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Cover Page Footnote

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Should the NCAA Have to Pay? Long-Term Injuries in College Athletics, Improper Assumptions of Risk, and Coverage of Medical Expenses After College

Alexandrea Jacinto*

Student-athletes spend years training, perfecting their sport, and working hard in school in order to make it to the big leagues: Division I College Athletics. However, when student-athletes finally get there, they are met with empty promises, and often leave with injuries that no one took the time to warn them about. That is because, despite being told that they must sign an agreement with the National Collegiate Athletic Association ("NCAA") which binds them to the organization's rules, athletes learn quickly that the other side of that agreement is rarely, if ever, upheld when they need it. Courts fail to recognize the coercive nature of the relationship between the NCAA and student-athletes, and completely ignore the duty of the NCAA to adequately inform athletes of the potential risk of their athletic participation. The long-relied-upon assumption-of-risk doctrine utilized by the NCAA as a defense should no longer be accepted by the courts, as it is clear that the nature of participation in athletics is not always entirely voluntary. Thus, the NCAA should be held liable for the lifelong medical expenses of student-athletes

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brought about by injuries sustained while acting as athletic representatives of their school.

INTRODUCTION

Performing in each football game for the University of South Carolina, Stanley Doughty was a promising young athlete and a strong defensive tackle.[1] He endured multiple significant collisions during games, many of which resulted in injury. Without fail, after each hit or injury, he was quickly sent back into the game to perform for his team, his coach, and his school.[2] Doughty relentlessly pursued his dream of being drafted into the NFL. Like many other collegiate football players, he hoped that his athletic gift would lead him to success despite a perceived lack of skill in the classroom or familial support.

Doughty's dream, however, was cut short almost as quickly as it came to fruition. When he was asked to come to practice for the Kansas City Chiefs in 2007, the team and the NFL mandated that Doughty get a physical done through the organization's medical professionals.[3] Doughty's examination revealed that he had a severe cervical spine injury—so severe, in fact, that one more hit could have left him completely paralyzed for life.[4] Despite playing on behalf of a Southeastern Conference ("SEC") football program (which is the richest and most prestigious in the country), Doughty's injury had gone undetected by coaches, the university he trusted, the medical staff who examined him, and, most notably, by the NCAA.[5] With this news, the young man was left with nothing—nothing except a potentially life-altering injury.[6] He now had no chance of a career in athletics, he had not obtained a degree from the

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1 *See* Megan Walsh, *'I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes*, ATLANTIC (May 1, 2013), https://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/ [https://perma.cc/A93H-WYSW] (Stanley Doughty was a starting player for the team so he played in most competitions).

2 *See id*.

3 *Id*.

4 *Id*.

5 *Id*.

6 *Id*.

University, and had no insurance or means to take care of himself.[7] Perhaps most brutally, despite years of dedication to his team, his university, and the NCAA, Doughty was left to foot the bill himself.[8] Upon reflecting on his situation, Doughty expressed his sense of betrayal by his university: "I was young. . . . I thought they knew what was good for me. I just listened to 'em. I trusted 'em."[9]

Student-athletes are not typical college students and should therefore be treated with a special duty of care by universities, and especially by the NCAA. This includes the ways in which they are treated by university training and medical staff, and then reimbursed for medical bills when they endure serious injuries during athletic participation. Students often contend with lifelong consequences stemming from injuries sustained while acting as athletic representatives for their universities; representation from which these universities and the NCAA profit significantly. Importantly, the NCAA and its constituent universities are "non-profit" organizations which consistently make steady annual profits from the performance and success of student-athletes.[10] For instance, the NCAA brings in about $1 billion in revenue annually from the regulation of college athletics.[11] In light of these astronomical figures, observers might expect that the NCAA would adequately compensate student-athletes for injuries sustained while making this money for the organization.

This Note will focus on the relationship between student-athletes and the NCAA as well as the relationship between student-athletes and their schools. From the moment that a student-athlete joins a team (whether by scholarship or not) and accedes to the NCAA's

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7 *See id*. Doughty did not actually obtain his degree; he left school early, twelve credits shy of obtaining his degree, in order to participate in the NFL draft. This is a common practice allowed by NCAA-accredited schools and the NFL. *See id.*

8 *See id*.

9 *Id.*

10 *See* Steve Berkowitz, *NCAA Reports Revenues of More Than $1 Billion in 2017*, USA TODAY (Mar. 7, 2018), https://www.usatoday.com/story/sports/college/2018/03/07/ncaa-reports-revenues-more-than-1-billion-2017/402486002/ [/https://perma.cc/R6LZ-V75U].

11 *See* Steve Cameron, *The NCAA Brings in $1 Billion a Year–Here's Why It Refuses to Pay Its College Athletes*, BUS. INSIDER (Mar. 26, 2019), https://www.businessinsider.com/ncaa-college-athletes-march-madness-basketball-football-sports-not-paid-2019-3 [https://perma.cc/QER5-HU82].

rules and regulations, this special relationship between student-athletes and athletic institutions indicates that student-athletes deserve a special duty of protection from injuries and their attendant long-term effects.[12] When this duty is not met, student-athletes should receive adequate legal protection, compensation, and medical coverage for their injuries. In light of college athletes' actual experiences, the NCAA's continuous use of the assumption-of-risk affirmative defense should no longer be accepted by courts. Without such a doctrinal shift, the NCAA will continue to use this affirmative defense to shift the blame onto student-athletes, who are clearly not as well-suited as the NCAA to understand the inherent risks of their athletic participation. Thus, for such a profitable organization as NCAA, the compensation of athletes with lifelong injuries and side effects that will impact their lives far after the NCAA is done profiting off of their athletic gifts should be a top priority. Whether this intervention comes from a change in jurisprudence or voluntary action by the NCAA and its constituent conferences is something that remains to be seen, although this Note argues that the NCAA should voluntarily take such action.

Part I of this Note will cover the history and background of the NCAA, as well as the types of injuries that student-athletes endure while competing in collegiate athletics. Part I further elaborates on the categories of injuries from which student-athletes lack protection and the long-term implications of such injuries. Part II of this Note will look at assumption of risk: the tort doctrine directly applicable to many cases involving injuries to student-athletes and these students' relationships with the NCAA and their schools. Analyzing the on-the-ground dynamics between athletes and athletic institutions and colleges, Part II will also apply the assumption-of-risk doctrine to the specific context of Division I college athletics. Finally, this Part will demonstrate the ways in which the NCAA uses the assumption-of-risk doctrine to evade liability, as the organization argues that any contract that may exist is not enforceable.[13]

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[12] *See generally* Keya Denner, Comment, *Taking One for the Team: The Role of Assumption of the Risk in Sports in Torts Cases*, 14 SETON HALL J. SPORTS & ENT. L. 209 (2004).

[13] *See infra* Part II.D.

Part III advocates for more responsibility to be taken on the part of the NCAA when it comes to liability for long-life medical expenses accrued by injury-riddled student-athletes. In particular, this Part argues for a shift in the analysis of the relationship between student-athletes and athletic-academic institutions which would impose a greater degree of responsibility upon the institutions to protect its athletes. Legally, this includes curbing the NCAA and its member universities' ability to assert assumption of risk, which they often argue in defense of liability for athlete's injuries. Part III will further argue that with this higher level of responsibility, student-athletes should receive more adequate compensation, or, at a minimum, reimbursement for accumulated bills by the NCAA; such compensation would cover the effects of lifelong injuries endured while competing in athletic competition, including, but not limited to, lifetime insurance plans for student-athletes, which would be guaranteed upon agreement to participate in collegiate athletics.

I. BACKGROUND

A. The Creation of the NCAA

The formation of the NCAA opened the door to the concept that student-athletes were owed certain rights and protections in exchange for their participation in college athletics. In 1904, after a growing nationwide concern over the excessive number of head injuries sustained by students participating in college football, President Theodore Roosevelt established the Intercollegiate Athletic Association ("IAA"), whose role was to create rules and regulations that would protect college athletes from injury or death in collegiate athletics, especially in football.[14] Six years later, in 1910, the NCAA was born out of the IAA as an effort to further protect college football players from the dangers of serious head injuries which were plaguing college athletics.[15] The original objective of the organization was to create standards and regulations that would facilitate a safer playing environment for college football players. The

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[14] *See* Rodney K. Smith, *Head Injuries, Student Welfare, and Saving College Football: A Game Plan for the NCAA*, 41 PEPP. L. REV. 267, 268–69 (2014).

[15] *See id*.

organization, however, has significantly evolved from its basic purpose. For example, the NCAA has since created eligibility and recruiting guidelines, rules regarding distribution of financial aid, and rules that student-athletes must adhere to in order to maintain eligibility.[16] The NCAA has specific protocols for handling violations of these rules and guidelines, focusing especially on violations of recruitment rules, unfair competition practices, or improper financial gains on the part of member institutions or student-athletes.[17] Losing sight of its initial purpose, what began as a committee of individuals dedicated to protecting college football players from horrific head injuries has ironically evolved into an economic engine which faces constant litigation and backlash for its perpetual inability to adequately protect student-athletes in college, *especially* from head injuries.[18] In light of this history, the NCAA's current legal stance—by which it shields itself of liability for such injuries—betrays its founding purpose.[19]

Since evolving into what is now the supervisory body of nearly all Division I athletics, the NCAA has created a standard of practices and regulations to which all student-athletes must adhere if they want to remain eligible athletes at participating universities ("member institutions").[20] The organization oversees about 490,000 collegiate athletes among 19,500 teams at member institutions[21] with the objectives of ensuring fairness in athletics and enforcing safety protocols.[22] Clocking in at 440 pages, the most recent version of the NCAA Division I Bylaws ("Bylaws") outlines all of the expectations of the NCAA, member institutions, and student-athletes at

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16 *See* Christian Dennie, *The Benefits of Arbitration: Arbitration in NCAA Student-Athlete Participation and Infractions Matters Provides for Fundamental Fairness*, 46 U. MEM. L. REV. 135, 137–38 (2015).

17 *See id.* at 141–42.

18 *See id.* at 138.

19 *See, e.g.*, Rose v. NCAA, 346 F. Supp. 3d 1212 (N.D. Ill. Sept. 28, 2018); Bradley v. NCAA, 249 F. Supp. 3d 149, 157 (D.D.C. 2017).

20 *See generally NCAA Division I Manual (2018–19)*, NCAA (Aug. 1, 2018), http://www.ncaapublications.com/productdownloads/D119.pdf [https://perma.cc/7BDD-RDQJ].

21 *NCAA Recruiting Facts*, NCAA (last updated Mar. 2018), https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf [https://perma.cc/793R-5BJQ].

22 *See* Katherine Mason, Note, *Informed Consent in the NCAA: A Solution to the Injured Athlete Epidemic*, 36 WHITTIER L. REV. 511, 511–12 (2015).

member institutions.[23] Student-athletes are expected to have fully read and completely understood the entirety of the 440-page document before signing an agreement with the NCAA and their member institution.[24] Student-athletes are also expected to comply with all aspects outlined in the elaborate agreement; they are otherwise subjected to punishment through "enforcement" by the NCAA or their school.[25]

Instances of enforcement often revolve around economically charged "rule-breakings" based on the regulations laid out in the Bylaws.[26] This includes improper recruiting practices by universities and coaches, improper compensation for student-athletes for their athletic participation, and other violations stemming from financial gain by either athletes or universities.[27] More often than not, however, such enforcement is brought against the athletes: enforcement of the terms of the Bylaws against the NCAA itself—for failing to fulfill its stated promises—is rare, despite the clear obligations and objectives that the association promises to enforce.[28] Regardless of the Bylaws' initial promise to "enhance the well-being of student-athletes," the NCAA then quickly passes on this responsibility to its member institutions, making them carry out the promises set forth in the Bylaws on NCAA's behalf.[29] This problematic delegation of discretion to member institutions, born out of the NCAA's evasion of legal liability, is perhaps the biggest reason

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23 *See generally NCAA Division I Manual (2018–19)*, *supra* note 20.

