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Head Injuries, Student Welfare, and Saving College Football: A Game Plan for the NCAA

Rodney K. Smith*

I. INTRODUCTION.....	268
II. THE PROBLEM OF HEAD INJURIES IN COLLEGE FOOTBALL	273
III. SOLVING THE PROBLEM OF HEAD INJURIES.....	282
A. <i>Improving Safety</i>	283
1. Safety Rules and Strengthening Medical Care and Protocols.....	283
2. Scheduling Games and Practices	290
3. Enforcing Safety Rules	293
4. Compensating for Injuries.....	304
a. <i>Greed, the BCS, and Big-Time College Football</i>	308
b. <i>Scheduling and Adding Games for a National Championship</i>	312
c. <i>Limiting Compensation to FBS Student-Athletes</i>	314
d. <i>Title IX and Equity Arguments Against Compensation</i>	316
IV. CONCLUSION.....	318

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*You read some of these stories about college players who undergo some of these . . . problems with concussions and so forth and then have nothing to fall back on. That's something that I'd like to see the NCAA think about.*¹

I. INTRODUCTION

As understanding regarding the severity of head injuries and concussions in football increased dramatically,² President Obama entered the fray early in 2013 when, among other things, he called on the National Collegiate Athletic Association (NCAA) to “think about” concussions and injuries in college football.³ President Obama’s involvement is not the first instance of a president calling for reform in college football due to severe injuries. At the turn of the twentieth century, President Theodore Roosevelt responded to the tragic deaths of eighteen college football players in 1904.⁴ President Roosevelt called on university leaders to participate in a White House Conference that was called to deal with the problem of injuries and deaths in college football through the development of safety rules.⁵ Roosevelt, no doubt, was also responding to concerns raised in the press, including a 1903 article in the *New York Times* referring to college football as “‘mayhem and homicide.’”⁶

College leaders heeded President Roosevelt’s call by gathering and eventually adopting new safety rules, although it took over a decade for the new football rules to be put in place.⁷ As one commentator put it, those

1. Franklin Foer & Chris Hughes, *O*², NEW REPUBLIC, February 11, 2013, at 22, 29 (statement of President Obama) (“[I]f I had a son, I’d have to think long and hard before I let him play football. And I think that those of us who love the sport are going to have to wrestle with the fact that it will probably change gradually to try to reduce some of the violence.”), available at <http://www.newrepublic.com/article/112190/obama-interview-2013-sit-down-president#>.

2. See *infra* notes 38–116 and accompanying text for a discussion of the development and heightening of concerns regarding head injuries in college football.

3. Foer & Hughes, *supra* note 1, at 29.

4. Paul M. Barrett, *Pain Point*, BLOOMBERG BUSINESSWEEK, Feb. 4–Feb. 10, 2013, at 52, 54 available at <http://www.businessweek.com/articles/2013-01-31/will-brain-injury-lawsuits-doom-or-save-the-nfl>.

5. MATTHEW MITTEN ET AL., SPORTS LAW: GOVERNANCE AND REGULATION 100 (3rd ed. 2012).

6. Barrett, *supra* note 4, at 54.

7. See, e.g., Marc Edelman & David Rosenthal, *A Sobering Conflict: The Call for Consistency in the Message Colleges Send About Alcohol*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1389, 1399 (2010) (noting that “[i]n the NCAA’s early years, the Association’s leaders resolved many of President Roosevelt’s safety concerns” and that “in 1916, the NCAA instituted a formal code of

initial reform efforts “led to the formation of a Rules Committee and the formation of the Intercollegiate Athletic Association, which, in 1910, was renamed the [National Collegiate Athletic Association].”⁸ With these rule changes and the eventual formation of the NCAA, a major early twentieth century crisis, that threatened the very existence of football, was averted.

Perhaps not so ironically, just over a century later, in the second decade of the twenty-first century, we face a new but similar crisis that threatens football at all levels.⁹ That crisis has been fueled by scientific and medical studies that are making it increasingly clear that concussions and sub-concussions, or repeated trauma to the head, suffered regularly in football, contribute to subsequent brain injuries and impairment.¹⁰ Litigation and legislative, administrative, or executive action has followed in response to these studies, particularly with regard to the National Football League (NFL).¹¹ The NCAA has also been subjected to litigation over these issues.¹² If plaintiffs are successful in such litigation, as they could well be as public concerns regarding the treatment of student-athletes intensify, the costs associated with such litigation and other governmental demands may render football, particularly at the amateur level, unaffordable, both economically and in terms of the gravity of injuries to participants.¹³

College football at the Football Bowl Subdivision (FBS) level is made up of teams from major universities that play football at the most competitive level in college.¹⁴ FBS teams are considered as possible participants in the Bowl Championship Series (BCS).¹⁵ The BCS and its FBS members are involved in producing college football games at a highly

safety and ethics that extended beyond just football and to all collegiate sports.”).

8. MATTHEW J. MITTEN, SPORTS LAW IN THE UNITED STATES 34 (2011).

9. Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 T. JEFFERSON L. REV. 127, 129 (2013) [hereinafter Smith, *Solving the Concussion Problem*].

10. *Id.* at 127, 130–33.

11. *Id.* at 147, 159–60, 172–75.

12. See Complaint at ¶ 1, *Arrington v. NCAA*, No. 11CV06356, 2011 WL 4374451 (N.D. Ill. Sept. 12, 2011), available at <http://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2011cv06356/259901/1/>.

13. See Smith, *Solving the Concussion Problem*, *supra* note 9, at 147–61.

14. *BCS Background*, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4809699> (last updated Oct. 31, 2013) (“The Bowl Championship Series (BCS) is a five-game showcase of college football. It is designed to ensure that the two top-rated teams in the country meet in the national championship game, and to create exciting and competitive matchups among eight other highly ranked teams in four other [premiere] bowl games.”).

15. *Id.*

commercial and financially lucrative level.¹⁶ In 2011–12, for example, the football program at the University of Texas generated \$103.8 million in revenue and an astounding \$77.9 million in net profit.¹⁷ The University of Michigan, which was second in net revenue, generated a healthy \$61.6 million in net profit, with the Universities of Georgia and Florida each generating over \$50 million in net profit.¹⁸

In 2010, the BCS, which is generally considered to be the major national championship in NCAA football, generated \$1.2 billion in revenues for host cities and “also distributed \$142,500,000 to participating athletic departments.”¹⁹ The overall “payout for the five 2011 BCS bowls [wa]s \$230,237,000.”²⁰ And, for the year of 2011, “eight BCS bowl coaches received an additional \$1,864,000 because their teams are playing in a BCS bowl game.”²¹ Yet, as one commentator noted, “BCS players, the main bowl ingredient, receive \$250 to \$500 gift bags for their work leading up to and participation in BCS bowl games. . . . [which generate] billions [of dollars in revenues] for universities, coaches, and host cities.”²² The voices of critics will grow harsher and calls for paying players will increase as media revenue for the BCS grows to as much as \$500 million in 2014, a figure that is more than triple the \$150 million currently being paid by ESPN for media rights to broadcast the bowl series.²³

In reporting reminiscent of the media’s strong indictment of college football in the early twentieth century, the *New York Times* recently questioned what is happening in college football and reported that the NCAA is experiencing “tumultuous days” as “calls for reform grow

16. See Kristi Dosh, *Texas Tops in Football Profit, Revenue*, ESPN.COM (Dec. 12, 2012), http://espn.go.com/blog/playbook/dollars/post/_id/2556/texas-tops-in-football-profit-revenue.

17. *Id.*

18. *Id.*

19. Emmett Gill, *Da Season for Distribution: A 2012 BCS Revenue Sharing Plan*, BLACK ATHLETE SPORTS NETWORK (Jan. 3, 2012), <http://blackathlete.net/2012/01/da-season-for-distribution-a-2012-bcs-revenue-sharing-plan/>.

20. *Id.*

21. *Id.*

22. *Id.*

23. Chris Smith, *The Money Behind the BCS National Championship*, FORBES (Jan. 7, 2013) [hereinafter Chris Smith, *The Money Behind the BCS*], <http://www.forbes.com/sites/chris-smith/2013/01/07/the-money-behind-the-bcs-national-championship/> (“The network pays more than \$150 million per year for the rights to all five BCS bowls. And those paychecks will only get bigger as college football moves to a playoff system for the 2014 season. ESPN is in the process of securing the playoff TV rights, and many expect the network will eventually have to pay somewhere in the neighborhood of \$500 million annually for them.”).

louder.”²⁴ Much attention has focused on the NCAA’s handling of its enforcement process, particularly after a mishandling by the NCAA of an investigation at the University of Miami²⁵ and questions regarding the NCAA’s process in strongly sanctioning Penn State University.²⁶ Other critics focus on the refusal to compensate players, who produce revenues providing millions of dollars in profit to institutions.²⁷ This revenue is often used to provide very competitive compensation to coaches and athletics personnel.²⁸

Rather than joining in the pay-for-play debate, however, this article focuses primarily on a critique of the NCAA’s current treatment of student welfare issues related primarily to head injuries suffered by student-athletes participating in college football. In response to those issues, this article raises safety, enforcement, and compensation concerns and offers a game plan for dealing constructively with those issues.

The NCAA is rightfully concerned about its reputation, as the leader in intercollegiate athletics. Those concerns will surely be heightened as issues related to student welfare receive increased media attention. Josephine Potuto, former chair of the NCAA’s Committee on Infractions recently declared she could not “recall a time when there has been less optimism about the [NCAA] and how it operates.”²⁹ Potuto added, “[w]hether that’s on merit, or a confluence of events hitting at the same time, the fact is there’s an overwhelming feeling that everything is wrong.”³⁰ President Mark Emmert, who has led the NCAA since 2010 and receives an annual compensation that has been reported at over \$1.6 million per year,³¹ recently

24. Greg Bishop, *Tumultuous Days for N.C.A.A.’s President as the Calls for Reform Grow Louder*, N.Y. TIMES, Feb. 27, 2013, http://www.nytimes.com/2013/02/28/sports/ncaafotball/calls-for-reform-grow-louder-for-ncaa-and-mark-emmert.html?pagewanted=all&_r=0 (“In the past month, the N.C.A.A. and its president, Mark Emmert, have been sued, criticized and ridiculed—and more than usual. They were embarrassed by admitted mistakes in a high-profile investigation. Their critics, growing louder and in number, included a governor, state senators, lawyers, academics and university presidents.”).

25. *Id.*

26. See generally Matthew Mitten, *The Penn State “Consent Decree”: The NCAA’s Coercive Means Don’t Justify Its Laudable Ends, But Is There a Legal Remedy?*, 41 PEPP. L. REV. 321 (2014).

27. See David Berri, *What Sports Illustrated Didn’t Tell You About Paying College Athletes*, HUFFINGTON POST SPORTS—THE BLOG (Nov. 11, 2011, 8:05PM), http://www.huffingtonpost.com/david-berri/paying-college-athletes_b_1089102.html.

28. *Id.*

29. *Id.*

30. *Id.*

31. Steve Berkowitz, *NCAA President Mark Emmert Paid at Nearly \$1.6M per Year*, USA

acknowledged that “[t]he frustration is you take two steps forward on the reform agenda and something explodes and you get knocked back. We’re making great progress, but it has been much more tumultuous than any of us expected.”³²

If the NCAA proactively addresses student health and welfare issues associated with head injuries in big-time football, it will deal with one of the most tumultuous challenges that it faces and will revitalize confidence in its brand as a student-oriented enterprise.³³ The NCAA and its member institutions—the colleges and universities that make up the NCAA—have not consistently lived up to their own constitution, which, in describing its “basic purpose,” extols amateurism and the student-athlete:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.³⁴

In order to achieve this educational and student-centered purpose, the NCAA Constitution sets forth the objective of student-athlete well-being: “[i]ntercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes.”³⁵ In enhancing the physical well-being of student-athletes, the constitution further mandates that, “[i]t is the responsibility of each member institution to protect the health of, and provide a safe environment

TODAY (July 9, 2012), <http://usatoday30.usatoday.com/sports/college/story/2012-07-09/NCAA-Mark-Emmert-salary/56117864/1>.

32. Bishop, *supra* note 24.

33. Cf. Cailyn Reilly, Comment, *The NCAA Needs Smelling Salts When It Comes to Concussion Regulation in Major College Athletics*, 19 UCLA ENT. L. REV. 245, 290–91 (2012) (making the point that “[b]y failing to properly address the dangers of concussions in contact sports, the NCAA has revealed itself to be an inefficient and obtuse organization, yet it remains in the unique position of being able to provide for the safety of its student-athletes”).

34. NCAA CONST. art. 1.3.1, *reprinted in* 2013–14 NCAA DIVISION I MANUAL 1 (effective Aug. 1, 2013) [hereinafter NCAA MANUAL], *available at* <http://www.ncaapublications.com/productdownloads/D114.pdf>.

35. NCAA CONST. art. 2.2, *reprinted in* NCAA MANUAL, *supra* note 34, at 3.

for, each of its participating student-athletes.”³⁶ Finally, in order to achieve such a safe environment each member institution must “foster[] a positive relationship between the student-athlete and coach.”³⁷

This article sets forth a challenging but viable game plan for protecting the health and well-being of intercollegiate football players. Acting proactively will help revitalize the NCAA’s brand of competitive, student-centered athletics. This article consists of three parts: The Problem of Head Injuries in College Football; Solving the Problem of Head Injuries in College Football; and Conclusion.

II. THE PROBLEM OF HEAD INJURIES IN COLLEGE FOOTBALL

The NCAA has made significant progress in dealing with catastrophic injuries since the early 1900s when deaths were common in college football.³⁸ From 2004 to 2009, for example, “there were no fatalities from direct catastrophic injuries in NCAA football.”³⁹ However, “[n]ationwide, across all sports levels, there have been more deaths from heat stroke in the 2005–2009 time block than any other five-year block during the past 35 years.”⁴⁰ The NCAA, in turn, reports that, “[t]he overall injury rate in NCAA football is 8.1 injuries per 1,000 athlete exposures (games and practices combined)” and that “[t]here were more than 41,000 injuries and 25 million athlete exposures from 2004 to 2009.”⁴¹ Of those injuries 7.4% were concussions and 4.3% were head, face, and neck injuries.⁴²

The percentage of recorded concussions and head related injuries is significant, but it is only the tip of the iceberg in terms of brain damage or injury, much of which appears only years after the concussive and sub-concussive blows or head trauma that caused it.⁴³ In a recent debate

36. NCAA CONST. art. 2.2.3, *reprinted in* NCAA MANUAL, *supra* note 34, at 3.

37. NCAA CONST. art. 2.2.4, *reprinted in* NCAA MANUAL, *supra* note 34, at 3.

38. *See Football’s Death Record for 1907*, N.Y. TIMES (Nov. 24, 1907), [http://query.nytimes.com/mem/archive-free/pdf?res=9D0CE7D6103EE033A25757C2A9679D946697D6CF](http://query.nytimes.com/mem/archive-free/pdf?res=9D0CE7D6103EE033A25757C2A9679D946697D6CF; Nineteen Killed on Gridiron); *Nineteen Killed on Gridiron*, THE S.F. CALL, Nov. 27, 1905, at 1, *available at* <http://chroniclingamerica.loc.gov/lccn/sn85066387/1905-11-27/ed-1/seq-1/>.

