ARTICLE

AN ABSENCE OF GOOD FAITH: DEFINING A UNIVERSITY'S EDUCATIONAL OBLIGATION TO STUDENT-ATHLETES

Timothy Davis*

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* Assistant Professor of Law, Southern Methodist University School of Law. B.A. 1975, Stanford University; J.D. 1979, University of California at Berkeley School of Law. The author gratefully acknowledges the comments and suggestions of C. Paul Rogers III, Roy R. Anderson, Mark I. Steinberg, and Cynthia M. Patterson. He also thanks Leora F. Olorunisomo, Michael Mitchell, and Lizabeth E. Kahn for their assistance in researching this article.

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I. INTRODUCTION

In 1982 Kevin Ross enrolled at Westside Preparatory School, a private elementary school located in Chicago, Illinois. As was true of other students, Kevin Ross enrolled at Westside to acquire basic educational skills such as reading and writing. Yet the path that led to Ross's enrollment at Westside differed markedly from that taken by Westside's other students. Kevin Ross enrolled at Westside after he had attended public schools in Kansas City for twelve years and Creighton University for four years.

Ross attended Creighton University as a basketball scholarship student. He achieved a grade point average of only 0.54 during his last semester at Creighton. Not surprisingly, Ross left Creighton after his four years of scholarship eligibility without obtaining a degree. Ross departed Creighton as a functional illiterate, unequipped to write a check or read a menu.

During his eight months of study at Westside, Ross improved his reading skills to the level of a high school senior.

2. See Ross, 740 F. Supp. at 1322.
5. Curry, supra note 3, at B10, col. 5.
6. See Ross, 740 F. Supp. at 1322 (noting that Ross earned only 96 of the 128 credits needed to graduate).
7. Curry, supra note 3, at B9, col. 2. When Ross left Creighton, his reading skills were at a seventh grade level, and his overall language skills were at a fourth grade level. Ross, 740 F. Supp. at 1322.
8. Mount, supra note 1, at C1, col. 5.
The story of Kevin Ross did not, however, end with his departure from Westside in 1983. After leaving Westside, he turned to a life of alcohol and drug abuse. According to Ross, nightmares concerning his experiences at Creighton and Westside led to a violent incident in 1987, during which he threw furniture and other items from the eighth floor of a Chicago hotel room and held police at bay for several hours. After this incident, Ross underwent psychiatric treatment for depression.

In 1989 attorneys for Ross filed a lawsuit alleging that Creighton had committed educational malpractice and breached the duty of good faith and fair dealing, which they asserted was implied in the express contract between the university and Ross. Ross claimed that Creighton had wrongfully recruited and enrolled him despite knowledge that he was unprepared to participate effectively in the university’s academic program and had very little chance to obtain a degree. In addition, Ross alleged that Creighton engaged in a pattern of conduct that obstructed the minimal opportunity that he had to obtain substantive educational benefits during his college career. According to Ross, the implied duty of good faith and fair dealing imposed an obligation on Creighton to “provide a reasonable opportunity to [him] to obtain a meaningful college education and degree . . . .”

Kevin Ross’s case is an extreme example of a student-athlete’s failure to obtain substantive educational benefits.

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9. See Curry, supra note 3, at B10, col. 5.
10. Ross, 740 F. Supp. at 1322; Curry, supra note 3, at B10, col. 5.
11. Ross Amended Complaint, supra note 4, at 9; Mount, supra note 1, at C2, col. 1.
13. See Ross, 740 F. Supp. at 1322-23 (noting that plaintiff’s tort claim combined elements of negligent infliction of emotional distress and educational malpractice).
14. See Ross Amended Complaint, supra note 4, at 8-9. For a discussion of the proposition that every contract has an implied duty of good faith and fair dealing, refer to notes 180-96 infra and accompanying text.
15. See Ross Amended Complaint, supra note 4, at 8.
16. See id. at 8-9.
17. Id. at 11. “Meaningful education” has been defined as the intellectual development of “students engaged in good faith in the academic process.” Widmer, Suits by Student-Athletes Against Colleges for Obstructing Educational Opportunity, 24 Ariz. L. Rev. 467, 470 n.25 (1982).
during his college career. The issues raised by Ross's suit, however, are not unique. Billy Don Jackson, a former University of California at Los Angeles football player who never learned to read or write, and Dexter Manley, who was illiterate after four years at Oklahoma State University, provide two well-publicized examples of the many student-athletes who leave colleges and universities as functional illiterates. Indeed, other former student-athletes have initiated actions similar to Ross's, alleging that institutions interfered with or frustrated their attempts to acquire educational benefits.

Kevin Ross's lawsuit draws attention to important social and legal issues confronting intercollegiate athletics today. These issues include the compromise of academic integrity and the exploitation of student-athletes. This Article ad-

19. Kevin Ross's case was extreme because he was functionally illiterate when he left his university. See Ross, 740 F. Supp. at 1322. In contrast, Terrell Jackson, a student on a basketball scholarship, sued Drake University, not because he was functionally illiterate, but because Drake failed to provide him with a college education as promised. See Petition at 5-7, Jackson v. Drake Univ., No. CC8449942 (Iowa Dist. Ct., Polk County, filed May 7, 1990) [hereinafter Jackson Petition]; see also The Sidelines: Drake Flunks as Ex-Player Sues, L.A. Times, May 8, 1990, at P10, col. 1 [hereinafter Drake Flunks] (discussing the circumstances surrounding Jackson's suit against the university for reneging on a promise to provide an education).

20. While a freshman at UCLA, Jackson was an All-American defensive tackle and was considered a gifted athlete. See L.A. Times, Nov. 4, 1985, pt. 3, at 12, col. 1. Because of a severe reading disability, Jackson enrolled in courses stressing oral over written skills. Id. He eventually left UCLA and transferred to San Jose State. Id. In 1982 Jackson was sentenced to one year in jail after pleading no contest to the charge of fatally stabbing a drug dealer. Id.

Manley, a talented defensive end for the Washington Redskins, graduated from Houston public schools and then attended Oklahoma State University. See N.Y. Times, May 19, 1989, § B, at 17, col. 1. Manley suffered from a learning disability that rendered him illiterate. Id. After drug rehabilitation efforts in 1987 and 1988 failed, he was banned by the National Football League for violating the league's substance abuse policy. See Wash. Post, Nov. 23, 1989, at C3. Manley later enrolled in Washington's Lab School and reached an adult reading level. Id. He was also allowed to rejoin the NFL when the Phoenix Cardinals signed him in November 1990. See Wash. Post, July 24, 1991, at B3.

21. See, e.g., Jones v. Williams, 172 Mich. App. 167, 170, 431 N.W.2d 419, 422 (1988) (student-athlete who was unable to read or write brought suit against the Detroit Board of Education, the University of Michigan, and North Idaho Junior College); Jackson Petition, supra note 19, at 5 (alleging that Drake engaged in conduct, such as counseling him to enroll in classes that conflicted least with the basketball schedule but enabled him to obtain the grades necessary to remain academically eligible to compete, which made it impossible for Jackson to receive an education); see also Note, supra note 18, at 109-10 (citing Echols v. Board of Trustees, No. C 286,777 (Cal. Super. Ct., L.A. County June 7, 1984), in which seven former basketball players at California State University at Los Angeles brought suit against the university alleging causes of action in tort and contract law).

22. See M. SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS THE UNIVERSITY 277-78 (1990) (analyzing the extent to which the increasing emphasis on college athletics corrupts the academic mission of the school).

23. Exploitation is likely to occur when, notwithstanding the benefits that accrue
dresses these issues and examines how they impact the rights and obligations of student-athletes and the educational institutions they attend. It first probes the scope of the abusive practices that create the potential for exploitation. It then examines whether an educational institution that fails to provide a student-athlete with a bona fide educational opportunity has breached a contractual obligation.

Colleges and universities make a contractual commitment to student-athletes. Yet the contract documents establishing this relationship do not outline the duties of the college and university. As a result, colleges and universities escape liability for their failure to provide student-athletes with an educational opportunity. This Article discusses the expectations that arise out of the express contract between the student-athlete and the educational institution. Then, after studying the essence of the relationship, the Article reviews the theoretical foundation of the good faith doctrine and proposes that the good faith doctrine is the best mechanism for giving content to the institution's otherwise vaguely expressed education-

to institutions, student-athletes receive little in the way of substantive educational benefits. See Figler, Measuring Academic Exploitation of College Athletes and a Suggestion for Sharing Data, 1984 Soc. Sport J. 381, 381. Figler defines exploitation as occurring "to the extent that the coach, the team, the athletic department, the school, or the governing associations use college athletes for their own purposes without providing for the needs of the athletes." Id. at 382.

Colleges receive significant benefits from intercollegiate sports competition. NCAA, REPORT OF THE SELECT COMMITTEE ON ATHLETIC PROBLEMS AND CONCERNS IN HIGHER EDUCATION 5 (1983) (hereinafter SELECT COMM. REP.) (report by an independent commission established by the National Collegiate Athletic Association to study and propose solutions to the serious problems affecting college athletics). An intercollegiate athletic program can result in benefits to colleges and universities that include "favorable public exposure, increased financial support, and a common focal point for students, alumni, and a diffuse constituency. A skillful administration can make all of these work toward the betterment of the institution." Id. at 5. For a discussion of the extent to which institutions actually derive financial benefits from intercollegiate athletics, refer to notes 39-47 infra and accompanying text.

24. Refer to notes 50-96 infra and accompanying text.
25. Refer to notes 197-221 infra and accompanying text.
26. Refer to notes 161-79 infra and accompanying text.
27. See, e.g., Ross v. Creighton Univ., 740 F. Supp. 1319, 1331-32 (N.D. Ill. 1990) (deferring the imposition of contractual duties on the colleges and universities to private regulatory groups such as the NCAA, absent express contractual provisions).

The duty to provide an educational opportunity is not synonymous with the duty to educate. The former imposes an obligation on postsecondary institutions to engage in conduct that will enable students to obtain substantive educational benefits during their college careers. It also precludes institutions from obstructing and frustrating efforts by student-athletes to develop academically. Refer to notes 272-79 infra and accompanying text.

28. Refer to notes 200-11 infra and accompanying text.
29. Refer to notes 151-96 infra and accompanying text.
al commitment.\textsuperscript{30} The Article argues that the good faith doctrine imposes a contractual obligation on institutions to provide an educational opportunity to student-athletes.\textsuperscript{31}

The Article next examines, from a policy perspective, whether implying this obligation rewrites the contract, thus abrogating the parties’ intent.\textsuperscript{32} In this regard, the Article argues that the existence of the obligation is necessary to promote the “inner logic” of the transaction and to protect the parties’ reasonable expectations. The Article then discusses the policy implications of creating a duty to provide educational benefits in the context of \textit{Ross v. Creighton University}.\textsuperscript{33} In conclusion, the Article defines the parameters of the duty and suggests that it should balance and protect the interests of student-athletes and their institutions.\textsuperscript{34}

\section{Private Law: A Means of Increasing Accountability}

\subsection{The Commercialization of Intercollegiate Athletics}

The role of college athletics in American colleges and universities has undergone a metamorphosis since the first intercollegiate competition in 1852.\textsuperscript{35} Universities initially viewed

\begin{enumerate}
\item Refer to notes 197-99 \textit{infra} and accompanying text.
\item Refer to notes 200-21 \textit{infra} and accompanying text. Other commentators also argue that colleges and universities should be held liable for failing to provide student-athletes with an educational opportunity. See, e.g., Wasikauksi, The Regulation of Academic Standards in Intercollegiate Athletics, 1982 \textit{Ariz. St. L.J.} 79, 100 (stating that when a school promises to provide an education in exchange for participation on a sports team, the promise should be legally binding); Widener, supra note 17, at 471 (arguing that institutions should be held liable where their agents have obstructed the student-athletes educational opportunity); Note, supra note 18, at 122 (suggesting that the recognition of liability for student-athlete exploitation may provide the necessary incentives for universities to revise their conduct); Note, \textit{Achieving Educational Opportunity Through Freshman Ineligibility and Coaching Selection: Key Elements in the NCAA Battle for Academic Integrity of Intercollegiate Athletics}, 14 \textit{J.C. & U.L.} 383, 384 (1987) [hereinafter Note, \textit{Achieving Educational Opportunity}] (arguing that universities owe a commitment to student-athletes in exchange for the rewards that universities reap from athletic programs). These commentators tend to assume the existence of the duty without discussing the theoretical basis for finding a duty in the first instance. See, e.g., Wasikauksi, supra, at 86 (stating that the school should not be able to evade its obligation to provide student-athletes meaningful access to a genuine education, but failing to discuss the basis for that obligation). This Article develops a conceptual approach that provides the theoretical basis for implying a contractual obligation to provide an educational opportunity to student-athletes.
\item Refer to notes 200-21 \textit{infra} and accompanying text.
\item 740 F. Supp. 1319 (N.D. Ill. 1990). Refer to notes 222-71 \textit{infra} and accompanying text.
\item Refer to notes 272-77 \textit{infra} and accompanying text.
\item See H. Savage, American College Athletics 17 (1929) (acknowledging a crew race between Harvard and Yale in 1852 as the first intercollegiate competition).
\end{enumerate}
intercollegiate athletics as a distraction. By the 1920s, however, college athletics had evolved into an integral and formal part of institutions of higher education. This transformation occurred after colleges recognized the benefits that could be gained from college sports programs, particularly football.

Although the commercialization of college sports is not a new phenomenon, it has reached remarkably high levels over the past few years. Today, intercollegiate athletics gen-

A game between Amherst and Williams in 1859 made baseball the next sport to involve intercollegiate competition. See Davenport, From Crew to Commercialism—The Paradox of Sport in Higher Education, in Sport and Higher Education 6-7 (1985). The "watershed" for intercollegiate competition did not occur, however, until 1869, the year in which Princeton and Rutgers competed in the first intercollegiate football game. See id. at 7. After 1870, intercollegiate athletics grew as did the formal codification and organization governing the activity. See H. Savage, supra, at 20. For instance, football rules were first written in 1871, and an intercollegiate football association was formed in 1876. Id.

36. Some faculties regarded college athletics as "inimical to the best scholarly interests of the colleges." H. Savage, supra note 35, at 21. This resulted in attempts to control college football in the 1890s. The most drastic attempt occurred in 1894 when the Harvard faculty voted to abolish football. Id. at 22. Notwithstanding this and other less drastic efforts to control college athletics, most faculties did not oppose, but rather tolerated, college athletics. Id. See generally Davenport, supra note 35, at 6 (discussing the historical foundations of college sports as a basis for understanding the complex relationship between athletics and academics in institutions of higher education).


38. See Davenport, supra note 35, at 7. The growth of intercollegiate sports can be traced in part to the recognition that it presented an opportunity for acquiring resources by American colleges and universities with unstable financial and student support. D. Chu, The Character of American Higher Education and Intercollegiate Sport 33 (1989). Professor Chu views a successful athletic program that could result in enhanced prestige as a critical means by which a university could acquire support from its various constituencies. See id. at 34. In addition, "[c]ollege presidents, themselves hungry for evidence of their effective leadership, felt they had in sports success a symbolic representation of the value of their institutions." Id. at 57. These beliefs resulted in college and university programs that formally embraced athletics around the turn of the twentieth century. Id.