24 *See* Student-Athlete Statement—NCAA Division I (2012–2013) (on file with author).

25 *See id.*

26 *See NCAA Division I Manual (2018–19)*, *supra* note 20.

27 *See, e.g.*, Craig Lyons, *MSU Investigating NCAA Violation Claims Against D'Antonio*, LANSING ST. J. (Feb. 18, 2020), https://www.lansingstatejournal.com/story/news/2020/02/18/michigan-state-university-ncaa-violation-investigation-mark-dantonio-curtis-blackwell-lawsuit/4797929002/ [https://perma.cc/R4VA-5ELV]; Aaron Beard, *NCAA Filing Holds Firm on Charges in NC State Case*, AP NEWS (Feb. 10, 2020), https://apnews.com/909c6543ffc1458e1dae434fe35073f5 [https://perma.cc/8G2A-HN9W]; *Pitt Panthers Men's Basketball and Football Teams Commit NCAA Coaching Violations*, CBS PITT. (Feb. 20, 2020), https://pittsburgh.cbslocal.com/2020/02/20/pitt-ncaa-violations/ [https://perma.cc/VJ96-BBUZ].

28 *Cf.* Rose v. NCAA, 346 F. Supp. 3d 1212, 1217 (N.D. Ill. Sept. 28, 2018); Bradley v. NCAA, 249 F. Supp. 3d 149, 156 (D.D.C. 2017) (showing how in the rare instances when litigants bring a case against the NCAA, courts often throw out arguments made by athletes, ruling in favor of the NCAA).

29 *NCAA Division I Manual (2018–19)*, *supra* note 20, at xii.

that the NCAA has ultimately failed both in its mission to enforce its safety protocols and to adequately protect student-athletes from the consequences of lifelong injuries.

B. The NCAA Bylaws and Regulations

The NCAA describes itself on its website as a "membership organization dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field . . . the classroom, and throughout life."[30] In the Bylaws, the association makes a promise to "(1) conduct intercollegiate athletics in a manner designed to protect and enhance the *physical* and *educational well-being* of students athletes; and (2) to require that each member institution protect the health of, and provide a safe environment for, each of its participating student-athletes."[31]

For the purposes of this Note, the most relevant sections of the 2018–2019 Division I NCAA Manual fall within Article 16.4 of the Bylaws.[32] The section titled "Medical Expenses" states that member institutions must provide medical care for student-athletes with respect to athletically related injuries that occur while participating in intercollegiate activities.[33] However, the provision within Article 16 also states that it is at the discretion of the member institution to determine how much medical care is provided, the type or level of care that must be provided; the provision further grants member institutions the power to decide whether or not the injury is "athletically related."[34] The "Medical Expenses" section details just a fraction of the excessive discretion that the NCAA delegates to member institutions when it comes to fulfilling its promise to protect the well-being of student-athletes in schools, as is clearly stated in the NCAA's objectives.[35] Further, in the Bylaws under 16.4.1, the NCAA states that the coverage for student-athletes extends for a period of two years after graduation or departure from their

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30 Mason, *supra* note 22, at 512.
31 *Rose*, 346 F. Supp. 3d at 1227.
32 *See NCAA Division I Manual (2018–19)*, *supra* note 20, at 230.
33 *Id*.
34 *Id*.
35 *Id*.

respective member institution.[36] Thus, the reality for student-athletes is that the insurance provided by their school only covers the short-term and immediate impact of athletically related injuries and leaves them to cover their own expenses beyond those two years.[37]

Despite the initial purpose for which the organization was established, the NCAA has been notoriously unhurried in their objective of creating rules and regulations for member institutions with regard to the medical treatment of student-athletes.[38] Perhaps the most egregious and infamously discussed action (or inaction) of the NCAA has been its delay in addressing concussion protocols.[39] The NCAA did not create any kind of concussion management protocol system until 2010, even though the organization had a century to accomplish its main purpose: creating regulations to limit the number and severity of head injuries in college football.[40] Further, although the NCAA has created such guidelines and regulations for member institutions, as of this writing, the NCAA has neither created a mandate nor an enforcement strategy to ensure that NCAA-compliant institutions specifically adhere to the lax regulations.[41] In the apparent absence of voluntary solutions by the NCAA, this naked abandonment of its original purpose in favor of profit is one central reason that courts' treatment of the NCAA must change.

The Bylaws make it clear that the "regulations" and standards set by the NCAA were not constructed to be strictly enforced and that it is at the discretion of the member institution to ensure that these regulations are being followed.[42] Such regulations include the enforcement of concussion protocols and general injury prevention,

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36 *Id*.

37 *See id*.

38 *See* Ralph D. Russo, *Wave of Concussion Lawsuits to Test NCAA's Liability*, AP NEWS (Feb. 7, 2019), https://apnews.com/4a4ed68e4c3a426abc4e34606ae4a399 [https://perma.cc/EZZ7-JJHQ].

39 *See Judge OK's Concussion Suit Settlement vs. NCAA*, ESPN (Aug. 12, 2019), https://www.espn.com/college-football/story/_/id/27376128/judge-oks-concussion-suit-settlement-vs-ncaa [https://perma.cc/CEP3-CWKP]; *see also id*.

40 *See* Elizabeth Etherton, *Systematic Negligence: The NCAA Concussion Management Plan and Its Limitations*, 21 SPORTS L.J. 1, 3 (2014).

41 *See id.* at 10.

42 *See* Mason, *supra* note 22, at 517.

detection, and treatment processes.[43] Another crucial example of the wide discretion granted to member institutions is in insurance coverage. While the NCAA mandates that athletes have health insurance upon entering school, it does not require schools to pay for any part of the athletes' insurance.[44] Thus, the NCAA gives universities the discretion to decide what kind of insurance students must obtain, which would potentially make coverage for injuries in the future far more expensive in terms of money and recovery time.[45] It is evident that while student-athletes rely on the NCAA to protect them from injury and to help them handle injuries when they do occur, the NCAA—despite writing the rules and regulations themselves—instead redirects the responsibility and decision-making to member institutions.[46]

C. Litigation vs. Settlement

Despite an increase in litigation between the NCAA and former student-athletes over the last fifteen years, there still seems to be no significant case law pointing in favor of liability for negligence on the part of the NCAA. This is in part because the NCAA has the financial means in most cases to settle suits out of court.[47] For example, in 2017, a widow, Deb Hardin Ploetz, filed a complaint against the NCAA for negligently ignoring the signs of irreparable brain damage that her husband Greg had exhibited, which resulted from repetitive concussive hits.[48] Unfortunately, Greg's injury is one that many football players—at all levels, including college—continue to sustain.[49] Had this case resulted in a ruling against the NCAA, it easily could have established a landmark case; such a

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43 *See id*.

44 *See Student-Athletes Unaware of Their Career Ending Injuries*, PRO ATHLETE L. GROUP, http://proathletelawgroup.com/student-athletes-unaware-of-their-career-ending-injuries/ [https://perma.cc/HH4V-J2C2].

45 *Id*.

46 *Id*.; *see also When College Athletes Get Injured*, TURCO L. (Nov. 7, 2019), https://www.massinjuryfirm.com/blog/2019/11/college-athletes/ [https://perma.cc/QK2T-4ZNM].

47 *See* Jeremy Bauer-Wolf, *A Verdict Could Have Changed the Tide*, INSIDE HIGHER ED (June 26, 2018), https://www.insidehighered.com/news/2018/06/26/settlement-highly-anticipated-concussion-lawsuit-against-ncaa [https://perma.cc/6RDE-4Q2U].

48 *See id*.

49 *See id*.

precedent might have invited a wave of litigation against the organization, and forced the NCAA into developing more stringent and effective regulations with respect to medical treatment for student-athletes and the establishment of preventative measures.[50] Unfortunately, the court never had the opportunity to make such an impact on collegiate athletics. After just three days at trial, the parties settled, and Mrs. Ploetz took home an undisclosed, presumptively large, sum of money instead.[51] Furthermore, the details of the settlement have not been disclosed to the public; outside of the NCAA and the Ploetz family, we will likely never know how much money was agreed upon or what arguments the NCAA made to get to this point.[52] While the details of this settlement are not available, it can presumably be surmised that it, like many settlement agreements, involved a confidentiality agreement, which prevents any disclosure of facts that a successful suit may otherwise allow.[53]

D. Lifelong Injuries Endured by Student-Athletes

The first concern surrounding the long-term impact of athletic injury is proper treatment. The National Athletic Trainer's Association conducted a study, in which athletic trainers employed by NCAA member institutions throughout the country answered surveys regarding their roles as trainers in Division I athletic programs.[54] The survey focused on instances in which coaches, trainers, or other members of their employer school intentionally ignored the symptoms of injury in student-athletes.[55] Of the trainers who answered the survey, an incredible 18.73% of trainers reported that a "coach play[ed] an athlete who had been deemed medically ineligible for participation" at some point during their time working with

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50 *See id*.

51 *See id*.

52 *See id*.

53 *See In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig., 2019 U.S. Dist. LEXIS 135682, at *46–47 (N.D. Ill. 2019).

54 *See Only Half of Collegiate-Level Sports Programs Follow Medical Model of Care for Student-Athletes, Survey Finds*, NATA (June 26, 2019), https://www.nata.org/press-release/062619/only-half-collegiate-level-sports-programs-follow-medical-model-care-student [https://perma.cc/57Z7-WZ63].

55 *See id*.

a Division I program.[56] While this number may not seem astronomical, considering that there are over 460,000 student-athletes, with 179,200 in Division I programs alone across the United States, the survey suggests that a significant number of athletes are being ignored.[57] This should draw attention to a serious problem caused by the significant delegation of power to the member universities by the NCAA: because there is not a strict nor specific protocol for member institutions to follow regarding medical treatment of student-athletes, there is too much leeway for member institutions to avoid dealing with athletes' injuries properly and thoroughly.[58]

1. The Concussion Epidemic

Much of the focus on injury of athletes has zeroed in on concussion protocols and regulations. This is certainly a prominent issue for student-athletes in most sports, and the NCAA's lack of enforcement is beyond troubling. The NCAA released a statement that anywhere between 1.6 million and 3.8 million concussions occur annually as a result of participation in recreational activities and sports.[59] Though much of the media attention focuses on concussions as a result of the constant impacts in football, a large number of these injuries occur in other sports.[60]

As previously mentioned, the NCAA did not create any type of concussion protocol for member institutions to adhere to until 2010, exactly a century after the creation of the organization.[61] Despite the gap between the organization's knowledge of the ongoing epidemic of traumatic head injuries and the implementation of effective

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56 *Id*.

57 *See Student-Athletes*, NCAA, http://www.ncaa.org/student-athletes [https://perma.cc/XU5B-8MJ].

58 *See* sources cited *supra* note 46 and accompanying text; *see also* Dawson v. Nat'l Collegiate Athletic Ass'n/PAC-12 Conference, 932 F.3d 905, 908–09 (9th Cir. 2019) (explaining the relationship between member schools and the NCAA with regard to implementation and enforcement of violations of NCAA bylaws).

59 Elizabeth Etherton, *Systematic Negligence: The NCAA Concussion Management Plan and Its Limitations*, 21 SPORTS L.J. 1, 2 (2014).