39. NCAA, FOOTBALL INJURIES: DATA FROM THE 2004/05–2008/09 SEASONS, NCAA 1, http://cdn.ca9.uscourts.gov/datastore/library/2013/08/02/NCAA_Football%20Injuries.pdf (last visited Nov. 21, 2013) [hereinafter NCAA, FOOTBALL INJURIES].

40. *Id.*

41. *Id.*

42. *Id.*

43. Terry Zeigler, *Chronic Traumatic Encephalopathy (CTE)*, SPORTSMED,

regarding whether college football should be banned, noted author Malcolm Gladwell emphasized that it is “the continuous small blows to the brain that are creating the damning evidence being found in the brains of former football players.”⁴⁴ Chronic Traumatic Encephalopathy,⁴⁵ the evidence of brain damage found in the brains of many former football players, “is not the product of massive concussions, rather it is borne through repetitive sub-concussive blows.”⁴⁶ A football player may suffer thousands of such blows over the course of time when they are actively participating in football.⁴⁷

This article focuses on head injuries suffered in college football, many of which are latent, appearing as dementia later in life.⁴⁸ A major lawsuit has been filed against the NFL to seek to recover for losses related to those brain injuries.⁴⁹ The NCAA has been sued by a group of former players as well.⁵⁰ President Obama entered the fray, directing his comments primarily to the NCAA and indicating his expectation that they will deal with these issues.⁵¹ Even Congress has become increasingly interested in the issue of brain injuries and trauma related to football.⁵² One of the defenses asserted by the NFL in the lawsuit brought by former players against the association is that it is not clear that blows suffered in the NFL are any more likely to be the cause of brain injury than injuries incurred by blows to the head that occurred at the collegiate, high school, and youth levels.⁵³ What is clear, however, is that college football, like the NFL, high school, and youth

<http://www.sportsmd.com/Articles/id/44.aspx> (last visited Nov. 6, 2013).

44. Michael Felder, *Sub-Concussive Blows Are the True Danger in College Football*, BLEACHER REPORT (May 9, 2012), <http://bleacherreport.com/articles/1177616-college-football-sub-concussive-blows-are-the-true-danger-in-college-football>.

45. Zeigler, *supra* note 43 (“Chronic traumatic encephalopathy is a degenerative brain disease that results in behaviors similar to Alzheimer’s disease (AD). However, according to researchers, CTE has a clear environmental cause (repeated brain trauma) rather than a genetic cause. In other words, CTE is the only preventable form of dementia.”).

46. Felder, *supra* note 44 (“Those little hits. The constant banging on the offensive and defensive line. The running back being tackled every play as he carries the ball over 200 times a season. The linebacker who is putting up 125 tackles. Those are not all concussions, but they are repetitive sub-concussive blows to the head that are the building blocks of CTE.”).

47. See Anahad O’Connor, *Head Injuries on the Football Field*, N.Y. TIMES WELL BLOG (Sept. 8, 2011), well.blogs.nytimes.com/2011/09/08/head-blows-on-the-football-field/.

48. Zeigler, *supra* note 43.

49. Smith, *Solving the Concussion Problem*, *supra* note 9, at 136.

50. See *infra* notes 92–104 and accompanying text.

51. See *supra* note 1.

52. See Smith, *Solving the Concussion Problem*, *supra* note 9, at 136, 143, 145, 172–80.

53. See *id.* at 149 & n.118, 164.

football, is a source of brain trauma that may lead to CTE later in the life of a former football player.⁵⁴

As noted previously, the NCAA was formed, in part, in response to fatal head and other injuries that occurred early in the twentieth century.⁵⁵ Over the years, the NCAA has responded by creating a variety of safety rules designed to better protect the health and safety of student-athletes.⁵⁶ The NCAA's response to injuries, including head injuries, has generally been successful albeit a bit slow in coming.⁵⁷ It was not until 1916, for example, more than a decade after the deaths of the eighteen college football players that led to the intervention of President Roosevelt, that the first NCAA Football Rules Code was "developed and published."⁵⁸ Twenty-three more years passed before college players were required to wear helmets in 1939.⁵⁹ Another twenty-five years passed before a player was no longer permitted to "deliberately and maliciously use his helmet or head to butt or ram an opponent."⁶⁰ Almost another decade passed before the NCAA acted again, in 1973, requiring college football players to wear mouth guards.⁶¹ Just three years later in 1976, college football players were prohibited from spearing—"the deliberate use of the helmet in an attempt to punish the opponent."⁶² It took almost two more decades before the NCAA published its first set of Concussion Guidelines in 1994.⁶³ In 1996, in an effort to further protect college football players from head injuries, the NCAA adopted a rule requiring a play to be blown dead if the ball carrier's helmet comes off.⁶⁴ In the first decade of the twenty-first century, a series of new safety related rules were adopted by the NCAA: 2002 (a "defenseless player" is defined to provide added protection);⁶⁵ 2003 (a preseason

54. *See id.* at 164.

55. *See supra* notes 4–8 and accompanying text.

56. *See supra* notes 34–37 and accompanying text.

57. *See id.*

58. NCAA, FOOTBALL INJURIES, *supra* note 39, at 2; *see also supra* note 7 and accompanying text.

59. NCAA, FOOTBALL INJURIES, *supra* note 39, at 2. Requiring helmets may have contributed to an increase in head trauma because the helmet is now often considered to be a weapon that can be used to strike a blow or aid in tackling another player. *See id.*

60. *Id.*

61. *Id.*

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

63. *Id.*

64. *Id.*

65. *Id.*

schedule, together with more extensive medical examinations for participation, are mandated for safety purposes);⁶⁶ 2006 (“[e]ye shields must be completely clear to allow for quick medical diagnoses of student-athletes”);⁶⁷ 2008 (“[t]he horse-collar tackle is [declared to be] illegal; players [are] protected from a chop-block; and [more] focus [was placed] on eliminating hits on defenseless players and blows to the head”);⁶⁸ and 2010 (concussion management plans were mandated in that “any injured player [must now] be removed from play and cleared by medical personnel before returning to play,” and certain “blocking schemes on kick plays” were also limited).⁶⁹

The NCAA is to be applauded for its increasing commitment over the past decade to do more to protect football players from serious head injuries. It is not surprising, given increased knowledge regarding the severity of brain-related injuries, that the NCAA has acted more decisively in the past decade to protect student-athletes playing college football from injuries, including serious head injuries. It is clear, however, that more must be done.

To better understand why the NCAA has acted and why it will have to do more in the future to protect its student-athletes playing football, a short summary of the development of scientific and medical knowledge regarding brain trauma suffered in football and other major contact sports will be helpful.⁷⁰ Given that protective helmets were not required until 1939, it is evident that an appreciation of the consequences of head trauma in college football was slow in developing.⁷¹

Well before 1939, it was clear in boxing that repeated blows to the head could result in brain damage—referred to as dementia pugilistica.⁷² Dementia pugilistica is defined as, “a syndrome affecting boxers that is caused by cumulative cerebral injuries and is characterized by impaired cognitive processes (as thinking and remembering), parkinsonism, impaired and often slurred speech, and slow poorly coordinated movements especially

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See, e.g.,* Smith, *Solving the Concussion Problem*, *supra* note 9, at 132–33. The short summary in this article is derived from a lengthier discussion of brain trauma and injuries appearing in an article written by the author in the Thomas Jefferson Law Review. *See generally id.*

71. *See* NCAA, FOOTBALL INJURIES, *supra* note 39, at 2.

72. *Id.* at 130.

of the legs.”⁷³ As early as 1928, in an article published in the *Journal of the American Medical Association*, Dr. Harrison S. Marland found early symptoms of brain injury in boxers due to repeated blows or trauma to the head.⁷⁴

From 1928 to 2002, there was a general and growing recognition that serious and repeated blows to the head could give rise to serious brain injuries.⁷⁵ This increased understanding manifested itself in the adoption of various NCAA rules between 1939 and 2002, beginning with the requirement that players wear helmets, which was implemented in 1939.⁷⁶ By 1994, the NCAA recognized the significance of brain trauma when it published an initial set of concussion guidelines.⁷⁷ In 2003, the NCAA performed a major study involving 2905 college football players in which they concluded that players who “have suffered concussions are more susceptible to further [head trauma] for . . . seven to ten days after the . . . injury.”⁷⁸ A study at The Center for the Study of Retired Athletes (CSRA) at the University of North Carolina found “a link between multiple concussions and depression among former [NFL and collegiate] players.”⁷⁹ A 2005 study by the CSRA found “a connection between concussions and both brain impairment and Alzheimer’s disease among retired NFL players.”⁸⁰ Recognition of the seriousness of head trauma, including concussions, was growing in the first decade of the twenty-first century.

An even more significant set of studies were developing at the same time—studies that were evidencing the connection between sub-concussive blows to the head and brain injury taking the form of CTE later in life. In 2002, a forensic pathologist, Dr. Bennet Omalu, studied the brains of a number of former football players, including Mike Webster, and found clear

73. *Dementia Pugilistica Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/medical/dementia%20pugilistica> (last visited Nov. 7, 2013).

74. Harrison S. Martland, *Punch Drunk*, 91 J. AM. MED. ASS’N 1103, 1103 (1928).

75. Smith, *Solving the Concussion Problem*, *supra* note 9, at 131–32.

76. See NCAA, FOOTBALL INJURIES, *supra* note 39, at 2.

77. See *id.*; Travis Waldron, *The NCAA’s History with Concussions: A Timeline*, THINK PROGRESS (July 23, 2013), <http://thinkprogress.org/sports/2013/07/23/2339571/ncaa-concussion-timeline/>.

78. Chris Simmons, *Casper’s Way: NFL Should Face Concussion Problem*, THE MIRROR (Mar. 21, 2007), <http://fairfieldmirror.com/2007/03/21/casperswaynflshouldfaceconcussionproblem/>.

79. Pellman Steps Down as NFL’s Top Concussion Expert, ESPN (Feb. 28, 2007), <http://sports.espn.go.com/nfl/news/story?id=2782445>.

80. *Id.*

evidence of CTE,⁸¹ which “interferes with memory and anger control [and] can cause dementia and death.”⁸² Other studies followed and the connection between repeated blows (trauma) to the head suffered in a football game and CTE has become much clearer.⁸³ Studies had multiplied, and in 2010 Dr. Omalu emphatically testified before the House Committee on the Judiciary that “permanent brain damage and dementia following repeated blows to the head is a . . . generally accepted principle in medicine.”⁸⁴ Dr. Omalu closed his testimony by pleading for more action to protect football players at all levels.⁸⁵

The case of Mike Webster is illustrative. Webster died at the age of fifty, after suffering from dementia, amnesia, and depression.⁸⁶ After his death and as a result of the Omalu study, Webster’s estate successfully brought a lawsuit against the NFL in the United States District Court for Maryland and was awarded over \$1.6 million in disability payments, interest, and fees.⁸⁷ The NFL appealed the ruling; but, on December 13th, 2006, the U.S. Court of Appeals for the Fourth Circuit affirmed the district judge’s ruling.⁸⁸

Before playing for over a decade in the NFL, Webster had a highly successful collegiate career at the University of Wisconsin.⁸⁹ Clearly, repeated blows to the head (head trauma) suffered during his collegiate career at Wisconsin, a major Big Ten university, contributed to his CTE.⁹⁰ Indeed, some doctors estimated Webster had been in the equivalent of

81. Jeanne Marie Laskas, *Game Brain*, GQ (Oct. 2009), <http://www.gq.com/sports/profiles/200909/nfl-players-brain-dementia-study-memory-concussions>.

82. Barrett, *supra* note 4, at 55.

83. Liz Neporent, *Football Head Injuries Increasing Because of Bigger, Faster Players*, ABC NEWS (Jan. 11, 2013), <http://abcnews.go.com/Health/football-head-injuries-increasing-bigger-faster-players/story?id=18183735#.UZsRqZVMafQ>.

84. *Legal Issues Related to Football Head Injuries, Pt. II: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 3 (2010) (written statement of Bennet Omalu, MD, Co-Director, Brain Injury Research Institute), available at http://judiciary.house.gov/hearings/printers/111th/111-82_53092.PDF.

85. *Id.* at 7.

86. Greg Garber, *A Tormented Soul*, ESPN (Jan. 24, 2005), <http://sports.espn.go.com/nfl/news/story?id=1972285>.

87. *Jani v. Bell*, 2005 LEXIS 44331, 12–13 (D. Md. 2005), enforcing 2005 LEXIS 10150, 17 (D. Md.).

88. *Jani v. Bell*, 209 F. App’x 305, 319–20 (4th Cir. 2006).

89. *Hall of Famers: Mike Webster*, PRO FOOTBALL HALL OF FAME, http://www.profootballhof.com/hof/member.aspx?PLAYER_ID=227 (last visited Nov. 12, 2013).

90. See Barrett, *supra* note 4, at 55.

“25,000 car crashes” in over twenty-five years of playing football at the high school, college, and professional levels.⁹¹

In September of 2011, Adrian Arrington, who played college football at Eastern Illinois University, filed a class action lawsuit against the NCAA alleging that the NCAA failed to adequately protect its student-athletes from concussions and head injuries.⁹² In the first allegation in the complaint, Arrington alleges:

For over 30 years, the NCAA has failed its student-athletes—choosing instead to sacrifice them on an altar of money and profits. The NCAA has engaged in a long-established pattern of negligence and inaction with respect to concussions and concussion-related maladies sustained by its student-athletes, all the while profiting immensely from those same student-athletes.⁹³

Arrington alleges further that he suffered five concussions, which resulted in “memory loss, migraine headaches, depression, and seizures.”⁹⁴ He “faults the NCAA for not adopting tougher rules on certain on-the-field plays that are more likely to result in head injuries.”⁹⁵ The Chicago Tribune recently reported that Arrington’s attorney, Joe Siprut, sought class-action status⁹⁶ for the lawsuit “focusing on the NCAA . . . because its officials knew as early as 2003 that multiple concussions could lead to health problems, yet did not require colleges to have concussion policies until 2010.”⁹⁷ According to the Tribune:

The lawsuit claims that after Arrington’s first three concussions, Eastern’s team doctor told him he could get back on the field the

91. *NFL Players Donating Their Brains to Science: Mike Webster*, CBS NEWS, http://www.cbsnews.com/2300-204_162-10007027-2.html (last visited Nov. 12, 2013).