Professor James V. Koch asserts that the popularity of intercollegiate athletics surged after World War I. Koch, The Economic Realities of Amateur Sports Organization, 61 Ind. L.J. 9, 12-13 (1986). He suggests that factors such as rising consumer incomes, increased public interest in intercollegiate athletics, media designation of All-American teams, national rankings of teams by the press, and the desire of radio networks to broadcast important athletic events led many universities to use athletics as a means to attract enrollment and supplement their revenues. Id. at 13.

39. See Davenport, supra note 35, at 7 (asserting that college sports had become small businesses by the 1890s and that universities were determined to win at any price); see also H. Savage, supra note 35, at viii (discussing a 1929 Carnegie Foundation report that concluded that college sports, particularly football, had become a "highly commercialized enterprise").

40. In 1988, the 104 Division I-A football teams generated revenues in excess of "$500 million through gate, TV, and licensing receipts." R. Telander, The Hundred Yard Lie: The Corruption of College Football and What We Can Do to Stop It 44 (1989). Division I-A is the upper echelon of NCAA college football. For a con-
erate millions of dollars in revenues for colleges and universities. For example, the Columbia Broadcasting System recently agreed to pay the National Collegiate Athletic Association (NCAA) one billion dollars over a seven-year period for the television rights to all NCAA basketball tournament games. The 1990 tournament generated gross revenues estimated at 76.2 million dollars, with the final four schools in the tournament each receiving an estimated 1.4 million dollars. In August 1990, the NCAA Executive Committee approved recommendations for a new formula for distributing the tournament revenues. Under the revised distribution plan, the

Reference to remain in Division I-A, 60% of the conference's schools must either have a 30,000 seat football stadium and average 17,000 fans per home game or average 20,000 fans per game for all games. L.A. Times, Aug. 30, 1990, at C12, col. 1. The schools must meet this criteria at least once every four seasons. Id.

The perception that colleges and universities share in the financial rewards of intercollegiate athletics, however, emerges as a myth. See M. Sperber, supra note 22, at 2-3. Although intercollegiate athletics generate big money, most institutions actually lose money on their programs. Id. A primary reason for operating in red ink is that athletic department spending outpaces revenues. Id. at 39. Because athletic department budgets continue to expand, any money earned by college sports stays in the athletic department and never goes into a university's general fund. Id. at 4. For example, the University of Miami, due to its athletic successes in the 1980s, generated millions in revenues. Id. at 39. Yet, the university lost money because its athletic department increased its spending over a four-year period from $5.5 to $12.9 million. Id. The manner in which the NCAA distributes money from major revenue sources, such as television contracts and bowl appearances, also contributes to this lack of profitability. See id. at 3 (reporting as an example that the NCAA keeps approximately half of the revenue from the NCAA Division I men's basketball tournament).

Although they often fail to profit financially from intercollegiate sports, colleges and universities ultimately reap other benefits due to the services student-athletes provide. See D. Chu, supra note 38, at 30-31 (discussing how prestige aids in acquiring financial support); Davenport, supra note 35, at 7 (stating that football and the associated publicity increases alumni donations and the prestige of institutions).

41. See Goldman, Sports and Antitrust: Should College Students Be Paid to Play? 65 Notre Dame L. Rev. 206, 206 (1990) (stating that amateur athletics is big business that generates lucrative revenues); see also M. Sperber, supra note 22, at 2-3 (differentiating between the fact that college sports generates large revenues and the myth that it is profitable).

42. Refer to notes 139-40 infra and accompanying text for a discussion of purposes and goals of the NCAA.


45. NCAA Oks Distribution of TV Money from Basketball Tournament, Dallas Morning News, Aug. 16, 1990, at 4B, col. 1. The distribution plan creates two pools of revenue. Id. The first is based on each conference's participation in the men's basketball tournament during the previous six years. Id. Revenues in this pool will go to each conference for allocation to the individual schools according to a particular conference's rules. Id. The second pool is based on the number of programs
final four schools in the 1991 tournament received varying amounts: $203,846 for the University of Nevada at Las Vegas, $529,578 for the University of Kansas, and $792,047 each for Duke University and the University of North Carolina. The increasing commercialization of intercollegiate athletics has led one commentator to describe it as an industry comprised of "firms" that are "primarily involved in the selling of athletic entertainment to potential fans and ticket purchasers."

One consequence of this increased commercialization is pressure on colleges to produce winning teams. This pressure in turn increases the competition between colleges and universities for the best student-athletes. The cycle is completed when this competition leads to ethical and academic abuses.

1. The compromise of ethics. At some educational institutions, the goal of producing a winning team must be achieved at any cost. The numerous instances of NCAA

and scholarships a school offers and 'academic enhancement.' Id. The NCAA will distribute money in the second pool directly to schools. Id.

46. USA Today, Apr. 2, 1991, at 4C.

47. Koch, supra note 38, at 11. Professor Koch asserts that university athletic teams are supplying "intangibles such as pride and identification to alumni, legislators, and friends of the institution who might reward or support the institution." Id. (footnote omitted). According to Koch, the "university-firms" also sell the rights to cover their teams' intercollegiate athletic contests to radio and television networks. Id. This "multiproduct productive process" requires input of capital such as stadiums, equipment, and the like, but more importantly, it requires an input of people: "the coaches, athletic directors and especially the student-athletes who play on the teams that the university-firms field." Id. Koch claims that understanding the competition for, and use of, human resources such as student-athletes is essential to understanding modern intercollegiate athletics. Id.

48. See Goldman, supra note 41, at 241 (observing that commercialization of college athletics creates a "win at all costs' mentality"). Although the increase in revenues has increased the temptation to win at any cost, the debate concerning the negative effects of increased competition is not a current development. In 1905 President Roosevelt met with representatives of Harvard, Yale, and Princeton to discuss reports of abuses in football. Davenport, supra note 35, at 7-8. The formation of the NCAA in 1906 emerged as a consequence of President Roosevelt's efforts to reduce the violence in intercollegiate football and his desire to preserve amateurism. Koch, supra note 38, at 12. In 1929, the Carnegie Foundation urged colleges and universities to clean up the abuses occurring in intercollegiate athletics that were the result of commercialism and competition. H. SAVAGE, supra note 35, at 306-10.

Notwithstanding the talk of reform coming in the aftermath of each scandal or revelation of abuse, the pressure to win continues to cause a compromise of ethical and academic integrity. Refer to notes 50-65 infra and accompanying text. This is especially true given that "the money is bigger, the temptations are greater and the pressures to win more crushing." Gup, Fouls, Time, Apr. 3, 1989, at 54.

49. See Koch, supra note 38, at 13 (stating that the quest for revenues leads to "fierce struggles" in the recruiting of talented athletes).

50. See Goldman, supra note 41, at 240 (asserting that schools change admission standards and financial priorities to win at any cost).
sanctions levied against colleges and universities guilty of ethical abuses provide evidence of this win-at-all-costs attitude.\textsuperscript{51} In November 1990, for example, twenty-one colleges and universities were under investigation by the NCAA for possible violations.\textsuperscript{62} The alleged violations included: cars and other improper gifts given by athletic department boosters to basketball players, cash payments made to prospective as well as enrolled players, the alteration of academic transcripts, the participation in competition by academically ineligible players, and various other recruiting violations.\textsuperscript{63} As of January 1991, thirty-two colleges and universities were actually under NCAA sanctions.\textsuperscript{64} In fact, during the 1980s, the NCAA imposed sanctions on approximately fifty-seven percent of its 106 Divi-
sion I-A institutions.  

2. The compromise of academic integrity. A greater cost of commercialization and the concomitant increased pressure to win is the compromise of academic integrity. The overwhelming neglect of the academic needs of student-athletes evinces this exploitative atmosphere. The legendary football coach Paul "Bear" Bryant aptly described the greater priority placed on athletics over academics:

I used to go along with the idea that football players on scholarship were "student-athletes," which is what the NCAA calls them. Meaning a student first, an athlete second. We were kidding ourselves, trying to make it more palatable to the academicians. We don't have to say that and we shouldn't. At the level we play, the boy is really an athlete first and a student second.  

The graduation rates of student-athletes provide revealing evidence of the compromise of academic integrity. An unjustifiably high number of student-athletes leave institutions of higher education without degrees. A survey by the General Accounting Office revealed that fewer than one in five basketball players graduate at one-third of American colleges and universities with major men's basketball programs. Another survey

55. Davis, supra note 44, at 253 n.129.
56. See Goldman, supra note 41, at 241 (claiming that commercialization has led institutions to recruit underprepared athletes and to commit academic fraud to retain them, without regard for the effect on the athlete's education); Widener, supra note 17, at 467 (discussing chronic exploitation of student-athletes by postsecondary educational institutions); Note, supra note 18, at 96 (stating that a large percentage of student-athletes "are leaving postsecondary institutions, after four years of training," unable to write or read at a level indicative of a college education); Note, Achieving Educational Opportunity, supra note 31, at 393-91 (discussing "exploitation" of student-athletes by a failure to provide educational opportunities); cf. Wacukauski, supra note 31, at 79 (commenting on how the news media critically focused on the lack of academic integrity in intercollegiate athletics).

Richard Lapchick, the director of the Center for the Study of Sport in Society at Northeastern University, believes that "[w]hat we're dealing with is a national scandal." Sanoff, It's Cleanup Time for College Sports, U.S. NEWS & WORLD REP., July 1, 1985, at 62, 63. Others express similar views. See, e.g., Grantham, Views of Sport: It's Time to Give College Players a Cut, N.Y. Times, Mar. 18, 1990, § B, at 10, col. 2 (suggesting that student-athletes are exploited by a system that views an education and a college degree as distractions from its priority of making money); Bogan, 41% in NFL Graduate from College, L.A. Times, Jan. 27, 1986, pt. III, at 32, col. 1 (reporting a statement by a former admissions director at the University of Southern California suggesting that athletes are admitted to universities although they are not academically qualified and that "[t]hey are brought in and just dumped").

57. D. CHU, supra note 38, at 190.
58. M. Sperber, supra note 22, at 299-300.
59. Id. at 297. Not only are graduation rates low but they may underestimate
revealed that two-thirds of the college athletes drafted by professional football and basketball teams in spring 1990 failed to earn degrees.\footnote{See Athletics Notes, Chron. Higher Educ., Aug. 1, 1990, at A30, col. 1 (discussing a survey by the Associated Press).}

A recent Chronicle of Higher Education survey\footnote{Id.} examined graduation rates of student-athletes and non-athletes at 262 of 295 NCAA Division I colleges and universities.\footnote{Id. at 288-90.} Although the survey revealed higher graduation rates for student-athletes as compared to non-athletes,\footnote{Id. Student-athletes, however, never leave college due to an inability to pay their tuition or other school bills because they have full scholarships. Id. The NCAA and CFA comparisons of athletes' versus students' graduation rates are invalid because they do not consider these differences.} it confirmed that graduation rates for student-athletes who compete in the revenue-producing sports, basketball and football, at the Division I-A level lag behind graduation rates both for other student-athletes and non-athletes students.\footnote{Id. Some college administrators argue that comparing graduation rates for student-athletes and non-athletes is misleading. Lederman, College Officials Worry that Graduation-Rate Data May Be Misread and Misused, Chron. Higher Educ., Mar. 27, 1991, at A38, col. 1. These officials also disagree with using a five-year period to calculate graduation rates because many non-athletes require over six years to graduate. See id. This longer period arises out of the need of many non-athletes to interrupt their educational careers for financial reasons, which typically is not a concern for student-athletes because their scholarships provide sufficiently for room, meals, and books. See id. Thus, higher overall graduation rates for student-athletes in comparison to non-athletes is misleading because it fails to take into account such variables. Id. Those suspicious of using all non-athletes for comparison purposes argue that it would be more appropriate to compare the graduation rates of student-athletes with those non-athletes who attend school full-time for a four-or-five-year period. See Brown, College Sports Must Deliver on Its Promises, USA Today, June 21, 1991, at 2C, col. 1.} According to the survey, only thirty-two percent of basketball scholarship players in Division I-A
graduated after five years. This rate is considerably lower than the fifty-six percent graduation rate for all Division I student-athletes and the forty-eight per cent graduation rate for all students in Division I. The graduation rate for football players was reported at forty-seven percent, which is lower than the rate for other student-athletes and non-student-athletes.

The results of the survey also suggest that graduation rates for student-athletes are significantly affected by the nature of the sport in which a student-athlete participates, the type of institution a student-athlete attends, a student-athlete's gender, and the level of competition at which the student-athlete competes. Thus, the overall graduation rate for student-athletes is somewhat illusory because it is skewed upward by variables such as higher graduation rates at certain private institutions.

Princeton University, for example, reported graduation rates of 100 percent for basketball players and 96.6 percent for all male student-athletes. In contrast, Georgia State University reported graduation rates of 0.0 percent for basketball players and 15.4 percent for all male student-athletes. Similarly, Brown University reported graduation rates of 88.1 percent for basketball players and 88.3 percent for all male student-athletes, while the University of Alabama reported graduation rates of 0.0 percent for basketball players and 25.0 percent for all male student-athletes. In addition, graduation rates for all student-athletes are skewed upward by higher graduation rates for female student-athletes. The survey re-

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65. Id.
68. Lederman, College Athletes, supra note 61, at A38, col. 2.
69. See id. at col. 4.
70. Graduation Rates, supra note 66, at A41, col. 1.
71. Id. at A40, col. 1.
72. Id. at A42, col. 1 The graduation rate for basketball players attending private institutions is 63%, while the graduation rate for basketball players at public institutions is 28.2%. Id. at A41, col. 1.
73. Lederman, College Athletes, supra note 61, at A33, col. 5. Graduation rates for student-athletes are also affected by the level at which they compete; rates are higher for student-athletes who attend schools that participate at less costly and less visible competitive levels. Id. at col. 3. For example, 46.7% of basketball players who
results showed overall graduation rates of 65.6 percent for female athletes and 52.7 percent for male athletes. In sum, the survey is consistent with previous reports demonstrating that graduation rates for student-athletes in the revenue-producing sports are unjustifiably low.

The relatively low graduation rates among some student-athletes are not surprising because colleges and universities often admit student-athletes with low academic predictors and then fail to provide the support services necessary for these students to derive educational benefits during their college careers. Moreover, such low graduation rates do not appear surprising when one considers the amount of time student-athletes devote to sports. A 1988 NCAA report revealed that basketball and football players spend approximately thirty hours per week on sports, but only twenty-five hours per week on academic work. In the words of James Delaney, Commissioner of the Big Ten Conference, "too often, we're taking students who are unprepared vis-a-vis the rest of the student

competed at the less competitive Division I-AA level graduated in comparison to 31.5% of basketball players who competed at the Division I-A level. Graduation Rates, supra note 66, at A39, col. 1. The size of the institution may also affect graduation rates. See Lederman, College Athletes, supra note 61, at A38, col. 1.