60 *See Sports-Related Head Injury*, AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS, https://www.aans.org/en/Patients/Neurosurgical-Conditions-and-Treatments/Sports-related-Head-Injury [https://perma.cc/2XAJ-EFH2].

61 *See* Etherton, *supra* note 40, at 3.

regulation, the NCAA's plan is still vague and potentially ineffective.[62] Section 3.2.4.18 of the 2018–2019 Bylaws sets forth the guidelines for a Concussion Management Plan that active member institutions must follow.[63] The "Concussion Safety Protocol" states that member institutions shall have, among other things, "baseline testing," "procedures for reducing exposure to head injuries," "procedures for education about concussions," and procedures that "ensure that proper and appropriate concussion management" is exercised.[64]

While on its face the Bylaws seem to regulate concussion management in member institutions, they actually only do the bare minimum to appear effective. In fact, none of the supposed "requirements" actually specify what procedures members institutions must implement to protect students, just that some kind of procedure must exist.[65] Despite its promises to protect student-athletes' well-being, and its central organizational purpose to avoid head trauma, the NCAA continues to employ this type of language which leaves its empty protocols nearly completely to the discretion of member institutions—all in an effort to clear themselves of liability.[66]

In *Bradley v. NCAA*, a female athlete sued the NCAA for negligence and gross negligence after being improperly treated for a head injury while playing field hockey.[67] Bradley was a member of the varsity field hockey team at American University in the fall of 2011[68]—one year after the NCAA finally implemented rules and regulations regarding concussion protocol.[69] During a game against Richmond University, Bradley was hit in the head, after which she began to experience concussion-like symptoms.[70] Despite her signs of head injury, Bradley continued playing in games and participating in practices with the field hockey team, and was not advised by any

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62 *See id*.
63 *See NCAA Division I Manual (2018–19)*, *supra* note 20, at 12.
64 *Id*.
65 *See id*.
66 *See* sources cited *supra* note 45 and accompanying text.
67 *See* Bradley v. NCAA, 249 F. Supp. 3d 149, 155 (D.D.C. 2017).
68 *See id.* at 155–56.
69 *See id.* at 162.
70 *See id.* at 157.

member of the coaching, training, or university staff to sit out from athletic activity while her symptoms persisted.[71] Bradley went on to sue the NCAA for negligence, alleging that the organization was "careless and negligent by breaching the duties of care it assumed for the benefit of the plaintiff".[72]

In response to the suit, the NCAA averred that it had no part in the medical decision made by the university or any healthcare provider with whom Bradley chose to consult.[73] The NCAA also noted that because the NCAA was not aware of the injury, there should be no liability on behalf of the organization.[74] In this instance, the NCAA pointed the finger at every other potentially responsible party to ensure they would avoid any and all liability for the student-athlete's injury, which was sustained while competing in an NCAA-sanctioned athletic event.[75] Though athletes like Bradley continue to trust the NCAA to protect their well-being, when the time comes for the organization to follow through with respect to treatment of injuries and medical care, it repeatedly evades liability.[76] To accomplish this result, the NCAA has used several legal defenses.[77] One argument is that there was never an enforceable agreement binding the organization to the protection of student-athletes.[78] Furthermore, regardless of any possible agreement with the NCAA, student-athletes tacitly agreed to the possibility of injury when participating in college athletics, thereby shielding the NCAA from liability.[79]

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71 *Id*.

72 *Bradley*, 249 F. Supp. 3d at 167.

73 *See id.*

74 *See id.* at 168.

75 *See generally id*.

76 *See generally id*. at 167.

77 The NCAA's first argument in *Bradley* was that her "claim is about the medical care she received from other people, not the NCAA," despite the fact that the NCAA has an agreement with those "other people" (i.e., university staff, coaches, trainers, etc.), to ensure the safety of student-athletes. 249 F. Supp. 3d at 167.

78 *See id.* at 171–73.

79 *See id.* at 167.

2. Beyond the Concussion Focus—Other Long-Term Injuries

Despite the undeniable severity of repeated head injuries and the attention from athletes on concussion protocol and reform, some of the most prevalent injuries sustained by student-athletes are ligament and muscle tears, many of which have proven to be career-ending for athletes.[80] These extremely common injuries typically produce both "devastating short-term *and* long-term consequences."[81] The long-term symptoms and complications of certain knee injuries, such as ACL and MCL tears, include "pain, functional impairment, and early onset crippling arthritis, which can cause disability, handicap, and distress."[82] These long-term effects can lead to multiple expensive surgeries, long-term pain, and overall risks and discomfort for the rest of one's life.[83]

According to a study published in 2017, 67% of a polled group of former student-athletes had sustained a "major injury" while competing, and 50% had reported "chronic" and long-lasting pain or symptoms.[84] Further, studies show that 40% of former student-athletes suffer from osteoarthritis after they retire from college athletics, compared to 24% of the general, non-athlete student population after such students graduate from college.[85] There is clearly a significant risk of long-term injury in all forms of collegiate athletic participation, about which student-athletes have received neither adequate warning nor preparation, even after purportedly reading a 440-page agreement from the NCAA.[86] This is especially true with respect to the long-term effects that athletic play has on female athletes.[87]

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80 *See* Mason, *supra* note 22, at 515 (emphasis added).

81 *Id*.

82 *Id*.

83 *See id*.

84 Ian McMahan, *Former College Athletics Chronic Injuries and Health Issues*, SPORTS ILLUSTRATED (Oct. 31, 2017), https://www.si.com/edge/2017/10/31/former-college-athletes-chronic-injuries-health-issues [https://perma.cc/BM75-A79T].

85 *Id*.

86 Despite stating that they have read the 440-page bylaws when signing eligibility agreements, it is reasonable to assume that most 18-year-old student-athletes have not actually read the entire document, if any of it.

87 *See* Mason, *supra* note 22, at 514–15.

Perhaps the most ignored concern in college sports is the long-term impact that participation in most Division I varsity athletics has on female student-athletes. Studies show that because of the significant difference between male and female anatomy, female athletes endure physical injuries very differently than male athletes.[88] This results in a higher number of injuries for female athletes, as the structure of college athletics and training is geared primarily towards male athletes.[89] For example, because female athletes generally have smaller heads and weaker necks, they are more likely to suffer a concussion after a less forceful impact than their male counterparts.[90]

Women are also significantly more prone to knee injuries, specifically ACL tears.[91] This is because women are already predisposed to bone density issues, with many women experiencing osteoporosis into their adult years; unfortunately, the structure of workouts and gameplay in college athletics directly affect this predisposition.[92] Further, studies show that heavy exercise such as that required of student-athletes in college suppresses proper hormone function, which can lead to higher risks of fractures and bone related injuries.[93] The impact that heavy exercise has on female athletes is often irreversible, and can leave women with permanent problems and lifelong symptoms long after an initial injury.[94] As a former Division I female athlete, this Note's author can authoritatively say from personal experience that women are not warned of the unique risks that are inherent to participating as a female athlete in most college sports.

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88 *See id*.
89 *See id*.
90 *Id*.
91 *See id.* at 515.
92 *See id.* at 515–16.
93 *See id.* at 516.
94 *Id*.

II. LEGAL TOOLS USED BY THE NCAA TO EVADE LIABILITY

A. In Loco Parentis

The relationship between student-athletes and the NCAA is defined in many cases as that of a special relationship.[95] In the case of a special relationship, a defendant party is responsible for a harm to the plaintiff party when the harm is reasonably foreseeable to the defendant and there is a connection between the harm caused and the defendant's conduct.[96] This idea of the "special relationship" has evolved over time with respect to the relationship between universities and students. The relationship was once viewed as that of a more guardian-like relationship, but has since evolved into the modern view that the relationship is more contractual in nature.[97]

Before the courts can examine the relationship between student-athletes and the NCAA, they must review the history of the way courts have understood the relationship between students and universities, and how that relationship has evolved over time. The doctrine of in loco parentis was an early concept of what the relationship between educational institutions and students should be; schools were meant to "stand in the shoes of parents," which created an elevated special duty toward students.[98] In essence, a school would assume the parental role over students, and thus the level of liability expected for institutions would be that of a parent-child relationship.[99] Therefore, because the relationship was meant to replace that of the "child-parent" in which the school "stands in the shoes" of the parents, in loco parentis was not intended to be upheld like a contractual relationship.[100] Instead, the relationship existed through the power and rights of the university in their ability to "exercise control

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95 *See id.* at 521–22.

96 *See id.* at 521.

97 *See generally id*.

98 VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY 251–52 (2d ed. 2010).

99 *See generally* K.B. Melear, *From* In Loco Parentis *to Consumerism: Legal Analysis of the Contractual Relationship Between Institution and Student*, 40 NASPA J. 124 (2003).

100 DODD, *supra* note 98, at 251.

over students."[101] With this broad power, universities had the ability to enforce rules and regulations over students.[102]

Over time, however, this doctrine has proved problematic in many cases involving universities and students who expect certain guarantees when they pay for an advanced education.[103] For instance, in cases involving public schools, courts have generally discarded the concept of in loco parentis entirely, either through case law or legislation, with the exception of a few specific areas in which the doctrine is still used.[104] The shift in the role of the university with relation to students can be described as moving away from the in loco parentis relationship, which would replace the parental figure for students, to a more contractual relationship, in which universities are providers and students are consumers.[105] Thus, there has been a change in the judicial understanding of the relationship between universities and students, as well as a change in the role of higher education institutions in society, and more specifically, the economic market.[106] This shift to "student consumerism" is representative of the "marketplace competition among institutions and a recognition that students have economic and property interests which deserve legal protection."[107]

When analyzing the student-university relationship, courts have relied on student handbooks, manuals, university publications and bulletins, syllabi and specific courses from schools, curriculum guidelines, and other similar types of documents to show that a contractual relationship exists between students and universities.[108] These types of documents highlight the obligations that the universities owe to their consumer student body.[109] This type of analysis depicts the shift in judicial review of the relationship between

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101 Melear, *supra* note 99, at 127.

102 *See id*.

103 DODD, *supra* note 98, at 252–53.

104 *See id.* (explaining that in loco parentis is not really used in reference to liability of schools anymore, except in cases of school searches and civil liability in cases of sexual misconduct).

105 Melear, *supra* note 99, at 124.

106 *See id*.

107 *Id*.

108 *See id.* at 125.

109 *Id*.

universities and students from that of overseer and student, to a contractual relationship based in the framework of a competitive economic market.[110] Such a shift has seemingly been limited to the educational relationship between universities and students. This Note, in contrast, aims to address how this shift in legal analysis of relationships between universities and students should also be applied to the relationship between student-athletes and the NCAA, another athletic and academic organization overseeing students.

As described above, the in loco parentis doctrine has been slowly dying out with respect to the relationship between universities and students. Courts are instead looking to contract theory in analyzing this relationship. In so doing, courts embrace the notion that the world of higher education is a competitive marketplace, and that students are able to bargain and negotiate regarding the price, type, and level of education for which they pay, the same way consumers do in any other market.[111] Why is it that courts do not use the same university-student analysis, documentary evidence, and view of the marketplace, when analyzing the tort liabilities currently allocated between student-athletes and universities and the NCAA?

B. Duty of Care and Special Relationship

Before the assumption-of-risk defense can be used, a tort claim for negligence has to be made. The first step in establishing a negligence claim is to determine whether or not a duty is owed to the plaintiff by the defendant in a case.[112] Determination of the duty owed by a defendant to a plaintiff is based on both statute and policy.[113] With respect to collegiate athletics, administrations that organize athletic programs have the duty to use "reasonable care to protect students from anticipated and preventable injuries."[114] Additionally, such organizations owe student-athletes the duty to

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110 *See id.* at 125–26.