92. Libby Sander, *Former Football Player Sues NCAA over Concussion Policies*, CHRONICLE OF HIGHER EDUCATION (Sep. 19, 2011), <http://chronicle.com/blogs/ticker/former-football-player-sues-ncaa-over-concussion-policies/36408> (based on an AP report); see Complaint, *supra* note 12, at ¶ 1.

93. Complaint, *supra* note 12, at ¶ 1.

94. John Keilman, *Ex-College Football Player Claims Concussions Ruined His Life*, CHICAGO TRIBUNE (Jan. 4, 2013), http://articles.chicagotribune.com/2013-01-04/news/ct-met-college-concussion-20130104_1_multiple-concussions-concussion-policies-class-action-status.

95. Sander, *supra* note 92.

96. Keilman, *supra* note 94.

97. *Id.*

next day. The team sent him to a neurologist only after he started to experience seizures, he alleges, and even then he continued to play, suffering two more concussions before leaving the team near the end of his senior season.⁹⁸

The NCAA has denied liability in the *Arrington* case by responding that it has taken serious action regarding concussions, including having provided for concussion guidelines in 1994 and by requiring concussion management plans beginning in 2010⁹⁹—the year prior to the filing of Mr. Arrington’s suit,¹⁰⁰ but after Arrington ceased playing football at Eastern Illinois University.¹⁰¹ In its defense the NCAA also asserts that “each school is responsible for protecting the health of its players, and that athletes sign forms in which they acknowledge the risk of concussions.”¹⁰² Christopher Radford, speaking on behalf of the NCAA, noted further that the NCAA advises teams on the best practices of managing concussion and head injuries.¹⁰³ Radford added, “[t]he NCAA has great compassion for student athletes who are injured as a result of training, practice or competition, which fuels our desire to make student athlete safety our top priority.”¹⁰⁴

With the *Arrington* lawsuit—which largely sounds in negligence—the NCAA has joined the NFL in having to defend against litigation that, if successful, could have a significant economic impact on the NCAA and its member institutions.¹⁰⁵ Even if not successful, such litigation brings undesired negative attention to the NCAA’s weaker-than-hoped-for response to the health and safety issues related to head injuries.¹⁰⁶

The NCAA may also find itself subject to a worker’s compensation lawsuit in a state like California, where the legislature recently passed SB

98. *Id.*

99. *Cf.* Complaint, *supra* note 12, at ¶ 22–24; Keilman, *supra* note 94; Waldron, *supra* note 77.

100. Complaint, *supra* note 12.

101. *Id.* at ¶ 25–27 (noting that Arrington played for Eastern Illinois University from 2006–2009).

102. Keilman, *supra* note 94.

103. *Id.*

104. *Id.*

105. See Ken Belson, *Concussion Liability Costs May Rise, and Not Just for N.F.L.*, N.Y. TIMES (Dec. 10, 2012), <http://www.nytimes.com/2012/12/11/sports/football/insurance-liability-in-nfl-concussion-suits-may-have-costly-consequences.html?pagewanted=all>.

106. *Cf.* George Vecsey, *College Athletes Move Concussions into the Courtroom*, N.Y. TIMES (Nov. 29, 2011), <http://www.nytimes.com/2011/11/30/sports/ncaaf/college-players-move-concussions-issue-into-the-courtroom.html?pagewanted=all>.

1525 establishing a “Student-Athlete Bill of Rights.”¹⁰⁷ The legislation provides benefits, including extended scholarships and insurance for needy student-athletes, at major revenue-producing schools in California, including UCLA, UC Berkeley, Stanford, and the University of Southern California.¹⁰⁸ As a matter of policy, there is only a short step from providing benefits of the sort provided in SB 1525 to providing workers’ compensation benefits for players at major, revenue-producing universities in California.¹⁰⁹ Indeed, California seems to be moving toward a policy of treating student-athletes in major revenue-producing programs in the state more like employees, which could open up the possibility of filing a successful workers’ compensation claim in the state.¹¹⁰ Such claims would, in all likelihood, be brought against the university and not the NCAA, but it would be a cause for major concern on the part of the NCAA and its membership.¹¹¹

On August 1, 2013, Representatives Charlie Dent (R-Pennsylvania) and Joyce Beatty (D-Ohio) introduced H.R. 2903, the National Collegiate Athletics Accountability Act, which illustrates willingness on the part of some members of Congress to hold the NCAA accountable for the manner in which it treats student-athletes and member institutions under the NCAA’s enforcement process.¹¹² If adopted, the Act would terminate billions of dollars in federal aid, in the form of Title IV funding for qualifying colleges and universities, if an institution fails to protect student-athletes and universities in keeping with the provisions of the Act. The proposed Act mandates annual baseline concussion tests for student-athletes participating in contact or limited-contact sports. It also mandates an irrevocable four-year scholarship for student-athletes participating in contact sports, with scholarships being guaranteed in the event of loss of athletic

107. CAL. EDUC. CODE § 67450 (West 2013); *SB 1525 – Establishes a Student Athlete Bill of Rights – Key Vote*, PROJECT VOTE SMART, <http://votesmart.org/bill/15342/establishes-a-student-athlete-bill-of-rights#> (last visited Nov. 13, 2013).

108. See *infra* Part III.A.4.

109. See Michael Hiltzik, *California Gives a Huge Payoff to the NFL*, L.A. TIMES—THE ECONOMY HUB (Oct. 8, 2013), <http://www.latimes.com/business/hiltzik/la-fi-mh-nfl-20131008,0,4478247.story#axzz2kbH1XYn1>. NFL players who played a single game in the state of California have been awarded worker’s compensation in the California worker’s compensation process. See *id.*

110. Cf. generally Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006).

111. See generally *id.*

112. National Collegiate Athletics Accountability Act, H.R. 2903, 113th Cong. (2013), available at <https://www.govtrack.us/congress/bills/113/hr2903/text>.

skill or injury. In an apparent response to the NCAA's sanctioning of Penn State University, without a formal hearing, the Act seeks to guarantee that all student-athletes and universities will have the opportunity for a formal administrative hearing prior to the implementation of any NCAA punishment for an alleged rules violation, under the NCAA's enforcement process. It is unlikely that this Act will be adopted, but it does evidence a willingness on the part of members of Congress to hold the NCAA accountable.

With the threat of litigation and strong concern being expressed by President Obama and others, including members of Congress, it is not surprising that the NCAA has become more assertive in dealing with the problem of head injuries in college football. Such a posture is in keeping with its own constitutionally mandated obligation to provide for student-welfare.¹¹³ Despite its many critics, the NCAA's response may be well intended, although criticism that the NCAA tends to be reactive and to move too slowly in protecting and providing for its student-athletes is justified.¹¹⁴

Taking proactive and more dramatic steps is also a strong defensive strategy—a means of avoiding the major losses that the NCAA and its member institutions could incur in litigation.¹¹⁵ Acting to protect and provide for student-athletes playing college football, particularly at the FBS and BCS level, will also help the NCAA maintain its student-centered brand.¹¹⁶ Just as when academic leaders responded to concerns over deaths in college football in the early twentieth century, action now, in the early stages of the twenty-first century, to address student-athlete welfare issues related to head trauma may help save college football and revitalize the NCAA's student-centered brand.

III. SOLVING THE PROBLEM OF HEAD INJURIES

In order to deal with the various issues regarding head injuries, the NCAA will have to adopt significant reform in two areas: (1) improving safety, through stronger rules and implementation of an enforcement process designed to ensure that the rules are enforced; and (2) caring for former college football players who have suffered from traumatic head injuries or

113. See generally NCAA CONST., reprinted in NCAA MANUAL, *supra* note 34.

114. See Reilly, *supra* note 33, at 274–76.

115. See Belson, *supra* note 105.

116. See generally Reilly, *supra* note 33.

blows suffered while playing football at an NCAA member institution.

A. *Improving Safety*

The NCAA has adopted rules designed to protect players from head injuries, particularly concussions.¹¹⁷ The NCAA has also taken steps to increase the professional nature of medical care provided to players, by mandating improved protocols for dealing with concussions and providing more authority or latitude for medical and training professionals serving athletes.¹¹⁸ In addition to adopting rules designed to protect and provide improved care for student-athletes, the NCAA mandated a new preseason schedule in 2003, recognizing that the “preseason has the highest injury rate (9.7 per 1,000 athlete exposures) compared with in-season (7.5) and the postseason (4.2)” and that “[t]he greatest incidence for adverse events such as fatalities, heat illness and collapse is more often during transitions such as the first and second day of preseason and after a break period from practice.”¹¹⁹ It is clear, however, that more safety and scheduling rules, designed to deal with head trauma, must be adopted if the health and safety of student-athletes is to be adequately protected.

1. Safety Rules and Strengthening Medical Care and Protocols

To develop meaningful changes in the rules which will protect against head injuries, the NCAA must begin to gather data regarding head trauma (concussions and sub-concussions) suffered by position (line, linebacker, defensive back, running back, quarterback, etc.) and type of play (special teams, general play, running play, passing play, etc.). Studies should also be undertaken to evaluate equipment and ensure that the players are required to use the safest equipment. Rule changes must be data driven. Rules must also be assessed on a regular basis to ensure that they are achieving their intended result.

The NCAA has evidenced an increased willingness to engage in the scientific studies necessary to make wise policy to protect its student-athletes from head injuries. For example, on March 15, 2013, “[i]n an effort to expand its commitment to the health and safety of its student-athletes, the

117. See *supra* notes 55–69 and accompanying text.

118. See *infra* notes 140–45 and accompanying text.

119. NCAA, FOOTBALL INJURIES, *supra* note 39, at 1.

NCAA announced it will participate in an unprecedented strategic alliance formed by the NFL and [General Electric (GE)] to facilitate innovation and advance research into brain injuries.”¹²⁰ The NCAA’s release notes further that “NCAA president Mark Emmert said the strategic alliance is an extension of the NCAA’s 107-year-old founding mission to protect the health and well-being of student-athletes.”¹²¹ The NFL, GE, and Under Armour are funding the project, with the NCAA playing a supportive role:

The NCAA will support research funded by the partnership by providing scientists with opportunities to study concussions and their effects beyond the football field, the sport that has brought the injury’s detrimental effects to the forefront of health and safety discussions. The NCAA will encourage its member institutions to participate in the initiative by having medical staff who work with their student-athletes speak with the students about volunteering for study.¹²²

The NCAA must, however, play more than a supportive role—it must allocate resources to such studies, particularly given that many NCAA members have research institutions and medical schools attached to them.¹²³ The NFL has funded a project with the National Institutes of Health and has joined with the NFL Players Association (NFLPA) to fund a study that is underway at the Harvard Medical School.¹²⁴ The NCAA should follow the NFL’s example by aggressively supporting research regarding head trauma.

It is clear that the NCAA, the BCS, major conferences, and universities must do more to support and sponsor research regarding the head injuries. The NCAA’s increased willingness to gather information is, nevertheless, a positive sign. Data already gathered by the NCAA reveals that 13.6% of all competition injuries occur during special teams play—kickoffs, punts, field

120. Brian Hendrickson, *NCAA a Participant in Strategic Alliance to Enhance Head Health*, NCAA (Mar. 15, 2013), <http://www.ncaa.org/about/resources/media-center/news/ncaa-participant-strategic-alliance-enhance-head-health>.

121. *Id.*

122. *Id.*

123. For example, the University of California in Irvine, Baylor University, and the University of South Florida all have medical schools. *See, e.g.*, SCHOOL OF MEDICINE: UNIVERSITY OF CALIFORNIA—IRVINE, <http://www.som.uci.edu> (last visited Nov. 14, 2013); BAYLOR COLLEGE OF MEDICINE, <http://www.bcm.edu> (last visited Nov. 14, 2013); USF HEALTH: MORSANI COLLEGE OF MEDICINE, <http://health.usf.edu/medicine/index.htm> (last visited Nov. 14, 2013).

124. *See generally* Smith, *Solving the Concussion Problem*, *supra* note 9.

goals, and point-after attempts.¹²⁵ The NCAA would be wise to consider and then implement strong rules limiting contact in special teams play. An even more dramatic change would be to simply do away with special teams play if the data warrants such a move. Such a dramatic change would no doubt be opposed by purists, who would argue that eliminating special teams play would change the dynamic of the game.¹²⁶ Every rule change—and there have been many over the years—changes the dynamic of play to some extent.¹²⁷ The real question is whether the benefit outweighs the cost. The chance to reduce injuries by almost fifteen percent with a simple change, like eliminating special teams play,¹²⁸ could well be worth the price. Short of making such a dramatic rule change, the NCAA must, at a minimum, gather data indicating the nature and extent of injuries suffered in special teams play to determine what specific rules might be adopted to minimize those injuries.

To develop meaningful rules, the NCAA needs data and must do more to fund the collection of it, particularly data related to head trauma in football. It will also have access to studies being done by the NFL and others,¹²⁹ which will provide a basis for wise rulemaking designed to protect the welfare of student-athletes. Without access to such data, it is beyond the scope of this article and the competence of its author to suggest specific rule changes, but such changes must be forthcoming if the NCAA is to protect its student-athletes.

Existing data regarding head injuries is suggestive of additional areas where rule changes would better protect student-athletes, and the NFL has been a leader in this area.¹³⁰ The NCAA has been gathering data regarding concussions in football for a number of years and it should use that data more aggressively. According to the NCAA's own statistics, concussions in college football continually increased over a twenty-one-year period from

125. NCAA, FOOTBALL INJURIES, *supra* note 39, at 2.

126. See generally Lisa Horne, *Just How Special Are Special Teams in College Football?*, BLEACHER REPORT (Mar. 26, 2013), <http://bleacherreport.com/articles/1580902-just-how-special-are-special-teams-in-college-football> (explaining the importance of special teams play).

127. But see Smith, *Solving the Concussion Problem*, *supra* note 9, at 185 (“The NFL has initiated a number of rule changes designed to protect the players, and it appears those changes have not adversely impacted the game.”).

128. NCAA, FOOTBALL INJURIES, *supra* note 39, at 2.

129. See generally Smith, *Solving the Concussion Problem*, *supra* note 9.

130. *Id.* at 185–86.

the 1980s,¹³¹ without much action on the part of the NCAA or its members. The NCAA seems to draw some solace from the fact that the number of concussions has remained fairly consistent since 2004, at a rate of 2.5 concussions per 1000 game-related exposures.¹³² David Klossner, NCAA Director of Health and Safety, opined:

Given the increased awareness and sensitivity to concussions by coaches, athletes and medical staff over the last few years, a level rate of concussions is encouraging as we anticipated a spike in the data set Although we do not yet have enough information to draw final conclusions, these data are important to monitor trends as we strive to make competition and practice safer for our student-athletes in all sports.¹³³

Klossner is right about the need to continue studying concussions; but, the NCAA takes undue solace in the fact that the rate of concussions remains essentially constant with the high-water mark reached a decade ago.¹³⁴ Studying concussions and taking solace in statistics that remain at a level that warrants grave concern, even though they have leveled off, is not enough. The NCAA must be more engaged in efforts to determine the impact of repeated concussive and sub-concussive blows suffered during practices and games and must cease to place the burden on schools to deal with the health issues that arise as a result of those blows.¹³⁵ Indeed, the failure by the NCAA to address sub-concussive trauma is deeply troublesome.

