, at least, sanctions, fines, recruitment penalties, scholarship penalties, and suspensions;¹⁶⁷ head coach penalties should be included as well. Coaches wield tremendous influence and are often the ones pressuring concussed athletes to return to play.¹⁶⁸

The Committee can be implemented through the Higher Education Act (HEA), a federal law governing higher education in the United States.¹⁶⁹ The law authorizes numerous federal student aid programs.¹⁷⁰ Per the Congressional Research Service, Title IV “authorizes the federal government’s major student financial aid programs, which are the primary source of direct federal support to students pursuing postsecondary education.”¹⁷¹ The HEA can be amended to create the Committee and pull Title IV funding from schools who do not comply.¹⁷² The HEA amendment would prohibit a member school with an intercollegiate athletic program from membership in a nonprofit athletic association¹⁷³ unless it creates and

¹⁶¹ See Caputo, *supra* note 33, at 81.

¹⁶² See Caputo, *supra* note 33 (The Journal of Law and Health is published by the Cleveland State University College of Law).

¹⁶³ See S. 4724, 117th Congress (2022).

¹⁶⁴ *Id.*

¹⁶⁵ Caputo, *supra* note 33, at 81.

¹⁶⁶ *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. at 213.

¹⁶⁷ Caputo, *supra* note 33, at 83.

¹⁶⁸ Pretty, *supra* note 8, at 2387–88 (“If coaches, trainers, and athletic directors know that a failure to comply with the terms of their concussion plans could expose their football programs to serious penalties, it would provide a strong incentive for all parties to ensure that head injuries receive proper attention.”).

¹⁶⁹ Caputo, *supra* note 33, at 85.

¹⁷⁰ Alexandra Hegji, CONG. RSCH. SERV., R43351, The Higher Education Act (HEA): A Primer, Aug. 25, 2017, <https://fas.org/sgp/crs/misc/R43351.pdf>; Caputo, *supra* note 33, at 86 (“Some of the programs include: supporting students in financing their education, providing support to less-advantaged students, providing support to students pursuing an international education and certain professional degrees, and supporting certain institutions to improve their ability to offer postsecondary education programs.”).

¹⁷¹ Hegji, *supra* note 170.

¹⁷² Caputo, *supra* note 33, at 85.

¹⁷³ Such as the NCAA.

maintains or allows a third party¹⁷⁴ to create and maintain the CSOC.¹⁷⁵ In short, schools would see a drop in funding unless they are affiliated with an intercollegiate athletic association overseen by the CSOC. The NCAA would likely encourage schools to join; well-funded schools are more likely to pay NCAA membership fees.

C. Benefits

The CSOC would come with a number of benefits. The CSOC would act as a direct remedy to glaring issues in new protocols,¹⁷⁶ medical monitoring,¹⁷⁷ and judicial remedies.¹⁷⁸ Regarding concussion protocols, the CSOC would ease the burden of enforcing borne by student-athletes, medical staff, and coaches. Penalties for risking student-athlete safety can then come from a disinterested party. Second, medical monitoring simply does not do much to stop the creation of new cases. The process resembles shoveling a driveway while snow is still falling. The CSOC would bring student-athletes closer to lasting change by at least slowing the rate of new concussions through proper protocol enforcement. Third, the CSOC could also ease the burden concussion litigation puts on courts. *In re NCAA* has led to a spike in claims;¹⁷⁹ easing this caseload may speed things up for parties that find themselves in court. The risk of an unmanageable caseload increases as researchers at Boston University continue to develop a CTE blood test.¹⁸⁰ Since post-mortem CTE diagnoses would no longer be the only option, scores of student-athlete claims could become active tomorrow.

Finally, a body such as the CSOC is better equipped to clear the hurdles that can arise while handling such a complex issue. With positions occupied by experts in sports medicine and college athletics, the CSOC could approach concussion safety in a way courts cannot. While courts are on the outside looking in, CSOC members would have been steeped in the worlds of college athletics and sports medicine throughout their careers. CSOC members understand the intricacies of college athletic programs; current state of concussion research and protocol best practices; and can better anticipate unforeseen hurdles regarding policies, investigations, and enforcement. This way, the CSOC can work with a scalpel instead of a hammer.

¹⁷⁴ Such as the federal government.

¹⁷⁵ Caputo, *supra* note 33, at 86.

¹⁷⁶ See *supra* Part IV.D.2.

¹⁷⁷ See *supra* Part IV.D.1.

¹⁷⁸ See *supra* Part IV.A–C.

¹⁷⁹ Caputo, *supra* note 33, at 72.

¹⁸⁰ Ken Belson, *A Test for C.T.E. in the Living May Be Closer Than Ever*, N.Y. TIMES (Nov. 17, 2022), <https://www.nytimes.com/2022/11/17/sports/football/cte-test-concussions-alzheimers.html>.