75. Academic and athletic success are not mutually exclusive. See, e.g., Gup, supra note 48, at 58 (observing that the players on the University of Arizona's basketball team, which went to the Final Four in 1988, had a 3.0 (on a 4.00 scale) cumulative grade point average (GPA)). Moreover, low graduation rates and student-athletes need not be coexisting terms. See, e.g., Scorecard: A Positive Payoff, SPORTS ILLUSTRATED, Dec. 4, 1989, at 22 (reporting that 95.8% of the seniors who played for the 12-school, Division I, Metro Atlantic Athletic Conference in the 1988-1989 season had graduated by July 1989); Where Grades Mean More Than Points, U.S. NEWS & WORLD REP., July 1, 1985, at 64 (noting that Duke University outtranks most of its competitors in graduating athletes).

76. Academic predictors refer to grades and standardized test scores that provide some median of objective criteria to assess the present and future academic performance of a student. See Figler, supra note 23, at 383-85 (discussing methods for measuring academic progress).

77. See Wacukauski, supra note 31, at 80 (noting the failure of colleges and universities "to provide the education or grant the degrees promised to athletes"); Note, Achieving Educational Opportunity, supra note 31, at 386 (discussing the lack of support systems needed to provide ill-prepared athletes the opportunity for academic success).

78. See Lederman, Many College Athletes Favor Limits on the Time They Spend on Sports, Chron. Higher Educ., Sept. 20, 1989, at A44, col. 1. However, the NCAA estimate of the time a student-athlete devotes to sports may be low. See M. Sperber, supra note 22, at 302. For example, student-athletes at Louisiana State University spent as much as 60 hours per week on sports. Id. Similarly, a football player for the University of Wisconsin estimated that he devoted 61 hours per week to football and 45 hours per week on study and attending classes. Id. Sociologist Harry Edwards found that many football players spend up to 60 hours per week on sports during season, while basketball players spend up to 50 hours per week. Id.
body, and we're putting them on TV, we're putting them on the road, and when they fail, we act like, "How did this happen?". 79

The failure of student-athletes to acquire substantive educational benefits during their four or five years at college illustrates the exploitative nature of the relationship between the student-athletes and many colleges. Once admitted to institutions, student-athletes are often encouraged and counseled to take courses that will enable them to maintain their athletic eligibility, even though such courses will not provide them with substantive educational benefits. 80 Unfortunately, such a program of study results in student-athletes completing few, if any, courses related to a major during their first three years at college. 81 By the fourth or fifth year, they have completed few of the courses required to earn a degree. 82 Similarly, avoiding "hard" majors and intellectually challenging courses results in the failure of the student-athlete to benefit academically. 83

Even the student-athlete who earns a degree sometimes

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80. See M. Sperber, supra note 22, at 279 (observing that student-athletes are often directed to take easy courses); see also Gup, supra note 48, at 55 (calling the promise of an education for student-athletes a sham). The NCAA merely requires that a student-athlete demonstrate satisfactory progress toward a degree to remain academically eligible to participate in intercollegiate sports. See NATIONAL COLLEGIATE ATHLETIC ASSOCIATION MANUAL §§ 14.4.1-14.4.2 (1990-1991) [hereinafter NCAA MANUAL].

81. The need for athletes to maintain their academic "good standing" in order to play leads to abuses. D. Chu, supra note 38, at 109. The result is forged transcripts, phony credits, and substitute test-takers. Id. Professor Chu asserts that coaches, interested in maintaining eligibility, and intercollegiate athletes, often ill-prepared for university level work, may follow a particular eligibility strategy. Id. Athletes may avoid the more difficult core courses required for graduation. Id. Consequently, they maintain the flexibility to change majors often, which further ensures that upper-level courses may be avoided. Id. Athletes may also take physical education courses and basic courses in other departments, where good grades are more probable. Id. These courses, however, do not amount to a meaningful course load that will lead to graduation and prepare a student for career after college. Id. See also M. Sperber, supra note 22, at 278-80 (discussing compromises made by academic advisors resulting in disregard of the athlete's educational needs in order to concentrate on maintaining eligibility).

82. For instance, Ronnie Harmon, a former football player at the University of Iowa, took only one course toward his computer science major during his three years in college; the courses he did take included watercolor painting and billiards. Scorecard: Fresh Fracas, SPORTS ILLUSTRATED, Apr. 24, 1989, at 13. Another Iowa football player, Devon Mitchell, enrolled in courses such as "ancient athletics, recreational leisure, advanced slow-pitch softball, and the ever-popular billiards." Id.

83. See M. Sperber, supra note 22, at 280 (stating that the "advising system insures that athletes will live inside the 'athletic department cocoon' and not receive much of an education").
encounters difficulties. These student-athletes, despite completing a university’s degree requirements, often depart from the institution without having matured intellectually. 84 Student-athletes often enroll in baccalaureate programs that include many courses with little academic content. 85 Thus, a degree may not constitute an accurate measure of whether student-athletes have obtained educational skills that will permit them to compete and earn a living in our increasingly complex society. 86

3. The black student-athlete. A more compelling need for greater academic credibility arises in the case of black student-athletes. Their substantive educational benefits, as evidenced by graduation rates, often fall short of other student-athletes. 87 In 1984 Professor Harry Edwards estimated that sixty-five to seventy-five percent of black student-athletes on athletic scholarships fail to graduate, whereas only thirty to thirty-five percent of their white peers fail to do so. 88 For example, over a twelve

84. See id. at 33 (discussing the concern of universities regarding the widespread functional illiteracy of athletes).
85. See id. at 282.
86. Degrees and grade point averages also often emerge as illusory measures of intellectual development because the student-athlete’s program of study is “contaminated” by easy courses such as physical education courses or “Mickey Mouse courses” in other departments, which do not advance either graduation or career preparation. Figler, supra note 23, at 383-84; see also Gup, supra note 46, at 66 (suggesting that student-athletes are directed to take easy courses). Furthermore, institutions develop hideaway baccalaureate programs that contain courses without much substantive educational content. See M. SPERBER, supra note 22, at 282-84.
88. Edwards, supra note 87, at 9. A recent study sponsored by the NCAA validates these earlier estimates of lower graduation rates for black student-athletes. The study included student-athletes entering college in 1984 and 1985 and reported five-year graduation rates of 26.6% for black student-athletes and 52.2% for their white counterparts. NCAA Findings from Its Study of 3,283 Athletes, USA Today, July 3, 1991, at 9C, col. 7. This survey also found that only 9.2% of black student-athletes graduated within four years, while 25% of all student-athletes graduated within that time frame. Id. In addition, among student-athletes failing to graduate, 42.6% of black student-athletes and 19.6% of white student-athletes left school in less than good academic standing. Id.

A 1985 study of the professional players on National Football League (NFL) teams revealed significant differences between the graduation rates for black and white athletes. See Bogan, supra note 56, at 32, col. 1. The study showed that 33% of the black players had earned degrees in contrast with 50% of the white players. Id. This report further concluded that black NFL athletes “graduated at a rate 20% to 40% below the national student average.” Id.
year period, not one of Memphis State's black basketball players graduated. 89 Over a ten year period, the University of Georgia awarded degrees to only seventeen percent of its black football players and only four percent of its black basketball players. 90 At one time, the spread between the graduation rates of white and black student-athletes was twenty-seven percentage points in the Southwest Conference. 91

The black student-athlete also appears more likely to experience harsh consequences from the failure to obtain a degree or otherwise acquire substantive educational benefits during college. 92 Because of a "lower social and financial 'safety net'" 93 than their white counterparts, black student-athletes who fail to graduate often find themselves at a competitive disadvantage outside the collegiate environment. 94 The frustration and anger caused by a feeling of exploitation contributes to such extreme expressions of trauma as "antisocial behavior, substance abuse, [and] 'nervous breakdowns.'" 95 The lack of academic attainment and the exploitation of the black student-athlete led Penn State football coach Joe Paterno to admit: "For 15 years we have had a race problem. We have raped a generation and a half of young black athletes." 96

B. Attempts to Restore Academic Integrity

1. NCAA action. The NCAA, college administrators, and Congress are reacting to the gravity of the academic abuses. 97 Responding to public concern about widespread academic abuses involving intercollegiate athletics, the NCAA passed Proposi-

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90. Sanoff, supra note 56, at 63.
91. Bogan, supra note 56, at 33, col. 1.
92. See Edwards, supra note 87, at 9 (suggesting that because black athletes tend to come from less prosperous backgrounds, they are more likely to end up on the streets than their white counterparts who do not receive professional contracts).
93. Id.
94. Id.
95. Id.
96. Gladwell, supra note 87, at 84; see also M. SPERBER, supra note 22, at 277 (discussing sociologist Harry Edwards' characterization of black student-athletes as twentieth-century "gladiators," brought to college only to play sports).
97. See Toner, A Statement of NCAA Policy and Intentions Regarding Proposal 48, 131 C. BOARD REV. 13, 13-14 (1984) (noting NCAA commitment to maintain academic standards for student-athletes and citing recent reform as indicative of that commitment); see also M. SPERBER, supra note 22, at 218 (noting the response of college presidents to widespread illiteracy among student-athletes). Congressman Tom McMillen states that "student-athletes in big-money sports spend more time with playbooks than textbooks; and the money flowing the system is perverting the delicate balance between academics and athletics." McMillen, NCAA Heal Thyself, or Expect Congress to Issue Prescription, USA Today, Jan. 3, 1991, at SC, col. 6.
Effective August 1, 1986, Proposition 48 established minimum academic standards that freshmen student-athletes must achieve to receive athletic-related financial aid and to participate in intercollegiate athletics at a Division I institution. In a further effort to stem academic abuse, the NCAA passed Proposition 42 at its 1989 convention. Proposition 42 tightened the rules that govern athletic scholarships by eliminating the "partial qualifier" loophole of Proposition 48. As originally adopted, Proposition 42 mandated that only incoming freshmen who met all of the requirements of Proposition 48 could receive athletic scholarships.

Some educators and athletic directors believed that Proposition 42 was premature because the effects of Proposition 48 had

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98. See Toner, supra note 97, at 13-14 (stating that Proposition 48 was adopted as an amendment to the academic requirements found in NCAA Bylaw 5-1-(j) at the 1983 NCAA Convention in response to increased public criticism); see also M. Sperber, supra note 22, at 218-20 (crediting college presidents with pressuring the NCAA to raise academic admission requirements).

99. Toner, supra note 97, at 13. Proposition 48's minimum standards require that a student-athlete achieve a minimum 2.00 GPA in at least eleven designated high school courses, including three English, two mathematics, two social science, and two natural or physical science courses. See NCAA Manual, supra note 80, § 14.3.1.1(a). In addition, Proposition 48 requires a minimum combined score of 700 (out of a possible 1600) on the Scholastic Aptitude Test (SAT) or a minimum composite score of 15 (out of a possible 36) on the American College Test (ACT). See id. § 14.3.1.1(b).

100. M. Sperber, supra note 22, at 224. Proposition 42 was in part a reaction to the perception that schools were not adhering in good faith to the rules of Proposition 48. See id. The president of Lehigh University charged that "some coaches are bringing in large numbers of partial qualifiers, essentially parking them for a year in an environment in which the coaches believe they can make sure the kid is eligible. Sure enough, if he next year, he's eligible and the coach has circumvented the [academic] rules." Id.


A freshman who failed to meet Proposition 48 criteria could still receive an athletic scholarship as a "partial qualifier" provided the athlete earned a minimum 2.00 GPA in all high school courses and agreed to forego playing or practicing with the team as a freshman. Edwards, supra note 87, at 10. The partial qualifier lost one year of athletic eligibility. Id. A student-athlete who failed to qualify under Proposition 48 could also elect to be classified as a "nonqualifier." Id. As a nonqualifier, the student-athlete could participate in all team activities, except games, without receiving athletic financial aid. Id. If the athlete complied with the satisfactory progress rules, he or she could then begin competition as a sophomore without losing a year of eligibility. Id. This practice is commonly called "red-shirtig." For additional discussion of Proposition 48, see M. Sperber, supra note 22, at 218-24.

102. See Sanoff & Witkin, When Is the Playing Field Too Level?, U.S. News & World Rep., Jan. 30, 1989, at 68 (stating that only students with a C average in 11 core academic courses and a 700 on the SAT or an equivalent score on the ACT are eligible for athletic scholarships); see also M. Sperber, supra note 22, at 224 (discussing the changes imposed by Proposition 42).
not yet been evaluated. Others criticized Proposition 42 on grounds that it placed too much emphasis on test scores and placed minorities at a disadvantage because standardized college entrance tests are culturally biased.

In light of this criticism, the NCAA modified Proposition 42 at its 1990 convention. Under the new provisions, partial qualifiers are eligible to receive non-athletic financial aid, but remain ineligible to play or practice with the team as freshmen. Some remain critical of Proposition 42, however, believing that it will only lead to more cheating of the nature that surfaced when Proposition 48 was passed. Critics also believe that athletic departments will circumvent the rule by devising ways to enable partial qualifiers to obtain the same financial resources available to students on full athletic scholarships. Moreover, critics argue that student-athletes will obtain the necessary funding through loans that less advantaged athletes will be unable to pay back.

103. See, Sanoff & Witkin, supra note 102, at 68 (quoting the director of athletics at Harvard asserting that Proposition 42 was "premature" and "mean spirited").
104. See Kroll, supra note 101, at 56 (describing one coach's protest against Proposition 42 because of perceived racial discrimination in the rule); see also Sanoff & Witkin, supra note 102, at 69 (noting that in 1988 the average SAT score for blacks was 737, which was 167 points beneath the national average of 904).
105. See M. SPERBER, supra note 22, at 225 (describing the modification of Proposition 42 as permitting normal institutional aid to partial qualifiers on a need basis). The NCAA passed other legislation at its 1990 convention aimed at restoring academic integrity in intercollegiate athletics by limiting the time student-athletes may participate in sports activities. See Sullivan, Scorecard: The Battle of Dallas, SPORTS ILLUSTRATED, Jan. 22, 1990 at 7 (describing the effect of Proposition 30, effective in 1992, which will shorten the basketball practice season by two weeks, reduce the number of regular season basketball games from 28 to 25, and reduce spring football practice from 20 to 16 days); see also Currents: NCAA Brains Show Brown, U.S. NEWS & WORLD REP., Jan. 22, 1990, at 12 (mentioning reforms designed to increase the time student-athletes devote to academics).
106. The financial aid will be based on need and will come from the institution's general scholarship fund. NCAA MANUAL, supra note 80, § 14.3.2.1.1; see also Sullivan, supra note 105, at 7 (clarifying that financial aid to partial qualifiers may not come from the athletic department). However, Professor Sporber states that "[o]ne certain effect of the 1990 amendment is that it makes it easier for universities to divert limited financial aid money to athletes and away from regular students." M. SPERBER, supra note 22, at 225-26.
107. See NCAA MANUAL, supra note 80, § 14.3.2.1.1; see also Sullivan, supra note 105, at 7 (stating that partial qualifiers will not be allowed to participate in sports as freshmen).
108. See, e.g., M. SPERBER, supra note 22, at 225-28 (discussing unethical methods, such as forgiving loans or diverting financial aid, that can be used to nullify Proposition 42).
109. See, e.g., id. (explaining that colleges can arrange funding for partial qualifiers through payment schemes or by diverting general financial aid from other students who are not athletes).
110. See id. at 225 (noting the objections of black coaches to Proposition 42).
2. **Action by college presidents.** The Presidents Commission of the NCAA\textsuperscript{111} sponsored reform legislation at the January 1991 NCAA Convention.\textsuperscript{112} The proposals addressed issues related to "cutting costs, reorganizing the association's membership structure, and reducing time demands and strain on athletes."\textsuperscript{113} The legislation was motivated in part by the desire of college administrators to integrate student-athletes into the mainstream of the student body and to help restore the tarnished image of college athletics.\textsuperscript{114}

For many, however, the primary source of motivation was the threat of intervention by Congress,\textsuperscript{115} state legislatures,\textsuperscript{116} and independent organizations such as the Knight Foundation Commission on Intercollegiate Athletics (the Knight

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111. The Presidents Commission is comprised of 44 representatives from NCAA member schools. NCAA Manual, supra note 60, § 4.5.1. The NCAA vests the Commission with significant powers including the ability to:

1. Review any activity of the NCAA;
2. Commission studies of issues affecting intercollegiate athletics;
3. Propose legislation to any NCAA Convention; and
4. Call for a special meeting of the NCAA.