When data is gathered, at the associational, conference, and institutional member levels, as it must be, it should be used in the rulemaking process to formulate and assess the effectiveness of rules. Information, by institution, should also be disclosed to student-athletes and their families in the letter of intent or signing process. If an institution has a higher incidence of injuries,

131. Brian Hendrickson, *Concussion Rate Remains Steady*, NCAA (Sept. 21, 2012), <http://www.ncaa.org/about/resources/media-center/news/concussion-rate-remains-steady>.

132. *Id.*

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

134. *See Id.*

135. Keilman, *supra* note 94 (noting that in responding to a lawsuit, the NCAA explained that “each school is responsible for protecting the health of its players, and that athletes sign forms in which they acknowledge the risk of concussions”).

the player and his family should be aware of that fact before signing.¹³⁶

The NCAA should also be attentive to studies being done by others. For example, Dr. Omalu has recommended that a student-athlete receiving a concussion should be held out for more than two weeks, perhaps as long as three months.¹³⁷ In developing its policies, the NCAA should resist the pressure to get student-athletes back on the field after a concussion and should be conservative in determining when to permit a player to return to play.¹³⁸ This is an area where reliance on the members—universities and coaches—themselves is ill-placed, given the incentive to play an injured student-athlete to win a game.¹³⁹

Another area where the NCAA has taken some initial strides to protect the health and welfare of its student-athletes is in requiring management plans or protocols for dealing with head injuries. In 2010, the NCAA mandated concussion management plans.¹⁴⁰ Previously, in 2003, the NCAA mandated participation in medical exams and, in 2010, it created a requirement that any injured player be cleared by medical personnel before being permitted to return to play.¹⁴¹

In December of 2012, the Committee on Competitive Safeguards and Medical Aspects of Sports (CSMAS) developed a policy statement addressing misperceptions regarding the effectiveness of equipment designed to provide protective benefits against concussions and made it clear that “the NCAA would not provide medical waivers for the use of the equipment to prevent concussions in order to medically clear student-athletes for play.”¹⁴² David Klossner, NCAA Director of Health and Safety, emphasized that, “[t]he committee wanted to clearly state that these devices should not be used to permit medical clearance of a student-athlete to play their sport for the prevention of concussions or if they would otherwise not

136. See *infra* notes 230–31 and accompanying text.

137. Matt Chaney, *Brain Expert Omalu Wants Longer Rest for Concussed Football Players*, CHANEY'S BLOG (Jan. 28, 2011, 10:27 AM), <http://blog.4wallsublishing.com/2011/01/28/brain-expert-omalu-wants-longer-rest-for-concussed-football-players.aspx>.

138. See *id.*

139. See *infra* notes 181–85 and accompanying text.

140. NCAA, FOOTBALL INJURIES, *supra* note 39, at 2.

141. *Id.*

142. Brian Hendrickson, *NCAA Committee Clarifies Headgear Issue*, NCAA (Jan. 30, 2013), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2013/january/ncaa+committee+clarifies+headgear+issue>.

be medically cleared to participate due to a concussion.”¹⁴³ The NCAA has also developed a fact sheet regarding concussions for coaches.¹⁴⁴

The NCAA’s fact sheet recommends a four-step process when a player has suffered a head injury or possible concussion:

1. Remove the student-athlete from play. . . . Do not allow the student-athlete to just “shake it off.” Each individual athlete will respond to concussions differently.
2. Ensure that the student-athlete is evaluated right away by an appropriate health care professional
3. Allow the student-athlete to return to play only with permission from a health care professional with experience in evaluating for concussion
4. Develop a game plan.¹⁴⁵

If institutions were required—not just advised—to follow this simple four-step rule, there would be a reduction in multiple concussions or concussions followed by serious sub-concussive blows, the very harm disclosed in the NCAA’s 2003 concussion study.¹⁴⁶ Unfortunately, the NCAA’s recommended four-step process is little more than a guideline, the violation of which is not subject to the NCAA’s enforcement sanctions.¹⁴⁷

It is not surprising, therefore, that the NCAA has been criticized for doing too little and delegating too much authority to coaches and medical personnel at the institutional level.¹⁴⁸ In a particularly damning article, Dan Diamond, a *Forbes* contributor, recently criticized the University of Arizona, and its coaching staff, for permitting its quarterback to “play[]

143. *Id.*

144. *Concussion: A Fact Sheet for Coaches*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Health+and+Safety/Concussion+homepage/Resources/Concussion+Facts+For+Coaches> (last visited Nov. 15, 2013) [hereinafter *Concussion*].

145. *Id.*; see Dan Diamond, *Arizona Just Broke the NCAA’s Concussion Policy. Will it Matter?*, FORBES (Oct. 27, 2012, 9:27 PM), <http://www.forbes.com/sites/dandiamond/2012/10/27/arizona-just-broke-the-ncaas-concussion-policy-will-it-matter/>.

146. See, e.g., Simmons, *supra* note 78.

147. See *Concussion*, *supra* note 144.

148. See Diamond, *supra* note 145.

through an almost-certain concussion” in order to win an important game.¹⁴⁹ Diamond put it this way:

To be fair, it was [Arizona’s] biggest victory in two whole years. And the NCAA’s not going to penalize [Arizona], so why protect your player? It’s not like we’ve learned anything about football and head injuries.

....

[Arizona’s star quarterback] was showing tell-tale signs of concussion, and the NCAA—which is being sued for failing to implement appropriate concussion screening, return-to-play guidelines, and other safety measures—is pretty clear on what coaches should do next: “Take [an athlete] out of play immediately and allow adequate time for evaluation by a health care professional experienced in evaluating for concussion.”¹⁵⁰

The University of Arizona and its coaching staff apparently ignored the NCAA’s recommended four-step process for dealing with serious head trauma, and the NCAA did nothing to intervene.¹⁵¹ Sadly, this “washing of the hands”¹⁵² approach is the NCAA’s primary defense in the *Arrington* case¹⁵³—they argue that member institutions are responsible for enforcing safety protocols, thereby seeking to absolve the Association of all responsibility for the failure of coaches and member institutions to live up to these standards.¹⁵⁴ Yet, the NCAA will enforce recruiting and related rules to ensure that the schools maintain “a level playing field,” or competitive equity—matters that are arguably necessary to maintain the profitability of big-time college football.¹⁵⁵ Evidently, competitive equity warrants Associational enforcement, but student safety and welfare does not. It seems

149. *Id.*

150. *Id.* (alterations in original).

151. *See id.*

152. *See Matthew 27:24.*

153. *See supra* notes 99–100, 102 and accompanying text.

154. *See supra* notes 99–100, 102–03 and accompanying text.

155. *See* Gary Brown, *Board Adopts Tougher, More Efficient Enforcement Program*, NCAA (Oct. 30, 2012), <https://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/october/board+adopts+tougher+more+efficient+enforcement+program>.

that schools that disregard the four-step process for dealing with head trauma not only disregard student-athlete welfare, but they also gain a competitive advantage over schools that adhere to that process.¹⁵⁶ If a school disregards the process and keeps its star quarterback on the field, and another team pulls its star quarterback because it follows the process, the school playing its “injured” quarterback may well gain a very significant competitive advantage, which may, in turn, result in financial gain to the university that disregards the protocols.¹⁵⁷

2. Scheduling Games and Practices

It is clear that fewer games and contact practices would decrease the number of injuries and would probably have the single greatest effect of any rule change in terms of limiting concussive and sub-concussive trauma.¹⁵⁸ Sub-concussive trauma (the play-after-play hits or blows to the head) is the major cause of CTE.¹⁵⁹ FBS football powers currently play twelve to fourteen games in a season.¹⁶⁰ A drop from twelve to ten games and a shortening of the season would clearly have a more positive impact on student welfare, both in terms of limiting injuries and increasing time for study and academic success for student-athletes, than any other single proposal that might be adopted.¹⁶¹ With their emphasis on student welfare, NCAA D-III schools often schedule as few as eight games in a season, with the possibility of playing in the postseason.¹⁶²

Unfortunately, but not surprisingly, given that more games mean more revenue for big-time college FBS football programs, it is unlikely that the

156. See Diamond, *supra* note 145.

157. See *id.*

158. Patrick Hruby, *Head Games*, SPORTS ON EARTH (Jan. 16, 2013), <http://www.sportsonearth.com/article/40980196/>; Gregg Easterbrook, *Football Finally Focusing on Practice*, ESPN PLAYBOOK (Aug. 14, 2012), http://espn.go.com/espn/playbook/story/_/id/8265669/pop-warner-rules-limiting-contact-practice-show-football-taking-head-injuries-seriously.

159. *What is CTE?*, BOS.UNIV. CTR. FOR THE STUDY OF TRAUMATIC ENCEPHALOPATHY, <http://www.bu.edu/cste/about/what-is-cte/> (last visited Nov. 19, 2013).

160. See, e.g., Michael Felder, *More Games for College Football Teams Should Not Be an Option*, BLEACHER REPORT (Jan. 30, 2013), <http://bleacherreport.com/articles/1507902-more-games-for-college-football-teams-should-not-be-an-option>.

161. See Hruby, *supra* note 158.

162. For example, Amherst, a major D-III football program, only scheduled eight games in 2013. See, e.g., *2013 Schedule*, AMHERST COLLEGE: FOOTBALL SCHEDULE/RESULTS (2013), <https://www.amherst.edu/athletics/teams/fall/football/schedule>.

NCAA and its members who benefit financially from adding games will do the right thing for their student-athletes and reduce the number of games played and the length of the season—and thereby limiting the number of practices as well.¹⁶³ Rather, it appears that there may be more pressure to expand the number of regular season games for FBS schools, from twelve to thirteen games, than to decrease it to nine or ten games.¹⁶⁴ The Big Ten, for example, voted in February of 2013 to expand the number of league games from eight to ten, resulting in some arguing for adding a game to the regular season.¹⁶⁵ More league contests will mean more revenue for most Big Ten schools.¹⁶⁶ Nevertheless, some Big Ten schools want more home games, because home games are very profitable, which will increase pressure to add a regular season game to the schedule in order to accommodate the conference's desire to increase the number of conference games.¹⁶⁷

It appears unlikely, for economic reasons, that the NCAA will trim the length of the season for FBS schools, which would be the one thing that could do more than any other single act to help protect the health and safety of its student-athletes.¹⁶⁸ Fewer games would translate into fewer incidences of head trauma among football players.¹⁶⁹ As was the case with the NCAA's intransigence or reluctance to enforce safety rules, however, we see another instance—in the case of scheduling—of the reality that the NCAA, particularly at the FBS level, is driven more by revenue maximization than

163. See Easterbrook, *supra* note 158; Dan Wetzel, *The People's Voice: College Football Playoffs*, YAHOO SPORTS (Nov. 29, 2007), <http://sports.yahoo.com/news/peoples-voice-college-football-playoffs-140600791—ncaaf.html>.

164. Dave Wischnowsky, *Does College Football Need a 13-Game Regular Season?*, CBS CHICAGO (Feb. 16, 2013), <http://chicago.cbslocal.com/2013/02/16/wisch-does-college-football-need-a-13-game-regular-season/>.

165. Adam Rittenberg, *Big 10 to Increase League Games*, ESPN COLLEGE FOOTBALL (Feb. 11, 2013, 7:11 PM), http://espn.go.com/college-football/story/_id/8937704/big-ten-increase-number-league-games-eight.

166. See *id.* (referencing the impact of the Big Ten's new schedule on television and revenue agreements).

167. *Id.*; cf. *Big Ten Coaches Aren't Sold on a Nine-Game Conference Schedule*, BLEACHER REPORT (Aug. 5, 2010), <http://bleacherreport.com/articles/430197-big-ten-coaches-arent-sold-on-a-nine-game-conference-schedule>.

168. See Easterbrook, *supra* note 158; see also Wischnowsky, *supra* note 164.

169. See *supra* notes 43–47 and accompanying text; see also Easterbrook, *supra* note 158; cf. Wischnowsky, *supra* note 164 (“[W]ith football currently in the crosshairs of the many critics who are concerned about the long-term health implications of the sport, the NCAA adding another game to its schedule may not be the most well received idea right now. . . . With health issues factored in, I’m not convinced that a 13-game regular season would be the best move for the NCAA . . .”).

by student welfare concerns.¹⁷⁰

Nevertheless, at a minimum, the NCAA should form a committee to examine the benefits and costs of shortening the season to protect student-athletes.¹⁷¹ It might, for example, prove revenue-positive to create a national championship, involving sixteen teams, and shorten the regular season for all FBS teams by two games, particularly if revenues generated are shared to help address losses by universities that are not participating in the postseason.¹⁷² If economic concerns can be addressed, it is possible that the length of the season could be shortened, thereby limiting the incidence of head trauma for college football players.¹⁷³

The NCAA should also take steps to limit the number of contact practices, thereby reducing incidences of head trauma.¹⁷⁴ Limiting practices may not be as effectual, however, as limiting the number of games played.¹⁷⁵ According to the NCAA's own statistics, "[f]ootball players are nearly seven times more likely to be injured during a game than in practice."¹⁷⁶ It is worth noting, however, that in case of head trauma or sub-concussive events that may lead to CTE later in life, the number of hits to the head—and not whether they occurred in practice or in a game—is of primary concern.¹⁷⁷ Reducing the number of contact practices should, therefore, have a significant impact in reducing the number of sub-concussive blows to the head of college football players.¹⁷⁸

170. See, e.g., Kevin Kelley, *The Hawaii Exemption*, FBSCHEDULES.COM (May 25, 2010), <http://www.fbschedules.com/2010/05/the-hawaii-exemption/> (explaining that the NCAA allows for a "Hawaii Exemption" whereby Division I football teams that play at Hawaii are allowed to schedule a thirteenth game, usually at home, thus creating extra revenue).

171. See Smith, *Solving the Concussion Problem*, *supra* note 9, at 138. The NCAA could model its approach to committee formation on that of the NFL, which "formed committees and otherwise acted in response to a growing sense of concern regarding head injuries on the part of former and current players." *Id.*

172. See *infra* Part III.A.4.b.

173. See *infra* Part III.A.4.b.

174. See, e.g., Michael Cohen, *Syracuse Football Experienced Fewer Concussions with Revised Practice Format in 2012*, SYRACUSE.COM POWERED BY: THE POST-STANDARD (July 22, 2013, 10:15 AM), http://www.syracuse.com/orangefootball/index.ssf/2013/07/syracuse_football_experienced.html (praising Syracuse football for reducing the number of full-contact practices to prevent concussive injuries).