111 *See id.* at 138–39.

112 *See* Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 103–04 (Cal. 1963).

113 *See* Davidson v. Univ. of N.C. at Chapel Hill, 142 N.C. App. 544, 552 (N.C. Ct. App. 2001).

114 Denner, *supra* note 12, at 217 (citing Samuel Langerman & Noel Fidel, *Sports Injury—Negligence*, 15 AM. JUR. 2d PROOF OF FACTS §§ 1, 8 (2002)).

not increase any potential risks, such as through use of inadequate equipment or facilities.[115] While this may seem straightforward, there has been much uncertainty regarding the contractual relationship between athletes and the NCAA.[116]

The special relationship between student-athletes and the NCAA creates a specific kind of duty of care owed. The NCAA and member institutions, as organizers of athletic activities on the collegiate level, have a duty of reasonable care to protect athletes "from injuries arising out of unassumed, concealed, or unreasonably increased risks."[117] The existence of such a duty suggests that there should be some liability on the shoulders of the NCAA and member institutions.[118] Despite the seemingly clear special relationship, courts tend to reject the argument that such a duty exists when circumstances involving lifelong injuries of student-athletes reach the point of litigation.

To refer back to the case in *Bradley*, the student-athlete stated that the NCAA had failed its "duties" to "protect the physical and mental well-being of all student-athletes participating in intercollegiate sports," including protection from brain injuries.[119] The court concluded that despite the nature of the formal agreements between the student-athlete and the NCAA, those documents were not considered enforceable contracts because they merely acted as confirmation that student-athletes were familiar with the guidelines and regulations enforceable against them, or that the signed forms were simply "requests" from the NCAA for information from the athletes.[120] The court stated that Bradley had not "identified a valid, enforceable contract wherein the NCAA agreed to protect the physical and mental well-being of student-athletes,"[121] despite the fact that such language is written in the early pages of the exact same

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115 *Id*.
116 *See infra* Part II.C.
117 Bukowski v. Clarkson Univ., 86 A.D.3d 736, 736 (N.Y. Sup. Ct. 2011).
118 *See id*.
119 Bradley v. NCAA, 249 F. Supp. 3d 149, 171 (D.D.C. 2017).
120 *Id*.
121 *Id*.

Bylaws, which again the athletes are expected to have fully read before signing their participation agreements.[122]

This judicial result stems from student-athletes' unique yet unfortunate legal circumstances. Unlike professional athletes, student-athletes are not protected by employment contracts, and unlike when they participated in youth athletic programs, they are no longer protected by their status as minors, or by their parents or guardians.[123] Thus, student-athletes are often left in limbo between what they might understand to be a contractual obligation from the NCAA to protect their well-being, and the legal reality of being on their own to figure things out once they become injured.[124]

According to the special relationship doctrine, a plaintiff is usually in one way or another "particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare."[125] This is especially true in cases where the defendant holds an economic power or advantage over the plaintiff.[126] In *Lamorie v. Warner Pacific College*,[127] a college basketball player broke his nose and injured his eyed during recreational activity.[128] Despite being instructed by doctors that he should not participate in athletic activity until his injuries were healed, Lamorie continued to play out of fear of losing his scholarship after his coach asked him to play anyway.[129] This forced the court to consider whether a student-athlete can legitimately volunteer to the risk of injury when they are fearful of losing a scholarship and feel pressured to continue to play despite serious injury.[130] However, in such cases, experienced organizations like the NCAA's hands remain

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122 *See generally NCAA Division I Manual (2018–19)*, *supra* note 20.

123 *See* Mason, *supra* note 22, at 517.

124 *See generally, e.g.*, *Bradley*, 249 F. Supp. 3d 149; Davidson v. Univ. of N.C. at Chapel Hill, 142 N.C. App. 544 (N.C. Ct. App. 2001).

125 *Davidson*, 142 N.C. App. at 554.

126 *See id.* at 554–55.

127 850 P.2d 401 (Ore. Ct. App. 1993).

128 *See* Jeff Kessler, Note, *Dollar Signs on the Muscle . . . and the Ligament, Tendon, and Ulnar Nerve: Institutional Liability Arising from Injuries to Student-Athletes*, 3 VA. J. SPORTS & L. 80, 96–97 (2001).

129 *See id*.

130 See generally Lamorie, 850 P.2d 401.

clean while most of the liability falls on the coaches, school staff, and member institutions.[131]

Such cases involving a special relationship may lead to concerns of negligence when the more powerfully situated defendant's omission results in such negligence.[132] Typically, the special relationship doctrine is used to describe the legal understanding of other kinds of vulnerable relationships, such as the doctor-patient relationship.[133] Many courts have determined that the duty owed to student-athletes from the NCAA and universities is also that of a special relationship.[134] Authorities have defined a special-relationship as historically having been based on an "existence of mutual dependence" between parties.[135] In the case of student-athlete relationships with the NCAA, there is a clear relationship of mutual dependence. Student-athletes clearly rely on the organization to protect them from unnecessary physical harm and to ensure they get the education they are promised, and the NCAA depends on the student-athletes to help their programs grow in financial success and create a favorable image of college athletics.[136]

While there is clearly an unbalanced power dynamic between student-athletes and the universities, courts continue to ignore the duties owed to athletes by the NCAA. Whether economic, academic, or otherwise, universities and the NCAA have a significant advantage *vis-à-vis* student-athletes, who are clearly the more vulnerable and dependent party in the relationship.[137] In *Davidson v. University of North Carolina Chapel Hill*, the state court determined that a special relationship existed between the university and a member of the university's cheerleading squad.[138] Emphasizing the importance of a relationship of mutual dependence, the court concluded that it was clear that the university benefited from having

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131 *See id.*

132 *See Davidson*, 142 N.C. App. at 554–55.

133 *See* Kessler, *supra* note 128, at 92.

134 *Id*.

135 *Davidson*, 142 N.C. App. at 555.

136 *NCAA Division I Manual (2018–19)*, *supra* note 20, at xii (stating the objectives of the NCAA and the promise to protect student-athletes from injury in exchange for their compliance and continued eligibility).

137 *See Davidson*, 142 N.C. App. at 554.

138 *See id.* at 544.

Davidson, along with the other members of the cheerleading squad, on the team and as athletic representatives for their school.[139] The court explained that "UNC depended upon the cheerleading program for a variety of benefits . . . [they were] responsible for cheerleading at JV basketball games, women's basketball games, and wrestling events . . . [they] represented UNC at a trade show, and often entertained the Rams Club before games."[140] Thus, the court concluded that the relationship between the athletes and the university was in fact mutually dependent, even without consideration of the additional economic dependence which weighs heavily in cases of athletic programs that make huge profits for certain universities.[141]

While this mutual dependence argument may be valid, this form of mutual dependence is not evenly distributed in the relationship between universities and student-athletes. A special relationship can exist in instances where one party exerts a higher degree of control over the other party to the relationship.[142] In *Davidson*, the court concluded that, because UNC had such a high degree of control over the student-athlete's life, it should be presumed that the student would expect a rational level of care and protection from their respective university.[143] The tenuous relationship between the NCAA and student-athletes is partly to blame on the relationships that exist between the NCAA and member institutions. It is clear that the NCAA does not want to be liable for anything in the tort arena regarding student-athletes, and such sentiment is reflected in their bylaws.[144]

Courts have further emphasized the significance of the "relationship of mutual dependence" between a university and student-athlete in cases where a student has been actively recruited by a school.[145] When student-athletes are actively recruited by

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139 *See id.* at 555.

140 *Id*.

141 *See id*. at 555–56.

142 *See id.* at 555.

143 *See id.* at 555–56.

144 *See generally NCAA Division I Manual (2018–19)*, *supra* note 20.

145 Kessler, *supra* note 128, at 82 (citing Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1367 (3d Cir. 1993)).

universities or when they are recipients of scholarships, there has clearly been a mutual exchange made in the establishment of that relationship.[146] Thus, while students depend on the NCAA to educate and protect them with respect to athletically related injuries, the NCAA undoubtedly relies on athletes in order to stay in business.[147]

Despite existing case law and scholarship which emphasizes the importance of the special relationship between universities and athletes, there is far less grounding in the relationship between the NCAA and student-athletes.[148] However, it is clear that, as with universities, there is in fact a special-relationship between the NCAA and student-athletes. This special relationship arises out of the fact that the NCAA has access to "superior knowledge" over student-athletes with respect to the inherent risks of athletic participation and the general inner workings of higher education and college athletics.[149]

C. Relationship Between the NCAA and Student-Athletes

It is clear that the nature of the relationship between student-athletes and the NCAA is that of mutual, but not equal, dependence. Many discrepancies exist with regard to this relationship because of the nature of student-athletes' "contracts" (or lack thereof), according to many courts.[150] The rationale is that student-athletes are not technically "employees" of a university nor the NCAA.[151] Thus, even though a court may find that there was an agreement, said agreement would not be enforceable as a

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146 *See Davidson*, 142 N.C. App. at 556 (noting, with regard to the special relationship doctrine, the emphasis that the Third Circuit placed on the significance of colleges actively recruiting students for their athletic programs).

147 *See Where Does the Money Go?*, NCAA, https://www.ncaa.org/sites/default/files/Where%20Does%20the%20Money%20Go-WEB.PDF [https://perma.cc/KX3Y-QEM4].

148 *See, e.g.*, Bukowski v. Clarkson Univ., 86 A.D.3d 736, 737 (N.Y. Sup. Ct. 2011) (holding that "[o]rganizers of sporting activities owe a duty to exercise reasonable care to protect participants from . . . unreasonably increased risks"); *Davidson*, 142 N.C. App. at 555 (holding that a special relationship existed between the student-athlete and the university).

149 *See* Mason, *supra* note 22, at 527–28.

150 *See, e.g.*, Dawson v. Nat'l Collegiate Athletic Ass'n/PAC-12 Conference, 932 F.3d 905, 907 (9th Cir. 2019).

151 *See id*. at 908.

contract.[152] The NCAA argues that because they are a "voluntary, unincorporated association composed of 1,100 autonomous member institutions with [athletic] programs," they do not have a "special relationship" with any of the 490,000 student-athletes whom they promise to protect; the special relationship is between the athletes and autonomous member institutions.[153] However, the NCAA requires that student-athletes sign an agreement that they agree to all provisions and bylaws of the NCAA handbook, in order to be eligible to participate in collegiate athletics.[154] Further, student-athletes participating in Division I athletics are required to sign a series of agreements, many of which touch upon medical treatment and protocols, insurance policies, and liability of universities, student-athletes, and the NCAA.[155] For example, a student-athlete in a Division I program almost certainly would have to sign a Student-Athlete Concussion Statement, which explains the proper concussion protocols and means by which member institutions and the NCAA purport to protect athletes.[156]

While courts adamantly reject the idea that student-athletes are employees of universities consorting with the NCAA, such judicial precedent still does not preclude the existence of a contractual relationship between the NCAA and student-athletes. Yet, despite the seemingly "contract-like" nature of the agreements from the perspective of the students who are required to sign them, courts often have decided that such agreements between students and the NCAA are not enforceable contracts.[157] For example, in 2018, in *Dawson v. NCAA/PAC-12 Conference*, Division I athlete Lamar Dawson brought a suit against the NCAA (as well as his university's athletic conference), wherein he argued that he was an employee of both the NCAA and PAC-12 Conference under the definition of the Fair Labor and Standards Act and state labor laws in the state of

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152 *See id*.