Id. § 4.5.3.

112. See Reed, Scorecard: A Steamroller for Reform, Sports Illustrated, Jan. 21, 1991, at 9 (noting that reform legislation emerged as the product of a study by members of the Presidents Commission); see also Schultz, NCAA Addresses Sweeping Reforms, USA Today, Jan. 3, 1991, at SC, col. 3 (crediting conference commissioners with a role in making recommendations that became part of the reform).


114. See Reed, supra note 112, at 9 (emphasizing that coaches should realize that the goals of the reforms are compatible with competitive college athletics).

115. In an article published one week before passage of the reforms, NCAA executive director Dick Schultz advised members to accept moderate reform now rather than deal with outside intervention. Schultz, supra note 112, at SC, col. 4. See also Lederman, Despite Adoption of Sweeping Reforms, NCAA Continues to Face Pressure from Lawmakers and Other Outsiders, Chron. Higher Educ., Jan. 22, 1991, at A31, col. 2 [hereinafter Lederman, NCAA Continues to Face Pressure] (noting current congressional action on college sports, including preparation of eight bills and an anticipated hearing by the Oversight Committee on Commerce); Blackstone, NCAA's Apparent Reform Front Only Clouds True Issue, Dallas Morning News, Jan. 10, 1991, at B9, col. 1 (criticizing the reforms as insignificant, but saying they may be adequate to prevent congressional action). United States Representative Tom McMillen has threatened to introduce legislation revoking the NCAA's nonprofit status if it fails to adopt measures enhancing the ability of college presidents to control their athletic programs. McMillen, supra note 97, at SC, col. 7; see also Sidelines, Chron. Higher Educ., Jan. 9, 1991, at A41, col. 1 (quoting McMillen as stating that there is congressional support for "conditionalizing the NCAA's nonprofit status")

116. See Lederman, NCAA Continues to Face Pressure, supra note 115, at A31, col. 2 (noting that several state legislatures have considered bills restricting and regulating the NCAA).
Commission)\textsuperscript{117} if college presidents continued to demonstrate an inability to control their athletic programs.\textsuperscript{118} Shortly before the 1991 convention, one commentator hypothesized that "[i]f meaningful progress is made, the Knight [Commission] and others probably will be satisfied with a supporting role in promoting further reforms. But if this year's efforts fall short, the presidents may lose their credibility and cede their role as the primary advocates of change."\textsuperscript{119} According to Gary Roberts, assistant law dean at Tulane University, "[t]he N.C.A.A. doesn't do what it does because it's the right thing to do . . . . It does things because it's afraid of being taken over by an outside organization."\textsuperscript{120}

The major proposals enacted by the NCAA at its 1991 convention included: (1) limiting the time that athletes can devote to practice to twenty hours per week and four hours per day; (2) requiring all Division I colleges to offer academic counseling services to recruited athletes; (3) eliminating athletic dormitories; (4) mandating exit interviews for athletes; (5) reducing by ten per cent the scholarships available to Division I sports; (6) decreasing the number of paid recruiting visits by Division I schools from eighty-five to seventy for football and eighteen to fifteen for basketball; (7) limiting the size of coaching staffs for Division I-A football teams; and (8) decreasing coaching staffs in other sports.\textsuperscript{121}

\textsuperscript{117} On October 19, 1989, the trustees of the Knight Foundation, a philanthropic foundation based in Akron, Ohio, created a commission to propose a reform agenda for intercollegiate athletics. See Knight Foundation, Commission on Intercollegiate Athletics, Report: Keeping Faith with the Student-Athlete—A New Model for Intercollegiate Athletics v (1991) [hereinafter Knight Commission Report]. The Commission included past and present presidents of major universities, business leaders, the Executive Director of the NCAA, the Treasurer of the United States Olympic Committee, and a United States Congressman. See id. at ix-x; see also McMillen, supra note 97, at 8C, col. 7 (describing the composition of the Knight Commission and stating that a primary objective of the Commission is to increase the control exercised by college presidents). For further discussion of the Knight Commission and its recommendations, refer to notes 141-50 infra and accompanying text.

\textsuperscript{118} See Lederman, NCAA to Decide, supra note 113, at A28, col. 1 (noting that independent organizations, including the Knight Commission, would closely monitor developments at the NCAA convention).

\textsuperscript{119} Lederman, NCAA Presidents' Panel Begins Effort to Win Passage of Major Reforms, Chron. Higher Educ., Nov. 21, 1990, at A29, col. 1 [hereinafter Lederman, NCAA Presidents' Panel]. Ironically, the overwhelming success of reform proposals may result in increased pressure and scrutiny from outsiders who believe that the NCAA responds only to external pressure. See Lederman, NCAA Continues to Face Pressure, supra note 115, at A31, col. 2.

\textsuperscript{120} Lederman, NCAA Continues to Face Pressure, supra note 116, at A31, col. 2.

\textsuperscript{121} See Blackstone, supra note 115, at 3B, col. 1; Bedell, NCAA Reform Package a Shocking Success, Dallas Morning News, Jan. 9, 1991, at 1B, col. 1.
Not all of the proposals sponsored by the Presidents Commission received approval from NCAA delegates. Significantly, the delegates rejected a proposal that would have imposed probation or disqualification on Division I schools that failed to graduate half of their student-athletes. The delegates also rejected a proposal requiring that student-athletes in academic difficulty show “minimal improvement in order to remain eligible to play sports.” Furthermore, the convention rejected a proposal requiring student-athletes to maintain a minimum grade point average to remain eligible. In fact, the delegates repudiated most of the proposals relating to academic issues.

Despite the moderate nature of the proposals the NCAA did enact, some athletic directors, coaches, and administrators have met such changes with hostility and opposition. Others, however, view the reforms as a necessary precursor to future reform efforts. Still others believe the reforms are illusory and will obfuscate the true issues. These critics emphasize that the reforms were aimed principally at reducing the administrative costs of collegiate athletic programs and signaling to Congress that the NCAA can police itself.

122. See Blackiston, supra note 115, at 3B, col. 4 (asserting that the NCAA failed to pass reforms that could impact the quality of education obtained by student-athletes or deal with widespread cheating).
123. Id. at 3B, col. 2.
124. Id. at 3B, col. 3.
125. Sidelines, Chron. Higher Educ., Jan. 16, 1991, at A37, col. 1. The Presidents Commission proposed minimum GPAs of 1.6 after 24 semester hours, 1.7 after 48 semester hours, 1.8 after 72 semester hours, and 1.9 after 96 semester hours. Id.
126. Id. (noting that the delegates chose to wait until next year when those issues are expected to be a focal point).
127. See Reed, supra note 112, at 9 (stating that “the reforms were not all that radical!”).
128. See id.; see also Lederman, NCAA Presidents’ Panel, supra note 119, Chron. Higher Educ., Nov. 21, 1990, at A29, col. 1 (noting that coaches especially opposed measures that would restrict recruiting).
129. Many college administrators recognize “that the 1991 reforms represent only the first wave of change.” Rawlings, Why Did We Take So Long?, SPORTS ILLUSTRATED, Jan. 21, 1991, at 72. One delegate summarized the reforms as follows: “I do not believe we can breathe easily now. . . . The public is not going to believe we’ve cleaned up our act just because we’ve cut costs and eliminated athletic dorms in Southern universities. They want to see improvement in graduation rates—genuine academic standards.” Lederman, NCAA Continues to Face Pressure, supra note 115, at A32, col. 1. An athletic director stated, “We’re going in the right direction, but we haven’t nearly turned the corner yet.” Id. at A32, col. 2.
130. See, e.g., Blackiston, supra note 115, at 3B, col. 2 (accusing the NCAA convention of clouding the issues rather than improving the condition of Division I athletics).
131. See id. at 3B, col. 5 (noting reductions in the number of scholarships and coaching positions).
132. See id. (suggesting that Congress may abandon action if it believes the
3. Federal intervention. In 1990 Congress passed the Student Right-to-Know and Campus Security Act (Right-to-Know Act), imposing reporting requirements on colleges and universities that receive federal financial assistance. Some commentators believe an institution's graduation rate for student-athletes provides one important indicia of the quality of the education a student-athlete is likely to receive. With access to this information, a student-athlete may make a more informed decision about which college to attend. The Right-to-Know Act requires postsecondary institutions receiving federal financial assistance to report graduation rates for specific categories of student-athletes receiving financial aid. An institution must also make this and other information available.

NCAA can make its own improvements).

133. Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, § 104, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 2381 (codified as amended at 20 U.S.C.A. §§ 1085, 1092, 1094 & 1232(g) (West Supp. 1991)) (hereinafter Right-to-Know Act). At its January 1990 meeting, the NCAA passed a regulation requiring its member schools to disclose graduation rates. Currents: NCAA Brains Show Brown, supra note 105, at 12. Some commentators have suggested that the NCAA passed the new regulation in an effort to thwart congressional action. See, e.g., Blackstone, supra note 115, at 3B, col. 5 (asserting that reforms, though lacking, may be sufficient to prevent congressional intervention); Schultz, supra note 112, at 8C, col. 4 (suggesting that the changes would be more acceptable than governmental action). Congress, however, passed the legislation after the NCAA regulation. See Right-to-Know Act, § 102(7) (noting the date of enactment as November 8, 1990). Opponents to the legislation argue that federal intervention is inappropriate because graduation rates are too complex and may be misleading. See Note, The Student-Athlete Right-to-Know Act: Legislation Would Require Colleges to Make Public Graduation Rates of Student-Athletes, 16 J.C. & U.L. 287, 294 (1989).

134. See, e.g., 124 CONG. REC. 14,284 (1988) (statement of Sen. Bradley) (arguing that information required under the Right-to-Know Act would help high school athletes to make an informed decision before they sign with a particular school); Note, supra note 133, at 288, 292-93 (noting that proponents of the Act believe that disclosing graduation rates will provide athletes and their parents with basic information about the quality of education at an institution).

135. See H.R. 1454, 101st Cong., 2d Sess., 136 CONG. REC. H3119 (daily ed. June 5, 1990) ("Knowledge of the graduation rates of student-athletes would assist prospective students and their families in making an informed judgment about the educational benefits available at a given institution of higher education"); see also Lederman, New Bills in Congress Would Force Colleges to Disclose Graduation Rates of Athletes and All Other Students, Chron. Higher Educ., June 22, 1988, at A29, col. 2 (reporting that sponsors of the Right-to-Know Act call it a "consumer rights" measure aimed at giving college athletes information about the quality of education they are likely to receive); Note, supra note 133, at 288 (asserting that prospective student-athletes who wish to obtain an education can make a more informed decision when selecting a college).


137. Other information that colleges and universities must report includes: (1) the number of students at the institution who receive athletically related student aid, broken down by sport, race, and sex; (2) the number of students at the institution,
able to the student, his parents, guidance counselor, and coach when it makes an offer of financial aid to a potential student-athlete. 138

Time will tell whether these efforts will achieve the sought-after results. The maintenance of academic integrity is presently within the control of each college and university. Rules promulgated by athletic associations, to which most colleges and universities belong, supplement this institutional control. 139 Historically, however, self-regulation by colleges and universities has prevented neither academic abuse nor exploitation of student-athletes. The same is true with regard to the rules and regulations promulgated by athletic associations. 140

4. The Knight Commission Report. The shortcomings of institutional control were recently examined by the Knight Commission which released its report on the state of intercollegiate athletics on March 19, 1991. 141 The report, entitled

broken down by race and sex; (3) the completion or graduation rate for students, broken down by race and sex; (4) the average graduation rate for the four most recent graduating classes of all students at the institution who received athletically related student aid, broken down by sport, race, and sex; and (5) the average graduation rate for the four most recent graduating classes of students at the institution who received athletically related student aid, broken down by sport, race, and sex. Id. § 1092(c)(1).

138. Id.

139. See Waicukauski, supra note 31, at 80 (citing the NCAA code of conduct as an example of rules that supplement institutional control).

140. The NCAA, which is the largest of these national associations, was formed to regulate and administer intercollegiate athletics in the United States. Id. at 80-81. Other national organizations devoted to regulating intercollegiate athletics include the National Association in Intercollegiate Athletics (NAIA), the Amateur Athletic Union (AAU), and the National Junior College Athletic Association (NJCAA). See id. at 81; Koch, supra note 38, at 12. Colleges and universities with more modest athletic programs comprise the membership of these other organizations. See Waicukauski, supra note 31, at 81 (noting that most major colleges and universities in the United States belong to the NCAA). The AAU no longer rivals the NCAA, and the NAIA, though a legitimate rival, has fewer members and less economic power, drawing from small institutions that do not seek to compete in "big-time" intercollegiate athletics. Koch, supra note 38, at 12. The NCAA now has expanded to include women's intercollegiate athletics, thus eclipsing the influence of the Association of Intercollegiate Athletics for Women (AIAW). Id.

The NCAA sets academic standards that its member institutions must observe. Waicukauski, supra note 31, at 82. The Fundamental Policy of the NCAA, as articulated in a constitutional provision entitled "Principle of Sound Academic Standards," imposes four basic requirements for student eligibility in intercollegiate athletics: (1) admission in accordance with an institution's published entrance requirements; (2) continued good academic standing in accordance with the institution's general standards; (3) enrollment as a full-time student; and (4) satisfactory progress toward a degree. Id. at 82-83.