175. NCAA, FOOTBALL INJURIES, *supra* note 39, at 1.

176. *Id.*

177. See *What is CTE*, *supra* note 159.

178. See Cohen, *supra* note 174.

3. Enforcing Safety Rules

The NCAA must do much more than it has done to date to enforce safety rules, guidelines, and protocols.¹⁷⁹ It is unlikely that any new safety rules, particularly in the form of protocols, will be of much impact unless they are vigorously enforced.¹⁸⁰ There is a culture in college football that makes it unlikely that schools will strictly enforce concussion management plans or other safety rules and protocols at the institutional level.¹⁸¹ Players are often praised for “playing through injuries” as illustrated by the following 2011 report regarding the University of Michigan’s Taylor Lewan, who may be the best lineman in the Big Ten:

Taylor Lewan was wearing a walking boot. He had a cast on his right wrist. His elbow was bothering him.

And he was complaining.

....

....

That’s when senior center David Molk told the gregarious Lewan to shut up.

Lewan said that was the best injury advice he’s ever received.

“I was at practice one day, saying all kinds of words I can’t say in front of you guys, and Dave’s like, ‘What the hell are you doing? Why don’t you just stop talking about it, and it’ll go away?’” Lewan said. “I stopped talking about it, I stopped trying to limp, I stopped trying not to limp, and you just keep going.

179. See, e.g., Jon Solomon, *Internal NCAA Documents Reveal Lack of Oversight on Concussions*, AL.COM (July 21, 2013, 12:41 PM), http://www.al.com/sports/index.ssf/2013/07/internal_ncaa_documents_could.html (“documents released last week in a lawsuit against the NCAA show the concussion management plans have essentially not been enforced by college sports’ governing body.”).

180. See *id.*

181. See Kyle Meinke, *Michigan’s Taylor Lewan Learns to Play Through Injury by Shutting Up, Growing Up*, ANN ARBOR NEWS (Nov. 10, 2011), <http://www.annarbor.com/sports/um-football/michigans-taylor-lewan-learns-to-play-through-injury-by-shutting-up-growing-up/>.

“If you don’t talk about pain, it will go away. That’s one thing Dave Molk taught me.”

That helps to explain how Lewan’s been able to stay in the lineup despite his mounting injuries.

Coach Brady Hoke said that kind of courage has given No. 22 Michigan a lift—one it will need as it prepares to face the good defensive line of Illinois on Saturday (3:30 p.m., ABC).

That is particularly true due to the ankle injuries sustained by starting left guard Ricky Barnum, which leaves the Wolverines with only one healthy reserve offensive lineman. Hoke, when asked what he would do if Lewan went down as well, efforted [sic] a response before surrendering: “It would have been interesting.”

But Lewan doesn’t like to talk about the pain, nor the praise he’s received for playing through it.

“People keep talking about staying healthy and fighting through injuries and stuff, and I don’t know why everyone’s making a big deal out of it,” he said. “I’m playing football, I’m an offensive lineman, that’s what I’m supposed to do.”

“Everyone sees me limping on the field? That’s going to happen. I’m all beat up everywhere—but at the same time, so is everybody else. At this point in the season, if you’re not hurt, you’re not playing, and I don’t want to be that guy.”¹⁸²

During the next season, 2012, Taylor Lewan once again fought through numerous injuries, eventually leaving the Ohio State game with a shoulder injury.¹⁸³ Despite his injuries, Lewan echoed anew the “play through injury” and “win at all cost” culture that pervades big-time college football when he indicated that he would be ready for Michigan’s bowl game against the University of South Carolina: “I . . . can’t loom on those [injuries] too

182. *Id.*

183. Kyle Meinke, *Taylor Lewan Not Limited by Shoulder Injury Heading into Matchup with South Carolina’s Jadeveon Clowney*, MLIVE.COM (Dec. 3, 2012), http://www.mlive.com/wolverines/index.ssf/2012/12/taylor_lewan_not_limited_by_sh.html.

much. That kind of stuff is going to happen. It's the [twelfth] game of the season. All that stuff happens for a reason, and you just got to keep playing.'"¹⁸⁴ Taylor Lewan's disregard for injuries, and his coach's resulting praise, epitomizes the "play through injury" and "win at all cost" culture that dominates big-time college football and makes it very difficult to ensure student-athlete welfare.¹⁸⁵

Taylor Lewan's obvious injuries, however, may be of less long-term significance than the number of sub-concussive blows he takes to his head as he returns to play game after game. Any reputable concussion management plan is founded on tests that are designed to determine whether a concussion has occurred, by testing performance after a blow to the head.¹⁸⁶ These protocols develop baseline mental testing done for each player (the baselines are tailored to each player) when they are healthy—free of brain injury—and prior to a concussive blow to the head.¹⁸⁷ The problem is that "athletes [may be able to] sandbag their baseline scores without being detected."¹⁸⁸ In fact, coaches often reward such behavior as noted by ESPN's Gregg Easterbrook:

The core problem is that football coaches at the high school, college and professional levels are rewarded for winning games but not penalized for allowing their players to be harmed. A coach who sits a player down out of concern for the player's health may pay a price, if a game is lost. A coach who sends a concussed player onto the field may never be penalized in any way if that player suffers another concussion. Human beings respond to incentives, and right now the coaches' incentive is to be irresponsible with players' health.¹⁸⁹

Given this culture, and the commercialization of big-time college football that reinforces it, the NCAA's response of leaving safety to the

184. *Id.*

185. *See id.*

186. *See* McCrory et al., *Concussion Management*, CARLETON COLLEGE (2009), http://apps.carleton.edu/athletics/about/athletic_training/concussion/.

187. *Id.*

188. Kristi Erdal, *Neuropsychological Testing for Sports-Related Concussion: How Athletes Can Sandbag Their Baseline Testing Without Detection*, ARCHIVES OF CLINICAL NEUROPSYCHOLOGY (June 8, 2012), <http://acn.oxfordjournals.org/content/early/2012/06/08/arcn.acs050.full>.

189. Gregg Easterbrook, *Concussion Hazards Must Be Addressed*, ESPN: PAGE 2 (Sept. 21, 2010) [hereinafter *Concussion Hazards*], http://sports.espn.go.com/espn/page2/story?page=easterbrook/100921_tuesday_morning_quarterback&sportCat=nfl.

schools effectively means leaving it to the coaches, who are often the most powerful people on campus.¹⁹⁰ An enforcement system that relies on coaches for enforcement is like asking the “fox to guard the henhouse” and is practically and morally indefensible. The NCAA is promulgating strong safety rules and protocols,¹⁹¹ but it now must *actually enforce them*, particularly against the coaches and athletic and university personnel who defer to coaches in making—or refusing to make—such determinations.

In describing its enforcement program, the NCAA notes that:

The NCAA enforcement program strives to *maintain a level playing field* for the more than 400,000 student-athletes. Commitment to fair play is a bedrock principle of the NCAA. The NCAA upholds that principle by enforcing membership-created rules that ensure equitable competition *and protect the well-being of student-athletes* at all member institutions.

The enforcement program is dedicated to creating positive student-athlete experiences by preserving the integrity of the enterprise. The mission of the NCAA enforcement program is to reduce violations of NCAA legislation and impose appropriate penalties if violations occur.¹⁹²

While the NCAA has focused entirely on “maintain[ing] a level playing field,” it appears to recognize that it also has a role in protecting the “well-being of student-athletes at all member institutions.”¹⁹³ Indeed, when a university disregards player safety to win a game, it is also providing itself with a short-term competitive advantage over universities that protect their

190. See, e.g., Timothy Davis & Keith E. Smith, *Eradicating Student-Athlete Sexual Assault of Women: Section 1983 and Personal Liability Following Fitzgerald v. Barnstable*, 2009 MICH. ST. L. REV. 629, 662 (2009) (recognizing coaches’ “positions of influence and power”).

191. See Ty Halpin, *Committee Recommends Several Football Rules Proposals to Enhance Safety*, NCAA (Feb. 9, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/February/Committee+recommends+several+football+rules+proposals+to+enhance+safety>; Greg Johnson, *NCAA Announces Tighter Targeting Rules to Take Effect in Upcoming Season*, NCAA, <http://www.ncaa.com/news/football/article/2013-08-27/ncaa-announces-tighter-targeting-rules-take-effect-upcoming-season> (last updated Oct. 23, 2013).

192. *Enforcement*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/enforcement/index.html> (last visited Nov. 20, 2013) (emphasis added).

193. *Id.*

student-athletes.¹⁹⁴

To protect student-athletes from head injuries, the NCAA must convert its fact sheet¹⁹⁵ regarding concussions and its requirement of a concussion management plan¹⁹⁶ into rules and an enforcement system designed to protect student-athlete welfare as aggressively as it currently protects against institutional efforts to gain a competitive advantage. If a coach, team, or player refuses to abide by those standards and protocols—as the University of Arizona apparently did when it recently kept its star quarterback on the field despite his having suffered what clearly appeared to be serious head trauma in front of a national television audience¹⁹⁷—an investigation should be initiated and any coaches and other personnel, including the student-athletes themselves, should be sanctioned if it is established that they disregarded safety protocols. If a set of rules, guidelines, and protocols is adopted, a violation of them creates an unfair advantage for the offending team if it is not penalized.¹⁹⁸ Even more significantly, playing an injured player evidences disregard of student-athlete welfare, a core principle purportedly embraced by the NCAA.

It was precisely this kind of reasoning that warranted the NCAA's sanctioning of Penn State athletic and university personnel for failing to investigate and report on child sexual abuse by a former football coach—abuse that occurred in their facilities.¹⁹⁹ Reporting and dealing with known sexual abuse matters in a timely way could have adversely impacted the reputation and recruiting capacity of the Penn State football program.²⁰⁰ Covering the abuse up helped Penn State retain its competitive advantage in

194. See, e.g., Diamond, *supra* note 145.

195. *Concussion*, *supra* note 144.

196. *NCAA Approach to Concussions*, NCAA (Apr. 11, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Behind+the+Blue+Disk/NCAA+Approach+to+Concussions>.

197. See Diamond, *supra* note 145 (discussing the University of Arizona incident).

198. See *id.*

199. *Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by the Pennsylvania State University*, NCAA, 1 (July 23, 2012), <http://s3.amazonaws.com/ncaa/files/20120723/21207236PDF.pdf>.

200. See Genaro Armas, *Jerry Sandusky Charged with Sexual Abuse: Did Penn State Officials Tim Curley, Gary Schultz It Cover Up?*, HUFFINGTON POST SPORTS (Nov. 7, 2011 11:20 PM), http://www.huffingtonpost.com/2011/11/06/jerry-sandusky-penn-state-child-sex-scandal-curley-schultz-cover-up_n_1078493.html (“Paterno has spent years cultivating a reputation for putting integrity ahead of modern college-sports economics. It’s a notion that has benefited Penn State’s marketing and recruiting efforts over the decades and one that the Big Ten school’s alumni proudly tout years after they leave.”).

recruiting, because reporting a former coach's on-premises sexual abuse of a child would have harmed the reputation and recruiting capacity of the football program.²⁰¹ It, therefore, was an appropriate area for sanctioning the University, coaches, and administrative personnel, who were involved in a cover-up effort to keep such sensitive information from the media and public.

The NCAA recently adopted stiffer sanctions for violations of NCAA rules, which the NCAA described in the following fashion: “[v]iolator [b]eware: [p]enalties in [the] new enforcement structure pack a punch.”²⁰² In describing the process, the NCAA reported that:

Working group member David Williams, the vice chancellor for university affairs and athletics at Vanderbilt and a current member of the Division I Infractions Appeals Committee, said the group borrowed from a legal model to develop its matrix.

“We provided a range, as is done with sentencing guidelines, where the judge has to pretty much stay within those unless there are extraordinary circumstances,” he said.

In the new enforcement structure, there are four levels of violations, or “conduct breaches.” The matrix is essentially designed to address Levels I and II (severe and significant breaches of conduct), which are the violations that most threaten the integrity of the collegiate model. Violations can be “significant” when they have more than a passing consequence to the benefit of those who cheat. But they can escalate to “severe” if the violations are much broader and deeper in terms of who is implicated and the kind of behavior those people engaged in to get the result they did.

The matrix lists a range of expected outcomes in various penalty categories for Level I and II cases that are processed normally (in the matrix, those are called “standard”). Those ranges can change,

201. *Id.*

202. Gary Brown, *Violator Beware: Penalties in New Enforcement Structure Pack a Punch*, NCAA (Jan. 9, 2013), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2013/january/violator+beware-penalties+in+new+enforcement+structure+pack+a+punch>.

though, if there are mitigating or aggravating circumstances.²⁰³

Examining a case in which a coach decides to leave a critical player in the game after he has evidenced signs of a concussion or serious head trauma—something akin to the Arizona case previously mentioned²⁰⁴—is illustrative. In the Arizona case, the coach evidently disregarded both the NCAA’s fact sheet for dealing with possible concussions and the basic protocols included in a typical concussion management plan.²⁰⁵ The NCAA’s fact sheet for dealing with concussions and typical concussion management plans require, at a minimum, that: (1) the student-athlete should be removed from play—the student-athlete should not be permitted to just “shake it off” or play through the injury; (2) the student-athlete should be immediately evaluated and treated by an appropriate health care professional; (3) the student-athlete should only be permitted to return to play with permission from a health care professional with experience in evaluating head trauma and concussions, and; (4) coaches should develop a game plan that accounts for the amount of time a player may need to rest before returning to competition.²⁰⁶ A coach, any complicit administrative personnel, and perhaps even the player will be in serious violation of these basic standards if they: (1) fail to follow those basic steps or protocols; or (2) put pressure on the health care professional to disregard the potential for further injury and return the player to the field prematurely. It is not clear in the Arizona example whether the coach placed any pressure on the health care professionals serving the team.²⁰⁷ Indeed, it appears that the coach simply avoided having the player examined by the health care professional who was present.²⁰⁸ In such an instance, it is clear that an investigation should be initiated to determine what happened.²⁰⁹

Failing to follow well-recognized steps for dealing with head trauma and possible concussions or placing pressure on a health care professional to return a player to the field prematurely are both very serious violations of the NCAA Constitution. NCAA Constitution Article 2.2, The Principle of

203. *Id.*

204. *See* Diamond, *supra* note 145.

205. *See id.*

206. *Concussion*, *supra* note 144.

207. *See supra* notes 149–51 and accompanying text.

208. *See* Diamond, *supra* note 145.