153 Greiber v. Nat'l Collegiate Athletic Ass'n, 2017 N.Y. Misc. LEXIS 5234, at *11 (N.Y. Sup. Ct. Sept. 5, 2017).

154 *See* Student-Athlete Statement, *supra* note 25.

155 *See* Bradley v. NCAA, 249 F. Supp. 3d 149, 171 (D.D.C. 2017).

156 *See id.* at 171–72.

157 *See id.* at 172.

California.[158] In the suit, Dawson contended that the NCAA acts as an employer to student-athletes by "prescribing the terms and conditions under which student-athletes perform services" as per the NCAA Bylaws.[159] Dawson further argued that though the NCAA did not directly grant scholarships to athletes, the bylaws do stipulate regulations and requirements regarding scholarships, specifically limitations on the distribution thereof.[160] The court rejected this argument, and instead stated that the "economic reality" of the relationship is not indicative of an employment relationship; because Dawson did not receive a scholarship directly from the NCAA, Dawson and other student-athletes did not constitute the association's employees.[161] The court further stated that despite the economic benefits that the NCAA gains from collegiate athletics, such revenue does not "automatically engender or foreclose the existence of an employment relationship."[162] In other words, the Ninth Circuit found the NCAA's revenues to be non-dispositive.

Comparing this directly with professional organizations such as the National Football League ("NFL") and the National Basketball League ("NBA"), there is a significant difference in bargaining power between athletes and their superiors in such agreements, whether they are considered employees or not.[163] Professional athletes have the means to hire attorneys and representatives, who can assist in bargaining with their employers regarding contracts, including salary, medical treatment and insurance, and so on.[164] Professional athletes also have collective bargaining agreements ("CBAs") which are "negotiated between the player's labor union and the league and the standard player contract[s] which an athlete signs govern the team's duty to provide an injured player with medical treatment."[165] However, student-athletes do not have this luxury, and instead are told that, in order to be eligible and participate

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158 *See* Dawson v. Nat'l Collegiate Athletic Ass'n/PAC-12 Conference, 932 F.3d 905, 907 (9th Cir. 2019).

159 *Id.* at 908.

160 *See id.* at 909.

161 *Id*.

162 *Id.* at 910.

163 *See* Denner, *supra* note 12, at 229.

164 *See id*.

165 *See id*.

in collegiate athletics, they must sign on and agree to all aspects of the NCAA Bylaws.[166] Whether or not the student-athletes are viewed as employees should not matter when the agreement is clearly so one-sided and the students have nearly zero bargaining power in the exchange.[167]

Beyond the signed agreements between athletes and the NCAA, courts have also generally held that student-athlete handbooks are not enforceable with respect to liability or obligations of the NCAA. This is the case even though the NCAA Bylaws are enforceable against student-athletes themselves, which seems patently unfair.[168] In *Knelman v. Middlebury College*, a student-athlete argued that he was a third-party beneficiary to the contractual agreement between the NCAA and Middlebury College.[169] The student argued that student-athletes have the right to enforce the provisions of the NCAA Manual, as students should be considered "intended third-party beneficiaries" of the college's contract with the NCAA.[170] As the student reasoned, because the NCAA imposed regulations on student-athletes through the agreement with member institutions, athletes should also reap the protections promised in such an agreement.[171] Despite Knelman's compelling arguments, the Second Circuit held that the NCAA did not have a contractual duty to uphold its rules and regulations for a student-athlete.[172] The court compared Knelman's case to other Second Circuit decisions in stating that, though it was clear that the NCAA rules and regulations are essential to the functionality of athletics in member institutions, it is "not clear . . . that this fact is sufficient to elevate a student from an incidental to an intended beneficiary" and therefore, there is no breach of contract, because there is no obligation to the athlete.[173] The court insisted that the manual contained nothing regarding "fairness" in

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166 *See generally NCAA Division I Manual (2018–19)*, *supra* note 20.

167 *See* Denner, *supra* note 12, at 229.

168 *See* Knelman v. Middlebury Coll., 898 F. Supp. 2d 697, 713 (D. Vt. 2012).

169 *See id.* at 713–14.

170 *Id.* at 713–15.

171 *See NCAA Division I Manual (2018–19)*, *supra* note 20, at xii.

172 *Knelman*, 898 F. Supp. 2d at 714.

173 *Id.* at 715; *see also* Phillip v. Fairfield Univ., 118 F.3d 131, 135 (2d Cir. 1997).

treatment of student-athletes; the manual is meant to show eligibility requirements and regulations for coaches and student-athletes.[174]

Essentially, courts have held that the "agreement" between student-athletes and the NCAA is not a contract, but rather a set of guidelines and regulations with which the student-athletes must maintain compliance for eligibility to play collegiate sports.[175] Some courts take this argument further by holding that because the NCAA does not receive any "benefits" from the relationship with the student-athletes, any agreements between athletes and the NCAA cannot be viewed as "employment contract[s]," or as an obligatory contract whatsoever.[176] However, because the premise of these courts' reasoning is flawed in that the NCAA clearly benefits financially from student-athlete participation, the agreement should instead be viewed as an enforceable contract between the athletes and the NCAA.[177]

The pact between student-athletes and the NCAA consists, on the one hand, of athletes agreeing to abide by the rules and regulations set forth in the NCAA Bylaws and participating in varsity college athletics. In exchange, the NCAA promises a "commitment [to the] student-athlete[s'] well-being."[178] While many courts have held that this is not a contractual arrangement, it is apparent that such an agreement could reasonably be viewed as an illusory contract.[179] Such an agreement between the NCAA and student-athletes clearly contains an illusory promise; the NCAA makes a promise to athletes to "protect their well-being," but then argues in court, to avoid liability, that they are not contractually obligated to uphold that promise.[180]

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174 *Knelman*, 898 F. Supp. 2d at 713–14.

175 *Id.* at 713.

176 Kessler, *supra* note 128, at 106.

177 *See id.* at 106.

178 *NCAA Division I Manual (2018–19)*, *supra* note 20, at 12.

179 *See Illusory Contract Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/i/illusory-contract/ [https://perma.cc/5BKZ-KK5X] (illusory contract is defined as "a contract between two parties in which the consideration for the contract is illusory . . . one party gives as consideration a promise that is so insubstantial that it would not result in or impose any obligations").

180 *NCAA Division I Manual (2018–19)*, *supra* note 20, at 12.

Another reason the relationship between the NCAA and student-athletes should be viewed as a contract is the athlete recruiting process. In many cases, student-athletes are recruited by universities because of their athletic ability and what the athlete will potentially bring to a team, athletic program, or university.[181] The recruiting process is extensive; an athlete must pay to register with the NCAA eligibility center, follow specific contact periods in which they are allowed to communicate directly with coaches and schools, attend official visits with schools, and sign an agreement with the school and the NCAA called the "Letter of Intent" expressing their intent to commit to athletic participation at that school.[182] This Letter of Intent is a binding agreement, in which a student-athlete commits to one academic year at the member institution, whether or not they actually play on their team.[183] Despite being defined as and viewed as a "binding agreement" between the NCAA and a student-athlete, the NCAA still disputes that any enforceable contract exists between them.[184]

D. Assumption of Risk Doctrine

In response to complaints of negligence and liability resulting from long-term injuries, the NCAA has repeatedly responded to litigation by employing the affirmative defense of assumption of risk.[185] This doctrine is prominent in tort law, especially in the context of sports-related injuries.[186] The assumption-of-risk doctrine states that when an individual voluntarily participates in a sporting, recreational, or otherwise dangerous activity, they accept the *inherent* dangers that are associated with the activity so selected.[187] This means that a participant on an athletic team assumes the risk of that activity, and therefore accepts liability for injuries that may result

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[181] *See Recruiting*, NCAA, http://www.ncaa.org/student-athletes/future/recruiting [https://perma.cc/2XVL-RCNT].

[182] *Id*.

[183] *About the National Letter of Intent*, NAT'L LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html [https://perma.cc/S7N2-GFJA].

[184] Greiber v. Nat'l Collegiate Athletic Ass'n, 2017 N.Y. Misc. LEXIS 5234, at *11 (N.Y. Sup. Ct. 2017).

[185] *See generally* Dennie, *supra* note 16.

[186] *See generally* Denner, *supra* note 12.

[187] *See* Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 482 (N.Y. 1929).

from the inherent risks of the sport.[188] However, potential dangers that are not inherent, not reasonably foreseen, are hidden, or are so egregious that necessary precautions should have been taken to remedy the potential risk, are not covered by the assumption of risk doctrine.[189] The assumption of risk may be either expressed clearly in a waiver (an explicit written contract) or implied based on context.[190]

Because it is an affirmative defense, the defendant bears the burden of proof and persuasion for showing assumption of risk; however, if met, the affirmative defense fully negates liability.[191] In order for assumption of risk to apply, the defendant must meet two factors; (1) that the plaintiff or participant knew of the potential danger of the activity, with a complete understanding of the full *degree of danger* at risk, and (2) that the plaintiff or participant *voluntarily* took part in the activity in question, knowing the potential risks.[192] The contention that student-athletes have "complete understanding" of the inherent risks of their activity with respect to college athletics revolves heavily upon how the two different parties define the term "inherent" with respect to the dangers of the athletic participation. In the Merriam-Webster Dictionary, "inherent" is broadly defined as being innate or characteristic of something, a definition that is clearly up to interpretation.[193] That being said, what is considered "inherent" to an eighteen-year-old in their first year of college may very well radically differ from what a 100-year-old organization specializing in sports-injury prevention and backed by scores of financiers, insurance policies, and lawyers might interpret as "inherent." Yet, regardless of the definition employed, as currently implemented by the courts in college athletics, such "inhe-

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188 *Id*. at 483.

189 *See id*.

190 *Id*.

191 *Affirmative Defense*, CORNELL LAW SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/affirmative_defense [https://perma.cc/M4WQ-BSW2].

192 *See* Denner, *supra* note 12, at 210–12.

193 *Inherent*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/inherent [https://perma.cc/G499-VZXS].

rent" risks can be waived by the athletic participant, either expressly or implicitly.[194]

In *Cameron v. University of Toledo*, after being actively recruited by the school, Kyle Cameron began his freshman year at the University of Toledo as a member of the football team.[195] In the summer before his freshman year of college, Cameron participated in the "Freshman Olympics" with the university's football team, in which freshman were instructed by the upper-classmen of the team to partake in various athletic and physical challenges.[196] During one of the challenges, Cameron was seriously injured when he fell on his head and neck, experienced a seizure, and, as he later learned, suffered serious brain damage.[197] These injuries subsequently ended Cameron's athletic career forever.[198] Alleging that the school was liable for his injuries on the basis of negligence, Cameron then filed a suit against the school and coaching staff which stemmed heavily on concerns of hazing.[199] The court, however, held that such injuries were *inherent* to his participation on the football team: because the Freshmen Olympics were related to football activity, the voluntary participation had an inherent risk of injury.[200] It is clear that the court in *Cameron* defined the application of "inherent risks" very broadly, far beyond what a reasonable freshman athlete would assume, especially at the very outset of their collegiate career. Furthermore, how could Cameron have assumed the risk of getting a seizure during an "Olympics" event when he joined the football team and never once stepped on the field? This holding continues to raise questions about the unfair legal results that seriously injured student-athletes are achieving currently in the courts.

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194 Tom Baker et al., *Waiver and Estoppel—Part 1*, ALI ADVISOR (May 17, 2018), http://www.thealiadviser.org/liability-insurance/waiver-and-estoppel-part-1/ [https://perma.cc/2M6H-A8WV].

195 98 N.E.3d 305, 309 (Ohio Ct. App. 2018).