D. Adjustments

Multiple adjustments can be made to improve the CSOC's impact. First, mental health advancements could be a mandate the CSOC hands down to the NCAA. Improved access to mental health resources is a preventative measure to slow creation of new cases. Student-athletes will also be educated on mental wellness, which has taken a backseat to physical fitness.¹⁸¹

A number of student athlete suicides have ignited a national conversation regarding mental health in collegiate sports. Madison Holleran was a University of Pennsylvania track athlete.¹⁸² Holleran was blessed to be surrounded by the love of her friends and family.¹⁸³ Despite her achievements as a Division I athlete, Holleran grappled with challenges few could understand.¹⁸⁴ Many knew Holleran was unhappy, but they could not understand how deep her struggle was.¹⁸⁵ Holleran herself struggled to understand what was happening in her mind; "[her] track coach knew that the nineteen-year-old University of Pennsylvania track runner was struggling to figure out whether track was making her unhappy, or just Penn."¹⁸⁶ Unable to find help on her own, Madison Holleran killed herself by jumping off from the ninth level of a parking garage.¹⁸⁷

Unfortunately, cases like Madison Holleran's are far too common. Kosta Karageorge was a football player at The Ohio State University.¹⁸⁸ Karageorge had gone missing before he was found dead in a dumpster on Ohio State's campus: he had shot himself in the head.¹⁸⁹ Right before his death, Karageorge texted his mother saying he felt he was "an embarrassment" and that his "concussions have [his] head all f--ed up."¹⁹⁰ Kosta Karageorge is neither the first nor the last student-athlete who fell by the wayside due to insufficient mental health protections. Despite the grim nature of these high-profile deaths, they have not resulted in long-term change. Scores of female athletes indicated they had no knowledge of any

¹⁸¹ There have been many student-athlete suicides due to effects of concussions and other mental illnesses. See generally Jayce Born, *National Protection of Student-Athlete Mental Health: The Case for Federal Regulation over the National Collegiate Athletic Association*, 92 IND. L.J. 1221, 1223 (2017); see Nicole Noren, *College Mental Health Awareness Grows*, ESPN (Jan. 22, 2014), https://www.espn.com/espn/ot/story/_id/10335925/awareness-better-treatment-college-athletes-mental-health-begins-take-shape; Associated Press, *NCAA trainers draft mental health proposal*, ESPN (Sept. 25, 2013, 10:56 AM), https://www.espn.com/college-sports/story/_id/9720732/ncaa-trainers-make-mental-health-recommendations.

¹⁸² Born, *supra* note 181, at 1221.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Terrence McCoy, *The Violent Death of Ohio State's Kosta Karageorge--and the Troubling Link Between Suicide and Concussions*, WASH. POST (Dec. 1, 2014, 6:04 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/01/the-violent-death-of-ohio-state-football-player-kosta-karageorge-and-concussions-suicidal-impact/> [<https://perma.cc/4PFZ-GHA3>].

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

tangible NCAA mental health resources, despite their heightened risk of depression, anxiety and eating disorders.¹⁹¹

Tackling mental wellness can help combat concussion effects and the stress that comes with college athletics.¹⁹² This can take the form of intakes before each season¹⁹³ and improved access to on-campus counselors equipped to work with student-athletes. With counselors becoming confidants, Sessions can even be safe spaces for players to report concussion safety violations.

Second, the CSOC's scope must be broadened beyond Division I men's football to contact sports generally. Concussions are intertwined with football, not Division I football. Overseeing Divisions I-III is a task the NCAA does already, so the CSOC must work to protect all athletes. Likewise, overseeing other sports is necessary. There are few women's football programs at a high level, but harm happens elsewhere. With female athletes being more vulnerable to concussions,¹⁹⁴ the CSOC must ensure the NCAA lives up to its mission. Overseeing contact sports is feasible if the CSOC phases them in over time. The CSOC comes with the full might of the federal government; it has the power to protect all student-athletes. The CSOC does not need to be all or nothing. The initial focus can be Division I football and expand in order of sports with the highest concussion rates.

E. Concerns and Suggestions

Despite the numerous benefits, creating the CSOC comes with concerns. First, the threat of a legislative logjam is very real. If an amendment to the HEA cannot make it through Congress, the Committee will never get a chance to go to work for student-athletes. Yet, Congress has approached the issue in the past and may still be open to it.¹⁹⁵ While researching the issue, Senator Chris Murphy of Connecticut spoke of bipartisan support for solutions.¹⁹⁶ Although Senator Murphy was not specifically referring to the Committee, he spoke of support for solutions in

¹⁹¹ Born, *supra* note 181, at 1223.

¹⁹² There have been many student-athlete suicides due to effects of concussions and other mental illnesses. Born, *supra* note 181, at 1221; *see* Noren, *supra* note 181.

¹⁹³ This would enable players to both feel supported and receive education on mental health resources available.

¹⁹⁴ Neil K. McGroarty, Symone M. Brown & Mary K. Mulcahey, *Sport-Related Concussion in Female Athletes: A Systematic Review*, 8 ORTHOPEDIC J. SPORTS MED., Jul. 16, 2020, at 1, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7366411/>; Katharine Sanderson, *Why Sports Concussions are Worse for Women*, 596 NATURE., 26 (Aug. 3, 2021), <https://www.nature.com/articles/d41586-021-02089-2> (last visited May 10, 2023); *Women May be More Vulnerable to Concussions Because of "Leaner" Nerve Fibers, Penn Study Suggests*, PENN MED., Nov. 27, 2017, <https://www.pennmedicine.org/news/news-releases/2017/november/women-may-be-more-vulnerable-to-concussions-because-of-leaner-nerve-fibers-penn-study-suggests> (last visited May 10, 2023).