209. *Cf. id.*

Student-Athlete Well-Being, mandates that “[i]ntercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes.”²¹⁰ Article 2.2.3, in turn, provides: “[i]t is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes.”²¹¹ Article 2.2.4 also recognizes a special relationship of trust between a student-athlete and his coach: “[i]t is the responsibility of each member institution to establish and maintain an environment that fosters a positive relationship between the student-athlete and coach.”²¹² Clearly, the juxtaposition of the student-athlete’s health and the coach’s responsibility to the student-athlete makes it clear that the NCAA intends that coaches be entrusted with caring for the health and well-being of their players. Therefore, if a coach returns a player to play prematurely—in a manner inconsistent with well-recognized protocols for dealing with head trauma and possible concussions—he has committed a serious violation of NCAA rules, thereby giving his team an unfair advantage.²¹³

Under the NCAA’s new, stiffer enforcement guidelines, when a coach jeopardizes a player’s health to gain a competitive advantage, particularly in the case of a possible head injury or concussion, the coach has engaged in what must surely be termed “severe” or “significant breach of conduct,” which constitutes a level I or II violation under the new enforcement scheme.²¹⁴ A level I or II violation should result in an order to show cause of one to ten years for the coach, with the length of the order to show cause based on whether there are any mitigating factors.²¹⁵ Orders to show cause are the stiffest penalty that can be invoked against a coach, because they directly limit a coach’s ability to continue coaching at the collegiate level.²¹⁶ In one sanctioning,²¹⁷ for example, a seven year order to show cause

210. NCAA CONST. art. 2.2, reprinted in NCAA MANUAL, *supra* note 34, at 3.

211. NCAA CONST. art. 2.2.3, reprinted in NCAA MANUAL, *supra* note 34, at 3.

212. NCAA CONST. art. 2.2.4, reprinted in NCAA MANUAL, *supra* note 34, at 3.

213. See *supra* notes 194, 198 and accompanying text.

214. *New Violation Structure*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/DivisionI/Enforcement/New+Violation+Structure> (last updated Aug. 1, 2013).

215. *Penalty Guidelines, Version No. 6*, NCAA (Jul. 12, 2012) [hereinafter *Penalty Guidelines*], <http://ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2012/penalty+guidelines>; see Brown, *supra* note 155.

216. See *Penalty Guidelines*, *supra* note 215.

217. MITTEN, ET AL., SPORTS LAW: GOVERNANCE AND REGULATION, *supra* note 5, at 191.

effectively ended the lengthy and largely successful—in terms of wins and losses—coaching career of Coach Clem Haskins, leading one commentator to refer to it as the “death penalty” for coaches.²¹⁸ Such orders to show cause have been imposed in the NCAA’s infractions process on football coaches, including Jim Tressel, former head coach at Ohio State University, who also left college coaching.²¹⁹ Such orders to show cause can be fashioned to fit the gravity of the violation.²²⁰

If a coach is sanctioned for jeopardizing a student-athlete’s health and well-being by disregarding protocols for dealing with head trauma, the order to show cause should be clearly written to limit the coach’s capacity to coach at the collegiate level in the future.²²¹ In a game that impacts the post-season, the institution should also receive a post-season ban or another suitable penalty.²²² Additionally, scholarship and recruiting limitation sanctions should be enforced, because a university with a football program that places a student-athlete’s health in jeopardy, particularly with regard to a head injury, should be limited in bringing other student-athletes into the program until the institution has demonstrated that it has regained institutional control over its program.

Coaches are the primary culprits in maintaining the “play through injury” culture that often prevails in football programs,²²³ in clear violation

218. *Id.* at 70–74.

219. *Id.* at 68–73; NCAA COMMITTEE ON INFRACTIONS, THE OHIO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT (2011), available at <http://ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2011/ohio+state+coi+public+report>.

220. For example, writing for *Sports Illustrated*, Andy Staples claimed that the order to show cause against Coach Tressel was “flimsy,” asserting that:

[T]he COI blew it in Tressel’s case. The committee gave Tressel a five year show-cause, but the penalty only has teeth for the first five weeks of Tressel’s first season, when he must miss games. He also must miss that season’s bowl game. Tom, I saw your team on TV this season. We could reanimate Vince Lombardi, put him on your sideline and your team might not make a bowl game in 2012. So Tressel’s postseason ban is essentially meaningless in your case. Basically, you can get one of the best coaches in the history of the game, and all it will cost you is five games and a progress report submitted to the NCAA every six months. Tressel can still recruit. He can still hire a staff. All he has to do is sit out five weeks of meetings, practices and games.

Andy Staples, *A Modest Proposal: Hire Tressel After Flimsy Show-Cause Penalty*, SPORTS ILLUSTRATED (Dec. 20, 2011), http://sportsillustrated.cnn.com/2011/writers/andy_staples/12/20/jim-tressel-ohio-state-ncaa-sanctions/index.html#ixzz2Ox9JNgTR.

221. *Cf. id.*

222. *Cf. id.*

223. *Cf. NFL Football Poll: Playing Through the Pain*, WASH. POST (Apr. 13, 2013), <http://www.washingtonpost.com/politics/polling/nfl-football-poll-playing-pain/2013/04/13/6b459cfa>

of the NCAA Constitution.²²⁴ They often are also, as was the case with Coach Paterno at Penn State, the most powerful individuals on campus.²²⁵ As such, they should receive very stiff penalties for disregarding the health and well-being of student-athletes. If we are to break the “win at all costs” and “play through injury” mentality that prevails in the culture of college football,²²⁶ coaches—those on the front-line of the culture—must be held accountable for the health and safety of student-athletes placed in their care.²²⁷ They are not the only possible culprits, however. Institutions (their athletic and academic administrative personnel) and sometimes even the players are also culprits or violators.²²⁸

If the institution was or should have been aware of the coach’s disregard or practice of disregarding the health and well-being of a student-athlete, other institutional personnel should also be sanctioned for failing to penalize the coach. For example, in the Taylor Lewan case noted above, Coach Hoke appeared at best indifferent to Lewan’s injuries, praising Lewan for his courage and leadership by playing through pain and injuries.²²⁹ In such a case, the University of Michigan is on notice that it has a coach who may be disregarding the well-being and health of his players. At a minimum, it has an obligation to investigate and possibly report a violation on the part of Coach Hoke. If athletic and university personnel fail to do so, they should be held accountable and sanctioned.²³⁰ A university with such violations should also be required to disclose in the recruiting process—on the letter of

-a4a2-11e2-bd52-614156372695_page.html.

224. See *supra* notes 210–12 and accompanying text.

225. See, e.g., Howard Bryant, *Joe Paterno: Hard Lessons, Bitter Truths*, ESPN (Jan. 22, 2012), http://espn.go.com/espn/commentary/story/_/page/bryant-120122/the-life-death-joe-paterno-opportunity-re-evaluate-coaches-power.

226. See Rodney K. Smith, *Picking Politics and Football over Education*, USA TODAY (Jan. 3, 2013), <http://www.usatoday.com/story/opinion/2013/01/03/penn-state-ncaa-sanctions-sandusky-tom-corbett/1805189/>.

227. Cf. Associated Press, *NCAA Approves Tougher Sanctions*, ESPN (Oct. 30, 2012), http://espn.go.com/college-sports/story/_/id/8572310/ncaa-tougher-sanctions-rule-breakers.

228. See NCAA, 2012–2013 NCAA SPORTS MEDICINE HANDBOOK [hereinafter SPORTS MEDICINE HANDBOOK], available at <http://ncaapublications.com/productdownloads/MD12.pdf>.

229. See *supra* notes 181–85 and accompanying text.

230. As a former college president, for example, if it had come to my attention, through the media or otherwise, that one of my coaches encouraged a player to play through injuries, I would ask for an immediate investigation and report from the athletic department. If the report found that the coach had encouraged a player to play despite an injury, then I would insist that it be dealt with through the imposition of sanctions at the institutional level and reporting of the violation to our conference and the NCAA.

intent—the fact that they have been sanctioned for disregarding student-athlete health and well-being.²³¹ If medical personnel have acted in disregard of their responsibilities, they should also be penalized and the applicable medical licensing board should be made aware of that action.²³²

Student-athletes—the players—can also be culprits. Clearly, for example, if it can be established that a player faked baselines for concussion testing or engaged in some other deception to be able to return to play prematurely,²³³ that player should be subjected to serious sanctions. Teaching student-athletes to take responsibility for their health and well-being is surely appropriate. It must also be acknowledged that they often realize that if they fail to play through injuries, they risk the disfavor of their coach and loss of their starting position.²³⁴ Given the impressionability and immaturity of collegiate players, the major culprits surely are the coaches and the institutions that permit coaches to persist in their perpetuating of a “play through injury” and “win at all costs” culture.²³⁵

It is in the NCAA’s and its member’s best interests to act decisively in this area. If they act, they will be taking steps to avoid litigation,²³⁶ which could be very costly. If the NCAA and its member institutions do not respond, it will become increasingly likely that a plaintiff will succeed in a case against them, because it is becoming more evident that the institutions and the NCAA are refusing to strictly abide by their own safety protocols and rules—they are putting winning, with its commercial and reputational rewards, above the welfare of their student-athletes.²³⁷ The first responsibility of the NCAA ought to be to the health and well-being of their

231. Cf. *Penalty Guidelines*, *supra* note 215 (outlining other recruiting penalties).

232. See *SPORTS MEDICINE HANDBOOK*, *supra* note 228, at 6–7 (“Member institutions should not place their sports medicine staffs in compromising situations by having them provide inequitable treatment in violation of their medical codes of ethics. Institutions should be encouraged to incorporate questions regarding adequacy of medical care, with special emphasis on equitable treatment, in exit interviews with student-athletes.”).

233. See Erdal, *supra* note 188.

234. See *Concussion*, *supra* note 144 (emphasizing that potentially concussed student-athletes must be taken out of games by their coaches and must sit out of competition until cleared by a medical professional).

235. See *id.* (noting that it is the responsibility of coaches to educate student athletes about concussions).

236. Cf. *Diamond*, *supra* note 145 (noting that the NCAA “is being sued for failing to implement appropriate concussion screening”).

237. See *id.*

students, and they should be willing to act accordingly.²³⁸

4. Compensating for Injuries

Even after adopting safety rules, making scheduling changes to increase safety, and creating an enforcement process to protect the health and well-being of student-athletes, the work of the NCAA will remain unfinished. There are present and former student-athletes who played college football who should receive compensation in some form for injuries incurred in the course of play.²³⁹ California recently recognized the need for universities to do more, when it adopted SB 1525—a Student Bill of Rights.²⁴⁰ SB 1525, among other things, requires universities with athletic programs that generate in excess of \$10 million in media revenue to: (1) “pay the insurance premiums that cover participation in the athletic program for each student athlete whose household has an income and asset level that does not exceed the level for Cal Grant A recipients”; and (2) “pay an insurance deductible amount for any student athlete injury that resulted from his or her participation in the athletic program, for up to 5 years after the date of the injury.”²⁴¹ SB 1525, as adopted, also requires that universities provide continuing scholarships to injured players.²⁴² Under SB 1525, student-athletes receive two kinds of benefits: insurance against injury, if they cannot otherwise afford insurance; and compensation in the form of a scholarship, in the event that they suffer an injury that ends their participation.²⁴³

Under the policies that drive SB 1525, student-athletes at commercially successful university athletic programs in California are essentially being treated like employees. Those who play receive compensation in the form of guaranteed scholarships, even if injured.²⁴⁴ Scholarships are easily valued in

238. *See id.*

239. *See* Bill Pennington, *When Injured Athlete Leaves Campus, College's Responsibility Ends*, N.Y. TIMES (Apr. 4, 2013), <http://www.nytimes.com/2013/04/05/sports/ncaabasketball/broken-leg-renews-focus-on-college-athletes-health-insurance.html>.

240. PROJECT VOTE SMART, *supra* note 107.

241. *Id.*

242. *Id.* (“Requires an athletic program that does not renew an athletic scholarship of a student athlete who has been injured during his or her participation to provide an equivalent scholarship.”).

243. *Id.*; *see also* CAL. EDUC. CODE § 67450.

244. *See supra* note 243.

the thousands of dollars.²⁴⁵ Student-athletes playing at financially lucrative universities in California also receive benefits in the form of insurance—if the student-athlete is not financially able to pay for it.²⁴⁶ This legislative intent or policy choice may evidence a commitment on the part of California, as a next step, to extend worker’s compensation benefits to student-athletes.

According to a recent report prepared by ESPN’s Kristi Dosh, “[r]evenue among FBS football programs ranged from a high of \$103.8 million at Texas to a low of \$3.6 million at the University of Louisiana at Monroe. The average FBS football program brought in \$25 million, with a median of \$19.9 million.”²⁴⁷ With average revenues of approximately \$20 million per year, it is difficult to argue that student-athletes playing for FBS football programs should not receive compensation and benefits in some form, particularly if that form is designed to protect the health and safety of students. With the addition of a national championship at the FBS level, revenues produced by FBS institutions are likely to increase dramatically,²⁴⁸ which will provide big-time college programs with even more revenues that can be allocated to care for the needs of their student-athletes.

Taylor Branch, a respected historian, wrote a particularly scathing article in *The Atlantic* in 2011,²⁴⁹ in which he chronicled a series of “scandals” that have undercut collegiate sports and argued that players should receive additional compensation:

Critics scold schools for breaking faith with their educational mission, and for failing to enforce the sanctity of “amateurism.”

245. At UCLA, the value of a full athletic scholarship for the 2012–2013 school year was approximately \$54,000. *Justin Combs Scholarship: P Diddy’s Son, Gets \$54,000 UCLA Football Scholarship*, HUFFINGTON POST (June 2, 2012), http://www.huffingtonpost.com/2012/06/01/justin-combs-scholarship_n_1563373.html. At UC Berkeley, the value of a full athletic scholarship for the 2013–2014 school year is approximately \$56,400. *Undergraduate Student Budgets 2013–14*, UNIV. OF CAL., BERKELEY, <http://students.berkeley.edu/finaid/undergraduates/cost.htm> (last visited Nov. 21, 2013). “The average value of a full scholarship at an in-state, public school is \$15,000 a year. For an out-of-state public school, the average value is \$25,000 a year. Full scholarships at private schools average \$35,000 a year.” *Athletic Scholarships*, NCAA (June 21, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Behind+the+Blue+Disk/How+Do+Athletic+Scholarships+Work..>

246. See *supra* notes 241–43.

247. Dosh, *supra* note 16.

248. See Gill, *supra* note 19; Chris Smith, *The Money Behind the BCS*, *supra* note 23.

249. Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sept. 7, 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/5/>.

Sportswriters denounce the NCAA for both tyranny and impotence in its quest to “clean up” college sports. Observers on all sides express jumbled emotions about youth and innocence, venting against professional mores or greedy amateurs.

For all the outrage, the real scandal is not that students are getting illegally paid or recruited, it’s that two of the noble principles on which the NCAA justifies its existence—“amateurism” and the “student-athlete”—are cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes. The tragedy at the heart of college sports is not that some college athletes are getting paid, but that more of them are not.²⁵⁰

Calls for compensating student-athletes, who are generating hundreds of millions of dollars in revenue in the FBS, are likely to increase until compensation in some form is provided for football student-athletes at that level. In October of 2011, even NCAA President Mark Emmert called for increased compensation for student-athletes.²⁵¹ President Emmert backed a proposal which would have allowed conferences to “increase grants to student-athletes by \$2,000, ‘to more closely approach’ the full cost of attending college, beyond the athletic scholarships given for tuition, fees, room, board and books.”²⁵² In addressing the Knight Commission, which is a leader in studying the reform of college athletics, Emmert is reported to have “noted that student-athletes have limited opportunities to work outside the classroom and playing fields, and that the current model of athletic scholarship hasn’t changed for 40 years.”²⁵³

With dramatic increases in revenue in big-time, highly commercialized college football, and the passing of a generation since compensation, in the form of the athletic scholarship, has changed, the NCAA must act. If the NCAA is proactive, rather than reactive, as has been its custom, it may avert the threat of litigation and can reclaim its reputation as an association that genuinely cares for its student-athletes, past and present.