196 *See id*.

197 *See id.* at 309–10.

198 *Id.* at 310.

199 *See id*.

200 *Id.* at 322.

E. Waiver and Expressed Assumption of Risk

Express assumptions of risk are inherent risks of an activity or sport that are made clear to the participant, for which the plaintiff waives the ability to hold a defendant liable for their negligent or reckless actions in advance.[201] In an express contract, form, or writing, a plaintiff who "expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover of such harm, unless the agreement is invalid as contrary to public policy."[202]

A waiver acts as a contractual agreement between parties in which the parties agree that one will participate in the activity or sport, and in exchange will not hold the other party legally responsible for certain results of the participation.[203] The Restatement of Contracts defines a waiver as "a writing providing that a duty owed to the maker of the release is discharged immediately or on the occurrence of a condition."[204] However, in order for a waiver to be valid, the waiver must "clearly communicate the risks involved in the activity and that it is the participant who waives his or her right to sue" when participating in an organized activity.[205] In *Tunkl v. Regents of University of California*, the Supreme Court of California established a test to determine whether a waiver is valid by balancing several factors.[206] Under the *Tunkl* doctrine, there are six factors that the court considers:

> (1) the agreement concerns an endeavor of a type generally thought suitable for public regulation;
> (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;
> (3) such party holds itself out as willing to perform this service for any member of the public who

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201 *See* RESTATEMENT (SECOND) OF TORTS § 496B (AM. LAW INST. 1965).

202 *Id.* § 496B.

203 *See* Gina Pauline et al., *Do Entry Form Waivers Properly Inform Triathlon Participants of the Dangers of the Sport?*, 26 J. LEGAL ASPECTS SPORT 106, 109 (2016).

204 RESTATEMENT (SECOND) OF CONTRACTS § 284 (AM. LAW INST. 1981).

205 *See* Pauline et al., *supra* note 203, at 109.

206 *See* Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 98–99 (1963).

> seeks it, or at least for any member of the public coming within certain established standards;
> (4) the party seeking the exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services;
> (5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby those receiving services may pay additional reasonable fees and obtain protection against negligence; and
> (6) the person or members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnishers, its employees, or its agents.[207]

These factors take into consideration fairness, the legality of the waiver, and how the waiver holds up against public policy interests.[208] These criteria are not a definitive test to determine whether a waiver is valid. Instead, the *Tunkl* factors are applied on a case-by-case basis, and when the waiver in question runs up against multiple factors, it is more likely to be considered invalid by a court of law.[209] However, when it comes to waivers between the NCAA and student-athletes, the *Tunkl* analysis becomes murkier, as most agreements between the two parties use implicit waiver language as opposed to express waiver language.[210]

F. Implicit Waiver

The greatest argument against plaintiffs in sports injury litigation has been the application of the assumption-of-risk doctrine, insisting that a waiver has been made on behalf of the student-athlete implicitly through their willingness to participate in the sport.[211] The

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[207] Kessler, *supra* note 128, at 83 (citing *Tunkl*, 60 Cal. 2d at 98–99).
[208] *See id*.
[209] *See* Kessler, *supra* note 128, at 84.
[210] *See generally NCAA Division I Manual (2018–19)*, *supra* note 20.
[211] *See generally* Denner, *supra* note 12.

assumption-of-risk defense is a complete bar against liability in sports injury, based on the rationale that there is no duty of care owed to an athlete for the injuries caused by the "inherent risks of the sport or activity."[212] This assumption is drawn from the idea of implicit waiver, which is a waiver that is presumed based on a participant's behavior in an activity.[213] Many cases have concluded that student-athletes have assumed the risks inherent to their respective sports under this doctrine, thus relieving the NCAA from liability for their injuries.[214]

However, by simply agreeing to participate in varsity sports, student-athletes are not necessarily consenting to extensive and less obvious potential injuries to the sport—injuries that a professional organization such as the NCAA is better equipped to monitor, understand, and guard against. The NCAA is more well-suited because it has observed all of the potential risks, injuries, and consequences in a variety of athletic settings since its inception over a hundred years ago.[215] Therefore, the NCAA has more knowledge of the "inherent risks" of college sports than almost any other organization possibly could have. Student-athletes, meanwhile, at seventeen- to eighteen-years-old, agree to participate in Division I athletics, armed only with their own limited knowledge of what they reasonably believe to be the inherent risks of their participation in a particular sport.[216] As *Cameron* demonstrates, sometimes the injuries that are held to be "inherently" accepted are those which occur off the field and not even during the "assumed" athletic activity.[217]

A large number of negligence and liability cases revolve around the advantage held by member institutions and the NCAA over student-athletes with respect to a comprehensible understanding of the truly "inherent" risks to athletic participation. For instance, in *Rose v. NCAA*, two former Division I football players from Purdue

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212 Mason, *supra* note 22, at 522.

213 *See Implied Waiver*, L. DICTIONARY, https://thelawdictionary.org/implied-waiver/ [https://perma.cc/4MM7-YJ82].

214 *See* Pauline et al., *supra* note 203, at 109.

215 *See* Smith, *supra* note 14, at 269.

216 *See* Cameron v. Univ. of Toledo, 98 N.E.3d 305, 309–10 (Ohio Ct. App. 2018); *see also supra* Section II.D.

217 *See Cameron*, 98 N.E.3d at 309–10.

University brought a suit against the NCAA, alleging that the association was "uniquely aware of the risks of repetitive brain trauma and, yet, exposed players to those risks with no regard for the players' health and safety."[218] The plaintiff-athletes further contended that the NCAA, as well as the Big Ten Conference and Purdue University, had knowledge of the "repetitive sub-concussive and concussive impacts to football players" and that they "created a serious risk of neurodegenerative disorders and disease."[219] Thus, as the former football players stated, the NCAA was in a superior position compared to the student-athletes in having comprehensive knowledge and understanding of the risk of serious neurodegenerative disorders as a result of playing college football.[220]

In the *Rose* case, Rose and his fellow plaintiff Stratton had both suffered several sub-concussive hits and concussive hits, and at the time of trial, they had both suffered neurodegenerative brain diseases.[221] Both young men suffered from a variety of symptoms, including memory loss, depression, abrupt and uncontrollable mood swings, migraines, and anxiety.[222] In a contradictory statement, the court in *Rose* stated that although the athletes clearly expected the NCAA to protect their health and safety, they did not *clearly* expect to be compensated for those injuries which were not necessarily foreseeable, and thus Rose was not entitled to compensation.[223] It is apparent that courts have to yet to give full weight to the fact that athletes are not nearly as well-equipped to understand the inherent risks of athletic participation as are the NCAA or universities, despite the crushing impact that this lack of understanding has on the future health and safety of athletes.[224]

G. Validity of Waivers

In order for a waiver to be valid, it must be clear to the one waiving their right to sue what exactly is being waived, including

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218 Rose v. NCAA, 346 F. Supp. 3d 1212, 1217 (N.D. Ill. 2018).
219 *Id*.
220 *See id*.
221 *See id.*
222 *See id.*
223 *Id.* at 1229.
224 *See supra* text accompanying note 215.

"properly identifying the parties, consideration, capacity, and understanding of the intent of the parties through use of clear, unambiguous language."[225] In analyzing the validity of any waivers that student-athletes consent to with regard to the liability of the NCAA, courts should refer back to the aforementioned *Tunkl* factors in order to determine whether such waivers are fair, legal, and adhere to public policy.[226]

The *Tunkl* factors that are relevant in determining the validity of waivers between student-athletes and the NCAA, as well as universities, are the fourth, fifth, and sixth factors.[227] The fourth factor considers the difference in bargaining power between the parties agreeing to the waiver.[228] In the case of the NCAA, it is clear that the athletic organization has the upper-hand in the relationship. The fifth and sixth factors analyze whether or not the waiver would fall under the level of a contract of adhesion because of the nature of the relationship between the parties.[229] Again, it is arguable that because of the aforementioned imbalance in power between these parties in the present types of agreements, such waivers could easily be viewed by a court as that of adhesion.[230] After a proper analysis using the *Tunkl* factors, the court should then look more closely at the assumption-of-risk doctrine's two requirements: (1) that the student-athlete understands the inherent risk of athletic activity; and (2) that the athlete voluntarily assumes the risk of injury.[231]

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225 *See* Pauline et al., *supra* note 203, at 109.

226 *See generally* Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92 (Cal. 1963).

227 *See infra* Part II.E.

228 *See Tunkl*, 60 Cal. 2d at 99–101.

229 *See id.* at 99–102.

230 A contract of adhesion is defined as:

> a contract drafted by one party (usually a business with stronger bargaining power) and signed by another party (usually one with weaker bargaining power, usually a consumer in need of goods or services). The second party typically does not have the power to negotiate or modify the terms of the contract.

Adhesion Contract (Contract of Adhesion), CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion) [https://perma.cc/5C6A-RCBB].

231 *See Tunkl*, 60 Cal. 2d at 99–102.

1. Understanding the Degree of Risk

It is clear that many athletes "do not fully understand the cost of temporary success over their physical and mental well-being."[232] Yet, the NCAA relies heavily on the argument that an athlete "voluntarily assumes the risk of *any* injury inherent in his or her sport."[233] The assumption-of-risk doctrine first requires that there be proof that the participant is aware of the inherent risks involved in the activity, and that they understand that degree of risk associated with the activity.[234] However, it is unclear whether student-athletes actually understand, or have the ability or opportunity to understand, the totality of the "inherent" risks of participating in college sports. There are many risks that student-athletes do not necessarily assume, such as use of dangerous or defective equipment, poor medical treatment from school staff, negligence on behalf of the coaching staff, or intentional aggression or torts committed by opposing teams.[235]

Some courts have refuted the assumption-of-risk defense in cases where it is clear that a plaintiff could not reasonably assume the inherent risks in question; such factors that the court may consider include a plaintiff's age, intelligence, experience, and general knowledge.[236] When taking such factors into consideration, it is not unreasonable to assume that an eighteen-year-old student has a less comprehensible understanding of all of the supposedly inherent risks that are incorporated in college athletics than the NCAA does, where the organization's main objective is to represent and protect student-athletes.[237] The NCAA sees things differently in most litigation involving liability for injuries endured by student-athletes, many times blaming schools, coaches, and the student-athletes themselves.[238] However, the NCAA, it can be reasonably assumed,

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232 Mason, *supra* note 22, at 516.

233 *Id.* at 521 (emphasis added).

234 *See* Denner, *supra* note 12, at 210.

235 *See* Kessler, *supra* note 128, at 81.

236 *See* Denner, *supra* note 12, at 211.

237 *See supra* Part II.B.