141. Eskenazi, Panel Tells College Heads to Take Control of Athletics, N.Y. Times, Mar. 20, 1991, at B8, col. 4. The Knight Commission spent more than a year studying and debating the status of intercollegiate sports. KNIGHT COMMISSION REPORT,
Keeping Faith With the Student Athlete—A New Model for Intercollegiate Athletics, concluded that the problems affecting intercollegiate athletics were so “deep-rooted” as to be systematic and could “no longer be swept under the rug or kept under control by tinkering around the edges.” According to the Knight Commission, the pervasiveness of the problem requires creating a new structure if intercollegiate athletics are to be restored to their proper place in colleges and universities.

The new structure suggested by the Knight Commission is characterized as a one-plus-three model. This model “consists of the ‘one’—presidential control—directed toward the ‘three’—academic integrity, financial integrity and accountability through certification.” The one-plus-three model attempts to reinforce the idea that college presidents should control athletic programs.

The report urges universities that wish to seriously consider the one-plus-three model to begin by committing to a “statement of principles.” These principles include: (1) governing intercollegiate athletic programs in accordance with the educational values, practices, and mission of colleges; (2) vesting presidents with the responsibility and authority to administer the policies, finances, and personnel of athletic departments; (3) providing student-athletes with educational opportunities that are as close to those of non-athletes as possible; (4) treating all student-athletes equitably regardless of their race or gender; (5) admitting only student-athletes who show a reasonable promise of “being successful in a course of study leading to an academic degree”; (6) reviewing the academic performance of student-athletes each semester and determining eligibility to compete on reasonable progress towards graduation during each academic term; (7) achieving graduation rates for all student-athletes comparable to those of non-athletes; (8) channeling all revenues generated by intercollegiate athletic programs through the institution’s general treasury; (9) requiring university approval

supra note 117, at v. It sought the advice and suggestions of more than 80 experts, and, during a series of public hearings, listened to a wide variety of people who have a stake in intercollegiate athletics, including administrators, coaches, student-athletes, scholars, journalists, and others. Id.

142. KNIGHT COMMISSION REPORT, supra note 117, at 7.
143. Id.
144. Id. at 11.
145. Id. (footnote omitted).
147. KNIGHT COMMISSION REPORT, supra note 117, at 30.
of athletic-related income generated by coaches and administrators from outside sources; and (10) conducting annual academic and fiscal audits of athletic programs.\148\ In addition to these broad goals set forth in the Statement of Principles, the Knight Commission offered thirty specific recommendations designed to reform college sports.\149\ 

The Knight Commission made the following observation about the present state of intercollegiate athletics:

At their best, which is most of the time, intercollegiate athletics provide millions of people—athletes, undergraduates, alumni and the general public—with great pleasure, the spectacle of extraordinary effort and physical grace, the excitement of an outcome in doubt, and a shared unifying experience . . . .

But at their worst, big-time college athletics appear to have lost their bearings. With increasing frequency they threaten to overwhelm the universities in whose name they were established and to undermine the integrity of one of our fundamental national institutions: higher education.\150\ 

The Knight Commission has proposed an agenda for reform. Yet, notwithstanding the recent efforts of the Knight Commission, the NCAA, and others, alternative mechanisms will be necessary to ensure educational opportunities for student-athletes.

III. THE UTILITY OF CONTRACT LAW AS A MEANS OF RESTORING ACADEMIC INTEGRITY

Traditional contract doctrine can function indirectly to help restore academic integrity to intercollegiate athletics. This restoration begins by recognizing the reasonable expectations that flow out of the contractual relationship between a student-athlete and the educational institution. In this context, the good faith doctrine becomes critical. It represents the specific mechanism by which courts should define the educational duty that colleges and universities owe to student-athletes. This analysis begins by focusing on the contractual relationship between student-athletes and colleges and universities.

\148. Id. at 30-31.

\149. Knight Commission Tells Presidents, supra note 146, at A1, col. 2. Other notable recommendations include: (1) offering athletic scholarships for a five-year period; (2) requiring incoming freshmen to complete 16 high school core subjects instead of the 11 currently required; (3) reducing athletic costs; (4) revising athletic grants-in-aid so that they cover the full cost of attendance; (5) devising a new plan for distributing to colleges the revenues derived from television and tournaments; and (6) offering renewable long-term contracts to coaches. See KNIGHT COMMISSION REPORT, supra note 117, at 18-21.

\150. KNIGHT COMMISSION REPORT, supra note 117, at vii.
A. The Express Contractual Relationship Between Student-Athletes and Postsecondary Institutions

Although the relationship between the student-athlete and the university escapes easy definition, most courts and commentators consider the relationship contractual in nature.\(^{161}\) For example, in Taylor v. Wake Forest University,\(^{162}\) a student-athlete alleged that the university wrongfully terminated his

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Commentators have also characterized the relationship between student-athletes and their institutions as contractual. See, e.g., Cazzillo, The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name, 35 Wayne L. Rev. 1275, 1282-83 (1989) (arguing that the typical National Letter of Intent contains the requisite elements of a contract). Professor Cazzillo employs traditional contract doctrine to analyze the relationship between the student-athlete and the university. In his exhaustive study, he initially notes that the Letter of Intent "has served as a partial predicate for judicial recognition of the contractual relationship between university and student." Id. at 1300. He further argues that the university is the offeror and the student-athlete is the offeree. See id. at 1311. An offer is tendered when the university presents the scholarship proposal to the student-athlete, and the parties create an executory contract when the student signs the Letter of Intent. Id. at 1311-18. See also Waicukauski, supra note 31, at 99 (asserting that "the essence of the transaction is the exchange of the promise of athletic services by the student for the reciprocal promise of educational services by the institution"); Widener, supra note 17, at 468-69 (observing that an athletic scholarship documents the student's contractual relationship to the institution); Note, Rensing v. Indiana State University Board of Trustees, The Status of the College Scholarship Athlete—Employee or Student?, 13 CAP. U.L. Rev. 87, 96 (1983) [hereinafter Note, Rensing v. Indiana State Univ.] (noting that "legal precedent substantiate[s] a finding that a scholarship agreement . . . creates a contractual relationship"); Note, supra note 18, at 104 (claiming that because the student-athlete's relationship with the university is unlike the conventional student-university relationship and because the university has a significant conflict of interest, a cause of action should lie in contract for student-athletes deprived of an education due to the university's failure to perform as promised).

football scholarship after he refused to participate in football due to his poor academic performance.\textsuperscript{163} Taylor's grade point average for the first semester of his freshman year was 1.0 on a 4.0 scale.\textsuperscript{164} As a result of this poor academic showing, Taylor refused, and in fact was ineligible,\textsuperscript{165} to play football during the spring term of his freshman year.\textsuperscript{166} Although Taylor's second semester grade point average improved such that he became academically eligible to participate, he refused to play football during his sophomore year.\textsuperscript{167} The university terminated his scholarship after his sophomore year.\textsuperscript{168} Taylor sought to recover expenses incurred to finish his degree requirements after the university terminated his scholarship.\textsuperscript{169} Without discussion, the court assumed the existence of a contract between the plaintiff and the university.\textsuperscript{170} It held that plaintiff's refusal to participate in athletics, when he was both academically and physically able to do so, constituted a breach of "his contractual obligation," excusing the university's obligation to provide financial assistance.\textsuperscript{171}

The express contractual relationship between the student-athlete and the university arises out of the Letter of Intent,\textsuperscript{172} the Statement of Financial Assistance,\textsuperscript{173} and various other

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\textsuperscript{163} Id. at 118-19, 191 S.E.2d at 380-81.
\textsuperscript{164} Id. at 119, 191 S.E.2d at 381.
\textsuperscript{165} Wake Forest required a minimum 1.35 GPA after the freshman year to maintain academic eligibility. See id.
\textsuperscript{166} See id.
\textsuperscript{167} See id. (noting that Taylor made a 1.9 GPA in his second semester).
\textsuperscript{168} Id. (stating that termination occurred after a hearing before the Faculty Athletic Committee).
\textsuperscript{169} Id. at 120, 191 S.E.2d at 381-82.
\textsuperscript{170} Id. at 121, 191 S.E.2d at 382.
\textsuperscript{171} See id. (holding that summary judgment was proper because it was not disputed that Taylor failed to fully comply with the agreement). The court rejected Taylor's argument that the contract between the parties provided that participation in athletics could be eliminated if it interfered with his ability to make "reasonable academic progress." \textit{Id.}
\textsuperscript{172} See Cozzillio, supra note 151, at 1290 (stating that the National Letter of Intent manifests the commitment between the university and student-athlete). The Letter of Intent is the linchpin of the National Letter of Intent Program (NLIP) which was instituted in 1964. \textit{Id.} at 1289. The NLIP was adopted to solve two problems: "(1) it allows the student-athlete to make a timely decision and to be theoretically free of further recruiting hassles; and (2) it allows the institution to save time and money by ceasing recruitment efforts after a student-athlete signs a Letter of Intent." \textit{Id.} at 1292 n.62. Cozzillio also notes that the formal Letter of Intent used in the NLIP differs from a general letter of intent. \textit{Id.} at 1305. The latter usually serves as a precursor to a future document that will formally memorialize the understanding of the contracting parties. \textit{Id.} at 1305-06.
\textsuperscript{173} Although each conference has its own version of a Statement of Financial Assistance, the substance of each form is the same. See Widener, supra note 17, at 469 n.18 (noting that the substance of the forms is identical to those used by mem-
university publications such as bulletins and catalogues. These documents contain the promises that provide consideration for the bargain. The student-athlete promises to attend a particular college and to participate in athletics when he signs a Letter of Intent. In exchange for this commitment, the university promises to provide financial assistance in the form of an athletic scholarship. In legal terms, the validity of a signed Letter of Intent is conditioned upon the student-athlete's prior possession of a written commitment of financial assistance from the institution. The student-athlete who executes a valid Letter of Intent in essence becomes a "contractual employee[ ] of an athletic program." The NCAA requires the accompanying financial assistance statement to "list the terms and conditions of the award, as

bers of the Pacific-10 Athletic Conference).

164. See Cozzillo, supra note 151, at 1319 (suggesting that student handbooks and catalogues contain implicit contractual terms); Dodd, The Non-Contractual Nature of the Student-University Contractual Relationship, 33 U. KAN. L. REV. 701, 702 (1985) (stating the terms of the contract between college students and universities are largely found in the institutions' various documents, including their catalogues, bulletins, and circulars); Note, supra note 18, at 114 (discussing what constitutes evidence of the terms of the contract between student-athletes and universities); cf. Nordin, The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship, 8 J.C. & U.L. 141, 155-56 (1981-1982) (contending that the express contract is not found in university bulletins or catalogues but is instead comprised of a number of documents and oral assertions).

165. See Cozzillo, supra note 151, at 1290 (observing that a student-athlete, by signing the Letter of Intent, waives the right to participate in intercollegiate sports at other NLIP institutions); Note, supra note 18, at 114-15 (explaining that the letter of intent certifies a student-athlete's intent to attend a particular college to participate in intercollegiate athletics and includes provisions that deter "school-jumping").

166. See Note, Compensation for Collegiate Athletes: A Run for More than the Roses, 22 SAN DIEGO L. REV. 701, 703 (1985) (indicating that the athletic scholarship provides funds for tuition, books, room and board, and "other expenses"); see also NCAA MANUAL, supra note 60, §§ 15.02.3, 15.2.1-15.2.3 (stating that the purpose of financial aid is to assist student-athletes in paying educational costs).

167. The institution's commitment to provide financial assistance must appear in the form of a written award of recommendation for financial aid. See Widener, supra note 17, at 469-70 (discussing the offer and acceptance aspects of the contract between a student-athlete and an institution); see also Note, supra note 18, at 115 (noting that NCAA rules require a student-athlete to possess a statement from the institution outlining terms and conditions of financial aid before she signs the Letter of Intent).

The validity of the Letter of Intent is conditioned upon the signatures of the student-athlete's legal guardian and an institution's athletic director. See Widener, supra note 17, at 469-70. The signatures of the student-athlete and the student-athlete's parents also constitute an acceptance of the university's offer. Id.; see also Cozzillo, supra note 151, at 1290 (reviewing the process by which the contract is established).

168. M. SPERBER, supra note 22, at 208 (contending that the student-athlete "sells" sports talents for an athletic scholarship).
well as its amount and duration.\textsuperscript{169} Institutions typically award athletic scholarships on an annual basis,\textsuperscript{170} for a maximum of four or five years.\textsuperscript{171} The university, however, may withdraw the financial aid award if the student-athlete fails to comply with the terms and conditions set forth in the financial assistance statement.\textsuperscript{172} These terms and conditions require student-athletes to comply with the rules and regulations of the particular institution, athletic conference, and the athletic association.\textsuperscript{173} The student-athlete also promises to remain academically eligible and to participate in the institution’s athletic program.\textsuperscript{174}

While this express contract specifically delineates the student-athlete’s contractual obligations, the duties of the college or university remain virtually undisclosed. The only obligation that the contract documents specifically impose upon the institution concerns the student-athlete’s financial assistance.\textsuperscript{175} Although the contract documents suggest an educational component to this relationship,\textsuperscript{176} the contours of this aspect of the relationship remain unclear.

The Statement of Financial Assistance provides that the school will extend financial aid only to the extent of tuition, fees, room, board, and books.\textsuperscript{177} According to the Statement, the purpose of financial aid is to assist and enable student-

\begin{itemize}
\item\textsuperscript{169} Cozzillo, supra note 151, at 1290; see also Widenor, supra note 17, at 469 (explaining that the financial assistance offer outlines the terms for continued receipt of financial aid).
\item\textsuperscript{170} NCAA Manual, supra note 80, § 15.3.3.1.
\item\textsuperscript{171} See Cozzillo, supra note 151, at 1291, 1321. Cozzillo suggests that because the university’s scholarship is typically for one year, the bilateral executory contract that comes into existence when the Letter of Intent is executed exists only for the student-athlete’s freshman year. Id. at 1321. Thereafter, a university’s offer of a scholarship is an offer to create a unilateral contract because the student-athlete does not promise to stay at the institution beyond his freshman year. See id. at 1291, 1321-22. The student-athlete accepts the offer when he performs by maintaining academic eligibility, avoiding school disciplinary sanctions, and participating in the chosen sport. See id. at 1321 n. 160.
\item\textsuperscript{172} See Note, supra note 18, at 115-16.
\item\textsuperscript{173} See NCAA Manual, supra note 60, § 15.01.5 (requiring students to meet the regulations of the NCAA, the conference, and the institution in order to receive financial aid); see also Note, supra note 18, at 115 (discussing the express clauses within the financial aid statement that require conformity with all applicable rules and regulations).
\item\textsuperscript{174} See Note, supra note 18, at 115.
\item\textsuperscript{175} See Cozzillo, supra note 151, at 1362-63 (noting that the Letter of Intent reflects the university’s promise to provide financial aid and the student-athlete’s promise to attend the university and participate in the designated sport).
\item\textsuperscript{176} See Cozzillo, supra note 151, at 1367 (defining a university’s duty, in part, as allowing the athlete “an opportunity to secure an education”).
\item\textsuperscript{177} See NCAA Manual, supra note 60, §§ 15.2.1-15.2.3 (identifying the purposes for which financial aid may be used).
\end{itemize}
athletes to pursue a program of study and to participate in the educational process of the institution.\textsuperscript{178} In addition, a student-athlete signing the Letter of Intent acknowledges that he will attend the institution as a regular student who is presumably there to obtain an education.\textsuperscript{179} Notwithstanding this assumption that a student-athlete attends an institution, at least in part, to obtain an education, the university's role is unclear. This uncertainty stems from the failure of the contract documents to articulate the nature of the institution's contractual obligation to assist the student-athlete in achieving educational goals.