¹⁹⁵ S. 4724, 177th Cong. (2022).

¹⁹⁶ *See* Press Release, Chris Murphy, U.S. Senator, *The NCAA and Colleges Must Do More to Make Sure Athletes' Health Comes First*, (Dec. 16, 2019), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-the-ncaa-and-colleges-must-do-more-to-make-sure-athletes-health-comes-first>.

general. Virtually any issue faces the risk of being politicized and held up; but for now, with bipartisan support, the Committee could make it through Congress intact.

Another concern regarding the CSOC's effectiveness is the possibility of a revolving door. A revolving door refers to instances where people take up a position at a private employer after working in the public sector.¹⁹⁷ This phenomenon is troubling when the interests of one's next job impairs their decision-making in their current one.¹⁹⁸ As a community, we do not want our public employees to have their visions clouded by conflicting interests. In the case of the CSOC, it would not be ideal for a sports medicine expert to secure a post-committee position at Louisiana State University (LSU). Although LSU is a public institution, the concern would be the CSOC member making decisions directly impacting their future employers. Long "cooldown" periods for CSOC members could help. For example, a CSOC member may not be allowed to work at the NCAA or member institutions the CSOC investigated for a period of three years after their term ends. The high degree of employment turnover in college sports could ensure that three years may blunt any potential unethical benefits to CSOC members. Recusal in the face of conflicts may help, but a CSOC member's entire term could live in the shadow of securing a favorable position afterward.

The CSOC must also exist on firm constitutional grounds so it may impose harsh penalties. Varying tiers and types of penalties in the event of violations are probably the best way to assure compliance.¹⁹⁹ To this end, the most the Committee can do itself is pull Title IV funds via the HEL.²⁰⁰ One could argue that the NCAA and the organization's members affect interstate commerce.²⁰¹ However, this argument is not guaranteed to be effective.²⁰² The federal government, through the CSOC, looking for funds to pull elsewhere could be unconstitutional.²⁰³

What else could be done if schools do not respond to pulled Title IV funding? The CSOC should direct the NCAA to issue punishments, which is already in their power. The NCAA has come down on schools in the past, such as Southern Methodist University and the "death penalty."²⁰⁴ This

¹⁹⁷ *Revolving Door Prohibitions*, NCSL (Aug. 24, 2021), <https://www.ncsl.org/ethics/revolving-door-prohibitions#:~:text=The%20phrase%20%22revolving%20door%22%20describes,public%20service%20for%20lobbying%20positions.>

¹⁹⁸ *Id.*

¹⁹⁹ Pretty, *supra* note 8, at 2386–87.

²⁰⁰ Hegji, *supra* note 170, at 3.

²⁰¹ Born, *supra* note 181, at 1241.

²⁰² *See generally* United States v. Morrison, 529 U.S. 598, 627 (2000) (ruling that Section 13981, which provided a federal civil remedy for victims of gender-motivated violence, could not be sustained under the Commerce Clause).

²⁰³ South Dakota v. Dole, 479 U.S. 203, 211 (1986). *See* Nat'l Collegiate Athletic Ass'n v. Smith 525 U.S. 459, 468 (1999).

²⁰⁴ Eric Dodds, *The "Death Penalty" and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM), <https://time.com/3720498/ncaa-smu-death-penalty/> (citing to the rule in

“cat’s paw” arrangement, which sees the NCAA acting as an agent of the CSOC, depends on the NCAA. To keep the NCAA in line, the CSOC could recommend the IRS revoke NCAA’s tax-exempt status under section 501(c)(3) of the Internal Revenue Code.²⁰⁵ The CSOC can demonstrate the NCAA’s activities, such as shirking student-athlete safety duties, are less than charitable.²⁰⁶ In that case, the IRS is likely to heed the CSOC’s recommendation. To promote cooperation between the CSOC and NCAA, the CSOC could include an NCAA representative. This representative could be a non-voting member of the CSOC who will offer the NCAA’s viewpoint regarding regulation and enforcement. The NCAA representative should decrease the opportunity of a disconnect between the CSOC and NCAA.

CONCLUSION

Student-athletes are vulnerable and should be protected from further harm. Football is an inherently dangerous sport, but our representatives in the Federal Government must do what they can. They must ensure that the NCAA and member schools are ultimately putting students first, since they have proven they will not do it on their own. To this end, we should use the might of our government to create oversight and ensure our children—our future—are being protected.

Official NCAA parlance that wiped out Southern Methodist University’s entire 1987 season and forced others to cancel their seasons as well after the NCAA determined school had been paying several football players).

²⁰⁵ 26 U.S.C. § 501(c)(3).

²⁰⁶ Caputo, *supra* note 33, at 84; *see* Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983).