238 *See* Bradley v. NCAA, 249 F. Supp. 3d 149, 171 (D.D.C. 2017); *see also* Greiber v. Nat'l Collegiate Athletic Ass'n, 2017 N.Y. Misc. LEXIS 5234, at *11 (N.Y. Sup. Ct. Sept. 5, 2017).

is better situated with respect to knowledge of inherent risks and further, should be responsible for disclosing these risks to future and current athletes.[239]

2. The "Voluntary" Participation Façade

As previously stated, in order for the assumption-of-risk doctrine to apply, there must be proof that the plaintiff-participant voluntarily participated in the activity, despite their being well aware of the potential and inherent risks.[240] Thus, one of the biggest arguments used to shut down litigation from student-athletes against the NCAA is that athletes voluntarily participate in collegiate athletics, and therefore voluntarily undertake the inherent risks of said participation.[241] However, it is highly questionable as to whether (1) student-athletes actually do "voluntarily" participate in athletics, and even if they do, (2) whether the inherent risks they consent to include the potentially lifelong injuries or physical problems that student-athletes often endure.[242] In *Bukowski v. Clarkson University*, Bukowski, a baseball pitcher, was injured during a "live practice" when the freshmen athlete was hit by a batted ball.[243] Bukowski argued that the university and coach were liable because he was instructed by coaches to hold the live practice without using a protective screen to pitch, which would have protected him from his injury.[244] Bukowski argued that he had "no option but to participate without a protective screen" because it was customary of team practices and what the coach instructed.[245] The court, however, rejected this argument; they decided that such participation was voluntary, and that such injury was an inherent risk to such voluntary participation.[246] While it is acceptable to assume that a baseball player does voluntarily accept the risk of getting hit by a baseball in practice, that assumption is made based on typical baseball practices

239 *See* Denner, *supra* note 12, at 211–12.
240 *See id.* at 212.
241 *See id.* at 211.
242 *See id.* at 211–12.
243 *See* Bukowski v. Clarkson Univ., 86 A.D.3d 736, 736 (2011).
244 *See id.* at 738–39.
245 *Id.* at 739.
246 *See id.* at 739–40.

and customs.[247] The "customary" team practice of pitching without a screen during hitting practice is not necessarily the typical practice of baseball teams in college, however, and it is clear that the athlete in this case felt pressured to participate in the practice to appease the coach and his team.[248]

Although the courts have determined that student-athletes are not employees and that they generally lack a contractual relationship with the NCAA, as mentioned above, it is apparent that student-athletes have a special relationship with the NCAA, in which they depend on the NCAA to protect them in exchange for their services as athletes in Division I programs.[249] Student-athletes further depend on coaches, university staff, and the NCAA to ensure a controlled environment that facilitates learning and safe athletic competition.[250] This reliance clearly shatters the façade that athletes do not volunteer to the physical toll that short-term play has on their lives in the long-run.

III. SOLUTION: DOING AWAY WITH ASSUMPTION OF RISK AND PROVIDING OTHER MEANS OF PROTECTING STUDENT-ATHLETES

Student-athletes cannot reasonably assume the risk of injury upon their participation in their respective sports when they sign agreements with universities and the NCAA to become members of varsity teams. Factors such as the imbalance in negotiating power between students and the NCAA, the superior knowledge of the NCAA about inherent risks, and the deep pockets of the NCAA all point to the conclusion that the NCAA should be held liable for injuries sustained by student-athletes, and that there should be a more efficient structure implemented to protect and help student-athletes beyond just the short-term impact of their injuries.

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[247] From the author's experience playing Division I Softball, the customary practice is for pitchers and/or coaches to stand behind a net during batting practice as a means of protection.

[248] *See Bukowski*, 86 A.D.3d at 740.

[249] *See generally id.*; *see also* Davidson v. Univ. of N.C. at Chapel Hill, 142 N.C. App. 544, 555–56 (N.C. Ct. App. 2001).

[250] *See NCAA Division I Manual (2018–19)*, *supra* note 20, at 3.

A. Bargaining Power of Student-Athletes

One of the most concerning aspects of the relationship between the NCAA and student-athletes is the lack of bargaining power on the side of student-athletes. In professional sports, such as the NFL or the NBA, a team or organization's legal duty exists as a matter of a contractual obligation.[251] This is because professional athletes are typically members of unions, from which they benefit from CBAs, as previously mentioned.[252] Such agreements take into consideration laws surrounding contract, tort, and labor laws to ensure protection and coverage of athletes who endure serious injuries while competing in professional sports.[253]

Despite the clear desire to protect professional athletes via CBAs, employment contracts, and unions which puts professionals in a much better situation in terms of compensation for long-term injury, there seems to be less urgency in the athletic community to similarly protect student-athletes. The biggest argument that the NCAA and some courts have expressed is that there is no actual "contract" between student-athletes and the NCAA nor their respective universities.[254] The NCAA still stands by the belief that there is not an enforceable contract between the parties despite various factors pointing to the contrary, namely the fact that student-athletes must sign a Letter of Intent; the fact that student-athletes must agree to comply with the rules and regulations of the NCAA bylaws; the fact that the NCAA has enforcement protocols against athletes and schools who break these aforementioned rules; and the fact that the NCAA makes a significant profit from collegiate sports.[255] Furthermore, there is a lack of consistency amongst circuits regarding the classification of the type of relationship that is shared by student-athletes and athletic organizations.

Moreover, student-athletes have a lesser bargaining power because of the unbalanced distribution of dependence in the

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251 *See* Denner, *supra* note 12, at 229.

252 *See id.* at 230; *see also supra* note 160 and accompanying text.

253 *See id.* at 230.

254 *See id.* at 229.

255 *See, e.g.*, *NLI Binding Agreement Facts*, *supra* note 183; *NCAA Division I Manual (2018–19)*, *supra* note 20, at 335; *supra* text accompanying note 126.

relationship between athletes and universities or the NCAA. As previously mentioned, some courts have determined that student-athletes and universities or the NCAA hold a mutually dependent relationship.[256] However, it is clear that the dependence is not equal: student-athletes are far more dependent on the NCAA and universities while playing in college athletics as they are required to adhere to NCAA's guidelines in order to maintain eligibility in their respective sport.[257] For example, student-athletes are required to attend seminars and informational sessions outlining the ethical and regulatory standards of participating in Division I athletics at an NCAA member institution.[258] Such unethical behaviors are listed in the Bylaws as well, explaining that student-athletes may not receive special treatment for their status as athletes.[259] Student-athletes agree to follow these guidelines, and in exchange rely on the promises of the NCAA to further their education, protect their well-being, and reasonably prevent them from hardships or injuries.[260] Athletes are forced to comply with the NCAA Bylaws in order to participate in collegiate athletics, therefore the NCAA holds great power over student-athletes and controls their ability to participate in college sports at all.[261]

B. Assumption of Risk vs. Reliance and Property Interest

Within the context of college sports, the first question regarding the use of the assumption-of-risk doctrine is whether a participant in collegiate sports truly "volunteers" to take on the inherent risks of the sport.[262] Students assume that compliance with NCAA regulations and bylaws will guarantee or at least assist in the venture of admission into a school of higher education. In many cases, such prospects are made with the promise of scholarship to pay for

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256 *See supra* Part II.B.

257 *NCAA Division I Manual (2018–19)*, *supra* note 20, at 7.

258 Author's note: as a former Division I athlete, there were informational sessions that my fellow student-athletes and I were required to attend in order to compete in games. These sessions often outlined good ethical practices and NCAA regulations of student-athletes. *See also NCAA Division I Manual (2018–19)*, *supra* note 20, at 45.

259 *NCAA Division I Manual (2018–19)*, *supra* note 20, at 61–91.

260 *See id.* at xii (promising a commitment to the student-athletes' well-being).

261 *See* Mason, *supra* note 22, at 521–22.

262 *See id.* at 522–23.

school. With such valuable interests on the line, are student-athletes able to "voluntarily" consent to the risks associated with athletic participation?

1. Scholarships

Student-athletes cannot be reasonably believed to *voluntarily* assume the risks of athletic participation, when they rely on their membership on a team for financial means to pay for school. Athletic scholarships are granted to student-athletes on an annual basis; athletes who receive scholarships based on athletic ability are not guaranteed to receive their grant all four years of school (five years for some athletes in unique circumstances).[263] Student-athletes are awarded scholarships in exchange for their commitment to perform in athletics for their school, and comply with all rules and regulations set forth by the NCAA.[264] If scholarship-athletes do not follow the rules and regulations of the NCAA, they run the risk of losing their scholarships, which would result in a loss of any ability to pay for an education at all for many students.[265]

While universities do typically use their discretion to honor scholarships for athletes who are ruled out due to physical injuries, students still feel the pressure to continue through injury or pain, out of fear of losing these valuable scholarships.[266] This fear stems from a misunderstanding of their rights as student-athletes and insecurity in the belief that the NCAA will follow through to "protect their well-being."[267] In reflecting on the relevant cases, it is clear that there is a dominant-submissive power dynamic between athletes and their coaches, universities, and the NCAA.[268]

2. Admission or Academic Support

While there have been arguments that scholarship-athletes should be compensated, some non-scholarship student-athletes also

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263 *See NCAA Division I Manual (2018–19)*, *supra* note 20, 206–11.

264 *See* Mason, *supra* note 22, at 522.

265 *See id*. at 522.

266 *See* Kessler, *supra* note 128, at 97–98.

267 *Mission Statements and Bylaws*, NCAA, https://www.ncaa.org/sites/default/files/M_WinonaState_SAACBylaws.pdf [https://perma.cc/R2QM-HYNC].

268 *See* Kessler, *supra* note 128, at 97–98.

rely on athletics as a means to gain acceptance into a school. Those athletes should still be covered with medical coverage for long-term injuries. A common misunderstanding of the system of athletic scholarships is that athletes simply receive a free ride with no strings attached.[269] This is far from the truth. As previously mentioned, the NCAA mandates that athletic scholarships are only allowed to be given on an annual basis.[270] Thus, student-athletes cannot just assume that no matter how they perform, athletically or academically, that they will continue to have the financial support they are supposedly "guaranteed" from the beginning of their college athletic career.[271] Further, the NCAA bylaws state that it is at the discretion of member institutions to decide whether or not they will honor scholarships for students who are unable to participate in athletics due to physical injury or poor academic performance, thus increasing the fear in student-athletes of potentially losing their financial aid.[272]

3. Educational Goals and Ignoring Brain Trauma

Student-athletes rely on universities and athletic institutions like the NCAA to protect their education and well-being beyond their physical health.[273] Speaking from personal experience as a former Division I athlete, the author of this Note has seen firsthand how many student-athletes find the balance between commitment to their teams and a regular school workload to be grueling and how when they become athletes at universities, there is an understanding that their coaches, schools, and other athletic representatives will assist them in furthering their education. Ultimately, obtaining higher education is the main purpose of attending a university for the vast majority of student-athletes in the United States.

From an "extra-legal" lens, it is important to focus on the objective of both universities and the NCAA when it comes to the well-being of student-athletes. The NCAA and member institutions

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269 *NCAA Division I Manual (2018–19)*, *supra* note 20, 206–11 (explaining requirements to receive and maintain athletic scholarships).

270 *Id.* at 201.

271 *Id.* at 206.

272 *See id.* at 208

273 *See id.* at xii.

have very specific and unique objectives when it comes to their relationship with student-athletes, all of which are ignored through their inaction when it comes to the protection and compensation of student-athletes.[274] The aim of member institutions is to provide a higher level of education for students, through an "education of the highest quality."[275] Further, the mission of the NCAA is to "emphasize academic opportunities and responsibilities of student-athletes in their college experiences."[276] Tellingly, neither of these objectives includes caring for student-athletes' long term health.

C. Compensation for Long-Term Medical Issues

Many scholars and advocates for student-athletes have argued that the NCAA should implement some kind of worker's compensation benefit for student-athletes who endure injuries while participating in collegiate sports.[277] This seems like a much-needed solution considering that, without student-athletes, the NCAA would not exist and would not be profitable. In fiscal year 2016–2017, the NCAA had a total revenue of $1.06 billion.[278] The organization made $761 million dollars alone for the 2017 NCAA men's basketball tournament.[279] How is this money spent? According to a 2017 study, of the $1.06 billion revenue for the NCAA, about $560 million, approximately 60% of the annual revenue, gets distributed amongst Division I schools.[280] But what happened to the remaining $446 million made in 2017? Remembering that the NCAA was created as an organization to protect student-athletes from serious

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274 *Id.*

275 *See, e.g.*, *Mission Statement*, FORDHAM U., https://www.fordham.edu/info/20057/about/2997/mission_statement [https://perma.cc/CLF7-TNVD]; *Mission Statement*, LAFAYETTE C., http://catalog.lafayette.edu/en/current/Catalog/Introduction/Mission-Statement [https://perma.cc/CLF7-TNVD].