Application of the good faith doctrine could serve to clarify the nature of the institution's obligation to the student-athlete. The following discussion outlines the good faith doctrine and proposes its use as a tool for defining the nature of the institution's educational obligation to student-athletes. It further urges application of the good faith doctrine to impose a contractual obligation on colleges and universities to provide an educational opportunity to student-athletes.

B. The Implied Duty of Good Faith

The concept that every contract has an implied duty of good faith and fair dealing is an integral part of the American law of contracts.\textsuperscript{180} Yet, despite its widespread acceptance, the duty of good faith defies easy conceptualization. In his seminal

\textsuperscript{178} See Widener, supra note 17, at 470-71 (noting that the Statement of Financial Assistance waives tuition and fees and grants the student-athlete the same right of access to education as any other student).

\textsuperscript{179} See id. at 469, 471 (noting that the student-athlete is a member of the academic student body and that athletics are only part of the educational process). But see M. Speiser, supra note 22, at 280 (observing that the "athletic department cocoon" ensures that athletes do not receive much of an education).

article, Professor Summers conceptualized the good faith obligation as an excluder.\textsuperscript{181} Under this framework, no single meaning can or should be attached to the duty of good faith.\textsuperscript{182} Rather, courts should determine what constitutes good faith by identifying different types of bad faith behavior.\textsuperscript{183}

Professor Summers postulated that by excluding conduct exemplifying bad faith, the good faith doctrine functions as a tool for enforcing what he termed "the unspecifed 'inner logic'" of a transaction "when custom and usage are silent and when the true basis for implying a promise is that good faith requires as much."\textsuperscript{184} According to Summers, the underlying rationale for the good faith doctrine is to provide "a means to 'justice and to justice according to law.'"\textsuperscript{185} The Restatement (Second) of Contracts has adopted Professor Summers's excluder approach to the duty of good faith\textsuperscript{186} and imposes an obligation of good faith and fair dealing in the performance and enforcement of every contract.\textsuperscript{187}

In contrast to Professor Summers's excluder formulation for

\textsuperscript{181} Summers, "Good Faith" in General Contract Law, supra note 180, at 196-96 (defining good faith conduct negatively by determining that such conduct is not in bad faith).

\textsuperscript{182} According to Professor Summers, it is preferable that the good faith obligation not have a specific meaning or meanings. See Summers, The General Duty of Good Faith, supra note 180, at 825-26. In his view, any effort to give the good faith obligation a positive meaning would be unwise because it would provide little useful guidance and might unduly restrict the scope of the doctrine. Id.

\textsuperscript{183} See Summers, "Good Faith" in General Contract Law, supra note 180, at 202 (concluding that the cases he analyzed illustrated that judges used the good faith doctrine to exclude particular forms of conduct rather than to formulate the "positivo content of a standard"). Summers further explained that:

Good faith, then, takes on specific and variant meanings by way of contrast with the specific and variant forms of bad faith which judges decide to prohibit. From the cases it would be possible to compile a list of forms of bad faith, with an opposite for each listed as the corresponding specific meaning of good faith.

Id.

\textsuperscript{184} Id. at 199.

\textsuperscript{185} Summers, The General Duty of Good Faith, supra note 180, at 826 (footnote omitted).

\textsuperscript{186} See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979). The comment to section 205 states that the meaning of good faith varies with the context in which it is used. Id. comment a. Good faith performance of a contract deals with "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Id. It excludes types of conduct involving "bad faith' because they violate community standards of decency, fairness or reasonableness." Id.

\textsuperscript{187} Id. § 205. The language of section 205 limits the scope of the good faith doctrine to the performance and enforcement stages of the contracting process. See id. Professor Summers, however, believes that the duty of good faith is applicable to all stages of the contracting process. See Summers, "Good Faith" in General Contract Law, supra note 180, at 216 (observing that the principle of good faith doctrine applies to contract formation, enforcement, and performance).
good faith, Professor Burton has formulated an economic conceptualization of the good faith obligation. Profes- sor Burton observed that when the express terms of the contract are either unclear or omitted, one party may have the power to determine or control their performance obligation. According to Professor Burton, good faith performance occurs when the party with discretion pursues any purpose consistent with the opportunities the parties, at the time they contracted, reasonably contemplated to be preserved. Thus, under Professor Burton's formulation of good faith, a party, who uses this discretion to recapture opportunities surrendered at the time of contracting, performs in bad faith.

Notwithstanding these different conceptualizations of the good faith doctrine, commentators hold similar views with respect to general precepts of the doctrine. Almost all view

188. See Burton, supra note 180, at 371 (stating that the question of good faith "arises because a contract is an exchange expressed imperfectly and projected into an uncertain future"); Burton, More on Good Faith Performance of a Contract: A Reply to Professor Summers, 69 IOWA L. REV. 487, 500-01 (1984) [hereinafter Burton, More on Good Faith Performance] (explaining the duty of good faith based on "cost perspective" and employing the concepts of modern microeconomics).

In positing his formulation, Professor Burton expressed concern with the vagueness of the operative standards of Professor Summers's approach to the good faith doctrine. See id. at 499. He was also concerned with the potential that a doctrine based upon morality might lead to abuse of discretion and contravention of the contracting parties' intentions. See id. Professor Burton explained that the Summers formulation, like the Restatement, involves "explicit requirements of 'contractual morality' such as the unconscionability doctrine and various general equitable principles." Id. Burton argues that "contractual morality" implies that it may supersede the agreement of the parties. Id. This approach allows courts to use the doctrine to override agreed terms or to impose obligations that are contrary to the original agreement. Id. Moreover, such a formulation implies that "vagueness...is a virtue". Id. Vagueness such as "doing 'justice and justice according to law,' or ruling out 'abuses of powers' allows courts to decide each case according to the perceived moral requirements given the particular circumstances. Id.

189. See Burton, More on Good Faith Performance, supra note 188, at 501. Parties have discretion because they may not have found it practicable or otherwise desirable, at the time of contract formation, to delineate the specifics of their performance obligations. See Andersen, supra note 180, at 326. Commonly used illustrations of this situation are requirements contracts and contracts containing satisfaction clauses. See id. at 325-26 (pointing out that requirements contracts and contracts containing satisfaction clauses often give parties discretion in performance); Burton, More on Good Faith Performance, supra note 188, at 501 (providing that agreements may give express discretion concerning performance in output and requirements contracts or satisfaction conditions). Discretion in performance may also occur due to an omission of express terms or "a lack of clarity in the express terms." Id.

190. Burton, More on Good Faith Performance, supra note 188, at 500.

191. Id.

192. See C. KNAFF & N. CRYSTAL, PROBLEMS IN CONTRACT LAW 376-77 (1937) (noting that courts and writers appear to share a general view of what constitutes good faith).
the concept as a mechanism to prevent one party from engaging in conduct which undermines the spirit of the bargain, either by trying to actualize opportunities implicitly surrendered at the time of contract formation or by unfairly preventing the other party from actualizing the gains reasonably contemplated at the time of contract formation. In sum, the good faith doctrine insulates the parties' bargain from attempts by one party or the other to evade or undermine it. It imposes upon the parties an obligation to cooperate in achieving the benefits that they expected to flow from their bargain. The doctrine thus protects and promotes the contracting parties' expectations by implying into the contract an affirmative duty to cooperate, which goes beyond, but is consistent with, the express terms of the contract.

C. Applying the Good Faith Doctrine to the Student-Athlete/University Relationship

The good faith performance standard differs depending on the context in which it arises. In the student-athlete con-

193. See id. at 377; see also Burton, More on Good Faith Performance, supra note 188, at 499 (asserting that the good faith performance doctrine effectuates the intentions of the parties, or protects their reasonable expectations, through interpretation and implication); Farnsworth, supra note 180, at 669 (providing that good faith performance requires cooperation by one party to the contract so as not to deprive the other party of that party's reasonable expectation).

194. See E. FARNSWORTH, CONTRACTS § 7.17, at 311 (2d ed. 1990) (noting that conduct such as subterfuge or evasion violates the duty of good faith).

195. See id. § 7.17, at 300 (stating that good faith requires each party 'to do nothing destructive of the other party's right to enjoy the fruits of the contract'); C. KNAPP & N. CRYSTAL, supra note 192, at 376-77 (noting that every contract has an implied covenant that protects the other party's right to the fruits of the contract).

196. See E. FARNSWORTH, supra note 194, § 7.17, at 311 (asserting that a party may be under a duty not only to refrain from hindering or preventing the conditions of the party's own duty or the performance of the other party's duty, but also to take affirmative steps to cooperate in achieving these goals).

197. See id. § 7.17, at 310-11 (stating that the scope of good faith varies according to the context and nature of the agreement; RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1979) (providing that the phrase "good faith" has a variety of meanings depending on the context). One commentator has stated this consideration as follows:

What good faith requires must differ industry by industry, depending on customary practice and expectations. It will differ as contracts tend more to the discrete or the relational. It will differ depending upon whether it is among professionals, among consumers, or between consumers and professionals. It will differ over time: surely no one should suggest that, given prevailing social, economic, political, and philosophical views, good faith would require the same sorts of performance in the mid-eighteenth, early-nineteenth and late-twentieth centuries. As the range of the legally relevant expands, and as we come to recognize that society precedes contract, and that no contract can be seen other than as set in its social context, it be-
text, the good faith performance issue arises from the failure of the contract documents to explicitly define an institution's educational obligations to its student-athletes. The good faith doctrine provides a means to imply terms into this otherwise incomplete agreement. The doctrine thus operates to define the parameters of the institution's duty to cooperate with student-athletes in their efforts to achieve a meaningful education.

1. Implying a duty to provide an educational opportunity to student-athletes. Whether one adopts the good faith formulation proposed by Professor Summers or that proposed by Professor Burton, the good faith doctrine provides a means to give substance to the express contract between the student-athlete and the university: It provides a means to imply an obligation that the university provide an educational opportunity to student-athletes. Using the doctrine to arrive at this conclusion accords with the realities of the student-athlete/university relationship.

The good faith doctrine promotes the essence of a bargain, even when it is not clearly expressed in an agreement. Student-athletes enter postsecondary institutions with the desire and expectation that they will participate in intercollegiate athletic competition. Contrary to the negative stereotypes, however, most student-athletes also enter college with the con-
comitant desire to succeed academically and to earn a degree. A recent study of college football and basketball players found that seventy-three percent of the freshman and sophomore participants believed, at the time they enrolled in college, that earning a degree was very important. The idea that student-athletes expect to participate in a program comprised entirely of athletics devoid of an educational component is, therefore, unfounded.

Consequently, institutions deny student-athletes the full value they expect to derive from the transaction when they refuse to provide them with an educational opportunity. By diminishing the contract's value, the institution does not merely frustrate, but actually defeats the student-athlete's reasonable expectations. Thus, defining the university's educational obligation beyond the commitment to provide financial aid serves to protect the reasonable expectations of student-athletes.

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202. See CENTER FOR THE STUDY OF ATHLETICS, AM. INSTS. FOR RESEARCH, REPORT NO. 1: SUMMARY RESULTS FROM THE 1987-88 NATIONAL STUDY OF INTERCOLLEGIATE ATHLETES 9 (1988) (hereinafter REPORT NO. 1); Adler & Adler, supra note 201, at 242-43. Unfortunately this desire to succeed often transforms to cynicism and detachment. See id. at 244 (advancing that scholastic idealism lasts only through freshman year). This transformation results from the dominant position that athletics play in virtually all aspects of the student-athlete's college experience. See id. Professors Peter Adler and Patricia Adler suggest that:

First, athletes are overwhelmed by the demands and intensity of the athletic realm, which absorbs their concentration and commitment. Second, athletes find themselves socially isolated from other students because of their geographic and temporal separation and their physical and cultural differences. Finally, for many athletes, the gap between their academic abilities and the university's expectations brings failure, frustration, and alienation. Athletes respond by gradually withdrawing from their commitment to academics.

Id. at 248. Professor Sperber, however, takes a different position on this issue. He believes that most student-athletes have less interest in receiving an education than in participating in athletics. See M. SPERBER, supra note 22, at 229.

203. See REPORT NO. 1, supra note 202, at 11; see also Note, supra note 18, at 116 (asserting that student-athletes intend to acquire an education).

204. See Note, supra note 18, at 116 (arguing that it is unreasonable to assume that the student-athlete intends to leave school after four years without a degree).

205. Gaining access to a meaningful educational opportunity is a reasonable expectation. At the time they enter into the contractual relationship, student-athletes may not comprehend the degree to which athletics will dominate their college experience. Moreover, colleges, through their athletic departments, promote the academic aspects of attending college and significantly contribute to the development of this expectation. See Adler & Adler, supra note 201, at 243.

206. See id. at 247-48 (stating that although initially the athletes had optimistic academic expectations, the university environment caused academic detachment and diminished academic performance by athletes).

207. For a discussion of how employing the good faith doctrine to clarify performance obligations protects the parties' expectations, refer to note 193 supra and accompanying text. See also Koeber v. Superior Court, 181 Cal. App. 3d 1155, 1159, 226 Cal. Rptr. 820, 828 (1986) (observing that "the specific nature of the obligations
In addition, the imposition of a duty to provide an educational opportunity remains consistent with the intentions of colleges and universities.\textsuperscript{208} Here, the good faith doctrine functions to supplement the express terms of the contract that vaguely acknowledge the existence of some type of duty on the part of institutions to assist student-athletes in acquiring an education.\textsuperscript{209} The circumstances under which the transaction occurs further substantiate the implied duty. For instance, NCAA rules and regulations indicate that institutions undertake an obligation to educate student-athletes.\textsuperscript{210} These rules imposed by the implied covenant of good faith and fair dealing [depends] upon the nature and purpose of the underlying contract and the legitimate expectations of the parties*.

\textsuperscript{208} See Burton, \textit{More on Good Faith Performance}, supra note 188, at 499 (asserting that good faith protects the parties' intentions by incorporating the parties' reasonable expectations into the contract).