The best solution would be to develop a workers’ compensation-like system, whereby student-athletes who played at the FBS level will be

250. *Id.*

251. *NCAA Pushes \$2K Increase for Athletes*, ESPN (Oct. 25, 2011), http://espn.go.com/college-sports/story/_/id/7143961/ncaa-weighting-2000-payments-student-athletes.

252. *Id.*

253. *Id.*

compensated for head injuries, including but not limited to CTE that appears later in life. A no-fault system of this type would avoid litigation and could provide a measure of certainty for planning purposes for universities and players. It would also avoid transactional costs, including major attorney's fee awards, associated with litigation,²⁵⁴ thereby permitting funds to be focused on injured student-athletes, past and present. Benefits should be afforded to players who have played at FBS schools since either: 1994, when the NCAA first published concussion guidelines; 2003, when their own study indicated the seriousness of concussions; or 2010, when they mandated Concussion Management Plans, because each of those dates reflect that the NCAA was well aware of the danger, in terms of head injury, that attends the playing of football at the FBS level.²⁵⁵ Under such a worker's compensation-like system, a former college player who suffers CTE, dementia in some form later in life, that is arguably attributable to trauma suffered during his playing days, would be permitted to obtain medical care and some basic living expenses. Former FBS student-athletes should also be provided with brain imaging and other preventative procedures designed to avoid or limit future brain damage.

The best way to fund such a compensation system would be to create a trust, which would grow over time and be a source for paying future claims—that will surely come—as CTE manifests itself in the lives of former college players in the future.²⁵⁶ The fact that CTE is latent does not absolve the NCAA and its member institutions of their responsibility to care for injuries incurred in large part while playing football. A source for such funding must be identified and allocated to the trust.

The best source for such funding would be the BCS championship, especially given that the BCS anticipates an increased income stream of about \$300 million per year in 2014, with the addition of a four-team national championship.²⁵⁷ If, for example, only half of that increase—\$150 million per year—was reserved to be placed in a trust to protect student-

254. See Smith, *Solving the Concussion Problem*, *supra* note 9, at 152–54 (discussing the costs of litigation).

255. See Waldron, *supra* note 77.

256. See David DiSalvo, *Is Malcolm Gladwell Right, Should College Football Be Banned to Save Brains?*, FORBES (Jul, 21, 2013, 6:36 PM), <http://www.forbes.com/sites/daviddisalvo/2013/07/21/is-malcolm-gladwell-right-should-college-football-be-banned> (discussing studies showing evidence of CTE in the brains of former college and professional football players).

257. Mike Ozanian, *BCS Playoff TV Deal Worth at Least \$3 Billion*, FORBES (May 29, 2012), <http://www.forbes.com/sites/mikeozanian/2012/05/29/bcs-playoff-tv-deal-worth-at-least-3-billion/>.

athletes, it is likely that the trust would be sufficient to protect FBS players. If there is resistance to permitting a mere half of the anticipated increase to be used for the health and safety of FBS student-athletes, the national championship could be expanded, raising even more dollars that could be allocated to this purpose, while simultaneously increasing the coffers of FBS and BCS members dramatically. Thus, the source of funding for the trust could easily be generated by providing for an eight or sixteen game national championship, leaving abundant new revenue for the FBS and BCS and their members to address what they most seem to crave—the building of new stadia and facilities, increasing the salaries of coaches and administrators, etc. What is clear is that there is a source of new revenue that could easily fund a trust designed as part of a compensation system to deal with injuries, particularly head injuries, and to provide for the health and safety of student-athletes. The problem, therefore, is not one of resources—it is one of will and, sadly, greed.

Even though a source of funding from new revenues exists,²⁵⁸ a number of issues must be addressed: (a) the greed or selfishness of the BCS and its members—their desire to have all the funds go back into their coffers, the coffers of major athletic programs, coaches, and personnel—makes it less likely that they will voluntarily permit the funds to be used for the purpose of compensating student-athletes; (b) the problem of increasing injuries through the scheduling of additional games in an effort to form an eight- or sixteen-team national championship, if that route is taken, as a means of creating a very significant new revenue stream or source of funds for such a trust; (c) the problem of limiting funding and compensation to student-athletes who participated in FBS or major revenue-producing football programs, as was done in SB 1525 in California; and (d) Title IX and equity arguments that all student-athletes should be permitted to participate in the compensation system, which, through the expansion of the number of individuals to be compensated under the system, would threaten to bankrupt such a system.

a. Greed, the BCS, and Big-Time College Football

Unlike the NCAA, which according to its own Constitution exists to

258. See *supra* note 257 and accompanying text.

further the well-being of student-athletes,²⁵⁹ the BCS is designed to maximize profits to be distributed to its members by hosting a national championship in big-time, FBS college football.²⁶⁰ The BCS is neither an eleemosynary nor an academic, student-oriented, entity.²⁶¹ It would appear that the BCS is really only a middleman, passing profits on to its members—its “shareholders”—under a bonus system, and that its members are responsible to use the funds for student welfare purposes. That argument only further illustrates the problem, however, that the powerful, and for the most part academically respected, universities that control the BCS have no track record of using such funds to benefit their student-athletes in the ways discussed in this article. Increased revenues largely are disbursed to the powerful BCS members²⁶² who, in turn, use them to fund expansion of facilities, pay higher salaries for coaches and athletic personnel, and financially support other non-student-related purposes that are designed to separate those powerful BCS institutions from their competition and thereby protect their market share.²⁶³ In that process, it is clear that any benefits to or protection of student-athletes, who largely generate those funds through their play, are merely incidental.

What is clear is that the BCS is, by design, unconcerned about student

259. See *Who is the NCAA?*, NCAA (2012), <http://www.ncaa.org/wps/wcm/connect/11d98a804d5803658ac1be7c2d0d15b8/Who+is+the+NCAA.pdf?MOD=AJPERES&CACHEID=11d98a804d5803658ac1be7c2d0d15b8> (“The NCAA seeks to prepare student-athletes to succeed at life by offering academic and athletics opportunities to help them achieve their full potential.”).

260. See *BCS Background*, *supra* note 14; Chris Smith, *The Money Behind the BCS*, *supra* note 23.

261. See Dylan Williams & Chad Seifried, *The Taxing Postseason: The Potential Impact of Unrelated Business Income Taxation on College Football Bowl Organizers*, 23 J. LEGAL ASPECT SPORT 72, 77 (2013) (explaining that “bowl organizers operate independently from the NCAA” and that “several bowl organizations have begun to blur the lines between the purpose of a for-profit company and that which justifies a tax-exemption as an educational or charitable institution through some controversial activities”).

262. See *supra* note 260 and accompanying text.

263. The major BCS conferences receive the largest proportion of revenues, arguably because they play in the BCS designated bowls, which produce the revenue. See, e.g., DAN WETZEL, JOSH PETER & JEFF PASSAN, *DEATH TO THE BCS: THE DEFINITIVE CASE AGAINST THE BOWL CHAMPIONSHIP SERIES* (2010); *Alabama-Notre Dame Blowout Highlights Complaints About BCS Selection Process*, AT YOUR LIBRARY, <http://atyourlibrary.org/sports/alabama-notre-dame-blowout-highlights-complaints-about-bcs-selection-process> (last visited Nov. 22, 2013). Questions have been raised regarding the fairness of the BCS selection process, arguing that the process is designed to favor the major conferences that run the BCS. See *Alabama-Notre Dame Blowout Highlights Complaints About BCS Selection Process*, *supra* note 263.

welfare issues.²⁶⁴ Students are not involved in the operations of the BCS,²⁶⁵ other than being the workers who largely produce the revenues that fund BCS personnel and ends. Funds are not allocated, other than indirectly at the whim of individual members, to student-athletes. In short, the BCS exists, in some measure, as a conduit to deliver revenues to management, or its “shareholders,” and not to compensate student-workers, many of whom are student-athletes of color—largely African American—and are economically disadvantaged, which makes their exploitation appear racist and even more questionable.²⁶⁶ Taylor Branch’s critique of a lack of integrity on the part of the NCAA and collegiate sports is particularly telling with regard to the operation of the BCS, which is completely profit—not student—driven.²⁶⁷

It is clear, nevertheless, that the BCS has a stranglehold on the largest single set of revenues that could be used to fund a meaningful student compensation system,²⁶⁸ and the powerful university members that control the BCS appear highly unlikely to permit those revenues to be used for student welfare concerns and diverted away from their efforts to maintain their competitive edge in big-time college football. The NCAA plays at best a limited role, through its members, in determining how funds under the control of the BCS should be distributed.²⁶⁹

In big-time (Division I) college basketball, on the other hand, the major

264. Rodney K. Smith & Neil Millhiser, *The BCS and Big-Time Intercollegiate Football Receive an “F”*: Reforming a Failed System, 2 WAKE FOREST J.L. & POL’Y 45, 56 (2012) (noting that the BCS’s “priorities are focused more on preserving the profitable BCS market share and less on furthering academic values, lowering injuries to meet student welfare needs, or combating racial inequity in the current system”).

265. See *BCS Governance*, BOWL CHAMPIONSHIP SERIES (Oct. 29, 2013, 8:50 PM), <http://www.bcsfootball.org/news/story?id=4809846> (“The BCS is managed by the commissioners . . . [They] make decisions regarding all BCS issues . . .”).

266. Rodney K. Smith, *When Ignorance Is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329, 348–50 (1996) [hereinafter Smith, *Ignorance Is Not Bliss*].

267. See Branch, *supra* note 249.

268. See generally *Bowl Championship Series Five Year Summary of Revenue Distribution 2005–06 Through 2009–10*, NCAA (Apr. 10, 2010), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/postseason+football/bowl+championship+series+five+year+summary+of+revenue+distribution+2005+06+through+2009+10> (revealing total BCS revenue at over \$155 million for 2009–2010).

269. See Associated Press, *N.C.A.A. Chief Calls Role in Championship Limited*, N.Y. TIMES (May 18, 2011), <http://www.nytimes.com/2011/05/19/sports/ncaafotball/ncaa-chief-calls-role-in-championship-limited.html>.

source of revenues for funding such a compensation program for basketball student-athletes would come from coffers under the control of the NCAA, because the NCAA itself oversees “March Madness.”²⁷⁰ The NCAA could implement such a funding system in big-time basketball; but, it cannot force the BCS to allocate funds to sources other than those determined by the BCS’s very powerful and financially successful programs which are either independent or represent major conferences, like Texas (Big 12), Michigan (Big 10), Georgia (SEC), and Notre Dame (independent).²⁷¹ The BCS has facilitated and effectively protects these conferences and institutions in their effort to control and perhaps even monopolize the revenue stream from big-time college football.²⁷² With the growth of the power of the BCS, and its controlling members, the exploitation of student-athletes has expanded dramatically, as hundreds of millions of dollars are allocated each year with little or no thought being given to student health, safety, and well-being.

With hundreds of millions in new and, as yet, unallocated revenue being anticipated in 2014 for television rights related to the national championship it sponsors,²⁷³ the BCS clearly has the revenue necessary to fund a trust that could provide benefits to compensate for injuries suffered while playing college football. The BCS, however, will either have to be dismantled or strongly pressured into agreeing to the allocation of revenues for student welfare, compensation, and related concerns.

The BCS could and probably should be dismantled by the members themselves, returning power to the NCAA to control the national championship as it does in all other sports, but the economic interests of those controlling member institutions and conferences make that unlikely. Dismantlement or consolidation of the BCS into the NCAA would be

270. See *Basketball Distribution Fund*, NCAA (Mar. 13, 2013), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Basketball+Resources/Basketball+Resource+Distribution+Fund>. The NCAA already funds specific student-athlete benefit programs for basketball, including an injury surveillance program. See *NCAA Student-Athlete Benefits*, NCAA, <http://ncaa.org/wps/wcm/connect/public/NCAA/Finances/Finances+Student+Athlete+Benefits> (last updated Feb. 13, 2013).

271. See *Bowl Championship Series Five Year Summary of Revenue Distribution 2005–06 Through 2009–10*, *supra* note 268.

272. There is an ongoing argument about whether the BCS is monopolistic and violates antitrust law. Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 2–3 (2000). Even if it is not monopolistic in a legal sense, it is clear that the BCS dominates the market on behalf of the economic interests of its members. *Id.*

273. See Chris Smith, *The Money Behind the BCS*, *supra* note 23.

efficient. The BCS is inefficient. It duplicates costs by requiring a second organization other than the NCAA—the BCS—together with many bowl entities with their own additional administrative costs, to manage a highly lucrative championship and bowl series, rather than simply using the NCAA’s existing structure.²⁷⁴ Nevertheless, the powers that control the BCS and its ever-growing revenues have an economic interest in maintaining the BCS and insuring that its revenues continue to flow to its most powerful members.²⁷⁵ By ensuring that powerful institutions and a few major conferences receive the vast majority of revenues generated by the BCS, they maintain the competitive advantage and edge of those major institutions and conferences.

Given the unlikelihood that the BCS and its powerful members will act, and the fact that the NCAA has no control over the BCS, the best remedy or way of dealing with the problem of greed is to have Congress hold hearings on compensating injured college football players. Such hearings might pressure the powers that be in the BCS to relent, or at a minimum shame them into yielding up a measure of their power and revenues to benefit their student-athletes, who largely generate those funds. Congress should also examine whether the NCAA should be given control over a national championship in football. Finally, the hearings should also consider student-athlete health and compensation issues, because action on those issues is inhibited by the current BCS stranglehold over revenues that could be used to protect the health and welfare of student-athletes.

b. Scheduling and Adding Games for a National Championship

If the BCS, or preferably the NCAA, moved to an eight or sixteen team national championship, it would clearly produce a new revenue stream, a portion of which would be sufficient to fund insurance and compensation for FBS level college football players. Adding games, however, would increase the likelihood of injuries and could present new student-athlete health and welfare concerns. Playing a few additional games would clearly increase the number of times when players on participating teams would suffer

274. The NCAA has extensive experience conducting championships. *See, e.g., Championships*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/championships/index.html> (last visited Nov. 25, 2013).