276 *Mission Statements and Bylaws*, *supra* note 264.

277 *See* Denner, *supra* note 12, at 229–30.

278 *See* Darren Rovell, *NCAA Tops $1 Billion in Revenue During 2016–17 School Year*, ESPN (Mar. 7, 2018) https://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first [https://perma.cc/7ZWU-JL3S].

279 *See id*.

280 *See* Alex Kirshner, *Don't Miss the Point About All the Money the NCAA Tournament Makes*, SB NATION (Mar. 7, 2018, 3:19 PM), https://www.sbnation.com/college-basketball/2018/3/7/17093112/ncaa-tournament-revenue-tv-athletes-2018 [https://perma.cc/KWT6-7A3D].

injuries, it is not irrational to suggest that the remaining nearly half a billion dollars be put towards creating long-term medical insurance programs for student-athletes. However, this is not the current use of that remaining funds. The NCAA's website lists that a portion of their funds, $74.3 million and $39.7 million, are used for "other association-wide expenses" and "general and administrative expenses" respectively.[281] The meaning and details of such expenses are not available to the public, so it is unclear what expenses are covered by "other association wide-expenses."[282] It is not unfathomable to think that the organization could use such excess funds to facilitate insurance-like programs for student-athletes, in terms of long-term care, which would circle back to the NCAA's original and true purpose: protecting student-athletes from injury.[283]

The NCAA has taken some steps to create adequate coverage for student-athletes with insurance; however, the coverage is very limited. The NCAA has implemented what is called the "Catastrophic Insurance Program."[284] The Catastrophic Insurance Program covers student-athletes that have suffered extreme physical injury or illness that has precluded them from playing sports, covering up to $90,000 in medical bills for the athlete, only after their own insurance plans have met their limit.[285] Section 3.2.4.8.1. of the Bylaws states that a student-athletes' coverage must cover "equal or greater the value than the deductible of the NCAA Catastrophic Injury Program," which should be provided through the insurance of a participant's guardians, personal coverage, or the insurance provided by the university itself.[286] The NCAA created this program in 2005, and has since made an effort to ensure that student-athletes have insurance

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281 *See Where Does the Money Go?*, *supra* note 147.

282 *See id*.

283 *See* Smith, *supra* note 14, at 269–70.

284 *NCAA Division I Manual (2018–19)*, *supra* note 20, at 10, 12.

285 Cory McCune, *NCAA Policies for Student-Athlete Medical Insurance Breakdown*, BLEACHER REP. (Apr. 8, 2013), https://bleacherreport.com/articles/1595326-ncaa-policies-for-student-athlete-medical-insurance-breakdown [https://perma.cc/L86L-5KP8].

286 *NCAA Division I Manual (2018–19)*, *supra* note 20, at 10.

and medical coverage for injuries sustained while participating in athletic activities.[287]

While, initially, this may seem to be adequate coverage, in practice, this only covers athletes for the immediate impact of their injuries. The coverage under the Catastrophic Coverage Insurance Program requires that (1) student-athletes have insurance by their own means, and (2) that the insurance has a deductible of $90,000. The Program then states that once the deductible has been met, the NCAA will then provide limited coverage.[288] For those who are eligible, this coverage can span over a lifetime, not simply the two years promised in other injury coverage by the school; the coverage will actually extend, after the $90,000 threshold, for a maximum of $20 million in coverage.[289] However, this program only covers those who suffer severe, nearly life-ending injuries, which have left them disabled or handicapped for life.[290] This coverage does not account for the thousands of student-athletes who have a lifetime of migraines, memory loss, joint pain and injuries, and other lifelong symptoms that are not necessarily "life-threatening," but are still debilitating and painful.

Further, the NCAA has made an attempt to expand their medical coverage with an "exceptional student-athlete disability insurance program" which provides limited qualifying students with disability insurance contracts.[291] These contracts use pre-approved financing to "protect against future loss of earnings as a professional athlete due to a disabling injury or sickness that may occur during the

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[287] *NCAA Student-Athlete Medical Insurance Legislation*, NCAA, http://www.ncaa.org/about/resources/insurance/ncaa-student-athlete-medical-insurance-legislation [https://perma.cc/B88B-XZL3].

[288] *See Student-Athletes Unaware of Their Career-Ending Injuries*, *supra* note 44.

[289] *See id*.

[290] *See id*.

[291] *See Exceptional Student-Athlete Disability Insurance Program*, NCAA, http://www.ncaa.org/about/resources/insurance/exceptional-student-athlete-disability-insurance-program (non-archivable website). (Note that this "exceptional student-athletes disability insurance program" only applies to men's football, basketball, baseball, and ice hockey, and women's basketball. This classification is based on athletes' ability to be drafted into professional sports leagues; thus only student athletes who can potentially "go pro" qualify for the insurance program.)

college career."[292] However, this program is simply a loan program, and athletes essentially borrow money through the NCAA, which will later need to be paid back to the organization.[293] Thus, instead of putting a portion of the $74.3 million "other expenses" to assist former student-athletes with lifelong health issues, the NCAA merely offers them a loan program.[294]

The media and the NCAA have regularly ignored lesser-named athletes who constantly sacrifice their physical health and well-being for their sport, their schools, and the NCAA's fiscal well-being.[295] Beyond that, the NCAA leaves it up to the discretion of each NCAA member institution to decide how much coverage student-athletes are protected with, if any at all.[296] The $90,000 amount is a one-time threshold, not annually reimbursed for the years following the end of one's athletic career; the issue arises when former athletes are left to foot the bill for their medical expenses for years following their initial injury.[297]

As previously mentioned, some scholars and students' rights activists have suggested that student-athletes should be given worker's compensation when they become members of athletic teams. Such measures would compensate athletes when they become unable to play their sport due to injury.[298] However, this argument is often shot down because many courts have concluded that student-athletes are not employees of their schools or the NCAA, and workers compensation is only available for employees.[299] In one case, the Supreme Court of Colorado rejected the idea of worker's compensation for a football player.[300] The court held that "none of the benefits he received could . . . be claimed as consideration to play football, and there is nothing in the evidence that is indicative of the fact that the contract of hire by the college was dependent upon his playing

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292 *See id.*

293 *See id*.

294 *NCAA Division I Manual (2018–19)*, *supra* note 20, at 235.

295 *See* Walsh, *supra* note 1; *see also* Smith, *supra* note 14, at 269.

296 *See generally NCAA Division I Manual (2018–2019)*, *supra* note 20.

297 *See NCAA Student-Athlete Medical Insurance Legislation*, *supra* note 287.

298 *See* Kessler, *supra* note 125, at 104–05.

299 *See* Dawson v. Nat'l Collegiate Athletic Ass'n/PAC-12 Conference, 932 F.3d 905, 907 (9th Cir. 2019).

300 *See* Bradley v. NCAA, 249 F. Supp. 3d 149, 157 (D.D.C. 2017).

football . . . ."[301] This case is over fifty years old, but the sentiment has not changed to date.[302]

Just as was seen in the *Dawson* case, courts continue to hold that although the NCAA benefits financially from student-athlete participation, poses limitations on the distribution of athletic scholarships, and enforces mandatory regulations on athletes at member institutions, there is somehow still not a contractual relationship of mutual dependence between the NCAA and student-athletes.[303] This is because the courts seem to continue to incorrectly apply the assumption-of-risk doctrine, and have curiously disregarded the borderline contract of adhesion to which the NCAA forces student-athletes to accede. Agreeing to the rules and regulations outlined by the NCAA, student-athletes are required to sign an agreement which should be mutually binding as a contract in courts of law.[304]

The NCAA Bylaws lay out clear promises to protect student-athletes, to work with member institutions in an effective way, and to create a safe environment for the athletes.[305] However, as is clear in all of the preceding cases, when student-athletes request that the NCAA follow through on these promises, the NCAA either redirects their liability to member institutions, or claims that there was never actually an enforceable agreement to begin with.[306] This is obviously confusing for athletes who are told that in order to stay eligible in college athletics, they must adhere to the NCAA Bylaws, but are then told that the NCAA does not have the same obligation, as the courts have repeatedly decided.[307]

Further, the repeated use of the assumption-of-risk doctrine by the NCAA as a defense should no longer be accepted by the courts, as it is clear that the nature of participation in athletics is not always

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[301] State Comp. Ins. Fund v. Indus. Comm'n of Colo., 314 P.2d 288, 288–90 (Colo. 1957).

[302] *See* Kessler, *supra* note 125, at 104–05.

[303] *See Dawson*, 932 F.3d at 908–11.

[304] *See generally NCAA Division I Manual (2018–19)*, *supra* note 20.

[305] *See generally NCAA Division I Manual (2018–19)*, *supra* note 20.

[306] *See* Rose v. NCAA, 346 F. Supp. 3d 1212, 1216 (N.D. Ill. Sept. 28, 2018); *see also Dawson*, 932 F.3d at 908–11.

[307] *See generally NCAA Division I Manual (2018–19)*, *supra* note 20.

entirely voluntary.[308] Courts have repeatedly misinterpreted the relationship between the NCAA and student-athletes, by failing to recognize the coercive nature of the relationship. Finally, student-athletes do not receive full disclosure from the NCAA, especially with respect to information that would adequately inform student-athletes of the extent of inherent risks to which they are allegedly agreeing.[309] Time and time again, in a variety of cases, student-athletes have explained to the courts that they were not warned of the non-inherent risks of their athletic participation.[310] Due to the nature of the special relationship between student-athletes and the NCAA, the NCAA should be held liable for lifelong medical expenses of student-athletes for the injuries sustained while acting as representatives of their school and the national organization.

CONCLUSION

With fewer than 2% of the 179,200 student-athletes in Division I programs getting through the first step towards a professional athletic career, it is clear that student-athletes depend on the NCAA to protect them as they provide benefits by serving their teams, their schools, and the NCAA itself during their time as athletes.[311] It is evident that the NCAA has a special relationship with student-athletes, and therefore should be held to a higher standard of liability than what is currently enforced in the courts. The two have a mutually dependent relationship, in which the NCAA relies on the participation and performance of student-athletes in order to remain economically lucrative as an organization, and athletes rely on the NCAA to enforce rules and regulations that are meant to protect the mental and physical well-being of student-athletes.[312]

When the NCAA fails to uphold their obligation, despite active participation in athletics by students, the organization should be held liable, and student-athletes should be properly compensated for their

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308 *See generally supra* Part II.F.ii.

309 *See generally supra* Part. II.C.

310 *See Rose*, 346 F. Supp. 3d at 1216; *see also Dawson*, 932 F.3d at 908–11; Davidson v. Univ. of N.C. at Chapel Hill, 142 N.C. App. 544, 554–55 (N.C. Ct. App. 2001).

311 *See NCAA Recruiting Facts*, *supra* note 21.

312 *See generally supra* Part II.C.

crippling long-term injuries. If a student-athlete abides by the rules and regulations of the NCAA Bylaws, they should reasonably expect that the NCAA will follow through with their promise to "conduct [intercollegiate athletics] in a manner designed to enhance the well-being of student-athletes who choose to participate and to prevent undue commercial or other influences that may interfere with their scholastic, athletics or related interests."[313]

313 *NCAA Division I Manual (2018–19)*, *supra* note 20, at xii.