\textsuperscript{209} Refer to text accompanying notes 176-79 supra (discussing that the terms of the contract suggest an educational component to the relationship). While the good faith doctrine may be used to supplement the terms of a contract, courts generally hold that it may not override the express terms of the contract. \textit{See}, e.g., Ford v. Manufacturers Hanover Mortgage Corp., 831 F.2d 1620, 1624 (9th Cir. 1987) (noting that California follows the traditional rule that express, unambiguous contract terms will not be amended by an implied duty of good faith and fair dealing); Pizza Management, Inc. v. Pizza Hut, Inc., 737 F. Supp. 1164, 1179 (D. Kan. 1990) (stating that good faith doctrine "does not create or supply new contract terms but grows out of existing ones"); Hartford Fire Ins. Co. v. Federated Dept Stores, Inc., 722 F. Supp. 976, 991 (S.D.N.Y. 1985) (stating that good faith doctrine does not give courts "carte blanche to rewrite the parties' agreement"); General Aviation, Inc. v. Cessna Aircraft Co., 703 F. Supp. 637, 643 (W.D. Mich. 1988) (stating that good faith cannot override express contract terms), aff'd in part and rev'd in part, 915 F.2d 1038 (6th Cir. 1990); Reinharz v. Chrysler Motors Corp., 514 F. Supp. 1141, 1145 (C.D. Cal. 1981) (refusing to employ good faith to vary the express terms of an unambiguous contract); Milstein v. Security Pac. Nat'l Bank, 27 Cal. App. 3d 482, 487, 103 Cal. Rptr. 16, 19 (1972) (determining that good faith doctrine will not be employed to vary the express, unambiguous terms of a contract); \textit{see also} Burton, \textit{More on Good Faith Performance}, supra note 188, at 499 (concluding that employing the good faith doctrine to define contractual obligations contrary to the express terms of the contract is improper because to do so would override the intentions of the parties at the time they entered into the contract).

\textsuperscript{210} See NCAA \textit{MANUAL}, supra note 80, § 2.2. The NCAA rules and regulations are in large part designed to protect the student-athlete. To this end, the NCAA requires that "[i]ntercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational welfare of student-athletes." \textit{Id.} (emphasis added).

Section 2.4 further provides that:

Intercollegiate athletics programs shall be maintained as a vital component of the educational program and student-athletes shall be an integral part of the student body. The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general.

\textit{Id.} § 2.4. The NCAA regulations speak directly of the role of the institution in the educational welfare of its athletes in that the regulations require the institution to determine whether a student-athlete is making satisfactory progress towards a degree. \textit{Id.} §§ 14.4.1-14.4.2.
are analogous to the usage of trade in a typical commercial contract and are thus relevant to determining a party's intent.\textsuperscript{211}

The primary function of any educational institution is to educate its students.\textsuperscript{212} The implied duty to provide an educational opportunity comports with this function. Moreover, the expectation that an institution will undertake efforts to enable the student-athlete to obtain a substantively meaningful educational opportunity goes to the heart of the university's bargain with the student-athlete. In this sense, the relationship is one "instinct"\textsuperscript{213} with an educational commitment by the institution to the student-athlete.\textsuperscript{214} Institutions, therefore, make some level of commitment to the educational and intellectual well-being of student-athletes if merely by the circumstances that surround their contractual relationship.\textsuperscript{215}

An implied contractual obligation that forces a college or university to provide an educational opportunity to a student-athlete merely requires the institution to act faithfully with respect to the "agreed common purpose" of the relationship.\textsuperscript{216} Imposing this obligation on the university appears particularly valid if it is viewed as the party exercising discretion.\textsuperscript{217} Be-

\begin{quote}
211. See U.C.C. § 1-205(2) (1989) (defining "usage of trade" as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question").

212. See \textit{SELECT COMM. REP.}, supra note 23, at 5 (urging institutions to view athletes as students first and athletes second so that they may complete their degree requirements); \textit{see also} H.R. 2620, 99th Cong., 1st Sess. 2 (1985) (declaring that the primary purpose of colleges and universities is to provide and encourage higher education and to confer a degree); \textit{cf.} H. \textsc{savage}, supra note 35, at xii (questioning whether a university can also serve as an agency to promote business, industry, journalism, salesmanship, and organized athletics on an extensive commercial basis in addition to its primary purpose of education).


214. See \textit{Note}, supra note 18, at 116 (suggesting that institutions recognize the student's intention to gain an education and the funds to pay for it). \textit{See generally} \textsc{E. Farnsworth}, supra note 194, § 7.10, at 265 (discussing the principle of contract interpretation that allows a court to look to all relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which parties manifested their assent, together with any prior negotiations, any applicable course of dealing, course of performance, or usage).

215. See \textit{Note}, supra note 18, at 116 (suggesting that the relevant circumstances surrounding the contractual relationship do not merely impose an obligation on the institution to extend aid, but also to protect the student's educational well-being).

216. See \textit{Restatement (Second) of Contracts} § 205 comment a (1979) (stating that good faith emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party).

217. See \textsc{Burton}, More on Good Faith Performance, supra note 188, at 500 (argu-
cause the contract only vaguely defines the express terms of the educational opportunity, the institution has within its power the discretion to determine the boundaries of performance of its obligation to student-athletes. When an institution obstructs or fails to further the student-athlete's educational opportunity, it acts inconsistently with contractual expectations of the student-athlete. Such an abuse of discretion, although not explicitly precluded by the terms of the contract, constitutes bad faith behavior. An implied duty to provide an educational opportunity would prevent an institution from defeating the reasonable expectations of the student-athlete.

2. Public policy considerations. Public policy considerations also support employing the good faith performance doctrine as a device to define an institution's contractual obligations to its student-athletes. These public policy factors become apparent in the context of Ross v. Creighton University, where the court relied upon policy arguments to justify its refusal to employ the good faith doctrine.

The tort and contract claims as asserted by Ross

218. See Note, supra note 18, at 114-18 (noting that the terms are gathered from numerous sources, including the documents executed by the athlete and the university, the general catalog, and various university bulletins, brochures, and pamphlets, plus the negotiation between the parties). Refer to notes 162-68 supra and accompanying text.

219. See Burton, More on Good Faith Performance, supra note 188, at 501 (asserting that one party to a contract may have discretion to perform because of an omission or ambiguity in the express terms).

220. See E. Farnsworth, supra note 194, § 7.17, at 311 (asserting that good faith prevents a party from hindering its own or the other party's performance and requires the party to cooperate).

221. See Andersen, supra note 180, at 326 (analogizing abuse of discretion to a buyer's bad faith rejection of goods simply because the market has fallen and other goods are available elsewhere at cheaper costs).

222. 740 F. Supp. 1319 (N.D. Ill. 1990). Ross is the only case to date to address the issue of whether the good faith doctrine imposes an obligation on institutions of higher education to provide an educational opportunity to student-athletes.

223. See id. at 1332 (deferring the supervision of college athletics to private groups such as the NCAA, unless the court may act on an express provision in the contract).

224. Plaintiff's tort claim combined elements of negligent infliction of emotional distress with educational malpractice. Id. at 1323. Plaintiff's counsel articulated Ross's tort claim as "negligence in recruiting and repeatedly re-enrolling an athlete utterly incapable—without substantial tutoring and other support—of performing the academic work required to make educational progress." Id. (quoting plaintiff's amended complaint). Ross also alleged that Creighton failed to provide assistance or take additional measures, such as placing him in a remedial elementary school program, which contributed to the emotional problems he experienced. See id.

225. The gist of the contract claim was that Creighton breached its contractual
presented issues of first impression in Illinois. The court
denied the existence of a cognizable tort cause of action pre-
mised on educational malpractice. Although the court recog-
nized the contractual nature of the student-athlete/university
relationship, it nonetheless also refused to imply a contract-
tual duty requiring institutions to provide an educational oppor-
tunity to student-athletes.

(a) Academic abstention. The Ross court concluded that
because of the subjective nature of the educational process,
Illinois would not recognize a cause of action for educational
malpractice. Even though the court acknowledged its discre-
tion to imply such a duty into the express contract, it refused
to exercise its discretion. The court based this refusal in
part on a perceived inability to supervise the relationship be-
tween the university and the student-athlete.

obligation to provide Ross with the educational and financial support necessary to
enable him to acquire a meaningful education. See id. Ross alleged that Creighton
acted in bad faith by engaging in a pattern of conduct which frustrated and imped-
ed Ross's ability to obtain substantive educational benefits. Ross Amended Com-
plaint, supra note 4, at 3-15. This pattern of bad faith conduct allegedly included
the failure of Creighton to provide Ross with necessary support services and the
academic advice from counsellors that encouraged him to enroll in "beneath cours-
es"—courses without substantive academic merit but that allowed Ross to remain
eligible to play basketball. Id. at 6. For example, Ross alleged that upon the advice
of Creighton, he took courses such as "Theory of Basketball, Theory of Track and
Field, Theory of Football, Ceramics and Marksmanship." Id. Ross further complained
that this enrollment advice evidenced both Creighton's interference with his ability
to obtain substantive academic benefits and Creighton's failure to comply with its
contractual obligation to provide him with an educational opportunity. Id. at 6-7.
226. See Ross, 740 F. Supp. at 1328 n.2.
227. Id. at 1328 (noting that the nature of education is radically different from
other professions normally held liable for malpractice, such as doctors, lawyers, and
accountants).
228. Id. at 1330-31.
229. Id.
230. See id. at 1328. Although this Article focuses on the breach of contract
claim and the duty of good faith, a brief discussion of the policy reasons that under-
lie the court's decision to deny the tort claim is appropriate. These same policy
considerations influenced the court's refusal to imply an obligation to provide an
educational opportunity into the express contract. See id. at 1329. The Ross court
noted "the practical impossibility of proving that the alleged malpractice of the
teacher proximately caused the learning deficiency of the plaintiff student, because
[factors such as the student's attitude, motivation, temperament, past experience
and home environment may all play an essential and immeasurable role in learning]"
Id. at 1328 (quoting Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440,
446, 391 N.E.2d 1362, 1365, 418 N.Y.S.2d 376, 379 (1979) (Wachtler, J., concurring)).
Therefore, according to the court, determining whether a student would have suc-
cceeded in obtaining an education is an extremely subjective and difficult task. See
id.
231. See id. at 1332 (refusing to supply open-ended terms not bargained for or
agreed to by Creighton or Ross).
232. See id. (reasoning that absent an express contractual provision, the super-
The court's stance reflects the concept of academic abstention. The academic abstention doctrine arises from the notion that because of their expertise in educational matters, faculties and governing bodies of educational institutions should be afforded considerable discretion. As one commentator noted:

The rule of judicial nonintervention in academic affairs reflects belief in the compelling need for institutional autonomy and a recognition of the courts' limited expertise. Judicial restraint is premised upon the belief that "in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in large measure, be left to the educational institution."

Historically, courts have refused to become involved in student/university affairs based upon this doctrine. In recent years, however, "courts have shown a willingness to become involved, particularly in issues which concern the administrative or business functions of the university."

The relationship between the student-athlete and the university, however, is not purely academic. The express contract obligates a student-athlete to provide services for the university. The obligations imposed upon student-athletes, coupled vision of college athletics should remain the responsibility of private regulatory groups such as the NCAA, which presumably possess the staff and expertise to carry out the job.

233 See Latourette & King, Judicial Intervention in the Student-University Relationship: Due Process and Contract Theories, 65 U. Det. L. Rev. 199, 201 (1988) (noting a lack of judicial expertise as well as a reluctance to intrude into the student-university relationship); Note, Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit—The Fiduciary Alternative, 40 SUCCURS L. Rev. 837, 848 (1989) (citing the public's need to have confidence in the educators' judgment as a reason for the courts' deference to the university).

234 Latourette & King, supra note 233, at 201 (quoting in part from Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 887, 889, 57 Cal. Rptr. 462, 475 (1967)).

235 See id. (asserting that an underlying concept for judicial restraint is academic freedom, which is essential for a university to exercise its educational responsibilities); Note, supra note 233, at 838 (stating that courts will not interfere with university decisions unless arbitrary or capricious); cf. Nordin, supra note 164, at 148-81 (arguing that although the courts generally defer to universities, the courts should intervene in certain circumstances to protect students); Note, The College or University Power to Withhold Diplomas, 15 J.C. & UL 335, 337 (1989) (discussing that courts are more willing to intervene in disciplinary matters than academic matters).

Relying on these and other public policy considerations, the judiciary has uniformly refused to recognize a tort of educational malpractice by students against academic institutions. See Comment, Educational Malpractice Update, 14 CAP. ULL. Rev. 609, 614-18 (1985).

236 Nordin, supra note 164, at 141; see also Latourette & King, supra note 233, at 200 (discussing the willingness of courts to examine institutional actions).

237 See M. SPENBERG, supra note 22, at 208 (describing student-athletes as "staff members" whom the university "hires" on the basis of their skills to do certain
with the benefits that universities derive from their participation in intercollegiate athletics, have led some commentators to conclude that the student-athlete is an employee of the university. This business aspect of the relationship creates an inherent conflict of interest between the university’s interest in winning and its interest in educating the student-athlete.

Adherence to the academic abstention doctrine is unwarranted in this context. Indeed, it tends to perpetuate the exploitative nature of this quasi-business relationship. Furthermore, adherence to the doctrine is unjustified because courts are not being called upon to determine matters of academic freedom, but to interpret the terms of an express contract. Moreover, nothing suggests that courts cannot ascertain whether a university refused to provide an educational opportunity. Such a determination does not require an evaluation of subjective factors. Rather, whether an institution has properly performed its obligation to provide an educational opportunity lends itself to an objective determination.

(b) The potential for unlimited liability. In Ross the court expressed concern that the subjective nature of a duty to educate exposes educational institutions to unlimited liability.

238. A discourse on whether a student-athlete is an employee is beyond the scope of this paper, but other commentators have addressed the issue. See, e.g., Goldman, supra note 41, at 206 (discussing the big business of college athletics in which the money makers do not share in the rewards); Yasser, Are Scholarship Athletes at Big-Time Programs Really University Employees?—You Bet They Are!, 9 BLACK L.J. 55 (1984) (arguing that student-athletes are employees for worker’s compensation purposes); Note, Rensing v. Indiana State Univ., supra note 151, at 87 (questioning whether student-athletes are employees entitled to worker’s compensation); Note, supra note 166, at 701 (questioning whether the NCAA violates antitrust laws if student-athletes are considered employees). Courts that characterize student-athletes as employees have limited the application of the employee status. See, e.g., Van Horn v. Industrial Accident Comm’n, 219 Cal. App. 2d 457, 464-65, 467, 33 Cal. Rptr. 169, 172-73, 175 (1963) (finding that a student-athlete is an employee as that term is defined under California’s Workmen’s Compensation Act); University of Denver v. Nemeth, 127 Colo. 395, 398, 267 P.2d 423, 425 (1953) (holding that a student-athlete is an employee of the university in order to afford him the protection of the Workmen’s Compensation Act). But see Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1174-75 (Ind. 1983) (stating that a student-athlete is not an employee under Indiana’s Workmen’s Compensation Act); Coleman v. Western Mich. Univ., 125 Mich. App. 35, 44, 336 N.W.2d 224, 228 (1983) (holding that a student-athlete is not an employee).

239. See Note, supra note 18, at 106 (discussing whether schools are recruiting the best student-athletes or the best athletes irrespective of their academic ability).

240. See id. at 112-13 (arguing that adhering to the doctrine results in a blatant disregard for some institutions’ ulterior motives).