275. *See 2009–10 Revenue Distribution Data*, BCS (Jan. 25, 2010), <http://www.bcsfootball.org/news/story?id=4856975> (providing an example of how the BCS allocates money).

concussions and blows or trauma, and, thus, sub-concussive head injury—the major known cause of CTE and future brain impairment.²⁷⁶

A four-team playoff adds only one game for two teams. An eight-team playoff would add one additional game for four teams and two additional games for two teams, with the teams in the championship playing a game that is currently scheduled. A sixteen-game playoff would add even more games for a number of schools. Interestingly, the post-season has the lowest injury rate, with 4.2 injuries per 1,000 athlete exposures, as compared to 7.5 injuries per 1,000 athlete exposures during the season.²⁷⁷ However, with regard to CTE, which is latent and not a part of those statistics,²⁷⁸ the additional practices and games involved in a national championship would be a source of multiple new or additional sub-concussive blows to the head.

A simple answer would be to shorten the season, as is done at the Division II (D-II) and Division III (D-III) levels, to accommodate a national championship.²⁷⁹ Under a ten game regular (and shortened) season schedule (rather than twelve, as is presently the case), for example, there would be far fewer games played and fewer instances of trauma to the head. Thus, if there were a sixteen-team playoff, sixteen teams would play eleven games, eight of those teams would play twelve games, four of the teams would play thirteen games, and only two teams would play fourteen games. The net number of games played by FBS schools would drop dramatically.²⁸⁰

The question remaining would be whether revenues lost from the playing of those additional games would decrease net revenues to teams sufficiently to render such a proposal unviable. A study should be commissioned to determine whether the added revenues from an expanded

276. See Zeigler, *supra* note 43.

277. NCAA, FOOTBALL INJURIES, *supra* note 39, at 1.

278. See Zeigler, *supra* note 43 (“Unfortunately, at this time, there are no specific markers or tests to detect CTE in a living athlete. Currently, CTE is diagnosed through studying brain tissue under a microscope after death.”).

279. D-II and D-III football each have a maximum of five playoff games per school. *Division II Football Bracket*, NCAA, <http://www.ncaa.com/interactive-bracket/football/d2> (last visited Nov. 25, 2013); *Division III Football Bracket*, NCAA, <http://www.ncaa.com/interactive-bracket/football/d3> (last visited Nov. 25, 2013).

280. In 2012–2013, there were 120 universities (teams) in the FBS. *Division I Facts and Figures*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/DivisionI/DivI+Facts+and+Figures> (last updated May 2, 2013). Dropping a regular season schedule from twelve to ten games would, therefore, translate into a decrease of 240 games. Clearly, this reduction in games, and the practices that attend them, would dramatically decrease the number of concussions and head trauma occurring in FBS football.

playoff would be sufficient to offset losses, while also providing a revenue stream for funding a compensatory trust and insurance for players. Student-athlete welfare concerns, at a minimum, merit study of such a proposal. The resultant data would help academic leaders determine whether such a championship system would be economically viable. It is clear that it would be beneficial in terms of student-athlete safety and health.

c. Limiting Compensation to FBS Student-Athletes

The compensation proposal in this article is limited to student-athletes participating at the FBS level. The FBS produces significant revenue,²⁸¹ and the participating student-athletes are major factors in generating that revenue.²⁸² The cost that would attend extending such compensation to student-athletes playing football at other levels—FCS, D-II, and D-III levels—and to student-athletes participating in other non-revenue-producing sports would be very high, rendering such a proposal to compensate student-athletes who participate in sports that do not generate significant revenue economically unrealistic.²⁸³ The revenue generated at the FBS level is attributable in significant measure to the efforts and talent of student-athletes participating at that level.²⁸⁴ Student-athletes producing such significant revenues ought to be treated more like employees than their counterparts in non-revenue-producing sports. In some measure, requiring money they earn to pay for other sports would merely constitute further exploitation of those playing football at the most competitive and commercially productive level.²⁸⁵ Such exploitation of student-athletes, many of whom are of color, may also raise issues of racism.²⁸⁶

Men's basketball at the D-I level also generates significant revenue, and

281. *Revenues & Expenses 2004–2010: NCAA Division I Intercollegiate Athletics Programs Report*, NCAA 20 (Aug. 2011), <http://www.ncaapublications.com/productdownloads/2010RevExp.pdf> (FBS institutions generated a median revenue of \$35.3 million for 2010).

282. See Gill, *supra* note 19.

283. See *Revenues & Expenses 2004–2010: NCAA Division I Intercollegiate Athletics Programs Report*, *supra* note 281 (FCS institutions generated a median revenue of \$3.3 million for 2010, and largest reported generated revenue was \$18.7 million for the same year).

284. See Gill, *supra* note 19 (stating that the players were the “main bowl ingredient” to the 2010 BCS bowl games that generated a reported \$1.2 trillion for host cities).

285. See Smith, *Ignorance Is Not Bliss*, *supra* note 266, at 348–50 (stating that using profits from revenue-producing sports to fund other sports raises questions of exploitation).

286. See, e.g., *id.* at 348; MITTEN ET AL., *SPORTS LAW: GOVERNANCE AND REGULATION*, *supra* note 5, at 707–21.

it does so using fewer student-athletes (employees) than football.²⁸⁷ In 2009, for example, both Duke and Louisville generated over \$25 million in revenue.²⁸⁸ That is about \$2 million in revenue per player. Men's basketball, however, is not included in the compensation proposal recommended in this article. This article focuses on dealing with head injuries, which are far more common in football than basketball.²⁸⁹ Men's basketball at the highest levels, in terms of revenue production, should nevertheless consider creating a compensation system that fits the needs of its student-athletes.

Student-athletes playing football at the less commercially profitable FCS, D-II, and D-III levels also suffer concussions and trauma to the head.²⁹⁰ The rule changes and scheduling recommendations in this article²⁹¹ should apply at those levels. Safety rules and strong protocols—limiting re-entry to play on the part of student-athletes who have suffered a concussion or serious trauma to the head—must be applied strictly at all levels. Additionally, enforcement of such rules and protocols, or safety procedures, should be as vigorous at those levels as at the FBS level. Except in the case of playoffs, keeping the number of games down to nine or fewer and shortening the length of the season also makes great sense within those non-revenue producing levels. Any revenues generated at those lower levels by the playing of additional games are not significant and are certainly outweighed by student health and safety concerns.²⁹²

Student-athletes playing at the FBS, FCS, D-II, and D-III levels should all receive information regarding head injuries suffered by student-athletes at

287. NCAA CONST. arts. 15.5.5.1, 15.5.6.1, *reprinted in* NCAA MANUAL, *supra* note 34, at 206–07 (limiting scholarships to thirteen per school for Division I men's basketball programs, while allowing eighty-five per school for FBS football programs).

288. Patrick Rische, *Duke, Louisville, North Carolina Generate the Most College Basketball Revenue*, FORBES (Mar. 7, 2011), <http://www.forbes.com/sites/sportsmoney/2011/03/07/duke-louisville-north-carolina-generate-the-most-college-basketball-revenue/2/>.

289. See SPORTS MEDICINE HANDBOOK, *supra* note 228, at 53 (“In the years 2004 to 2009, the rate of concussion during games per 1,000 athlete exposures for football was 3.1 . . . and for men's basketball 0.6”); *Patient Information: Sports-Related Head Injury*, AM. ASS'N NEUROLOGICAL SURGEONS, <http://www.aans.org/Patient%20Information/Conditions%20and%20Treatments/Sports-Related%20Head%20Injury.aspx> (last visited Nov. 25, 2013).

290. See, e.g., Kevin M. Guskiewicz et al., *Cumulative Effects Associated with Recurrent Concussion in Collegiate Football Players: The NCAA Concussion Study*, 290 J. AM. MED. ASS'N 2549 (2003) (listing some statistics on football-related head injuries at various collegiate division levels), available at <http://jama.jamanetwork.com/article.aspx?articleid=197667>.

291. See *supra* Part III.A.1–2.

292. See *supra* Part III.A.2.

that level prior to commencing play. The facts regarding head injuries, including the possibility of CTE later in life, should be documented, generally and at the institutional level. Student-athletes should then sign a waiver indicating that they are aware of these facts before being permitted to participate. If they are minors, their parents or legal guardians should add their signatures to the disclosure and waiver form.

d. Title IX and Equity Arguments Against Compensation

If compensation is provided to football players at the FBS level, arguments will be raised asserting that compensating and insuring these student-athletes, while not providing similar compensation to other student-athletes, is inequitable.²⁹³ In particular, it will be asserted that women are being treated inequitably, in violation of Title IX.²⁹⁴ Women playing soccer, for example, which involves serious head trauma related to heading the ball,²⁹⁵ would assert that they need compensation and insurance as much as their male counterparts.

There are two primary responses to this assertion of gender inequity and allegations that Title IX is being violated: (1) women's sports generally are not revenue-generating sports, as is the case with the FBS, and the distinction is not between men and women but is revenue based; and (2) the FBS athletes who generate millions of dollars in revenue are often persons of color or are from lower socio-economic groups, and failing to compensate them constitutes exploitation.²⁹⁶ Furthermore, if women's sports begin to generate revenue, the student-athletes in those sports will be in a position to argue that they should be treated more like employees, for compensation, and a more equitable distribution of revenues they help generate.²⁹⁷

Many universities at the FBS level currently demand that their athletic

293. See, e.g., Smith, *Ignorance Is Not Bliss*, *supra* note 266, at 342–45.

294. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012).

295. See *Heading in Soccer Raises Concerns of Brain Injury, Study Finds*, HUFFINGTON POST (June 18, 2013), http://huffingtonpost.com/2013/06/18/soccer-brain-injury-heading_n_3456009.html (stating that soccer players who head the ball frequently are subject to head-related injuries).

296. See Smith, *Ignorance Is Not Bliss*, *supra* note 266, at 349.

297. At present, achieving consistent profitability seems to be the exception, not the norm, in women's college sports. See, e.g., Chris Smith, *When It's Okay to Lose Money: The Business of Women's College Basketball*, FORBES (Mar. 29, 2012) [hereinafter Chris Smith, *When It's Okay to Lose Money*], <http://www.forbes.com/sites/chris-smith/2012/03/29/when-its-okay-to-lose-money-the-business-of-womens-college-basketball/>.

programs be treated as “profit centers,” with the expectation that funds generated by the athletic program will cover the costs of all sports and operations within the entire athletic program.²⁹⁸ That typically translates into using funds generated by men’s football and basketball to fund other non-revenue-producing men’s and women’s sports, including scholarships, travel, coaches’ salaries, facilities, etc.²⁹⁹ In essence, funds generated by male athletes, who are often poor and persons of color, are used to achieve equity.³⁰⁰ It has been argued that such a funding system is racially and economically exploitive and creates tension between racial and gender equity.³⁰¹ Permitting some special compensation for athletes producing those revenues, therefore, would seem to be a wise balance between equities: non-revenue-producing women’s and men’s programs will continue to be funded, while revenue-producing football programs will be permitted to provide their student-athletes with basic compensation and protection.

It is highly doubtful that such arguments will sway the most ardent proponents of Title IX and gender equity. Advocates of gender equity can assert with some force that past discrimination against women has contributed to the fact that women’s sports are not able to produce the same revenue stream as men’s sports, particularly football, which is and has historically been a male-dominated sport.³⁰² It is likely, therefore, that potentially costly litigation will threaten this proposal.

In light of the above, it is recommended that Congress, as part of the hearings recommended in this article,³⁰³ exempt this compensation system from Title IX limitations. Such a determination will be difficult politically, because it will be opposed by women’s groups, but it will also receive support from groups concerned about exploitation of student-athletes within the FBS.³⁰⁴ It is possible, as well, that some compromise beyond the scope of this article can be fashioned by people of good intention, who understand

298. See Smith, *Ignorance Is Not Bliss*, *supra* note 266, at 348 (suggesting that funds from revenue-producing sports “largely fund the entire operations of the NCAA”).

299. See *id.*

300. *Id.* at 349.

301. See generally Smith, *Ignorance Is Not Bliss*, *supra* note 266.

302. See, Smith, *Ignorance Is Not Bliss*, *supra* note 266, at 342–43; Bob Cook, *For National Girls and Women in Sports Day, More Evidence Fighting Title IX is Losing Battle*, FORBES (Feb. 1, 2012), <http://www.forbes.com/sites/bobcook/2012/02/01/for-national-girls-and-women-in-sports-day-more-evidence-fighting-title-ix-is-losing-battle/>.

303. See *supra* Part III.A.4.a.

304. See Smith, *Ignorance Is Not Bliss*, *supra* note 266, at 348–49, 359.

the value of gender equity, racial equity, and the harms that attend economic exploitation. To help move this process along, funds already being transferred from commercially successful men's programs—football and basketball at the most competitive levels—to other, non-revenue-producing sports should be documented. Furthermore, additional funds might be allocated to assist with promoting non-revenue sports that are most likely to generate revenues, such as women's basketball.³⁰⁵

IV. CONCLUSION

The NCAA's reputation, particularly in the enforcement area, may be at an all time low, as evidenced by the NCAA's own recent report acknowledging that significant errors have been made.³⁰⁶ With concern over head injuries and exploitation of football players at the FBS level rising, the NCAA must be proactive in order to avoid a further crisis. It is doubtful that the NCAA, as we know it, can survive a major public relations debacle related to its failure to act to protect the health and well-being of its student-athletes—something that is mandated by its own Constitution. It must address the “play through injury” and “win at all costs” culture in college football which its inaction has facilitated. If the NCAA persists in failing to act, a single, tragic death that could have been avoided, or even a serious head injury, in the future might trigger a media frenzy, which could threaten the very survival of the NCAA and college football as we know it.³⁰⁷

The NCAA must cease to be purely reactive in developing its policies regarding concussions and head injuries suffered in college football. It must take steps to ensure the safety and well-being of college football players. If the NCAA refuses to sanction coaches, personnel, programs, and institutions for violations of student health and safety, it will surely be subjected to increased litigation for failing to abide by its own constitution to the detriment of its student-athletes. Member institutions will also be sued for failing to follow guidelines and protocols that have been in existence for many years.

If the NCAA fails to take action, Congress should follow President

305. See Chris Smith, *When It's Okay to Lose Money*, *supra* note 297.

306. People who attack the NCAA seldom indicate who might do the work of the NCAA if it were displaced. It is clear that an organization like the BCS would be worse, not better, than the NCAA in terms of insuring student-athlete well-being. See *supra*, Part III.A.4.a.

307. See Smith, *Solving the Concussion Problem*, *supra* note 9, at 172–73.

Obama's lead in questioning the handling of concussions and head injuries in college football by holding hearings on H.R. 2903 or other legislation designed to deal with this very serious problem. Congress has held hearings that have spurred the NFL into action, and it must play a similar role in protecting college football players at all levels from head injuries. Congress, together with the Executive Branch, can also play a critical role in protecting student-athletes at the FBS level from exploitation by working with the NCAA to develop a viable compensation proposal along the lines suggested in this article, all in an effort to protect student-athletes and salvage college football.

[Vol. 41: 267, 2014]

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