241. Refer to notes 274-77 infra and accompanying text.

Yet characterizing the obligation as a duty to "educate" is not only inaccurate, but suggests that institutions would guarantee a student-athlete's academic success. The obligation is more appropriately characterized as a duty to "provide an educational opportunity," and it merely requires that the institution provide a student-athlete with a reasonable opportunity to succeed academically—not a guarantee of academic success. More importantly, the scope of this obligation can be defined to protect the interests of both the student-athlete and the institution. In addition, the parameters of the obligation are conducive to objective assessment, which would serve to limit the litigation feared by the court in Ross.

Finally, some institutions already provide student-athletes with an educational opportunity. Therefore, even though an increase in litigation may result from the recognition of this duty, the unrestrained flood of litigation the Ross court feared probably will not occur. Moreover, to the extent that other colleges and universities inadequately perform their educational obligations, student-athletes should have the power to resort to private law to protect their reasonable expectations. This power serves to deter improper conduct. Indeed, "[t]he benefits of promoting just resolutions of legitimate disputes overshadow whatever speculative costs and inconvenience the courts would incur by opening their doors to this limited class of plaintiffs."

(c) Limiting the duty to student-athletes. The Ross court also questioned the propriety of creating a duty that benefits student-athletes but not other college students. The student-athlete's unique relationship with the institution, however,

\[\text{\textsuperscript{243}}\text{ Refer to notes 272-77 infra and accompanying text.}\]
\[\text{\textsuperscript{244}}\text{ Refer to notes 274-77 infra and accompanying text.}\]
\[\text{\textsuperscript{245}}\text{ See Ross, 740 F. Supp. at 1329.}\]
\[\text{\textsuperscript{246}}\text{ See, e.g., Scorecard: A Positive Payoff, supra note 75, at 22 (discussing the precedent set by the Metro Atlantic Athletic Conference in voluntarily announcing its 95.89% graduation rate for senior basketball players); Gup, supra note 48, at 58 (noting the success of the University of Arizona basketball team in attaining a 3.0 cumulative GPA); Where Grades Mean More Than Points, supra note 75, at 64 (noting Duke University's success in graduating athletes).}\]
\[\text{\textsuperscript{247}}\text{ Note, supra note 233, at 846-47. Although it is unfortunate, the threat of litigation and potential liability is necessary before some will respect the contractual obligations imposed upon them. Id. at 846.}\]
\[\text{\textsuperscript{248}}\text{ See Ross, 740 F. Supp. at 1330 (concluding that the court should not create a duty that is sui generis). Judge Norberg discussed this issue in the context of plaintiff's educational malpractice claims: [W]hy should the cause of action be limited to student athletes? Shouldn't all students who actually pay tuition also have an equal right to recover if they are negligently admitted, and once negligently admitted, have a right to recover if the school negligently counsels and fails to educate them? Id.}\]
justifies the greater protection.\textsuperscript{249} The relationship between the university and lay student\textsuperscript{250} arises mainly from an implied contract.\textsuperscript{251} In contrast, the student-athlete and the university base their relationship primarily upon an express contract.\textsuperscript{252} The terms of this express contract impose obligations on the student-athlete that exceed those imposed upon the lay student.\textsuperscript{253}

In addition, the contrast between the college experiences of student-athletes and lay students justifies a cause of action that protects the interests of student-athletes, but not necessarily the latter. For example, institutions often afford student-athletes an opportunity to pursue a college education only because of their willingness to perform athletically.\textsuperscript{254} This distinction underscores the differences between the way the two groups of students interact with their institutions.

These differences first appear even before enrollment at an institution. Unlike lay students, the student-athlete is usually recruited to attend a particular institution.\textsuperscript{255} Before the student-athlete signs the National Letter of Intent, members of an institution’s coaching staff observe an athlete in a game situation, and if they like what they see, they will then engage in intense efforts to recruit the athlete.\textsuperscript{256} This intense recruiting

\textsuperscript{249} See M. Sperber, supra note 22, at 208 (stating that it is inappropriate to compare student-athletes to regular students because the latter pay for their tuition rather than earn it). Whether such a duty should be extended to benefit the student who is not an athlete is beyond the scope of this paper.

\textsuperscript{250} "Lay student" refers to college students who do not participate in intercollegiate athletics.

\textsuperscript{251} See Nordin, supra note 164, at 162 (noting that lay students do not sign a formal agreement with their school); cf. Note, Wanted: A Strict Contractual Approach to the Private University/Student Relationship, 68 KY. L.J. 439, 441 (1979-1980) (commenting on universities’ right to discipline under an implied contract). The implied contract between the lay student and the university ‘‘carries out of both oral and written elements’’ and ‘‘[t]he catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.’’ Nordin, supra note 164, at 166 n.83 (quoting from Zumbrun v. Univ. of S. Cal., 25 Cal. App. 3d 1, 9-10, 101 Cal. Rptr. 499, 503-04 (1972)). See generally Note, supra note 18, at 104 (comparing the contractual obligations of the lay students with those of the student-athletes).

\textsuperscript{252} See Note, supra note 18, at 104 (stating that student-athletes sign letters of intent and financial aid statements which constitute binding contracts to attend the institution). For a discussion of the components of the express contract between the university and the student-athlete, refer to notes 162-66 supra and accompanying text.

\textsuperscript{253} See Note, supra note 18, at 104-05 (discussing obligations such as having to perform athletically to retain scholarships).

\textsuperscript{254} See M. Sperber, supra note 22, at 209 (explaining that many schools now grant only one-year scholarships; therefore, if an athlete fails to perform, the scholarship does not have to be revoked, but merely lapses).

\textsuperscript{255} See Waicukauski, supra note 31, at 92.

\textsuperscript{256} See J. Rooney, The Recruiting Game: Toward a New System of Inter-
usually begins during the summer before the athlete's senior year in high school and does not end until the athlete signs a National Letter of Intent certifying the decision to enroll at a particular institution. During this period, a coach or assistant coach often establishes a close relationship with the prospective student-athlete. Because of the dynamics of the recruiting process, a relationship of trust and dependence often develops that is not present in the relationship between lay students and universities.

The importance of this relationship of trust and dependence extends beyond the influence on a student-athlete's choice of institution. The athletic department may dominate every aspect of the student-athlete's college career, including academic decisions. An athletic department often devises an academic

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COLLEGIATE SPORTS 25 (1980) (observing that coaches will visit the student, talk with family and friends, and finally invite the athlete to visit the school).

257. NCAA rules prohibit in-person, off-campus recruiting contacts with high school prospects or the prospect's relatives or guardians until the student has completed the eleventh grade. NCAA MANUAL, supra note 80, § 13.01.6. However, documented instances suggest that recruiting of blue-chip athletes begin as early as junior high-school. See Cozzillio, supra note 151, at 1277 n.2.

258. However, recruiting efforts may not end with the signing of the National Letter of Intent. See Cozzillio, supra note 151, at 1277 (discussing the case of a prospective athlete who, after signing a National Letter of Intent with UCLA, signed another with the University of Michigan).

259. Coaches agree that the development of a close relationship with the student-athlete is critically important to a successful recruiting effort. See A. WOLFF & A. KESEY, RAW RECRUTS 136 (1990). Kevin O'Neill, the head basketball coach at Marquette University, remarked: "[I]n the end it's not just about the kid. You have to make sure he trusts you. If you want the kid to buy into your program, you have to have a relationship with them." Id.

260. The process, in fact, is geared to overwhelm the student. Former Marquette basketball coach Al McGuire once observed: "The young person doesn't know what's going on. . . . Coaches are hypnotists. When we bring high school kids in to visit, . . . we push a button and the lights go on. You put me with a 17-year-old kid, pal, and I'll leave him in a tailspin." Keith, A Conversation with Chairman Al, SPORTS ILLUSTRATED, Nov. 28, 1977, at 35, 37.

261. One assistant coach described the implications of the trust and dependence as follows: "Buy [a kid] some shoes, take him to dinner, get him some nice clothes, maybe a car. You become his best friend, and he gets hooked, like a junkie." A. WOLFF & A. KESEY, supra note 259, at 184-85. He continued: "[T]he secret is controlling the product early . . . . And you know the saddest part? The kids don't even know. It's like a pervert offering a kid some candy to get in his car." Id.

262. See Waichukauski, supra note 31, at 106 (noting that a student-athlete's only counseling may come from the athletic department). The degree to which college coaches influence student-athletes should not be underestimated. The ability to influence stems from the need many athletes have for a sense of belonging and family. This is especially true when the isolation that many student-athletes encounter at college is coupled with the absence of a father figure in a single-parent home, from which many student-athletes now come. See R. BERGER, supra note 40, at 95. As a result, coaches exert great influence over an athlete's attitudes and values. Moreover, coaches may become teachers and role models and influence many decisions made by student-athletes including academic decisions. See Poskanzer, Spot-
program for a student-athlete that avoids intellectually challenging courses.\textsuperscript{263} The case of Brian Railly, a basketball player for the University of Tulsa, illustrates this practice.\textsuperscript{264} From the first day he enrolled at the university, athletic department personnel made important decisions for him.\textsuperscript{265} For instance, the athletic department arranged a summer job for him\textsuperscript{266} and, more importantly, selected the courses he would take.\textsuperscript{267}

Athletic departments also often control the daily lives of scholarship athletes.\textsuperscript{268} The departments schedule mandatory practices, weight training sessions, and team meetings.\textsuperscript{269} These constraints, as well as the intrusions on class and study time from road trips, seriously impair the student-athlete’s opportunity to acquire a meaningful education.\textsuperscript{270} Thus, the intimate and pervasive involvement of athletic departments in decisions that significantly impact a student-athlete’s academic success justifies creating a duty that may not extend to other students.\textsuperscript{271}

D. Defining the Duty to Provide an Educational Opportunity

The boundaries of the duty to provide an educational opportunity must be determined in light of the intentions, inten-

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The coach has a dual role with respect to a student-athlete. Sperber explains that:

Because program heads recruit and directly offer athletic scholarships to athletes, the result, as in any job recruitment, is that the hiring party—the coach—becomes the employee’s—the player’s—boss. Not surprisingly, many program heads feel they can “fire” an athlete for unsatisfactory athletic performance and they do so by ‘yanking’ his or her grant.

M. SPERBER, supra note 22, at 208.

263. Widener, supra note 17, at 471-72 (discussing conduct by athletic department personnel that “breaches the student-athlete’s contractual right to an educational opportunity”). Refer to notes 66-86 supra and accompanying text.

264. See Gyp, supra note 48, at 59 (discussing the academic decisions made by the athletic department for Railly).

265. Id.

266. Id.

267. Id. Brian stated: “I was kind of ignorant . . . . I thought this was the way it was done. I had no idea I could be in charge of making my own course decisions.” Id. Although Brian wanted to study communications, he was initially directed to take courses in the business department and later to take courses in the department of physical education. Id.

268. Widener, supra note 17, at 472.

269. Id.

270. Id.

271. Refer to notes 66-86 supra and accompanying text (discussing the extent to which these factors influence a student-athlete’s ability to progress academically).
ests, and expectations of student-athletes and the educational institutions they attend. An institution's obligation, however, is to provide an educational opportunity, not to educate the student-athlete. Characterizing the obligation as a duty to educate creates the risk of subjectivity to which the court in Ross alluded.\textsuperscript{272} Whether a student-athlete receives a meaningful education depends in large part upon the student's desire and initiative. Because of these factors, a university cannot guarantee that the student-athlete will become educated or earn a degree. Thus, by implying a duty to educate courts would impose an obligation on institutions to obtain results that are outside their control.\textsuperscript{273}

In contrast, characterizing the obligation as a duty to provide an educational opportunity renders it capable of objective evaluation. The critical inquiry that flows from this characterization is whether an institution engages in conduct that enables a student-athlete to obtain substantive educational benefits.\textsuperscript{274} When the conduct of an institution obstructs a student-athlete's access to a meaningful educational opportunity, it evades the spirit of the bargain. This obstruction, coupled with an institution's improper use of its discretion to deny student-athletes the benefits of their contractual relationship, translates into bad faith behavior.\textsuperscript{275}

Courts must examine the circumstances surrounding each relationship between a student-athlete and an educational institution to determine if that institution has engaged in improper conduct toward that student-athlete.\textsuperscript{276} Nevertheless, conduct that will in most cases tend to defeat a student-athlete's reasonable expectations and thereby deprive the student of the essence of the bargain would include: (1) failing to provide meaningful tutorial and remedial assistance to student-athletes

\textsuperscript{272} See Ross, 740 F. Supp. at 1330.

\textsuperscript{273} See Note, Achieving Educational Opportunity, supra note 31, at 385 (requiring schools to "force feed" education may demand too much). But see Note, supra note 18, at 123-24 (seeking judicial enforcement of contracts to educate).

\textsuperscript{274} See Note, Achieving Educational Opportunity, supra note 31, at 385 (framing the question as whether the school is making it easier or harder for the student-athlete to obtain an education).

\textsuperscript{275} Refer to notes 216-21 supra and accompanying text.

\textsuperscript{276} The institution will have acted in bad faith if its conduct obstructs the student-athlete's ability to acquire substantive educational benefits. See Widener, supra note 17, at 471 n.31. Similarly, bad faith conduct may occur if the institution obstructs the student-athlete in performing his obligations under the contract. Id. A condition precedent to a student-athlete receiving a renewal of financial assistance is that the recipient make normal progress towards graduation. Id. at 470. Conduct by the institution that obstructs the student-athlete's normal progress towards graduation will constitute bad faith behavior. Id. at 471.
with marginal academic records; (2) providing academic counseling that encourages student-athletes to undertake a program of study to maintain academic eligibility, but which lacks academic merit; (3) failing to provide sufficient study time; (4) failing to monitor a student-athlete's academic performance and progress towards graduation; and (5) diluting academic standards so that a student-athlete can maintain athletic eligibility. Whether an institution has engaged in these forms of behavior requires an objective determination.

IV. CONCLUSION

Attending college presents an opportunity for student-athletes to mature intellectually and athletically. Yet, for many student-athletes, the opportunities for growth and maturation are restricted to the playing field. If colleges and universities adhere to the notion that a student-athlete remains a student, the law must acknowledge that an academic institution's obligation to student-athletes extends beyond fostering their athletic development. The good faith doctrine provides a mechanism by which courts can recognize the educational component of an institution's obligation to its student-athletes. Employing the good faith doctrine to define the institution's obligation to provide an educational opportunity to student-athletes not only promotes and protects the expectations of the parties, but enables student-athletes to partake of the many benefits a college education has to offer. This enhances their ability to cope with life after college.

The exploitative nature of the relationship between student-athletes and the universities they attend will not be eliminated until courts hold colleges and universities accountable for the academic performance of student-athletes. Only then will academic integrity again flourish in our institutions of higher learning and only then will student-athletes share in the full benefits that can arise out of participation in intercollegiate athletics.

277. See id. at 467 (claiming that bad academic counseling can sometimes be detrimental to the student's progress towards graduation); see also Note, supra note 18, at 110 (noting the extreme example of some students who were advised to repeat classes they had already taken in order to protect their athletic eligibility); Note, Achieving Educational Opportunity, supra note 31, at 386 (questioning whether advice to student-athletes is given to promote their education or to keep them on the playing field).